

**PAN-PROTESTANTISM AND PROSELYTIZING: MINORITY
RELIGIONS IN A PROTESTANT EMPIRE**

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I. INTRODUCTION

This is the fifth article in a series of papers exploring the meaning, nature, and purposes of the American Protestant Empire¹ as they bear on the question of religious freedom. The major thesis of these papers is that America was and still is a Protestant Empire,² a polity having the following major characteristics:

The basic character and purpose of this Protestant Empire flow from a series of Religious Settlements dating back to 1534. Religious Settlements are acts of a State . . . that “have as their primary objective the establishment and maintenance of a Protestant Empire.” These Religious Settlements are the constitutive elements or dimensions of the American Protestant Empire. They reflect the underlying reality of a . . . state that seeks to perpetuate and extend the . . . Protestant Reformation as it manifested itself in England and in the United States.

The American Protestant Empire . . . exhibits five major “procedural” characteristics. The first is an opposition to Roman Catholicism. The second consists of a dedication to convert the people of the United States to Protestantism. The third is a fluctuating commitment to the idea that the various Protestant denominations constitute an affinity group participating in a complex tapestry of competition and cooperation. The fourth amounts to a belief that the perfect society, the “purified” Protestant Empire, is only one or more social reforms away. The fifth is a pragmatic commitment to attrition and restraint to achieve the goals of the Protestant Empire, rather than the use of the most violent forms of coercion in furtherance of those goals, though these forms remain in the background.³

I stated that the Protestant Empire “is a culturally embedded reality with almost 500 years of history to shape and form it. Those who insist that we live in a post-Protestant Age have a great deal of explaining to do.”⁴ More specifically, I indicated that, among other things, those maintaining that

1. See Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187 (2001) [hereinafter Newsom, *Protestant Empire*]; Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219 (2002) [hereinafter Newsom, *Common School Religion*]; Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739 (2005) [hereinafter Newsom, *Some Kind of Religious Freedom*]; Michael deHaven Newsom, *The Case for Local and State Settlement of Questions of American Church-State Law: An Idea Whose Time Has Come, Gone, and Is Still Gone*, 2 FORUM ON PUB. POL'Y 97 (2006) [hereinafter Newsom, *Local and State*].

2. See, e.g., Newsom, *Protestant Empire*, *supra* note 1, at 266 (stating that “[t]he Protestant Empire is a present reality” in that “[i]t is either the substance of the American national experience or it is summoned forth by the work of the American people, or it is both,” and that “[i]t is a culturally embedded reality with almost 500 years of history to shape and form it.”).

3. Newsom, *Common School Religion*, *supra* note 1, at 222-23.

4. Newsom, *Protestant Empire*, *supra* note 1, at 266.

America is no longer a Protestant Empire would have to “confront the issues of anti-Roman Catholicism, Protestantization, Pan-Protestantism, Social Reform and attrition and restraint,”⁵ the five procedural characteristics of a Protestant Empire. In addition, I argued that they would have to “account for cultural or majoritarian suasion and coercion and the larger social truth of Protestantism as a culturally embedded reality,” and would have to show that the United States is not “the home of the Anglo-American Reformation.”⁶

Thomas Berg has attempted to make the case for which I called. He states that,

[t]he image of a dominant, proselytizing⁷ Protestantism fails to capture conditions in much of America today. With traditionalist and progressive Protestants often at each other’s throats, there is typically no single set of “goals and objectives of an American Protestant empire,” no common “social reform that serves the interests of the Protestant empire,” and little “affinity of various Protestant sects” that can be reinforced by “their shared political and legal control of the common schools.”⁸

In partial support of his conclusion, he insists that the evidence of Pan-Protestantism “is not very strong,”⁹ and that the differences between Protestants and Catholics over the Eucharist may be real, but that they “play[] very little role in disputes over religion and public life.”¹⁰ I appreciate Professor Berg’s efforts, for they contribute to an important discussion about the links that may or may not exist between history, ideas—in this particular instance the theology of the Eucharist—culture, politics, and the law. On the merits, however, he fails entirely in his purpose.

Of considerable interest here, his approach to the complex and dynamic relation of history, ideas, culture, politics and law, intentionally or otherwise, furthers the interests of the Protestant Empire in a significant way. First, Professor Berg argues that “if evangelicals¹¹ . . . are distinguished from other Christians such as Catholics and liberal Protestants, they may sometimes be an outsider minority.”¹² But he insists that:

5. *Id.* at 266 n.621.

6. *Id.*

7. I have suggested that, when all is said and done, the primary goal and objective of the Protestant Empire is Protestantization. *See* Newsom, *Common School Religion*, *supra* note 1, at 222 (stating that a Protestant Empire is a “state that seeks to perpetuate and extend the . . . Protestant Reformation as it manifested itself in England and in the United States.”).

8. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 956 (2004).

9. *Id.*

10. *Id.* at 956 n.190.

11. For a discussion of the use of the word “evangelicals” or the term “evangelical Protestants,” see *infra* notes 110-13 and accompanying text. As that discussion suggests, the appropriate term for “evangelicals” or “evangelical Protestants” is “pietistic evangelical Protestants,” a term which I shall use hereinafter.

12. Berg, *supra* note 8, at 948.

distinctions of minority/majority and outsider/insider are highly contestable and manipulable. This is largely because there are several different possible “maps” for defining the key religious distinctions and categories in America today. Each map leads to a different categorization of the relevant competing faiths, and therefore to a different judgment about who constitutes the minority. And choosing which of these maps best reflects a particular situation is, again, the kind of variable analysis that probably exceeds the competence of courts.¹³

This assertion can be true only if Berg is right that the Protestant Empire no longer exists, or no longer matters, even if it somehow still exists. If the Protestant Empire still exists—and matters—then it becomes necessary to consider whether the pan-Protestant nomos, pan-Protestantism, generates a map which in fact trumps or supersedes the other “maps” that Berg identifies.¹⁴ Thus, in a sense, the issue is joined. I believe that the pan-Protestant nomos continues powerfully to inform and shape America’s religious, social, and cultural environment. Professor Berg does not.

Pan-Protestantism, in and of itself, is but one element of a larger historical, religious, and cultural truth: the Protestant Empire. Any consideration of pan-Protestantism, therefore, must reckon with the broader context in which it finds itself. Part II of this paper will take up the question of the Protestant Empire, generally, although the primary emphasis will be on the present nature, character, and significance of the pan-Protestant nomos and will demonstrate that pan-Protestantism continues to play a dominant role in America’s religious character.

Professor Berg also argues that religious groups have, in effect, the right to proselytize in the public square, be they minority religions or majority religions. With regard to minority religions, Berg argues that minority protection is an important goal or objective of the Religion Clauses,¹⁵ a proposition with which I agree.¹⁶ He concludes that the Constitution protects—or should protect—religious minorities in two ways, one negative and the other affirmative. The negative conception of minority protection guards “against being religiously coerced by majoritarian government,” and “points logically toward keeping the public sphere wholly secular in its content, so that no religious view can be imposed on others. The logic may extend even to the point of restricting the religious speech of individual citizens in governmental settings like public schools.”¹⁷ Berg’s counterbalancing affirmative conception “recognize[s] that religious minorities

13. *Id.* at 948.

14. *Id.* at 941-63.

15. *Id.* at 923 (stating that “the protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one.”). The relevant portions of the First Amendment, which constitute the Religion Clauses, read as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

16. See Newsom, *Common School Religion*, *supra* note 1.

17. Berg, *supra* note 8, at 929.

also have a positive interest in practicing their faith, or expressing it, in governmental settings. A wholly secular public sphere can restrict the positive religious exercise of minorities.”¹⁸ Thus, Berg concludes that “[a]nalysis of minority religious rights must take into account the positive as well as the negative aspects of liberty in religious matters.”¹⁹ Berg’s affirmative conception of minority protection has to encompass proselytizing in the public square.

With regard to majority religions, Berg declares that,

[u]nder any plausible constitutional interpretation, majority faiths have rights to practice and spread their beliefs in certain basic ways (even though there are, of course, many questions about the outer scope of religious freedom). Such basic rights are protected even when they have effects that members of minority faiths regard as negative.²⁰

Berg does not explicitly state here that majority religions have the right to proselytize *in the public square*. But he does not appear to set out differential standards or tests on the question of proselytizing in the public square for minority religions and majority religions. It would seem to follow, therefore, that all religions have the same right, in Professor Berg’s view, to proselytize in the public square, notwithstanding any “negative effects” visited upon the targets of the proselytizing.

In the setting of the common schools, which this article will consider, proselytizing cannot be effected by the direct instrumental assistance of school officials, administrators, and teachers.²¹ But, of course, it can be affected with their indirect instrumental assistance.²² The critical actors, therefore, become, at least in light of the distinction just noted, students and others not affiliated with the public schools, such as parents and clergy, who wish to proselytize American public school children. However, the characterization of the religion of these actors as either a majority religion or a minority religion takes on a special importance, for it is difficult to avoid the impression or conclusion that school officials have endorsed majoritarian proselytizing, and thus run afoul of the prohibitions of the non-establishment principle in the

18. *Id.*

19. *Id.*

20. *Id.* at 922.

21. See Newsom, *Common School Religion*, *supra* note 1, at 225-29.

22. *Id.* This distinction between direct and indirect instrumental assistance is, in my view, untenable. See *id.* Indeed, it may be possible, at some point in the future, to persuade the Court to take a broad view of what constitutes direct instrumental assistance and a narrow view of what constitutes indirect instrumental assistance, that is, to persuade the Court to reconsider, recast, and modify its holdings in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), or, more forthrightly, overrule these two cases. A full discussion of this point lies, however, beyond the scope of this paper.

Religion Clauses.²³ Proselytizing by minority religions might not give rise to the same impression or conclusion.

In any event, it makes sense to consider the question whether pietistic evangelical Protestants can be properly characterized as “an outsider minority” as against Catholics and liberal Protestants, as Professor Berg suggests may be appropriate,²⁴ or as measured or arrayed against any other combination of religious groups, including pietistic evangelical Protestants belonging to different denominations or sects than the particular group of pietistic evangelical Protestants claiming in a particular case or instance to be a minority religion. I do agree that Protestant groups can, in a Protestant Empire, qualify as religious minorities, but insist that they can do so only under very limited and special circumstances, a matter which I address in Part III. The claim by a pietistic evangelical Protestant group, sect, or denomination that it constitutes a beleaguered and put-upon religious minority, rather than a constituent element of a powerful pan-Protestant *nomos*, should be taken, therefore, with the proverbial grain of salt.²⁵

It follows, therefore, that proselytizing by pietistic evangelical Protestants in the common schools may constitute proselytizing by adherents of a majority religion, with all of the difficulties attendant on such activities.²⁶ In Part IV, I explore some of the theological underpinnings of proselytizing by Christian groups, concluding that proselytizing by pietistic evangelical Protestants is particularly troublesome, particularly in light of the deeply embedded constitutional right of families to control the spiritual formation of their children. I thus call into question the equanimity which Professor Berg confers upon it.²⁷

23. *Mergens* and *Good News Club* do not foreclose this conclusion because in neither case did the Court specifically consider the question whether the religious groups seeking to have meetings on school property were majority religions or minority religions.

24. See Berg, *supra* note 8, at 948 (footnote omitted).

25. Professor Berg seems to accept this characterization of the status which evangelical Protestants claim to hold. *Id.* at 931. He does not explain, however, why this claim has any objective merit. See *infra* notes 230-245 and accompanying text (discussing pietistic evangelical Protestants contriving to invent and create tension between themselves, as a subculture, and the “other,” the target or opponent of that subculture).

26. In my view, *any* proselytizing in the common schools by *any* religious group, be they majority or minority religions, is problematic. Such conduct by majoritarian groups is, in the final analysis, simply even more problematic, particularly given the continuing reality of the Protestant Empire. It is, of course, impossible to prevent proselytizing in informal one-on-one or other similar settings where groups or other organizations are not critically involved in the effort to proselytize. As I have noted elsewhere, life is hard for members of minority groups. The relevant question is whether the state will make it even harder. See Newsom, *Common School Religion*, *supra* note 1, at 227.

27. Berg, *supra* note 8, at 922; see *supra* note 20 and accompanying text.

II. REPORTS OF THE DEATH OF THE PROTESTANT EMPIRE ARE GREATLY EXAGGERATED

Analysis of the five “procedural” characteristics of a Protestant Empire—anti-Catholicism, Protestantization, Pan-Protestantism, Social Reform, and a pragmatic commitment to suasion and attrition in doing the work of the Protestant Empire even as recourse to coercion remains as a threat—reveals that Protestantism has within it forces that operate to draw Protestants together and to push them apart.²⁸

Here I will examine (1) the centripetal force of anti-Catholicism, both in its theological and its sociological dimensions, and (2) the centrifugal force of the doctrine of private judgment—a central and determinative element of pan-Protestantism. In analyzing the theology of anti-Catholicism, I will focus on Eucharistic theology, for it lay at the center of the Protestant Reformations. These two forces largely define pan-Protestantism, even as they remain in tension with each other. It bears noting that the doctrine of private judgment may well constitute nothing more than an elaboration of anti-Catholicism, particularly with respect to Eucharistic theology.

I will further explore these two opposing forces and the dynamics of pan-Protestantism. First, I will take up the worldviews that emerge from the antipodal Eucharistic theologies of Protestants and Catholics, using school vouchers as an illustration. Second, I will examine the question whether the so-called “culture wars”²⁹ affect the basic dynamic balance between these two primary sources of the tension that mark American Protestantism: anti-Catholicism and private judgment.³⁰

A. Anti-Catholicism and Private Judgment: Framing the Dynamic Character of Pan-Protestantism

The five characteristics of the Anglo-American Protestant Empire are all rooted in the historical experience of Anglo-American Protestantism. Some aspects of that history warrant brief note. First, the English Reformation was a remarkably untidy affair, spanning several centuries. Indeed, it has not yet

28. My attempt here is to understand the nature of the Protestant Empire on its own—i.e. Protestant—terms. As I discuss later, *see infra* notes 151-75 and accompanying text, there is a distinctive Protestant world view which derives from a tendency of Anglo-American Protestants to see the world through the lens of dualisms set in opposition to each other. I therefore use the metaphor of tension and conflict in discussing how the dynamic informs the Protestant *nomos*. From a Catholic perspective, tension is not the ultimate state that one can attain, but rather a reconciliation of the tension, a state in which similarities trump differences.

29. In large part, the current “culture wars” are a mere contrivance and invention. *See infra* notes 230-45.

30. A closely related question as to the continued existence of the Protestant Empire concerns the matter of Protestantization. Largely because of the structure of Professor Berg’s failed attempt to disprove the continued existence of the Protestant Empire, I will address Protestantization in Part IV, *infra*.

played itself out.³¹ Second, a major factor in this long-running Reformation has been the stubborn refusal of Anglicanism, the established Church of England and the religion that, in the United States, draws its members disproportionately from the American elite, the American social and cultural establishment,³² to adopt the views of many Anglo-American Protestants regarding matters of faith and practice.³³ Third, there has been the equally stubborn refusal of non-Anglican Anglo-American Protestants to accede to Anglican doctrine and forms. Fourth, Catholicism has been a constant bugbear of Anglo-American Protestants.³⁴ Finally, the perduring tension between Anglican and non-Anglican Anglo-American Protestantism gave shape to the dominant substantive goal of the Protestant Empire: conversion or Protestantization,³⁵ which means, in fact, conversion to the “right” forms of Protestantism, forms that fall within the norms of pan-Protestantism. The other procedural characteristics of the Protestant Empire aid in furtherance of that goal.

Anti-Catholicism serves many functions, perhaps, in a Protestant Empire, but one of them entails the construction of Roman Catholicism as the embodiment of what “true” Christianity and “true” Americanism are *not*.³⁶ As such, above and beyond tensions between Anglicans and non-Anglicans, anti-Roman Catholicism furnishes, at least in the mind of the Protestant Empire, a reason for conversion, and it rallies the Protestant forces trying to effect conversion.³⁷

31. See Jeremy Gregory, *The Making of a Protestant Nation: “Success” and “Failure” in England’s Long Reformation*, in *ENGLAND’S LONG REFORMATION: 1500-1800*, at 313-14 (Nicholas Tyacke ed., UCL Press 1998); T.M. PARKER, *THE ENGLISH REFORMATION TO 1558*, at 172 (1950); A.G. DICKENS, *THE ENGLISH REFORMATION 392-93* (2d ed. 1989).

32. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 840.

33. See, e.g., Newsom, *Protestant Empire*, *supra* note 1, at 222 (discussing the resistance of Elizabeth I to the demands of the Puritans as she supported Episcopalianism). This resistance continued through the trials and vicissitudes of the Seventh Century. *Id.* at 232-40 (discussing the Religious Settlements of 1662 and 1688). For a consideration of more recent tension between Episcopalians and the spiritual descendants of the Elizabethan Puritans, see Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 832-68 (discussing the possibility that the exemption of the religious use of wine from the prohibitory régime of the Volstead Act amounted to propitiation of Episcopalians by non-liturgical Protestants, Protestants who did not tend to celebrate Holy Communion every Sunday, but did so, if at all, only monthly, quarterly, or annually).

34. See MARK S. MASSA, *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* 18-19 (2003).

35. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 878-79.

36. See *infra* notes 73-84 and accompanying text.

37. Anti-Catholicism provides a better and more powerful motivation than any anti-Anglican sensibilities that non-Anglican Anglo-American Protestants might harbor. See, e.g., Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 832-68 (discussing the complex relationship between Episcopalians and other American Protestants in the run up to National Prohibition). Although over 250 years earlier, at the beginning of the Puritan Revolution, a sermon delivered by Thomas Goodwin, an Independent, referred to the Anglican Establishment, soon to be overthrown, at least temporarily, as the “beast” of Babylon. TAI LIU,

Pan-Protestantism, to the extent that Protestants see themselves as, and function as, a religious or theological affinity group—and perhaps a political or cultural one as well—serves two functions. The first defines acceptable conversion as conversion to any one of the forms, sects, or denominations of Protestantism that are members of that affinity group, otherwise known as pan-Protestantism. Given that affinity group, Protestants can minimize the impact of the pronounced tendency, inherent in Protestantism, to splinter into innumerable groups, sects or denominations.³⁸ By so doing, they facilitate conversion. The target for conversion merely has to choose the Protestant group, sect, or denomination that appears most nearly—or likely—to meet his or her spiritual needs,³⁹ but which, of course, should hopefully be within the pan-Protestant consensus. The second function of pan-Protestantism lies in building an *esprit de corps* among those Protestants engaged in the work of conversion. Far better it is if the forces attempting to convert non-Protestants see themselves as allied in a common cause or endeavor, notwithstanding denominational or other differences.⁴⁰

The desire to “purify” society by means of social reforms of one kind or another facilitates conversion, again, in the mind of the Protestant Empire at least, because making a culture or society more “Protestant friendly”⁴¹ creates a large incentive for individuals who wish to conform to large societal norms and conventions to join a Protestant religious group. Finally, the tendency to

DISCORD IN ZION: THE PURITAN DIVINES AND THE PURITAN REVOLUTION 1640-1660, at 1 (1973).

38. A comprehensive survey of religion in the United States and Canada lists virtually countless numbers of denominations, sects, or groups falling within the following Protestant religious families: Anglican; Lutheran; Reformed-Presbyterian; Pictist-Methodist; Holiness; Pentecostal; European Free-Church; Baptist; Independent Fundamentalist; Adventist; Liberal; Latter-day Saints; Communal; Christian Science-Metaphysical; and Spiritualist, Psychic, and New Age. ENCYCLOPEDIA OF AMERICAN RELIGIONS (J. Gordon Melton ed., 7th ed. 2003).

Bryan Hillis has commented on schisms in the 1970s in three long-standing Protestant groups: the Southern Presbyterian Church, The Lutheran Church—Missouri Synod, and the Episcopal Church, *see* BRYAN V. HILLIS, CAN TWO WALK TOGETHER UNLESS THEY BE AGREED?: AMERICAN RELIGIOUS SCHISMS IN THE 1970S (1991), demonstrating that the impulse to splinter reaches, even in our day, into stable and powerful Protestant denominations. This fissiparous quality of Protestantism, of course, robs Protestants of the unity and cohesion that, for example, Catholics and Eastern Orthodox exhibit, a cohesion rooted, in large part, in their hierarchical polity and their strong or “high” church ecclesiology. Groups calling themselves “Catholic” may break away, emerge, or otherwise appear, *see id.*, but their numbers are relatively small in comparison and, in most if not all instances, are not in communion with Rome.

39. *See* ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 18 (1992) (arguing that “the ‘natural’ state of religious economies is one in which a variety of religious groups successfully caters to the special needs and interests of specific market segments”).

40. There are tensions between and among Protestants regarding the question of Protestantization. However, these tensions can be reconciled. *See infra* notes 404-27 and accompanying text.

41. *See* Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 780-82 (discussing the relation between conversion and National Prohibition, which was one of the great social reforms of the American Protestant Empire—and one of the great disasters in American social and constitutional history).

use suasion, with coercion present, even if in the background, makes it easier to portray or represent Protestantization as a matter of voluntary conversion. The fact that Protestantization frequently causes enormous harm on non-Protestants⁴² can be ignored or “explained” away on the grounds that conversion is not being sought at the point of a sword or by threats of civil fines, imprisonment, civil disabilities, or other penalties or sanctions, or that the harm actually sustained is not really harm at all,⁴³ or both.

Simply put, two procedural characteristics of the Anglo-American Protestant Empire seem to epitomize the forces drawing Protestants together and those driving them apart: anti-Catholicism and pan-Protestantism. The first works in one direction, unifying Protestants in a common endeavor. The second has elements that have both centripetal and centrifugal force. It is to them that I turn. Subpart 1 will consider anti-Catholicism in more detail, and Subpart 2 will consider the tendency to splinter, without which there would be no need for pan-Protestantism.

1. Anti-Catholicism

Ideas matter. For many people who take religion seriously, theology matters, therefore. Anti-Catholicism functions as a *leitmotif* in this article, as it constantly appears and reappears in somewhat altered guises or forms. Here I take up two foundational aspects of anti-Catholicism: the theological and the sociological or ideological. In Subpart B, I consider some of the implications of these two dimensions of anti-Catholicism.

a. Eucharistic Theology

It is impossible to think seriously about Christianity—much less apprehend it—without thinking about the Eucharist. Dom Gregory Dix, the great Anglican Divine, wrote that the Eucharist has been the central act of Christian worship from the very beginning.⁴⁴ Its origins lay not in Scripture, but in Tradition,⁴⁵ because “[t]he [E]ucharist had already been at the heart of the religion of [C]hristians for twenty years before the first of [the] New Testament documents was written.”⁴⁶ Dix remarked that “the church had found in the [E]ucharist an entire epitome of ‘the Gospel’ before our four gospels had been written.”⁴⁷ The central importance of the Eucharist, therefore, holds true even for Protestants who seldom, if ever, celebrate the

42. See Newsom, *Common School Religion*, *supra* note 1, at 308-25.

43. *Id.* at 262-64.

44. DOM GREGORY DIX, *THE SHAPE OF THE LITURGY* 1 (Seabury Press 1982) (1945).

45. *Id.* at 2-5.

46. *Id.* at 3.

47. *Id.* at 4.

Lord's Supper.⁴⁸ This latter point seems counterintuitive and requires some further elaboration.

In the early Church, from the First Century forward, Christians did not argue among themselves about the Eucharist. Evidently they must have held to a fundamental agreement or consensus about the meaning of the Eucharist. The Patristic Fathers did use different modes or types of language to discuss and meditate upon the Eucharist, but these were merely "alternative theological models that are not exclusive but complementary ways of describing the [E]ucharistic mystery."⁴⁹ There was a shift in the linguistic modality in the post-Constantinian age, starting in the Fourth Century. But the views that emerged from that shift—those most notably of St. Augustine of Hippo and of St. Ambrose of Milan—"were not in competition with each other, any more than [the earlier linguistic forms] were in competition with each other throughout the patristic period."⁵⁰ Arguably, a disagreement did arise in the Ninth Century, an apparent dispute between two monks residing in the same monastery, but relatively little seems to have come of it.⁵¹

A more serious dispute over Eucharistic theology erupted in the Eleventh Century between the Church and a theologian, Berengar of Tours. Berengar's personality, as well as his views, may have added fuel to the fire and heightened the drama, if not the merits, of the disagreement between him and the Church over the meaning of the Eucharist.⁵² In the end, the Church forced him to recant,⁵³ marking the first time in the history of Western Christianity in which a disagreement over the meaning of the Eucharist led to formal ecclesial sanction. Again, new linguistic modes of expression and new philosophical ideals may have had much to do with this controversy. In the end, the Church declared the doctrine of transubstantiation *de fide* in 1215,⁵⁴ a little more than a century or so after the unprecedented encounter between the Church and Berengar. But this declaration merely amounted to a definitive statement of the ancient and perduring consensus, now twelve centuries old, among Christians, merely using Aristotelian philosophical categories to express it.⁵⁵

48. MARTIN E. MARTY, *PROTESTANTISM* 167 (1972) (stating that "[i]t might almost be said that the Lord's Supper (or Mass, or Eucharist, or Holy Communion, or Lord's Table) was more fought over than enjoyed in Protestantism"); RICHARD D. PHILLIPS, *WHAT IS THE LORD'S SUPPER* 5 (2005) (arguing that "many . . . contemporary evangelical [Christians] . . . seldom observe" the Lord's Supper); LEONARD J. VANDER ZEE, *CHRIST, BAPTISM AND THE LORD'S SUPPER: RECOVERING THE SACRAMENTS FOR EVANGELICAL WORSHIP* 10 (2004) (observing that "Evangelicals apparently are not very interested in the sacraments").

49. WILLIAM R. CROCKETT, *EUCARIST: SYMBOL OF TRANSFORMATION* 86-87 (1989).

50. *Id.* at 98.

51. *Id.* at 106-07.

52. See J. P. WHITNEY, *HILDEBRANDINE ESSAYS* 166-79 (1932).

53. CROCKETT, *supra* note 49, at 109-10.

54. *THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1390-91* (F.L. Cross & E.A. Livingstone eds., 2d ed. 1974).

55. *But see* JOHN W. NEVIN, *THE MYSTICAL PRESENCE: AND OTHER WRITINGS ON THE EUCARIST* 118 (Bard Thompson & George H. Bricker eds., United Church Press 1966) (1846) (insisting, in an ultimately failed effort, to buttress the Eucharistic doctrine taught by

Three centuries later, the unity of Western Christianity was destroyed in the crucible of the Protestant Reformations. And whatever their precise causes might or might not have been,⁵⁶ the theology of the Eucharist—and the language or conceptions that one might use to talk about it—lay at the heart of the rupture of Western Christianity. Ironically perhaps, the best evidence of the continuing and transcendent importance of the Eucharist in Christian thought, belief, and practice is the bewildering array of Protestant doctrines of the Eucharist that emerged in that crucible.⁵⁷ The Reformers thought that they had to get the doctrine right, even at the cost of Protestant unity.⁵⁸ Perhaps the welter of Protestant doctrines of the Eucharist reflected the reality of the principle of private judgment,⁵⁹ illustrating that even with respect to a core theological concern, Protestants could not act of one accord. Private judgment, it would appear, does not confine its reach solely to matters of secondary or tertiary importance. The right of private judgment, a core and central Protestant tenet, applies to even the most basic and foundational matters.

Nonetheless, private judgment notwithstanding, a remarkable consensus emerged among non-liturgical Protestants.⁶⁰ Among the many Protestant Eucharistic theologies that emerged in the Sixteenth Century, one, Zwinglianism, stood out as the most diametrically opposed to the Roman Catholic doctrine of transubstantiation,⁶¹ and it furnished the basis for the non-liturgical Protestant consensus on the Eucharist. I have elsewhere discussed the contrasting features of transubstantiation and Zwinglianism,⁶² and there is no need to rehearse them here. But they essentially come down to

John Calvin, that “there must be a certain fundamental substratum, in which the true idea of the sacrament was always at hand, and which the church is bound accordingly, through all ages, to respect in this light . . . [but that] the early fathers do not teach either transubstantiation or consubstantiation” but rather taught something like Calvin’s Eucharistic doctrine).

56. See Newsom, *Protestant Empire*, *supra* note 1, at 191-92 (arguing that Germanic nationalism had much to do with the Protestant Reformations); *but see* SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 72 (1972) (arguing that “[t]he interplay of so many convergent forces makes it impossible to designate any one person, event, or set of conditions as the *cause* of the Reformation”). My views and Ahlstrom’s can be reconciled in that Germanic nationalism itself is an “interplay of . . . convergent forces.” *Id.*

57. Newsom, *Protestant Empire*, *supra* note 1, at 196 n.65.

58. See HERMANN SASSE, *THIS IS MY BODY: LUTHER’S CONTENTION FOR THE REAL PRESENCE IN THE SACRAMENT OF THE ALTAR* 143-55 (1959) (discussing the failure of Martin Luther and representatives of Ulrich Zwingli to compose their differences on the subject of the Eucharist).

59. See *infra* notes 96-109 and accompanying text for a discussion of private judgment.

60. I use a slightly different terminology in discussing non-liturgical Protestants in much of the rest of this paper. See *infra* notes 110-120 and accompanying text (distinguishing between pietistic and liberal evangelical Protestants on the one hand (some of whom might be liturgical Protestants, although, as a general rule, evangelical Protestants, whether pietistic or liberal, tend not to be liturgical Protestants, and “orthodox” (presumably liturgical) Protestants on the other hand).

61. See ROBERT LETHAM, *THE LORD’S SUPPER: ETERNAL WORD IN BROKEN BREAD* 25 (2001) (describing Zwinglianism as the most distant from transubstantiation).

62. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 754-71.

this: transubstantiation rests on an “earthly” reconciliationist view whereby the Divine and the created order unite, most especially in the Eucharist, in order to advance the salvation economy.⁶³ The Roman Catholic Church, therefore, plainly and unequivocally teaches that “[i]n the most blessed sacrament of the Eucharist ‘the body and blood, together with the soul and divinity, of our Lord Jesus Christ and, therefore, *the whole Christ is truly, really, and substantially* contained.’”⁶⁴ Non-liturgical Protestant doctrine rests, instead, on a series of dualistic rules or propositions that collectively operate, in the non-liturgical Protestant system, to deny any such union of the Divine and the created order in the Eucharist.⁶⁵ Thus, the bread and wine remain bread and wine, they cannot exist in any sort of sacramental union with the Body and Blood of Christ, they cannot be instruments of grace, and the most, therefore, that the communicant can receive is a psychic boost or enhancement to the communicant’s private, subjective recollection of what Christ did for mankind on the Cross.⁶⁶

Liturgical Protestants, in contrast with non-liturgical Protestants, hold to a wide range of Eucharistic theologies ranging from Zwinglianism at one extreme,⁶⁷ to something very much akin to transubstantiation at the other.⁶⁸

63. *Id.* at 752-53.

64. CATECHISM OF THE CATHOLIC CHURCH 383, para. 1374 (United States Catholic Conference, Inc. trans., Image Books 1995).

65. Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 758-61.

66. See ULRICH ZWINGLI, *Letter to the Princes of Germany* (1530), reprinted in ON PROVIDENCE AND OTHER ESSAYS 111 (William John Hinke ed., Labyrinth Press 1983) (1922).

