

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

by Michael deHaven Newsom*

INTRODUCTION

Some apologists for the Religious Right¹ have argued that church-state matters should be left to states and localities to settle. This paper will discuss the proposals of two such apologists.² I conclude that their proposals will not resolve our culture wars,³ our disagreements over a variety of “hot button” issues, including church-state questions, but will merely remap the battlefield – perhaps only temporarily – in an effort to gain an advantage for their side in this conflict. This paper concludes that the case for devolving, shifting, or remapping, the locus of the settlement of church-state issues from the national government to the state and local level fails because it is morally indefensible,

*Professor, Howard University School of Law, Washington, DC

¹ I use the term “Religious Right” to refer to those who believe that their religious convictions require conservative political decisions and outcomes.

² Gordon Butler, *Cometh the Revolution: The Case for Overruling McCollum v. Board of Education*, 99 DICK. L. REV. 843 (1995); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991).

³ See, e.g., Recent Development, *Peterson v. Hewlett-Packard: Exposing Title VII Inconsistencies in its Protection of Employees from Workplace Harassment*, 83 N. Car. L. Rev. 776, 777 (2005) (describing a culture war as a “conflict between secular and religious concerns”); Dan Hunter, *Culture War*, 83 Tex. L. Rev. 1105, 1106 (2005) (arguing that “culture wars can best be understood as elements of a Marxist class struggle”); Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. Davis L. Rev. 509, 521-522 (2005) (arguing that “anti-civil rights groups aligned with the religious right ... cast themselves as targets in a culture war, in much the same manner that segregationists viewed themselves as victims of the twentieth century civil rights movement”); David Greene, *Why Protect Political Art as “Political Speech”?* 27 Hastings Comm. & Ent. L. J. 359, 373 (2005) (describing a “tension found throughout American society between social liberalism and ‘family values’ and Western-centric thought and multi-culturalism”).

would exacerbate the culture wars and would undermine national security. Federalism can be a difficult and complex subject.⁴ But its broad outlines and contours are reasonably clear. One of the central tasks of federalism as governmental structure and organization is the mapping of decision-making, deciding at the level at which government decisions should be made. In the American constitutional system, the first “cut” involves a determination whether the decision-making should be lodged in the federal government or in the various state governments (including the District of Columbia⁵). The second “cut” involves a determination of whether responsibilities assigned to the states should be discharged at a statewide level or at the level of a political subdivision such as a county, city, town, village or other municipality.⁶ Thus a kind of “mini-federalism” operates in the American states.⁷

⁴ One commentator suggests that “the justifications for federalism-based structures of governance [divide] into hot federalism and cool federalism ...” Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 *Wm. & Mary L. Rev.* 1385 (2005). He distinguishes between federalism operating as a means for permitting coherent groups that distrust each other to cooperate in the enterprise of governance, hot federalism, *id.*, and federalism operating as a means for more efficient and effective governance. *Id.* at 1386. The full implications of this distinction lie beyond the scope of this paper.

⁵ The District of Columbia enjoys a limited form of home- or self-rule. However, the law establishing the current home rule regime reflects a series of political compromises that left Congress clearly in control. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). Similar issues may exist with regard to American territories, but consideration of them lies outside the scope of this paper. I have included the District of Columbia because its residents can participate in the election of the President of the United States. *See* U.S. Const. Amend. 23. Citizens or residents of American territories such as Guam, Puerto Rico and the American Virgin Islands have no such right.

⁶ The allocation of power as between the state, acting through the state legislature, and local or municipal governments is typically controlled by the constitution of the state. *See, e.g.*, Illinois. Const. Art. VII §§ 6, 7 (providing that certain counties and municipalities are home rule units with special powers, immune from change or alteration by the state legislature, an immunity that other local governmental units do not have); New York Const. Art IX §§ 1-3 (providing for a Bill of Rights for local governments protecting or immunizing certain local governmental powers from interference by the state legislature); Arizona Const. Arts. XII and XIII (providing that certain counties and municipalities may adopt charters pursuant to which they obtain certain powers that are immune from interference by the state legislature).

⁷ An important element of American national federalism is the fact that under the American Constitution every citizen is a member of four concentric nested constituencies – one local or congressional district, two statewide United States senate constituencies and one national or presidential constituency, and these four

FEDERALISM

Since federalism shapes and informs American government, it is not surprising that Americans might appeal to federalism as a way of advancing a particular political interest or agenda. There appears to be a real division in the United States on the proper role of religion in the common schools, and the disagreement is one of the constituent elements of our culture wars. Many evangelical Protestants in the Religious Right seem bent on returning religion, in some official way, to the common schools.⁸ Thus, the mapping or federalism question as it relates to official religion in the common schools goes to the heart of the great American experiment in self-government. How the United States of America settles the question will say a much about the nature and character of American democracy.

MAPPING THE RED AND BLUE AMERICA

constituencies are temporally asymmetrical because the local or congressional constituency is on a two year cycle, the two senate constituencies are on non-concurrent six year cycles, and the national presidential constituency is on a four year cycle. *See, generally*, Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L. J. 679 (1997). This kinetic or cadenced feature of national American federalism is present in most of the American states. The details may differ, but the basic principle appears to hold in all of the American states, although the number of nested constituencies may be smaller and the temporal asymmetry may not be as dramatic. *See, e.g.*, Cal. Const. Art. IV §2 (2005) (providing for a 40 member state senate, elected for four-year terms, 20 to begin every two years, and an 80 member state assembly, all members elected every two years to two year terms) and Cal. Const. Art. V § 2 (2005) (calling for the election of a governor for a four year term); Ill. Const. Art. IV, § 2 (2005) (establishing staggered terms four year terms for both state senators and state representatives) and Ill. Const. Art. V, §2 (providing for a four year term for the governor).

⁸ *See, generally*, Robert S. Alley, *School Prayer, The Court, the Congress, and the First Amendment* (1994); Frank S. Ravitch, *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters* 19 – 43 (1999). While it is not clear what the views of non-evangelical Protestant members of the Religious Right might be on this point, one could reasonably suppose that some of them support the general thrust of the evangelical Protestants who clearly dominate the Religious Right, to impose their religion on American school children, whether those children or their parents want it or not. Again, one supposes that Jews and Catholics who are members of the Religious Right somehow believe either that a stiff dose of evangelical Protestantism will not harm Jewish or Catholic school children, or that, somehow, Jewish and Catholic public school children will be exposed to official expressions of their faith and not of evangelical Protestantism.

A powerful metaphor which has come to capture the American consciousness – red states versus blue states⁹ -- provides incalculable aid in understanding the mapping question. This metaphor originated in the increasingly common practice of designating states that go Democratic in presidential elections as blue states and states that go Republican as red states. The metaphor is strengthened by the fact that the results of the 2000 and 2004 presidential elections show a strikingly stable electoral map. Iowa and New Mexico turned from blue in 2000 to red in 2004 whereas New Hampshire turned from red to blue. Apart from these few shifts or changes, red states in 2000 remained red states in 2004, and blue states in 2000 remained blue states in 2004. One could reasonably suppose that the political divisions in the United States, at least as reflected in the presidential elections – our only national elections¹⁰ – of 2000 and 2004 are persistent, and unlikely to change in any dramatic way in the near future.¹¹

The metaphor also captures an important truth about the American federal system because it enables us to apprehend the geographical dimensions of the culture wars. The concurrent nested constituencies that Professor Fitzgerald has described¹² clearly have a geographical or spatial dimension.

If one just looked at the states, as spatial referents, it would appear that America is overwhelmingly red.¹³ However, adjusting for population, the red areas shrink considerably, as the blue areas grow dramatically, more accurately representing the relatively close division, among American voters, between

⁹ The metaphor has found its way into the learned journals of the American legal academy. See Rodney A. Smolla, *Restoring Reason and Civility to the Judicial Selection Process*, 39 U. Rich. L. Rev. 793 (2005); William P. Marshall, *The Judicial Nominations Wars*, 39 U. Rich. L. Rev. 819 (2005).

¹⁰ See Fitzgerald, *supra* note 7.

¹¹ I believe that only a handful of states will be in play in the 2008 presidential election, barring a significant event that utterly transforms American politics. Iowa, New Mexico and New Hampshire, all small states, remain in play. In addition, I would think that Florida, Ohio, Arizona, Colorado and Nevada are also in play, to one degree or another. However, this last group of states has gone Republican in the last two elections, although in the case of Florida, the United States Supreme Court rigged, if not stole, Florida for the Republican candidate. See *Bush v. Gore*, 531 U.S. 98 (2000).

¹² See Fitzgerald, *supra* note 7.

¹³ See Michael Gastner, Cosma Shalizi and Mark Newman, *Maps and Cartograms of the 2004 US Presidential Election Results*, <http://www-personal.umich.edu/~mejn/election/>. (Last visited on July 7, 2005), Map I. (The Gastner, Shalizi, Newman article includes nine maps. While not numbered there, I will refer to them here, by number, in the order in which they appear in that article.)

Democrats and Republicans in presidential elections.¹⁴ On the other hand, the Electoral College distorts the popular vote, causing the red area to grow.¹⁵ Each state – and the District of Columbia – is allocated two electoral votes without regard to population. The small states tend to be red states. Thus, at least for the nonce, the Electoral College has a red tilt. In the 2000 American presidential election, Al Gore got more popular votes than George Bush did, even without regard to the Florida *débâcle*.

The red-blue divide is even more dramatic if state counties function as the relevant spatial referent. Like the states, red counties cover far more territory than do blue counties.¹⁶ However, adjusting for population, the size gap between red and blue counties shrinks dramatically.¹⁷ Adjusting for voting percentages, using red, blue, and shades of purple to reflect those percentages, the “county” map of America looks rather different, indicating a number of counties in which the vote was closely divided.¹⁸ Adjusting for population, the spatial pattern becomes even more complex.¹⁹ Finally, if one were to use a color scale that ranges from pure red for counties that went Republican by 70% or more to pure blue for counties that went Democratic by 70% or more, the Republicans still hold the territorial advantage.²⁰ But, when adjusted for population, the advantage shrinks considerably.²¹ This analysis reveals that within many American states, there is a serious and significant – and geographically complex – red-blue divide. One must take this fact into account in assessing the merit of any proposals to devolve questions of church and state to the state and local governments.

Some insist that the metaphors of (1) red and blue and (2) culture wars overstate the case because they overlook the considerable common ground that Americans share.²² Others insist that the differences are real and substantial.

¹⁴ *Id.* Map II.

¹⁵ *Id.* Map III.

¹⁶ *Id.* Map IV.

¹⁷ *Id.* Map V.

¹⁸ *Id.* Map VI.

¹⁹ *Id.* Map VII.

²⁰ *Id.* Map VIII.

²¹ *Id.* Map IX.

²² See Andrew J. Weaver, Kevin J. Flannelly, and Cathleen Galek, *Our Poll Shows the Differences between Red & Blue States*, January/February 2005 *Spirituality & Health*, www.spiritualityhealt.com/newsh/items/article/item_9576.html (last visited April 27, 2005) (arguing that a poll of attitudes that might mark one as a fundamentalist or not shows that the attitudes of Republicans and Democrats, while different, were not

The facts tend to support the second view. The data show that “[t]he red states have the largest populations of Protestants and Mormons. The blue states have larger populations of Catholics, Jews, people with ‘other’ religions (such as Buddhism, Islam and Hinduism), and people with no religious affiliation.”²³ Polling data indicate that “59 percent of Protestants voted for the president ... 52 percent of Catholics voted for Bush ... Jews favored the Democrat ... by ... 74 percent ... [and] others and people with no religious affiliation favored the Democratic candidate – 74 percent and 67 percent, respectively.”²⁴ But, as the work of Gastner, Shalizi and Newman suggests,²⁵ “[m]ore than 25 million people who voted for Bush (or nearly 42% of his total) voted in blue states ... [and] [m]ore than 26 million people who voted for Kerry (or 46% of his total) voted in red states ...”²⁶ However, county-based spatial mapping of Americans by religion might well explain the patterns uncovered by Gastner, Shalizi and Newman.²⁷

Two additional variables operate here. One commentator has suggested that “[t]he contrasts in opinion between urban and non-urban residents are far more striking than those that separate one state’s voters from another’s.”²⁸ This means that the relevant spatial referent should be cities or counties, rather than states, not that the red-blue divide is overstated. It may also be that “Americans may be sorting themselves into communities that are more and more politically

dramatically so); Mark Muro and Alan Berube, *Red and Blue States Not Black-and-White: Sharp Demarcations on Electoral Map Don’t Match Reality*, San Francisco Chronicle, August 15, 2004 <http://brookings.edu> (last visited April 27, 2005) (arguing that voters in both red and blue states agreed on a number of political questions).

