Yet Another Threat To Religious Freedom?: Continuity and Change in the Church-State Debate

"Our freedom as Americans to practice our religious liberties and express our faith in God is under assault as never before," asserted conservative political strategist and founder of the Faith and Freedom Coalition, Ralph Reed in March 2014.[1] His comments echoed those of Alabama Governor George Wallace who, fifty years earlier, warned of a "deliberate design to subordinate the American people, their faith, their customs, and their religious traditions to a godless state."[2] Similar claims of religious freedom under attack abound in the history of the debate about the relationship between church and state in the United States; in fact in 1984, when the issue of religion in public life was particularly high on the nation's political agenda, *New York Times* reporter Walter Goodman noted: "[o]n neither side of the issue have the arguments changed much in two decades."[3] On the surface, comparing the quotes from Wallace and Reed suggests Goodman's observation could equally be applied to the thirty years which followed. Such a reading would, however, misunderstand the half century of church-state debate encompassed by their words and ignore the impact of the major social, political, religious, and legal changes which occurred within the United States in that period. Focussing on the experience of conservative Christians, this article argues that the apparent continuity in the language they employed to discuss church-state relations masked significant changes in the arguments made, changes which reflected conservative Christians' responses

[1] Quoted in Sarah Posner, "The Movie the Faithful Want You To See," *Politico*, 9 March 2014 (http://www.politico.com/magazine/story/2014/03/persecution-cpac-movie-the-faithful-want-you-to-see-104471, accessed 31 October 2014).

[2] US House of Representatives. Committee on the Judiciary. Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools, 88th Congress, 2nd Session (1964), 855 (hereafter House Hearings).

[3] Walter Goodman, "Strongest Effort Yet to Put Organised Prayer in Schools," *New York Times*, 8 March 1984.

to social changes in the nation, the impact of such changes for their view of their place in American society, and their assessment of the arguments which would best aid in achieving their political and policy aims.[4]

To show how and why the arguments changed, the article explores two key themes that remained central throughout fifty years of church-state debates: people of faith as a community besieged and the language of religious liberty. To show how conservative Christians' use of these themes were influenced by the social and cultural changes in wider society, the article focuses on three periods when the public debate about church and state was high on the national agenda: the response to the Supreme Court's rulings in *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963) that school-sponsored prayer and Bible reading in the public schools violated the Establishment Clause of the First Amendment[5]; the debate in the 1980s about school prayer and religion in American life which coalesced around a new prayer amendment proposed by President Reagan; and the debates from 2011 onwards about same-sex marriage and the right of religious businesses, charities, and non-profits to exemption from the requirement to provide contraception to

[4] Arguments made by secular and religious liberals show similar surface continuities; this article's focus on conservative Christians is not to suggest otherwise. As used here, the term "conservative Christian" encompasses those groups and individuals which, from the 1980s onwards, came to be associated with the Religious Right, particularly Fundamentalist and Evangelical Protestants and conservative Catholics. While recognising the changing relationships between these groups throughout the period discussed here, the article also notes clear similarities in the arguments made by them even at times of deepest public disagreement. The focus is on such arguments rather than on the level of cooperation between the different groups at any given time. See generally, Robert Wuthnow, *The Restructuring of American Religion* (Princeton: Princeton University Press, 1988).

[5] *Engel v. Vitale* 370 US 411 (1962) (school prayer) and *Abington School District v. Schempp* 374 U.S. 203 (1963) (Bible reading).

female employees under Obamacare. Analysing each theme across fifty years, including the manner and context in which they were employed, suggests that the continuity in the language is important because of the changes which it both encompassed and obscured.

Faith under attack was a common immediate response to the Court's ruling in *Engel*.[6] Senator Barry Goldwater (R-AZ) claimed that the Court had ruled "against God," Congressman John Bell Williams (D-MS) accused the Court and its supporters of "a deliberate and carefully planned conspiracy to substitute materialism for spiritual values," while Cardinal Francis Spellman, Catholic Archbishop of New York, argued both that the decision, "strikes at the heart of the Godly tradition in which America's children have for so long been raised" and that it represented "the establishment of a new religion of secularism."[7] The National Association of Evangelicals, the nation's leading organisation representing evangelical Christians, echoed these sentiments, editorializing that *Engel*, "opened a Pandora's box of secularistic influences" which threatened the place of religion in American life.[8] The Court's decision in *Schempp* the following year prompted a similar response. Opening the 1964 House Judiciary Committee hearings on a possible school prayer amendment to the Constitution, Congressman Frank Becker (R-NY), who became the leading figure in the battle to overturn the Court's rulings, accused a "fraternity of cynics, atheists, and unbelievers" of seeking to "abolish any mention of the deity in our schools and other public institutions." Claims that faith were under attack were made so frequently during the

[6] For a good introduction to the case and its background see Bruce Dierenfield, *The Battle Over School Prayer: How* Engel v. Vitale *Changed America* (Lawrence, Kansas: University Press of Kansas, 2007).

[7] "Goldwater Hits Court Decision," *Washington Post*, 1 July 1962; *Congressional Record*, 108th Congress, 26 June 1962, 11,719; "Clerics, Politicians Hit Court Prayer Decision," *Washington Post*, 26 June 1962; "Spellman Scores Ruling on Prayer," *New York Times*, 3 August 1962.

[8] "Editorial," *United Evangelical Action*, October 1962.

hearings that committee members were moved to request that speakers address only the constitutional issues rather than making sweeping statements about the impending danger to faith allegedly posed by *Engel* and *Schempp*.[9]

By the time school prayer returned to the national political agenda in the early 1980s, conservative Christians' sense of endangerment had been deepened by battles with, among others, the media over religious broadcasting, with school boards over textbooks and sex education in public schools, and with the Internal Revenue Service over tax-exempt status for religious schools in relation to their policies on race.[10] Leading evangelicals including theologian Francis Schaeffer and political activist and founder of Christian advocacy group Christian Voice, Robert Grant, argued that liberal, secular society was incompatible with Christianity and that Christians needed to fight back to preserve their way of life.[11] Such sentiments were a regular part of the debate about church and state in the 1980s. Jerry Falwell, founder of conservative Christian action group Moral Majority, Senator Orrin Hatch (R-UT), Education Secretary William Bennett, and the National Association of Evangelicals,

[9] House Hearings, 223, 224, 265 (hereafter House Hearings). For a good introduction to the hearings see John Laubach, *School Prayers: Congress, the Courts and the Public* (Washington DC: Public Affairs Press, 1969).