67. It is possible to be a Zwinglian liturgical Protestant. A discussion of the reasons why lies, however, beyond the scope of this paper. It suffices to note that the 1552 Book of Common Prayer of the Church of England easily admits of a Zwinglian interpretation. See DIX, *supra* note 44, at 658-59 (stating that the Zwinglianism instinct in the 1549 Book of Common Prayer found full expression in the 1552 Book). Later versions of the Book of Common Prayer reflect a “higher” Eucharistic theology. See BYRON D. STUHLMAN, EUCHARISTIC CELEBRATION 1789-1979, at 161-62 (1988) (arguing that the Books of Common Prayer in the Episcopal Church from 1789 to 1979 reflect a virtualist understanding of the Eucharist).

68. Within the Anglican tradition alone, one finds the full range of Eucharistic theologies. See, e.g., RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY, Book V, at 330-43 (W. Speed Hill ed., Harvard University Press 1977) (1597) (arguing that Christians should bracket the question of what does or does not happen to the bread and wine, but focus on what does or does not happen to the communicant). But divisions among Anglicans subsisted. See 2 JOHN JOHNSON, *The Unbloody Sacrifice, and Altar, Unveiled and Supported: In Which the Nature of the Eucharist is Explained According to the Sentiments of the Christian Church in the Four First Centuries*, in THE THEOLOGICAL WORKS OF THE REV. JOHN JOHNSON, M.A. (John Henry Parker ed., 1847) (1718) (taking the virtualist position that the power of the Holy Spirit is joined with the bread and wine, even though the Body and Blood of Christ remain in Heaven); BENJAMIN HOADLEY, A PLAIN ACCOUNT OF THE NATURE AND END OF THE SACRAMENT OF THE LORD’S-SUPPER (London, James, John & Paul Knapton 1735) (taking the Zwinglian position that nothing happens either to the bread and wine or to the communicant, the Body and Blood of Christ remaining in Heaven); DANIEL WATERLAND, A REVIEW OF THE DOCTRINE OF THE EUCHARIST: WITH FOUR CHARGES TO THE CLERGY OF MIDDLESEX CONNECTED WITH THE SAME SUBJECT (London, Clarendon Press 1868) (1737) (taking the receptionist position that nothing happens to the bread and wine, but that the communicant receives the Body and Blood of Christ in a heavenly or spiritual manner only); JOHN HENRY NEWMAN, TRACTS FOR THE TIMES NO. 90: REMARKS ON CERTAIN PASSAGES IN THE THIRTY-NINE ARTICLES 45-48 (New

These Protestants have no broad and overarching consensus. However, the vast majority of these Protestants, including Anglicans, would deny transubstantiation.⁶⁹ It is possible, therefore, to synthesize Protestant Eucharistic theologies and thus discover a certain commonality that links all Protestants—liturgical and non-liturgical—together in a pan-Protestant *nomos*: *something happens to the bread and wine, or to the believers, or both, in, through, and during the course of the liturgy, having something to do with the Body and Blood of Christ, but that it only matters that the Catholic doctrine of transubstantiation does not comprehend or explain what does or does not happen, concerning the Body and Blood of Christ, to what, when, or to whom.*⁷⁰

York, J. A. Sparks 1841) (arguing for transubstantiation, or something very much like it, whereby the substance of the Body and Blood of Christ become really present in the bread and wine and are given, as such, to the communicant); JOHN KEBLE, *ON EUCHARISTICAL ADORATION: WITH CONSIDERATIONS SUGGESTED BY A LATE PASTORAL LETTER (1858) ON THE DOCTRINE OF THE MOST HOLY EUCHARIST* (3d ed., London, James Parker & Co. 1867) (arguing for consubstantiation, whereby the substance of the Body and Blood of Christ become really present, together with the substance of the bread and wine and are given, as such, to the communicant). Confessional Lutherans, of course, hold to the teachings of Martin Luther to the effect that the Body and Blood of Christ are present in the Eucharist, although not by way of transubstantiation. See 37 LUTHER'S WORKS: WORD & SACRAMENT III, at 59 (Robert H. Fischer ed. & Helmut T. Lehman gen. ed., 1961). Liturgical Calvinists, outside of the Anglican tradition, teach, especially at the present time, some variation of Calvin's doctrine. See 1 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* chs. IV, XVII (John Allen ed., 6th ed., rev. 1921) (1559), which holds that in some spiritual way, the communicant experiences the Body and Blood of Christ, not here on earth and certainly not by and through the bread and wine, but, somehow, in Heaven.

For examples of current liturgical Calvinist thought about the Eucharist, see GORDON T. SMITH, *A HOLY MEAL: THE LORD'S SUPPER IN THE LIFE OF THE CHURCH* 10 (2005) (referring to "[t]he encounter with the ascended Christ" which is experienced together with "the experience of the grace"); LETHAM, *supra* note 61, at 28 (arguing that "Christ does not come down to us in his body and blood. [But i]nstead, we are lifted up to him by the Holy Spirit"); VANDER ZEE, *supra* note 48, at 198 (stating that "[i]n the Lord's Supper, Christ does not descend, we ascend through the power of the Holy Spirit to participate in the life and worship of our ascended Lord"); KEITH A. MATHISON, *GIVEN FOR YOU: RECLAIMING CALVIN'S DOCTRINE OF THE LORD'S SUPPER* 268 (2002) (claiming that Calvin's doctrine is "an important alternative" to both Zwinglianism and transubstantiation).

69. See Article 28 of the Articles of Religion of the Church of England (plainly rejecting transubstantiation, declaring that "[t]ransubstantiation (or the change of the substance of Bread and Wine) . . . cannot be proved by holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a Sacrament, and hath given occasion to many superstitions"); MATHISON, *supra* note 68, at 239-49 (speaking from the Reformed or Calvinist tradition, criticizing, *inter alia*, transubstantiation).

70. This discussion has focused entirely on the Eucharistic theologies of Western Christianity, Catholic and Protestant. There are, of course, other Christians. Most notably, the Eastern Orthodox and the Oriental Churches hold to a doctrine of the Eucharist that is close to, but not identical with, the teachings of the Roman Catholic Church. See, e.g., John Karmiris, *Concerning the Sacraments*, in *EASTERN ORTHODOX THEOLOGY: A CONTEMPORARY READER* 27 (Daniel B. Clendenin ed., 2d ed. 2003) (citation omitted) (stating that "[t]he Orthodox Catholic Church accepts the real presence of Christ in the Holy Eucharist: the elements of bread and wine are changed into Christ's very body and blood in such a way that he is hypostatically and essentially present in the sacrament"); KALLISTOS WARE, *THE ORTHODOX WAY* 37 (rev. ed., St.

The key, of course, lies in the rejection of transubstantiation, in a theologically driven anti-Catholicism.⁷¹ One cannot, therefore, plausibly argue that differences between liturgical Protestants and non-liturgical Protestants on the subject of the Eucharist somehow trump that which they all have in common. Anti-Catholicism holds Protestants together on the vitally important question of the meaning of the Eucharist.⁷²

b. Sociology and Ideology

Protestant Eucharistic theologies provide a powerful motivating force for anti-Catholicism. It overflowed its theological banks and took on a broader embedded cultural or sociological set of meanings, never, however, completely divorcing itself from its origins in Eucharistic theology.

Robert P. Lockwood has identified seven elements of *contemporary* anti-Catholicism, “stereotypes relished in colonial times, and assumed in contemporary news and entertainment media.”⁷³ This bigotry is pervasive in

Vladimir’s Seminary Press 1999) (1979) (stating that, for the Orthodox, “in the extension of Christ’s Incarnation at the Eucharist, the Father sends down the Holy Spirit, to effect the Son’s presence in the consecrated gifts”); CHRISTOS YANNARAS, *ELEMENTS OF FAITH: AN INTRODUCTION TO ORTHODOX THEOLOGY* 129-31 (1991) (declaring that the Orthodox “call down the Holy Spirit ‘on us *and* on these gifts before us’ seeking precisely the transformation of life, that life be made imperishable, that the gifts be changed and that those who share in the gifts share in a new creation, freed from death—in the Body of Christ,” but also criticizing and rejecting the objectivist essentialism of transubstantiation in favor of understanding the change of the bread and the wine as having a “relationship with the existential event, the human adventure of life and death”); MAR APREM, *SACRAMENTS OF THE CHURCH OF THE EAST* 71-73 (1978) (citation omitted) (noting that the Nestorian Church “has not defined a doctrine either of transubstantiation of [sic] consubstantiation” but believes that “the Holy Elements . . . receive[d] at the Eucharist have been changed to the Body and Blood of Christ through faith . . . [although] this change does not necessarily involve the doctrine of Transubstantiation”).

71. This rejection of transubstantiation even found expression in the laws of late Stuart England. See *The Corporation Act, 1661*, 13 Car. 2, st. 2, c. 1, § 102 (Eng. & Wales), reprinted in *THE STUART CONSTITUTION 1603-1688: DOCUMENTS AND COMMENTARY* 376-78 (J. P. Kenyon ed., 1966) (requiring public officials to receive the Eucharist in a Church of England liturgy *and to abjure transubstantiation*); *An Act for the more effectually preserving the King’s Person and Government by disabling Papists from sitting in either House of Parlyament, 1678*, 30 Car. 2, st. 2, c. 1 (Eng. & Wales), reprinted in *5 The Statutes of the Realm: 1625-1680*, at 894 (London, Eyre & Strahan 1810-1828) (The Second Test Act, requiring, with the exception of the Duke of York (later James II), that those sitting in Parliament take an oath, *inter alia*, *abjuring transubstantiation*).

72. To the extent that some Anglo-Catholics, followers of the Oxford Movement in the Church of England and in Anglicanism more generally, see ALF HÄRDELIN, *THE TRACTARIAN UNDERSTANDING OF THE EUCHARIST* (1965) (discussing the theologies of the founders of the Oxford Movement) actually held to transubstantiation, it is little wonder that other Protestants objected. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 854-57.

73. Robert P. Lockwood, *The Evolution of Anti-Catholicism in the United States*, in *ANTI-CATHOLICISM IN AMERICAN CULTURE* 1, 20 (Robert P. Lockwood ed., 2000). Anti-Catholicism, of course, in one form or another, goes back all the way to the beginning of the English Reformation. See Newsom, *Protestant Empire*, *supra* note 1, at 199.

contemporary American society.⁷⁴ The seven elements, in their stunning diversity and internal contradictions, provide targets of opportunity for American Protestants of all kinds and sorts.⁷⁵ This taxonomy⁷⁶ appears to invite the question whether Eucharistic theology plays a central or important role in informing this Anglo-American Protestant Empire's anti-Catholicism. Lockwood argues that "[a]nti-Catholicism is not disagreement with what the Church believes and teaches, even when forcefully—or satirically—expressed. It is not heated theological disputes and expressions of negative judgments on Church activities or public positions."⁷⁷ Nonetheless, Protestant objection to Catholic Eucharistic theology drives most, if not all, of the seven elements, even as they take cultural, sociological, and ideological, rather than theological, shape.

The first element is that Catholics are anti-Enlightenment:

Catholics and Catholicism are portrayed as essentially anti-intellectual, with the faith a collection of meaningless superstitions and thoughtless rituals While the driving force behind this stereotype today is secular thought, its roots are essentially in the Protestant Reformation ridicule of the "crosses and idle ceremonies of popery."⁷⁸

74. See PHILIP JENKINS, *THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE* 1-2 (2003) (stating that "Catholics and Catholicism are at the receiving end of a great deal of startling vituperation in contemporary America, although generally, those responsible never think of themselves as bigots" and that "[i]n 2002, the furor over child sexual abuse by Catholic clergy provoked a public outpouring of anti-Church and anti-Catholic vituperation on a scale not witnessed in this country since the 1920s").

75. The suggestion that anti-Catholicism has waned, see, e.g., JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 39-40 (1991), is clearly wide of the mark, perhaps because Hunter relied on public opinion polling data generated in surveys taken between 1966 and 1984. *Id.* The culture wars and their increasing ferocity and intensity in recent years track a resurgence of anti-Catholicism, not a falling away of the central ideology that holds Protestants together. See JENKINS, *supra* note 74, at 1-2. The persistence of anti-Catholicism, even if the locus of it has shifted from conservatives to progressives, see *infra* notes 129-35 and accompanying text, undermines Hunter's analysis of the culture wars, an analysis that Berg appears to adopt. See Berg, *supra* note 8, at 951-58.

76. For another taxonomy of anti-Catholicism, see MICHAEL SCHWARTZ, *THE PERSISTENT PREJUDICE: ANTI-CATHOLICISM IN AMERICA* 147-52 (1984) (identifying eight myths: "Catholicism as a pagan counterfeit of Christianity," Catholics as "intellectually inferior" to Anglo-Saxons, Catholics as opposed to the public schools, Catholics as "subjects of a foreign power," Catholics as "narrow-minded, intolerant and opposed to civil liberties," the Catholic Church as "anti-sex, anti-woman, and determined to make life joyless for everyone," the Catholic Church as responsible for the Nazi Holocaust, and anti-Catholic Catholics as the source of true insight into the Catholic Church).

77. Lockwood, *supra* note 73, at 20.

78. *Id.* I explain the "handing off" of anti-Catholicism from one group of Protestants, that I call pictistic evangelical Protestants, see *infra* notes 110-13 and accompanying text, to liberal evangelical Protestants, *id.*, some of whom, as I point out, see *infra* notes 106-09 and accompanying text, are essentially secularists. See *infra* notes 138-44 and accompanying text for a discussion of this "handing off."

Protestant ridicule of “meaningless superstitions and thoughtless rituals” and of the “crosses and idle ceremonies of popery” can only refer to the Mass, and the central theological truth of the Mass is transubstantiation. It is transubstantiation alone that enables Catholics to enter into and participate in the Pascal Mystery. Thus, Eucharistic theology lies at the heart of this element.

The second element is that Catholics are anti-democratic: “[t]hroughout American history, the Catholic Church and Catholics were portrayed as forces of evil, intent on destroying individual freedom. . . . [I]t portrays lay Catholics as incapable of independent thought and, as they slavishly subscribe to arcane religious belief, unworthy and unable to function in a free society.”⁷⁹ Accusing Catholics of being anti-democratic reflects Protestant fear and angst with regard to the Catholic hierarchy and the Catholic Magisterium or teaching authority. For Catholics, there can be no Church in its fullest expression without the Eucharist.⁸⁰ The hierarchy and the teaching authority are emblems or markers of the Church, and, as such, are indispensable elements of the Church, notwithstanding Protestant objection. “The Church . . . ‘has received [the] solemn command of Christ from the apostles to announce the saving truth[]’”⁸¹ and

[t]he Roman Pontiff and the bishops are “authentic teachers . . . endowed with the authority of Christ, who preach the faith to the people The *ordinary* and universal *Magisterium* of the Pope and the bishops in communion with him teach the faithful the truth to believe, the charity to practice, the beatitude to hope for.”⁸²

An attack on the hierarchy and the Magisterium, therefore, is necessarily an attack on the Catholic understanding of the Eucharist.

The third element is that power is the sole driving force of Catholicism: “[t]oday, particularly in the press, Catholic teaching is rarely reported on its face value. Religious or faith-based motives are dismissed and alternatives for Catholic action are presented as the desire to oppress or as a means to grab for secular power.”⁸³ Accusing Catholics of lusting for secular power also attacks the hierarchy and the Magisterium, and therefore, the Catholic conception of the Eucharist. This stereotype essentially rests on an objection to Catholics witnessing Catholic teaching in the secular, political, social, and cultural

79. Lockwood, *supra* note 73, at 21.

80. See CATECHISM, *supra* note 64, at 368-69, paras. 1322, 1324 (stating that Baptized and Confirmed Catholics “participate with the whole community in the Lord’s own sacrifice by means of the Eucharist” and “in the blessed Eucharist is contained the whole spiritual good of the Church, namely Christ himself, our Pasch”).

81. *Id.* at 546, para. 2032 (citation omitted).

82. *Id.* at 546, para. 2034 (citation omitted).

83. Lockwood, *supra* note 73, at 22.

realms.⁸⁴ But the objection makes no sense unless there is something about Catholicism, as a religious system, that Protestants reject.

The fourth element is that Catholicism is the religion of inferior races: “[t]oday, anti-immigration arguments are generally aimed at the predominantly Catholic immigrants from Mexico and the rest of Latin America.”⁸⁵ The Church, of course, has obliged on this one, as the powerful and defiant witness of Roger Cardinal Mahony makes clear,⁸⁶ giving as good as it gets. Demeaning Catholics as racial inferiors reflects, obviously, a racist view of humankind. The question whether this racist impulse springs from theological or cultural sources lies beyond the scope of this paper.⁸⁷ But it is fair to grant that the “inferior races” stereotype could issue, at least in part, from cultural soil, leaving the question open whether it also could issue from theological predicates.⁸⁸

The fifth element is that Catholicism is a faith alien to America:

[s]imilar to the fear of inferior races, Catholicism was viewed as an alien or foreign presence within the colonies and within the United States. Catholics represented something foreign to the American experience and have always been considered vaguely threatening strangers in our midst. . . . For the most part . . . this . . . concept . . . expressed itself more in religious terms, with Catholicism as a faith contrary to true Americanism. The Catholic faith was seen as essentially alien to the predominant Protestant culture.⁸⁹

Lockwood’s own construction of this element reveals that this prejudice rests on a theological basis.

The sixth element is that Catholics are guilty of both sexual profligacy and prudery:

84. Mark Massa makes the useful point that secular critics of the Catholic Church object to the fact that the Church is “large, well organized, and take[s] ethical stands on public and political issues that actually influence[] people’s voting behavior.” MASSA, *supra* note 34, at 197.

85. Lockwood, *supra* note 73, at 23.

86. See, e.g., *Cardinal Mahony Launches Immigration Justice Campaign in Los Angeles*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Jan. 16, 2006, <http://www.usccb.org/mrs/cardinalmahony.shtml> (last visited on July 7, 2008) (reporting that the cardinal archbishop opposed the Border Protection Antiterrorism and Illegal Control Act of 2005 which passed the House of Representatives on December 16, 2005).

87. Elsewhere I have stated that “[i]t is my ultimate judgment that the American Protestant Empire has largely been an unmitigated disaster for people who are not both white and Protestant, particularly, but not exclusively, Native Americans and African-Americans.” Newsom, *Protestant Empire*, *supra* note 1, at 188 n.3. I intend to pursue this matter in a future article.

88. Until recently, the Mormons adhered to a theologically based racism with regard to African-Americans. See JOHN J. STEWART, *MORMONISM AND THE NEGRO: AN EXPLANATION AND DEFENSE OF THE DOCTRINE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN REGARD TO NEGROES AND OTHERS OF NEGROID BLOOD* (3d ed. 1963). Mormons have since abandoned these views. See NEWELL G. BRINGHURST, *SAINTS, SLAVES, AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM* (1981).

89. Lockwood, *supra* note 73, at 24.

[t]he most curious anti-Catholic stereotype arises in regard to sexual practices. The relationship of Catholicism and sexuality has been a bedrock of anti-Catholic assumptions since Henry VIII. On the one hand, because of the practice of priestly celibacy, Catholicism is viewed as an unhealthy, sexually repressed faith with unmanly leadership and prudish laity. At the same time, Catholics are viewed from the Margaret Sanger perspective as unthinking breeders, while its clergy are perceived as lascivious predators of the young and innocent. . . . Today, this dual anti-Catholic assumption thrives.⁹⁰

The matter of sexual profligacy and prudery most likely has its origins in concerns about Catholic clergy and monastic religious. Henry VIII used sexual slurs and innuendoes to justify his dissolution of the monasteries, which meant, in practical terms, his seizure of Church lands.⁹¹ Here the links to Eucharistic theology appear faint indeed. Perhaps it suffices to point out that this myth may well have its origins in Henrician duplicity and mendacity, having taken on a life of its own because of the larger and broader theological assault on the Catholic system brought on by the Protestant Reformations.

Finally, the seventh element is that Catholics are deluded: “[i]n a similar self-contradictory expression of anti-Catholicism, Catholics have long been portrayed as ignorant dupes Yet, at the same time, most Catholics are portrayed as not believing what the church teaches [on contemporary social issues], if those teachings stand in contrast to the conventional cultural wisdom.”⁹² As is the case with the myths of Catholics as anti-democratic and power-hungry, this stereotype basically aims its fire at the Catholic hierarchy and Magisterium.

Collectively, the power of these stereotypes, rooted in a yeasty brew of theology and culture, is stunning. Protestants of every sort and kind can find something in them with which to attack Catholics, largely because at least five of the seven elements—if not all of them—have clear and unmistakable theological underpinnings.⁹³ As Michael Schwartz puts it: “[t]here is a liberal

90. *Id.* at 25-26.

91. See Newsom, *Protestant Empire*, *supra* note 1, at 210-11.

92. Lockwood, *supra* note 73, at 26.

93. Some commentators miss the powerful link between Eucharistic theology and the elements of contemporary anti-Catholicism because they suppose that the secular critics of Catholicism are not, in essence, arguing from a religious position or point of view. See, e.g., MASSA, *supra* note 34, at 194-95 (claiming that secular anti-Catholicism manifests a “post-Christian distrust of Catholicism”); Lou Baldwin, *Pious Prejudice: Catholicism and the American Press over Three Centuries*, in ANTI-CATHOLICISM IN AMERICAN CULTURE, *supra* note 73, at 55, 87 (arguing that “[t]he Catholic-baiters of today are rarely militant Protestants; they are almost always militant secularists”); Rick Hinshaw, *Anti-Catholicism Today*, in ANTI-CATHOLICISM IN AMERICAN CULTURE, *id.* at 89, 89-91 (insisting that anti-Catholic bias emanates these days not from “rather predictable sources of bigotry: hate groups like the Ku Klux Klan, anti-immigrant nativists, and hard-line anti-Catholic fundamentalists,” but from “cultural elite steeped in selfishness, materialism, and sexual hedonism,” a claim that, in addition to grossly mischaracterizing—if not slandering—modern American secularism, fails to take into account its religious origins). These commentators miss or ignore the seminal reality that liberal evangelical Protestantism has both religious and secular dimensions, all driven by the

anti-Catholicism and a conservative anti-Catholicism; an anti-Catholicism of the ignorant and of the enlightened; one of the religious and another of the agnostic.”⁹⁴ In the end it comes to this: *anti-Catholicism provides the glue that holds Protestants together*. Given the present reality of anti-Catholicism in contemporary America, one cannot easily suppose that Protestants have forgotten that they are Protestants and that Catholics are not. Even those Protestants supporting a “culture-war” alliance of conservatives across confessional lines have not forgotten.⁹⁵

2. Private Judgment and the “Spirit of Schism”: The Oxymoron of Protestant Orthodoxy

The fundamental affirmative principle of Protestantism is private judgment.⁹⁶ John W. Nevin, an important Nineteenth Century American thinker of decidedly Calvinist views, addressed the matter, setting the right of private judgment against the authority of tradition.⁹⁷ In the nature of things, however, the right of private judgment cannot admit to any meaningful or principled limit or restraint, although Nevin tried to impose a limitation, claiming that there was a Protestant orthodoxy and that it reined in anarchic private judgment.⁹⁸

The difficulty lies, however, in the claim of Protestant Orthodoxy—if there be any such thing—itsself. If the Protestant Reformers sought to overthrow *Catholic* Orthodoxy in the name of private judgment, then no principled basis exists to decry a rejection of *Protestant* “orthodoxy.” Simply put, the Protestant principle of private judgment let the genie out of the bottle. To set a claimed Protestant orthodoxy over private judgment is to insist that there is an established or settled body of doctrines which has a meaning and a validity which Protestants are not free, in the name of private judgment, to reject or deny.⁹⁹ The problem, however, is that Protestantism never had the power or the force to constrain the exercise of private judgment, particularly in the case of English Protestantism and, indeed, never could, given the fact that English Protestants never agreed as to the substantive content of established

fundamental Protestant principle of private judgment. *See infra* notes 96-112 and accompanying text.

94. SCHWARTZ, *supra* note 76, at 147.

95. *See infra* notes 246-260 and accompanying text.

96. *See, e.g.*, 2 KENNETH SCOTT LATOURETTE, *A HISTORY OF CHRISTIANITY* 837 (2d ed. 1975) (stating that “Protestantism entailed the right and the duty of the individual to judge for himself on religious issues”).

97. *See* NEVIN, *supra* note 55, at 130.

98. *Id.* at 133-34.

99. *Id.* at 130 (questioning “why . . . the particular judgment of Puritanism, as such, [should] be allowed to carry with it any such weight as is needed to bear down the judgment of the universal church . . . from the beginning”). However, Nevin never demonstrates why the judgment of Puritans should not have that weight, other than to suggest that what he claims to be “orthodoxy” holds to the tradition, stripped, presumably, of supposed Roman error. *Id.* His argument is essentially circular.

Protestant doctrine. From the very beginning of the English Reformation in the 1530s, it became apparent that English Protestantism had spawned and generated conflict and partisanship.¹⁰⁰ Henrician Anglo-Catholics—and their Anglican spiritual progeny—and Henrician Anglo-Protestants—and their non-Anglican spiritual descendants—disagreed on important matters of faith and practice, and have continued to do so. Ultimately the claims of each side—Anglicans and evangelical Protestants¹⁰¹—could only rest in private judgment. As I pointed out elsewhere, during the reign of Elizabeth I, “English people were learning the various ways of being Protestant.”¹⁰² This means, of course, that the principle of private judgment thoroughly dominated and pervaded the English Protestant *nomos*. The fact that England had an established church does not change the conclusion because there is, on the critical question of the Eucharist, no definitive, normative Anglican position.¹⁰³ Private judgment controls the question, a situation that has certainly generated a great deal of scorn and derision from Catholics.¹⁰⁴ Elizabeth I may have wanted the English to worship in the Church of England, her national church, but, for all intents and purposes, they could believe whatever they wanted to—although not transubstantiation, and even that extremely limited exception to the private judgment rule went by the boards in the Nineteenth Century with the rise of the Oxford Movement.¹⁰⁵

With the abandonment of orthodoxy, even within Anglicanism, not to mention the larger sphere of more radical English Protestantism, the way became clear for all sorts of expressions of Protestantism, including, secularism. It comes to this: there is no principled basis for objecting to the claim, on the basis of private judgment, that the Book of Mormon is the revealed Word of God;¹⁰⁶ or to the claim that the Trinity represents not an eternal reality, but merely an historical development of God, as God now is the Holy Spirit, the Father and the Son being merely stages in the historical

100. See PAUL O'GRADY, *HENRY VIII AND THE CONFORMING CATHOLICS* 7 (1990) (stating that from 1534 “until the decisive lurch leftward in 1549, Henrician religion embraced two distinct factions, the avowed goal of which was the elimination of the other”).

101. See *infra* notes 110-13 and accompanying text for a discussion of the term “evangelical.”

102. See Newsom, *Protestant Empire*, *supra* note 1, at 226.

103. See *supra* notes 67-69 and accompanying text.

104. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 858-63.

105. See *supra* note 68 (arguing that the Thirty-Nine Articles of the Church of England could, in fact, accommodate transubstantiation, or a doctrine very much like it, differing perhaps in name only); ROBERT ISAAC WILBERFORCE, *THE DOCTRINE OF THE HOLY EUCHARIST* (Philadelphia, Herman Hooker 1853) (arguing for Real Presence and rejecting the teachings of Zwingli and Calvin, and also arguing that the Holy Eucharist is a sacrifice); HÄRDELIN, *supra* note 72 (describing the Eucharistic theologies as the guiding lights of the Oxford or Tractarian Movement).

106. See, e.g., THOMAS F. O'DEA, *THE MORMONS* 19 (1957) (referring to “the rediscovery of a book . . . a miraculously translated one . . . the *Book of Mormon*”); GEORGE BARTHOLOMEW ARBAUGH, *REVELATION IN MORMONISM: ITS CHARACTER AND CHANGING FORMS*, at vi (1932) (stating that “Mormon revelation is a process . . . beginning . . . in the circumstantial origin of the Book of Mormon”).

development of God—if not historical relics;¹⁰⁷ or to the claim, on the basis of private judgment, that God is a mere beneficent watchmaker, who having created the Universe, has retreated to the far side of the clouds to tend to matters of His concern, the essential position of Deism;¹⁰⁸ or to the claim, on the basis of private judgment, that God may have gone a bit further and taken Himself out of the picture to such an extent or degree that one might wonder whether He exists any longer, the essential position of a religion-based liberal secularism.¹⁰⁹ Finally, it does no good to insist, in the name of a supposed body of established Protestant doctrines, that the Bible does not support any of these claims, because in the exercise of private judgment, people are free to read and understand or interpret the Bible any way that they want to.

Nevin could not defend the claims of a supposed Protestant orthodoxy—no one could—but he did provide a critical analytical framework for thinking about the consequences of free and unfettered private judgment and thus about the internal dynamics of pan-Protestantism as it developed in the Anglo-American Protestant *nomos*. He argued that evangelical Protestants, that is to say those who took up a Zwinglian view of the Eucharist,¹¹⁰ fell into two large groups: the rationalists and the sects.¹¹¹ The spiritual heirs of the sects are those that are commonly called evangelical Protestants. Because, however, evangelical Protestantism has two wings, as Nevin insisted, it would be far more appropriate to refer to the spiritual heirs of the sects as pietistic evangelical Protestants. The spiritual heirs of the rationalists are liberal Protestants and liberal secularists.¹¹² Given the acute problem of

107. Pentecostalism tends to define three ages, one associated with each person of the Trinity: thus the Old Testament era was the age of the Father, the Gospel era was the age of the son, and the Church Age was the age of the Spirit. See L. THOMAS HOLDCROFT, *THE HOLY SPIRIT: A PENTECOSTAL INTERPRETATION* 5-6 (3d ed. 1979). While this view standing by itself does not mean necessarily that the Spirit replaced the Son who had replaced the Father, a minority of Pentecostals apparently reject the traditional doctrine of the Trinity. See Cecil M. Robeck, Jr., *Foreword* to EDMUND J. RYBARCZYK, *BEYOND SALVATION: EASTERN ORTHODOXY AND CLASSICAL PENTECOSTALISM ON BECOMING LIKE CHRIST*, at xiii, xvii (2004). Therefore, for some Pentecostals, God has simply passed through three stages, there never having been three co-eternal Persons in the Triune Godhead.

108. See PETER BYRNE, *NATURAL RELIGION AND THE NATURE OF RELIGION: THE LEGACY OF DEISM* 3 (1989) (stating that the concept of natural religion supposes that human reason can “produce . . . a sufficient account of God-as-creator and God-as-saviour”).

109. Unitarians disagree, apparently, about the existence or nature of God. See DAVID ROBINSON, *THE UNITARIANS AND THE UNIVERSALISTS* 163 (1985). See also *supra* note 104 and accompanying text.

110. See *supra* notes 60-66 and accompanying text.

111. NEVIN, *supra* note 55, at 130-49.

112. The links between liberal evangelical Protestantism and liberal secularism arise from the fundamental nature of Protestantism itself. David Martin suggests that “[i]n the long run the intellectual structure of Calvinist election evolves into a naturalist and rationalistic moralism.” DAVID MARTIN, *ON SECULARIZATION: TOWARDS A REVISED GENERAL THEORY* 4 (2005). He continues, stating:

that both Calvinism and Lutheranism, imply the extension of a lay ethos to the point where the . . . [religious] orders . . . are abolished. The Church becomes assimilated to the

terminology,¹¹³ it might make more sense to refer to these heirs as liberal evangelical Protestants. Collectively, of course, pietistic evangelical Protestants and liberal evangelical Protestants are collectively simply evangelical Protestants.

