The liberal democracies of the West have shifted their principal orientation from liberty to equality. In one sense, this is simply a practical manifestation of liberal theory, which resists government imposition of substantive theories of the good. Contemporary liberal democracies generally seem less concerned with substantive freedoms than with individual autonomy, a personal right that sounds in liberty, but actually protects equality—the right of each individual to pursue the conception of the good that seems best to him or her, so long as the rights of others are not harmed.

The Western trend from liberty to equality is especially pronounced in the law of religious liberty. Two developments during the last half-century are at the base of this shift: the growth of the social welfare state and the explosion of religious diversity, including unbelief and unchurched belief. The result has been a reconceptualization of religion and religious exercise, from a former understanding of religious exercise as the activity of distinct communities having no secular analogues and entitled to special solicitude by government, to the current understanding in which belief is increasingly viewed as one of many possible ways of orienting one’s life, no worse than secular ways of living, but also no better.

This reconceptualization has initiated a reworking of the meaning of religious freedom in the Western democracies, one whose final form is not yet clear but which appears decidedly more committed a norm of equality than one of liberty in assessing the content of the freedom of religion. Although these developments are evident to some significant degree in every Western country, I will illustrate the doctrinal consequences of this confluence of social welfare democracy and radical religious pluralism using primarily constitutional doctrine formulated by the United States Supreme Court (USSCt) under the Religion Clauses of the First Amendment of the US Constitution.¹

¹ “Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof.” U.S. Constitution, amendment I (1791).
Two concepts of liberty

Isaiah Berlin famously contrasted two concepts of liberty: a “negative” understanding which conceives of liberty as the absence of the state, and an opposing “positive” understanding pursuant to which liberty is achieved through the state. Berlin wrote in 1958 as the Cold War was reaching its apex, and clearly had Soviet communism in mind as the exemplar of positive liberty. He nevertheless acknowledged the value of positive liberty in more benign forms of government such as social democracy, and recognized as well the dangers of the libertarian “night watchman state” that captures the ideal of negative liberty (Berlin 1969).

By now the Western democracies are much closer to positive than the negative conceptions of liberty. This is especially true in Europe, which has entrenched traditions of social welfare services and social democratic politics that have persisted beyond the fall of Communism. But even the United States, for all its libertarian rhetoric, is now more closely aligned to positive rather than negative liberty.

In the early days of Western democracy – say, in the early nineteenth-century United States – there were no conflicts between religion and government in the schools or the workplace because governments did not participate in regulating or funding education, and likewise did not generally regulate employer–employee relations. A negative libertarian state which provides no aid to public or private education and leaves relations between employers and employees largely unregulated creates little possibility for government infringement of individual or group religious exercise, because government is hardly present in these fields.

In a social welfare democracy characterized by positive liberty, however, education and the workplace are two of the most highly regulated and contested sites of contact between believers and government. If the government has a comprehensive system of free public education, potential infringements on religious freedom immediately arise: May the state rely on the symbols and practices of socially predominant religions in shaping the environment and curriculum of public schools? To what extent may administrators, teachers, and students engage in personal religious expression? Does the government’s decision to fund public education require or permit comparable funding of parochial schools and other private religious education?

Likewise with the workplace. The contemporary workplace is tightly controlled by government regulation in both the United States and Europe, including antidiscrimination laws (including laws that prohibit religious discrimination), medical and parental leave laws, minimum-wage and maximum-hour laws, safety regulations, union and labor-relations laws, and innumerable other such statutes and regulations. These, too, immediately raise religious freedom issues: To what extent are employers obligated to accommodate employee religions? Are employers entitled to exemption from labor laws that violate an employer’s religious beliefs or practices? Are religious employers entitled to special accommodation from anti-discrimination and other labor laws that interfere with a religion’s internal governance and the manner in which it protects its religious identity and pursues its religious mission?