[10] On the media see Gabriel Rossman, "Hollywood and Jerusalem: Christian Conservatives and the Media," in Steven Brint and Jean Reith Schroedel (Eds.), *Evangelicals and Democracy in America, Volume 1: Religion and Society* (New York: Russell Sage Foundation, 2009), 304-328; on education see James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991), 197-224 and Janice Irvine, *Talk About Sex: The Battles Over Sex Education in the United States* (London: University of California Press, 2002); on race see Joseph Crespino, "Civil Rights and the Religious Right," in Bruce Shulman and Julian Zelizer, *Rightward Bound: Making America Conservative in the 1970s* (London: Harvard University Press, 2008), 90-105.

[11] See Daniel K. Williams, *God's Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010), 137-43 (Schaeffer), 164-7 (Christian Voice).

were among those accusing the government of "hostility" towards people of faith.[12] Political activist Ralph Reed exclaimed, "sadly, there is a war going on against religious freedom in America," evangelical activist Beverley LaHaye described the Supreme Court's 1985 decision striking down Alabama's "moment of silence" law as an "act of war against this nation's religious heritage," and Falwell lamented that it had become acceptable to label fundamentalists as "Bible bangers."[13] Whether in response to Reagan's proposed prayer amendment or broader church-state trends in the 1980s, the arguments offered by conservative Christians echoed those of the 1960s and further embedded them into the heart of the church-state debate.

In early 2014, Roman Catholic Bishop Thomas Tobin, leader of the Providence Diocese, warned residents of Rhode Island of "yet another threat to religious freedom."[14] Tobin's particular target was his state's same-sex marriage law but his language tied the issue of same-sex marriage to the language of the earlier debates. In 2006, two-thirds of Protestants reported feeling "embattled" and commentary from a range of groups and individuals echoed

[12] Ari Goldman, "One Leader Calls for Retribution, Others For Accord on Prayer Issue," *New York Times*, 21 March 1984; Steven Roberts, "Senate Backers Agree to Wording Changes in Prayer Amendment," *New York Times*, 7 March 1984; "Bennett Assails Justice on 'Disdain For Religion'," *New York Times*, 3 July 1984; Dudley Clendinen, "Conservative Christians Again Take Issue of Religion in Schools to Court," *New York Times*, 28 February 1986; Joseph Piccione, "Prayer: Anchored in the Soil of Liberty," *New York Times*, 12 March 1984.

[13] Reed and LaHaye quoted in Dierenfield, 189, 198. Falwell quoted in Williams, 223. *Wallace v. Jaffree* 472 US 38 (1985).

[14] Quoted in David Klepper, "RI Gay Marriage Bill May Hinge on Religious Clauses," *Boston Globe*, 11 March 2014.

the sentiment that people of faith were under threat in the new century.[15] "Hostility towards people of faith is very real," declared conservative advocacy group, the Center for Arizona Policy, in defence of the state's so-called religious freedom bill, while the Congressional Prayer Caucus Foundation claimed to be "[a]larmed by the concerted effort to remove God from every vestige of government and to silence the voice of millions."[16] Evangelical author and campaigner Ravi Zacharias neatly summarized the views of many in the debates when he declared, "over the years the Christian faith has been targeted by rabid secularization."[17]

But the consistency of use of the language of danger by conservative Christians masked a significant change in the suggested source of that threat. In the aftermath of *Engel* and *Schempp*, Communists and atheists were primarily identified as the source of the danger. From the perspective of many conservative Christians, mainstream American life and culture was under threat from small groups of un-American or anti-American troublemakers. In his testimony, Becker conflated "cynics" and "secularists" with "atheists and unbelievers" and

[15] Robert Putnam and David Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon & Schuster, 2010), 114.

[16] Howard Fischer, "Calls Multiply for Veto of 'Religious Freedom' Bill From GOP, Business Groups," *Arizona Capitol Times*, 23 February 2014 (http://azcapitoltimes.com/news/2014/02/23/sb1062-veto-calls-multiply-from-gop-business-groups/, accessed 28 March 2014); Sarah Posner, "Are the Culture Wars Over? Look at the States," *Religion Dispatches*, 3 April 2013 (http://religiondispatches.org/are-the-culture-wars-over-look-at-the-states/, accessed 18 July 2013).

[17] Sarah Posner, "An Abbreviated Guide to 5 Arguments Against Contraceptive Coverage in Obamacare," *Religion Dispatches*, 4 February 2014 (http://religiondispatches.org/an-abbreviated-guide-to-5-arguments-against-contraceptive-coverage-in-obamacare/, accessed 28 March 2014). Conservative Christians saw campaigns against people of faith in myriad local and national concerns including the military, the Boy Scout Movement, public education, and social service provision.

concluded, "I find my enthusiasm increased by the nature and personnel of the opposition."[18] Actor Victor Jory, Congressman William Colmer (D-MS), and New York Catholic Bishop Fulton Sheen were among those making links between the Court's rulings and the Soviet Union, echoing Cardinal Francis McIntyre's comment that, "our American heritage of philosophy, of religion and of freedom [is] being abandoned in imitation of Soviet philosophy, of Soviet materialism, and of Soviet-regimented liberty."[19] A long history of deep connections between Protestantism and American culture had been reinforced since the end of World War Two by a religious revival which brought more people into the nation's churches and by conservative Protestant churches' strong anti-Communist stance.[20] On the eve of *Engel*, religion was central to mainstream American life and culture and thus it made sense to conservative Christians that challenges to hitherto widespread practices, such as school prayer and Bible reading, could only come from those individuals and small groups

[18] House Hearings, 212, 223-4.

[19] "3 in Films Back School Prayer," *New York Times*, 15 May 1964; "Clerics, Politicians Hit Court Prayer Decision," *Washington Post*, 26 June 1962; House Hearings, 826; McIntyre quoted in Dierenfield, 180.