²³ See Religion Distinguishes Red States from Blue States, <http://news.uns.purdue.edu/UNS/html3month/2004/041109.Davidson.religion.html> (last visited April 27, 2005) (noting that “[o]f the 13 states where Protestants and Mormons are more than 60 percent of the population, such as Alabama, Georgia, Utah and West Virginia, every one went red” whereas “[o]f the eight states where Catholics, Jews, ‘others’ and ‘nones’ are a clear majority, seven went blue” New Mexico alone being the exception).

²⁴ *Id.*

²⁵ See *supra* note 13 and accompanying text.

²⁶ See NewMexiKen, <http://newmexiken.com/archives/2004/11/004223.php> (last visited on April 27, 2005).

²⁷ Indeed, some have, perhaps not so humorously, suggested that the blue states should join with Canada to form the United States of Canada, and the red states should be reconstituted as Jesusland. See *Jesusland Map*, http://en.wikipedia.org/wiki/Jesusland_map (last visited on April 27, 2005).

²⁸ Commentary, *Blue States v. Red States?* Nieman Watchdog (March 28, 2005), <http://www.niemanwatchdog.org> (last visited on April 27, 2005).

homogeneous ...”²⁹ Second, as a general rule, the blue states are net payers of federal taxes and red states are net recipients of federal subsidies.³⁰ Military and agricultural subsidy spending may account for much of this result.³¹ However, “according to the Tax Foundation, the main reason so many blue states pay so much more than they get back is that their residents tend to earn more money and pay more income tax.”³² It may well be that urbanites are the mainstay of the blue counties, pay more in taxes, and are better educated. Thus, again, cities and counties would serve as a better spatial referent than states would. In any event, space, population, religion, urbanity (both in the sense of place and in the sense of a set of values), and economics and class all contribute to giving the red-blue metaphor a force and power that deeply reflects American experience, history, economics and social organization.

THE PROTESTANT EMPIRE

America was and still is a Protestant Empire.³³ America has always exhibited the five characteristic traits that define a Protestant Empire: a deeply embedded anti-Catholicism; a commitment to Protestantization; a wavering belief in pan-Protestantism; a commitment to social reform that “purifies” the polity, that is, makes it more ideally evangelical Protestant; and last, a willingness to wait out non-Protestants, but with the threat of state coercion or violence in the background if non-Protestants take too long in converting to evangelical Protestantism.³⁴

The basic fact of this Protestant Empire is incontrovertible. Martin Marty reminds us that “[f]rom Jamestown ... until the birth of the nation ... Protestant peoples came to dominate the area that would become the United

²⁹ See Muro and Berube, *supra* note 22. I will revisit this matter of migration. See *infra* notes 179-182 and accompanying text.

³⁰ Eric Scigliano, *Red and Blue and the Color of Money*, (February 13, 2005) http://seattlepi.nwsource.com/opinion/211080_sciglianomoney.html (last visited on April 27, 2005).

³¹ *Id.*

³² “Blue-staters earn more on average and pay more in taxes, because they are better educated, more productive, less likely to be retired or disabled and generally healthier; rates of obesity, smoking and alcoholism (not to mention divorce and suicide) all peak in the South or West. The highly educated have always been healthier and earned more but more of them used to vote Republican; as the two parties have switched identities, these voters have gone Democratic.”

³³ See Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 *Washburn L. J.* 187 (2001).

³⁴ *Id.* at 194-195.

States.”³⁵ The Protestantism of the American colonials “was merely a projection of Western Europe and chiefly of portions of the British Isles.”³⁶ More particularly, this Protestantism was largely of a radical evangelical form.³⁷ Joining the British settlers were Protestants, largely of the Reformed tradition, from Ulster, Germany, and Holland.³⁸ There was, and is, a considerable denominational variation among evangelical Protestants, but colonial American Protestantism was radical Protestantism, indeed more radical than the Protestantism “in the British Isles or anywhere on the Continent of Europe.”³⁹ American Protestantism has changed little since. What variation existed in colonial American religion also had a spatial dimension. Congregationalism predominated in the New England Colonies, Anglicanism, although of a decidedly Low Church or evangelical sort,⁴⁰ became established in the southern colonies, whereas a mix of Presbyterianism, other forms of Reformed evangelical Protestantism, and Quakerism prevailed in the middle colonies.⁴¹

America became an escape valve for Anglican England, a refuge, a safe haven for radical evangelical British Protestants who, for whatever reason, refused to conform to the doctrine and rites of the established Church of England. Settlers from elsewhere in Protestant Europe who immigrated to British North America may have done so for entirely secular reasons.⁴² But the cultural and religious symbols of the radical evangelical Protestants dominated the American colonial experience. We hear echoes of this in such “national” hymns as “My Country ‘Tis of Thee” with its reference to “land of the Pilgrim’s pride.” Thanksgiving, a national holiday, is utterly incomprehensible without understanding its origins in early Seventeenth Century Puritan New England.

³⁵ Martin Marty, *Pilgrims in Their Own Land* 91 (1984).

³⁶ 2 Kenneth Scott Latourette, *A History of Christianity: Reformation to the Present*, 952 (1975 ed.)(1953).

³⁷ *Id.* at 953.

³⁸ *Id.* at 954.

³⁹ *Id.*

⁴⁰ See E. Clowes Chorley, *Men and Movements in the American Episcopal Church* 1-129 (1946) (discussing the dominant evangelicalism of Anglicanism in Virginia and other southern colonies).

⁴¹ See, generally, Sydney E. Ahlstrom, *A Religious History of the American People* 135-259 (1972).

⁴² See Latourette, *supra* note 36 at 954.

The Thirteen Colonies created their religious settlements from their experience, their demography, and their sense of how best to advance the interests of a Protestant Empire. And, consistent with the spatial non-uniformity of evangelical Protestant denominations, they did so in a non-uniform way.⁴³ But the differences were largely insignificant, in the larger scheme of things. Whatever might have been the strictures imposed and arrayed against “Quakers, Jews, Catholics, Unitarians, freethinkers and atheists,”⁴⁴ or marginal white or European groups, generally,⁴⁵ the religions of African Americans⁴⁶ and Native Americans⁴⁷ received no protection whatsoever. Ultimately the task, so typically that of a Protestant Empire, became the conversion of African Americans, if not also Native Americans, to evangelical Protestantism.⁴⁸

If the ultimate goal was the establishment of a Protestant Empire, the leaders in the American colonies had to confront the practical realities of their situation. “The vast open spaces of the North American continent, and the need to attract white settlers to do the work of colonization”⁴⁹ contributed mightily to a reliance on restraint and attrition in doing the work of the Protestant empire. Furthermore, “[o]ther factors tending toward restraint and attrition included (1) the social and political implications of the Great Awakening ... and (2) the absence of any common colonial establishment or *theory* of establishment.”⁵⁰

James Madison reflected this point of view. He objected to a bill before the Virginia General Assembly to “establish[] a provision for teachers of

⁴³ George Dargo tells us that “[f]rom New Hampshire to the Carolinas, principles of religious liberty were adopted in some degree in nearly every English mainland settlement either by royal instruction, proprietary grant or provincial self-enactment.” See, generally, George Dargo, *Religious Toleration and Its Limits in Early America*, 16 N. Ill. U. L. Rev. 341 (1996). However, “[r]eligious liberty was not universal nor was the regime of liberty uniformly distributed either in place or in time. There were differences in religious culture from region to region. Religious dissent was tolerated in some colonies but not in others.”

⁴⁴ *Id.* at 352.

⁴⁵ *Id.* at 353-355.

⁴⁶ *Id.* at 356-358.

⁴⁷ *Id.* at 358-360.

⁴⁸ *Id.* at 356-360.

⁴⁹ See Newsom, *supra* note 33 at 243.

⁵⁰ *Id.* at 243-244.

the Christian Religion,”⁵¹ a bill that would tax citizens of Virginia, with some limited exceptions, to fund the provision of such teachers.⁵² In his “Memorial and Remonstrance against Religious Assessments” which received constitutional status and sanction⁵³ in *Everson v. Bd. of Education*,⁵⁴ Madison framed the practical argument for disestablishment and religious freedom: The bill, if adopted, would discourage immigration and encourage emigration. Federalism, space, and competition combine to become a potent force in Madison’s argument: Virginia would lose and other states would win if the Virginia legislature were to tax its citizens to support teachers of the Christian religion – make that evangelical Protestant religion in at least some of its denominational forms.⁵⁵

⁵¹ *Memorial and Remonstrance*, 330 U.S. at 64.

⁵² See A Bill Establishing a Provision for Teachers of the Christian Religion, 330 U.S. at 72-74.

⁵³ I wish here to note that James Madison did not give the US Constitution and the first Ten Amendments legal effect. Many constitutional interpreters make the great mistake of confusing the views of those who wrote the relevant documents and those who, in state assemblies and conventions, gave those documents legal force and effect. Even the slightest commitment to democratic norms requires us to ask what the ratifiers – not the draftsmen and the apologists – thought that the Constitution and the Bill of Rights might mean. This appeal to democratic principles operates even though the democracy of late Eighteenth Century America was flawed, as the ratifiers were limited to white male property holders. It may be difficult to discover what the ratifiers thought about these documents, but that fact does not, without more, make Madison or any other drafter, the authority on the meaning of these documents. The larger implications of this, including the incoherence or “originalism” or “textualism” in interpreting the constitutive documents of a democratic republic, lie beyond the scope of this paper.

⁵⁴ 330 U.S. 1 (1947).

⁵⁵ Madison wrote: “[T]he proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a luster to our country, and an accession to the number of its citizens ... Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. ... The magnanimous sufferer under [the] cruel scourge [of the Inquisition], must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.” *Memorial and Remonstrance*, 330 U.S. at 68-69. He continued: “[I]t will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.” *Id.* at

The Founders of the United States of America established the Tentative Principle: “*allocate much of the work of the Anglo-American Reformation to the states and other institutions and not the federal government.*”⁵⁶ The major thrust of the Protestant Empire and its works, goals, and objectives, would come from the states, in that varied and non-uniform way that federalism often guarantees. Perhaps the Tentative Principle merely responded to the fact that no single Protestant denomination was sufficiently powerful to make itself the national religion of the new United States of America, even while pan-Protestantism⁵⁷ had, in colonial America, taken on a meaning, or at least a promise and a potential, that had failed to take hold in England, or elsewhere in Protestant Europe. America would become a Pan-Protestant Empire.

Thus denominational religious establishments of the old or traditional sort did not last past the 1830s,⁵⁸ and Pan-Protestantism became the source of the religion of many American Nineteenth and Twentieth Century public schools.⁵⁹ While the development was not uniform – thanks to federalism – prayer and Bible reading eventually came to be commonplace in most American common schools.⁶⁰ Pan-Protestant Establishment underwent an institutional shift or transformation from church to school.⁶¹ As a result, the

Madison advanced other arguments against the bill to fund Christian religion teachers bill, many having to do with theological and political theory considerations. These arguments lie beyond the limited scope of this paper.

⁵⁶ Newsom, *supra* note 33 at 250.

⁵⁷ “Pan-Protestantism” refers to a pattern or cooperation and conflict between Protestant denominations. *See* Newsom, *supra* note 33 at 195, n.60. *See, also*, Charles Newton Brickley, *The Episcopal Church in Protestant America, 1800-1860: A Study in Thought and Action* (A Dissertation submitted to the Faculty of Clary University, Worcester, Massachusetts, in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of History and International Relations, 1946) (discussing the pattern of competition and cooperation between Episcopalians and evangelical Protestants).

⁵⁸ The Massachusetts establishment, the last of the state establishments, collapsed in 1833. *See* John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., *Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government* 245 (2001).

⁵⁹ That is to say, cooperation between evangelical Protestant denominations produced a consensus or an agreement as to the broad contours of common school religion. *See* Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. Cal. Interdisc. L. J. 222, 233-237 (2002).

⁶⁰ *Id.* at 244-248.

numberless American evangelical Protestant denominations – or at least most of them⁶² -- could make common cause when it came to religion in the common schools.