Regimes of positive liberty, in short, greatly multiply the points of contact between participants in private life and the government, and consequently also greatly multiple the possibilities for friction and conflict in citizen–government relationships. Unsurprisingly, a remarkable number

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2 Cf. Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum-hour regulation as violation of freedom of employers and employees to freely agree among themselves what the employees hours shall be).
of the USSCt’s Religion Clause decisions have involved whether religion and expressions of religious belief are appropriately present in state schools (as part of the official school curriculum or as the personal expression of students or teachers), and whether the state may contribute financial assistance to private religious schools (directly to the schools themselves or indirectly by grants or tax credits to students or their parents) (see generally Gedicks 1995: 44–71). A substantial additional portion of its cases in this area also concern conflicts between religious exercise and governmental regulations in the workplace. Similar concerns have occupied the European Court of Human Rights (ECtHR).

### Contemporary belief

A hypothesis urged by Western sociologists during the early twentieth century predicted the gradual but inevitable disappearance of religion under the pressure of Enlightenment science and rationality. And it is true that nearly a century later, the unbelief that was scandalous and largely unknown 50 or 60 years ago is now espoused by a growing and increasingly vocal minority, comprising between 10 and 15 percent of the American population, and significantly more in Western Europe. Multiple bestsellers, for example, urge the discard of outdated and dangerous beliefs in God (Dawkins 2006; Harris 2004; Hitchens 2007). Arguments from unbelief are now a common and accepted part of public life in the West, if still not wholly mainstream in the United States (see generally Pickel and Müller 2009; Pickel and Sammet 2012).

Nevertheless, the West has hardly been overrun with unbelief, and the secularization hypothesis has turned out to be spectacularly wrong. Other bestselling titles, such as “God is back!” or “the end of innocence,” hail a contemporary popular (re)turn to religion (e.g., Mickelthwait and Woolridge 2009: 27). Religion indeed remains alive and well in the United States and elsewhere, if not in Europe (cf. Berger 2008: 9–10 arguing that secular Europe is the exception and a persistently religious America the global rule).

But even though belief remains prevalent in the West, its object and character have decidedly changed. One dramatic alteration in the religious landscape of the West has been the growth of unaffiliated believers, sometimes called “nones” or the “spiritual but not religious,” from their refusal to name a religious membership or affiliation in response to survey questions (Pew Forum on Religion and Public Life 2012). Another has been the diffusion and reorientation of traditional belief to a personal inwardness, thereby weakening the traditional Christian denominations. These trends show that the focus of belief is decisively shifting, from a search for outward transcendence, to one for immanent personal meaning.

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The rise of spirituality

In a monograph provocatively entitled *Spiritual, But Not Religious*, Robert Fuller defined “spirituality” as the attitude of one struggling to understand how his or her life relates to a greater cosmic scheme. According to Fuller, “We encounter spiritual issues every time we wonder where the universe comes from, why we are here, or what happens when we die,” as well as when we are “moved by values such as beauty, love, or creativity that seem to reveal a meaning or power beyond our visible world. An idea or practice is ‘spiritual’ when it reveals our personal desire to establish a felt relationship with the deepest meanings or powers governing life” (Fuller 2001: 8–9).

A noteworthy dimension of the new spirituality is its loose denominational and creedal character. Spirituality capitalizes on declining numbers of Americans and Europeans who practice their religion in strict accordance with the teachings and doctrines of a traditional or national denomination (Berger 2001: 446–7; Hargrove 1989: 126–7). Many believers see the catechisms and other theological boundaries of denominational religion as obstacles to personal quests for spiritual meaning. As Fuller suggests, they describe themselves as “spiritual,” but not “religious” (Fuller 2001; see Berger 2001: 448). In the United States, as many as one in five people may fit this description (Fuller 2001: 1, 4–5). If accurate, this figure would mean that there are nearly as many spiritually “unchurched” people in the United States as there are members of any single denomination (Wolfe 2005: 183).