For Nevin, the fundamental error of evangelical Protestantism in either of its manifestations was unconfined private judgment, that evangelical Protestantism “ran out into sheer subjectivity; first in the form of Pietism, and afterward in the overflowing desolation of rationalism The subjective is everything; the objective next to nothing.”¹¹⁴ The two forms of evangelical Protestantism are “antagonistic to the idea of the church. Both are disposed

State, the sacred ministry becomes yet another profession and the monastic brotherhood is converted into the reproductive family. . . . [T]he special social structures designed to carry and mediate grace revert to the ‘natural’ formations of ethnicity and the family. However, that was only one of the reversions to nature within Protestantism. Nature also asserted itself in terms of the autonomy of individual reason and of empirical reality

Id. at 5. And, with reference to “the Christianizations attempted through the evangelical and Pietist ‘Awakenings,’” the resultant “evangelical or Pentecostal subculture runs alongside modernization in a mutually supportive manner Almost from the start this evangelical Christianization runs alongside, and even overlaps, a Romantic return to nature.” *Id.*

See also Clayton Crockett, *Introduction* to *SECULAR THEOLOGY: AMERICAN RADICAL THEOLOGICAL THOUGHT* 6 (Clayton Crockett ed., 2001) (referring to “the inextricable relationship between religion and the secular in the human and divine work of the worlding of the world . . . [a] dialectical interpenetration . . . originat[ing] in a biblical thought which is manifested in . . . [*inter alia*] Tertullian, Augustine, Luther, Calvin and Tillich,” thus suggesting that, at least in the days of the early Church, some Catholics—Tertullian and Augustine—reflected this interpenetration of the secular and the divine); EDWARD BAILEY, *THE SECULAR FAITH CONTROVERSY: RELIGION IN THREE DIMENSIONS* 3 (2001) (stating that “[w]hat were seen as belonging to two separate worlds (‘secular’ and ‘faith’) can now be seen as belonging together, like two sides of the same coin”).

Apologists for pietistic evangelical Protestantism and for Orthodox Calvinism tend to sneer at liberal Protestant religion. See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 *IOWA L. REV.* 1067, 1096 (1991); ROBERT J. BLAICKIE, ‘SECULAR CHRISTIANITY’ AND GOD WHO ACTS 215-16 (1970); NEVIN, *supra* note 55, at 130-31. But, as Nevin points out, the rationalist or liberal tradition in Protestant Christianity dates back to the Reformation Age itself with the Socinians of the Sixteenth Century, *id.*, indeed Nevin concedes that rationalism “grew out of a tendency involved in the very nature of Protestantism from the beginning.” *Id.* at 133.

Criticism of liberal religion, therefore, may reflect mere partisanship. Protestants, therefore, have no coherent basis for denying that post-liberal secularism is just a form of liberal evangelical Protestantism. While Catholicism may also contain a secularizing strain, Catholic ecclesiology—a “high” church theology—keeps liberal secularism under some restraint, and thus “liberal Catholicism”—if such there be—finds no separate institutional expression, at least not in the Roman Catholic Church. Liberal pietistic evangelical Protestantism has at least one separate institutional expression, the Unitarian Universalist Church. See GEORGE N. MARSHALL, *CHALLENGE OF A LIBERAL FAITH* (3rd ed. 1991).

113. I have previously used the term “evangelical” in ways that perhaps lacked a certain precision. See, e.g., Newsom, *Protestant Empire*, *supra* note 1, at 196 (referring to an “[e]vangelical Protestant theology”). Precision was not necessary then. Perhaps it is necessary now.

114. NEVIN, *supra* note 55, at 134.

to trample underfoot the authority of *history*.”¹¹⁵ Nevin declared evangelical Protestantism to be heresy and given to schism.¹¹⁶ According to him, evangelical Protestantism generates and sustains the “spirit of *schism*.”¹¹⁷

A dedication to the objective reality that is the church, as liturgical Protestants—most often non-evangelical Protestants as well—understand it, would seriously retard and hinder any impulse to split away. This is not to suppose that liturgical Protestants are immune to schism, but it is to suppose that they are far less likely to break away and establish new sects than evangelical Protestants would be.¹¹⁸ Zwinglianism does not require a commitment to “church” as an objective reality because it offers no such reality in connection with the Eucharist. It recognizes only a subjective mental exercise: remembering what Christ did for mankind on the Cross.¹¹⁹

Subjectivity in the Eucharist matches subjectivity in the church. It is no surprise, therefore, that American Protestantism, which is mainly evangelical in its form, is awash in sects and denominations.¹²⁰ But, that said, a fundamental consensus on Eucharistic theology remains intact in evangelical Protestantism, and this holds true particularly for small Protestant sects or groups. Their very existence calls to mind the reality of that consensus, for the “spirit of schism”, finds its clearest expression in the ranks of evangelical Protestants. Nevin thus identified three American Protestant parties: pietistic evangelical Protestants, liberal evangelical Protestants, and those whom Nevin would claim are “orthodox” Protestants. Nevin, in defense of essentially a form of “high church” Calvinism, utterly disparaged the other two Zwinglian or evangelical parties.

Robert Baird, a contemporary of Nevin’s, took a different position on the question of Protestant “orthodoxy” in a nomos in which private judgment reigns supreme.¹²¹ For Baird, American established Protestant doctrine found expression in pietistic evangelical Protestantism, not in liturgical Protestantism of the Calvinistic sort, and certainly not in liberal or rationalistic

115. *Id.* at 141.

116. *Id.* at 145.

117. *Id.* at 146.

118. Indeed, the prototypical liturgical Protestant denomination, the Episcopal Church, suffered a schism in the 1970s, see HILLIS, *supra* note 38, at 101, and may well suffer another schism now as a result of the current difficulties in the Anglican Communion worldwide and in the Episcopal Church in the United States, the proximate cause being the ordination of a non-celibate gay bishop in the Episcopal Church. See Schism: Episcopal Diocese OKs Split Over Bible Gays, <http://digital-dharma.net/2008/10/05/schism-episcopal-diocese-oks-split-over-bible-gays/> (last visited Nov. 18, 2008). The final nature and shape of the schism yet remains to be seen, however.

119. See *supra* notes 65-70 and accompanying text.

120. See *supra* note 38.

121. ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA: OR AN ACCOUNT OF THE ORIGIN, PROGRESS, RELATIONS TO THE STATE, AND PRESENT CONDITION OF THE EVANGELICAL CHURCHES IN THE UNITED STATES OF AMERICA WITH NOTICES OF THE UNEVANGELICAL DENOMINATIONS (photo. reprint 1969) (1844).

Protestantism.¹²² Baird insisted that the touchstone of Protestantism consisted of a belief in “the Bible, the whole Bible, and nothing but the Bible.”¹²³ As I have noted above, any attempt to argue from Protestant “orthodoxy” cannot easily bear its own weight. However, there is, clearly, a consensus among evangelical Protestants on the matter of the Eucharist, and it is that doctrine of the Eucharist that largely gives rise to the Biblicism that Baird contends marks the essence of evangelical Christianity. Zwinglian Eucharistic theology reduces the Eucharist to a mere psychic boost for subjective individual mental recollection of what Jesus did for mankind on Calvary.¹²⁴ Any Divine or Holy “substance” in evangelical Protestantism has to come from something other than the sacraments. For evangelical Protestants, that Holy “substance” exists not in the Eucharist, but in the Bible. The Bible becomes, for evangelical Protestants, a substitute for the church-sacrament system, a system in which sacramental realism, of which transubstantiation is a prime example, plays a large and important role.¹²⁵ Indeed, it is fair to say that evangelical Protestantism turns the Bible into a crypto-sacrament. And it is this Biblicism of pietistic evangelical Protestantism, a Biblicism that follows easily, even if not inexorably, from Zwinglianism, that Baird offers up as a central element or component of the large American pietistic evangelical Protestant consensus.¹²⁶

Baird would have insisted that this consensus constituted “orthodoxy” in the traditional sense of the term. It is possible, of course, for Protestants to reach a large consensus, as evangelicals of both types have on the question of Eucharistic theology and, at least as far as pietistic evangelical Protestants are concerned, Biblicism—the Bible as pseudo-sacrament. But a consensus is not orthodoxy. Liturgical Protestantism, whether of a Calvinist, Anglican, Lutheran, or other variety, reminds us that the question of *Protestant* “orthodoxy” continues to be contested. Furthermore, the “spirit of schism” negates any serious claims of orthodoxy. The ultimate reality of religious orthodoxy is the integrity of the institutional expressions of that belief system. Certainly that has been the experience, for example, both with Roman Catholicism and Eastern Orthodoxy.

122. *Id.* at 663 (describing normative American Protestantism as “not the dead formalism of ecclesiastical institutions,” nor as “a body of superstitions,” nor as “Rationalism,” but as “evangelical Christianity,—the Christianity of the New Testament”).

123. *Id.* at 613.

124. *See supra* notes 65-66 and accompanying text.

125. I do not mean to suggest that the “higher” Protestant Eucharistic doctrines are necessarily expressions of sacramental realism. The Lutheran doctrine clearly counts as a realist understanding of the sacrament; so too does consubstantiation. *See supra* note 68. The same cannot be said of the others, those coming from the Reformed and the non-Tractarian Anglican traditions. *See also* Newsom, *Protestant Empire*, *supra* note 1, at 196-97 n.65.

126. Baird identified the Reformed, or Calvinistic, tradition as the source of the central components of this consensus. *See* BAIRD, *supra* note 121, at 658. He did grant, however, that Methodists “reject the Calvinistic or Reformed doctrine of predestination,” *id.*, and that “[a] considerable portion” of Episcopalian clergy and laity “ascribe to sacraments and other external institutions, a certain spiritual efficacy not recognised by other [i.e. evangelical] Protestants.” *Id.* at 659.

Nonetheless, Baird offered up the best possible argument for evangelical Protestantism as the normative expression of a supposed Protestant orthodoxy. He turned Nevin's contempt for the "spirit of schism" on its head, arguing for a kind of evangelical Protestant institutional coherence necessary to support a claim of orthodoxy. He first argued that the "multiplicity" of evangelical Protestant sects in early to mid-Nineteenth Century America was due to "the various quarters from which the country has been colonised."¹²⁷ That might have been a fair judgment at the time. Later events in the history of American Protestantism, however, tend to support Nevin's view that private judgment, unconstrained by any supposed established doctrines, foments schism.¹²⁸ Baird found himself on surer ground when he made the following argument:

Great, however, as may be the disadvantages resulting from this multiplicity of different communions, were they all reduced to one or two, we apprehend still worse evils would follow. Diversity on non-essential points among the churches . . . often gives opportunity . . . to attend the services and ministrations that each finds most edifying, instead of being reduced to the sad alternative of either joining in forms of worship which they conscientiously disapprove, and of listening to a minister whom they find unedifying, or of abstaining from public worship altogether.¹²⁹

But on the important point of institutional integrity, Baird ultimately yielded. Episcopalians, defined by Baird as "evangelicals," destroy any argument of institutional coherence, and, therefore, orthodoxy, with respect to pietistic evangelical Protestants.¹³⁰

Baird insisted that pietistic evangelical Protestants "as they exist in the United States, ought to be viewed as branches of one great body, even the entire visible church of Christ in [the United States]."¹³¹ He claimed that these Protestants "manifest[] a remarkable degree of mutual respect and fraternal affection."¹³² Baird also stated that "among all but the Episcopalians, whose peculiar views of [Episcopal] ordination stand in the way, there is a frequent exchanging of pulpits."¹³³ Baird finally asserted that "the members of one evangelical communion often join with those of another in receiving the Lord's Supper in the same church."¹³⁴ This point requires amplification. If there can be no exchange of pulpits by and between Episcopalians and other Protestants, no basis exists for a common or ecumenical Lord's supper, at least as far as Episcopalians are concerned. Indeed, a great scandal arose in

127. *Id.* at 604.

128. *See supra* note 38 for a discussion of the number of Protestant denominations in the United States of America.

129. BAIRD, *supra* note 121, at 607.

130. *Id.* at 500-07.

131. *Id.* at 606.

132. *Id.* at 608.

133. *Id.*

134. *Id.* at 609.

the Episcopal Church in the years following the Civil War when some Episcopalian clergy of a decidedly evangelical bent celebrated the Lord's Supper with other evangelical Protestants in 1869.¹³⁵ Schism was the result, with the emergence of the Reformed Episcopal Church in 1873.¹³⁶

Evangelical Protestant denominations cannot be viewed "as branches of one great body" if all of them cannot or will not share a common Eucharist. The hard fact remains that the spirit of schism can and in some instances does, hinder and block a common evangelical Protestant Eucharist. But while there may be no orthodoxy, because there is no institutional expression of that orthodoxy, there still is consensus. Some of the consequences of this point will be considered in Part III, *infra*, in connection with the question of the identification of religious minorities.

The "spirit of schism" therefore constitutes a centrifugal force, tending to drive Protestants apart. In a tension-filled dynamic, which easily inhabits the Protestant mind,¹³⁷ a counterforce has to exist, a force which tends to pull Protestants together. Anti-Catholicism, of course, is such a force, alive and well, and by no means a spent force. But there are other centripetal forces that exist in the interstices of the pan-Protestant *nomos*.

Fanning the flames of anti-Catholicism provides a perfect illustration of the interior dynamics at work in the Protestant Empire. Philip Jenkins writes that "[w]e must distinguish between the general historical fact of anti-Catholicism and its current manifestations."¹³⁸ He concludes that "[m]odern anti-Catholicism differs in significant ways from older models. . . . [T]he older tradition was primarily nativist, xenophobic, and politically right-wing, [whereas] the modern distaste for Catholicism is primarily found on the left/liberal side of the spectrum, especially among feminists and gay activists."¹³⁹ Jenkins put the proposition more broadly: "since the 1970s anti-Catholicism had become firmly anchored in liberal politics, to the extent that it constituted a significant ideological component of the new liberalism."¹⁴⁰ At the same time, Jenkins insists that in "liberal" anti-Catholicism "we can still perceive definite continuities with older ideas."¹⁴¹ This clearly suggests that pietistic evangelical Protestants have handed off the work of anti-Catholicism, or at least a significant portion of it, to liberal evangelical Protestants. And in the hands of liberal evangelical Protestants, much of the substantive content of anti-Catholicism, as it developed over the centuries, manifests itself in contemporary "liberal" anti-Catholicism. It is this "handing off" that, while perhaps surprising to some, reflects the integrative power of anti-Catholicism. It is only by "handing off" that anti-Catholicism can have its maximum religious, political, and social impact.

135. See E. CLOWES CHORLEY, MEN AND MOVEMENTS IN THE AMERICAN EPISCOPAL CHURCH 410-13 (1946).

136. *Id.* at 416-22.

137. See *infra* notes 151-75 and accompanying text.

138. JENKINS, *supra* note 74, at 18.

139. *Id.* at 20.

140. *Id.* at 66.

141. *Id.* at 21.

The pietists, however, still practice anti-Catholicism. Mark Massa recounts the sharp, vulgar, and hard-edged “comic book” theological attack on Catholicism waged by someone named “Jack Chick” who, Massa says, may or may not be a real person,¹⁴² and who “has successfully tapped into the rather large reservoir of anger and cultural suspicion underlying the rise of Protestant Fundamentalism in the United States . . . [a] resolutely militant form of Protestant evangelicalism.”¹⁴³ Massa states that Jack Chick’s output “represents a more extreme (or, at least, more offensive) version of a diffuse distrust of Catholics shared by a number of contemporary evangelical Christians in North America across the denominational spectrum.”¹⁴⁴ And it bears noting that “it is the Catholic doctrine of the eucharist[sic] that draws Chick’s special enmity, embodied in the classic form in the offensively named ‘Death Cookie’ Chicklet. The ‘cookie’ referred to, of course, is the small round wafer used for communion in Catholic churches.”¹⁴⁵ If both the liberal establishment and the rabble rousers engage in pushing and peddling anti-Catholicism, then it is reasonable to suppose that the overall effect would be greater than if only one “side” were taking on Catholicism. Thus “handing off,” making a common cause, represents one way in which Protestants counteract the disintegrative consequences of the Reformation principle of private judgment. It is not necessary that every Protestant group participate in attacking Catholicism, but it is necessary that enough of them, from various vantage points in the Protestant nomos, do.

There is another centrifugal power, however, that may operate affirmatively to exclude some Protestants from the pan-Protestant consensus even while it expressly includes other Protestants. I take up the matter of repudiation and retaliation in Part IIIC, *infra*. For the nonce, however, I turn to a further elaboration of the central ideas examined in this Part: anti-Catholicism and the Protestant Reformation principle of private judgment.

B. Further Implications of the Dynamic Relation between Anti-Catholicism and Private Judgment

Anti-Catholicism and the principle of private judgment are huge generative concepts or constructs. They sprawl in an unruly fashion across the intellectual and analytical landscape of the Protestant Empire. That said, however, this subpart will explore the phenomenon of theologically-based world views, taking the world views in and of themselves and then, later, the world views as they find expression in our so-called “culture wars”.

142. MASSA, *supra* note 34, at 100-20.

143. *Id.* at 119.

144. *Id.* at 109.

145. *Id.* at 106.

1. Weltanschauungen

There is a regrettable tendency to overlook the impact that theology has on the way people view the world—and act in it. If it is impossible to think seriously about Christianity without thinking about the Eucharist, it is also impossible to think seriously about the relation between Christianity and the societies and cultures in which Christianity exists as a significant, if not determinative, social, cultural and religious force or presence without thinking about the worldviews that Eucharistic theology generate.¹⁴⁶ It is clear that Eucharistic theology does in fact impact broader and wider worldviews,¹⁴⁷ because Christianity itself invites a comprehensive understanding of human life and existence, as seen through the lens or prism of the Eucharist: it has an ethical dimension which draws much of its meaning from its cultic, liturgical, or sacramental face.¹⁴⁸ But worldviews, in turn, impact and influence public policy choices.¹⁴⁹ Thus, the conclusion is inescapable that understandings about the Eucharist profoundly shape the public policy attitudes and positions of Christians.¹⁵⁰

a. Two Opposing World Views

Catholic and evangelical Protestant Eucharistic theologies stand diametrically opposed to each other,¹⁵¹ and, not surprisingly, two dramatically different world views emerge from these contending Eucharistic theologies. The first manifestation of this difference resides in the language that Catholics and evangelical Protestants use. “The conceptual language of Roman Catholic theology, worship, and ethics is . . . analogical language. This language uses analogy, that is, it utilizes things we know to understand things we don’t know”¹⁵² While not ignoring “the distinctions between God and the world, nonetheless the emphasis remains on similarities in difference, on connections

146. *But see* Berg, *supra* note 8, at 956 n.190 (arguing that the difference between Catholic and Protestant Eucharistic theologies counts for little “in disputes over religion”). Professor Berg frames the matter in such a way, perhaps, to overlook the question as to how religious views influence or shape not just “Church-State” issues, but also influence broad social reform public policy. National Prohibition provides a useful illustration of the point. The broad concern, the public policy question, at stake in National Prohibition was the consumption of beverage alcohol. The “Church-State” question involved whether, notwithstanding the prohibitory régime, there should be an exemption for the religious use of wine. The so-called “culture wars” focus largely on questions of the first sort, not questions of the second. *See infra* notes 213-65 for a discussion of our “culture wars”. They involve broad social reform, public policy issues, arguably rather different than questions of “religion and public life.”

147. *See* MASSA, *supra* note 34, at 51-58.

148. *See* *Matthew* 5:3-12.

149. *See infra* notes 176-205 and accompanying text.

150. This is one of the points on which Professor Berg’s argument is so terribly weak. He seems to ignore worldview altogether, because he accords little to no weight to Eucharistic theology which is an indispensable element of Christian worldviews. Berg, *supra* note 8.

151. *See supra* notes 61-66 and accompanying text.

152. MASSA, *supra* note 34, at 51.

linking humans to each other and to the Holy.”¹⁵³ On the other hand, evangelical Protestants use dialectical language, language that “insist[s] on the radical difference separating the Holy from human culture. Dialectical language focuses on the gulf between salvation and the human condition”¹⁵⁴

These two oppositional languages, in turn, shape views and attitudes about the human condition. Mark Massa notes that:

the Catholic imagination tends to see human societies, including the institutional church, as sacramentally embodying God . . . human institutions are historical embodiments of the communal virtues of justice and love, embodiments that reveal—however imperfectly—the goodness and presence of God. . . . [H]uman communities are both natural and good.¹⁵⁵

But Massa continues: “groups who utilize the dialectical imagination—by no means all Protestants today, but certainly groups like those Calvinists who settled New England—see human institutions as necessary to ensure public peace, but as being both unnatural and oppressive to the individual, who must struggle for autonomy.”¹⁵⁶ Thus the United States, clearly a society¹⁵⁷ “organized around [the] set of impulses [generated by the dialectical imagination] see the individual as struggling for personal freedom against the sinful oppression of social networks; these societies stress values and behaviors that contribute to personal freedom and independence from group control.”¹⁵⁸

Notwithstanding the tendency of some conservative American Catholics and conservative evangelical Protestants to make common cause in the so-called “culture wars,”¹⁵⁹ there is good reason to wonder whether this alliance—if such it be in fact—is anything other than a temporary phenomenon, a convergence of interests,¹⁶⁰ likely to disintegrate and fall apart when the conflicting worldviews of these conservatives begin to assert themselves because of the ontological reality of stubborn facts.

Indeed, the more important existential question for American Catholics is whether, how, and under what circumstances Catholicism will survive in the American Protestant Empire. The respective worldviews of Catholics and Protestants do not easily coexist. Massa argues that “Catholicism seems to actually see a different world than the one many Americans accept as real. It is

153. *Id.* at 52.

154. *Id.* at 53.

155. *Id.* at 55.

156. *Id.* at 56.

157. *Id.* at 56-57 (stating that “[b]oth the Declaration of Independence and the Bill of Rights were built on firm Calvinist foundations in warning that the individual was always to be protected from the inevitable oppressions of the group”).

158. MASSA, *supra* note 34, at 56.

159. *See infra* notes 213-65 and accompanying text.

160. For an explication of interest-convergence theory, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

this shared sense of non-fit, of Catholic otherness, that is so arresting for both understanding Catholics' perceptions of themselves and others' perceptions of them."¹⁶¹

The anti-Catholicism of the Protestant Empire, both as a theological expression and as a broader cultural and sociological worldview, may well serve a different, complementary function: it may shape how Catholics understand themselves. Mark Massa concludes that a "sense of Catholic differentness might very well turn out to be what saves the Catholic tradition from being swallowed up by contemporary North American culture."¹⁶² Given the persistence of Protestant Empire anti-Catholicism, Catholics intent on preserving the Catholic faith in America in the face of that Empire may have little choice but to emphasize and celebrate their distinctive theologically grounded worldview. Massa writes:

It is disingenuous for Catholics to feign surprise, anger, or grief to learn that they are not in the mainstream of their culture, or that they are perceived as such by a number of their fellow citizens who shape cultural tastes. Such has always been the (blessed) lot of the saints in every age. . . . Catholicism doesn't completely fit into the lively experiment that is the United States, and probably never will.

That's the good news.¹⁶³

But cultural pressures and forces, the desire to "fit in" being chief among them, cause some Catholics to prefer a more assimilationist approach, as "culture-war" alliances between conservatives across confessional boundaries demonstrate.

A half-century ago, Will Herberg claimed that America had one religion—"the American Way of Life"¹⁶⁴—with three constituent religious communities: Protestants, Catholics, and Jews;¹⁶⁵ a white America of the 1950s in which Mexican Americans and Puerto Rican Americans will "tend to break up into two distinct sections, one 'white,' the other 'colored'" (defined by a complex of 'racial' and socio-cultural factors)," and in which African-Americans "constitute[d] a much more difficult problem, about which very little may be said with any assurance."¹⁶⁶ Whether or not Herberg was ever right on the relation between "the American Way of Life" and the three major American religious communities, and given the persistence and the pervasiveness of anti-Catholicism, serious doubt exists that Herberg ever was, he still correctly identified the Protestant origins of "the American Way of Life."¹⁶⁷

161. MASSA, *supra* note 34, at 50.

162. *Id.* at 58.

163. *Id.* at 198.

164. WILL HERBERG, PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 75 (rev. ed. 1960).

165. *Id.* at 211.

166. *Id.* at 42 n.11.

167. *Id.* at 81.

An assimilationist approach of any sort, therefore, can jeopardize the distinctive non-Protestant characteristics of Catholicism. Philip Jenkins notes, with apparent sympathy, polling data which purports to show that many American Roman Catholics have fallen away from a belief in transubstantiation.¹⁶⁸ If this is true, and if the trend continues and strengthens, then Catholics abandoning transubstantiation have become, in all but name, liturgical Protestants, at most, and perhaps even evangelical Protestants, embracing a Eucharistic theology—Zwinglianism—that is entirely antithetical to transubstantiation.¹⁶⁹ An empty, hollowed out “Catholic” Church with only a stubborn remnant of true believers would probably recede into a kind of sociological, religious, and cultural irrelevance, if not collapse outright.¹⁷⁰ An assimilationist approach, therefore, plays directly into the hands of those superintending a strategy that relies on suasion with coercion in the background, one of the five major procedural traits of the Anglo-American Protestant Empire.¹⁷¹ This strategy, in turn, depends on a strong and vital pan-Protestant nomos, a set of commonalities that form part of the very definition of Protestantism. Put simply, Catholic assimilationists merely strengthen Protestant resolve to advance the goal and objective of conversion.

This fact explains Mark Massa’s call for strengthening Catholic “differentness.” And Russell Shaw bluntly declares that “[t]he assimilation of American Catholics into a secular culture hostile to Catholic beliefs and values has done, and goes on doing, serious harm to the Church.”¹⁷² While Shaw may miss the crucial point that this “secular” culture has religious origins, liberal evangelical Protestantism having both religious and secular dimensions,¹⁷³ he stoutly calls for the rebuilding of “a viable Catholic subculture. To some extent, that will mean rebuilding Catholic institutions and programs that now exist To some extent it will involve creating new institutions and programs”¹⁷⁴ If anti-Catholicism furnishes the glue that holds Protestants together, some Catholics understand that anti-Catholicism

168. JENKINS, *supra* note 74, at 57. Jenkins notes that he is a former Roman Catholic who “left, without any particular rancor, and since the late 1980s, [has] been a member of the Episcopal Church. (Within that tradition, I define myself as a small c-catholic, a distinction that often puzzles large-C Roman Catholics.)” *Id.* at vii. It is by no means clear—at least to me—that “small c-catholic” Episcopalians believe in transubstantiation or anything remotely like it, however, those who call themselves Anglo-Catholics, in the tradition of the Oxford or Tractarian Movement, well might. See HÄRDELIN, *supra* note 72.

169. See *supra* notes 61-66 and accompanying text.

170. It is altogether possible that a “remnant” American Catholic Church could become “a haven for the nonconformist conscience” much as the Catholic Church did for three centuries, and thus sustain itself as a vital, albeit smaller, American religion. J. C. H. AVELING, *THE HANDLE AND THE AXE: THE CATHOLIC RECUSANTS IN ENGLAND FROM REFORMATION TO EMANCIPATION* 21 (1976).

171. See *supra* note 3 and accompanying text.

172. Russell Shaw, *The Church and the Media: Who’s to Blame?*, in *ANTI-CATHOLICISM IN AMERICAN CULTURE*, *supra* note 73, at 105, 128.

173. See *supra* note 112.

174. Shaw, *supra* note 172, at 130.

may well yield up the glue that holds American Roman Catholics together—so long as Catholics understand the reality of the Protestant Empire and take affirmative steps to hold the Empire at bay. If Massa and Shaw are right, then Catholics really have no choice, if they wish to preserve the Catholic faith in the United States, but to claim their “differentness.”¹⁷⁵

b. School Vouchers—An Illustration of “Differentness”

Consider, by way of illustration, two briefs *amicus curiae* filed in *Zelman v. Simmons-Harris*,¹⁷⁶ the Cleveland school vouchers case.¹⁷⁷ One brief was filed by the United States Conference of Catholic Bishops.¹⁷⁸ It concerned itself not with the free exercise rights of parents, but rather with the religious witness of the Catholic Church. With regard to parents, however, this Brief took the position that the opinions, attitudes, and judgments of poor parents in Cleveland relative to the question of the *education* of their children mattered in understanding what was at stake in *Zelman*. It stated that “the parents of scholarship students chose religious schools primarily for educational and developmental reasons,” citing evidence in the record in support,¹⁷⁹ and observed that “[i]n many cases, parents choose religious schools simply because of safety and health conditions,” again citing evidence in the record.¹⁸⁰ The Brief summarized the point as follows: “[p]arents choose a school based on their conclusion that the selected school offers the best available education for their children, and they can frequently do so only because of the help the Ohio scholarship program provides.”¹⁸¹

The Catholic Bishops’ Brief squarely presented and reasoned from a secular rationale for school vouchers, referring to “a wholly secular concern: relief for low income citizens whose children attended schools in the Cleveland school district,”¹⁸² and declared that “[t]he instant case . . . is not about a subject that legitimately concerns only government or religion, but falls within the class of

175. There are several matters internal to Catholicism which may contribute to the dilemma that the American Catholic Church faces in a hostile Protestant Empire. One is the failure of many Catholics to recognize the Protestant reality behind American secularism. Nevin saw it. See NEVIN, *supra* note 55; see *supra* note 112 and accompanying text. Catholics need to see it too. Others include issues of liturgy, formation, and parish life, a discussion of which clearly lies without the scope of this paper.

176. 536 U.S. 639 (2002).

177. In a separate article, I will address more fully the question of school voucher programs, particularly those in which religious schools are eligible to participate. I incline to the view that participation by religious schools in school voucher programs is problematic, to say the least, but that it *might* be possible to fashion prophylactic rules which inhibit the proselytizing of voucher students by the religious groups operating sectarian schools that participate in school voucher programs.

178. Brief for United States Conference of Catholic Bishops as Amicus Curiae Supporting Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480726 [hereinafter Catholic Bishops’ Brief].

179. *Id.* at 29.

180. *Id.*

181. *Id.* at 30.

182. *Id.* at 3.

social welfare issues, here, education, in which both institutions have a proper interest and historic role.”¹⁸³ And again, “[t]he Ohio program . . . was designed and structured to give means tested assistance to low income students living within a school district that had been placed under the control of the state’s superintendent of schools,” and the program “did, in fact, operate as the legislature had intended, to provide low income children with better educational options.”¹⁸⁴

Nonetheless, the Roman Catholic Church is a religious organization, and the Catholic Bishops’ Brief had something interesting to say about Catholic schools which sheds a good deal of light on the religious witness of the Catholic Church. The Brief rejected the claim that Catholic parochial schools indoctrinate their students.¹⁸⁵

That parents would choose Catholic schools should not be a surprise or a cause for concern. Catholic schools stand for quality education, presented by professionals, who believe that the needs of children are at the center of everything they do. The schools reflect the nature of the communities they serve. Indeed, the overall statistics reflecting the religious makeup of the student bodies at schools participating in the scholarship program reflect extraordinarily high numbers of students whose personal religious beliefs are other than those of the organization to which the school belongs. That the schools are an expression of the Catholic Church’s mission in the world and reflect a set of moral values of those who lead the institution and teach does not undermine the willingness of the schools to abide by their agreements when they participate in the Ohio scholarship program.¹⁸⁶

And the Church participated in the program for a principled—religious—reason: “Catholic schools participate because of an abiding commitment to help low income, and especially minority and special needs, children, and because of a belief in the tremendous importance of primary and secondary education.”¹⁸⁷

A group of organizations of a largely, if not exclusively, pietistic evangelical Protestant cast filed the second brief under consideration here.¹⁸⁸ The organizations cooperating in this brief consisted of a “nonprofit interdenominational association . . . [that] strives to preserve religious freedom

183. *Id.* at 13-14.