But subtle mapping problems surfaced even during the heyday of pan-Protestant common school religion. Some state courts refused to countenance this religion and banished it from the public schools.⁶³ As early as 1890 one court noted that the larger cities in its state did *not* provide for common school religion.⁶⁴ Spatial variation had emerged, and it presaged the red and blue mapping discussed above. During the Gilded Age and thereafter, it became clear that a fair number of American cities no longer had Protestant majorities.⁶⁵ Local urban school boards, left to their own devices, would not easily impose the King James Version of the Bible, much less evangelical Protestant prayers, on a student population that was majority non-Protestant. Yet, in some American cities, common school religion of a sort appeared. Typically, it took the form of Bible reading from a choice of Bibles –

⁶¹ *Id.* at 257. This adjustment nicely accommodated the fissiparous nature of evangelical Protestantism. Indeed, America, dominated from the very beginning by radical evangelical Protestantism, has seen a significant increase in the number of Protestant denominations. See Latourette, *supra* note 37 at 1229, 1259-1261.

⁶² Some evangelical Protestants maintained their distance from the pan-Protestantism that took over the common schools in much of America. The Jehovah's Witnesses come to mind. For them, evangelization played itself out not in the public schools, but in other public spaces, in particular the streets and other public ways. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Prince v. Massachusetts*, 321 U.S. 158 (1944). So too, for quite different reasons, do most of the Lutheran Synods. See, e.g., G. Everett Arden, *Augustana Heritage: A History of the Augustana Lutheran Church* 17 (1960) (discussing the differentiation of the Augustana Synod, "the effort to distinguish, clarify, particularize, and assert those elements in the religious tradition ... that were characteristic of" this Swedish-American Lutheran Synod); *The Lutherans in North America* 350 (E. Clifford Nelson, ed. 1975) (noting the "opposition to the use of English" in 1890 by the leadership of the Missouri Synod for fear of the "American spirit" contained in the English language). Much of the standoffishness of Nineteenth Century Lutheranism was a belief that Lutheran doctrine was superior to the theology of Anglo-American evangelical Protestantism, *id.* at 389, particularly the Lutheran Eucharistic doctrine of True Presence. Paul Kuenning, *The Rise and Fall of American Lutheran Pietism: The Rejection of an Activist Heritage* 166 (1988). Indeed, the great expositor of the significance of confessional Lutheran Eucharistic theology is Charles P. Krauth, *The Conservative Reformation and Its Theology* (1871).

⁶³ See the cases collected in Newsom, *supra* note 59 at 244 - 248.

⁶⁴ *State ex rel. Weiss v. Dist. Bd.*, 44 N.W. 2d 967,974 (1890) (stating that Bible reading "does not prevail in the public schools in any of the larger cities in the state").

⁶⁵ And many evangelical Protestants bemoaned that fact. See *JOSIAH STRONG, Our Country* (Juergen Herbst ed., 1963) (1890).

Protestant, Catholic and Jewish⁶⁶ – and of supposedly nonsectarian prayer.⁶⁷ Given the dominance of evangelical Protestantism in American society and culture, the variant forms of common school religion that appeared in cities like New York and Baltimore, were, in practical effect, but Protestantism with a thin veneer of Catholicism and Judaism, were, in practical effect, pan-Protestantism waiting out Catholics and Jews, a pan-Protestantism patiently working to erode and undermine those elements of Catholicism and Judaism that distinguish them from evangelical Protestantism.⁶⁸ Such an effect was, of course, perfectly consistent with the inner workings of a Protestant Empire content to rely on suasion with coercion, however, lurking in the background. And this would be doubly true where the states compelled their cities, even those with non-Protestant majorities, to require Bible reading in the public schools.

By the Twentieth Century the rate of cultural, social, economic and political change had grown exponentially. A century that began with gaslights and buggies ended with computers and rockets, and would see the life expectancy of Americans almost double.⁶⁹ This century also spawned war and genocide on a monstrous scale, and saw the United States become a great power, and, at the end of the century, the preeminent power on Earth. It is during this remarkable century that common school religion, indeed the Protestant Empire itself, would come under severe strain, pressure and scrutiny, even though it never imploded.

Concern for national security led the leadership classes in America to conclude that the country needed to rely on the benefits of science and technology.⁷⁰ Common school religion had to be restrained, if not eliminated. The Scopes Trial proved to be more than just an embarrassment. It would not do for American school children – the indispensable scientists and engineers of the future – to mock or question the premises of science, even if the objections to science were rooted in evangelical Protestant religion, at least in its more

⁶⁶ See *Lewis v. Bd. of Educ.*, 285 N.Y.S. 164 (N.Y. App. Div. 1935) (New York City) and *Murray v. Curlett*, 179 A.2d 698 (Md. 1962), *rev'd sub nom.* *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Baltimore).

⁶⁷ See *Engel v. Vitale*, 370 U.S. 421 (1962).

⁶⁸ See Will Herberg, *Protestant Catholic Jew: An Essay in American Religious Sociology* (1983 ed.)(1955).

⁶⁹ See <http://www.cdc.gov/nchs/fastats/lifexpect.htm> (visited on May 17, 2005) (stating that the average life expectancy of all Americans of all races and both sexes was 47.3 in 1900); www.cdc.gov/nchs (visited on May 17, 2005) (stating that the average life expectancy of all Americans of all races and both sexes was 76.7 years in 1999). See, also, www.infoplease.com/ipa/A0005148.html. (Visited on May 17,2005).

⁷⁰ See Newsom, *supra* note 33 at 259-263.

extreme forms. The result was a Revised Tentative Principle: “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.”⁷¹

However, many evangelical Protestants refused to accept the new understanding of the relation between science and religion and between pan-Protestantism and other American religions. In addition, the spectacular collapse of National Prohibition (herein of a titanic the clash of values and science) – not to mention the embarrassment of the Scopes Trial (herein again of the clash of values and science) – caused many evangelicals to withdraw into their own tight-knit communities, and shun American politics.⁷² The American Protestant Empire came to be dominated by those forms of evangelical Protestantism that had sought to reconcile religion and science. The Court took notice. Hence the Revised Tentative Principle became the operative judicial norm, finding expression in a line of cases beginning in 1948.⁷³ Common school religion in either its official or its collaborative forms took a pasting. At the same time, the Court tempered its judgment – slightly or too much, depending upon one’s point of view – accepting the proposition that *indirect* aid from the common schools and their officials to the works of the Protestant Empire passed constitutional muster even as *direct* aid did not. This resulted in another line of cases with its roots or origins going back to 1952.⁷⁴

Those who had withdrawn returned from their self-imposed political exile. Perhaps emboldened or inflamed by the common school religion cases, the abortion cases,⁷⁵ and perhaps even the race cases,⁷⁶ they resurfaced in American politics in 1976 as Jimmy Carter openly sought their votes.⁷⁷

⁷¹ *Id.* at 263. The difference between the Tentative Principle, adopted and the Founding, and the Revised Tentative Principle adopted in the mid-20th Century is, of course the final clause in the latter, allocating none of the work of the Protestant Empire to the officials, administrators and teachers in the public schools.

⁷² See David O. Beale, In Pursuit of Purity: American Fundamentalism Since 1850 at 251-258 (1986); *Introduction*, The New Christian Right: Political and Social Issues xiv, xx (Melvin I. Urofsky and Martha May eds. 1996).

⁷³ See Newsom, *supra* note 59 at 289-290.

⁷⁴ *Id.* at 290-292.

⁷⁵ See *Roe v. Wade*, 410 U.S. 113 (1973), *reaffirmed in* *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992).

⁷⁶ See *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Regents v. Bakke*, 438 U.S. 265 (1978).

⁷⁷ *Introduction*, *supra* note 72 at xx.

Dissatisfied with his presidency, evangelical Protestants supported Ronald Reagan in 1980⁷⁸ and have remained solidly Republican ever since.⁷⁹ The culture wars, which had been around for quite some time, although they had simmered as much as they had boiled over, now erupted with full force and fury.

RULES REGARDING COMMON SCHOOL RELIGION THAT HAVE EMERGED UNDER THE REVISED TENTATIVE PRINCIPLE

The two lines of cases⁸⁰ that elaborate upon the Revised Tentative Principle as it applies to the common schools merit brief examination. The first line consists of a series of prohibitions or limitations, uniformly imposed on all public school officials in the United States.⁸¹ These cases prohibit on-site released time programs,⁸² prayers in the public schools led by teachers or other public officials,⁸³ Bible reading exercises (whether or not strictly devotional) led or sanctioned by the common schools,⁸⁴ enforcement of statutes that forbid the teaching of evolution in the public schools,⁸⁵ posting the Ten Commandments,⁸⁶ moments of silence, when intended to be religious exercises,⁸⁷ enforcement of statutes that forbid the teaching of evolution in public schools if not accompanied by the teaching of “Creationism,”⁸⁸ graduation prayers delivered by a clergyman selected by the school and written in accordance with school guidelines,⁸⁹ and student-led student-initiated

⁷⁸ *Id.* at xii.

⁷⁹ *Id.* at xii-xiii.

⁸⁰ *See supra* note 73 and accompanying text.

⁸¹ Whether or not these prohibitions are uniformly obeyed is another matter entirely. *See Ravitch, supra* note 8 at 7 (stating that “some school districts still engage in practices the Court has specifically prohibited”).

⁸² *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

⁸³ *Engel v. Vitale*, 370 U.S. 421 (1962).

⁸⁴ *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

⁸⁵ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁸⁶ *Stone v. Graham*, 449 U.S. 39 (1980).

⁸⁷ *Wallace v. Jaffree*, 447 U.S. 38 (1985).

⁸⁸ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁸⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

prayers given at football games.⁹⁰ Much of what the minions of the Protestant Empire had taken to be their divinely ordained right to have their religion function as common school religion had gone by the boards.⁹¹

The second line consists of a series of accommodations. Off-site (as distinguished from on-site) released time programs are permissible,⁹² high school “student religious groups meeting certain statutory requirements are entitled to access to common school facilities during noninstructional time equal to that of nonreligious groups where the schools have established a ‘limited open forum’”⁹³ but are not so entitled where the schools have not established such a forum,⁹⁴ and in a third case,⁹⁵ public elementary schools must make “facilities available to outside religious groups on the same terms that it did for outside nonreligious groups, even though the religious group wished to start its program of religious instruction aimed at school children immediately after the close of the school day.”⁹⁶ These cases give the minions of the Protestant Empire a little playing room, a little leverage, in their efforts to get evangelical Protestantism back in the common schools.⁹⁷ However, this leverage did not satisfy some.

⁹⁰ Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

⁹¹ See Newsom, *supra* note 59 at 244-248 (discussing “Bible,” “Prayer,” and “Service Exercise” cases – the latter class of cases typically being an admixture of Bible reading, prayers, and sometimes hymn singing or other activities of a similar nature).

⁹² Zorach v. Clauson, 343 U.S. 306 (1952).

⁹³ See Newsom, *supra* note 59 at 290.

⁹⁴ Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

⁹⁵ Good News Club v. Milford Central School, 533 U.S. 98 (2001).

⁹⁶ See Newsom, *supra* note 59 at 291.

⁹⁷ Navigating the shoals between these two lines of cases is not always easy. There is the obvious pressure from those seeking to expand the reach and sway of common school religion to read the first line of cases narrowly, and the second line broadly. Those seeking to guard against common school religion would, of course, tend to read the first line of cases broadly and the second line of cases narrowly. Several organizations, probably dominated by those generally opposed to common school religion, have issued a Joint Statement of current law regarding religion in the public schools. The statement can be found at:

<http://www.interfaithalliance.org/site/pp.asp?c=8dJIIWMCE7b=482797> (last visited on May 11, 2005). While the details of this Statement lie beyond the reach of this paper, the Joint Statement covers a wide range of subjects, indicating prohibitions and accommodations regarding student prayers, graduation prayer and baccalaureates,

CHALLENGING THE REVISED TENTATIVE PRINCIPLE

Gordon Butler has argued that the first of the modern post-incorporation separationist decisions,⁹⁸ should be overruled so as to permit “voluntary, parentally controlled religious training in the [public] schools.”⁹⁹ He would not disturb the prayer and Bible reading cases,¹⁰⁰ and indeed argues that acceptance of his proposal would “alleviate the pressure for a constitutional amendment overruling those cases.”¹⁰¹ Butler is arguing for an expansion of the accommodationist doctrine.¹⁰²

Butler makes several arguments in support of his proposal: man is by nature religious;¹⁰³ religion determines culture;¹⁰⁴ American culture is essentially Calvinist-Puritan in its origins;¹⁰⁵ and public schools are essential

official participation or encouragement of religious activity teaching about religion, student assignments and religion, distribution of religious literature, “See you at the pole,” religious persuasion versus religious harassment, the Equal Access Act, religious holidays, excusal from religiously objectionable lessons, teaching values, student garb, and released time. The Joint Statement appears to be a fair and accurate restatement of the relevant legal principles, rules, and decisions, including the decisions discussed above.