[20] David Sehat has convincingly argued that not only did evangelicals identify with mainstream American culture, but that historically they shaped and controlled it, through what he terms a "moral establishment." The connection between conservative Protestantism and mainstream culture at the time of *Engel* and *Schempp* was, in Sehat's view, part of a long-standing history of Protestant cultural dominance that the Supreme Court cases began to dismantle. David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, Updated Ed., 2016). Scholars differ about how deep or genuine the 1950s religious revival was but agree that there were at least the signs of increased religious adherence. Wuthnow, 12-53; Robert Ellwood, *The Fifties Spiritual Marketplace: American Religion in a Decade of Conflict* (New Brunswick: Rutgers University Press, 1997); Axel Schäfer, *Countercultural Conservatives: American Evangelicalism From the Postwar Revival to the New Christian Right* (London: University of Wisconsin Press, 2011), 42-68.

who stood outside or against traditional American values.[21] Arguably the most shocking element of *Engel* and *Schempp* for conservative Christians was that the Court sided with such outsiders.

By the 1970s, however, and consistently into the twenty-first century, conservative Christians increasingly portrayed themselves as "cultural counterrevolutionaries," as a besieged minority under attack from the broader American culture with which they had so closely identified less than a decade earlier.[22] As *Christianity Today* warned its readers in 1973 in response to *Roe v. Wade*: "Christians should accustom themselves to the thought that the American state no longer supports, in any meaningful sense, the laws of God, and prepare themselves spiritually for the prospect that it may one day formally repudiate them and turn against those who seek to live by them."[23] Atheists and Communists remained suspect, but more frequently broader American culture, and a creeping secularism, were identified as the major source of danger to those of faith.[24] William Wholean, executive director of the

[21] Prayer and Bible reading in the nation's public schools were common by the mid-twentieth century but were not without controversy historically. See Diane Ravitch, *The Great School Wars, New York City, 1805-1973: A History of Public Schools as Battlefields of Social Change* (New York: Basic Books, 1974); Steven K. Green, *The Bible, The School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* (New York: Oxford University Press, 2012). The anti-Catholic sentiment deeply rooted in these controversies continued into the 1960s and kept evangelicals and Catholics separate despite often similar views on the role of religion generally in American life as expressed by leading church figures.

[22] Andrew Hartman, *A War For the Soul of America: A History of the Culture Wars* (Chicago: University of Chicago Press, 2015), 79.

[23] "Abortion and the Court," *Christianity Today*, 16 February 1973, 32-33, quoted in Williams, 119.

[24] In a four part series on the emerging Religious Right in 1980, the *New York Times* observed that "secular humanism" had become "a catch word" and "shorthand for the forces of evil." Kenneth Briggs, "Evangelicals

Connecticut Catholic Conference, criticised his state's "silent meditation" bill, arguing, "By pushing secular humanism they've made that the state religion." Senator Jesse Helms (R-NC) portrayed his campaigns of the 1970s and 1980s against abortion and school bussing and for school prayer as "basically ... about faith in God versus Secular Humanism." And in the 1983 Senate Judiciary Committee hearings on what became the Equal Access Act, Ted Pantaleo of the Freedom Council, testified that such action was necessary as the result of "a ruthless, clawing and deep-seated anti-God conviction ... perpetrated by humanists."[25] As Sarah Barringer Gordon has argued, such critiques drew heavily on the language of anti-Communism of an earlier era, and often sought to equate the danger of secular humanism to that of Communism.[26] But the critiques of the 1970s and later clearly reflected a new sense of religious conservatives' alienation from the culture around them, in stark contrast to their situation in the 1960s. The language of danger and threat remained consistent, but the source of that threat had changed dramatically.

Turning to Politics Fear Moral Slide Imperils Nation," N*ew York Times*, 19 August 1980; Dudley Cleninden, "'Christian New Right's' Rush to Power," *New York Times*, 18 August 1980.

[25] L. Fellows, "Connecticut Passes Bill for 'Meditation' in Public Schools," *New York Times*, 23 May 1975; Francis Clines, "Helms Takes Aim at 'Secular Humanism'," *New York Times*, 28 June 1981; US Senate. Committee on the Judiciary. Hearings on S.815 and S.1059, Bills Addressing the Statutory Protection of the Right of Students to Meet Voluntarily on Public School Grounds During Extracurricular Periods for Religious Purposes. 98th Congress, 1st Session (1983), 238, 242-3. The Equal Access Act (1984) guaranteed student religious groups the right to meet on school grounds equally with secular activities groups.

[26] Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (London: Belknap Press, 2010), 141-7. On the failure of conservative Christians' attempts to reform society in this era see David Courtwright, *No Right Turn: Conservative Politics in Liberal America* (London: Harvard University Press, 2010).

Broad changes in the secular and religious culture of the time offer a partial explanation for conservative Christians' continued use over half a century of the language of besiegement and hostility.[27] Americans in the 1960s experienced major challenges to the norms of American life as it had been experienced in the previous decades. Increased opportunities for women, sexual liberation, the development of the contraceptive pill, the expansion of higher education, the arrival of pot and LSD, the hippie culture, abortion, and criticism of figures and institutions of authority both within and outside the family, posed fundamental challenges to conservative Christians' views about authority, family, and morality.[28] In the following decade, the impact of Watergate and Vietnam, the Supreme Court's ruling on abortion in *Roe v. Wade* (1973), changes in education policy, including sex education in schools, and the rise of the gay rights movement added new issues to those already pushing against the beliefs and values held by religious conservatives who found, for the first time in the post-war period, that they were pitted against mainstream American culture.[29] The politically-active evangelical Protestants and conservative Catholics who constituted the so-called Religious Right actively drew on this sense of alienation to motivate their constituents to political action on issues as diverse as abortion and American nuclear policy from the 1980s onwards, a legacy continued into the debates on same-sex marriage and Obamacare.

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[27] This view underpins theories of the so-called "culture wars" in American politics and society. See Hunter, *Culture Wars*; Andrew Hartman, *A War For the Soul of America*. On events of this period generally see Wuthnow, *The Restructuring of American Religion*.