184. Catholic Bishops’ Brief, *supra* note 178, at 8-9.

185. *Id.* at 26 (stating that “[t]he majority below erred when it presumed the worst about why religious schools decided to participate in the scholarship program, and the motives of teachers and parents, to support its conclusion that the ‘primary effect’ of the program is governmental support of religion and religious indoctrination”).

186. *Id.* at 27 (internal citation omitted).

187. *Id.* at 28. *See infra* notes 190-92 and accompanying text for a discussion of the sources of the Catholic justification for the secular rationale.

188. Brief for Christian Legal Society, et al. as Amici Curiae Supporting Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1684557 [hereinafter Pietistic Evangelical Protestant Brief].

in order that men and women might be free to do God's will,"¹⁸⁹ a Commission of the Southern Baptist Convention,¹⁹⁰ a group "dedicated to articulating and advancing a family-centered philosophy of public life,"¹⁹¹ and The National Association of Evangelicals.¹⁹²

The Pietistic Evangelical Protestant Brief acknowledged that the Cleveland, Ohio school voucher program "gives a preference to low-income children, offering scholarships to wealthier children only if all poor students have received consideration."¹⁹³ But this brief moved straightaway to a free exercise argument. It declared that "[t]he ultimate goal of the Religion Clauses is religious liberty for all The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence."¹⁹⁴ And again, "[t]he position of opponents of the Ohio scholarship program . . . believe that excluding religious schools from the program would be neutral and fail to realize that such exclusion may in fact constitute discrimination against religious viewpoints in education and against the religious liberty interests of parents and their children."¹⁹⁵ The Pietistic Evangelical Protestant Brief repeats the point one more time, stating that under the school voucher program, "the State is allowing citizens to choose an education that best fits with their particular religious preferences."¹⁹⁶

The Pietistic Evangelical Protestant Brief declined to address the obvious secular justification for school voucher programs: the linkage between family poverty and poorly performing public schools in low-income neighborhoods.¹⁹⁷ And it is reasonable to conclude, therefore, that the Pietistic Evangelical Protestant Brief displayed little to no interest in the secular rationale, either as the Court saw it, or as elaborated by the Roman Catholic Brief.

The two briefs brilliantly reflect the respective worldviews of Catholics and pietistic evangelical Protestants, the analogical-sacramental and the dialectic-dualist-Zwinglian. While they ostensibly line up on the same side in *Zelman*, the fundamental logic of the two Briefs suggests that, in other circumstances, the two religious groups might not find themselves on the same side of a legal dispute regarding school vouchers.

The Roman Catholic Brief treats schools—"human institutions," to use Mark Massa's words—as having innate virtue. The failure of the Cleveland

189. *Id.* at 30.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 3. *See Zelman*, 536 U.S. at 646 (stating that "[f]amilies with incomes below 200% of the poverty line are given priority").

194. Pietistic Evangelical Protestant Brief, *supra* note 188, at 9.

195. *Id.* at 18.

196. *Id.* at 20.

197. The Court upheld the voucher program at issue in the case on secular grounds. *See Zelman*, 536 U.S. at 649 (stating that "[t]here is no dispute that the program . . . was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system").

public schools to educate merely means that the Catholic Church is prepared to step forward and make its schools available as an *alternative* means of discharging the responsibility that the public schools in Cleveland stunningly failed to meet. In so doing, however, the Catholic Church did not suggest, and indeed flatly denied, that it sought to use the occasion of that massive failure as a means of proselytizing non-Catholic voucher students.¹⁹⁸ The ultimate moral power of the Roman Catholic Brief resides in its claim, noted earlier,¹⁹⁹ that education of non-Catholic voucher students constitutes, in and of itself, a religious commitment on the part of the Catholic Church. This argument does not rest on the dualisms so characteristic of evangelical Protestant thought, but rather reflects the deep and abiding commitment of Roman Catholicism to reconciliation, to finding those sacred and secular places where the supposed dual opposites meet in communion. Schools are one of those places where this communion can take place. This communion, this reconciliation, takes place in Catholic schools, not just between Catholics, but between Catholics and non-Catholics, in schools administered by a religious institution with no plans afoot to convert the non-Catholics to Roman Catholicism.²⁰⁰ The brief makes, therefore, a powerful appeal to reconciliation. The religious and the secular do not stand as dualistic opposites but, rather, are harmonized through the power of analogy.

On the other hand, the Pietistic Evangelical Protestant Brief demonstrates the dialectical imagination's powerful inclination to focus on "liberty."²⁰¹ The brief, to borrow again from Mark Massa, sees the public schools as "[b]oth unnatural and oppressive to the individual, who must struggle for autonomy."²⁰² The parent who wishes her child to be educated in accordance with her religious beliefs has to struggle "for personal freedom against the sinful oppression" of the public schools which form part of the "social networks."²⁰³ Reconciliation plays no part in the argument advanced by the Pietistic Evangelical Protestant Brief, but a dialectical dualism does.

Practical consequences follow from the radically different approaches taken in the two briefs. The Catholic Church does not seek to defend its schools as Catholic redoubts or bastions, bent on making every student who enters their doors into practicing Catholics. Reconciliation requires something different. However, pietistic evangelical Protestants clearly do envisage their schools as instruments for advancing the evangelical Protestant faith by building up that faith in the students attending their schools.²⁰⁴ Nothing in the tactical or

198. Catholic Bishops' Brief, *supra* note 178, at 27.

199. *See supra* note 186 and accompanying text.

200. *See infra* Part IV for a discussion of proselytizing.

201. Pietistic Evangelical Protestant Brief, *supra* note 188, at 9-11.

202. MASSA, *supra* note 34, at 56.

203. *Id.*

204. *See* John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282-83 (2001) (referring to "faith-based education" taught at pietistic evangelical Protestant "Christian" academies); The Association of Christian Schools International declares that "Christian schools exist to support parents in fulfilling their biblical

strategic coming together of Catholics and pietistic evangelical Protestants in support of the school voucher program at issue in *Zelman* trumps the wildly different *Weltanschauungen* of the authors of the briefs under consideration here.²⁰⁵

c. Liturgical Protestants

Not all American Protestants are evangelical Protestants, although the vast majority of them surely are.²⁰⁶ Liturgical Protestants holding to particularly “high” Eucharistic theologies might have developed worldviews that have elements of the analogical, as well as the dialectical.²⁰⁷ On the question of

responsibility to educate children” and that the framework of such education consists of five elements: (1) Scripture as truth and integrated into the learning experience; (2) the intellectual development of the “[pietistic evangelical Protestant] Christian mind” which includes “[a]ccurately interpreting the Word of God”; (3) “Christian” educators who are “committed followers of Christ, teaching and leading from a biblically integrated perspective”; (4) learning experiences that “engage students toward their full potential in Christ”; and (5) “[o]perational [i]ntegrity” implementing biblical values. Association of Christian Schools International, <https://www.acsi.org/web2003/default.aspx?ID=1641> (last visited Oct. 26, 2008). Christian Schools International declares a principle of “Christian education” is the Bible: “Through the Bible God reveals himself to us so we can understand him, ourselves, others, and the world. The Bible directs us in our relationships and activities, guiding us as we educate our children.” Christian School International, Mission Statement, <http://www.csionline.org/about/mission> (last visited Oct. 26, 2008). The Association of Classical & Christian Schools states that its primary mission “is to promote, establish and equip schools committed to a classical approach to education in light of a Christian worldview grounded in the Old and New Testament Scriptures.” The Association of Classical & Christian Schools, <http://www.accsedu.org/> (last visited Oct. 26, 2008). It would be fair to say, therefore that “Christian” schools would “actively promote[] [pietistic evangelical Protestant] Christian beliefs among students.” Warren A. Nord, *Religion, the First Amendment, and Public Education*, 8 *BYU J. PUB. L.* 439, 453 (1994).

205. As I noted earlier, *see supra* note 177, I will take up school vouchers in a separate article. The subject warrants further exploration. I note for present purposes, however, that at least one pietistic evangelical Protestant group opposed school vouchers. *See* Brief for Council on Religious Freedom, et al. as Amici Curiae Supporting Respondents, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1638646.

206. A survey of faith in America, released in September, 2006, found that Protestants comprise at least sixty one percent of the American population, if not as much as seventy percent or thereabouts. *See* BAYLOR INST. FOR STUDIES OF RELIGION, AMERICAN PIETY IN THE 21ST CENTURY: NEW INSIGHTS TO THE DEPTH AND COMPLEXITY OF RELIGION IN THE US 8 (2006). The Study shows that one-third of Americans are evangelicals and just under one-fourth are mainline Protestants and another five percent are black Protestants. *Id.* A substantial percentage of the mainline Protestants are evangelical Protestants, and black Protestants, overwhelmingly Methodists, Baptists and Pentecostals, are evangelical Protestants as well. Furthermore, many, if not most, of the ten to eleven percent of Americans found by the study to be unaffiliated with any religious group are undoubtedly liberal evangelical Protestants of the secular sort. *Id.*

207. *See* EDWARD P. ECHLIN, *THE ANGLICAN EUCHARIST IN ECUMENICAL PERSPECTIVE: DOCTRINE AND RITE FROM CRANMER TO SEABURY*, at vii (1968) (stating, as a Jesuit, that “within the comprehensive mood known as the Anglican Way . . . [he had] found [himself] very much at home”); MASSA, *supra* note 34, at 194 (stating that liturgical Protestants like Anglicans and Lutherans “retained significant analogical loyalties in their worship and ecclesiology”).

Protestants as religious minorities, the subject of Part III, it would seem much more reasonable to suppose that liturgical Protestants whose Eucharistic theology was so “high” that it was tantamount to transubstantiation, and whose theology, therefore, fell outside the synthesis suggested above,²⁰⁸ could so qualify far more readily as religious minorities than evangelical Protestant sects could. Of course, the only liturgical Protestants who hold to transubstantiation are a subset of Anglo-Catholics in the Episcopal Church.²⁰⁹ It strains credulity, however, to suppose that Anglo-Catholics, or any other parties in the Episcopal Church²¹⁰ need the benefit of whatever protection the Religion Clauses afford religious minorities.²¹¹ In the final analysis, the dialectical-dualist worldview held by evangelical Protestants is the definitive and normative world view of American Protestants. There are exceptions of course, but they do not necessarily involve small evangelical Protestant sects. These sects fall squarely in the mainstream of the evangelical Protestant consensus on the Eucharist.²¹²

208. See *supra* note 70 and accompanying text.

209. See *supra* notes 67-72 and accompanying text.

210. For a discussion of parties in the Episcopal Church, see CHORLEY, *supra* note 135; ROBERT W. PRICHARD, *A HISTORY OF THE EPISCOPAL CHURCH* (1991).

211. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1 *passim*.

212. Lutheranism in America warrants special consideration. Lutheranism began as a form of liturgical Protestantism, rooted in a theology of the Eucharist that posits the Real Presence of the Body and Blood of Christ. MARTIN LUTHER, *The Babylonian Captivity of the Church*, in *SELECTED WRITINGS OF MARTIN LUTHER 1517-1520*, at 355, 380-87 (Theodore G. Tappert ed., 1967). See also CHARLES P. KRAUTH, *THE CONSERVATIVE REFORMATION AND ITS THEOLOGY: AS REPRESENTED IN THE AUGSBURG CONFESSION, AND IN THE HISTORY AND LITERATURE OF THE EVANGELICAL LUTHERAN CHURCH 599-601* (Philadelphia, J.B. Lippincott & Co. 1872). As such, Lutheranism is quite distinct from both Calvinistic Orthodoxy and evangelical Protestantism in either of the latter's forms. See Newsom, *Protestant Empire*, *supra* note 1, at 196-97 n.65 (discussing the various Protestant Eucharistic theologies). This theological distinctiveness marks much of the history of Lutheranism in America.

Lutheran settlement in America began in Pennsylvania and Delaware in the Seventeenth Century. See Theodore G. Tappert, *Colonists on the Hudson and the Delaware*, in *THE LUTHERANS IN NORTH AMERICA* 3, 10-13 (E. Clifford Nelson ed., 1975). See also *THE NOTEBOOK OF A COLONIAL CLERGYMAN: CONDENSED FROM THE JOURNALS OF HENRY MELCHIOR MUHLENBERG*, at v (Theodore G. Tappert & John Doberstein eds. & trans., 1959) (referring to Muhlenberg's arrival “in America in 1742, called as pastor of three small Lutheran congregations in the Philadelphia area”). The upshot was the development of a brand of Lutheranism that sought to adapt to its Anglo-American evangelical Protestant environment. In 1855, representatives of this Americanized Lutheranism proposed to revise the Augsburg Confession, the fundamental symbolical of Lutheranism. OSCAR N. OLSON, *THE AUGUSTANA LUTHERAN CHURCH IN AMERICA: PIONEER PERIOD 1846 TO 1860*, at 241-42 (1950). One of the “errors” claimed to exist in the Confession was the affirmation of “real presence of the body and blood of the Savior in the Holy Communion.” August R. Suelflow and E. Clifford Nelson, *Sectionalism, Conflict, and Synthesis*, in *THE LUTHERANS IN NORTH AMERICA*, *supra*, at 210, 224. As one commentator put it, “[t]he American Lutherans advocated that the Lutheran church should possess characteristics similar to those of their Protestant neighbors in America. These characteristics included the practice of revivals, an essentially Zwinglian view of the sacraments, and an informal liturgy.” DAVID A. GUSTAFSON, *LUTHERANS IN CRISIS: THE QUESTION OF IDENTITY IN THE AMERICAN REPUBLIC* 165 (1993).

Arrayed against the Americanizers were Lutherans who wished to hold onto the distinctive teachings of Confessional Lutheranism. See G. EVERETT ARDEN, *AUGUSTANA HERITAGE: A HISTORY OF THE AUGUSTANA LUTHERAN CHURCH* 55 (1963). Many of those opposed to Americanizing Lutheranism came on “[t]he waves of mid-nineteenth century immigrations brought scores of thousands of Lutherans to America from Germany, Sweden, and Norway With them these immigrants brought a kind of confessional Lutheranism generally quite different from that which had developed in America over the preceding century-and-a-half” August R. Suelflow and E. Clifford Nelson, *To the Promised Land*, in *THE LUTHERANS IN NORTH AMERICA*, *supra*, at 147, 152.

Nineteenth Century Lutheranism, revived, strengthened, and largely peopled by these immigrants, took a position in the American Protestant nomos by which they held themselves apart from and as distinctive from Zwinglo-Calvinistic evangelical Protestantism, the dominant or normative form of American Protestantism. Thus,

[s]ince the time of the Civil War, Lutheran identity has been defined in rather rigid terms. It has centered in a search for a distinctiveness that has too often taken on the characteristics of a self-serving sectarianism. It has been closely associated with a strict and literal allegiance to its confessional books, in particular, with a sacramental theology that has stressed the importance of a realistic interpretation regarding the mode of Christ’s presence in the Lord’s Supper.

PAUL P. KUENNING, *THE RISE AND FALL OF AMERICAN LUTHERAN PIETISM: THE REJECTION OF AN ACTIVIST HERITAGE* 229 (1988). See also Eugene L. Fevold, *Merger Developments—Americanization*, in *THE LUTHERANS IN NORTH AMERICA*, *supra*, at 329, 351. So unique is Lutheran Eucharistic theology, a key feature being a strong and uncompromising belief in Real Presence coupled with a rejection of traditional Catholic theology of the church—ecclesiology—that Scandinavian Lutherans managed to be both pietistic and Confessional all at the same time. See ARDEN, *supra*, at 77; *A CENTURY OF LIFE AND GROWTH: AUGUSTANA 1848-1948*, at 26, 42 (Oscar N. Olson & George W. Wickstrom eds., 1948); August R. Suelflow and E. Clifford Nelson, *To the Promised Land*, in *THE LUTHERANS IN NORTH AMERICA*, *supra*, at 147, 170. An important strategy adopted by many Lutherans was “[o]pposition to the use of English, or extreme caution regarding it.” Fevold, *supra*, at 350. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a statute that prohibited the teaching of any subject in any language other than English, thus overturning the conviction of a teacher in a Lutheran parochial school for violating the statute).

With the passage of time, however, this fierce and rigid insistence on defending Confessional Lutheranism—with or without pietism thrown into the mix—may have lessened and waned, as Nineteenth Century German and Scandinavian Lutheran immigrants have become Americanized. See GUSTAFSON, *supra*, at 170-71 (stating that “[t]he debate regarding the form Lutheranism is to take in America is not finished,” noting that in the 1980s “the uneasy balance between loyalty to the Lutheran Confessions and accommodation to American culture has appeared once again to shift toward accommodation,” accommodation which Gustafson would reject). It may come to pass, therefore, that Lutheran theological distinctiveness, particularly as it regards the Eucharist, will largely disappear from the American scene. The decision of the Evangelical Lutheran Church in America and the Episcopal Church to enter into intercommunion, see G. SCOTT CADY AND CHRISTOPHER L. WEBBER, *LUTHERANS AND EPISCOPALIANS TOGETHER: A GUIDE TO UNDERSTANDING* 52-58 (2001) (discussing the distinctive Anglican and Lutheran understandings of and liturgical approaches to the Eucharist), may be further evidence of this development. However, the Lutheran Missouri Synod continues to maintain their adherence to Confessional Lutheranism. See MILTON L. RUDNICK, *FUNDAMENTALISM AND THE MISSOURI SYNOD: A HISTORICAL STUDY OF THEIR INTERACTION AND MUTUAL INFLUENCE* 67 (1966) (stating that as against evangelical Protestant fundamentalists, “[t]he distinctive characteristic of Missouri Synod conservatism was its unyielding adherence to the traditional Lutheran doctrinal authorities”). And the famous

2. The “Culture Wars”

The issue, in a nutshell, is whether our current so-called “culture wars” have somehow trumped or overwhelmed a pan-Protestant nomos that is five centuries old. In order to properly assess the question, it is important to begin with a brief review of the complex relationship between various Protestant groups, a relationship characterized by a shifting, evolving, and dynamic interplay of conflict and cooperation,²¹³ and a dynamic anchored by a remarkable consensus on Eucharistic theology and the world view that Zwinglianism generates.

From the very beginning of the English Reformation in the 1530s, it became apparent that English Protestantism had spawned and generated conflict and partisanship.²¹⁴ The struggles between Anglicans—prototypical liturgical Protestants—and Puritans—prototypical evangelical Protestants—continued until at least 1688 when the Act of Toleration ushered in a lasting form of pan-Protestantism which cast those Tudor-Stuart era struggles in a different light and a different legal régime.²¹⁵ Those early struggles included a bloody Civil War pitting Anglicans against Puritans.²¹⁶ Surely no one would argue that, at any time after Henry VIII broke with the Roman Catholic Church in 1534,²¹⁷ with the singular exception of the short reign of Mary I from 1553 to 1558, England was anything other than a Protestant Empire. The point bears repeating: the existence of conflict and disagreement, even bloody conflict and disagreement, between Anglo-American Protestants does not mean that somehow the Protestant Empire has disappeared, lapsed, degenerated, or disintegrated.

American religious historian, Martin Marty, has defended Confessional Lutheran Eucharistic theology. See MARTIN E. MARTY, *THE LORD’S SUPPER* 51-54, 72-78 (1980).

213. See Newsom, *Common School Religion*, *supra* note 1, at 222. See also Charles Newton Brickley, *The Episcopal Church in Protestant America, 1800-1860: A Study in Thought and Action* (1946) (unpublished Ph.D. dissertation, Clark University) (on file with author) (discussing both competition and cooperation between the Episcopal Church and evangelical Protestants during the period 1800-1860, and noting that Anglo-Catholics and High Churchmen in the Episcopal Communion looked with disfavor on cooperation between Episcopalians and evangelical Protestants).

214. See PAUL O’GRADY, *HENRY VIII AND THE CONFORMING CATHOLICS* 7 (1990) (stating that from 1534 “until the decisive lurch leftward in 1549, Henrician religion embraced two distinct factions, the avowed goal of which was the elimination of the other”).

215. See Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 834 (stating that “[p]an-Protestantism in 1688 took the form of Anglican toleration (with the threat of the penal law lurking in the background) of evangelical Protestants”).

216. For a discussion of the religious dimensions of the English Civil War, see JOHN SPURR, *THE RESTORATION CHURCH OF ENGLAND, 1646-1689*, at 1-28 (1991); JOHN COFFEY, *PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558-1689*, at 134-60 (2000); STUART E. PRALL, *CHURCH AND STATE IN TUDOR AND STUART ENGLAND* 116-36 (Arthur S. Link ed. 1993).

217. See *An Acte Concerning Treason & Takeing Away of Sanctuary, 1534*, 26 Hen. 8, c. 13 (Eng.), *reprinted in* 3 *The Statutes of the Realm: 1509-1545*, at 508 (London, Eyre & Strahan 1810-1828).

The Seventeenth Century Civil War meant that, for a while, England was a Puritan commonwealth, not an Anglican nation, even though the vast majority of English people at that time were Anglicans.²¹⁸ The Restoration, of course, brought the Anglicans back into power, and England, once again, became an Anglican Protestant Empire. But while England was under the control of the various Puritan parties, anti-Catholicism did not go by the boards, the impulse to protestantize did not disappear, and “purifying” social reform did not cease to matter. Puritans, be they Presbyterian or Congregationalist as a matter of church polity, used a mixture of suasion and coercion with respect to Anglicans: while they abolished the episcopate and banished the Book of Common Prayer, they nonetheless permitted, for whatever reason, Prayer Book Anglicanism to continue through the ministrations of Anglican parish clergy and the occasional suppressed Anglican bishop, albeit under reduced and constrained—if not outright difficult—circumstances.²¹⁹

In the United States, the pan-Protestantism engendered and informed by the English Act of Toleration necessarily had to change. First, as between Anglicans and pietistic evangelical Protestants, the demographics clearly favored the latter, not the former, as in America pietistic evangelical Protestants far outnumber Anglicans. As I observed elsewhere, “[i]n a democratic polity, Episcopalians were in no position to hold *legal* hegemonic sway over evangelical Protestants. But in a remarkable tribute to embedded cultural patterns and norms, Episcopalians nevertheless came to hold *cultural* hegemonic sway over evangelical Protestants. The Act of Toleration had become, in short, a *cultural* artifact.”²²⁰ This cultural hegemonic sway, for example, played a large, if not decisive, role in the decision of Congress to exempt the religious use of wine from the reach of National Prohibition. Not to have exempted the religious use of wine from the prohibitory régime of the Volstead Act²²¹ would have threatened and undermined the Anglican Eucharist.²²² There is good reason to believe that this cultural sway continued to the present time.²²³

Given the numerical dominance of evangelical Protestants in the United States, the nature of the relations between various evangelical Protestant groups became a central element in American pan-Protestantism. American

218. See PRALL, *supra* note 216, at 133 (stating that circa 1649 “the majority of the people were Anglican”); SUSAN DORAN AND CHRISTOPHER DURSTON, *PRINCES, PASTORS AND PEOPLE: THE CHURCH AND RELIGION IN ENGLAND, 1500-1700*, at 32 (2nd ed. 2003) (noting that the Presbyterian Directory for Public Worship, designed to replace the Anglican Book of Common Prayer “failed to gain much popular support”); COFFEY, *supra* note 216, at 158-59 (stating that “Prayer Book Anglicanism survived throughout the 1640s and 1650s . . . [b]ecause Anglican worship ‘had sunk deep roots in popular culture’ . . . [and] Prayer Book Anglicanism . . . had great popular appeal”); SPURR, *supra* note 216, at xiii (stating that Restoration Anglicanism “was the church of the overwhelming majority of the population throughout the later seventeenth century”).

219. See SPURR, *supra* note 216, at 1-28; COFFEY, *supra* note 216, at 141.

220. Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 834.

221. Volstead Act, ch. 85, 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI.

222. See generally Newsom, *Some Kind of Religious Freedom*, *supra* note 1.

223. *Id.* at 840 n.508.

evangelical Protestants had to figure out how to coexist without much instructive guidance from England. The Presbyterians and the Congregationalists had made a hash of things during the English Civil War, unable to agree among themselves as to the ecclesial structure of English Protestantism.²²⁴ On the religious point, the most that they could agree to was that English Protestantism should not be Anglican.²²⁵ And, of course, they lost, overwhelmed by the forces of the Restoration.

The American spiritual heirs of these English evangelical Protestants learned the lesson well. They apparently succeeded in preventing the establishment of a resident Anglican bishop in Colonial America.²²⁶ But beyond that, they were on their own. The practical exigencies of the colonial experience, however, forced American evangelical Protestants to learn, to one degree or another, how to live with each other, and the non-denominational character of revivalism reinforced the uniquely American form of pan-Protestantism that emerged in the crucible of that experience.²²⁷

American pan-Protestantism, of course, like its English cousin, also survived a Civil War. Again, as was the case in England, no one could plausibly argue that the battle between the American North and South somehow marked the end of the American Protestant Empire, or even its interruption. During that war, anti-Catholicism did not disappear, Protestantization continued to be an important objective, “purifying” social reform, of course, lay at the heart of the Civil War, and, at least on religious matters, belief in the power of suasion never disappeared—although it might have on the question of slavery—but instead continued to exist in a complex relationship with coercion, at least with respect to other questions. Indeed, within just a generation after the end of that conflict, one of the great and definitive testaments to the goals and ideals of the American Protestant Empire appeared, to great popular acclaim.²²⁸

Pan-Protestant commonalities, theologically rooted, have survived civil wars between Protestants both in England and in the United States.²²⁹ The question, perhaps restated, is how to understand the meaning and significance

224. See PRALL, *supra* note 216, at 125-26 (comparing the Presbyterian and the Congregationalist approaches to the organizational structure of English Protestantism).

225. See *supra* note 218 and accompanying text.

226. See Newsom, *Protestant Empire*, *supra* note 1, at 240-41.

227. See *id.* at 243-45.

228. See JOSIAH STRONG, *OUR COUNTRY* (Juergen Herbst ed., The Belknap Press of Harvard Univ. Press 1963) (1885).

229. It is interesting to note that James Davison Hunter’s analysis of what he identifies as our current culture wars claims that “the contemporary culture war evolved out of century-old religious tensions.” HUNTER, *supra* note 75, at 67. See also *id.* at 77-86. By largely limiting himself to *one* century, 1890 to 1990, or thereabouts, (his book, *CULTURE WARS*, was published in 1991) he manages to bracket, leave out, or ignore, most of the vital, rich, and important history of pan-Protestantism from the 1530s until 1890, especially the American and English Civil Wars. His failure to address that history undermines his thesis, yet again. See *supra* note 75 (indicating that Hunter had failed properly to estimate the extent and nature of contemporary anti-Catholicism).

of cultural and religious disagreements on the matter of human sexuality—indeed disagreements on the propriety of a puritanical sexual code—when compared with, for example, bloody and violent civil wars, and the impact of each of these types of conflict on the meaning, significance, and nature of the pan-Protestant nomos.

When all is said and done, the central defining disagreements that make up the current culture wars have to do with abortion and homosexuality, although other issues, such as needle exchange programs, gambling, prostitution, and pornography, many of which have sexuality dimensions or facets, also form part of the agenda.²³⁰ Abortion, I suggest, may be best understood as a question of human sexuality as much as a question of the value or sanctity of human life. To suppose that abortion implicates the sanctity of life means that life begins at or shortly after conception. However, there are many who reject that notion and for whom, therefore, abortion is not about the taking of a human life, but rather a woman's right to choose to abort a pregnancy.²³¹ Indeed, not to put too fine a point on it, opposition to abortion may well rest on a puritanical notion that if a woman becomes pregnant and wishes to terminate the pregnancy, she may well have become pregnant in an "immoral" way—sex outside of marriage—and should be forced to suffer the consequences of her "immoral" act. It may well be, therefore, that the culture wars merely reflect the persistence of those who would impose a puritanical sexual morality on other people and the resistance of those who want no part of puritanical meddling. It would seem, therefore, that Professor Berg's argument that "[w]ith traditionalist and progressive Protestants often at each other's throats [in America today], there is typically no single set of 'goals and objectives of an American Protestant empire'"²³² simply may not hold up.

There is yet a second factor that requires some comment in trying to assess the nature and the character of our current so-called "culture wars:" the subcultural identity theory of religious strength, the consequence of which is the real possibility that our "culture wars" may be, in large part, merely a contrivance and an invention, created in order to further a strategic religious objective.

Christian Smith, upon whom Professor Berg heavily relies,²³³ argues that pietistic "evangelicals construct subcultural distinction, engagement, and tension between themselves and others in a way that builds [pietistic] evangelical strength."²³⁴ He also observes that "it is precisely the tension-generating confrontation between the activist, expansive, engaging [pietistic]

230. Elaine B. Sharp, *Introduction to CULTURE WARS AND LOCAL POLITICS* 1, 2 (Elaine B. Sharp ed., 1999).

231. See Thomas I. Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 129, 130-31 (1982) (stating that when life begins is a matter of "theological or philosophical conclusion" and that there are "many different views as to when human life is created.")

232. Berg, *supra* note 8, at 956.

233. *Id.* at 931-32.

234. CHRISTIAN SMITH ET AL., *AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING* 89 (1998).

evangelical subculture and the pluralistic, nonevangelical dominant culture that it inhabits—which to [pietistic] evangelicals seems increasingly hostile and in need of redemptive influence—that generates evangelicalism’s vitality.”²³⁵ Smith, like so many others, overlooks the *liberal* evangelical Protestant origins of the supposed “nonevangelical” dominant culture. However, the larger point holds: pietistic evangelical Protestant strength and vitality flow from the creative and inventive powers of evangelical Protestant imagination. Pietistic evangelical Protestants constructed the dynamic tension upon which their vitality depends and, most importantly, it does not matter what the objective reality—the perduring Protestant Empire being the most notable example—might be. All that matters is that there be *a* social, cultural, or religious force—even a Protestant force—against which pietistic evangelical Protestants can array themselves.

This habit, or this inclination, to invent or to exaggerate tensions and differences finds its origins in Tudor England at the Reformation. Henrician Anglo-Protestants who were to evolve into Puritans and, later, evangelical Protestants, particularly of the pietistic sort, “always had a sense of purpose and cohesion.”²³⁶ Their conservative adversaries, the Henrician Anglo-Catholic party, lacked any such unity and usually only reacted to parries and thrusts of the Anglo-Protestants.²³⁷ The Henrician Anglo-Catholic party, almost destroyed as a consequence of the Marian reaction, eventually became one of the “high church” parties in Anglicanism, the established religion of England, losing, for a long time, any “Catholic” identity that only the Nineteenth Century Oxford Movement restored.²³⁸ Puritans, like their Henrician Anglo-Protestant forebears, kept pressing and pushing, insisting that the Church of England was not “pure” enough. In language remarkably evocative of that of Christian Smith, Patrick Collinson tells us that Elizabethan Puritans saw themselves as “a [religious] remnant . . . in a sea of hostile indifference.”²³⁹ The Puritans continued to press for their version of Protestantism, took England into a Civil War, and, of course, overplayed their hand.²⁴⁰ It is as if Puritans cannot actually afford to win, because if they do win, they simply cannot function effectively; they lose their vitality. Put differently, what Christian Smith describes as a perpetual struggle with the “other” that pietistic evangelicals cannot resolve in their favor,²⁴¹ may actually have a prescriptive or normative aspect: pietistic evangelical Protestants must struggle in order to maintain themselves as a vital force in American society,

235. *Id.* at 151.