The decline of denominationalism

The influence of the new spirituality is not confined to the unchurched, but has reached into denominational religion to alter the relationship of church members to their churches. Those who retain a denominational affiliation are increasingly shifting their religious commitment away from strict adherence to the traditional beliefs and practices of their denomination in the direction of personal spirituality (Fuller 2001: 9). Religion is becoming “consumerized,” with many religious Americans now “shopping” for a church like they do for consumer goods, choosing one because of the individual needs and preferences that it satisfies, rather than the truth of the doctrines it teaches (French 2003: 164). Related and growing phenomena is the practice of so-called “cafeteria” or “grocery cart” religion, terms which describe the attitude of believers who pick and choose which of the doctrines and practices of a denomination one will observe, or sometimes even assemble personalized collections of beliefs and practices from among the teachings and doctrines of diverse and antagonistic denominations and religious traditions (Berger 2001: 448; French 2003: 164–5). Charles Taylor has succinctly captured this bewildering growth of “intermediate positions” between atheism and orthodox belief in the United States and other Western nations:

[M]any people drop out of active practice while still declaring themselves as belonging to some confession or believing in God. On another dimension, . . . a wider range of people express religious beliefs that move outside Christian orthodoxy. Following in this line is the growth of non-Christian religions, particularly those originating in the Orient, and the proliferation of New Age modes of practice, of views that bridge the humanist/spiritual boundary, of practices that link spirituality and therapy. On top of this, more and more people adopt what would earlier have been seen as untenable positions; for example, they consider themselves Catholic while not accepting many crucial dogmas, or they combine Christianity with Buddhism, or they pray while not being certain they believe.

(Taylor 2002: 106–7)
The proliferation of spirituality among formerly orthodox believers (and, indeed, among some former unbelievers) is evident in the reactions of denominational leaders to the demands of their parishioners. Like manufacturers of consumer products, religions and their leaders increasingly compete to develop a brand that appeals to target populations (Gedicks and Hendrix 2005: 154–5). Thus, many contemporary Christian denominations dilute or deflect their doctrines and theologies in favor of a less divisive “religious nonjudgmentalism” that de-emphasizes denominational differences, doctrinal requirements, and traditional themes such as duty, responsibility, and sin, in favor of more comforting, inclusive, and therapeutic themes like the inherent worth of each individual, and the unconditional love that God holds for each person regardless of imperfection. According to Alan Wolfe, “Talk of hell, damnation, and even sin has been replaced by a nonjudgmental language of understanding and empathy” (Wolfe 2005: 3). Sin is transformed from an offense against a holy God to a self-defeating behavior (Wolfe 2005: 16).

Perhaps the most important effect of spirituality is the change it has wrought on the understanding of denominational religion by those who continue to value it. The traditional denominational church “held and dispensed the ‘means of grace’ through which the individual might attain salvation and without which that salvation was in jeopardy” (Hargrove 1989: 128). One of the principal tasks of the traditional denomination was to police the conformity of parishioners to the behavioral and creedal requirements of membership, and to certify the good standing before God of those members who comply with these requirements. In the contemporary church, however, “the individual is the focus and the exerciser of power” (Hargrove 1989: 128). Individuals judge their religion on the basis of whether it helps them to understand and discover themselves in the midst of the demands of their everyday life, rather than whether its teachings and doctrines conform to an external and ultimate divine reality. Taylor suggests that this is the residue of a long period of Western history (Taylor 2002: 8–13).

From transcendence to immanence

One should not assume from all this that spirituality is a trivial or superficial approach to God. On the contrary, spiritual believers take their beliefs seriously. What is different about spirituality is not the seriousness with which its adherents believe, but rather the focus of that belief. For spiritually inclined Americans, religion is about revelation of the immanent, rather than the transcendent. Whereas the focus of religion has historically been its revelation of the reality beyond the temporal self, spirituality is centered on uncovering the reality of that very self (Wolfe 2005: 182–4; Lupu and Tuttle 2002: 67). Spirituality casts religion less as the demand that believers fit themselves into God’s plan, than as the demand of believers for a comfortably fitting God and plan (Taylor 2002: 101).