[28] For a good introduction to the 1960s generally see Maurice Isserman and Michael Kazin, *America Divided: The Civil War of the 1960s* (New York: Oxford University Press, 2000) (for changes relating to religion specifically see 241-259). For a good introduction to issues relating to the family, see Robert Self, *All in the Family: The Realignment of American Democracy* (New York: Farr, Strauss, and Giroux, 2012).

[29] See Wuthnow, 191-214; Williams, 133-58; George Marsden, *Evangelicalism and Modern America* (Grand Rapids: William B. Eerdmans Publishing Co., 1984); Hartman, *A War For the Soul of America*.

These developments were compounded by changes in the religious universe. The 1960s saw a massive decline in church attendance among Catholics and mainline Protestants in particular, a decline made all the more stark by the high attendance figures of the previous decade. Declining numbers, divisions within churches about engagement in social issues, and the rise of non-traditional faith systems including Transcendental Meditation, Zen Buddhism, and Scientology, were the context for *Time* magazine's 1966 front cover asking, "Is God Dead?"[30] This pattern repeated itself at the turn of the century. Engagement with religion, particularly among religious conservatives, partially recovered throughout the 1970s and 1980s and, combined with their increasingly visible political presence through links with the Republican Party and activities of groups like Christian Voice, Focus on the Family, Moral Majority, and the Religious Roundtable, created an image of a new religious revival in the United States.[31] But, according to a 2010 study by Robert Putnam and David Campbell, that came to an end at the turn of the century with an impact that "rivals that of the powerful original quake of the Sixties."[32] As in that decade, the impression of decline was all the more stark against the background of earlier engagement. As the younger generation turned away from church attendance, became more tolerant of homosexuality than earlier generations and thus less accepting of faiths which preached anti-gay sentiments, and rejected the overt intermingling of religion and conservative politics of recent decades, conservative Christians once again appeared to be losing out in the battle for American culture. Against a

[30] *Time*, 8 April 1966. Putnam and Campbell, 91-100; Sidney Ahlstrom, *A Religious History of the American People* (London: Yale University Press, revised ed., 2004), 1077-96.

[31] Reflecting this growth, *Newsweek* declared 1976 the "Year of the Evangelical." For a good introduction, see Paul Boyer, "The Evangelical Resurgence in 1970s American Protestantism," in Schulman and Zelizer, 29-51.

[32] Putnam and Campbell, 120-32, 124. Hartman also suggested that the culture wars were over by the end of the 20th Century (285-290).

background of such major religious and cultural change it is possible that conservative Christians used the language of attack because they *felt* they were under attack, whether from identifiable groups or from the culture at large.

In addition to the social and cultural changes impacting conservative Christians, the language of the law increasingly appeared hostile to their interests. In two Vietnam War conscientious objector cases the Court appeared to equate traditional religious faith with secular moral and ethical beliefs.[33] Instead of Justice Douglas' 1952 statement that, "We are a religious people whose institutions presuppose a Supreme Being," conservatives were met with Justice Black's statement that, "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content ... those beliefs certainly occupy in the life of that individual a place parallel to that filled by ... God."[34] Then in 1990, after some Justices had begun to suggest that the Court's Religious Clause jurisprudence was hostile to religion, the Court handed down its opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*.[35] In upholding the denial of unemployment benefits to two Native

[33] *US v. Seeger* 380 US 163 (1965); *US v. Welsh* 398 US 333 (1970). In both cases, individuals had claimed exemption from military service on the grounds of deeply-held but non-traditional religious beliefs. The Court upheld their right to conscientious objector status.

[34] *Zorach v. Clauson* 343 US 306, 313 (1952); *US v. Welsh* 398 US 333, 340 (1970) (internal quotations omitted).

[35] See, for example, *Meek v. Pittenger* 421 US 349, 395 (1975) (Justice Rehnquist, concurring in part and dissenting in part); *Wallace v. Jaffree* 472 US 38, 85 (1985) (Chief Justice Burger, dissenting); *Edwards v. Aguillard* 482 US 578, 616-7 (1987) (Justice Scalia, dissenting); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* 492 US 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part); *Board of Education v. Mergens* 496 US 226, 261 (1990) (Justice Kennedy, concurring in part and concurring in judgment). Edward Gaffney Jr., "Hostility to Religion, American Style," *DePaul Law Review* 42 (Fall 1992):

American drug counsellors fired from their jobs for ingesting peyote as part of a Native American Church ritual, Justice Antonin Scalia wrote for the 5:4 majority: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Religious beliefs and conscientious scruples, Scalia argued, do not "relieve[] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[36] In essence, religious beliefs, the Court ruled, were not special or significant enough to overcome the requirements of a general law if that law did not specifically target religion. Following on from *Seeger* and *Welsh*, *Smith* served only to reinforce conservative Christians' perception that American society had turned against them.

Against the backdrop of these changes in American legal, social, and religious culture, the subtle changes in conservative Christians' use of the argument of threat and danger, while not changing the language itself, challenge the narrative of an unchanging church-state debate. They also indicate that continued use of the argument was not simply an unquestioning repetition of an old, familiar position but a careful and effective choice to apply existing language to changing circumstances for their own benefit.[37] In this the actions of

263-304, at 266-268. In each case the comment was made in passing with no attempt to clarify or define what constituted hostility.

[36] *Employment Division, Department of Human Resources of Oregon v. Smith* 494 US 872, 878-9 (1990). For a good introduction to the case, see Carolyn Long, *Religious Freedom and Indian Rights: The Case of* Oregon v. Smith (Lawrence, Kansas: University Press of Kansas, 2001).

[37] This reflects Jason Bivins' observation that religious groups use different arguments at different times to best suit their purposes, what he terms "polymorphous discourse." Jason Bivins, "Religious and Legal Others: Identity, Law, and Representation in American Christian Right and Neopagan Cultural Conflicts," *Culture and Religion* 6 (March 2005): 31-56.

conservative Christians reflected Christian Smith's 1998 observation that: "The evangelical movement ... flourishes on difference, engagement, tension, conflict, and threat."[38] Considered in this light, conservative Christians employed the language of besiegement not only because it reflected their perceived social status but because it offered them a strategy for achieving key policy aims. By creating, or at the very least emphasising, a sense of embattlement, of a need to fight for their rights, conservative Christians were able to mobilize their supporters to action. Despite the disappointment of *Smith*, the language of the law, in particular, offered conservatives an opportunity to make positive use of their newly-perceived minority status.