236. Newsom, *Protestant Empire*, *supra* note 1, at 201.

237. *Id.*

238. *See generally* HÄRDELIN, *supra* note 72.

239. *See* Patrick Collinson, *The Elizabethan Church and the New Religion*, in *THE STRUGGLE FOR POWER: ENGLISH HISTORY, 1550-1720*, at 161, 164 (John M. Beattie & Michael G. Finlayson eds., 1987).

240. *See supra* notes 216-25 and accompanying text.

241. SMITH ET AL., *supra* note 234, at 150.

even in an American Protestant Empire in which they may well be the dominant force.

But of course, the procedural elements of the Anglo-American Protestant Empire clearly comprehend and accommodate invention of the pietistic evangelical Protestant sort that Smith describes: Protestantization and social reform become merely ways of giving expression to the ontological reality—and necessity—for evangelical Protestants of the continuing struggle. Protestantization is never fully realized and neither are the social reforms necessary for a “pure” evangelical Protestant society or culture, even when the Protestant Empire appears to be firmly in control. There always remains one more person to protestantize, and there always remains one more social reform that would arguably further and advance the interests of the Protestant Empire. And, as the English experience plainly demonstrates, there always seems to be a group of Protestants—primarily Anglicans in England, and primarily liturgical Protestants and secular liberal evangelical Protestants in contemporary America—against whom the pietistic evangelical Protestants that Smith describes can rail.

The “Subcultural Identity” theory tracks and otherwise connects with the history and experience of Anglo-American pietistic evangelical Protestants. This is the source of the power and force of that theory. The identity theory has two elements. The first, persistence, is this: “*Religion survives and can thrive in pluralistic, modern society by embedding itself in subcultures that offer satisfying morally orienting collective identities which provide adherents meaning and belonging.*”²⁴² The second element, strength, is this: “*In a pluralistic society, those religious groups will be relatively stronger which better possess and employ the cultural tools needed to create both clear distinction from and significant engagement and tension with other relevant outgroups, short of becoming genuinely countercultural.*”²⁴³

It follows, therefore, that pietistic evangelical Protestants would, if only for strategic reasons, continue to push the envelope in order to generate engagement and tension with the other, that is to say, other relevant outgroups. Ratcheting up the tensions is, of course, a particularly effective way to ensure sufficient engagement and tension necessary for pietistic evangelical Protestantism to be successful in its objectives.

It makes no sense, therefore, for the “other” to seek to dampen the tension by acceding to the demands of the militant and aggressive subcultural group. The subcultural religious groups will not rest on the laurels of any particular victory, but will continue to press for more. In other words, accommodating or yielding to the demands and threats of pietistic evangelical Protestants is likely to be counterproductive. In order for them to maintain the tension that they need for their persistence and strength, they will merely reenter the lists this time with more extreme and unreasonable “suggestions” for how other people ought to live their lives, particularly their sex lives, or how other people ought to defer to what the prodders want. The better response is to push

242. *Id.* at 118.

243. *Id.* at 118-19.

back and not dither about it.²⁴⁴ Real people can be harmed by the constant pushing and prodding of pietistic evangelical Protestants.²⁴⁵ “Culture wars” may be nothing more, therefore, than strategic contrivances engineered and fueled by subcultural religious groups, with conflict or “war” resulting from the resistance of those opposed to the imposition of a puritanical sexual code on the American people.

But our current “culture wars,” even if contrived, strategic inventions, are real enough. The question arises as to what to make of cooperation between conservative Catholics and conservative evangelical Protestants in the present culture wars, whether that cooperation reflects a fundamental paradigm shift, undermining, to one degree or another, the pan-Protestant nomos.

One pietistic evangelical Protestant commentator has suggested that Vatican II ushered in a new era of rapprochement between evangelical Protestants and Roman Catholics.²⁴⁶ One of the consequences has been the cooperation between conservative Catholics and conservative pietistic evangelical Protestants on a number of fronts in the culture wars.²⁴⁷ Perhaps building upon this fact, in 1994, a small group of these conservatives published “*Evangelicals and Catholics Together: The Christian Mission in the Third Millennium*.”²⁴⁸ ECT created a stir, particularly in pietistic evangelical Protestant circles.²⁴⁹ If anything, the attempt by the authors of ECT to

244. Cf., Newsom, *Local and State*, *supra* note 1, at 137-38 (rejecting a strategy of trying to carve out enclaves that lie beyond the legal and political reach of sexual Puritans, favoring instead “a frontal assault on the Religious Right”).

245. See, e.g., Smolin, *supra* note 112, at 1094-95 (candidly conceding that he apparently favored criminalizing certain sexual behavior, because his puritanical religion calls for that).

246. Richard J. Mouw, *Foreword* to CATHOLICS AND EVANGELICALS: DO THEY SHARE A COMMON FUTURE? 1, 2 (Thomas P. Rausch ed., 2000). Other evangelical Protestants have suggested that Vatican II changed little to nothing, correctly noting that the Church reaffirmed Tridentine doctrine. See John H. Armstrong, *The Evangelical Moment?*, in ROMAN CATHOLICISM: EVANGELICAL PROTESTANTS ANALYZE WHAT DIVIDES AND UNITES US 295, 302 (John Armstrong ed., 1994) (stating that Rome did not “retract the old doctrines of the Council of Trent,” but rather “add[ed] a new formula, or a new way of thinking about these matters”).

247. There may well be instances of cooperation between liberals across denominational lines. But it would not appear that they can rival the links that have been forged by religious conservatives. It may well be unfair, therefore, for religious conservatives to impute to religious liberals the kind of ties across confessional boundaries that conservatives have, and thus it might be unfair to suppose that the “culture war” has the stark dimensions to it that some conservatives might suggest. Put in simpler terms, there may not, in fact, be a liberal of “secular humanist” monolith of the sort claimed by conservatives.

248. Reprinted in EVANGELICALS AND CATHOLICS TOGETHER: TOWARD A COMMON MISSION, at xv (Charles Colson & Richard John Neuhaus eds., 1995) [hereinafter referred to as “ECT” or “Statement”].

249. See Thomas P. Rausch, *Introduction* to CATHOLICS AND EVANGELICALS: DO THEY SHARE A COMMON FUTURE?, *supra* note 246, at 5, 6. For an unremitting rejection of “[e]cumenical relationships between Evangelicals and Catholics,” see DAVID W. CLOUD, EVANGELICALS AND ROME 4 (rev. ed. 2001). On the other hand, Catholics appear to have paid relatively little attention to ECT because it lacks any authoritative imprimatur of the Roman Catholic Church, although some Catholics have criticized ECT for “its conservative social and

rationalize this cooperation between conservatives across confessional boundaries served to reinforce the theological differences between Catholics and pietistic evangelical Protestants. ECT had fudged a number of critical theological issues that divide Catholics and evangelical Protestants, but given the nature of the enterprise, that seems unexceptional. Indeed, it fudged on the question of school vouchers.²⁵⁰ But ECT, with all of its equivocation, could not overcome the underlying theological differences that separate Catholics and evangelical Protestants.²⁵¹

J.I. Packer, an evangelical Protestant Anglican, has provided perhaps the best explication of the meaning, purpose, goals, and objectives of this statement, an explication that underscores the deep theological differences between the two groups of religious conservatives.²⁵² His analysis of the statement also sheds light on the relevance of pan-Protestant theological commonalities.

Packer sets out evangelical Protestant objections to ECT,²⁵³ and he declares that he is “not able to affirm of the Roman Catholic Church that ‘in its present

political agenda.” Thomas P. Rausch, *Catholic-Evangelical Relations: Signs of Progress*, in CATHOLICS AND EVANGELICALS: DO THEY SHARE A COMMON FUTURE?, *supra* note 246, at 37, 48.

250. The text of the ECT Statement regarding school vouchers reads as follows:

We [conservative Catholics and conservative evangelical Protestants] contend together for a comprehensive policy of parental choice in education. This is a *moral* question of simple justice. Parents are the primary educators of their children; the state and other institutions should be supportive of their exercise of that responsibility. We affirm policies that enable parents to effectively exercise their right and responsibility to choose the schooling that they consider best for their children.

EVANGELICALS AND CATHOLICS TOGETHER: TOWARD A COMMON MISSION, *supra* note 248, at xxvi, xxvi-xxxiii (emphasis added).

The basic structure of this text resembles the position taken by the authors of the Evangelical Protestant Brief, *see supra* notes 188-205 and accompanying text, in that the focus is on parental choice rather than the institutional objectives that undergird the Catholic Bishops Brief, and which are congruent with the secular purposes of the voucher program at issue in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *See supra* notes 178-205 and accompanying text. However, both briefs speak to explicitly *religious* values, even though these values are quite different, whereas the ECT Statement merely refers to *moral* values.

The language of the Northwest Ordinance, *reenacted* as An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789), nicely illustrates the fudging in the ECT Statement. The Ordinance referred to “religion, morality, and knowledge.” *Id.* at 52. The secular rationale for school vouchers clearly implicates the “knowledge” prong, the religious rationales implicate the “religion” prong, and the ECT Statement’s focus on “morality” strongly suggests the search for a position that lay between or otherwise straddled the religious and the secular. For a fuller discussion of the relevant language from the Ordinance, see Newsom, *Common School Religion*, *supra* note 1, at 253-55, 268-71.

251. *See supra* notes 204-205 and accompanying text for a discussion of possible disagreements between Roman Catholics and evangelical Protestants on the matter of school vouchers.

252. *See* J. I. Packer, *Crosscurrents Among Evangelicals*, in EVANGELICALS AND CATHOLICS TOGETHER: TOWARD A COMMON MISSION, *supra* note 248, at 147, 147-74.

253. *Id.* at 149-56.

confession it is an acceptance [sic] Christian communion.”²⁵⁴ But Packer declares that a basis exists on which to proceed, claiming that there are “many” Catholics who are acceptable to Packer, even if their Church is not.²⁵⁵ He concludes, in a way particularly appealing to lawyers, that “[t]he path of joint action that ECT envisages is not churchly but parachurchly.”²⁵⁶ Traditionally, parachurch organizations have been a staple of the pan-Protestant nomos for quite some time. Packer writes:

In the world of English-speaking evangelicalism, with its typical activist mindset and missionary outlook, parachurch bodies that reached out to tackle churchly tasks for which the organized churches lacked expertise, resources, and sometimes focused motivation, have been establishing themselves, usually under the name of societies, fellowships, or alliances, for the best part of two hundred years.²⁵⁷

He continues: “ECT is tentatively feeling its way towards a pattern of this kind that would involve Roman Catholics and would seek to do so on a principled basis, without compromise on either side.”²⁵⁸ But given Packer’s stunning and arrogant condescension, it is difficult to believe that even socially conservative Catholics need or want Packer’s acceptance of their Catholicism.

Of importance is that the theological divide—the *Weltanschauung* divide—between Catholics and evangelical Protestants remains and persists, notwithstanding a supposed “pattern of convergence and cooperation” between conservative Catholics and conservative evangelical Protestants.²⁵⁹

254. *Id.* at 162. See also NORMAN L. GEISLER & RALPH E. MACKENZIE, *ROMAN CATHOLICS AND EVANGELICALS: AGREEMENTS AND DIFFERENCES* 16 (1995) (stating that “as long as Roman Catholics hold [certain] dogma [like transubstantiation] . . . there is no hope for ecclesiastic union with Catholicism” but that “in view of the devastating effects of both Western secularism and Eastern mysticism on our culture, the time is overdue for Catholics and Protestants to hang together before we hang separately.”).

255. Packer, *supra* note 252, at 163-64. Indeed, Packer uses the occasion of ECT to launch a particularly bigoted tirade against the Catholic Church. He states that “were I, as a gesture of unity, invited to mass—which of course as a Protestant I am not, nor shall be—I would not feel free to accept the invitation.” *Id.* at 162-63. One has to wonder if he would attend a Mass of Christian Burial for one of the Catholics who was acceptable to Packer if someone were foolish enough to characterize attendance at such a funeral rite as a “gesture of unity.” See also MICHAEL SCOTT HORTON, *EVANGELICALS, CATHOLICS AND UNITY* 19 (1999) (stating that “the only reason I can count many Roman Catholics among my brothers and sisters in Christ is precisely that I do not consider them orthodox Roman Catholics. [For i]f they were, they would consciously be denying articles that are essential to the Gospel.”).

256. Packer, *supra* note 252, at 165.

257. *Id.* at 166. I would note that parachurch organizations exist precisely because there is no institutional coherence in Anglo-American Protestantism and, as I argue, no such thing as Protestant orthodoxy. See *supra* notes 96-136 and accompanying text.

258. *Id.*

259. Charles Colson & Richard John Neuhaus, *Introduction* to *EVANGELICALS AND CATHOLICS TOGETHER: TOWARD A COMMON MISSION*, *supra* note 248, at ix, x. Richard Mouw notes that “[t]he new patterns of cooperation between Catholics and evangelicals have been largely local and ad hoc.” Mouw, *supra* note 246, at 2. But see Rausch, *supra* note 249, at 51

The pan-Protestant commonalities remain intact. As such, they severely hamper the ability of these conservatives to forge the *parachurchly* institutions and other structures that they need to pursue their political objectives. It remains quite unlikely, if not flatly impossible, that these conservatives will be able to construct ecclesial or *churchly* structures which both conservative Catholics and conservative evangelical Protestants can call home, unless, of course, Catholicism gives up the ghost on transubstantiation and everything else that makes Catholicism Catholic.²⁶⁰ It becomes impossible to understand, therefore, the argument that this so-called “pattern of convergence and cooperation” between socially conservative Catholics and socially conservative pietistic evangelical Protestants somehow trumps 500 years of history,²⁶¹ particularly when those associated with the writing of ECT itself admit that the theological concerns simply will not go away.

And so it is today, “culture wars” and cooperation between some conservative Catholics and conservative pietistic evangelical Protestants notwithstanding, the pan-Protestant *nomos* persists. Anti-Catholicism continues to be a fact of American life.²⁶² The desire of pietistic evangelical Protestants to convert American non-Protestants to their faith persists.²⁶³ “Purifying” social reform remains high on the political agenda of many Protestants. Indeed, school vouchers, which I touched upon earlier,²⁶⁴ constitute, in pietistic evangelical Protestant eyes at least, such a reform.²⁶⁵ Finally, school vouchers illustrate perfectly the characteristic inclination of Anglo-American Protestants to rely, in varying degrees over time, on an admixture of suasion and coercion. Again, to suggest that the “culture wars”, or the cooperation of social and political conservatives across religious boundaries, somehow mean or imply that American pan-Protestantism no longer counts for much is simply to ignore or misread history. Fundamental commonalities in the pan-Protestant *nomos* have overcome military conflict and civil strife, and they surely will overcome strategic and tactical cooperation by and between conservatives across confessional boundaries with respect to matters largely involving human sexuality, that is to say, whether some people of a decidedly puritanical bent will be able to impose their views of sexual morality on others.

(declaring that notwithstanding theologically based “[m]isunderstandings and tensions between the two traditions . . . there are also significant signs of a new and vital relationship emerging from the grass roots”).

260. See *supra* notes 60-66 and accompanying text.

261. See Berg, *supra* note 8, at 949-60.

262. See generally ANTI-CATHOLICISM IN AMERICAN CULTURE, *supra* note 73; MASSA, *supra* note 34; JENKINS, *supra* note 74.

263. See *infra* Part IV.

264. See *supra* notes 168-97 and accompanying text.

265. *Id.*

III. PROTESTANT GROUPS AND SECTS AS RELIGIOUS MINORITIES

Protection of minorities is, or should be, a central constitutional value.²⁶⁶ The question remains whether minorities, religious minorities in this instance, amount to fungible entities, possessing no characteristics that justify a more careful sorting out of those claiming to be religious minorities. In a Protestant Empire, the question becomes all the more acute when those claiming to be religious minorities are Protestants. It is the central conclusion of this Part that some small Protestant groups, sects, or denominations do in fact qualify as religious minorities in precisely the same way that non-Protestant groups qualify. But it is also my conclusion that such qualification is the exception and not the rule.²⁶⁷

266. *See* *Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (stating that “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts”).

267. Non-Protestant religious groups can be said, presumptively, if not categorically, to be religious minorities. The characteristic traits of the American Protestant Empire make it abundantly clear that non-Protestants, be they Christians or not, are targets of a deep-seated drive and desire to convert, to protestantize. That said, it remains the case that Roman Catholics, the *bêtes noires* of the Protestant Empire, and Mormons constitute a demographic majority in some locations. Roman Catholics make up a majority of the population of the state of Rhode Island. Adherents.com, National & World Religion Statistics, Religious Bodies Which are the Largest Church in One or More U.S. States, 1990, http://adherents.com/rele_USA.html#Number1 (last visited Nov. 4, 2008). And Mormons make up a majority of the population in the state of Utah. *Id.* It does not follow, however, that this fact alone makes these two groups “majorities” for purposes of the Religion Clauses in either Rhode Island, Utah, or anywhere else in the United States.

The reason for this result is fairly simple and straightforward. America has a federal system of government under which the national government, on many issues, is supreme. *See* U.S. CONST. art. VI, cl. 2. It is impossible, therefore, for Rhode Island and Utah somehow to wall themselves off from the rest of the country when it comes to matters of church-state law. *See* *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (nationalizing the Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (nationalizing the Establishment Clause). Even if they could do so, it would be politically stupid to even attempt to do so. Catholics and Mormons are in the minority in the vast majority of American jurisdictions and would face the very serious possibility of retaliatory moves in jurisdictions other than Rhode Island and Utah. This possibility operates as a restraint, as a reminder that in the country as a whole, Catholics and Mormons are religious minorities. Even in a jurisdiction in which they might be the majority, the fact that they are in the minority elsewhere will affect the behavior of Catholics in Rhode Island and Mormons in Utah. In other words, contrary to Berg, *see* Berg, *supra* note 8, at 943 (arguing that “whether a particular religious group constitutes a minority may vary according to geographic location”), given our federal structure and national supremacy, and given the real likelihood of retaliation, the fact that Catholics make up a majority in Rhode Island and Mormons a majority in Utah counts for remarkably little. Geographic differences, therefore, can only be understood in the context of the complex and dynamic reality of the American federal system. For a discussion of certain aspects of this question, see generally Newsom, *Local and State*, *supra* note 1.

It might also be supposed that the fact that Catholics constitute a majority of the members of the United States Supreme Court undermines the argument that Catholics are somehow the quintessential American religious minority. But this does not follow. The critical

This Part takes up the structural or institutional side of the question. Subpart A will consider the question of minority protection as a constitutional value, subpart B will take up Justice Powell's opinion in *Regents of the University of California v. Bakke*,²⁶⁸ and subpart C will suggest a test for identifying when small Protestant groups, denominations, or sects are entitled to whatever

fact is that the five Catholics on the Court, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito, all sit on the conservative-to-reactionary end of the American political-ideological spectrum and do not represent, by a long shot, the views of substantial numbers of American Catholics, perhaps even a majority. For example, consider the voting records of the Catholic members of the United States Senate in the year 2004. Using the ratings system of the Americans for Democratic Action, a liberal organization, we see the following. The organization uses a "Liberal Quotient" ("LQ"), a rating based on twenty votes cast by members of the House and the Senate, a quotient or rating of 100 being the highest possible LQ and 0 being the lowest possible LQ, to evaluate members of the House and the Senate. The average LQ for Senate Democrats in the 108th Congress, Second Session (2004) was 89.6%. *ADA's 2004 Congressional Voting Record*, ADA TODAY (Americans for Democratic Action, Wash., D.C.), Apr. 2005, at 1, available at <http://www.adaction.org/media/votingrecords/2004.pdf>. The average LQ for Senate Republicans in that session was 19.6%. *Id.*

There were twenty six Catholic Senators serving during that session, of whom fourteen were Democrats and twelve were Republicans. Adherents.com, Religious Affiliations of 108th U.S. Congress (2003-2004), http://adherents.com/gov/congress_108.html (last visited Nov. 4, 2008). Leaving out Senator John Kerry, Democrat of Massachusetts, who missed most of the votes cast on which the LQ for 2004 was based, and whose LQ therefore was distorted, the Catholic Democratic Senators, excluding Senator Kerry, had an average LQ of ninety-five percent. The twelve Catholic Republican Senators had an average LQ of 21.67%. See ADA TODAY, *supra*, at 14-17. Catholics were, as a group, slightly more liberal than their non-Catholic colleagues, particularly on the Democratic side. However, party identification appears to explain the voting patterns of the Catholic senators, not their religious affiliation.

And consider the votes of Catholic Americans in 2004 and 2006. In 2004, Catholics narrowly favored George W. Bush, the Republican, over John Kerry, the Democrat, fifty two percent to forty seven percent. See CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Nov. 4, 2008). In 2006, American Catholics supported Democratic candidates for the United States House of Representatives fifty five percent to forty four percent over their Republican opponents. See CNN.com, America Votes 2006: Exit Polls, <http://www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html> (last visited Nov. 4, 2008).

If the five Catholic Justices consistently vote as a bloc, upholding a conservative-to-reactionary view on matters of large and important public interest, the result is most likely to be a ratcheting up of anti-Catholicism, especially on the part of liberals and progressives, see *supra* notes 138-144 and accompanying text (discussing "liberal" anti-Catholicism), and will give many, if not most, American Catholics, a bad case of heartburn—or worse. Catholics could well be in need of more protection rather than less, even though these five Catholic Justices clearly do *not* represent the views of large numbers of American Catholics. Protestants are not vulnerable to this sort of counterattack precisely because they constitute the majority religion of Americans and Catholicism does not.

Lest it be thought, however, that a culture war is raging among American Catholics, it is worth noting that the Catholic Church, the Universal Church, as an institution, is a powerful centripetal force tending, therefore, to hold Catholics together in ways that Protestant denominations, with their weak ecclesiology, simply cannot. Furthermore, as suggested earlier, see *supra* note 247, the absence of highly visible links between progressives or liberals across denominational or confessional lines certainly should raise serious doubts as to the correctness of the notion that somehow all that matters, or matters significantly more than other factors or elements, is liberalism and traditionalism.

268. 438 U.S. 265 (1978).

protection the Religion Clauses afford non-Protestant religious minorities, a test that does not ignore the reality of the pan-Protestant nomos and, therefore, the Protestant Empire. Part IV will take up directly the substantive or normative dimensions of the question of proselytizing by Protestants in a Protestant Empire and why it may or may not warrant such protection, quite apart from the structural or institutional conclusion reached as to the status, as minorities themselves, of those seeking to proselytize non-Protestant minorities.

A. Minority Protection as a Constitutional Value

Careful analysis of evidence and facts readily available to all strongly suggests that the Protestant Empire is alive and well: the perduring reality of a pan-Protestant nomos in the present-day United States of America simply cannot be ignored. The question remains, however, as to whether Protestant groups and sects might constitute religious minorities in a Protestant Empire. Professor Berg's answer is simple and straightforward: "a minority-protection approach [to the Religion Clauses] . . . should not identify particular faiths as inherent minorities, but should adopt constitutional rules for various categories of disputes that work to protect and equalize minority rights, *whoever* the minority happens to be."²⁶⁹ He relies heavily on Justice Powell's opinion in *Bakke* which essentially treats all Americans, regardless of race or ethnicity, and regardless of history and experience, as *racial* minorities.²⁷⁰

But it cannot suffice to suppose that one can, through formalist, abstract notions that, as formalism tends to do, ignore the broad sweep of American religious history and experience, identify which religious groups might constitute a "minority" for purposes of constitutional protection.²⁷¹ At the

269. Berg, *supra* note 8, at 961-62. Professor Berg has identified a series of factors which in his opinion make it difficult to determine when a particular religious group constitutes a "minority." See *id.* at 941-60. Conspicuously missing from his inventory of factors or criteria is any hint or suggestion of the relevance or importance of the broad sweep of American religious history and experience, and how they might impact on his categories. This is particularly problematic given the undeniable historical reality of pan-Protestantism. If one wishes to deny the present reality, or the significance, of pan-Protestantism, it would seem appropriate to treat the history of pan-Protestantism in order to determine the extent to which it might or might not influence the question of the characterization of a particular religious group as a "minority." But it is not appropriate merely to ignore that history.

270. See *Bakke*, 438 U.S. 265.

271. One could argue that the idea of a Protestant Empire is a formalist abstraction, but for the fact that it better explains history and experience than any alternative analytical construct has managed to do. See MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (Harold M. Hyman & Leonard W. Levy ed., 1970); DICKENS, *supra* note 31, at 394; AHLSTROM, *supra* note 56, at 1-13. Marty and Ahlstrom might believe that the Protestant Empire no longer exists, although once it surely did, but Dickens believes that it still has force and power, as do I. See Newsom, *Protestant Empire*, *supra* note 1. The key, of course, and it is the central thesis of this paper, is that the pan-Protestant nomos continues to have enormous force, power, and meaning in the United States because it houses the majority of Americans. See *supra* note 198 and accompanying text.

Founding, the purpose of the Religion Clauses was to enable the states to continue the work of the Protestant Empire, begun in England and continuing on in the North American colonies, with the nascent Federal Government largely sitting on the sidelines.²⁷² American Protestants were still working out their rules of engagement, it having been clear for some time that the English Act of Toleration model²⁷³ would not easily work in the United States because no single individual Protestant group or denomination constituted a national majority, although collectively evangelical Protestants comprised a substantial majority of Americans with religious affiliations²⁷⁴ and thus provided the existential basis or predicate for an *American* pan-Protestant nomos. As a matter of size and of political power, all Protestant groups were “minorities” *somewhere* in the brand new United States—and still are, even though some particular groups may have constituted a majority in certain locations.²⁷⁵ But it is the pan-Protestant nomos which constituted or constructed a religious majority, albeit a majority comprised of Protestant groups that were, in a purely individualistic or denominational sense, “minorities,” that mattered. At the Founding, therefore, “minority” protection in a functional sense concerned the protection of majoritarian Protestant interests, and the facilitation of the development of the American pan-Protestant nomos, even as, thanks to the Reformation principle of private judgment, Protestants had splintered or fractured into so many groups that as a matter of Protestant denominational identification, one could say that Protestants were “minorities,” *although minorities embedded in a pan-Protestant nomos*.

If, as I have argued elsewhere, the central and defining goal of the Protestant Empire, the normative function of the pan-Protestant nomos, is conversion of non-Protestants to Protestantism, then, in the final analysis, taking into account the characteristics of the Protestant Empire, “[r]eligious freedom means merely the privilege to practice one’s religion until conversion to . . . Protestantism shall take place. And that freedom might or might not include the right to resist conversion but only for so long.”²⁷⁶ There is little here that easily makes the protection of *non-Protestant* religious minorities a matter of serious constitutional importance.

This understanding of religious freedom and “minority” protection, as it stood at the Founding, underwent an important modification in the middle third of the last century: “*allocate much of the work of the Anglo-American Reformation to the states and other institutions and not the federal government, but allocate none of the work of the Anglo-American Reformation to the officials, administrators and teachers in the common schools.*”²⁷⁷ This modification restrains at least some

272. Newsom, *Protestant Empire*, *supra* note 1, at 249-56.

273. *Id.* at 235-40 (for a discussion of the Act of Toleration).

274. *See* FINKE & STARK, *supra* note 39, at 29-30.

275. *Id.*

276. Newsom, *Some Kind of Religious Freedom*, *supra* note 1, at 879.

277. Newsom, *Protestant Empire*, *supra* note 1, at 263. I explored the implications of this modification in an earlier work. *See* Newsom, *Common School Religion*, *supra* note 1 (discussing two lines of cases, one beginning with *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) and the other beginning with *Zorach v. Clauson*, 343 U.S. 306 (1952)).

elements of the Protestant Empire, specifically those bent on using the common schools and their teachers and officials as a means of proselytizing non-Protestant public school children.

In a formalist sense, the modification of the original understanding of the Religion Clauses expands or increases the quantity or the quality of religious freedom, or both, at least for non-Protestants. In a functionalist sense, however, the modification may mean something rather different. I take it that powerful Protestant interests came to believe that they had to rein in some of the minions of the Protestant Empire.²⁷⁸ There was a culture war a half a century ago, a war that focused largely not on human sexuality but rather on issues of national security and the best way to achieve it.²⁷⁹ It may be, in short, that the modification merely changed the rules by which the Protestant Empire would manage or attend to its affairs.

It is difficult, however, not to think that non-Protestant religious minorities had *something* to do with the modification which apparently liberalized the constitutional rules generated by, or comprehended by, the Religion Clauses on the subject of religious liberty and freedom. After all, non-Protestant religious minorities brought the cases that forced the courts to consider and evaluate the claim that the workings of the Protestant Empire in the common schools palpably harmed those minorities.²⁸⁰ It may suffice merely to make the claim of constitutional harm in order to get the attention of the forces directing the work of the Protestant Empire. The reality of non-Protestant religious minorities stubbornly refusing to go along with the wishes, hopes, dreams, and aspirations of the Protestant Empire—most importantly conversion to Protestantism—and who do so by way of recourse to the courts in order to contest, restrain, resist, and otherwise beat back attempts to convert, tends to concentrate the mind of those seeking to further the interests of the Protestant Empire and causes them, at the very least, to reconsider their tactics and strategies for effecting this conversion, for bringing about Protestantization.

Interest-convergence theory²⁸¹ goes a long way in explaining the modification and subsequent development of American church-state law.²⁸² Thus, applying that theory here, it follows that the Twentieth Century refinement of the Religious Settlement made at the Founding occurred because the interests of powerful elements in the American Protestant Empire and the interests of non-Protestant religious minorities converged. National security, at least as understood by some, and religious freedom for non-

278. See Newsom, *Protestant Empire*, *supra* note 1, at 259-63.

279. *Id.*

280. See Newsom, *Common School Religion*, *supra* note 1, at 308-25 (elaborating on a taxonomy of harm).

281. For the definitive explication of the theory, see Bell, *supra* note 160.

282. See, e.g., Newsom, *Protestant Empire*, *supra* note 1, at 189 (stating that “[o]ur constitutional arrangements may or may not have advanced the interests of [religious minorities]. But the primary objective has been the interests of those in power [i.e. American Protestants].”).

Protestants, fueled the convergence. Any discussion of the protection of minority religions as a major goal or objective of the Religion Clauses ought to keep the foregoing in mind. Indeed, it seems inescapable that it is necessary to distinguish between Protestant “minorities” and non-Protestant religious minorities.

Thus, the underlying functional reality of what groups might or might not constitute a religious “minority” can be vividly seen in the following illustration: what constitutes suitable, adequate, or appropriate protection of non-Protestant minority religions depends upon a view or judgment about the goals and objectives of the Protestant empire, particularly conversion. Those committed to proselytizing non-Protestants—perhaps themselves Protestant minority groups in some instances—might suppose that protection of non-Protestant minority groups merely means that the Protestant Empire will be a “kinder and gentler” proselytizer. Those opposed to conversion, non-Protestant “minorities” and others sympathetic to the position of non-Protestant “minorities,” might reasonably suppose that protection of non-Protestant minorities means that the Protestant Empire and its Protestant “minorities,” will be held at bay, and their efforts to proselytize thwarted or restricted to such a degree as to make it likely that conversion will seldom, if ever, occur.²⁸³ Only by a careful distinction between Protestant and non-Protestant “minorities,” only by a respectful appreciation of the continuing reality of the pan-Protestant nomos, can one reach a sensible understanding of the reality of religion in America and the central role of religious conversion in that reality.