The implausibility of negative liberty: the case of the United States

The combination of the social welfare state and the explosion of religious diversity pose a pressing question: How is government in the social welfare state to negotiate its innumerable contacts with a private life characterized by equally innumerable varieties and differences of belief and unbelief? The answer given by the courts is, with the orientation of government towards equality among religions and between belief and unbelief.

Consider, as a thought experiment, a liberal democratic social welfare state that is both committed to religious freedom and composed of citizens committed to the beliefs and practices of a single religion. Despite the inevitable friction caused by the many contacts between the social welfare state and private life, one would expect religious freedom in such a
state to be characterized by negative liberty despite the positive libertarian character of the state: the government would simply arrange its many programs and affairs to withdraw from circumstances in which it imposes upon the singular religion of its citizens, who would then be left free by such withdrawal to live by that religion without government interference. For example, the government could mandate the closure of private businesses as well as its own offices on the religion’s day of worship as well as on holy days that require special religious practices or observances.

This hypothetical can be complicated by adding some religious diversity – say, a religious minority to the predominant religious majority. Negative religious liberty might be sufficient to protect the religious freedom of all, but the government would have a more difficult time arranging itself so as not to impose itself upon the beliefs and practices of two religions rather than merely one. For example, if the two religions observed different days of worship and different religiously significant holy days – as indeed Christianity and Judaism do – the government would have to mandate government and business closure on twice as many days, or grant the religious minority an exemption from closure on the majority’s worship and holy days (perhaps on condition that it close its businesses on their own, different days), or – as the USSCt determined in the early 1960s – simply treat the minority religion unfavorably in comparison to the majority by declining to accommodate the minority’s different worship and holy days with any exemption or mandated closure.5

Finally, consider the plight of a social welfare state committed to religious freedom with a citizenry spread among the radically different possibilities of belief and unbelief that characterize the contemporary nations of the West. Protecting religious freedom with a strategy of negative liberty becomes hopelessly complex in such a state, probably too complex to be viable. The sheer number and diversity of requests for state withdrawal from spheres of private life so as to leave believers and unbelievers free from state intrusion make withdrawal an impractical, if not impossible, strategy. Uniform legislation would be impossible if all religions were to be accommodated; most government regulations would be compromised by exemptions for those religions and believers burdened by the regulations, perhaps to the point of rendering some regulations ineffective to achieve their goals. The state could still choose to accommodate only the beliefs and practices of a majority, but majorities often do not literally exist in such radically plural citizenries, and even when they do are often not politically dominant, making this strategy impractical. Accommodating majority religion without similar attention to religious minorities, and perhaps even at their expense, also contradicts a tenet of contemporary liberal theory, which holds that the ideal liberal state legislates only according to a thin, procedural conception of the good, eschewing favoritism for or endorsement of particular substantive conceptions of the good. Indeed, John Rawls elaborated a version of liberal equality precisely to confront the challenges of pluralism (e.g., Rawls 1997). And this strategy is, finally, normatively unattractive: it is hard to imagine the justification for singling out the religion of a bare majority of citizens from the regulatory burdens of the social welfare state, while leaving the remaining, religiously different minorities subject to such burdens.

In short, the adequacy of merely negative religious liberty is deeply complicated by religious pluralism. Many of these complications, however, can be resolved or mitigated by abandonment of negative religious liberty in favor of a general norm of equality among religions and between

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Religious freedom as equality

It has become increasingly evident that equality among religions and between belief and unbelief is the only plausible understanding of religious freedom in social welfare states marked by exploding religious pluralism. One can see this “religious-equality imperative” at work in the shift of US Religion Clause doctrine from liberty to equality during that last half century.