One strategy was that pursued particularly by conservative activist Beverley LaHaye in the 1970s and 1980s.[39] Convinced, along with many other conservative Christians, that atheists and secular humanists were conspiring to deny the religious rights of people of faith, LaHaye and the organisation she founded, Concerned Women for America (CWA), sought to use the courts to further their cause. The strategy was two-fold. First, LaHaye and CWA sought to exploit the "fuzziness" in the legal definition of "religion," which had resulted from courts largely shying away from too close a definition, to seek a court ruling that in legal terms secular humanism was, or was at least equivalent to, religion.[40] For conservative Christians, the recent tendency of the Supreme Court to interpret the Establishment Clause of the First Amendment to require a complete separation of church and state was tantamount to a

[38] Christian Smith, *American Evangelicalism: Embattled and Thriving* (Chicago: University of Chicago Press, 1998), 153. See broadly 89-153.

[39] This paragraph draws on Sarah Barringer Gordon's detailed analysis of LaHaye's aims and strategy. Gordon, 133-167.

[40] Gordon, 150.

campaign against believers; secularism was not only irreligious but anti-religious.[41] If secular humanism was defined as a religion then actions by the state which enforced separation might be portrayed as unconstitutionally establishing secular humanism. At the same time, LaHaye and CWA encouraged and supported specific legal challenges to secularism, particularly in the nation's public schools.[42] Their most high profile case, *Mozert v. Hawkins County Public Schools*, was ultimately as unsuccessful as the attempt to obtain a legal definition of secular humanism as religion.[43] If the legal campaign did not bring the desired results, however, it nevertheless held major significance. Just as CWA's strategy emerged from LaHaye's and others' concerns about the creeping influence of secular humanism, the coverage of CWA's litigation reinforced that perception, ultimately creating a self-sustaining narrative: conservative Christians had to fight for their rights because they were under threat but failure was a result of the power of the "enemy" proving only that the fight needed to continue.

A second legal strategy rested on the increasing importance of the language of rights in American political culture in the twentieth century and on the legal underpinnings of the Warren Court's "Rights Revolution" of the same period. Claims by religious groups that they were under attack, whether from hostile individuals, culture, or governments, helped to

[41] For different views of the consequences of the Court's jurisprudence see Sehat, 227-282 (arguing that separation was a positive move towards true pluralism) and Philip Hamburger, *Separation of Church and State* (London: Harvard University Press, 2002), 391-492 (arguing that such separationism posed a threat to religious liberty).

[42] CWA was involved, for example, in *Witters v. Washington Department of Services for the Blind* 474 US 481 (1986) and *Lamb's Chapel v. Center Moriches Union Free School District* 508 US 384 (1993), both of which achieved rulings favourable to CWA's position.

[43] *Mozert v. Hawkins County Public Schools* 647 F.Supp 1194 (E.D. Tenn., 1986). Gordon, 156-167.

build an image of an embattled minority group in need of protection. This was important in light of the Supreme Court's opinion in *US v. Carolene Products Co.* (1938). An otherwise unremarkable economic regulation case, in Footnote Four of *Carolene Products*, Justice Harlan Stone hinted that if constitutional claims of rights violations were made by "discreet and insular minorities," the Court might be willing look at them more closely, to apply, in the Court's terms, strict scrutiny to challenged legislation.[44] *Brown v. Board of Education* in 1954 suggested that the Court was leaning in this direction, but it was the coalescing of a liberal majority on the Court in 1962 that saw the full implications of Footnote Four reflected in the Warren Court's jurisprudence.

In a broad range of cases involving claims of individuals against the state, the Warren Court consistently found in favour of the rights of the individual.[45] Many contemporary and subsequent religious freedom cases drew on this legacy to protect the rights of members of minority faiths, including Jehovah's Witnesses, Seventh Day Adventists, the Amish, and Santeria.[46] Collectively these cases drew on the sentiments echoed by Justice Robert Jackson

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[44] *US v. Carolene Products Co.* 304 US 144, 152-3 (1938).

[45] For example, *Mapp v. Ohio* 367 US 643 (1961) (search and seizure); *Gideon v. Wainwright* 372 US 335 (1963) (right to legal representation); *Sherbert v. Verner* 374 US 398 (1963) (religious freedom and unemployment compensation); *Griswold v. Connecticut* 381 US 479 (1965) (privacy in marriage and contraception); *Miranda v. Arizona* 384 US 436 (1966) (right to silence). Sehat saw in the Warren Court's cases the "divorcing of law from Christian moral norms in a way that severely undercut Christian power and emphasized the equal and individual rights of all." Sehat, 254.

[46] See, for example, *Cantwell v. Connecticut* 310 US 296 (1940); *Martin v. Struthers* 319 US 141 (1943); *US v. Ballard* 322 US 78 (1944); *Niemotko v. Maryland* 340 US 268 (1951); *Sherbert v. Verner* 374 US 398 (1963); *Wisconsin v. Yoder* 406 US 205 (1972); *Church of the Lukumi Babalu Aye v. City of Hialeah* 508 US 502 (1993).

in *West Virginia State Board of Education v. Barnette* (1943): "One's right to ... freedom of worship ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[47] In this context, claims by conservative Christians that they were under attack drew direct connections between themselves and those religious minorities previously protected by the Court, to reinforce an image of themselves as a "discreet and insular minority" under the terms of Footnote Four, fighting only for their rights against a hostile society which failed to recognise them. Use of the language of attack and threat to create minority status allowed conservative Christians to draw on the Warren Court's legacy of protection for minority rights to underpin their claims for legal or political action defined as "protecting" their rights.[48]

The continuity of the language of threat over half a century of church-state debate masked significant change in usage during that time. From majority to minority emphasis, the language reflected the religious and secular changes in American society and considering the arguments in this light helps us to better understand how and in what ways the church-state debate was tied to broader changes in society outside of Supreme Court opinions. While reflective of some conservatives' sense of their new, and unwanted, place in the American social order, it also showed conservatives willing and able to turn that to their advantage, to use it within legal and political debate to achieve their objectives. Not just a lament for a "lost" status, it became a positive and powerful tool in their political and legal arsenal.

