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Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth Century America

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MAJORITY RIGHTS, MINORITY FREEDOMS: PROTESTANT CULTURE, PERSONAL AUTONOMY, AND CIVIL LIBERTIES IN NINETEENTH-CENTURY AMERICA

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INTRODUCTION

The landscape of nineteenth-century civil rights law would seem alien to someone steeped in the concepts of our own time. Bible readings were commonplace in the public schools; Sunday laws prohibited labor and commerce on the Lord's day; blasphemy prosecutions curbed the tongues of those who spoke against religion; and many of the period's most august lawyers believed that it was the job of the state to promote Christian morality. From a twenty-first-century perspective, this sort of environment may seem quaint at best, slightly barbaric at worst. Our age has done much to separate religion from public institutions, and we now treat as "rights" conduct that the nineteenth century would never have dreamed of protecting, such as homosexual relations, abortion, and contraception. We debate "new" rights, such as the right to die and the right to same-sex marriage, that would have been unthinkable in an earlier time. We live in a society in which constitutional rights are ever-expanding, and in which law is a tool to guard not only our physical freedoms, but also our more spiritual imperatives — what the Supreme Court has taken to calling our "concept[s] of existence, of meaning, of the universe, and of the mystery of human life."[1] For these reasons, it is tempting to think of modern rights law as an evolution, in the course of which we have made gains in human dignity and cast off the constraints of an earlier period. This view is reflected in the judgment of some scholars that nineteenth-century jurists were unconcerned with individual rights or too preoccupied with economic matters to worry about personal liberty.[2]

It is true that the nineteenth-century courts were not nearly as active as those of the twentieth in defining and expanding civil rights. But this was not the result of neglect. Rather, it was a product of very different expectations of individuals and of the law itself, heavily influenced by Protestant individualism and a resultant distinction between belief and behavior. This article is an attempt to recover the legal

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[1] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *see also* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting *Casey*, 504 U.S. at 851).

[2] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 31–32 (4th prtg. 1971); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 519 (1977).

and cultural context of individual liberties in nineteenth-century America and to explain how it was that the Americans of one age, living under the same set of constitutional principles as we, could differ so dramatically from us in how they honored those principles. In exploring these questions, I will emphasize three major themes of this era: Protestant Christianity, majoritarianism, and personal autonomy, which together gave rise to a distinctive vision of the nature of civil rights and the role of law in their exercise and enforcement.

The nineteenth century inherited a powerful Protestant tradition. The Puritans, for instance, had spent generations governing a large portion of America on expressly Christian principles. Even outside New England, state-established churches were the rule, not the exception, for most of the eighteenth century. By the nineteenth century, church and state had been officially separated through constitutional guarantees of freedom of conscience and the formal disestablishment of the state churches. But Christianity by no means disappeared from public life. Americans remained overwhelmingly Protestant, and they expressed their religious culture through laws enforcing Protestant standards of behavior. Sunday laws, prayer in schools, and religious qualifications for public office, to name a few, were manifestations of the Protestant influence. Laws enforcing religious norms were generally upheld by the courts because to strike down such laws would be to interfere with the majority's religious freedoms. Thus, while government could not dictate belief, it could dictate behavior in the name of the dominant culture, even to those who did not themselves believe.

The tension between this majoritarianism and the religious freedom of minorities was resolved by a belief in individual moral autonomy. The Protestant tradition had long emphasized the importance of individual effort in seeking salvation. By the nineteenth century, this spiritual individualism had evolved into a vision of personal moral responsibility, in which each person had both the power and the duty to seek what was morally right. Restraints on conduct, passed into law by the Protestant majority, could be distinguished from constraints on belief, which remained the domain of the autonomous individual. In other words, government could control behavior in the name of religion because the persons being controlled were still free to believe whatever they wished. Thus, forcing dissenting schoolchildren to stand for Bible readings did not infringe on the rights of conscience nor did laws forbidding Jews or Seventh-Day Baptists to work on a day that they did not regard as holy. This distinction between belief and behavior, now widely, if awkwardly, termed the "belief/action distinction," was central to the nineteenth-century concept of civil rights.[3] It minimized the role of courts and law in enforcing civil liberties by placing responsibility for the exercise of conscience on the morally autonomous individual.