**Equality and the Free Exercise Clause**

The USSCt’s doctrine under the Free Exercise Clause – “Congress shall pass no law . . . prohibiting the free exercise [of religion]” – illustrates why religious equality is the only plausible understanding of what can be constitutionally required in a religiously plural society marked by increasing numbers of unbelievers and unchurched believers and declining interest in traditional denominational religion. This recognition culminated in abandonment of the exemption doctrine adopted by the Court in the 1960s and 1970s, under which the Free Exercise was construed to require that believers who found their beliefs and practices burdened by government laws be excused from complying with the burdensome laws. Using the exemption doctrine to excuse from obedience to law any person or group whose beliefs and practices are incidentally burdened would result in significant numbers of citizens avoiding compliance with virtually every law on the books (Eisgruber and Sager 1994: 1256). Yet, confining religious exemptions to a smaller, more manageable number – say, those affiliated with traditional Christian denominations and Jewish groups – would be biased against believers in new or unconventional religions as well as against those with secular commitments as morally serious as religion, such as engaging in political activism for justice, serving the poor in one’s community, or spending time on strengthening family ties and relationships (Gedicks 1998: 555–6). It was precisely this inability to reconcile the impracticality of widespread exemptions with the normative unfairness of limited exemptions that set the USSCt on the road to eventual abandonment of the exemption doctrine.

Problems with the exemption doctrine were evident almost from the start. In the mid- and late-1960s, only a few years after adopting the exemption doctrine, the USSCt considered a series of cases involving the exemption for religious pacifists from the military draft that was supplying manpower to fight the Vietnam War. These cases involved persons who sought exemption on the basis of personal and largely secular moralities developed from moral philosophy rather than the teachings of denominational religion or conventional religious beliefs. Troubled by the unfairness of limiting exemptions to members of denominational religions that teach the immorality of war, the USSCt expanded the statutory definition of “religious” belief far beyond the ordinary meaning of the exemption statute, to encompass a person’s “ultimate concern,” that which a person takes “seriously without any reservation.”

But a too-broad exemption would have threatened the efficiency of the draft by allowing almost anyone to maintain a credible objection to war. Accordingly, the USSCt rejected a later

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8 Seeger 1965: 186–87 (quoting Protestant theologian Paul Tillich); accord Welsh, 1970: 339–40 (Religious pacifist exemption requires that one’s “opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”).
effort to broaden the exemption still further. It never did confront the obvious unfairness inherent in allowing members of historic anti-war denominations to escape the draft, but not those who conscientiously adhere to secular anti-war moralities and politics.

A similar dynamic is evident in the USSCt’s Amish cases of the 1970s and 1980s. While sympathetic to the corrosive effect of mandatory attendance laws that would have forced Amish children into public high schools, the Court also feared that a host of other groups might claim a similar exemption. It accordingly granted the Amish an exemption from the attendance laws, but wrote it so narrowly that that it apparently applied only to the Amish. And when a decade later the Amish sought exemption from withholding and paying Social Security taxes on their employees, the Court shuddered at the potential avalanche of exemption claims from others seeking to minimize their taxes, and denied the exemption claim.

From here it was a short step to eliminating the exemption doctrine altogether. After holding the doctrine inapplicable in several specific situations, the USSCt abandoned the doctrine, holding that the Free Exercise Clause provides no relief from religious burdens imposed by religiously neutral generally applicable laws, and confining the exemption doctrine to situations in which religious exercise is targeted for special burdens imposed on no one else.

The current free-exercise regime in the US avoids the problem of distinguishing between religious conduct entitled to special solicitude from the government, and secular conduct that is not, even when it possesses a comparable moral seriousness. An easy way to avoid maintaining the boundary between the religious and the secular is not to draw it in the first place. This is precisely the state of contemporary free-exercise doctrine in the US: believers are not presumptively entitled to protection from incidental burdens on their beliefs and practices.

Congress reinstated the exemption doctrine statutorily, with the Religious Freedom Restoration Act of 1993, which requires the federal government to prove that a law is the least restrictive means of implementing a “compelling” governmental interest if the law “substantially burdens” religion, even incidentally, and the Religious Land Use and Institutionalized Persons Act of 2000, which imposes the same test on the states with respect to decisions on land use that adversely affect churches, and refusals to accommodate the free-exercise needs of convicts held in state prisons. Judicial application of these statutes to afford exemptions

9 Gillette v. United States, 401 U.S. 437 (1971) (holding that exemption applies only to those who conscientiously object to all wars rather than merely to “unjust” wars).
10 Yoder 1972.
14 See 42 U.S.C. § 2000bb-1. RLUIPA was held invalid as applied to state government action, but remains in effect as applied to federal government action. City of Boerne v. Flores, 521 U.S. 507 (1997).
Religious freedom as equality

to religiously burdened individuals and organizations has highlighted the impracticality and unfairness of accommodating religious practices impacted by social welfare regulations in a radically pluralistic society.