⁹⁸ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948)

⁹⁹ Butler, *supra* note 2 at 938.

¹⁰⁰ *Engel v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963).

¹⁰¹ Butler, *supra* note 2 at 938-939.

¹⁰² *Id.* at 885 (stating that “[t]his article does not recommend that public schools be established specifically to teach religion or conduct prayer; nevertheless, as far greater accommodation than is presently tolerated is possible”).

¹⁰³ *Id.* at 872-873.

¹⁰⁴ *Id.* at 854 (stating that “[t]he history of the United States is the history of a people struggling to achieve religious aspirations” and that “[t]herefore, an American culture void of religious expression ... is a contradiction in terms”); *id.* at 855 (stating that “[t]he liberal utilitarian model was not the fundamental religious and moral conception of America,” and [t]hat original conception, *which has never ceased to be operative*, was based on an imaginative religious and moral conception of life that took account of a much broader range of social, ethical, aesthetic, and religious needs that the utilitarian model can deal with”). (Emphasis in the original.)

¹⁰⁵ *Id.* at 855 (referring to “the Puritan view of ‘covenant,’ around which the cultural heritage of America developed”); *id.* at 859-869 (arguing that American law developed out of a Calvinist-Puritan theology).

and indispensable transmitters of culture.¹⁰⁶ For Butler, as a matter of culture and law, America is a Protestant Empire,¹⁰⁷ for which he sees only an ugly alternative:

“I am convinced that the continued and increased dominance of the complex of capitalism, utilitarianism, and the belief that the only road to truth is science will rapidly lead to the destruction of American society, or possibly in an effort to stave off destruction, to a technical tyranny of the ‘brave new world’ variety.”¹⁰⁸

For Butler, therefore, there is a culture war under way between a Calvinist-Puritan culture, and a culture dominated by science.

Butler sees a country in crisis because “in 1948 ... the Supreme Court began its effort to remove all traces of the Christian religion from the public school.”¹⁰⁹ Butler argues that the Court undermined, if not destroyed, that

¹⁰⁶ *Id.* at 852 (referring to the public school system “as the chief means by which American culture is transmitted from generation to generation, as the supreme Court supposes”); *id.* at 859 (stating that “if religion is a vital component in the resolution of society’s problems, it may be necessary for the public school system to serve as a vehicle to facilitate religious value training”); *id.* at 876 (stating that the separation of law and religion “leads to perverse results in that it shields extreme cults from governmental inquiry, while preventing schools from openly and effectively transmitting the common culture”).

¹⁰⁷ I have suggested that the Anglo-American Protestant Empire is alive and well. *See generally*, Newsom *supra* note 34 *passim*. He and I disagree however, on the question whether this Protestant Empire is a good thing. I find it to be an “unmitigated disaster,” *id.* at 188 n. 3 (arguing 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” and “that it has posed enormous difficulties for whites who are not Protestants, mainly Catholics, Jews and Eastern Orthodox, the so-called ‘white ethnics’”). Butler, on the other hand, celebrates “Biblical religion” as having played “an integral part in the development of a free society in the United States,” Butler, *supra* note 2 at 941, and democracy in particular. *Id.* at 854 (insisting that “a general religious agreement as to the nature of a moral and just society is necessary in order to support a democratic government”).

¹⁰⁸ *Id.* at 856.

¹⁰⁹ *Id.* at 851. Butler, more broadly, claims that America’s problems are essentially moral and religious, *id.* at 877, and that even economic problems rest on a value- or religion-driven base or predicate. *Id.* at 882 (stating that “[s]ound economics ... must be built on the character of the people, which is essentially determined by religion,” citing Michael Novak, *The Catholic Ethic and the Spirit of Capitalism*, and Max

essential and critical role of the common schools as the transmitters of a Calvinist-Puritan culture. He fails to recognize that there is a religious justification for this removal. The Revised Tentative Principle is a religious settlement, not an *anti*-religious settlement. A religious person could say that she would prefer *no* religion in the common schools over the *wrong* religion because she was prepared to tend to the religious formation of her children without the “help” of evangelical Protestants or the common schools. She embraces strategic secularism, not because she rejects religion, but rather that she rejects the efforts of evangelical Protestants to convert her or her children to their religion. This is surely a religious justification.

Nonetheless, Butler correctly notes that “this removal of Calvinist-Puritan religion from public schools” has led to “the growth of Protestant Christian schools, home schooling, and the present pressure for a constitutional amendment addressing school prayer.”¹¹⁰ But these developments reflect the complaints and concerns of the evangelical Protestant Religious Right, not the broader American society and culture.¹¹¹

Weber’s work on the Protestant Ethic). Butler’s argument may be bad economics largely because it assumes a certain deterministic causation that may or may not survive scrutiny. But his approach to economics is entirely consistent with his elevation of Calvinist-Puritan religious values over science.

¹¹⁰ Butler, *supra* note 2 at 846.

¹¹¹ Some who are not evangelical Protestants are members of the Religious Right, although some might suggest that they are precious few in number. Catholics for a Free Choice, a liberal organization claims that as of 1994, only a handful of American Catholics had allied themselves with the Religious Right. See Steven Askin, *The Catholic Right: An Overview*, <http://www.catholicsforchoice.org/pubs/catholicrightLong.asp> (Visited on May 17, 2005). But see *Introduction, supra* note 72 at xviii (stating that fundamentalist Roman Catholics, Jews and Muslims “play an important role in contemporary political-religious affairs” and that “[w]hile Protestants comprise the bulk of the visible religious right, they are not alone, and their basic rejection of the liberal tradition is shared by fundamentalists of other faiths as well”). See, also, the journal *First Things*, <http://www.firstthings.com>, which, under the direction of Richard John Neuhaus, a former Lutheran pastor, now Roman Catholic priest, collects the thoughts and ideas of rightwing Catholics, Protestants and Jews. Nonetheless, whatever the numbers, there can be no doubt but that the driving force of the Religious Right is evangelical Protestantism of a revivalist, fundamentalist sort. Butler fudges the point, by characterizing these who object to the Revised Tentative Principle in inconsistent ways. At one point Butler describes the objectors as those whose values are “shared by Christians, Jews, Muslims and a number of other religions, Butler, *supra* note 2 at 851 (referring to values that “emphasize[] personal responsibility, stable family structures, respect for parents, teachers, and governmental authorities, respect for the person and property of others, the sanctity of truth, and the value of work and commitment”), at another, he refers merely to “Christians and Jews, *id.* at 852, although in so doing, he attempts to link both Christians and Jews to a passage in New Testament Scripture! *Id.*

Butler fails adequately to demonstrate why accommodating voluntary parent-controlled religious teaching in the common schools might undo the damage inflicted, in his view, by the 1948 decision. Given the magnitude of the problems, as Butler sees them, it is difficult to see why the other separationist decisions of the Supreme Court should not also be overruled so that official religious exercises could be reinstated in America's common schools. Furthermore, Butler never satisfactorily explains (1) who the parents are who would control this voluntary in-school religious instruction and (2) how a system of parental-control would actually work.

Butler places "parents" in four distinct groups: (1) those concerned with the removal of religion from the common schools and who have, therefore, taken their children out of the public schools;¹¹² (2) those inner city, presumably racially minority, parents, among others, who are "deviant, delinquent, or criminal ... [who a]t best ... misshape the character and lives of the young in their midst ... [and a]t worst ... abuse, neglect, or criminally prey upon the young;"¹¹³ (3) those "fighting poverty and lacking education [who] will find it almost impossible, without [government] help, to give their children a system of fundamental values that can counteract the combined forces of peer pressure and the entertainment media;"¹¹⁴ and (4) those in "two wage earner families ... [where] the pressures ... to earn an adequate living leave millions of children in situations without constant, relaxed, parental nurturing," and "[r]eligious training [for the children], even when desired by the parents, becomes increasingly difficult."¹¹⁵

Ignoring Butler's crude, racist characterization of minority inner city parents, he never explains how these four groups – or at least the last three of the four, the first group of parents having withdrawn their children from the public schools – are supposed to come together to construct and to control the voluntary program of religious instruction for which he calls. Presumably those parents fighting poverty and lacking education, are going to need help to enable them to find the time and to acquire the skills necessary meaningfully to participate in the design, management, administration and control of the

(citing Lk 4:4). Butler attempts to recover his footing by a reference to Deuteronomy. *Id.* But he has managed rather nicely to establish the great difficulties inherent in a claimed "Judeo-Christian" tradition, and why, especially from a Jewish point of view, the very idea is problematic, at best.

¹¹² *Id.* at 848 (referring to the "[m]any who have left the public system for privately operated Christian schools, while others have opted for home schooling").

¹¹³ *Id.* at 909.

¹¹⁴ *Id.* at 923.

¹¹⁵ *Id.* at 929.

program. But he never explains just what forms that help might take. Perhaps he merely wants right wing forces to provide the “help” by controlling the programs for which he calls. He never considers whether it is appropriate for government or others to be involved in an undertaking to empower poor and uneducated parents so as to enable them to take some control and supervision of a program to aid in the religious formation of and the transmission of religio-cultural values to their children. Surely the “deviant, delinquent and criminal” parents are going to need even more radical intervention by somebody, unless the Religious Right takes control by default. And for those parents who presumably are competent to superintend the religious formation of their children but merely lack the time to do so, some sort of program is needed in order to free up the necessary time for them to participate. Given Butler’s failure to explore meaningful programs to empower parents, one is left to suppose that the overactive, zealous minions of the Protestant Empire – parents, preachers, and assorted busybodies – will take charge. Butler’s proposal, in practical terms, empowers Religious Right activists.

The second question, how will these programs work in the real world, reinforces this conclusion. There is a federalism dimension to Butler’s proposal: “[s]uch programs would also involve parents in decision-making processes concerning their child’s moral and religious training and would offset the forced uniformity of standardized state or nationally approved criteria.”¹¹⁶ Butler clearly has in mind programs that operate school by school. However, school attendance boundaries present a fundamental problem of mapping. Gerrymandering for religious reasons is altogether possible,¹¹⁷ particularly given the detail that we have in federal census data. And no one can guarantee that school attendance zones will not be gerrymandered by Religious Right activists, if given the chance, in order to advance particular religious agendas.

But the problems only get worse. One of the concerns that animated the separationist decisions is the harm visited upon religious minorities, be they students or parents, by the practice of common school religion,¹¹⁸ even of the sort called for by Butler. He notes the problem,¹¹⁹ but never fully comes to grips with it. His argument regarding stigma, peer pressure and other forms of psychological and status-based harm visited upon students, parents and others who are members of minority religious¹²⁰ groups largely centers on the claim

¹¹⁶ *Id.* at 939.

¹¹⁷ See *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *United Jewish Organizations v. Carey*, 430 U.S. 144, 185-186 (1977) (Stewart, J., concurring in the judgment) (noting that “mathematical formulas and quotas in districts sustain ghettos by marshalling religious groups into enclaves”)

¹¹⁸ See Newsom, *supra* note 68 *passim*.

¹¹⁹ Butler, *supra* note 2 at 851.

¹²⁰ For a full discussion of these forms of harm, see Newsom, *supra* note 59 *passim*.

that under his program, a large number of religious groups would participate.¹²¹ Harm and stigma, he says, would not be serious problems, practically speaking. But in the program controlled by “parents,” what assurance is there that there will be a large number of religious groups? How will “parents” determine which groups will or will not participate in a particular program? What happens when “parents” with some savvy point out that the spatial scale or dimension of the program works against some religions? Where (a) the members of a particular religious group are spread among several school attendance districts, and (b) there is an insufficient number of members – and students – in any one district to make a program of instruction by a representative of that religion feasible or practicable, then it would not be feasible to participate in the program. Some religions would fare better if the program were administered off-site, which the law currently permits,¹²² provided that the school districts established uniform released times so that these religions could gather their children from throughout the school district for instruction in the tenets of that particular religion.