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[3] The distinction has survived to a limited extent in modern Free Exercise law. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (applying minimal scrutiny to laws of general applicability having only an incidental effect on religious practice). In most other contexts, it has been abandoned by the Supreme Court.

In modern constitutional law, courts frequently intervene to protect the individual from state action. The nineteenth-century courts, by contrast, believed that individuals had both the power and duty to protect themselves. The self, not the law, was the primary source of personal freedom.

This picture has profound implications both for our understanding of the nineteenth century and for our understanding of our own time. The cases discussed in this article involve freedom of religion, often known as freedom of conscience, which was at the center of much of the civil rights litigation of the nineteenth century. But in the twentieth century, the intersection of conscience and law became a fertile ground for the recognition of a much broader set of autonomy-based rights, including privacy, sexuality, and the more metaphysical kinds of freedoms defined in *Casey* and other decisions. Thus, while a more nuanced view of the nineteenth-century treatment of conscience illuminates the thought and culture of our past, it also lays the foundation for a deeper understanding of personal-autonomy rights in our own day.[4]

I also hope to fill some gaps in modern scholarship concerning the belief/action distinction and the nineteenth-century treatment of non-economic civil rights. The belief/action distinction has been roundly criticized by scholars in the context of First Amendment law.[5] This criticism tends to focus on the U.S. Supreme Court's use of the distinction in the 1878 case of *Reynolds v. United States* to uphold a federal law banning Mormon polygamy.[6] The Court, the argument goes, failed to see that belief and behavior are not readily separable and that infringements on behavior can trample civil rights by interfering with the transmission of beliefs to action.[7] In

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[4] I will offer some direct contrasts between the nineteenth- and twentieth-century treatment of rights later in this article, but a full treatment will be forthcoming in a work in progress.

[5] For a sustained critique of the distinction as insufficient to protect religious liberty, see Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993). For other criticisms in the First Amendment context, see W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 712 (1999) (contending that the belief/action distinction is "vacuous in practice"); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 500–01 (1991) (stating that the belief/action distinction is "far too blunt a tool for use in constitutional adjudication"); Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths"*, 34 WM. & MARY L. REV. 579, 610 (1993) (arguing that the distinction is "well-worn but largely vacuous"); Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1261 (1989) (describing the belief/action distinction as "unworkably rigid").

[6] 98 U.S. 145, 166 (1878).

[7] *See supra* note 5; *see also* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 416 n.93 (1987); Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998).

addition, some scholars have charged, the belief/action distinction was developed by the *Reynolds* Court to justify anti-Mormon bias, which renders it morally suspect as a way of thinking about rights.[8]

Whether or not *Reynolds* was correctly decided, such criticisms miss at least three important points. First, the belief/action distinction was nothing new in 1878. It had a long history in the state courts because it had deep roots in American Protestant culture. Far from being an ad hoc response to a morally and politically touchy set of facts, it was an expression of a widely shared cultural outlook and so deserves more sensitive consideration than many scholars have given it. Second, as an expression of cultural norms, the belief/action distinction has implications beyond the relatively narrow confines of religious freedom. Although the issue arose most often in a religious context in the nineteenth century, the courts' response to such claims went beyond questions of religion to touch on the very concept of civil liberty and what it meant to exercise rights of any kind in a free society. By looking to individual moral capacity instead of legal rules as the sources of liberty, the courts were saying something important not only about religious freedom, but about the relationship between individual autonomy and the rule of law — namely, that law was not the only source of freedom or even the most important. This is a very different view of civil rights than the courts now take, and those scholars who have confined their study of the issue to the First Amendment have missed an opportunity to broaden our understanding of rights generally in modern times. Finally, when the belief/action distinction is examined more closely, it can actually be seen as the nineteenth century's way of honoring its commitment to the freedoms of both majorities and minorities. Because individual conscience was seen as a sufficient source of personal freedom, the nineteenth-century courts repeatedly passed up opportunities to expand the definitions of protected rights through judge-made law. Where majorities trespassed on express textual provisions, they could be restrained, but the power of individual conscience meant that there was no need to expand the letter of the law to recognize unwritten minority rights. To modern eyes, this might look like indifference to rights, but from the nineteenth century's perspective, it was a way to accommodate the