In the end, however, Professor Berg’s highly formalist approach, which ignores the possible relation between the past and the present, privileges proselytizing by Protestants, conferring upon this religious practice the constitutional protections accorded to religious “minorities,” notwithstanding the harm²⁸⁴ that such proselytizing by Protestants operating in a Protestant Empire may cause non-Protestants. Berg largely dismisses such harm, preferring to characterize it merely as “negative effects.”²⁸⁵ Berg’s approach in this regard strongly resembles, unfortunately, that of the state court judges who supported and upheld common school religion.²⁸⁶ The United States

283. Professor Berg’s insistence that religious freedom has both negative and affirmative dimensions, *see supra* notes 15-25 and accompanying text, essentially places him on the side of those committed to proselytizing non-Protestants, particularly if those engaged in that activity can somehow pass themselves off as religious “minorities” rather than what they really are: shock troops in the service of the Protestant Empire. I attend to this matter more fully in Part IV, *infra*.

284. *See* Newsom, *Common School Religion*, *supra* note 1, at 308-25 (elaborating on the taxonomy of the harm inflicted on non-Protestants by common school religion—Protestant prayers, Bible reading, and worship services conducted in the public schools by school teachers and officials).

285. *See* Berg, *supra* note 8, at 922.

286. *See* Newsom, *Common School Religion*, *supra* note 1, at 261-64. I do not mean to suggest that Professor Berg agrees that common school religion is acceptable. However, embracing a narrow and pinched view of actionable harm can create difficulties for religious

Supreme Court, of course, struck down common school religion in *Engel v. Vitale*²⁸⁷ and *School District v. Schempp*,²⁸⁸ decisions which hopefully remain good law.²⁸⁹ But the majoritarianism—of the pan-Protestant sort—implicit in the earlier state court decisions may not have left us. Indeed, it cannot have left us because America still remains a Protestant Empire.

B. Justice Powell's Formalist Deconstruction of Whites as Racial Minorities and Some of Its Implications

Justice Powell's opinion in *Regents of the University of California v. Bakke*²⁹⁰ did violence to racial justice. He ignored history, circumstance, and experience, preferring to invent a specious concocted American racial history out of whole cloth, in order to make the argument that "the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups."²⁹¹ Powell got to the heart of his argument:

the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. . . . [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply

minorities in that it gives more latitude to those wishing to impose upon religious minorities, whether through the means of common school religion or something else.

287. 370 U.S. 421 (1962).

288. 374 U.S. 203 (1963).

289. While the Supreme Court has not adequately addressed the multi-dimensional problems of harm inflicted on non-Protestants by proselytizing activities in the public schools, see Newsom, *Common School Religion*, *supra* note 1, at 308-325, the Court has not reduced harm, particularly psychological harm to school children, to a mere question of "negative effects."

290. 438 U.S. 265 (1978).

291. *Id.* at 292 (citation omitted).

does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.²⁹²

Powell's position has drawn a great deal of deserved criticism.²⁹³ And perhaps more to the point the Court has not embraced Powell's peculiar and perverse rewriting of American racial history. One searches in vain for any evidence that any of the Justices embraced Powell's position in *Grutter v. Bollinger*,²⁹⁴ even as Justice O'Connor, writing for the majority, "discuss[ed] Justice Powell's opinion in some detail,"²⁹⁵ and "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."²⁹⁶ Perhaps the scholarly criticism of Powell's position might have given the Court, or at least the *Grutter* majority, reason for pause.

John Hart Ely observed that the question of judicial competence, so important to Powell, was irrelevant because the task before the Court was not the creation of admissions standards, but rather to rule on standards prepared by California officials.²⁹⁷ More importantly, Professor Ely pointed out that white people, even if they constituted an agglomeration of minorities, nonetheless have, from time to time, acted as a "monolith" in order to oppress and victimize racial minorities, but that in *Bakke*, the admissions policies reflect a decision by whites "to ignore whatever differences exist among us, and to disadvantage white persons generally in order to advantage certain nonwhite minorities we feel have been treated unjustly in the past."²⁹⁸ Professor Ely's analysis, of course, depends upon some consideration of historical fact, and it also rejects the notion that all minorities, white or otherwise, have been treated badly. It is important to recall the "monolithic" nature of the oppression visited upon various racial "minorities."

Darren Lenard Hutchinson accused Justice Powell of "deconstruct[ing] the population of whites and re-describ[ing] this class as historically subordinate and, thus, in need of the very protections that the Court affords to persons of

292. *Id.* at 295-97 (citation omitted).

293. Powell has his supporters too. But, even they appear to shy away from Powell's characterization of whites as victims. See John C. Jeffries, Jr., *Bakke Revisited*, in 2003 THE SUPREME COURT REVIEW, 1, 5 (Dennis J. Hutchinson et al. eds., 2004) (referring to whites as "undifferentiated," thereby suggesting that the characterization of whites as a collection of differentiated minorities was, at least for purposes of *Bakke*, inapt). In defense of Powell's position, his supporters trotted out a parade of horrors that, at least in my view, no sane white person or any non-white person would ever in his or her right mind support or adopt, *id.* at 6, and another characterized racial oppression as nothing more than "stigmatization," see William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 98-99 (1987), as if, somehow, lynching, for example, is merely a form of stigmatizing.

294. 539 U.S. 306 (2003).

295. *Id.* at 323.

296. *Id.* at 325.

297. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 12-13 n.47 (1978).

298. *Id.* at 14 n.47.

color under an equal protection analysis.”²⁹⁹ Professor Hutchinson argued that Powell invented white victimhood in order to perpetuate white privilege, although in order to settle the legal question presented in the case, Powell had to deny the undeniable fact of white privilege.³⁰⁰ In other words, Powell invented a history to suit his purposes which, it would appear, were designed at least in part to legitimize white objections to affirmative action programs for racial minorities—the preordained goal.

Adam Winkler, like Ely and Hutchinson, made the point that Powell’s analysis “obscure[s] the central issues of race involved and of America’s racial past inherent in the affirmative action controversy.”³⁰¹ Again, building on the inescapable reality of American racial history, Winkler noted that the picture that Powell painted on the question of minorities, one of shifting sands of oppression:

does not conform with the historical reality of racial categories in America Historically blacks have been a deeply oppressed minority, with never more than a token share of social, economic, and political power. While the white Anglo-Saxon minority has certainly grown at the margins to incorporate white ethnics, the dominant white majority has stubbornly resisted the full inclusion of blacks. If the sands shift in some places, in others they barely budge. The durability of American racial subordination undermines Justice Powell’s fear of shifting sands.³⁰²

Winkler also correctly pointed out that Powell’s deconstruction of racial truth silenced the voices of racial minorities. If he sought to give voice to white resistance to affirmative action—programs adopted by whites—Powell “was silent as to how many members of racial and ethnic minorities feel about the unfairness and symbolic illegitimacy of governmental institutions as currently constituted.”³⁰³

When the dust settles, Powell’s desecration of racial truth served to privilege white interests. It is by no means clear, given American history, that this serves the cause of *racial* justice. His rewriting of history is intellectually dishonest to such a degree that it is surprising that Professor Berg would seek to use it even in the admittedly somewhat different context of religion. However, there is a common thread in both Powell’s approach and that offered up by Berg: both tend to downplay the importance or significance of history. But, as it is dangerous to do so in the context of race, it is just as dangerous to do so in the context of religion. The difficulty is that Powell’s

299. Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 641 (2003).

300. *Id.* at 642.

301. Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 924-25 (1995).

302. *Id.* at 935 (footnote omitted).

303. *Id.* at 938.

approach, as applied to the question of the protection of religious minorities, might well disserve the cause of *religious* justice by privileging some Protestants even though history counsels that no basis exists for doing so. Put somewhat differently, applying Powell's approach to the question at hand invites the invention, or the elaboration of the invention, of Protestant victimhood in order to perpetuate Protestant privilege even as one willfully ignores the "monolith" that is the pan-Protestant nomos. We have already seen that pietistic evangelical Protestants, subcultural religious groups, are quite adept at invention and contrivance for strategic structural and cultural reasons.³⁰⁴

The implications of the foregoing on the question of the identification of religious minorities for purposes of the Religion Clauses count for a great deal. Given the normative Protestant doctrine of private judgment and the "spirit of schism," part of any strategy to invent, create, maintain, and intensify the continuing struggle that lies at the heart of subcultural identity must entail the creation of "minorities" that can claim that they are the victims of an overreaching majority that is hostile to the belief and practices of the "minority," and applying Powell's *Bakke* strategy means that, victimhood, a tactical invention and pure flim-flam, becomes instead, a legal fact, all as part of a strategy to privilege the inventors of the victimhood. Blind acceptance of the claim that a religious minority that happens to be a numerical minority at any time or at any place is a minority, which appears to me to be the essence of Professor Berg's argument, beggars belief in precisely the same way that Justice Powell's assertion that all Americans are racial minorities cruelly distorts and trashes American racial history and experience.³⁰⁵ In the end all that Berg manages to do is to give pietistic evangelical Protestants one more weapon with which they can wage their struggle to protestantize the rest of us. The justice or the propriety of this is difficult to fathom.³⁰⁶

304. *See supra* notes 234-41 and accompanying text.

305. Professor Berg insists that his approach is one that is rooted in an understanding and appreciation of context. *See Berg, supra* note 8, at 962. The difficulty is that Powell's approach ultimately becomes an ahistorical and acontextual numbers game. It is difficult to see how Berg's proposal, given his embrace of Powell's analysis, can be anything different.

306. Professor Berg insists that he "can think of few better ways to 'exacerbate [religious] tensions' than to pick out some groups, characterize them in a certain contestable way, and define them as always dominant and in need of restraint. Blanket judgments about who is a majority and minority are overinclusive or underinclusive too often to serve as the basis for constitutional rules." *Id.* at 961.

It is true that some pietistic evangelical Protestants would bewail and bemoan the temerity of those who would suppose that these Protestants are part of a religious majority, namely, are an important element of a still powerful, meaningful, and significant pan-Protestant nomos. But they cannot hold the rest of us hostage to their own invention of victimhood. *See supra* notes 233-41 and accompanying text. Nor is it clear that we ought to place a "veil of ignorance" over the pan-Protestant nomos. *See Berg, supra* note 8, at 962. Finally, given the historical reality of pietistic evangelical Protestantism, *see supra* notes 31-35 and accompanying text, it is difficult to imagine that pietistic evangelical Protestants will ever *not* complain about resistance to their views on religious and other matters. Whether such resistance constitutes a "harm" visited upon pietistic evangelical Protestants for which there is a constitutional remedy is a matter I take up later. *See infra* notes 456-62 and accompanying text.

C. Towards a Defensible Approach to the Question Whether Protestant Groups and Sects Can Qualify as Religious Minorities

1. The Standard: Repudiation and Retaliation

There is, nonetheless, much to be said for the notion that *some* Protestant sects or groups might, from time to time, qualify as religious minorities, that these groups are not mere invention or artifice designed to advance the goals and ambitions of the Protestant Empire. The pan-Protestant nomos provides a basis upon which to think about this matter. Pan-Protestantism is essentially a consensus.³⁰⁷ Therefore, the first question becomes whether some Protestant groups might fall outside of the consensus, in that they have repudiated or otherwise rejected the consensus. The question is not merely whether these groups dissent from or disagree with the consensus, but whether they have gone so far in their faith, practice, or both, as to repudiate or undermine the consensus and, in the final analysis, the goals of the Protestant Empire. The second question becomes whether Protestants within the pan-Protestant consensus have retaliated against those Protestant groups, denominations, or sects that have repudiated that consensus.³⁰⁸ It would be reasonable to suppose that any Protestant groups that have repudiated the Protestant Empire, and against whom Protestants in the Protestant Empire nomos have retaliated because of that repudiation, ought to be treated as religious minorities.³⁰⁹ There are, or have been, such groups. The most notable are Christian Scientists, Jehovah's Witnesses, and Mormons. Perhaps also, one might include Seventh-Day Adventists.³¹⁰ These groups all sprang

307. I reject the notion that there is any such thing as Protestant orthodoxy, not merely because of the central Reformation doctrine of private judgment, but also because there is no ecclesiastical structure in which to house any such "orthodoxy." See *supra* notes 121-36 and accompanying text. But Protestants may legitimately claim that they might have, with respect to certain normative claims, an overarching consensus.

308. The requirement that there be retaliation helps settle the question whether a particular small Protestant group came into existence for strategic or tactical reasons, merely to take advantage of minority status, or whether it came into existence for principled, faith-driven, but not politically-driven, reasons. Retaliation strongly suggests that the target came into being for principled reasons, reasons nonetheless repugnant to those within the pan-Protestant nomos.

309. There remains the possibility that some groups may repudiate only a *part* of the pan-Protestant nomos or that only a *part* of normative pan-Protestantism might retaliate against a particular Protestant group. However, the question merely becomes whether the repudiation and the retaliation in such instances function essentially the same way that repudiation and retaliation do in the cases discussed here. In the final analysis, the practical real-world consequences of retaliation at the hands of Protestants or a substantial subset of Protestants are what matters.

310. Other Protestant groups, particularly those in the Anabaptist tradition, such as the Amish, may also qualify for treatment as religious minorities. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the State of Wisconsin must accommodate the practice of the Old Order Amish, in of withdrawing their children from public school at age fourteen

up in the revivalistic evangelical Protestant soil of Nineteenth Century America.³¹¹ All of them, at least at one point in their history, repudiated the Protestant Empire, the pan-Protestant nomos, and all of them have suffered, and may even continue to suffer, retaliation driven by their repudiations.

Anthony Hoekema identified five “distinctive traits of the cult.”³¹² They are (1) the presence of an extra-Scriptural (i.e. non-Biblical) source of authority, (2) the denial of the doctrine of justification by grace alone, (3) the devaluation of Christ, (4) the belief that the group is the exclusive community of the saved, and (5) a belief in the group’s central role in eschatology.³¹³ For him, repudiation is largely a matter of theological belief and practice. That certainly can be an element of repudiation in the sense that I have used the term. However, given the reality of the Protestant empire, which implicates both theology and politics, a satisfactory theory of repudiation would have to include both theology and politics.

That said, Hoekema’s analysis provides useful insights into the question whether small Protestant groups, denominations, or sects might qualify as religious minorities because, of the five traits, the fourth and fifth contain, in the context of a Protestant Empire, both theological and political elements. Both clearly imply repudiation of other Protestants, and both may well invite retaliation. However, at least two of the first three may also contribute to the dynamic of repudiation and retaliation.

I have previously noted that Biblicism forms a large part of the evangelical Protestant consensus and follows easily, even if not necessarily, from a Zwinglian understanding of the Eucharist, the consensus evangelical Protestant doctrine of the Eucharist.³¹⁴ Liturgical Protestants do not necessarily share this view of the role and function of Scripture, precisely because they are *liturgical* Protestants for whom liturgy also plays an important part in their faith. It is another question, of course, whether liturgical or liberal Protestants would be any less upset with claims of non-Biblical sources of authority that do not emanate from Christian Tradition than evangelical Protestants would be. Repudiation of the pan-Protestant nomos, therefore, could easily follow from a belief in the authority of extra-Scriptural text. Repudiation of Biblicism by a small Protestant group, denomination, or sect might well lead to retaliation³¹⁵ by evangelical Protestants, and other

notwithstanding a state compulsory law mandating attendance at school through the age of sixteen).

311. See generally LATOURETTE, *supra* note 96, at 1233, 1259-60 (indicating that Christian Science appeared in 1875, Jehovah’s Witnesses sometime before 1914, Mormonism in 1830, and Seventh-Day Adventism sometime after 1844).

312. ANTHONY A. HOEKEMA, THE FOUR MAJOR CULTS: CHRISTIAN SCIENCE, JEHOVAH’S WITNESSES, MORMONISM, SEVENTH-DAY ADVENTISM 377 (1963).

313. *Id.* at 378-85.

314. See *supra* notes 115-18 and accompanying text.

315. I use the term “retaliation” in both an active and a passive sense. Retaliation can mean the deliberate decision affirmatively to disadvantage or discriminate against a religious minority. See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (characterizing the laws in question not as neutral, but as targeted efforts to harass a religious

Protestants as well. Such retaliation, without more, might suffice to infuse repudiation of Biblicism with political content and might justify a conclusion that that repudiating group needs the protections that the status as a religious minority for purposes of the Religion Clauses would confer.

The doctrine of justification by grace alone also follows easily, even if not inexorably, from a Zwinglian understanding of the Eucharist. The doctrine holds that “man is saved by grace alone. Salvation . . . does not depend on any human or ecclesiastical co-operation with God.”³¹⁶ Evangelical Protestants may be of one mind on this doctrine,³¹⁷ but again, some liturgical Protestants might demur on the grounds that liturgy—meaning the *work* of the people³¹⁸—is the central act of Christian worship. Nonetheless, as is the case with the question of extra-Scriptural authority, liturgical Protestants might find fault with claims of “works-righteousness”³¹⁹ where the “works” entail something other than liturgy as Christians have traditionally practiced it. Perhaps the case is less strong in this instance than it is in the case of repudiation of Biblicism, but repudiation of the doctrine of *sola gratia* might, in appropriate cases, justify defining those small Protestant sects that repudiate this doctrine as religious minorities, particularly if Protestants sited in the pan-Protestant *nomos* retaliate against those Protestants who repudiate *sola gratia*, thereby adding the necessary political element to the repudiation.

The devaluation of Christ by a sect may not, in and of itself, offend many Protestants. Unitarians do not recognize the divinity of Jesus Christ,³²⁰ but it

minority). Retaliation in the passive sense might mean indifference, or lack of concern, even in the face of protests, objections, and requests for accommodation. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (refusing to compel an accommodation of a religious practice from the reach of a “neutral” law of general applicability). *Smith*, of course, was wrongly decided precisely because, *inter alia*, it unduly narrowed the reach or scope of actionable “retaliation.” I put the term “neutral” in parentheses, because I have the gravest of doubts that there is any such thing as a “neutral” law. *See* Newsom, *Protestant Empire*, *supra* note 1, at 188 (referring to “neutrality” as an “empty verbal formulation[]”).

316. HOEKEMA, *supra* note 312, at 380.

317. *See* HORTON, *supra* note 255, at 18-19.

318. *See* THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, *supra* note 54, at 830.

319. *See* HORTON, *supra* note 255, at 29.

320. *See* PRESCOTT BROWNING WINTERSTEEN, CHRISTOLOGY IN AMERICAN UNITARIANISM: AN ANTHOLOGY OF OUTSTANDING NINETEENTH AND TWENTIETH CENTURY UNITARIAN THEOLOGIANS, WITH COMMENTARY AND HISTORICAL BACKGROUND 139, 143 (1977) (insisting that “[t]he limitation of divinity to Christ, denying it to men, is a fault of the Trinitarian doctrine and leads to the creation of the device of transubstantiation through the Eucharist, to effect the union which is really there to begin with,” but also insisting that there is a “need for a close, specific, emotional relationship to a Jesus Christ of some sort”). It has been suggested that “Calvinism . . . has an inherent tendency to become unitarian.” George H. Williams, *Forward* to CHRISTOLOGY IN AMERICAN UNITARIANISM: AN ANTHOLOGY OF OUTSTANDING NINETEENTH AND TWENTIETH CENTURY UNITARIAN THEOLOGIANS, WITH COMMENTARY AND HISTORICAL BACKGROUND, *id.* at x, a point stunningly made by Wintersteen when he specifically links Trinitarianism and Transubstantiation. Put differently, denying Transubstantiation may well be tantamount to denying Trinitarianism, or at least opening the

is difficult to imagine Unitarianism as a persecuted sect having to endure the contempt that evangelical Protestants like Hoekema heap on targets like Christian Scientists, Jehovah's Witnesses, and Mormons, all of whom, in their own way, hold to a Unitarian-type belief.³²¹ For example, during the years leading up to the collapse of the established Congregational Church in Massachusetts, the Unitarians fared spectacularly well in divvying up the property spoils of that establishment.³²² Something other than the devaluation of Jesus Christ must explain the difference in reaction to Unitarians on the one hand, and the "cults" on the other hand. It would not seem appropriate, therefore, to define Unitarian "cult" Protestant groups as religious minorities without taking into account, therefore, those other factors, whatever they might be, that might fuel retaliation against those groups repudiating the pan-Protestant consensus on the nature of Jesus Christ.

If a small Protestant group, denomination, or sect sees itself as the "exclusive community of the saved," then other Protestants, of whatever stripe, evangelical, liturgical, liberal, secular, or otherwise, either cannot be saved at all, or can play no role in salvation. Such a belief completely undermines the claims of other Protestants and undermines the claims of the Protestant Empire as it has evolved in history. The direct attack on the Protestant Empire occasioned by repudiation of other Protestants as part of the salvation economy, having both theological and political dimensions, clearly justifies treating any small Protestant group, denomination, or sect that makes such an attack as a religious minority. The political dimension finds expression in the repudiation itself. Retaliation by Protestants who are part of the pan-Protestant nomos or consensus would still be required in order to trigger any constitutional protections available to religious minorities. But it would be fair to suppose that the retaliation need not be as great or pronounced as might well be the case where the repudiation does not, in and of itself, make a political statement regarding the role and legitimacy of the Protestant Empire.

The fifth trait closely follows from the fourth. A belief that a small Protestant group, denomination, or sect will play a central role in "the [immanent eschatological] climax of history"³²³ implicitly deprecates the role of other groups, including other Protestants. Given the Protestant Empire's belief in "purifying" social reform, those holding to the belief implicit in the

door to that latter denial. In this sense, one might well suppose that Unitarianism, therefore, may be part of the pan-Protestant nomos.

321. Mary Baker Eddy, the founder of Christian Science, "dismissed the Trinity as polytheism." WILLIAM J. WHALEN, *MINORITY RELIGIONS IN AMERICA* 47-48 (rev. ed. 1981). Jehovah's Witnesses "believe in the historicity of Jesus of Nazareth, [but] while they hold that he was the Christ, the Messiah who was to come, they do not elevate him to equality or identity with Jehovah." ROYSTON PIKE, *JEHOVAH'S WITNESSES: WHO THEY ARE, WHAT THEY TEACH, WHAT THEY DO* 36 (1954). Mormons apparently believe that gods become men, and men can become gods. WHALEN, *supra*, at 96. Trinitarianism cannot easily coexist with such a belief.

322. See JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 243-44 (2001).

323. See HOEKEMA, *supra* note 312, at 386.

fifth trait must necessarily repudiate the Protestant Empire and its goals. Repudiation on these grounds, as is the case with repudiation on the grounds of exclusive legitimacy, has both theological and political elements. Again, small Protestant groups holding to this belief deserve whatever protections the Religion Clauses accord religious minorities, and the retaliation necessary to trigger those protections need not be as great as might be required where the repudiation itself did not mount a political challenge to the pan-Protestant nomos.

2. Christian Science, Jehovah's Witnesses, Mormonism, and Seventh-Day Adventism

Christian Science, Jehovah's Witnesses, Mormonism, and Seventh-Day Adventism have been labeled "cults."³²⁴ These groups provide instructive case studies against which to assess the proposed standard: small Protestant groups, denominations, or sects repudiating the pan-Protestant political and theological nomos, and against whom Protestants sited within that nomos have retaliated should be treated as religious minorities entitled to whatever protections the Religion Clauses accord.

Christian Science came into being as "a church designed to commemorate the word and works of our Master, which should reinstate primitive Christianity and its lost element of healing."³²⁵ Hoekema declares that Christian Science believes that it is "[t]he only true church . . . [and that] all others flounder about in error and in darkness."³²⁶ Christian Science also teaches that illness is an illusion.³²⁷ Retaliation against Christian Science was immediate and emanated largely from the medical profession.³²⁸ Indeed, as late as the 1980s, "the issue of medical care for children was revived in a series of court cases . . . as Christian Science parents were accused of homicide, child abuse, and negligence. . . . These cases had mixed results."³²⁹ Yet, Christian Science has achieved a significant number of legal victories. "Christian Scientists can deduct the cost of practitioner's fees on their federal income tax forms as medical expenses. Members of the Church often obtain exemption from medical examinations and vaccinations. Christian Scientists can qualify for commissions as Protestant chaplains in the armed forces."³³⁰ While

324. *Id.*

325. ROBERT PEEL, *HEALTH AND MEDICINE IN THE CHRISTIAN SCIENCE TRADITION: PRINCIPLE, PRACTICE, AND CHALLENGE 1* (James P. Wind ed., 1988) (footnote omitted).

326. HOEKEMA, *supra* note 312, at 213.

327. *See* WHALEN, *supra* note 321, at 47. *See also id.* at 37 (stating that Christian Scientists "maintain that murder, cancer, death and dismemberment are but illusions of mortal mind.").

328. JAMES R. LEWIS, *CULTS IN AMERICA: A REFERENCE HANDBOOK 78* (1998).

329. *Id.* at 78-79.

330. WHALEN, *supra* note 321, at 40.

Christian Science may be in a period of decline in numbers, it “will probably remain an influential and wealthy minority religion in the U.S.”³³¹

Applying the suggested standard, repudiation of the pan-Protestant nomos by Christian Scientists has both theological and political aspects and is, therefore, squarely aimed at the Protestant Empire, and retaliation, while perhaps spotty, is real nonetheless, as the criminal prosecutions in the 1980s show. Thus, were a dispute to arise between Christian Scientists and the government, the Christian Scientists would be properly entitled to claim the status of a religious minority and claim whatever relief that status might confer.

Royston Pike writes that “[w]here [Jehovah’s Witnesses] differ most from other Christians is just where they are most strongly convinced that they are in the right and other Christians have gone wrong.”³³² Andrew Holden states that “[t]he Witnesses see themselves as members not just of a religious movement but of one that monopolises the word of God.”³³³ He also notes that they have “disdain for secular society”³³⁴ and are “disillusion[ed] with the world.”³³⁵ If a Jehovah’s Witness attends a Protestant or Catholic worship service, the offender faces the penalty of disfellowship, something which appears to resemble excommunication.³³⁶ Most famously, Jehovah’s Witnesses “refus[e] to serve in the armed forces, . . . refus[e] to recognize and/or salute the symbol of any organization, such as the Christian cross or the flag of the United States of America, and . . . refus[e] to participate in secular and religious holidays,” including Christmas, Easter, and the Fourth of July.³³⁷

Not surprisingly, “Jehovah’s Witnesses have been identified . . . as . . . *the* most persecuted Christian organization in the twentieth century.”³³⁸ Retaliation has been swift, sure, and perhaps even lethal. Indeed, even the United States Supreme Court lent support, at least temporarily, to state-sponsored efforts to repress and punish the refusal of Jehovah’s Witnesses to salute the flag. In *Minersville School District v. Gobitis*,³³⁹ the Court framed the question as follows: “whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.”³⁴⁰

331. *Id.* at 48.

332. PIKE, *supra* note 321, at 31.

333. ANDREW HOLDEN, JEHOVAH’S WITNESSES: PORTRAIT OF A CONTEMPORARY RELIGIOUS MOVEMENT 23 (2002).

334. *Id.* at 26.

335. *Id.* at 29.

336. WHALEN, *supra* note 321, at 64.

337. DANIEL CRONN-MILLS, A QUALITATIVE ANALYSIS OF THE JEHOVAH’S WITNESSES: THE RHETORIC, REALITY AND RELIGION IN THE WATCHTOWER SOCIETY 6 (1999).

338. *Id.*

339. 310 U.S. 586 (1940).

340. *Id.* at 595.

Posed in this fashion, the outcome was inevitable: the objecting Jehovah's Witnesses lost.

Gobitis, one of the great blunders perpetrated by the Court, had a short shelf life. Perhaps appalled by the violence against Jehovah's Witnesses engendered by *Gobitis*, the Court came to its senses three years later in *West Virginia State Board of Education v. Barnette*,³⁴¹ striking down a school board resolution making "refusal to salute the Flag . . . an Act of insubordination."³⁴² Whereas *Gobitis* had upheld the use of coercion in engendering patriotic beliefs, *Barnette* took the opposite tack, denying the state the right to use coercion to engender faith or belief. The Court said that "[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."³⁴³ The Court concluded that it was not. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."³⁴⁴ The fanatical persecution of Jehovah's Witnesses, by the State and by private individuals and groups, appears to have abated dramatically over the last sixty years, although all may not be well with Jehovah's Witnesses today.

Both repudiation and retaliation are clear beyond the shadow of a doubt, and were a dispute to arise between Jehovah's Witnesses and the government, they would be properly entitled to claim the status of a religious minority and claim whatever relief that status might confer.

Mormons believe that their religion,

was not a Christian Church but the one and only Christian Church. . . . The Mormon position has not changed much today. Mormonism teaches that all other Christian bodies lack any authority from God to teach or baptize and this includes all Catholic, Protestant, and Orthodox Churches. Without exception these Churches are considered apostate and counterfeit.³⁴⁵

The Mormons also taught and practiced polygamy.³⁴⁶

If Jehovah's Witnesses were the most persecuted Protestant group, denomination, or sect in the Twentieth Century, Mormons surely had to be the most persecuted Protestant group, denomination, or sect in the Nineteenth Century. Polygamy became the great *cause célèbre*—or perhaps *causus bellum*. In *Reynolds v. United States*,³⁴⁷ the Court thundered that "[p]olygamy has always been odious among the northern and western nations

341. 319 U.S. 624 (1943).

342. *Id.* at 626.

343. *Id.* at 640.

344. *Id.* at 642.

345. WHALEN, *supra* note 321, at 90-91.

346. *Id.* at 93 (stating that "[f]rom 1852 to 1890 the Mormon Church openly taught that a man might have many wives if he married them under the authority of the Church").

347. 98 U.S. 145 (1878).

of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”³⁴⁸ On this issue, Mormons were clearly outside the boundaries of Western cultural norms. They were white people acting like “Asiatic and African” people. In 1890, “[t]he president of the Mormon Church yielded . . . and forbade future plural marriages, but the Church today still considers polygamy a suspended doctrine and has never denied its divine sanction. Mormon writers brand the laws against polygamy as unconstitutional and an infringement on religious liberty.”³⁴⁹

However, Mormons are no longer a “despised and persecuted minority whose existence was considered a national problem and [who were] driven across the continent to the wastes of Utah in the middle of the [nineteenth] century.”³⁵⁰ Instead, the Mormon Church “is fast becoming a national Church of size, wealth, and prestige.”³⁵¹ In this sense, the Mormon situation resembles that of the Christian Scientists. However, the one large difference remains: Christian Scientists have felt the lash of the law for reason of their religious beliefs as late as the 1980s, if not subsequently. Once the Mormons yielded on the *practice* of polygamy, it would not appear that there has been much in the way of retaliation against the Mormons for over 100 years.³⁵² Nonetheless, application of the standard proposed here still leads to the conclusion that were a dispute to arise between Mormons and the government, they would be properly entitled to claim the status of a religious minority and claim whatever relief that status might confer. It might also be necessary, though, to evaluate any claim of retaliation rather carefully given the apparent lack of such claims for a very long period of time. But it remains the case that retaliation is retaliation, and, as was apparently true in the case of the Christian Scientists, animus towards a particular religion can simply flare up after having been quiescent because of the facts, ideas, and forces at play at any given moment in time.³⁵³

The Seventh-Day Adventists present a difficult case, perhaps for reasons that are not readily obvious. The helpful suggestion has been made that Seventh-Day Adventism contains three distinct perspectives, Evangelical Adventism, Traditional Adventism, and Liberal Adventism.³⁵⁴ A pluriform “cult” may be difficult to define or describe, particularly if one perspective,

348. *Id.* at 164.