Butler never says what the time demands or dimensions of the program would be. Would the program take one hour a week? Five hours? More? Less? What happens if some religious groups opt for five hours and others for thirty minutes? Is that satisfactory? Furthermore, some religions do not believe that schools should be the medium or instrumentality for the transmission of religio-cultural values. How should the parents “controlling” the program handle that theological or religious issue?

The problem of harm to religious minorities remains precisely because of the differential response from parents and from the various religious groups that would invariably follow the establishment of the program that Butler advocates. He claims, without citing any authority whatsoever, “that junior high school students should be mature enough to sift through ideas and reject those with which they disagree.”¹²³ In light of the broader sweep of his article, this argument makes no sense. The program that he wants would segregate the students, for at least some time during the school day or week – we do not know which, along sectarian lines, with students who are not participating in the program presumably given something else to do during the religious instruction time or times. So there is no occasion to “sift and reject.”¹²⁴ Ultimately, Butler retreats to the argument that “[i]t is the school’s function to

¹²¹ *Id.* at 886, 927.

¹²² See *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹²³ *Id.* at 901.

¹²⁴ Butler never addresses the special problem of harm to *elementary* school students.

provide guidance to enable the child to discriminate between, and to resist, peer pressures, while respecting the rights of others.”¹²⁵

Butler’s thinking comes to this: the Court ought to empower “parents” by letting them “control” voluntary religious instruction in the common schools, but leave it to the school and the parents of school children who belong to minority religions to assuage the harm done by religious bullies.¹²⁶ It is all the more ironic, and insensitive, because Butler has characterized many parents as poor and ignorant, or, worse, as deviant, delinquent or criminal, or as too hardworking to have time to attend to the religious formation of their children. Now he expects these parents to recognize bullying, for children are not noted for telling their parents about such behavior, and find the skills, time, desire, and inclination to address the wounds and heal them. One has to conclude that Butler really wants to empower and legitimize religious bullies, both parents and children.

For Smolin, the question is who is going to win the culture wars and what happens if one side wins. He sees the culture wars as involving a struggle between “[t]he liberal secularism that Modernist Protestantism unleashed ... [and] a combination of Protestant evangelicalism and Roman Catholicism.”¹²⁷ He puts the matter starkly: “[t]he loser [*sic*] will live in a society that is hostile to the continuance of their ways of life, even if force is not literally used to destroy them.”¹²⁸

Smolin nonetheless frames the central question as one of “fairness,” and not of “winning and losing.”¹²⁹ According to Stanley Fish, Smolin’s

¹²⁵ *Id.* at 933.

¹²⁶ Butler writes: “Peer pressure to participate in religious classes is not different [from peer pressure in general], and successful instruction in mutual respect will reduce that pressure. Today the peer pressure would probably be mixed, with many students advocating attendance and others the opposite. But here, the decision to respond to any peer pressure is in the hands of the parent, who is chiefly responsible for the education and well being of the child.” *Id.*

¹²⁷ Smolin, *supra* note 2 at 1073.

¹²⁸ *Id.* at 1097.

¹²⁹ Smolin writes: “[F]airness requires that either side of America’s contemporary cultural conflict be allowed to win. This principle of fairness reflects America’s fundamental commitment to self-government, which assumes that government will reflect the will and values of the people. Fairness also includes certain guarantees to the losers. Self-government, after all, assumes continuous dissent and debate, and the conditions for such continued deliberation include America’s core commitment to civil liberties. These traditional guarantees of civil rights must also include the right to carry the legacy of dissent to future generations through the principle of family integrity.

appeal to and invocation of “fairness” suggests that Smolin “reveals himself to be just one more modernist liberal ...”¹³⁰ Nothing could be further from the truth. Smolin uses the rhetoric of “fairness” merely as a smokescreen for a remarkably illiberal and intolerant agenda.

Smolin argues that the Religion Clauses “were conceived to regulate competition between Christian denominations. It was the splintering of the church and the ugly specter of intra-Christian religious wars, rather than relations with those who professed other religions, or no religion, that produced America’s separation of church and state.”¹³¹ He has embraced the Tentative Principle.

Smolin claims, however, that the adoption of the Revised Tentative Principle “represents a change in the self-identity of the nation, because it renders the previously dominant concept of a ‘Christian America’ heretical and repugnant.”¹³² This rejection is, for Smolin, “unfair.” The truth, though, is that the Revised Tentative Principle represents a struggle between two different evangelical Protestant visions, two different evangelical Protestant strategies for maintaining the Protestant Empire, a struggle arising out of (1) the changing religious complexion of America and the efforts of religious majorities to overthrow Protestant hegemony,¹³³ and (2) the needs of national security. Smolin argues that this struggle is not in fact between evangelical Protestants of different stripes. For him “[l]iberal Christianity, like liberal Judaism, is an

Finally, America’s heritage of federalism offers another important means of containing social conflict.” *Id.* at 1103.

¹³⁰ Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 *Colum. L. Rev.* 2255, 2231 (1997).

¹³¹ *Id.* at 1069. If we substitute “Protestant” or “evangelical Protestant” for “Christian,” then we can comprehend Smolin’s position as a minion of the Protestant Empire. The dominant demographic position of radical evangelical Protestantism at the Founding warrants the conclusion that in the late Eighteenth Century, “Christian” meant “Protestant,” or, better, “evangelical Protestant. The demographic data establish that Catholics – not to mention Jews – constituted a miniscule percentage of the white American population in the late Eighteenth Century. See Roger Finke and Rodney Stark, *The Churching of America, 1776-1990*, at 55 (1992) (stating that Catholics comprised 1.8% of the religious adherents in America in 1776, adherents of any sort being only a small portion of the population at that time); Ahlstrom, *supra* note 41 at 342 (putting the count of Catholics in the thirteen colonies as of 1785 at no more than 32,500).

¹³² *Id.* at 1072.

¹³³ See generally, R. Laurence Moore, *Religious Outsiders and the Making of Americans* (1986); *Minority Faiths and the American Protestant Mainstream* (Jonathan D. Sarna ed., 1998). See also Newsom, *supra* note 59 at 238-242 (discussing the resistance of Catholics and Jews to pan-Protestant common school religion).

unstable way of life that lacks any center of coherence or generational continuance; succeeding generations dismantle the customs and beliefs of previous generations, which constitute arbitrary and sentimental artifacts.”¹³⁴ For him, therefore, the struggle between two evangelical Protestant visions quickly degenerated into a fight between traditionalist evangelical Protestants and liberal secularism.¹³⁵ The rationalist strain of evangelical Protestantism, from which liberal Protestantism comes, has at least as much durability as the pietistic strain from which evangelical Protestantism, particularly of the revivalist, fundamentalist sort, derives.¹³⁶ And the fact that fundamentalist evangelical Protestantism may be on the rise presently and liberal evangelical Protestant in decline¹³⁷ does not make the latter incoherent. Indeed, it is hard to imagine a time in American when liberal religion was on the rise in the United States, but liberal religion there has always been, at least since the Enlightenment.

Furthermore, modernist, rationalist, liberal evangelical Protestantism gained the advantage over fundamentalist evangelical Protestantism by 1935, in the wake of the Scopes Trial and the collapse of National Prohibition.¹³⁸ Liberals prevailed, most probably, because the twin disasters of trying to ban booze from America’s clubs and parlors, and trying to ban monkeys from mankind’s family tree led liberals and moderates – among others – to ridicule Smolin’s “traditionalists.” But it does not follow that the “traditionalists” did not have a numerical edge over liberals then as they do now. One also has to factor into the political and cultural equation of the 1930s the presence of large numbers of Catholics, Jews, Eastern Orthodox, adherents of other religions, atheists, nonbelievers and freethinkers of various and sundry stripe, not all of whom were liberals. Indeed Smolin claims some of them as his comrades in arms.¹³⁹ Smolin’s traditionalists had overplayed their hand. And in the years

¹³⁴ *Id.* at 1096.

¹³⁵ *Id.* at 1073.

¹³⁶ See John W. Nevin, *The Mystical Presence: A Vindication of the Reformed or Calvinistic Doctrine of the Holy Eucharist* 130-149 (Thompson and Bricker, eds. 1966) (1846) (roundly criticizing both rationalism, the source or root of liberal evangelical Protestantism, and sectarianism, the source or root of fundamentalist, pietistic evangelical Protestantism, finding both to be expressions of subjectivism, contrary to the objectivity of orthodox Calvinism, and finding both to be, in some sense logical, if unfortunate, consequences of Sixteenth Century Protestantism). Both “liberal” and “traditionalist” Protestantism have therefore been around for a quite a while, and the former is still in place, even if the number of its adherents is, at present, declining.

¹³⁷ Smolin, *supra* note 2 at 1096 n. 125.

¹³⁸ See *supra* notes 72-79 and accompanying text.

following 1935 the Revised Tentative Principle took hold. It is difficult to see how it becomes “unfair” for one side to “lose,” or at least to go into retreat, for overplaying its hand.

Smolin’s predicate for his specious “fairness” argument is his false equating of what his opponents might do to his side, should it win, with what his side would do to his opponents, should his side win:

“The conflict is more serious than most theorists and individuals appear to realize. The natural tendency of each cultural group is to destroy the other. On the one hand, traditionalist theists are willing to use the law to encourage and even force all persons to live according to certain minimum standards. Thus, if traditionalist theism wins, activities such as abortion, fornication, and homosexuality will be criminalized, or at least disfavored in relation to childbirth, marital intimacy, and heterosexuality. Obviously, there are those who consider their freedom to abort, fornicate, or sodomize absolutely necessary to the good life. On the other hand, many modernist liberals would bar traditionalist theists from relying on their religious and moral presuppositions in public life, while modernist liberals would be able to use the expanding scope of government to spread the ‘gospel’ of autonomous individualism and radical egalitarianism. The state itself would engage in cultural warfare against all cultural groups whose customs, practices, or beliefs include ‘stereotyped roles for men and women.’ The law would be used to crush those who oppose abortion. Those who oppose homosexuality on moral ground would be labeled bigoted and subjected to civil penalty, or have their speech suppressed as ‘hate speech.’ Those who punish their children through spanking would be legally categorized as child abusers. Marriage and the traditional family would progressively become merely one of the many alternative lifestyles; eventually, the traditional family would be disfavored in law, or even criminalized. Traditionalist theists increasingly would find themselves an endangered and beleaguered minority.”¹⁴⁰

First, Smolin misreads and distorts history. Given the victory of modernism in 1935, it is strange indeed that the Religious Right finds itself alive and well, and indeed, largely in control of American politics by and through the Republican Party. Smolin may have, *arguendo*, good grounds to criticize those

¹³⁹ Smolin, *supra* note 2 at 1073.

¹⁴⁰ *Id.* at 1094 -1095.

who would exclude the Religious Right from public political and civic discourse.¹⁴¹ But what Smolin objects to is, at a cultural level, the refusal of some American liberals to accept Smolin and his views as legitimate. It is hard to see how this disdain threatens traditionalists with criminal sanctions, however, and such a threat is necessary to sustain Smolin's "equation."

Second, there is no credible evidence that liberals and the progressives would disfavor or criminalize the traditional family.¹⁴² Smolin, who appears to be perfectly comfortable with the abuse of racial, religious and other minorities, including the imprisonment of gays and lesbians, given the chance, and the physical abuse of children by their parents, projects his own inclinations onto others, for which he has been deservedly rebuked.¹⁴³

One cannot take Smolin's argument for "fairness" seriously. Traditionalist criminalization is not the moral equivalent of liberal disrespect. In any event, what really matters for him is the following:

¹⁴¹ Id. at 1074 -1087.