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[8] John Delaney, *Police Power, Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 117 (1991) ("The *Reynolds* belief/action distinction was driven by a deep-seated, ethnocentric repugnance for polygamy . . . ."); Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 575 (1998) (finding it difficult "to accept the *Reynolds* 'belief/action' distinction as a principled line"); Todd M. Gillett, Note, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 513 (2000) ("[T]he discussion in *Reynolds* mirrored the anti-polygamy sentiment prevalent at the time."); Harmer-Dionne, *supra* note 7, at 1309 (arguing that "bias formed the basis of the belief-action distinction."). One commentator has gone so far as to liken the rule of *Reynolds* to the notorious pro-slavery case of *Dred Scott v. Sandford*. *See* Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia*, 34 U. TOL. L. REV. 425, 436 (2003).

rights of majorities and the freedoms of minorities within the constitutional framework. The nineteenth century thus de-emphasized the role of law as the guardian of individual liberty and relied far more heavily on individual conscience as a guarantor of freedom. While we have struck a different balance in our own time between moral autonomy and the role of law, we should not be quick to condemn the solutions of another age, especially where, as I hope to show, those solutions were grounded on a sincere attempt to acknowledge the personal power and dignity of individual conscience — a value that remains a central part of our rights jurisprudence.

In addition to providing a counterpoint to conventional views of the belief/action distinction, I hope to build upon some of the historical work that has been done in illuminating the nature of civil liberties in the nineteenth century. As the foregoing suggests, this study will focus on non-economic rights and, principally, the rights of conscience. While a great deal of scholarship has focused on the century's treatment of economic regulation and the rights of property,[9] the non-economic dimensions of liberty have received less scholarly attention than they deserve. There are a few notable exceptions. Foremost is Michael Les Benedict's essay, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States.*[10] Benedict saw the nineteenth-century treatment of civil liberties as the product of "Victorian moralism," which emphasized "restraint, order, and the transcendence of individual desires" to support what to modern eyes are restrictive definitions of individual rights.[11] Like Benedict, I see the legal treatment of rights as an outgrowth of public morality, though I will place more emphasis than he on both the role of Christianity and the distinction between the internal and external realms. In another useful study, David M. Gold used judicial biography to illuminate the nineteenth century's notion of "responsible individualism,"[12] a concept that I believe to be an important part of the century's view of individual moral autonomy. Sarah Barringer Gordon explored the implications of Protestant culture and the belief/action distinction for the marital rights of Mormon polygamists.[13] And in a still more focused piece, Thomas James examined

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[9] *See generally* HURST, *supra* note 2; KELLER, *supra* note 2, at 162–96, 343–70; WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

[10] Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 91 (Donald G. Nieman ed., 1992).

[11] *Id.* at 92, 103.

[12] DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (1990).

[13] SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

the consequences of "Protestant cultural hegemony" for the administration of the century's public schools.[14] As I hope to show, the Protestant influence extended beyond the family and the schools to permeate public life and to influence the culture's approach to civil rights in a variety of other contexts.

Finally, I have called this a "cultural" study, but more precisely I should call it a study of the *legal* culture. A "culture," as I use the term, is a set of shared values, assumptions, and goals that provide a framework for a group of people to make decisions (conscious or unconscious) about how they will live. In a nation as large and diverse as the United States, there probably has never been one universal culture, but there are often broad and influential trends in how people think and act. My focus here is on what I (and others) call the "legal culture," which consists mainly of judges, lawyers, and legislators. These are the people who most influence legal decision-making, and thus it is their assumptions and beliefs that can be considered most important in trying to understand the law. Not that the legal culture is entirely separate from that of the society around it. On the contrary, there is considerable interplay between the two. Jurisprudents are members of society, after all, and they can hardly help but be influenced by whatever zeitgeist is abroad. For that reason, an understanding of the legal culture requires attention to other social forces as well. Some of these will be explored in this article, though I will rely mainly on legal texts, such as judicial opinions, state constitutions, and legal treatises, to develop the story.