For example, the so-called “contraception mandate” of the Affordable Care Act of 2010 (the ACA or “Obamacare”) requires that secular for-profit employers cover all forms of medically approved contraceptives in their health care plans at no additional cost. The Court recently granted RFRA exemptions to two such employers, but only because it believed that the government could provide the mandated no-cost access to contraceptives through the employers’ healthcare insurers rather than the employers’ healthcare plans.

Scores of for-profit employers have objected to the mandate, claiming that provision of some or all of the mandated contraceptives violates the teachings of their religions. The Court’s grant of RFRA exemptions from the mandate to for-profit employers could have far-reaching effects. They opened the door for employer exemptions from covering any medical service or procedure to which they religiously object – indeed, to employer exemptions from any federal labor law to which they religiously object. Employers whose religions teach that women belong in the home and not in the workplace could claim exemptions from employment antidiscrimination laws, those who object to same-sex marriages or adoptions could claim exemptions from laws guaranteeing parental and family leaves, and those who object to the entire social welfare state could claim exemptions from minimum-wage and other social welfare regulations. Under RFRA, these exemptions would have to be granted unless the federal government could prove that the law or regulation is the least restrictive means of protecting a compelling government interest.

In short, RFRA exemptions for employers will usually come at the expense of employees who do not share the employer’s anticontraception beliefs and have religious and other freedoms of their own. The contraception mandate thus provides a vivid illustration of the impracticality and unfairness of conceptualizing religious freedom in a social welfare state marked by religious pluralism as a negative liberty right rather than an equality right.

17 The US provides health care for those under the age of 65 primarily through group health insurance plans offered by employers, rather than through a government-administered health plan as in Europe.
20 For a description of the contraception mandate and a detailed argument that RFRA exemptions from the mandate violate the Establishment Clause because of burdens they would impose on unconsenting third parties, see Gedicks and Van Tassell 2014.
Neutrality and the Establishment Clause

The USSCt’s doctrine under the Establishment Clause – “Congress shall make no law respecting an establishment of religion” – doctrine has followed a trajectory similar to its Free Exercise Clause doctrine. The core meaning of the US Establishment Clause is its prohibition of government support for any national or state religion. The USSCt has often characterized this norm as a requirement that government be “neutral” among different religions and between belief and unbelief.\(^{21}\)

The USSCt began its development of anti-establishment doctrine with a decided emphasis on separating church and state from each other's influence. This had the effect of denying government funding to private religious schools and other religious organizations even when they otherwise satisfied the secular eligibility requirements.\(^{22}\) In a social welfare state, the vitality of any private group often depends on its receipt of pervasive government funding and benefits, almost by definition. Just as it was difficult to under the free-exercise exemption doctrine to distinguish religious beliefs entitled to exemption from equally sincere and morally weighty secular commitments that were denied exemption, it also grew difficult to justify denying religious persons and organizations the social welfare benefits and funding that routinely go to secular organizations and individuals engaged in identical activities. Unsurprisingly, the Court fashioned a doctrine that permitted religious organizations and individuals to receive the same access to social welfare benefits and funding as comparably situated secular organizations and individuals, subject only to some minor variations.\(^{23}\) This generally established a regime of religious equality by eliminating the need to justify why religion is “specially disabled” from receiving social welfare benefits, and essentially treating religious organizations and individuals as equally entitled to such benefits.