¹⁴² Smolin's "authority" for his claimed overreaching of modernists, should they prevail, is sparse, and inapposite, and hardly reflective of the views and beliefs of those who voted, for example, for Gore and Kerry. Certainly they do not reflect my views. With regard to hate speech, for example, in light of the decision in the cross-burning cases, *Virginia v. Black*, 538 U.S. 343 (2003), the discussion on hate speech has changed in dramatic ways. The more careful commentators have sought to develop a more subtle analysis of the conflicting rights of free expression and personal safety, and free expression and unpopular views. See, e.g., Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 Ariz. St. L. J. 953 (2004) (arguing for an analytical distinction between speech and conduct so as to separate the expression itself from the setting or context in which it is uttered or made, an approach strongly suggested by *Virginia v. Black*); Chris Demaske, *Modern Power and the First Amendment* "Reassessing Hate Speech", 9 Comm. L. & Pol'y 273, 275 (2004) (calling "for a shift in the legal treatment of hate speech, a shift that will allow for the restriction of hate speech in certain circumstances depending on the power relationship between the speaker and the target of the speech"); Roger C. Hartley, *Cross Burning – Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 Cath. U. L. Rev. 1, 5 (2004) (expressing some reservations about *Virginia v. Black*, particularly with reference to which symbols should be regulated, and to the danger that the decision "inadequately protects against the punishment of unpopular views"). The bottom line is that the question is not whether to punish hate speech, but to punish conduct or behavior associated with such speech, particularly where the particular circumstances warrant such a sanction.

¹⁴³ See, e.g., Theodore Y. Blumoff, *An Essay on Liberalism and Public Theology*, 14 J.L. & Religion 229, 241n.22 (1999-2000) (asking "[w]hy should I welcome a conversation with one whose theology not only expressly dishonors my religion, but denies my equality and humanity, and at least implicitly promises my actual physical destruction?").

“I am not suggesting that we reverse the incorporation of the establishment clause, but rather that we recognize the usefulness of federalism for lessening contemporary tensions between traditionalist theism and modernist liberalism-as-autonomy. Even a cursory knowledge of American cultural patterns informs us that this cultural tension would be resolved differently in Louisiana than in Massachusetts. If the Supreme Court stops trying to settle this conflict through incorporation of autonomy principles into the Constitution, the states will go in increasingly different directions. America’s heritage of moving to a place reflective of one’s values will again be a vehicle for containing social tensions. Certainly, minorities within state should retain their civil and political rights ... Nonetheless, in the battle over defining and effectuating the temporal peace [between the opposing sides in the culture wars], one option of losers should be the traditional American remedy of migration.”¹⁴⁴

Smolin would strengthen the hand of the Religious Right, as his reference to Massachusetts (a blue state) and Louisiana (a red state) makes clear. If evangelical Protestantism cannot dominate every square inch of American real estate, let it at least have a free hand, or relatively free hand in those spaces that it can dominate. Butler is careful to confine his reach to a fairly narrow and restricted resurrection of one form of common school religion. Smolin recognizes no such limits, being prepared to demolish the entire edifice of law constructed on The Revised Tentative Principle. Smolin is arguing for nothing less than a return to the Tentative Principle and for having it apply to the entire reach and range of church-state questions, his denial notwithstanding. If we allow red Louisiana and blue Massachusetts to go their separate – and presumably different – ways, then the Revised Tentative Principle cannot stand. Local variation on the matter of autonomy would supplant or replace national uniformity on the matter of religious settlements because these settlements, by their very nature, implicate autonomy. At some level, religion is a private matter.

With regard to common school religion, Smolin cannot have a principled objection to the abuse of school children if it furthers the interests of “traditionalist” religion. If Smolin is willing to see gay people imprisoned, if he is willing to see minorities heckled and hounded, why should he object to the abuse and harassment of public school children who did not accept the religion of the dominant forces of the Religious Right?¹⁴⁵ Smolin can make no

¹⁴⁴ Smolin, *supra* note 2 at 1102-1103.

¹⁴⁵ On this score, sensible right-wing Roman Catholics, Muslims, Jews and others ought to ponder whether their children are really better off if routinely exposed to evangelical

pretense, as Butler did, of trying to explain away stigma, peer pressure and other forms of verbal and physical abuse as “slight” problems to which schools and the parents of the bullied and the abused would have to attend.

For if one objected to this abuse, Smolin has one answer: move on, migrate, and find a place in America where blue trumps red, where the losers will not be imprisoned, harassed, marginalized or otherwise mistreated. Or, the losers can stay and dissent and protest their mistreatment because for Smolin, “civil liberties” and “civil rights” can mean no more than this.¹⁴⁶

Smolin is merely more candid than Butler. The only practical way that “parental” control of Butler’s voluntary on-site religious instruction can work is if religious minorities migrate to more hospitable climes so that the remaining majority can work its will largely unfettered by the need to work through the difficult questions that a religiously diverse local school attendance district would otherwise present.

FURTHER THOUGHTS ON THE CHALLENGES POSED

At a moral level, the ideas of Professor Butler and Professor Smolin are indefensible. They encourage abuse and victimization, and they coldly and callously encourage religious minorities to pack up and move if they do not care for the brand of common school religion practiced in the local schools. And Professor Smolin constructs a patently false moral equivalency between (1) putting gay people in jail and harassing the weak and the powerless and (2) resisting his attempt to legitimize oppression and bullying. His adversaries, including, one supposes, a fair number of gay people and members of various religious minorities, have no desire to put him in jail. Smolin implicitly argues that not to let him have his way is to bully and harass him, particularly when, for a very long time, letting him have his way was the American way. But this can be so only because Smolin wants to harm other people. His intended victims have a right to resist. Resisting harm is not, therefore, the moral equivalent of a persistent desire to inflict it.¹⁴⁷ Put in its simplest terms, *Smolin claims that liberals harm him when they seek, through appeal to the principle of autonomy, to thwart him from harming people. Butler’s position is essentially the same: fashion a rule that increases the quantum of bullying and let others tend to the wounds inflicted. Butler may be more solicitous of the harm that his proposal would cause, but his proposal necessarily gives rise to this harm.*

Protestant religion in the common schools. Nothing in Smolin’s argument provides any guarantee that the interests of these religious minorities would be respected.

¹⁴⁶ *Id.* at 1103.

¹⁴⁷ See Newsom, *supra* note 59 at 238-244 (discussing resistance to and persistence in support of common school religion).

One could end here. But there are further, related, objections. The Butler and Smolin proposals would only ratchet up the tensions between “traditionalists” and “modernists,” and would greatly compromise national security. Devolution would exacerbate the conflict that divides America into red and blue. The true goal of devolution may not be states’ rights at all, but rather a desire to replace the current uniform national rules with new ones that serve the interests of the Religious Right, again intensifying the struggle between two different understandings of the mission and destiny of the United States, much like the difficulties that America experienced during National Prohibition. Replacing a liberal and reasonably generous right to settle with an intolerant call to pack up and leave tears at the fabric of the nation, causing only more division and dissension. And national security is severely compromised by an America that substitutes “values” for science.

REMAPPING: MAKING A BAD SITUATION WORSE

America’s religious conflicts have tended to be overwhelmingly local in nature. While one can point to broad, sweeping national movements such as National Prohibition, and its deeply ingrained anti-Catholicism,¹⁴⁸ or to political movements that transcended state lines like the Know Nothing Party of the ante-bellum era,¹⁴⁹ when it comes to religion in the common schools, local disputes form the heart and soul of the problem of religious bigotry and intolerance.

The case law on common school religion rests on struggles waged in local school districts.¹⁵⁰ The basic structure of American public primary and secondary education guarantees and has guaranteed this result. The cases involve actions brought by members of minority religious groups – parents and children, or both – against official religious practices conducted by local school districts. It is at the local level where the harassment, bullying and indoctrination have their greatest impact. Accounts of contemporary religious intolerance in America also reflect this pattern.¹⁵¹ Religious bigotry in America finds its harshest and crudest expression at the local level.

¹⁴⁸ See Ahlstrom, *supra* note 41 at 856 (stating that “[n]ativism, anti-Catholicism, and anti-Semitism prepared the ground for ... the Anti-Saloon League” in that “[t]hey were prominent and functional features of the Protestant Establishment in America during the last troubled decades of its hegemony”).

¹⁴⁹ See Peter H. Hanna, *School Vouchers, State Constitutions, and Free Speech*, 25 *Cardozo L. Rev.* 2371, 2385-2387 (discussing the origins, nature and character of the Know Nothing Party).

¹⁵⁰ See Newsom, *supra* note 59 at 244 – 248.

¹⁵¹ See, e.g., Carol Barner-Barry, *Contemporary Paganism: Minority Religions in a Majoritarian America* 147 - 171 (2005); Ravitch, *supra* note 8 at 8 – 16.

Devolution makes matters worse because the very premise upon which it rests will only encourage people to fight. Smolin and Butler are looking for victories wherever they can find them, having lost something they value under the principles of The Revised Tentative Principle. The minions of the Religious Right will, under devolution, seek to impose their will even more strenuously and more persistently than ever, and of course modernists and progressives will resist all the more.

The forces of the Religious Right might benefit from these heightened tensions. Maybe, on theological grounds, such struggle reminds them of Armageddon and the Second Coming, and maybe they look forward, therefore, to intensified warfare.¹⁵² Devolution, therefore, in and of itself, might well advance the goals of revivalist evangelical Protestants. But the upshot of this is an imposition, by the Religious Right of their theology on the rest of us, and the exaction of a toll that, for the rest of us, is unacceptable.

NATIONAL PROHIBITION: DÉJÀ VU ALL OVER AGAIN

National Prohibition constituted one of the greatest Protestant crusades in American history. Virtually all white, Anglo-Saxon Protestants, evangelical or liturgical, traditionalist or modernist, supported the Dry¹⁵³ Crusade.¹⁵⁴ But evangelical Protestantism was the most important part of the Protestant coalition.¹⁵⁵ The modern Religious Right is largely evangelical Protestant.¹⁵⁶ The Religious Right, by calling itself “traditionalist,” ties itself to such

¹⁵² See Jerald C. Brauer, *Revivalism and Millenarianism in America*, in *In the Great Tradition, in Honor of Winthrop S. Judson: Essays on Pluralism, Voluntarism and Revivalism 147-156* (Joseph D. Ban & Paul R. Dekar eds., 1982).

¹⁵³ The term “Dry” or “Drys” refers to those in favor of National Prohibition. The term “Wet” or “Wets” refers to those opposed to it.

¹⁵⁴ See, e.g., Marty, *supra* note 35 at 375 (stating that “[f]or the most part ... temperance became a Protestant preserve, a sign of last-ditch defenses of the old Protestant empire”); Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* 92 (1971) (noting that “[t]he temperance cause was a very important aspect of the struggle to maintain the patterns of Christian [i.e. evangelical Protestant] civilization in America”).

¹⁵⁵ The Baptists and the Methodists provided the lion’s share of the workers in the vineyard of the Drys. See, e.g., Note, 80 *The Methodist Recorder* 20 (October 25, 1919) (saying that “[t]he war against alcohol in France has been gravely handicapped by the fact that the nation has no strong evangelical church”); John Allen Krout, *The Origins of Prohibition* 300 (1925) (noting that “the greatest single force in the [Prohibition] movement was the power of evangelical Protestantism”).

¹⁵⁶ See *Introduction*, *supra* note 72 at x – xi.

“traditional” movements as National Prohibition. Finally, the Religious Right understands itself as the chief force in favor of reestablishing the preeminence and the authority of the Protestant Empire, precisely the goal and objective of the Drys. A powerful link exists, therefore, between the Drys and the modern Religious Right, and it makes sense to take a look at the strategy employed by the Drys to foist and impose National Prohibition on the American people. The strategy of the Drys may indeed inform the strategy of the Religious Right, given the ties between the two, and one needs to understand the ultimate meaning and purpose of devolution in this light.