[47] *West Virginia State Board of Education v. Barnette* 319 US 624, 639 (1943).

[48] The irony is that religious conservatives thus made use of a judicial legacy of which, in other contexts, they were openly critical.

In the debates about the place of religion in American society from the 1960s to the 2010s, religious liberty was as central as the issue of religion under attack. Absent from the earliest debates about *Engel*, by 1964 conservative Protestants and Catholics had begun to see in religious liberty an argument that could win widespread public support and give them a legal argument that could counteract claims that all the Court had done was follow the demands of the Constitution.[49] Quoting from recent academic scholarship, Congressman William Cramer (R-FL) asserted before the House Judiciary Committee in 1964 that religious freedom was at the heart of the debate about school prayer.[50] Roman Catholic Bishop of New York, Fulton Sheen, Dr. Robert Cook of the National Association of Evangelicals, and Dr. Charles Leaming were among those reinforcing the argument that in *Engel* the Court had failed to sufficiently protect the free exercise rights of the majority.[51] "Why," asked evangelist Billy Graham, "should the majority be so severely penalised by the protests of a handful?"[52] Such arguments found continued expression in debates about church-state relations. In hearings before the Senate Judiciary Committee's Subcommittee on Constitutional Amendments in the fall of 1973, religious and secular interest groups continued to argue that the majority's right to religious freedom had been negated by the Supreme Court, one advocate suggesting it was

[49] Liberty generally was not a new argument in relation to religious rights (see, for example, the discussion in Sehat, 13-124) but in relation to prayer and Bible reading it emerged marginally later than other arguments in defence of the practices. Although Dierenfield asserts that the 1964 hearings were "the first hearings ever heard on school prayer" (at 181), the Senate Judiciary Committee held brief hearings in response to *Engel* two years earlier (see US Senate. Committee on the Judiciary. Hearings on Prayer in Public Schools and Other Matters, 87th Congress, 2nd Session (1962)). A comparison shows that arguments about religious liberty were largely absent from the 1962 hearings but was a far more common response from prayer supporters in 1964.

[50] Erwin Griswold, "Absolute is in the Dark," *Utah Law Review* 8 (Summer 1963): 167-182.

[51] House Hearings, 372-3 825-32, 968-70, 889-905.

[52] Graham quoted in Dierenfield, 180.

"almost unbelievable that still today not only is freedom of religion denied in the public classroom, but Congress has failed to permit the nation to decide this matter through the constitutional process of amendment ratification."[53] And when President Reagan announced his proposed prayer amendment in May 1982, he drew explicitly on the principle of religious liberty: "... in recent years well-meaning Americans, in the name of freedom have taken freedom away … How can we hope to retain our freedom through the generations if we fail to teach our young that our liberty springs from an abiding faith in our Creator?[54] The following year, speaking to a convention of religious broadcasters, he repeated the connections, promising, "I am determined to bring that amendment back again and again and again and again, until we succeed in restoring religious freedom in the United States."[55]

By the early twenty-first century arguments about challenges to religious freedom were not only part of the debate but dominated church-state rhetoric. In 2009, the Manhattan Declaration, a coalition of Orthodox Jews, Catholics, and evangelical Protestants published a statement on faith, the family, and same-sex marriage, asserting that the first social harm that would come from same-sex marriage would be to "the religious liberty of those for whom this is a matter of conscience ...."[56] Across the US, a spate of so-called "religious freedom" bills, designed to permit business owners to cite religious grounds for refusal of service without being subject to legal retribution, also drew heavily on the language of religious

[53] Reverend Robert Howes of Catholic University, quoted in "Amendment for School Prayer Supported at a Senate Hearing," *New York Times*, 25 September 1973.

[54] Speech published in *New York Times*, 7 May 1982.

[55] F. Clines, "Preachers Hail Reagan on Abortion and Prayer," *New York Times*, 1 February 1983.

[56] The Manhattan Declaration (http://manhattandeclaration.org/#1, accessed 1 May 2014).

freedom in their defence.[57] Opponents of the Obamacare contraceptive mandate asserted that it too threatened their religious rights. The US Conference of Catholic Bishops urged the Obama Administration in early 2012 to rescind the requirement in the interests of "religious liberty and freedom of conscience for all"; the Becket Fund for Religious Liberty, a legal group involved in much of the litigation surrounding the contraceptive mandate, declared that it "leaves religious Americans at risk"; and the National Association of Evangelicals asserted, "[t]o uphold the ... mandate is to licence this and future administrations to object to every religious belief and practice on the grounds of government authority."[58]

As with the language of threat, buried deeply in this surface continuity of the language of rights was a fundamental shift in emphasis from majority to minority rights, driven, in part, by the same cultural and religious changes. In the 1960s, when conservative Christians saw themselves in alignment with the national culture, it was appropriate to argue that the liberty to be protected was that of the majority who adhered to the basic principles of the American

[57] Opponents, however, described the bills as being a licence to discriminate, drawing parallels between the actions the bills aimed to permit and the actions of opponents of segregation in the 1950s and 1960s. See John Kirk, "Even if Arizona Made Its Anti-Gay Bill Law, It Wouldn't Have Mattered – It Would Have Been Unconstitutional," *History News Network*, 3 March 2014 (http://historynewsnetwork.org/article/154855, accessed 31 March 2014); John Eligon, "In Kansas, Right Joins Left to Halt Bill on Gays," *New York Times*, 16 February 2014.