I. CULTURAL THEMES IN NINETEENTH-CENTURY LAW

Three themes related to individual rights stand out in the nineteenth-century legal culture: Protestantism, majoritarianism, and individual moral autonomy. These themes combined to form a unique view of individual liberties, one that was markedly different from what would develop in the twentieth century and beyond.

A. The Protestant Culture

The nineteenth century carried on a long tradition of Protestant influence in national life. In colonial and Revolutionary times, state-sponsored religion was commonplace not only in Puritan New England but throughout the emerging nation. Nine of the original thirteen colonies had state-established churches by the Revolutionary period, and all of these were Protestant.[15] Throughout the seventeenth and eighteenth centuries, many statutes, charters, and constitutions expressly promoted Protestantism and disadvantaged Catholicism by tying suffrage, officeholding, immigration, and

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[14] Thomas James, *Rights of Conscience and State School Systems in Nineteenth-Century America*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 117, 120 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

[15] MARTIN E. MARTY, RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA 36–40 (1970); *see also* ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 3–26 (1971).

taxation to religious belief.[16] Formal disestablishment was largely complete by 1800, though in three states, Connecticut, New Hampshire and Massachusetts, state churches would persist a few decades longer.[17] But disestablishment did not mean that Protestantism had lost its hold on society. On the contrary, separation was welcomed by many who wanted to keep the churches free from interference by the state.[18] Matters of spirituality could only be corrupted by the worldly business of government, and many Protestants felt that their religion was strong enough and widespread enough to thrive without state support. Thus, to a number of believers, disestablishment was a key to the strength of Protestantism, not the loss of a necessary prop.[19]

Not that state support was wholly withdrawn in any event. A few states continued to permit taxation for the support of Protestantism, despite its lack of "official" status.[20] A substantial number retained religious qualifications for public office well into the nineteenth century,[21] and many rendered moral support to the Protestant cause with language endorsing religion in general, or Christianity in particular, as a matter of public importance. The Virginia Bill of Rights and Constitution, for example, contained language from 1776 to 1902 proclaiming that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."[22] Other constitutions urged that religion was "essential to good government," or proclaimed the "duty" of all to worship the deity.[23] Church and state may have been formally separate, but they remained intimately connected.[24]

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[16] RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE, 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 7–16, 20–21 (Rinehart & Co., Inc. 1952) (1938).

[17] SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 380 (2d ed. 2004).

[18] MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 6 (1965).

[19] *See* AHLSTROM, *supra* note 17, at 381–82 (2d ed. 2004); GORDON, *supra* note 13, at 71–77; HOWE, *supra* note 18, at 6–8, 18, 149 (1965); MARTY, *supra* note 15, at 39; Linda Przybyszewski, *Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer*, 91 J. AM. HIST. 471, 477, 480 (2004).

[20] MD. CONST. of 1776, art. XXXIII; MASS. CONST. of 1780, pt. 1, art. III; N.H. CONST. of 1792, pt. 1, art. VI.

[21] ARK CONST. of 1864, art. VIII, § 3; MD. CONST. of 1867, art. XXXVII; MISS. CONST. of 1890, art. XIV, § 265; N.H. Const. of 1792, §§ XIV, XXIX (effective 1792–1900); N.C. CONST. of 1868, art. VI, § 5; PA. CONST. of 1873, art. I, § 4.

[22] VA. BILL OF RIGHTS of 1776, § 16; VA. CONST. of 1830, art. I (1776); VA. CONST. BILL OF RIGHTS of 1850, § XVI; VA. CONST. BILL OF RIGHTS of 1864, art. I; VA. CONST. of 1870, art. I, § 18; VA. CONST. of 1902, art. I, § 16.

[23] ARK. CONST. of 1874, art. II, § 25; CONN. CONST. of 1818, art. VII, § 1; DEL. CONST. of 1831, art. I, § 1; KAN. CONST. of 1855, art. I, § 7; NEB. CONST. of 1866–67, art. I, § 16; N.C. CONST. of 1868, art. IX, § 1; OHIO CONST. of 1851, art. I, § 7; VT. CONST. of 1793, ch. I, art. III.