349. WHALEN, *supra* note 321, at 93.

350. THOMAS F. O'DEA, *THE MORMONS 2* (Phoenix Books 1964) (1957).

351. WHALEN, *supra* note 321, at 100.

352. I confine my remarks to the Salt Lake City-based Mormon Church and do not take up fundamentalist offshoots of the Mormon Church which might practice polygamy. For a discussion of such groups, see *ENCYCLOPEDIA OF AMERICAN RELIGIONS*, *supra* note 38, at 133-37, 683-706.

353. Mitt Romney, the Mormon former governor of Massachusetts, ran for the 2008 Republican nomination for President of the United States and then later for the nomination for Vice President. He failed in both attempts. His religion may have been a factor working against him.

354. Kenneth R. Samples, *The Recent Truth About Seventh-day Adventism*, *CHRISTIANITY TODAY*, Feb. 5, 1990, at 18, 20-21.

Evangelical Adventism, tended to move Adventism closer to evangelical Protestant norms.

Perhaps Anthony Hoekema's treatment of this Protestant group, denomination, or sect sheds some light on the point. He concludes—reluctantly, it appears—that Seventh-Day Adventists exhibit the five distinctive traits that mark a “cult.”³⁵⁵ His stance towards Seventh-Day Adventism nonetheless stands in stark contrast to his uncompromising position vis-à-vis Christian Science, Jehovah's Witnesses, and Mormonism.³⁵⁶ Hoekema concludes that there are “soundly Scriptural elements in [Seventh-Day Adventist] teaching”³⁵⁷ and he “plead[s] with [his] friends, the Adventists, to repudiate the cultic features and unscriptural doctrines which mar Seventh-day Adventism and to return to sound, Biblical Christianity.”³⁵⁸ It would seem that Hoekema was appealing to Seventh-Day Adventists to move in the direction of the Evangelical Adventist party or perspective.

On the central question of repudiation, one commentator has stated that Seventh-Day Adventists believe that only “through the Adventist Church can the work of the Reformation be carried to its God-designed end,”³⁵⁹ and that “in general, Protestants have apostatized from the Reformation gospel and its implications and have thereby begun a landslide toward the papal curia.”³⁶⁰ This clearly constitutes a clear repudiation of the pan-Protestant *nomos* by the Seventh-Day Adventists. It may be that Evangelical Adventists do not make this argument, or at least do not stress or emphasize it. It would seem that Traditional Adventists well might. Thus, it may be difficult to claim that Adventism, as a general doctrinal matter, repudiates the Protestant Empire. However one might resolve the question of repudiation, it does not appear that Seventh-Day Adventists have suffered much, if at all, in the way of retaliation. Those “sound Scriptural elements” to which Hoekema referred, or the fact that Adventism may contain rather different perspectives on distinctive Adventist teachings, may have kept retaliation to a minimum.³⁶¹

Applying the standard proposed here, were a dispute to arise between Seventh-Day Adventists and the government, they nonetheless would be properly entitled to claim the status of a religious minority and claim whatever relief that status might confer, even though many elements in their teachings pass pan-Protestant muster.³⁶² As long as the belief in the exclusive status of

355. HOEKEMA, *supra* note 312, at 388-403.

356. *Id.* at 378-88.

357. *Id.* at 403.

358. *Id.* I assume that by the term “Biblical Christianity,” Hoekema means Protestant Christianity of the evangelical sort.

359. GEOFFREY J. PAXTON, *THE SHAKING OF ADVENTISM* 18 (1977).

360. *Id.* at 28.

361. There are some Protestant theologians, like Hoekema, who brand Seventh-Day Adventists as cultists. Others have “recently urged their fellow Protestants to take a second look at Adventism and perhaps reverse this judgment.” WHALEN, *supra* note 321, at 3.

362. It is perhaps worth noting that all four groups pass pan-Protestant muster on the question of the Eucharist. They are all rigidly Zwinglian in their doctrine and, therefore, are firmly in the Reformation tradition as understood by evangelical Protestants. Christian

Adventism as the remnant of Reformation—i.e. Protestant—religion remains “in” Adventism, then there is repudiation, and there is the possibility of retaliation because of it.

3. Other Pietistic Evangelical Protestants as Targets of Religious Prejudice and Bigotry

Professor Berg claims that pietistic evangelical Protestants nonetheless have been the targets of religious prejudice and bigotry, even though, presumably, they have not repudiated the legitimacy of the pan-Protestant nomos, and that they should be entitled to exemptions from rules and regulations that prohibit the free exercise of their religion. These predicate claims require careful examination for it is not clear that they can bear or withstand close scrutiny.

He first argues that “New York public school officials have repeatedly tried, with backing from courts, to exclude evangelical groups from meeting in the schools on the same terms as other voluntary groups.”³⁶³ Berg refers to four cases, *Brandon v. Board of Education*,³⁶⁴ *Lamb’s Chapel v. Center Moriches Union Free School District*,³⁶⁵ *Bronx Household of Faith v. Community School District No. 10*,³⁶⁶ and *Good News Club v. Milford Central School*.³⁶⁷ There is nothing, however, in these cases to suggest that New York public school officials excluded pietistic evangelical Protestant groups seeking to use public school property for specified religious uses while granting access to other religious groups for the same specified religious uses. Indeed, a fairer reading of the cases would suggest that New York public school officials have repeatedly tried to exclude religious groups from meeting in the schools on the same terms as other non-religious groups, but have not sought to target pietistic evangelical Protestants.

Scientists do not serve either bread or wine at their services. The object is merely to commemorate, not the Last Supper, but a morning meal that the Risen Christ shared with his disciples. HOEKEMA, *supra* note 312, at 214-15. Commemoration is the heart of the doctrine of Christian Science and thus it is Zwinglian, even if that which is commemorated is a meal different from the Last Supper. Jehovah’s Witnesses “maintain[] that the loaf of bread merely symbolizes Jesus’ fleshly body and that the cup of wine symbolizes Jesus’ blood.” *Id.* at 292. The Mormon “Sacrament rite extends Protestant ideas of the Lord’s Supper into a clear and affirmative memorialist position.” DOUGLAS J. DAVIES, AN INTRODUCTION TO MORMONISM 178 (2003). Seventh-Day Adventists view the Lord’s Supper “purely [as] a memorial and not a sacrament.” MALCOLM BULL & KEITH LOCKHART, SEEKING A SANCTUARY: SEVENTH-DAY ADVENTISM AND THE AMERICAN DREAM 154 (1989).

363. Berg, *supra* note 8, at 945.

364. 635 F.2d 971 (2d Cir. 1980).

365. 508 U.S. 384 (1993).

366. 127 F.3d 207 (2d Cir. 1997).

367. 533 U.S. 98 (2001). In response to *Good News Club*, The Bronx Household of Faith renewed their request, seeking a preliminary injunction to prevent the school officials from denying their request to use school property for purposes of religious worship and religious instruction. The Second Circuit upheld the grant of a preliminary injunction on the basis of its reading of the majority opinion in *Good News Club*, in *Bronx Household of Faith v. Board of Education*, 331 F.3d 342 (2d Cir. 2003) (affg grant of temporary injunction), *permanent injunction granted*, 400 F.Supp.2d 581 (S.D.N.Y. 2005), *vacated*, 492 F.3d 89 (2d Cir. 2007).

In *Brandon*, the plaintiffs, students at Guilderland High school, “sought declaratory relief and requested the court to enjoin the defendant[] [public school officials] from denying them a classroom for their prayer meetings.”³⁶⁸ The Second Circuit, in denying relief, carefully noted that “all religious groups are equally denied access to school facilities.”³⁶⁹ In *Lamb’s Chapel*, the Court upheld the right of a pietistic evangelical church to use school facilities in order to show a film series on the importance of “traditional” family values, noting that “the District had not opened its facilities to organizations similar to Lamb’s Chapel for religious purposes.”³⁷⁰ In *Bronx Household of Faith*, a case involving an epic struggle by an evangelical Protestant church to gain the use of certain school property for its Sunday worship services, the Second Circuit stated that the parties had stipulated that the School District has “never rent[ed] school facilities to non-school groups or organizations . . . for the purpose of conducting religious worship services and religious instruction on school premises.”³⁷¹ Finally, in *Good News Club*, the Supreme Court observed that “the school had not permitted other groups that provided religious instruction to use its limited public forum.”³⁷²

368. *Brandon*, 635 F.2d at 973.

369. *Id.* at 980. Berg notes that “*Brandon* was effectively reversed in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, 20 U.S.C. §§4071-4074).” Berg, *supra* note 8, at 945 n.131. It is worth pointing out, however, as the District Court indicated, that the prayer program sought in *Brandon* entailed the participation of adult volunteers who would supervise the prayer meetings. *Brandon v. Bd. of Educ.*, 487 F. Supp. 1219, 1222 (N.D.N.Y. 1980), *aff’d*, 635 F.2d 971 (2d Cir. 1980) *superseded by statute*, Equal Access Act, 20 U.S.C. §§4071-4072 (1984). The Equal Access Act requires that student-initiated meetings entitled to the protections of the Act “are not directed, controlled, conducted, or regularly attended by ‘nonschool persons.’” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990) (quoting 20 U.S.C. §4071(c)(5)). It would seem reasonable to suppose that the exclusion of “nonschool persons” operates to counter, to one degree or another, the impression that the meetings have some sort of official imprimatur. The point, therefore, is hardly a minor or technical one.

370. *Lamb’s Chapel*, 508 U.S. at 389-90. Admittedly, the Court found this point to be irrelevant:

[t]hat all religions and all uses for religious purposes are treated alike under [the applicable school district regulation], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

Id. at 393. Whether relevant or not, it is not fair to suggest that the school district, in singling out religious groups, was only singling out pietistic evangelical Protestant groups.

371. *Bronx Household of Faith*, 127 F.3d at 211. When the church again sought permission to use school facilities for Sunday services subsequent to the decision of the Supreme Court in *Good News Club*, the Second Circuit noted, yet again, that “the School District has never granted an application seeking to use school facilities for religious services.” *Bronx Household of Faith*, 331 F.3d at 348.

372. *Good News Club*, 533 U.S. at 105.

Second, Berg argues that “sometimes religious views common in the general population are, in the eyes of [university] academic officials, unfamiliar, unattractive, and even worthy of restriction. A majority view in the broader culture may be a minority in the government institution acting in the particular case.”³⁷³ To make his point, he relies on three cases, *Rader v. Johnston*,³⁷⁴ *Bishop v. Aronov*,³⁷⁵ and *Axson-Flynn v. Johnson*,³⁷⁶ the first two being relevant to the present question.³⁷⁷ Once again, a careful reading of these cases suggests that even if it were true, and it may or may not be so, that university academic officials disliked certain religious views, it is by no means clear that the religious views at issue were “common in the general population.” It may be, however, that the religious views at issue were held by people who repudiated the pan-Protestant nomos, but that possibility is far from self-evident.

While “Nebraska’s overall population may include a high percentage of conservative Protestants,”³⁷⁸ that fact is of little to no consequence in *Rader*. The plaintiff, a student seeking an exemption from the parietal rule of a public university in Nebraska, wished to reside, for religious reasons, in a facility near the campus operated by the Christian Student Fellowship rather than in a university dormitory.³⁷⁹ The Fellowship was a pietistic evangelical Protestant group.³⁸⁰ Douglas R. Wermedal, the Assistant Director of Residence Life at the university, “who is also a Baptist minister,”³⁸¹ rejected the plaintiff’s petition “on the basis of his own ‘personal experience,’ knowledge of life in [university] residence halls, and ‘religious expertise.’”³⁸² Wermedal’s superiors supported his decision.³⁸³

373. Berg, *supra* note 8, at 948.

374. 924 F. Supp. 1540 (D. Neb. 1996).

375. 926 F.2d 1066 (11th Cir. 1991).

376. 356 F.3d 1277 (10th Cir. 2004).

377. *Axson-Flynn* involves a case brought by a Mormon against certain officials at the University of Utah. *Id.* at 1281. As such, the case does not involve pietistic evangelical Protestants falling within the boundaries of the American pan-Protestant nomos. See *supra* notes 345-53 and accompanying text. That said, even if one were to conclude that Mormons fall within that pan-Protestant consensus, the case is of little to no avail to Professor Berg. In *Axson-Flynn*, plaintiff sought relief from a requirement in her acting class that she use certain words that she found offensive to her faith. *Axson-Flynn*, 356 F.3d at 1280-83. Because the District Court granted the defendants’ motion for summary judgment, the case came up on appeal on a thin factual record—too thin to justify any large or grand conclusions about the supposed hostility of the relevant university officials to the plaintiff’s Mormon faith, a faith held by a majority of the general population of Utah. Indeed, a critical question in the case was whether the refusal to accede to the plaintiff’s request that she not be required to utter certain words in class rested on pedagogical concerns or on hostility to the plaintiff’s faith, and, on this question, the Tenth Circuit held that “there [was] a genuine issue of material fact as to whether Defendants’ justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination.” *Id.* at 1293.

378. Berg, *supra* note 8, at 947.

379. *Rader*, 924 F. Supp. at 1543.

380. *Id.* at 1544-45.

381. *Id.* at 1548.

382. *Id.*

383. *Id.*

There can be no doubt that Baptists are pietistic evangelical Christians.³⁸⁴ For all that we know Wermedal's superiors may also have been pietistic evangelical Christians. Second, there is no evidence in the case that "conservative" Nebraska citizens were up in arms over the parietal rule at issue in the case. One cannot say, without more information, that the university officials were intolerant of a position held by most Nebraskans. On the other hand, it may well be the case that the Fellowship had repudiated the pan-Protestant nomos, a moral universe in which the university officials may have well resided. Furthermore, it may also well be the case that these officials sought to retaliate against the Fellowship by routinely denying exemptions from the parietal rule sought by students desiring to reside in the Fellowship's facility.³⁸⁵ The fact that roughly one-third of the students nominally subject to the parietal rule were granted exemptions, for one reason or another,³⁸⁶ makes the retaliation, if such be the case, all the more odious—and actionable—under my suggested analysis.

In *Bishop*, University of Alabama officials directed plaintiff, a professor, to cease "the interjection of religious beliefs and/or preferences during instructional time periods and . . . the optional classes where a 'Christian Perspective' of an academic topic is delivered."³⁸⁷ In an "optional" class, the plaintiff had rejected evolution, and some of his students "complained about [the plaintiff's in-class] comments and the after-class meeting."³⁸⁸ In order to make his point regarding *Bishop*, Berg claims that "most Alabamians likely believe in divine creation rather than evolution."³⁸⁹ He fails, however, to consider the possibility that some people, including some in Alabama, might believe in both. And perhaps more importantly, students at the University complained. At the very least, a fair accounting of the case would suppose that not only university officials, but at least some university students in addition, complained about the professor's remarks and sought relief. Furthermore, it may well be that the university officials reacted not necessarily because of their own personal views about evolution, or about Alabamians who might reject evolution, but because of a concern for the views of what would be, if Berg is right, a religious minority—the complaining students.³⁹⁰

384. See BAIRD, *supra* note 121, at 521-28.

385. *Rader*, 924 F. Supp. at 1548 (stating that "after 1991, every petition for exemption submitted . . . by freshman students requesting permission to reside at [the Fellowship facility] has been denied . . . [and that in] 1994 several [Fellowship] officials met with . . . [university] administrators regarding [the university's] practice of denying petitions for exceptions to live at [the Fellowship facility]").

386. *Id.* at 1546-47.

387. *Bishop v. Aronov*, 926 F.2d 1066, 1069 (11th Cir. 1991).

388. *Id.*

389. Berg, *supra* note 8, at 947.

390. The Eleventh Circuit was sensitive to the rights of the complaining students. *Bishop*, 926 F.2d at 1074 (expressing concern about "the coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid" and noting that "[t]he University's interest is most obvious when student complaints suggest apparent coercion—even when not intended by the professor"). A second, and perhaps related, concern

Third, Professor Berg argues that in *Mozert v. Hawkins County Board of Education*,³⁹¹ fundamentalist parents were wrongly denied the right “to withdraw their children from particular [public school] classes or assignments they found objectionable.”³⁹² Specifically, the plaintiffs complained that the reading textbooks assigned to their children teach values that are “contrary” to their religious beliefs.³⁹³ Berg believes that “there were ways to accommodate both the families’ and the school’s interests.”³⁹⁴ This is not at all self-evident, as the facts of the case make plain.

The *Mozert* plaintiffs did “not belong to a single church or denomination, but all consider[ed] themselves born again Christians. . . . There was evidence that other members of their churches, and even their pastors, d[id] not agree with their position in this case.”³⁹⁵ Given the foundational Reformation principle of private judgment, such a circumstance hardly seems special or unique. And herein lies the problem: any number of pietistic evangelical Protestants, could, in the name of private judgment, decide that, taken together, all of the elements, subjects, topics, and pedagogy in a basic reading series, or in all basic reading series reasonably available to the public schools which their children attended, violated their collective religious beliefs. Add to this the very real possibility that those from religious traditions outside of pietistic evangelical Protestantism could mount their own objections to the materials. The result would be that there would be nothing from which the schools could teach without at least one parent objecting that the books inculcated values at odds with the beliefs of the parents.

Judge Boggs, concurring, observed that “[i]t is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students’ individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment).”³⁹⁶ “[L]ocal, rough and ready adjustments” can be effective only where relatively few parents press the point. But there is no guarantee that such would be the case in many, if not most, school districts, particularly those in which the children come from a wide variety of religious backgrounds. No easily identifiable constitutional

involves “the University’s authority to reasonably control the content of its curriculum, particularly that content imparted during class time.” *Id.*

391. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

392. Berg, *supra* note 8, at 969 (footnote omitted). This may not be an altogether proper characterization of what the plaintiffs were seeking in this case. Judge Boggs, concurring, stated that he believed the court “finds that the plaintiffs actually want a school system that affirmatively teaches the correctness of their religion, and prevents other students from mentioning contrary ideas.” *Mozert*, 827 F.2d at 1074. Judge Boggs disagreed with this characterization of the relief sought by the plaintiffs, *id.* at 1075, but, given the intractable difficulties of accommodation, as I discuss herein, this characterization may actually be correct, in practical terms. Of course, if every parent could have her way, then, of course, the public schools would have to shut down. The solution is to deny the remedy sought by the *Mozert* plaintiffs, whatever “form” it might or might not take.

393. *Mozert*, 827 F.2d at 1060.

394. Berg, *supra* note 8, at 969 (footnote omitted).

395. *Mozert*, 827 F.2d at 1061.

396. *Id.* at 1080.

basis exists to accommodate one set of parents to the exclusion of others. Establishment Clause and Equal Protection difficulties seem insurmountable.³⁹⁷

Whatever might be the situation in contemporary America regarding retaliation against pietistic evangelical Protestants who have not repudiated the pan-Protestant nomos, Professor Berg fails to make the case that the phenomenon complained of exists. It is altogether possible however, that pietistic evangelical Protestants appear to be targets because they may largely be the only ones pressing for accommodations of one sort or another. Even so, Berg has not shown that resistance to their pushing the envelope is aimed at them because of animus against their religious beliefs.

There is one aspect of the belief system of pietistic evangelical Protestantism which may, however, blur the distinction suggested above. At a strategic level, some decision-makers might object to the mere fact that pushing and pressing might create administrative headaches. At the level of religious belief, some decision-makers might indeed object to the pushing and pressing because they dislike the religious belief system of pietistic evangelical Protestantism. At the level of principle not necessarily rooted in a religious belief system, however, some decision-makers might object because they believe that the pressing and pushing harms innocent third parties who merely wish to be left alone. There is, perhaps, something to be said for the first level, perhaps something for the second as well, but a great deal for the third. The question of proselytizing which I now take up, provides a useful vehicle for exploring what is the most problematic aspect of Professor Berg's article; namely his sanguine and blasé approach to the harm that proselytizing, particularly by pietistic evangelical Protestants, causes to their targets.³⁹⁸

Here we get to one of the central difficulties of the Protestant Empire: the belief that the only true religion is one form or another of Protestantism *and* that non-Protestants need to be converted to Protestantism, *and* that Protestants possess the divine right (or the divine duty) to bring this about, by one means or another, although it is important to keep in mind the subtle interplay between coercion and suasion that typifies the American Protestant Empire.

397. Judge Kennedy, concurring, found compelling pedagogical reasons for denying the relief sought and also found a compelling state interest in avoiding religious divisiveness, which would be engendered if the plaintiffs' children were permitted to opt out of the classes in which the "offending" reading texts were being used, or if plaintiffs could demand "that the courts compel the schools to sift out of their teaching everything inconsistent with [their] doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." *Id.* at 1070-73.

398. Professor Berg claims that "[i]f courts and commentators recognize that . . . there is a substantial minority-oriented case in favor of aid [to religious education], then this Article will have served a worthwhile purpose." Berg, *supra* note 8, at 1000. While I flatly disagree that there is any such case, this subject lies beyond the scope of this article. However, I do intend to address the question of school voucher programs in a subsequent article.

IV. THE MODE AND MANNER OF PROTESTANTIZATION, AND THE IMPROPRIETY OF PROSELYTIZING IN THE COMMON SCHOOLS

Protestantization is, in the final analysis, the central goal and objective of the Protestant Empire.³⁹⁹ The question is by what means shall this goal be accomplished. As this part will demonstrate, essentially three strategies present themselves, approaches that line up rather nicely with the major divisions in American Protestantism. For pietistic evangelical Protestants, a persistent and aggressive evangelization, not unfairly called proselytizing, would appear to be the preferred strategy. For liberal evangelical Protestants, an appeal to reason, given their rationalist roots, would be the preferred strategy. For liturgical Protestants, evangelism based on words and actions both, that is, something more than verbal proclamation or speech, constitutes the preferred approach to Protestantization.

These three modes, styles, or strategies generate and produce rather different results when examined from the perspective or point of view of the targets or objects of Protestantization. Proclamation can easily become nothing more than bullying and hectoring, a verbal form of coercion and abuse. And nowhere is this problem more likely and more severe than in the public schools where peer pressure and the fear of stigma, ostracism, —and worse—can be particularly intense.⁴⁰⁰ And the problem presents itself both in the cases of common school religion and, for want of a better term, equal access common school religion.⁴⁰¹

Appeals to reason, on the other hand, are not as likely to give rise to the kind of bullying that proselytizing in the pietistic evangelical Protestant fashion does. The whole point of an appeal to reason is to lower the temperature, rather than raising it. A pietistic evangelical Protestant school child might well say “Susie and Johnny, if you are Christians, then why aren’t you coming to my [equal access] club’s Bible study meeting today, Wednesday, right after classes let out for the day?” Complaints have been leveled against this sort of hectoring and the isolation, stigma, and abuse that all too often follow in its train.⁴⁰²

399. *See supra* notes 31-35 and accompanying text.

400. *See* FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSIDENTS* 7-18 (1999); *See also* ROBERT S. ALLEY, *WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS* (1996) (discussing instances of harassment of those objecting to religious exercises in the public schools).

401. RAVITCH, *supra* note 400, at 72 (noting that “[a]t some schools, groups meeting pursuant to the [Equal Access] Act can contribute to . . . ingroup-outgroup dynamics”).

402. One writer has carefully documented the unmistakable and undeniable tendency of pietistic evangelical Protestants to embrace and execute a particularly aggressive style of proselytizing, a style not demonstrated by the two other forms of Protestantism. *See* CAROL BARNER-BARRY, *CONTEMPORARY PAGANISM: MINORITY RELIGIONS IN A MAJORITARIAN AMERICA* 173, 187 (2005) (stating that pietistic evangelical Protestants “are . . . those most likely to demand religious conformity or harass the adherents of minority religions on the theory that the end justifies the means” and that “the most blatant abuses impacting minority religions . . . tend to occur in communities or regions where the overwhelming majority of the residents

No complaints have been made, as far as this writer can tell, because one school child said, if said at all, “Susie and Johnny, if you were Christians and had a brain in your heads, you would come to my [equal access] club’s meeting today, Wednesday, right after classes let out for the day, where we will discuss the idea of God as seen through the prism or lens of natural reason.” Such a statement would be entirely inappropriate, because of the explicit insult, but also because liberal evangelical Protestants do not appear to have fostered equal access clubs. In any event, it is unlikely that such an encounter has taken place, and evangelism based on both words and actions does not appear to have given rise to complaints either. It is most unlikely that the following has happened at all: “Susie and Johnny, if you are Christians, then why aren’t you coming to my [equal access] club’s meeting today, Wednesday, right after classes let out for the day, where we will organize a food drive for the poor because such social activism, along with the proclaiming the Word of God, particularly in the Sunday liturgy in our churches, which you should also attend if you are Christians, helps us bear witness to God.”⁴⁰³ Again, it does not appear that liturgical Protestants have established equal access clubs either.

It is proselytizing by public school children in the pietistic evangelical Protestant style that causes the problem. The other styles simply do not. This Part will first briefly review the sources and bases of these three styles. It will then consider, in light of Professor Berg’s remarkable argument in support of proselytizing in the public schools, the right of families to control the spiritual formation of their children free from interference by the direct or indirect instrumentality of the common schools and will demonstrate that this right to control, essentially the right to be left alone, trumps and takes priority over any claimed Free Exercise—or Free Speech—right of either a religious majority or religious minority to proselytize, to interfere with the countervailing right of privacy.

A. The Theology of Christian Evangelism

Joel Nichols recounts that “[pietistic e]vangelical Protestants perceive evangelism primarily as proclamation.”⁴⁰⁴ This conclusion easily—but not necessarily—follows from the Zwinglian understanding of the Eucharist, an understanding embraced by evangelical Protestantism.⁴⁰⁵ The search for a substitute Divine or Holy substance can lead many to embrace a rigid Biblicism. The Bible can be manifested in the world through both word and deed. However, the great tendency of pietistic evangelical Protestantism is to

belong to [pietistic] evangelical Protestant sects.”). Barner-Barry also has carefully documented the large number of complaints that such aggressiveness has engendered. *See id. passim*.

403. It would appear that all of the miscreants that Barner-Barry describes are pietistic evangelical Protestants. *See id. passim*.

404. Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT’L L. REV. 563, 568 (1998).

405. *See supra* notes 60-66 and accompanying text.

emphasize word, and therefore, to stress proclamation as the means of conversion.

Long ago, Robert Baird argued that “the preaching of evangelical ministers” was a means of “advanc[ing] . . . truth.”⁴⁰⁶ However, it is not clear now, and it was not clear then, that proclamation was to be solely the work of pietistic evangelical ministers. Indeed, it is fair to say that the duty to proclaim, to evangelize, and to proselytize, applies to pietistic evangelical clergy and laity alike.⁴⁰⁷ A “loosely knit coalition of individuals, churches, and parachurch organizations” came together in 1974 to propound The Lausanne Covenant.⁴⁰⁸ Convened by Dr. Billy Graham, The Lausanne Covenant fairly represents the views of pietistic evangelical Protestants, clerical and lay. Nichols tells us “Evangelism itself is the proclamation of the historical, biblical Christ as Saviour and Lord, with a view to persuading people to come to him personally.”⁴⁰⁹ Nichols continues: “[e]ssentially evangelism is proclamation. . . . Social action is not evangelism, nor is political liberation salvation. . . . [I]n this statement a clear difference from [Catholic teaching] is evidenced: evangelicals define evangelism as proclamation of the Gospel. . . . [S]ocio-political involvement is . . . a separate duty of Christians.”⁴¹⁰

Difficulties arise in interpreting The Lausanne Covenant when the question of who is a “Christian” presents itself. The general rule for all Christians appears to be that Christians should not evangelize other Christians. But everything turns, of course, on who is a “Christian.” Catholics take a liberal position on the question and hold that all baptized persons are Christians, whether they practice or not.⁴¹¹ Pietistic evangelical Protestants, on the other hand, appear to take a narrow view, believing that “*everyone* who does not fit the evangelical definition of a ‘Christian’ needs to be evangelized and converted.”⁴¹² We have already seen that many pietistic evangelical Protestants do not view Catholics as “Christians.”⁴¹³

Nichols observes that the narrow definition of who is a “Christian” leads to “criticism of [pietistic] evangelicals [that] often becomes most severe and most warranted.”⁴¹⁴ Nichols puts it all together, capturing, by the way, much of the essence of the American Protestant Empire:

In sum, the outstanding features of [pietistic] evangelical missiology are a strict definition of who is a Christian, [and] a strong belief in mission/witness as

406. BAIRD, *supra* note 121, at 654.

407. Nichols, *supra* note 404, at 600. Barner-Barry reports on a 2004 survey which showed that “[n]ine out of ten white evangelicals agree that it is important to spread their faith, and 81 percent . . . agree that it is important to convert others.” On the other hand, only 38 percent of [rationalistic] evangelical Protestants and liturgical Protestants believed that it is “important to convert others.” BARNER-BARRY, *supra* note 402, at 216.

408. Nichols, *supra* note 404, at 594.

409. *Id.* at 596 (quoting the Lausanne Covenant).

410. *Id.* at 596-97 (quoting the Lausanne Covenant).

411. *Id.* at 652.

412. *Id.* at 603.

413. *See supra* notes 253-55 and accompanying text.

414. Nichols, *supra* note 404, at 603.

proclamation rather than social action These features are nonnegotiables for [pietistic] evangelicals, who believe that the decision to become a Christian is primarily an individual [sic] that involves a change of heart and mind.

. . . .

However, [pietistic] evangelicals have precious little to say . . . about proper missionary techniques. Since they lack of principle of interreligious dialogue, they are much more susceptible to charges of proselytism. Without clearly stating what activities are licit and illicit for evangelism, [pietistic] evangelicals leave the door open to such charges. This problem is exacerbated if [pietistic] evangelicals adhere to a narrow definition of a Christian and consider nominal adherents of other Christian faiths (especially Catholicism and Orthodoxy) candidates for evangelism.⁴¹⁵

It becomes entirely clear that evangelical Protestants who evangelize—almost invariably pietistic evangelical Protestants—probably tend to take an aggressive, if not confrontational, stance on the matter of evangelization, and the duty to evangelize, nay proselytize, falls on clergy and laity alike.⁴¹⁶

By contrast, those Christian groups affiliated to one degree or another with the World Council of Churches take a different perspective on the matter of mission. Nichols notes that “[s]ome [pietistic] evangelical groups maintain membership in the WCC, while others do not.”⁴¹⁷ A document, *Ecumenical Affirmation: Mission and Evangelism*, issued by the WCC in 1982, “focuses on the importance of ecumenicity and unity in mission. . . . Infighting and competition between Christian groups is detrimental.”⁴¹⁸ Unlike pietistic evangelical Protestants, who stress proclamation,

the conciliar ecumenical movement defines evangelism more broadly Christians are called to announce the Good News in Christ, forgiveness, and the hope that Jesus brings. Christians are called to denounce sin and injustice in the world. Christians are called to console the widows and orphans, to heal and restore the broken-hearted. Christians are called to celebrate life in the midst of death.⁴¹⁹

415. *Id.* at 605.