[58] Cathy Lynn Grossman and Richard Wolf, "Bishops, Obama in Church-State Faceoff Over Birth Control," *USA Today Online*, 12 February 2012 (http://usatoday30.usatoday.com/news/washington/story/2012-02-12/obama-bishops-contraceptives/53065070/1, accessed 14 February 2012); Sarah Posner, "Why Religious Exemptions Matter," *Religion Dispatches*, 1 February 2013 (http://religiondispatches.org/why-religious-exemptions-matter/, accessed 1 February 2013); "NAE Asks High Court to Consider Mandate Covering Contraception" 29 October 2013 (from NAE website, http://nae.net/resources/news/1034-nae-asks-high-court-to-consider-mandate-covering-contraception, accessed 19 December 2013).

way of life. Perhaps nowhere was this sentiment clearer than in the 1963 Church-State Conference hosted by the National Association of Evangelicals at Winona Lake, Indiana. Attended by representatives from conservative and mainline Christian denominations, the former made the most frequent use of the language of majority rights. "We are in excessive danger in America," argued NAE Secretary for Public Affairs Clyde Taylor, "in losing religious freedom through the excessive demands of minorities for freedoms that actually rob the majority of their legal and constitutional rights." Taylor's sentiments were echoed by General Director George Ford who feared that *Engel* showed that "decisions which come down from the Supreme Court on these matters ... can very easily give advantage to a very small minority ... It might well be asked whether the rights of the majority are violated in the process."[59] Thus they viewed sympathetically Justice Potter Stewart's statement in dissent in *Engel*, that "to deny the wish of these school children to join in reciting the prayer is to deny them the opportunity of sharing in the spiritual heritage of the nation."[60] Stewart's language in dissent in *Engel* spoke to conservative Christians' sense of themselves and their place in society and led naturally to a view that the religious rights of the nation were being threatened by an undesirable minority of "outsiders".

As conservatives came increasingly to identify themselves as a minority within American culture, however, Stewart's language no longer provided appropriate grounds on which to base their argument. The language of minority rights, and of an overarching government

[59] Clyde W. Taylor, "Religious Liberty in America" and George L. Ford, "Religion and the Public Schools," Reports to the 1963 Church-State Conference. National Association of Evangelicals Archive, Wheaton College Special Collections, Wheaton, Illinois, Box 53, File 1. Reports from Rev. Dean Kelley of the National Council of Churches and Dr. Earle Cairns, professor of history at Wheaton College, in contrast, emphasised the benefits of the Court's approach.

[60] *Engel v. Vitale* 370 US 421, 445, 446 (1962) (Justice Stewart, dissenting).

failure to fully protect those rights, more effectively fitted with conservatives' perception of their new social status. "I'm tired of hearing about radicals, perverts, liberals, leftists, and Communists coming out of the closet," declared controversial Southern Baptist preacher James Robison in 1980, reflecting his distaste for the broader culture: "It's time for God's people to come out of the closet and the churches to influence positive changes in America."[61] During a 1995 debate on school prayer, Mormon Congressman Ernest Istook (R-OK) echoed the sense of unfair treatment of Christians: "You don't have the right to shut people up and censor them just because you choose to be thin-skinned and intolerant when someone else is trying to express their faith."[62] Such views remained part of the debate nearly twenty years later, one advocate portraying a challenge to public prayer as equivalent to "heckler's veto" aiming "to muzzle speech ... with which they disagree."[63] Consistently from the 1980s onwards, conservative Christians employed language which portrayed themselves as a minority within a culture from which they felt increasingly alienated.

The extent of the shift of position by conservative Christians is illuminated by a comparison with the arguments made during the 1964 prayer hearings by the nation's leading law scholars in defence of the Court and in opposition to the proposed prayer amendment. Professor Philip Kurland of the University of Chicago argued, "We have adopted a written Constitution in order that the minority, even down to the most insignificant individual, might have their rights protected." University of Michigan Law School professor Paul Kauper

[61] Robison quoted in Williams, 183.

[62] Istook quoted in Dierenfield, 207.

[63] Ken Klukowski, "Time to Restore Longstanding Meaning – and Sanity – to the Establishment Clause in *Town of Greece v. Galloway*," *SCOTUSBlog*, 3 October 2013 (http://www.scotusblog.com/2013/10/symposium-time-to-restore-longstanding-meaning-and-sanity-to-the-establishment-clause-in-town-of-greece-v-galloway/, accessed 18 October 2013).

concurred: "a major purpose of the constitutional system is to place a check on the will of the majority in the interest of protecting minority rights."[64] Conservative Christians' assertions of their right to religious freedom from the 1970s onwards reflected exactly these sentiments. Adoption of such arguments less than two decades after they were offered in defence of a position opposed by conservative Protestants and Catholics suggests both inconsistency in their rhetoric but also flexibility, a willingness to adapt to circumstances, and a clear indication that the argument offered them a very real benefit to their cause.[65]

The language of religious liberty tapped into what Mary Ann Glendon observed as the rise of "rights talk" in American society. Emerging initially in the early twentieth century, the Warren Court and the Civil Rights Movement gave impetus to a trend whereby rights became the way in which Americans spoke about their relationships to one another and to broader society.[66] The language of the law became familiar to ordinary Americans as it increasingly permeated political discourse. Not only that but the language of rights became, Glendon argued, "the principal language that we use in public settings to discuss weighty issues of right and wrong," at the same time that it presented rights as "absolute [and] individual."[67] Claiming access to a fundamental right thus permitted groups or individuals to access arguments which asserted not only that such a right was absolute and inviolable but that they

[64] Laubach, 63-64.

[65] On the ability of evangelicals in particular to turn cultural trends to their own advantage, see Schäfer, *Countercultural Conservatives*.

[66] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), ix-xiii. See generally, Mark Tushnet, "The Rights Revolution," in Michael Grossberg and Christopher Tomlins (Eds.), *The Cambridge History of Law in America: Vol. 2: The Twentieth Century and After (1920-)* (London: Cambridge University Press, 2008).

[67] Glendon, x, 12.

were on the side of right while opponents were on the "wrong" side of any given debate. Conservative Christians' employment of the language of religious liberty represented a judgment that it offered them the strongest grounds for achieving their policy aims.