[24] *See generally* HANDY, *supra* note 15, at 3–26; H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & ST. 509, 510–13 (1987). Historian Linda Przybyszewski offers a review of the historiography of the

Meanwhile, Americans themselves were overwhelmingly Christian, and overwhelmingly Protestant. Formal church membership is not the whole story: in the early part of the century, when official membership was a fairly rigid process, there was a "huge non-churched majority"[25] who were nonetheless Protestant in belief and temperament.[26] But the numbers do help to indicate the Protestant dominance. While in 1790, Protestant congregations outnumbered Catholic ones by a factor of seventy-two,[27] by 1850, there were only 1.75 million Catholics in the United States.[28] Rising immigration meant that those ratios would draw closer by mid-century,[29] but Protestants remained the clear majority throughout the 1800s.[30] Thus, even after formal disestablishment, there remained what some historians have called a "de facto establishment," a general Protestant Christianity that was widely shared and widely intertwined with government and public life.[31] Nineteenth-century Americans, "by observation and instinct . . . had come to call their territory Protestant."[32]

The concept of general Christianity is important to understanding the Protestant influence in the nineteenth century. While denominational differences would persist, American Protestantism in this period became far more homogenized than it had been before. Much of this stemmed from the liberalizing influence of Enlightenment thought on American theology.[33] Early American Protestantism, even outside New England, had often promoted Calvinistic themes of natural depravity, predestination,

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secularization of the United States following disestablishment, and persuasively argues that the traditional narrative of an increasingly secular society is incorrect. *See* Przybyszewski, *supra* note 19, at 476–79, 494–96. As she explains, and as the sources gathered in this article indicate, religion in the nineteenth century was a pervasive influence on law and public life. *See id.* For a more detailed analysis of the myth of separation of church and state, and the reality of the interrelationship of church and state in the nineteenth century, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002), especially Chapters 1–10. Hamburger's book is especially noteworthy for its thesis that religious freedom, not secularism, was the dominant theme in the early nineteenth century and that full separation, conceived as a wall between church and state, was a product of the mid- and late-century growth of Protestant nativism and individualistic attitudes toward religious and other authority. *See generally id.*

[25] MARTY, *supra* note 15, at 37.

[26] HANDY, *supra* note 15, at 27–28.

[27] *See* MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 166 (2002) (counting 65 Roman Catholic churches out of a total of 4,696 churches).

[28] AHLSTROM, *supra* note 17, at 542.

[29] *See id.*

[30] *See* MARTY, *supra* note 15, at 169, 210.

[31] HOWE, *supra* note 18, at 11; MARTY, *supra* note 15, at 44; *see also* IRVING H. BARTLETT, THE AMERICAN MIND IN THE MID-NINETEENTH CENTURY 7 (1967); Benedict, *supra* note 10, at 98–99; Way, *supra* note 24, at 509, 513.

[32] MARTY, *supra* note 15, at 16; *see also* AHLSTROM, *supra* note 17, at 381–82; HOWE, *supra* note 18, at 59.

[33] *See generally* AHLSTROM, *supra* note 17, at 343–59.

eternal punishment, and a kind of frightened moral vigilance. A hallmark of the nineteenth century, however, was the softening of these Calvinistic rigors to make the religious experience less a matter of divine terror than of reason, human capability, and good feeling. William Ellery Channing launched a direct attack on the old theology in his 1820 essay, *The Moral Argument Against Calvinism*.[34] Channing accused Calvinism of disgracing God by underplaying His beneficence and of disgracing man by underplaying his moral capabilities.[35] "[W]e think it ungrateful to disparage the powers which our Creator has given us," he wrote.[36] "[T]he earth is inhabited by rational and moral beings who are authorized to expect from their Creator the most benevolent and equitable government."[37] Channing concluded that Calvinism "has passed its meridian, and is sinking to rise no more. . . . Society is going forward in intelligence and charity, and of course is leaving the theology of the sixteenth century behind it."[38] Bolstering Channing's attack, revivalists such as Charles Grandison Finney stressed an emotive experience of God, who could now be approached as part of a group activity in a revival tent instead of in the tortured confines of one's own soul, as the Calvinists had taught.[39] By 1847, Horace Bushnell, an influential minister and theologian, could speak of an "organic" Christianity, a natural tendency of man to join with God, without the need for the rigors of the Puritan conversion experience.[40] The Transcendentalist movement took matters still further, positing the equivalence of man and God and offering an approach to spirituality that needed little more than the untutored promptings of the soul.[41] While Emerson and his ilk were not in the Protestant mainstream, the popularity of their teachings was a testament to the growing liberality of Christian thought.[42] As Christianity became more approachable, the result was a "large Protestant consensus"[43]

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[34] WILLIAM ELLERY CHANNING, *The Moral Argument Against Calvinism*, *in* UNITARIAN CHRISTIANITY AND OTHER ESSAYS 39 (Irving H. Bartlett ed., 1957).