416. Of course this persistent and aggressive approach to mission finds its origins in the unfolding of the English Reformation. See *supra* notes 31-35 and accompanying text, and the approach is alive and well. See Cecil M. Robeck, Jr., *Evangelicals and Catholics Together, in CATHOLICS AND EVANGELICALS: DO THEY SHARE A COMMON FUTURE?*, *supra* note 246, at 13, 21 (stating that “[pietistic] Evangelicals are taught from the day they are ‘born again’ to share their faith, proclaim the Gospel as best they can, and to bear witness to the One Who has saved them,” thus “[p]erhaps this accounts for their frequently aggressive and sometimes insensitive evangelistic fervor”).

417. Nichols, *supra* note 404, at 607.

418. *Id.* at 609.

419. *Id.* at 611.

For these Christian groups, there is a place for social activism in the work of evangelism.

On the important question of who is a “Christian,” or, perhaps more importantly, who is a “nominal Christian,” the WCC document provides little to no concrete guidance.⁴²⁰ Pietistic evangelical Protestants might view these Christians as appropriate targets for evangelization and mission⁴²¹ whereas other Christians might not. Other WCC documents stress that “evangeliz[ation] should not turn into ‘programmes for denominational aggrandizement.’”⁴²² Clearly aggressive efforts to convert non-Protestant Christians, nominal or not, in the face of objection from non-Protestant Christian groups, would appear to run afoul of the basic WCC approach.

Thomas Jefferson, the quintessential rationalist evangelical Protestant, laid out the strategy for conversion for this group of Protestants. Jefferson was of the view if people “candidly examine[d] themselves, and confess, [guided by the oracle of conscience] they would find that Unitarianism was really the religion of all.”⁴²³ Many liberal evangelical Protestants in the present age undoubtedly hold the same or a similar view: educated people would come to see the wisdom of joining a liberal evangelical Protestant group or denomination through their reason—reason unaided in the case of secularists and reason aided by God in the case of rationalists and liberals. The true heroes of liberal, rationalist, or secular Protestantism are teachers and educators who train the mind and stimulate, nurture, and encourage rational thinking.⁴²⁴

Nonetheless, it may well be that some Protestants, particularly those who have, for whatever reason, qualms about proselytizing, about stubborn, aggressive, and insistent proclamation whenever and wherever the opportunity presents itself, have “handed off” to other, more eager, Protestants the task of evangelization and mission in much the same way that some Protestants “handed off” to other Protestants a major piece of the work of anti-Catholicism.⁴²⁵ The pervasive nature of contemporary American anti-Catholicism strongly counsels against any easy assumption of indifference on the part of Protestants who do not engage in proselytizing. Those groups that do not engage in it may well be satisfied to have others bring converts into the pan-Protestant fold, and once in it, perhaps some will come to decide, on their own, to join those groups that do not actively evangelize.⁴²⁶ For liturgical

420. *Id.* at 616.

421. *Id.* at 610.

422. *Id.* at 619 (footnote omitted).

423. Letter from Thomas Jefferson to John Adams (Aug. 22, 1813), in XIII THE WRITINGS OF THOMAS JEFFERSON 349, 350 (Albert Ellery Bergh ed., 1907).

424. See MARSHALL, *supra* note 112, at 107 (stating that “[s]omeone has made the knowing [but in jest] remark that you do not need a doctor’s degree to be a Unitarian Universalist, but that it helps . . . [because] Unitarian Universalists are people who are expected to use their own minds and to arrive at their own rational conclusion”).

425. See *supra* notes 138-41 and accompanying text.

426. See BARNER-BARRY, *supra* note 402, at 212 (stating that “the more evangelical sects can act overtly in the political forum while the more restrained, ‘mainstream’ sects can just politely avert their eyes and still reap the benefits.”).

Protestants who hold to the basic WCC approach, their social activist-based witness may function as the draw for these converts, after their pietistic evangelical Protestant cousins have done the hard and gritty work of proselytizing, of softening up prospects for social activist- and liturgical-based witness. By the same token, liberal evangelical Protestants, religious or secular, may view proselytizing by pietistic evangelical Protestants as a first step in the process whereby reason leads the convert to liberal evangelical Protestantism.⁴²⁷

Disagreement among the three major American Protestant parties on the manner and mode of Protestantization, if it indeed be such, given the strategic benefit of “handing off,” does not spell the end of the Protestant Empire. Indeed, even if theological disagreements survive tactical agreement, there is good reason to think that the strategies of all three groups, taken together, are more likely to lead to conversion than any one conversion or protestantizing strategy standing alone, even if there is no “handing off” to pietistic evangelical Protestants. But from the point of view of non-Protestants, the strategic differences may matter a great deal. Works-based witness or social activism, or appeals to reason do not generate the same offense that proselytizing engenders. Neither social activism nor appeals to reason, without more, offend the right to be left alone. But stubborn, persistent and opportunistic proselytizing does. Thus proselytizing presents a stark conflict between the claim of pietistic evangelical Protestants of a right, presumably constitutionally protected, to proselytize and the claim that they are targets of a right, presumably constitutionally protected, to be left alone. It is at this point that Professor Berg’s analysis displays an uncritical acceptance of the first claimed right, at the expense of the second.

B. The Right of Families to Control the Spiritual Formation of Their Children

Berg takes the position that pietistic evangelical Protestant schoolchildren have the right to proselytize in the public schools.⁴²⁸ Two decisions of the

427. See ROBINSON, *supra* note 109, at 160 (stating that “converts from more conservative churches have continued to be an important basis of Unitarian growth”).

428. As noted earlier, *see supra* note 20 and accompanying text, Berg argues that “[u]nder any plausible constitutional interpretation, majority faiths have rights to practice and spread their beliefs in certain basic ways (even though there are, of course, many questions about the outer scope of religious freedom). Such basic rights are protected even when they have effects that members of minority faiths regard as negative.” Berg, *supra* note 8, at 922. He adds that “religious minorities also have a positive interest in practicing their faith, or expressing it, in governmental settings. A wholly secular public sphere can restrict the positive religious exercise of minorities.” *Id.* at 929. Whether viewed as a religious majority or a religious minority matters not a whit. What matters is the right of pietistic evangelical Protestants—lay and clerical alike—to proselytize, to engage in persistent and opportunistic proclamation of what they understand to be the word, notwithstanding the “negative effects” that such activities might cause the victims of this proselytizing. There are precious few groups that are not pietistic evangelical Protestants that claim that their religion entitles or requires them to engage in such practices. Perhaps some of the groups derived from certain Asian Indian religious

Court arguably support Berg's stance. *Board of Education v. Mergens*⁴²⁹ creates a great deal of latitude for pietistic evangelical Protestant schoolchildren, operating through the medium of student-based clubs, to proselytize their classmates.⁴³⁰ However, school districts are free to ban "noncurriculum related student groups"⁴³¹ altogether,⁴³² or to construct a *cordon sanitaire* around the normal school day and bar such clubs from meeting within one hour, for example, after the normal school day ends, giving an opportunity for most students to go home and thus escape at least some of the pressures to conform, to yield to the peer pressure exerted by those who would proselytize.

traditions might, *see* *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), and perhaps Muslims might, *see* Larry Poston, *The Future of Da'wab in North America*, in *MUSLIMS AND ISLAMIZATION IN NORTH AMERICA: PROBLEMS AND PROSPECTS* 383, 383-96 (Amber Haque ed., 1999) (suggesting that American Muslims, for a number of reasons, have failed to realize their missionary potential). But it is hard to imagine any other non-Protestant groups which might claim that they have a "positive interest in practicing their faith, or expressing it, in governmental settings." Berg, *supra* note 8, at 929. For all practical intents and purposes, therefore, only pietistic evangelical Protestants have this "positive interest."

Berg insists that "in some ways minority groups have a greater need than others to speak in public settings, including public schools. Minority groups must take their message out in public settings precisely because they cannot rely as heavily on established institutions, preexisting memberships, or quiet networking." *Id.* at 988. But Berg's meaning is clear: one of the strategic values that Berg seeks to defend is proselytizing. He insists that "because minority faiths lack a large preexisting base, they may find it important not just to speak in general, *but to seek converts in the public square.*" *Id.* at 989 (emphasis added).

Berg dismisses the argument that it is inappropriate to "single out student religious clubs for exclusion from general school-club programs in order to protect students of other faiths from any sort of exposure to the religious speech." *Id.* at 963. He argues that a "minority-protection approach should be much more hospitable to religious speech in public institutions [which should include public schools, of course] when it is done solely on the initiative of individuals, and is not sponsored by government." *Id.* at 987. To eliminate any doubt about his ultimate position, Berg insists that "[t]he protection of religious expression by private actors should extend to speech that occurs in public institutions, including the public schools." *Id.*

Berg's argument, as he frames it, seeks to accommodate proselytizing in other public settings and venues as well. For present purposes, it suffices to examine his claims with regard to proselytizing by schoolchildren.

429. 496 U.S. 226 (1990).

430. A survey of public school districts in the State of Ohio showed that "Christian clubs, usually of a Protestant nature, are the sole advocacy offerings in virtually all of the schools in which they are present." Dena S. Davis, *Religious Clubs in the Public Schools: What Happened after Mergens?*, 64 ALB. L. REV. 225, 238 (2000). While Professor Davis also states that there has not been "a tidal wave of religious evangelizing in public schools . . . [n]or . . . an upsurge of sectarian controversy or public conflict," *id.*, when pietistic evangelical Protestant "Equal Access" clubs are the only advocacy offerings available in a public school, then the likelihood of aggressive pietistic evangelical Protestant proselytizing that hectors, harasses, and annoys members of minority religions is simply too great to dismiss merely because outraged parents in Ohio have not filed suit to protect their children from such harassment.

431. *Mergens*, 496 U.S. at 237.

432. *Id.* at 241.

The Equal Access Act⁴³³ does allow school districts presumably to regulate and restrict such student-based clubs if they “materially and substantially interfere with the orderly conduct of educational activities,”⁴³⁴ and the Act provides that the United States cannot deny financial assistance to or limit the authority of a school “to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.”⁴³⁵ The upshot may be that school districts, in their discretion, could bar clubs whose members go too far in their efforts to proselytize their classmates. The problem, of course, is that some school districts might not take it upon themselves to protect non-Protestant schoolchildren from these efforts.

In a similar fashion, *Good News Club v. Milford Central School*⁴³⁶ creates an opportunity for pietistic evangelical Protestant schoolchildren, operating this time through the medium of outside-based clubs or groups, to proselytize their classmates. But again, school districts are free to bar outside clubs altogether, that is, school officials do not have to create or operate limited public fora,⁴³⁷ or they could create a *cordon sanitaire* as a way to provide some protection for non-Protestant schoolchildren.

Mergens and *Good News Club* are unfortunate decisions because they force school districts to weigh and balance the harm of proselytizing against the benefit of a rich variety of student-based and outside club activities that could enhance the learning experience of students, rather than leaving school officials free to chose enhancement and eschew proselytizing. Reliance on an interest in protecting public order or protecting non-Protestant schoolchildren from proselytizing as a basis for restraining such clubs—assuming that public school officials were prepared to protect, defend, and further these interests—may or may not pass legal muster. Neither *Mergens* nor *Good News Club* comes to grips with the reality of the harm that proselytizing inflicts on religious minorities,⁴³⁸ or, equally likely, the Justices supporting those decisions simply do not care about the harm caused by their rulings.⁴³⁹ And Berg seems content to dismiss the harm as mere “negative effects.”

433. 20 U.S.C.A. §§ 4071-4074 (West 2003).

434. 20 U.S.C.A. § 4071(c)(4) (West 2003).

435. 20 U.S.C.A. § 4071(f) (West 2003).

436. 533 U.S. 98 (2001).

437. *Id.* at 106.

438. See Newsom, *Common School Religion*, *supra* note 1, at 308-25.

439. Language in two cases would appear to support the right of school officials to ban “Equal Access” clubs that engage in harassing and bullying students. *See Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996) (suggesting that schools may deny recognition to student groups “that want to discriminate invidiously on the basis of religion, by excluding others out of bias or by stigmatizing those excluded”); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (stating that school officials “may . . . deny equal access to a student group . . . if the student group itself substantially interferes [through its own behavior or that of its members and supporters] with the school’s ability to maintain order and discipline”). This language may count for little if (1) schools do not act to deny equal access to clubs that are disruptive in the sense just supposed

As bad as *Mergens* and *Good News Club* are, Berg's argument seems to go even beyond the uncritical and excessive accommodationism of those two decisions. Berg appears to suggest not only that school districts should not be free to weigh the pros and cons of student-based and outside groups having access, for want of a better word, to target students, but that school officials should find themselves under an obligation to accommodate proselytizing because of the requirement supposedly imposed by the Religion Clauses.

Berg's Powellian invention⁴⁴⁰ of pietistic evangelical Protestant religious minorities provides something of a fig-leaf for his argument because pietistic evangelical Protestants thrive on manufacturing tension between themselves and the "other,"⁴⁴¹ only to claim that resistance to their claims by the "other" makes them, somehow, the victims of oppression, even though the claimants may have pushed the envelope to an unacceptable and unreasonable degree.⁴⁴² But it is only a fig leaf. In the final analysis, Berg proposes that the children of pietistic evangelical Protestants, who are in fact part of the religious majority in the United States, a majority rooted in an ancient and deeply embedded pan-Protestantism, have the right, verging on the absolute, to proselytize their public school classmates, with little to no regard for the psychological or status-based harm that proselytizing might cause the targets. There is little to no evidence to suggest that pietistic evangelical Protestant "Equal Access" student clubs are anything other than expressions of pan-Protestantism, at least as viewed from the evangelical Protestant perspective.

With regard to the right of families to control the spiritual formation of their children (hereinafter the "Family Right"), one could begin a consideration of the Family Right with *Meyer v. Nebraska*,⁴⁴³ *Pierce v. Society of Sisters*,⁴⁴⁴ and *Wisconsin v. Yoder*.⁴⁴⁵ These cases all involve the right of parents to "opt-out" of the common schools in favor of private or parochial schools, or even home schooling, in order to ensure that the spiritual formation of their children not be compromised or impeded by the workings of the public

above, or (2) even if schools act, the courts set aside their decision to deny recognition because the courts disagree with the conclusion that the student conduct is disruptive in fact.

440. The invention might just as properly be called Orwellian. See generally GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (describing a world in which truth was routinely denied, masked, and hidden through the manipulation of language and narrative by a cruel totalitarian dictatorship).

441. See *supra* notes 233-43 and accompanying text.

442. See *id.* (discussing the "Subcultural Identity" theory of religious strength). Given this theory, its *modus vivendi*, and its larger ramifications, it is particularly annoying, not to mention disingenuous and dishonest, when those pushing and prodding are held at bay, claiming that they are being oppressed for their religious views. But then, this is nothing more than the fundamental strategy and logic of the theory of subcultural identity at work, which pietistic evangelical Protestants have embraced, and the "other" would do well to remember that fact.

443. 262 U.S. 390 (1923).

444. 268 U.S. 510 (1925).

445. 406 U.S. 205 (1972).

schools. The right to opt out, however, has its costs, and many families cannot afford the cost of private school tuition.⁴⁴⁶

For the Family Right to have any practical value, therefore, the question of cost needs to be confronted head on. One answer might be tuition vouchers, whereby the right to opt out of the common schools is funded by the public.⁴⁴⁷ A second answer is that the Family Right operates in those cases where families send their children to public schools. For present purposes, this paper will analyze the Family Right as a counter to the supposed right of school children to use the direct or indirect instrumentality of the public schools to proselytize their fellow students.⁴⁴⁸ Children can make life difficult for religious minorities, without recourse to the instrumentality of the common schools. Majoritarian and peer group pressure, as expressed in unstructured and informal ways, in the playgrounds, hallways, classrooms, auditoriums, and other places on public school property where students gather, is simply a fact of life about which relatively little can be done. As I have indicated elsewhere, “[t]he relevant question is whether the state, *directly or indirectly*, makes matters worse.”⁴⁴⁹ It is the institutionalization of bullying and peer pressure by permitting student religious groups to meet on school grounds at times and under circumstances when other students—the targets—are vulnerable to pressure to join in the activities of these groups that gives rise to the offense. This is the core meaning of public school instrumentality: “accommodating” structured and organized activities that provide the occasion for a more focused and targeted proselytizing.

The Court has recognized the Family Right, as I have framed it. Justice Brennan, writing for the Court in *Edwards v. Aguillard*,⁴⁵⁰ stated that “[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”⁴⁵¹ To the extent that the reference to “the classroom” means, as it should, for policy reasons, those places where structured and organized activities take place, whether led by teachers, students, or outsiders, then this statement clearly tracks the Family Right as elaborated here.

446. See CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 284 (1988).

447. Using public funds to subvert, undermine, and possibly destroy the public schools requires serious thought. It is by no means self-evident that the destruction of the public schools serves the common good. This subject, however, lies beyond the scope of this paper, but I will take it up in a subsequent article.

448. The right of families to superintend the spiritual formation of their children, broadly conceived or understood, raises a series of difficult questions, particularly in connection with the issue of tolerance. A discussion of this matter, however, lies beyond the scope of this paper.

449. Newsom, *Common School Religion*, *supra* note 1, at 227.

450. 482 U.S. 578 (1987).

451. *Id.* at 584.

Similarly, in *Lee v. Weisman*,⁴⁵² Justice Kennedy, writing for the Court, ruled that “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.”⁴⁵³ Again, the family is emblematic of the “private sphere” and the public sphere includes, necessarily, the common schools when and as they operate to discharge their public, educational responsibilities, which must include structured and organized activities. It is of some interest that it takes a limited *public* forum to trigger the access requirements at issue in *Board of Education v. Mergens*,⁴⁵⁴ and *Good News Club v. Milford Central School*.⁴⁵⁵

The question, therefore, becomes not whether the Family Right exists, for it surely does—and has a constitutional warrant or dimension, but rather how it exists or functions when faced with the claimed right of school children to proselytize their fellow schoolmates. For any number of reasons, the former must trump the latter.

First, and foremost, the law ought to minimize harm. The psychological and status-based harm inflicted on families that practice or follow a minority religion is real and significant. It is not a mere trifle or figment of an overwrought imagination or excessively delicate sensitivities.⁴⁵⁶ I grant that, in some sense of the word, pietistic evangelical Protestant school children thwarted in their efforts to proselytize classmates who do not share their faith are “harmed.” But surely one cannot say that the harms are equal or equivalent.⁴⁵⁷ Most importantly, those bound and determined to light a pietistic evangelical Protestant fire in non-Protestant schoolchildren have alternatives. Pietistic evangelical Protestant parents can try to persuade other parents, one on one, to permit or allow their children to participate in organized group meetings for school aged children held in local or neighborhood pietistic evangelical Protestant churches. Such an approach, of course, provided there is no overreaching, respects the rights of both sets of parents.

Furthermore, given the history of overreaching by pietistic evangelical Protestants in the common schools,⁴⁵⁸ there is scant reason to prefer those seeking to restore that overreaching as against those seeking to avoid it. Put somewhat differently, given the relief, however limited, accorded religious minorities by the Revised Tentative Principle,⁴⁵⁹ which deprives pietistic evangelical Protestants of the *direct* instrumental assistance of the common schools in their efforts to proselytize American public schoolchildren, it would seem fitting and proper to require those who wish to proselytize to make the

452. 505 U.S. 577 (1992).

453. *Id.* at 589.

454. 496 U.S. 226, 237 (1990).

455. 533 U.S. 98, 106 (2001).

456. See Newsom, *Common School Religion*, *supra* note 1 *passim*.

457. See Newsom, *Local and State*, *supra* note 1, at 120-25 (discussing the problem of false equivalence, a problematic rhetorical device).

458. See Newsom, *Common School Religion*, *supra* note 1, at 223.

459. See Newsom, *Protestant Empire*, *supra* note 1, at 259-63.

positive or affirmative showing that that religious settlement was improper, and that it is the essence of the American character that every American ought to embrace Protestantism, especially pietistic evangelical Protestantism, *and* that those who are not pietistic evangelical Protestants assent to this proposition. Given the history of resistance to the outsized claims of pietistic evangelical Protestants,⁴⁶⁰ one supposes that pigs will fly before this assent is given. But, in the broader scheme of things, that is life.⁴⁶¹ Looking at this matter through a narrower lens, those seeking to protect their children from proselytizing are merely trying to preserve, in a real sense, the status quo. Those who wish to change it may well have the burden of proof and persuasion, not those seeking to preserve the Family Right.

It is this Family Right, therefore, which betrays the utter unreality of the view that religious speech is, categorically, no different from most, if not all other kinds of speech, precisely because in those instances there is no due process based right to be left alone which necessarily restricts the “free speech” rights of those who wish to interfere with such a right. Given the persistent reality of the pan-Protestant nomos and of the American Protestant Empire, the consequences of a formalistic blindness to truth are important and avoidable. Rather than accommodating a pietistic evangelical Protestantism bound and determined to make Protestants out of each and every American, in part by mischaracterizing itself as a coterie of minority religions, as Professor Berg would apparently have it, the proper role and function of the law should be to respect and protect (1) non-Protestant religious minorities, and (2) those Protestant religious minorities that have repudiated the pan-Protestant nomos and against whom Protestants who inhabit that nomos have taken retaliatory actions.

V. CONCLUSION

Professor Berg would have us believe that the American Protestant Empire no longer exists. His arguments, however, fall in the face of substantial evidence to the contrary. The vast and overwhelming majority of Americans believe in God.⁴⁶² Belief in God necessarily presupposes theology. It is unlikely that belief carries with it *no* thoughts about the nature and character of

460. See Newsom, *Common School Religion*, *supra* note 1, at 238-42.

461. On the very important matter, at least for some, of eternal salvation, those who refuse to give their assent might, if the pietistic evangelical Protestants are right, have some explaining to do when they come to stand at the Pearly Gates. But I suppose that people can decide for themselves to take their chances. After all, it could be that pietistic evangelical Protestants are not right, and that, in the final analysis, *they* might have some explaining to do to St. Peter. Settling this question is, obviously, beyond the reach and scope of this paper.

462. See BAYLOR INST., *supra* note 206, at 29 (indicating that 94.8% of Americans believe in God).

God,⁴⁶³ of the nature, purpose, and meaning of God's Creation, and the nature, purpose, and meaning of worship. One cannot say, therefore, that theology does not lie at the heart or the center of the believer.

Even the "culture wars" can be understood as a religious phenomenon, even if contrived, as an expression of a belief system, an expression of theology, in short. But it is surely amiss to suppose that disagreements over human sexuality and puritanical sexual codes somehow shape and define American theological discourse.⁴⁶⁴ But this would appear to be precisely Professor Berg's argument! To suppose that God, in some ultimate sense, is "about sex," or is more "about sex" than just about anything else, is to make a very large and contestable *theological* argument. It is precisely because the United States is a nation of believers in God, and that most of the believers are Protestants (mainly pietistic evangelical Protestants, with rationalistic or secular evangelical Protestants and liturgical Protestants thrown in for good measure) that the present reality of the Protestant Empire—a theologically-based understanding of American history, experience, culture, and society—continues unabated, although perhaps revised and modified on the margins from time to time. The interesting question, therefore, is not whether the Protestant Empire presently exists, for it surely does, or that it is an indispensable construct in understanding who we are as a nation, for it surely is, but rather its nature, purpose, and character over time.

Even though he rejects the central relevance and the continuing reality of the Protestant Empire, and hence the pan-Protestant *nomos*, Berg's arguments, particularly regarding proselytizing in the public schools (the focus in this article), ironically make the case for the continued existence of the American Protestant Empire. One cannot take seriously the claim that pietistic evangelical Protestant groups, that have not repudiated the norms of the pan-Protestant *nomos* and against whom those who construct and inhabit the *nomos* have not retaliated, are religious "minorities" in need of protection under the Religion Clauses. History and experience amply demonstrate that, in one sense, pietistic evangelical Protestants have always been "minorities." But no one could reasonably suppose that these Protestants have not been an important constituent part or element of the Anglo-American Protestant Empire as it has existed since the time of Henry VIII. An abiding truth about pietistic evangelical Protestants is their ability to create, construct, and invent tensions between themselves and others, including other Protestants, even when pietistic evangelical Protestants constitute an important element in a larger pan-Protestant *nomos* with which the pietistic evangelical Protestants need to exist in tension, in a dualism that traces back directly to the dualistic Eucharistic theology of Huldreich Zwingli.

463. *See id.* at 26-30 (discussing the four different theological conceptions of God found to be held by American believers: Authoritative God, Benevolent God, Critical God, and Distant God).

464. *See id.* at 31-50 (indicating that sexual morality is only one of a number of issues influenced by the conception of God held by the respondents in the Baylor Institute survey).

On the question of proselytizing in the common schools, therefore, Berg's argument, properly understood, comes to this: the law ought to accommodate the needs and desires of pietistic evangelical Protestants—or any Protestants, for that matter, who are, in fact, a part of a large pan-Protestant nomos, but who prefer to pretend that they exist in tension with at least certain elements in that nomos—to proselytize. And as a kind of a back up or reserve, he is apparently prepared to tolerate proselytizing by pietistic evangelical Protestants in the public schools even if they are understood or characterized as a majority religion.⁴⁶⁵ In other words, for Professor Berg, therefore, the law ought to advance the agenda of the Protestant Empire.⁴⁶⁶

Professor Berg and I stand on opposite sides of an important set of questions. I believe that the law ought to overthrow its allegiance to the Protestant Empire, its goals, objectives, plans, and works, and defend the rights of those that the Empire would, through the instrumentality of proselytizing by pietistic evangelical Protestants, seek to convert, to protestantize, that is, to carry on an important part of the work of the Protestant Empire. Professor Berg would have the law aid in that enterprise.

Two final comments close this essay. The first one points to further work to flow from the pen of this writer. The Catholic Church in America may be making a serious mistake—blunder, even—to the extent that it supports interpretations of the law that, in functional terms, advance the interests of the Protestant Empire. I think that the Church should be grateful for the likes of Mark Massa and Russell Shaw.⁴⁶⁷ They “get it;” they recognize, in their own way and fashion, the continuing real presence of the Protestant Empire. It is altogether appropriate that important American Catholic thinkers, like Massa and Shaw, understand this reality, for they can help to ensure that the American Catholic Church does not lose its way in a pan-Protestant nomos.

Second, I must say that Professor Berg has provided the occasion and the opportunity to examine closely the nature and character of pan-Protestantism, and for that I am grateful. While I strongly disagree with his conclusions, I appreciate his work, for on the matter of the Protestant Empire in general and the pan-Protestant nomos in particular, his work keeps me honest and deepens my conviction that the Protestant Empire continues to exert an outsized influence on American religion, culture, politics, and society, an unfortunate state of affairs to say the least.⁴⁶⁸

465. See *supra* note 20 and accompanying text.

466. Professor Berg also argues that there is a “substantial minority-oriented case in favor of” governmental aid to religious groups through such programs as school vouchers. Berg, *supra* note 8, at 1000. Full treatment of this claim lies beyond the scope of this paper, but I will address it in a subsequent article.

467. See *supra* notes 168-75 and accompanying text.

468. Elsewhere I have written that “[i]t is my ultimate judgment that the American Protestant Empire has largely been an unmitigated disaster for people who are not both white and Protestant” and that “[t]he American Protestant Empire needs to end.” Newsom, *Protestant Empire*, *supra* note 1, at 188 n.3. I continue to hold to this view more strongly than ever.

VI. ABSTRACT

This article responds to Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. Q. 919 (2004). He argues, *inter alia* that (1) the Protestant Empire is either gone, of little material consequence, or irrelevant, having been largely trumped by the “culture wars,” (2) that Protestant groups can be routinely treated as religious minorities, and (3) that religious minorities (and majorities) have a free exercise right to proselytize in the public schools.⁴⁶⁹

I address each of these three arguments in turn. With regard to the first, I conclude that the Protestant Empire still matters, largely because of the continuing and powerful present reality of the pan-Protestant nomos, a complex and dynamic relation between the various Protestant groups. This reality is rooted in considerations of Eucharistic theology, the central and most important element of Christian theology, Protestant or Catholic, and some of the social, cultural, and political implications and consequences of theology. Among these are the rather distinctive worldviews that separate Protestants, especially evangelical Protestants,⁴⁷⁰ and Catholics. I also conclude, in this connection, that the so-called “culture wars,” while real, are, to a large extent, the result of contrivance and invention. Theology, again Eucharistic theology, plays a large role in the construction of a Subcultural Identity by pietistic evangelical Protestants, the result being that these Protestants have a marked tendency to manufacture—and ratchet up—tension between themselves and the “other,” the “outgroup,” or the target of their endeavors in this regard. Notwithstanding the supposed agreement between socially conservative Catholics and pietistic evangelical Protestants on the desirability of imposing a puritanical sexual code on all Americans, the deep and profound theological differences between the two groups continue to exist, and indeed may have been underscored by this cooperation.

Building on the treatment of the first issue, I then address the question whether Protestant groups can be classified as religious minorities. I conclude that, as a general rule, they cannot: given the fissiparous nature of Protestantism, it is fair to say that at some time and at some place all American Protestants are minorities. But this view overlooks the reality of the pan-Protestant nomos which, in practical terms, makes aggregates of religious minorities into a powerful religious majority. Given this reality, Justice

469. Professor Berg also argues that there is a strong case for taxpayer-supported school voucher programs. I do not take up this argument in this article, but propose to discuss it in a separate article that I plan on writing this summer.

470. I address the difficult question of the proper classification or description of various Protestant groups. I conclude that Protestants fall into two groups and that one of those groups subdivides. The first and largest group, in demographic terms, is evangelical Protestants—Protestants who hold to a purely symbolic understanding of the Eucharist. This group in turn subdivides into two groups, pietists and rationalists. The second group consists of liturgical Protestants—Protestants who hold to a wide range of views about the Eucharist, from a purely memorialist view, just like evangelical Protestants, to a position not too terribly unlike the Catholic doctrine of transubstantiation, with a number of positions “in between.”

Powell's indefensible view in *Regents of California v. Bakke*, 438 U.S. 265 (1978) of whites as *racial* minorities, thereby overlooking concerted action by whites as against non-whites, is no less indefensible when applied to the question of classification or identification of *religious* minorities, given, once again, the present reality of the pan-Protestant nomos by and through which various Protestant groups, each of which might be, as noted above, at some time and in some place, a religious minority, can and do act in concert. Nonetheless, there is a basis for treating some Protestant groups and sects as religious minorities, and I set out a test for determining which groups might qualify. The test has two parts: (1) repudiation by the group in question of the pan-Protestant nomos, and (2) retaliation against the group by one or more of the constituent elements of that pan-Protestant nomos. I discuss Christian Science, Jehovah's Witnesses, Mormonism, and Seventh-Day Adventism and show that the first three, and perhaps the fourth as well, qualify as religious minorities. I also show that some other groups that Professor Berg would treat as religious minorities might or might not pass the test.

Finally, I consider the matter of proselytizing and, consistent with my view of the importance of theology, review the theological underpinnings of evangelism by pietistic evangelical Protestants, rationalist or secular evangelical Protestants, and by liturgical Protestants, noting the rather different approach taken by each of these classes of Protestants. I conclude that what appears to be Professor Berg's support for proselytizing in the common schools runs up against the right of families to control the spiritual formation of their children, and that the claimed "free exercise" right to proselytize in the public schools should yield to the latter right.

Simply put, when all is said and done, theology matters: it is difficult, if not impossible, to arrive at defensible judgments about the Religion Clauses if theology, especially Eucharistic theology, is bracketed or otherwise ignored. This proposition is central to all of my writings about the American Protestant Empire.