The Anti-Saloon League played a major role, if not the decisive role, in the adoption of the National Prohibition Amendment,¹⁵⁷ the Amendment prohibiting beverage alcohol.¹⁵⁸ The League demonstrated a remarkable ability to understand and exploit the hydraulics of the American federalism, both national and state. The League itself had a federal structure,¹⁵⁹ and drew

¹⁵⁷ See, e.g., Thomas M. Coffey, *The Long Thirst – Prohibition in America: 1920 – 1933* at 8 (1976) (describing Wayne Wheeler, the general counsel and national legislative superintendent of the Anti-Saloon League as the one “more than any other man, [who] was responsible for the strategy which inserted the liquor-banning Eighteenth Amendment into the U.S. Constitution and propelled the Volstead Act through Congress”); James H. Timberlake, *Prohibition and the Progressive Movement: 1900 – 1920* at 148 (1976) (stating that “the Eighteenth Amendment would probably never have materialized except for the league”); Norman H. Clark, *Deliver Us from Evil: An Interpretation of American Prohibition* 93, 114 (1976) (claiming that the League “became a lens through which the various and diffuse energies of Prohibition, evangelical Christianity, feminism, social purity, and political reform could be brought into sharp focus” and that Wayne Wheeler, the League official “put the 18th Amendment in the Constitution”); Herbert Asbury, *The Great Illusion: An Informal History of Prohibition* 94 (1968) (noting that the Anti-Saloon League led the Dry crusade “to final victory”). But see Peter H. Odegard, *Pressure Politics: The Story of the Anti-Saloon League* 78 (1928) (arguing that the League “provided an organization through which” a pre-existing Dry sentiment “made itself effective” and that “[i]n the final analysis, [the League’s] success depended not only upon its ability to make prohibition sentiment, but also upon its ability to build an effective political machine upon the basis of an already existing body of opinion”). But see John J. Rumbarger, *Profits, Power, and Prohibition: Alcohol Reform and the Industrializing of America, 1800 – 1930*, at xviii – xix, xxiv (1989) (arguing that the “dynamics of political economy” mattered, and that “men of power and substance [antisaloon capitalist barons] regarded temperance reform as integral and necessary to establishing a capitalist, industrial social order,” and “they turned to constitutional prohibition to achieve their goals for a saloonless working class and political stability ... [that is to say, to produce] an industrial order characterized by political stability and labor’s social quiescence”).

¹⁵⁸ U.S. Const. Amend. XVIII, *repealed*, U.S. Const. Amend. XXI.

¹⁵⁹ See Eliot Asinof, *1919 – America’s Loss of Innocence* 236 (1990) (stating that the structure of the League “would be a federation of strong state organizations over local

its membership from the evangelical Protestant churches which had developed their own federalist structures.¹⁶⁰ The League took the ecclesiological federalism of its wellsprings, evangelical Protestants, and adapted it for the purposes of accomplishing its overarching objective – National Prohibition.¹⁶¹

The League approached National Prohibition incrementally. This incrementalism had two aspects. The first was federalist: pursue local restrictions, then statewide restrictions, and then finally national controls.¹⁶²

temperance groups, mostly under church auspices”); Timberlake, *supra* note 159 at 135 (saying that “[f]rom a coalition of existing temperance groups, [the League] had become a national federation of state antisaloon leagues, which, in turn, had become federations of individual churches throughout each state” and “[w]ith a highly centralized yet extremely flexible federal structure, the league, through its closely coordinated state branches, could reach down into thousands of local churches and mobilize at almost a moment’s notice a large body of Protestant voters”); Jack S. Blocker, *Alcohol, Reform and Society: The Liquor Issue in Social Context* 150 (1979) (saying that the League had a modern structure).

¹⁶⁰ Ecclesiology is a subject that lies well beyond the scope of this article. I note, however, that in Christianity there are three essential forms: Episcopalian, *see* The Oxford Dictionary of the Christian Church 465 (F. L. Cross and E. A. Livingstone eds. 1983) (“any Church ruled by bishops”); Presbyterian, *id.* at 1120 – 1121 (“a form of ecclesiastical polity wherein the Church is governed by presbyters [i.e. the chief clergyman of a particular parish or congregation]” acting in synods and general assemblies, often with lay elders often participating), and congregational, *id.* at 332-333 (“that form of Church polity which rests on the independence and autonomy of each local church”). Clearly in the first two forms, some decisions are made by bishops or by presbyters sitting in synods or general assemblies, and other decisions are made at the local parish or congregational level. Just as clearly, such groups have, necessarily, a federalist structure. Even in the case of the congregational form, where there is some association of congregations so as to form a denomination, there are general conventions or other groupings that make at least some decisions. Each of these religious groups, regardless of its ecclesiastical polity, must engage in a mapping exercise, and may well have to confront issues of coexistence – hot federalism – and of efficiency – cool federalism. As an example of a problem of coexistence, consider the recent consecration of a gay bishop for the Episcopal diocese of New Hampshire living in openly with his same-sex partner, and the struggle of the Anglican Communion to stay together, notwithstanding the fact that many Episcopalians in America disagree with the elevation of this bishop and that many Anglicans in other provinces of the Communion disagree. Understood in federalism terms, the conflict precisely concerns the appropriate level of decision-making within the Anglican Communion with regard to the sexual orientation and life style of Anglican bishops.

¹⁶¹ *But see* Asbury, *supra* note 157 at 99 (stating that the League also had an effect on its constituent churches, “pushing them deeper into politics than they had ever been before” because the tendency of these churches had been to rely on moral suasion rather than legal coercion).

The second was strategic in a substantive sense, although linked to the first: attack the saloon, and then attack beverage alcohol.¹⁶³ The League's greatest genius was its choice of name. By calling itself the Anti-Saloon League, the League could say, as it did say, at least in the beginning, that the League sought only to banish the saloon.¹⁶⁴ Its goal, of course, was to banish not only the saloon but beverage alcohol as well.

An incrementalist approach, however, works well with federalist structures. Professor Fitzgerald has argued that the cadenced Constitution with concentric nested constituencies means that the system will generate continuing dialogue on important political matters.¹⁶⁵ Such a dialogue suited the League's purposes perfectly. If the League could get people to engage in a sustained dialogue about saloons, it would be possible to shift that conversation to beverage alcohol. That, of course, is exactly what happened.¹⁶⁶

¹⁶² See *Asbury*, *supra* note 157 at 101 (stating that “[t]he original and basic plan of the Anti-Saloon League was to dry up the United States in steps – first the towns and the villages, then the counties, then the states, and finally the nation”); Ernest H. Cherrington, *The Evolution of Prohibition in the United States of America: A Chronological History* 277, 313 (1920) (stating that prior to 1906 the League did not campaign for state-wide prohibition, limiting its activities to local option, reflecting “the historic politic of the League, which was to go only so far as the public sentiment of the state would justify” and that prior to 1913, the League “had not seen fit to inaugurate a specific campaign” for National Prohibition); Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* 433 (1989) (arguing that “[t]he league did not make national prohibition an explicit object all at once, but pursued whatever policy seemed likely to work in the circumstances,” a “politic flexibility [that] was the hallmark of league activity and its greatest strength” and “[i]f it was expedient to deny any wish to achieve national prohibition, then it simply did so [b]ut whatever the league people might say at any particular moment, they in fact aimed at national prohibition”).

¹⁶³ See *Clark*, *supra* note 157 at 95 – 96 (arguing that the first step in the early 1900s was to be the abolition of saloons, although going the full distance would mean the bone-dry ideal of National Prohibition); William Elliott West, *Dry Crusade: The Prohibition Movement in Colorado, 1858 – 1933*, at 169 (An unpublished thesis submitted to the Faculty of the Graduate School of the University of Colorado, 1971)(stating that “[a]lthough it never abandoned the ultimate purpose of prohibition of all manufacture and sale of liquor, the League appealed to churches and moral leaders, regardless of party affiliation, to join in a more limited goal – abolition of the saloon”).

¹⁶⁴ See *Clark*, *supra* note 157 at 93 (noting that “[t]he name itself reflected shrewd estimation of the American middle-class conscience, which was not yet willing to accept alcohol alone as the antibourgeois symbol, but was increasingly disturbed by the reality of the saloon”).

¹⁶⁵ See *Fitzgerald*, *supra* note 7 at 682 – 683.

The League may well have faltered in its efforts,¹⁶⁷ largely the result of a shift from legislative statutes to popularly adopted initiatives and referenda,¹⁶⁸ and thus perhaps also as a result of swings in public opinion. But fortuitous circumstances, most notably World War I,¹⁶⁹ enabled the League to rally and continue to forge the way to National Prohibition. Whatever glitches may have developed in the League's organizational structure and strategy,¹⁷⁰ the League ultimately prevailed, at least until the entire edifice of National Prohibition came crashing down in the Great Depression with the adoption of the Twenty First Amendment, repealing America's single most disastrous experiment in constitutional morality.¹⁷¹ The League essentially functioned as a non-

¹⁶⁶ See Larry Daniel Engelmann, *O Whiskey: The History of Prohibition in Michigan 168 – 169* (A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy (History) in the University of Michigan, 1971) (describing such an extended discussion in Michigan between the League and moderate voters, progressively wooing them to more radical positions, the key being “the destruction of the argument that prohibition was bad business for the small businessman and merchant” thereby “gain[ing] the vote of the moderate and cautious middle class, who lined up increasingly behind the dry crusade”).

¹⁶⁷ See Jack S. Blocker, *Retreat from Reform: The Prohibition Movement in the United States – 1890 – 1913* at 214-215 (1976) (describing a lull between 1909 and 1913 during which prohibition efforts lost ground, and the churches “showed signs of restiveness under the League's leadership” and noting that “during [those] years League leaders began to fear that their supremacy within the prohibition movement was at stake and accordingly started to search for a means of rallying their disheartened supporters” such that “a sense of impending failure as well as recognition of past success produced the resolution calling for a national prohibition constitutional amendment” in 1913).

¹⁶⁸ *Id.* at 215.

¹⁶⁹ See Brannon P. Denning and John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 *Tul. L. Rev.* 247, 263 (2002) (stating that the “Eighteenth Amendment was adopted and ratified owing to a peculiar synergy of patriotism and reformist zeal”).

¹⁷⁰ See Timberlake, *supra* note 162 at 148 (noting that “[t]he league's success ... was due to its organization, its agitation and propaganda machinery, its pressure group methods, and its astute tactics”).

¹⁷¹ The reasons advanced for the repeal of National Prohibition range from the need for more federal revenues, but preferably from the masses rather than the rich, in a time of great economic depression, to a revulsion against the lawlessness and disrespect for law that accompanied National Prohibition. It is more likely than not that both had something to do with the overturning of National Prohibition, along with a host of other factors. See, e.g., David E. Kyvig, *Repealing national Prohibition* xvii (1979) (arguing that a coalition of special interest or pressure groups led the way to repeal not just from a “desire to take a legal drink or shed a tax burden,” but also out of reaction to

partisan,¹⁷² single goal,¹⁷³ pressure group.¹⁷⁴ It sought to use leverage whenever possible.¹⁷⁵ It concerned itself with balance of power, and swing

“prohibition’s philosophy of active, authoritative federal government,”[c]oncern that prohibition ... was fostering criminal behavior, causing the government to take increasingly repressive enforcement action, and breeding disrespect for all government and law,” culminating in a widespread “fear of social disintegration ... long before the onset of the great depression generated additional claims that the liquor ban had proven economically burdensome”) Edward Behr, *Prohibition: Thirteen Years that Changed America* 233 – 234 (1997) (arguing that the economic and fiscal self-interest of the rich contributed much to the repeal of National Prohibition, but, as had happened before in American history, prohibition took a back seat when Americans “realized that there were more important things to worry about” such as Civil War in the Nineteenth Century and the Great Depression in the Twentieth Century); Kenneth D. Rose, *American Women and the Repeal of Prohibition* 146 – 147 (1996) (arguing that “the feminine influence on repeal [through the work of such groups as the Women’s Organization for National Prohibition Reform] was decisive” because “large-scale female opposition to prohibition was so unexpected ... these women were able to expose the moral deficiencies of prohibition and to accomplish the very difficult task of linking repeal with protection of the home” and whereas prohibition women “attempt[ed] to reform their society by restricting individual freedoms ... repeal women [were] attempting to do the same by expanding them”); Martin Alan Greenberg, *Prohibition Enforcement: Charting A New Mission* 179 – 180 (1999) (arguing that “the eventual unraveling of prohibition had a lot to due [sic] with simple greed and the overwhelming demand for alcoholic beverages” such that “effective enforcement was simply impossible”).

¹⁷² See Asinof, *supra* note 159 at 235-236 (stating that “[a]lthough intensely political, [the League] would be nonpartisan, working to unite people of all persuasions to support its program); Cherrington *supra* note 198 at 277 (stating that “[b]y 1906 the non-partisan movement for Prohibition [embodied in the League] had come to be generally considered as representing the most effective method of fighting the liquor traffic”); Asbury, *supra* note 157 at 100 (describing the League as “not partisan” as “it never tried to gain the support of any political party”)

¹⁷³ See Pinney, *supra* note 162 at 433 (stating that “the league would support any candidate who could stay sober long enough to vote Dry”); West, *supra* note 199 at 364-365 (recounting a conversation between Wayne Wheeler and “the national progressive figure Lincoln Steffens” to the effect that the League would support crooks “who promised to back prohibition,” and would sacrifice everything else because “one thing at a time”).