[35] *Id.* at 46.

[36] *Id.*

[37] *Id.* at 48.

[38] *Id.* at 58. On Channing's influence generally, see Irving H. Bartlett, *Introduction* to CHANNING, *supra* note 34, at vii–xxx. *See also* ANDREW DELBANCO, WILLIAM ELLERY CHANNING: AN ESSAY ON THE LIBERAL SPIRIT IN AMERICA (1981).

[39] AHLSTROM, *supra* note 17, at 460; BARTLETT, *supra* note 31, at 12–14. On Finney's career and theology generally, see WILLIAM G. MCLOUGHLIN, JR., MODERN REVIVALISM: CHARLES GRANDISON FINNEY TO BILLY GRAHAM (1959).

[40] BARTLETT, *supra* note 31, at 16–17; *see also* AHLSTROM, *supra* note 17, at 610–13; MARTY, *supra* note 15, at 194.

[41] *See, e.g.*, RALPH WALDO EMERSON, *An Address: Delivered Before the Senior Class in Divinity College, Cambridge, July 15, 1838*, *in* NATURE, ADDRESSES, AND LECTURES AND LETTERS AND SOCIAL AIMS 117, 117–51 (Riverside Press 1929) (1875).

[42] BARTLETT, *supra* note 31, at 8; BARBARA M. CROSS, HORACE BUSHNELL: MINISTER TO A CHANGING AMERICA 15–19 (1958).

[43] AHLSTROM, *supra* note 17, at 381.

that allowed Americans to commit themselves to the national support of an ecumenical, general Christianity. A dual process was at work: "Protestantism itself was being Americanized, and nineteenth-century America was becoming a Protestant civilization."[44]

Law did not escape the influence of the general Protestant culture. Sarah Gordon has observed that, in the nineteenth century, "secular law fit comfortably within central Protestant tenets,"[45] and indeed the legal establishment spoke openly of the need to acknowledge the place of general Christianity in the life and laws of America. As one state court explained in 1824, "Christianity, general Christianity, is and always has been a part of the common law of *Pennsylvania* . . . not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."[46] Daniel Webster, arguing before the Supreme Court twenty years later, used virtually the same terms: "All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown . . . is the law of the land."[47] One could speak of Christianity divorced from "particular religious tenets" precisely because Christian belief was so widespread. In the words of a popular mid-century author, it was "the very atmosphere in which our institutions exist," and the "cement by which they are bound together."[48] Sects, denominations, and other religious formalities were merely elaborations on this fundamental cultural theme.

The century's legal commentators endorsed the view that Christianity was closely allied with American law. At the most mundane level, the influence of Christianity was important to the process of workaday adjudication in a common-law society. Joseph Story was typical in viewing Christianity as "a part of the Common Law, from which it seeks the sanction of its rights, and by which it endeavours to regulate its doctrines."[49] The century's other great constitutional scholar, Thomas Cooley,

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[44] D.H. MEYER, THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC 25 (1972).

[45] GORDON, *supra* note 13, at 231.

[46] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824).

[47] 6 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 176 (Boston, Little Brown & Co. 20th ed. 1890). The case was *Vidal v. Girard's Executors*, 43 U.S. 127 (1844). A truncated version of Webster's statement appears in the official reports. *Id.* at 177–78.

[48] STEPHEN COLWELL, THE POSITION OF CHRISTIANITY IN THE UNITED STATES 67 (photo. reprint 1972) (1854).