The increasingly close links between the Religious Right and the secular New Right within the Republican Party in the 1980s showed how effective a political tool the language of liberty could be. At least in its initial stages the alliance offered Republicans "the mass political mobilization of conservative Protestants for rightwing political goals" and the Religious Right the ability to "transcend the confines of the religious niche" and thus obtain a broader constituency of support for their campaign against secular humanism.[68] Religious liberty arguments played an important part in both. Ed McAteer, Reagan adviser and founder of the Religious Roundtable, used the language of religious liberty and fears of secular humanism to convince the Southern Baptist Convention, the nation's largest evangelical denomination, to alter their historical opposition to a prayer amendment, in the hope that it would also bring their members into the Republican camp on other issues.[69] At the same time, conservative Christians brought their now-familiar language of attack and religious liberty to issues including economic policy and the nation's military strength which went well beyond their earlier focus on "morals" issues of abortion, pornography, education policy, and gay rights. Religious and secular conservatives thus sought to use the language of liberty, perceived as "right" and "absolute" in the language of "rights talk," to confer legitimacy on policy goals.

[68] Schäfer, 131.

[69] Williams, 200-202.

Conservative Christians' use of the language of liberty was given a further boost by passage of the Religious Freedom Restoration Act (RFRA) in 1993. In the aftermath of *Oregon v. Smith*, a broad coalition of religious and secular civil liberties groups combined to lobby Congress to restore the pre-*Smith* standards of a compelling government interest and a narrowly tailored law.[70] The title of the law itself reinforced conservative Christians' arguments that religious freedom had been denied and was now being "restored". But of more importance, as Winnifred Fallers Sullivan has argued, the coalition which came together in opposition to *Smith*, gave "new life to the specter of unreligion" and fundamentally "changed the legal and political language of religious freedom."[71] Not only did passage of RFRA legitimise conservative Christians' claims that they were under attack, it provided them with a potent legal argument in their fight against secularism in American society. The significance was clear in the debates over Obamacare. Not only did opponents state the need for an exemption to protect their religious liberties but they demanded it in terms that portrayed the right as absolute and inviolable. "The administration has no business forcing citizens to make a choice between making a living and living free," argued David Gortman, a lawyer involved in the litigation that would become *Burwell v. Hobby Lobby*, echoing the oft-repeated view that the law burdened the right of people of faith "not just to believe what they want to believe but to act and live their lives in conformity with those

[70] RFRA was struck down by the Supreme Court in *City of Boerne v. Flores* 521 US 507 (1997) as it applied to the states but it remains applicable to federal legislation. Subsequent legislation, including the Religious Land Use and Institutionalised Persons Act (2000), remains applicable to federal and state legislation.

[71] Winnifred Fallers Sullivan, "The World That *Smith* Made" in Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter G. Danchin (Eds.), *Politics of Religious Freedom* (London: University of Chicago Press, 2015), 234-5.

beliefs."[72] Such statements, portraying a dichotomous choice between religious liberty and religious oppression, reflected both the expanded definition of religious liberty identified by Williams as a consequence of the fight for RFRA and the trend towards absolutism in "rights talk" identified by Glendon two decades earlier. It also showed clearly the importance of liberty as the context for the debate. Despite the complexity of the issues raised by Obamacare, conservative Christians and Catholics, as exemplified by the Manhattan Declaration, maintained that the *only* issue was that of their religious liberty. The dominance of the issue in the debates indicated just how potent conservative Christians and Catholics perceived the issue to be in fighting their cause.

Conclusion

Walter Goodman's 1984 observation that the church-state debates had not changed in the twenty, and now fifty, years since the Court's rulings in *Engel* and *Schempp* remains accurate: conservative Christians continued to use the language of besiegement and of religious liberty. In fact, such assertions became more frequent throughout the fifty year period considered here. But such continuity should be interpreted neither as a lack of change nor as an unquestioned adherence to old ideas; in fact, conservative Christians' employment of arguments about endangerment and religious freedom reflected significant changes in the reasons for those arguments and the manner in which they were used.

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[72] Adam Liptak, "Justices to Hear Contraception Cases Challenging Health Law," *New York Times*, 26 November 2013; Nathan Diament, Executive Director of Public Policy, Union of Orthodox Jewish Congregations of America quoted in Melissa Maynard, "Religious Liberty Emerges as Sensitive Political Issue," *Deseret News*, 22 September 2012 (http://www.deseretnews.com/article/765605861/Religious-liberty-emerges-as-sensitive-political-issue.html?pg=all, accessed 30 September 2012). *Burwell v. Hobby Lobby* 573 US _ (2014) (holding exempt from the Obamacare contraceptive mandate businesses closely-held by religious individuals who objected to particular contraceptive methods).

In the 1960s, in response to *Engel* and *Schempp*, conservative Christians asserted that the danger was from a small group of un-American outsiders who threatened mainstream American life and culture; by the time President Reagan proposed a new prayer amendment, they more frequently asserted that the dominant culture itself was the threat to their religious life, an argument which persisted into twenty-first century debates about contraception and same-sex marriage. Equally, while in the 1960s conservative Christians identified as part of the majority, from the 1970s onwards they actively portrayed themselves as a minority and defended their rights in those terms. The shift was not total: evangelicals in particular had decried the dangers of secularism even before the Second World War and references to Communists and atheists appeared throughout the period. But the shift in the frequency of the arguments made over the half century of church-state debates was significant and reflected a clear change of emphasis by conservative Christians in the way in which the language of besiegement and religious liberty was employed.

This article proposes two reasons for the change. First, the arguments reflected conservative Christians' sense of their place within, and relationship to, mainstream American culture: from identification with the majority in the 1960s to a sense of an outsider status as a result of religious and social change in the decade that followed. As such, the language employed by conservative Christians in church-state debates reflected broader trends in American religious and secular culture and closer examination of the debates provides one way of further understanding recent US religious history. Second, conservative Christians efficiently and effectively used the language with which they were familiar to shape the debates around them: far from a passive response to their sense of loss of social position, they used the language of besiegement and religious liberty to mould the public debates in the hope of

achieving success for their causes. They drew on increased familiarity with the language of the law, a developing engagement with the language of rights, and opportunities offered by existing legal doctrines and political arguments to shape a new argument in old language that helped them seek legal and political success on a wide range of issues. While this does not exhaust discussion of the reasons for changes in the arguments employed by religious conservatives, it does show that their participation in half a century of church-state debates and, as a result, the nature of the church-state debate itself, was far more dynamic than Goodman's observation suggested and deserves recognition as such.