¹⁷⁴ See Clark, *supra* note 157 at 93, 114 (noting that the League is “still our classic case study in pressure politics – the use of power in every way consistent with American political procedures” and that “‘Wheelerism’ ... meant the techniques of hard persuasion” because “[i]n both state and federal legislative chambers, it meant thousands of telegrams and letters and the threat of political annihilation to a man of soft resolve who was tempted to vote wrong in committee or on the open floor”); Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance*

districts.¹⁷⁶ And it was also patient, using federalist structures as building blocks, all the while, however, more “concerned with results rather than democracy.”¹⁷⁷

Butler and Smolin couch their proposals in language that strongly suggests that they do not intend to impose their religious worldview on every American, but rather that they merely want the occasion for the Religious Right to triumph, at least to some extent, and at least in some places. They appear to appeal, therefore, to states’ rights, not to a new national pro-Religious Right régime. The Anti-Saloon League claimed that it was merely concerned with abolishing the saloon, and yet one ought to have known better then, and one ought to know better now. These two proposals are but merely the first step down the road towards a reinvigorated, oppressive Protestant Empire bent on using a complex mixture of coercion and suasion to Protestantize the American people. The fundamental logic of the Anglo-American Protestant Empire belies a narrow reading of the two proposals because the history, meaning and logic of the Protestant Empire point towards and unremitting, unyielding goal to impose evangelical Protestant “purity” on everybody else. Smolin, of course, is more inclined to reveal the iron fist that he would bring down on the gays and members of religious minorities, inviting them to move if they do not wish to suffer imprisonment or oppression, bullying and harassment. And,

Movement 108 (1963) (stating that “[t]he Anti-Saloon League ... operated as a ‘pressure group,’ with no formal attachment to any political or social system of ideas other than evangelical Protestantism”); see West, *supra* note 163 at 169 (describing the League not as a political party, but as a pressure group).

¹⁷⁵ See Cherrington, *supra* note 162 at 279-280 (noting that the League “took the ground that until a majority of the people in a majority of state legislative districts had reached the point of open hostility to the liquor traffic, efforts of the temperance forces could better be directed toward building sentiment and suppressing the liquor traffic in the local communities than in making a fight for state-wide Prohibition without some probability of success” and that the League sought to exploit the possibilities of “Prohibition minorities in no-license [i.e. anti-saloon] districts to join with the Prohibition minorities in license [i.e. not anti-saloon] districts to secure a majority expression for Prohibition in the state as a unit”).

¹⁷⁶ See Randall C. Jimerson, *The Temperance and Prohibition Movement in America, 1830 – 1933* at 15, in *Guide to the Microfilm Edition of Temperance and Prohibition Papers* (Randall C. Jimerson, Francis X. Blouin, Charles A. Isetts eds. 1977) (stating that the “League endorsed local option, working gradually toward prohibition by creating a minority group holding the balance of political power”); Asinof, *supra* note 195 at 254 (stating that “[l]obbying was as old as Congress, but the Anti-Saloon League gave it a special stamp” because “[i]f corporations persuaded by bribes and special favors, Wayne Wheeler came at Congressmen with the ultimate fear – that of losing their seats in the next election”).

¹⁷⁷ See Engelmann, *supra* note 166 at 153.

unlike Stanley Fish, one ought to accept the iron fist for what it is, and accept the history of the American Protestant Empire for what it is. Similarly, when one parses Butler's proposal, it becomes abundantly clear that the "parents" who would most benefit from his proposal are activist members of the Religious Right.

The Religious Right will ultimately fail just as National Prohibition failed. Evangelical Protestants have demonstrated an amazing ability over the centuries, to overplay their hand. But National Prohibition caused a great deal of harm. Why should the American people be subjected to the harm that a revanchist Protestant Empire will visit on the American people – or at least members of religious minorities unlucky enough not to have escaped the reach and clutches of the Religious Right, even if that harm is only temporary?

The inevitable consequence of the proposals put forth by Butler and Smolin, if adopted, would be to ratchet up the struggle between persistence by the Religious Right and resistance by modernists and liberals. Devolution will increase the intensity of the struggle by localizing it. So too will an effort to revive the Tentative Principle.

THE RIGHT TO SETTLE

There is a right to travel implicit in the United States Constitution. In *Saenz v. Roe*,¹⁷⁸ the United States Supreme Court held that "the right to travel" has "at least three different components."¹⁷⁹ The Court continued:

"It protects the right of a citizen of one State to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."¹⁸⁰

It is not clear that this constitutional right would entitle a visitor to the benefits of the religious settlement in her home state while visiting a second state, notwithstanding the form of the religious settlement in the second state. One could conceivably interpret the right to be treated as a welcome visitor, the second element or component, as meaning that the second state could not impose its religious settlement on the visitor, but could do so if she became a permanent resident. In the public school context, the children of visitors would receive different treatment than the children of permanent residents.

¹⁷⁸ 526 U.S. 489 (1999).

¹⁷⁹ 526 U.S. at 500.

¹⁸⁰ *Id.*

Admittedly, this reading of *Saenz* would present insuperable administrative problems. But even if the Court were to adopt it, in real world terms peer pressure would trump the “welcome.” Perhaps, therefore, the right to travel might not provide much practical or real-world protection for religious minorities. There is little to be gained as a perpetual visitor.

That said, there is a right-to-travel value, constitutional or not, that Smolin rejects. Madison argued that Virginia needed immigrants, and taxing Virginians to support teachers of the “Christian” religion would dissuade them from settling in his state and might persuade some Virginians to leave.¹⁸¹ He believed that Virginia ought to welcome white people seeking relief from religious oppression, and hold on to the ones that Virginia already had. He thought immigrants could make a positive contribution to the growth and development of the state.¹⁸² Not Smolin: conform to the wishes of the Religious Right or move on down the road. It does not matter, apparently, what economic or other damage such “encouraged” emigration causes. The economic health of the nation has to take second place to some sort of religious purity. Cultural and social diversity have to take a back seat to the values of the Religious Right.

Consider the matter from the perspective of the adherent of a minority religious faith who is “encouraged” to leave a particular state or locality adopting a religious settlement that will harm her or her children enrolled in the common schools. She may have been attracted to a particular state or locality for economic or other non-religious reasons. She may find it difficult to find another comparable economic opportunity elsewhere, and she may find it hard to abandon the non-religious features that attracted her in the first place. And yet, Smolin tells her to leave because he will have his way, if he wins. The economic health of this adherent to a different faith system has to take second place to some sort of religious purity.

Devolution does the country no good if one of the consequences is the undermining of our economic, social and cultural fabric, not to mention the estrangement of Americans who do not subscribe to the precepts of the Religious Right.

¹⁸¹ See *supra* notes 51-55 and accompanying text.

¹⁸² An important state case that struck down common school religion resonates with Madison’s “American” arguments against Patrick Henry’s bill. The court described immigrants as “industrious, intelligent, honest and thrifty; just the material for the development of a new state” and insisted that the state should respect their religious views. See *State ex rel. Weiss v. District Board*, 44 N.W. 967, 974 (Wis. 1890). A Michigan judge, dissenting in a case that upheld common school religion, made a similar point. See *Pfeiffer v. Board of Education*, 77 N.W. 250, 260 (Mich. 1898) (Moore, J., dissenting).

NATIONAL SECURITY

These proposals, essentially Trojan Horses, if the story of the Anti-Saloon League has any relevance, undermine the national security of the United States. Recall the very reason for the Revised Tentative Principle: national security!¹⁸³ The Religious Right has made it quite clear that values trump science. American purity requires that the country hold science at bay. Whether the question entails stem cell research, evolution, or general mastery of evolving and changing science and technology, the cry of the Religious Right declaims its preference for its peculiar set of values.

Perhaps the avatars of the Protestant Empire wish to outsource science. Let science not contaminate the fair American soil, or at least not until America needs it. Or, alternatively, America need not grow and develop its own scientists, because India, China, and other countries can train all of the scientists that we need. American children do not have to know how to confront, measure and master science and technology so long as Indian and Chinese children do. Furthermore, when these immigrants arrive in America, the Religious Right will be ready to convert them to true Americanism, or, if they resist, to send them back home, after the United States has taken advantage of as much of their work and ideas as it can. Or perhaps the Religious Right merely means to limit science to blue America, assuming that it is content to have such an America exist. Let California and New York educate scientists, but spare the tender sensibilities of schoolchildren in Louisiana and Kansas.

The United States cannot maintain its status as a global superpower if it quarantines or otherwise imposes unsound restrictions on the training, growth and development of scientists, and on scientific and technological endeavors and pursuits. This paper does not call for an unrestrained and unchecked scientism. Scientists can easily become arrogant zealots and lose sight of the human significance and dimensions of their work. But it is important that Americans be knowledgeable about the scientific method so that they can better appreciate its strengths and weaknesses. Even schoolchildren in Kansas need to develop an appreciation for science, even if they also develop a keen sense of its limitations, as methodology. But the material needs of the American nation-state are too great to be left to schoolchildren from New York City (if any) and Mumbai and Beijing. It would help advance the national security

¹⁸³ See Newsom, *supra* note 33 at 259 – 263.

of the United States if schoolchildren from Topeka and Shreveport also became part of the grand enterprise to keep America safe. Genius, talent, insight, sensitivity and creativity are no the stuff of mapping.

There are no simple answers to the inherent tension between religion and science. Each has to guard against the excesses and overbearing of the other, but neither can be limited or restricted in a fashion that puts the very safety and security of the United States at risk. The siren call of the Religious Right and of others preaching simplistic answers needs to be avoided. But it is also incumbent upon those who would resist the Religious Right to make the best case for such resistance.

Perhaps an old joke captures the dimensions of the problem of religion and science. As the story goes, it started to rain, and there was no indication that it would let up anytime soon. There was a man who lived alone and his neighbors became concerned about him. Some people came by in a car and said, "Mister, you had better come with us to higher ground." But the man replied, "God will provide." It kept raining and the water rose higher and higher. Soon some folks came by in a boat and said, "Mister, you had better come with us to higher ground." But the man replied, "God will provide." It kept raining and raining, and the water rose higher and higher, and the man had to retreat to the roof of his house. Soon some civil defense forces came by in a helicopter and said, "Mister, you had better come with us to higher ground." But the man replied, "God will provide." The rain kept coming down in torrents, and, in due course, the man drowned. When he got to the Pearly Gates, the man said to God, "I kept saying that You would provide. What happened?" God responded, "You fool, first I sent a car, then I sent a boat, and then I sent a helicopter!" America's national security depends on more than merely saying "God will provide." It depends on the ability to understand and appreciate when and how God has provided, and not just a pigheaded devotion to "values."

CONCLUSION

Devolution will not work in the best interests of the United States – understood as something other than or more than a Protestant Empire – for a variety of practical and political and psychological reasons. And America's history strongly counsels that those who wish to oppress and harass should be required to make their case on the biggest stage possible. They should not be allowed to hide under the cloak of localism, states' rights or any other such convenient cover. Smolin and Butler, and those who think like them, need to find themselves in the spotlight where everybody who cares can take a look at their wares.

One could plausibly maintain, however, that the resistance might find it easier to cede some territory to the Religious Right, in hopes that the modernists can maintain at least some of the ground. Thus, one might reason that devolution serves the interests of the resistance, because the modernists

have a chance to win some battles, perhaps to succeed in carving out local or state redoubts or fortresses of toleration and diversity, manipulating American federal structures and institutions for the benefit of those opposed to the Protestant Empire and its avatars in the Religious Right. This argument supposes that the Religious Right has the initiative, the advantage, the upper hand, and indeed American history on its side whereas the resistance lacks the courage, the ability, and the weapons to fight back. One must grant that recent political and cultural American history lend support to such a view.¹⁸⁴

In the end the question becomes one of strategy: frontal assault on the Religious Right, on the Protestant Empire itself, and doing so in the national arena or polity, or tactical retreat and retrenchment, fighting battles locality by locality, and state by state. One would have thought that the experience of National Prohibition and the run up to it would compel the first answer. I, at least, think so. But that may not be the case for others in the resistance. And there the matter rests.

¹⁸⁴ Those who claim that the Protestant Empire is dead have some explaining to do. *See* Newsom *supra* note 33, *passim*.