The USSCt has likewise moved towards equality in its religious speech cases, though these have been influenced as much by the egalitarian cast of US free-speech doctrine as by anti-establishment equality norms. The Free Speech Clause – “Congress shall make no law . . . abridging the freedom of speech”\(^{24}\) – contains a powerful prohibition on government regulation of speech on the basis of its content or viewpoint (Stone 1987: 48). Thus, the Court has concluded that the Establishment Clause poses no obstacle to the participation of religious individuals in government forums dedicated to the communication and exposition of ideas, and religious speech is thus equally entitled to free-speech protection along with secular speech. It has accordingly consistently invalidated government laws and regulations that exclude religious speech from government forums or programs that are generally open to all other kinds of speech.\(^{25}\)

\(^{21}\) E.g., *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).


\(^{24}\) *U.S. Constitution*, amendment I (1791).

Even so, the reach of equality in Establishment Clause cases is not complete. There remain several branches of Establishment Clause doctrine that have not completely moved to equality-based doctrines. There remain decisions that impose special disabilities on religion when it interacts with government — for example, those that ban public-school prayer and government-sponsored religious symbols, and that prohibit government from delegating its power to churches, interfering in internal church governance disputes, and directly funding religious worship. Here the USSCt has traveled a winding and uncertain path. It has both upheld government sponsored prayer, because the Framers of the Religion Clauses apparently saw no problem with it, and struck it down, because it tends to reflect majoritarian religious practices or burden religious minorities.

It has upheld government use of religious symbols in contexts that seem to obscure their religious content, but has struck them down when they appear to endorse a particular religion or religion generally. It has upheld the immunity of religious organizations from government regulation of their employment decisions and internal governance, but has allowed government intervention on the basis of religiously “neutral principles of general law.”

Even in these lines of cases, however, one can see the influence of the contemporary elevation of equality over liberty in defining religious freedom. They all exhibit an aversion to outright government favoritism of religion over nonreligion, unless there is no constitutional alternative. For example, the Court has not hesitated to strike down government involvement in prayer or display of religious symbols when it is clear that they are being used to entrench the power of a religious majority or to coerce participation by religious minorities. Even in the internal governance cases, the Court has recognized that government can intervene when it is possible to do so without entangling itself in theological questions.

Equality over liberty

Under the USSCt’s contemporary Religion Clause doctrine, Wiccans who worship pagan gods, Buddhists who worship no God at all, pacifists who oppose the war in Afghanistan, Santerians who sacrifice household pets, animal rights advocates who agitate for increased protection of animals, New Age adherents who seek self-enlightenment, political activists who seek social retrenchments or reforms, unchurched believers and their close unbelieving cousins — all receive

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30 E.g., *Hosanna-Tabor 2012* (reaffirming under both religion clauses that “ministerial exception” to federal antidiscrimination laws requires dismissal of lawsuits by ministers against their churches for adverse employment actions); *Serbian Eastern Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696 (1976) (holding that church had final authority to decide whether and by what means to remove bishop); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952) (invalidating state law that would have superseded church authority to determine what ecclesiastical body controlled use of cathedral).
32 *McCreary County 2005; Santa Fe 2001; Weisman 1994*.
33 *Jones 1979*.
nearly the same doctrinal respect as the familiar denominations and religions of US history. Whether in protection from discrimination or in the distribution of social welfare benefits, contemporary Religion Clause doctrines equally protect the innumerable variety of religious belief, unbelief, and secular moral commitment in the contemporary United States.

The constitutional doctrines of European nations are comparable. The ECtHR has long construed the European Convention’s protection of “freedom of religion and belief” to shelter atheists and agnostics along with believers. The drafters of the Constitution of Europe similarly declined to mention Christianity even in the preamble, choosing instead a vague recognition of historical religions. Even in countries with legally “established” or traditionally predominant religions, like the UK and Italy, equality norms have steadily displaced special privileges for particular religions or religion generally.

One can look, then, to a not-too-distant future in which religion remains a vibrant part of Western societies, but not one with a constitutionally distinct character. Religious freedom, one may expect, will be fully underwritten by an understanding of religious freedom as equality, not liberty.

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