[49] Joseph Story, *Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829*, *in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 176, 178 (Perry Miller ed., Cornell Univ. Press 1969) (1962) [hereinafter THE LEGAL MIND]; *see also* HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 390–91 (1895); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 225 (3d ed. 1898) (1880); HOWE, *supra* note 18, at 27–28 (discussing Jefferson's view that Christianity is not

likewise believed that "[q]uestions of public policy, as they arise in the common law, must always be largely dependent upon the prevailing system of public morals, and the public morals upon the prevailing religious belief."[50] But beyond the court system, there was a sense that Christianity should be a special concern of American government. Story called the Christian religion "the only solid basis of civil society,"[51] and he urged that "it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects."[52] While Story believed in freedom of conscience, he also believed that it was no constitutional violation for government to encourage Christianity:

> Probably at the time of the adoption of the constitution, and of the [first] amendment to it . . . the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as it is not incompatible with the private rights of conscience, and the freedom of religious worship.[53]

Like Story, Cooley believed that "the prevailing religion of the country is Christian,"[54] and he, too, thought that government should foster Christian sensibilities:

> The moral sense is measurably regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous are properly punished as offences, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws and corrupt the community.[55]

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a part of common law — a view differing from most court cases); JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS AND OF STATE LEGISLATURES 235 (1891).

[50] COOLEY, *supra* note 49, at 226–27.

[51] Story, *supra* note 49, at 186.

[52] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 699 (Carolina Acad. Press 1987) (1833).

[53] *Id.* at 700.

[54] COOLEY, *supra* note 49, at 226.

[55] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 471 (Da Capo Press 1972) (1868).

Henry Black (of law dictionary fame) wrote that "the laws are to recognize the existence of that [Christian] system of faith, and our institutions are to be based on that assumption."[56] And another treatise writer, John Ordronaux, called Christianity "the standard code of orthodoxy by which the national conscience seeks to guide itself."[57]

The treatise-writers were joined by the judges, who time and again acknowledged, argued, or declared that American society was Christian. A few examples, out of many that could be cited, will suggest the pervasiveness of such views. Chancellor Kent of New York, affirming a conviction for blasphemy in 1811, wrote that "[t]he people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice."[58] The Supreme Court of Texas remarked fifty years later that "[t]he vast majority of our people profess a belief in the Christian religion,"[59] while that of Pennsylvania described the state as "a community, the vast majority of whom are Christians."[60] The Missouri Supreme Court professed at mid-century that "our constitution was framed for a people whose religion was christianity."[61] Even the United States Supreme Court eventually joined the chorus, with Justice David Brewer's famous 1892 pronouncement that "this is a Christian nation."[62] The de facto establishment was thriving, and the legal culture embraced it.

B. Majoritarianism

A second theme of the nineteenth-century legal culture was majoritarianism, which embraced three major concepts: majority rule, majority rights, and the subordination of the individual to the whole. In part, majoritarianism encompassed the standard view that a democratic republic must be governed by greatest numbers. One legal commentator pragmatically (if glibly) noted that "if the majority did not govern, nothing could govern; and if there were no government, there could be no social order, no organized community."[63] Majoritarian lawmaking, such as legislation, was generally looked upon with favor. James Madison Porter, a prominent Pennsylvania lawyer, asserted the primacy of the many in an 1828 essay on the common law: "The legislator

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[56] BLACK, *supra* note 49, at 391.

[57] ORDRONAUX, *supra* note 49, at 235.

[58] People v. Ruggles, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811).

[59] Gabel v. City of Houston, 29 Tex. 335, 345 (1867).

[60] Specht v. Commonwealth, 8 Pa. 312, 322 (1848).

[61] State v. Ambs, 20 Mo. 214, 218–19 (1854).

[62] Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892). For a study of the context and significance of Brewer's statement, see Steven K. Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427 (1999). For an overview of the role of Protestantism in the lives and thoughts of Justice Brewer and other late nineteenth-century jurists, see Przybyszewski, *supra* note 19.

[63] THEOPHILUS PARSONS, THE POLITICAL, PERSONAL, AND PROPERTY RIGHTS OF A CITIZEN OF THE UNITED STATES 40 (photo. reprint 2004) (1875).

is free. No decree from a higher authority, except it be the letter and the spirit of the Constitution, has any restrictive force over his measures."[64] The courts, by and large, agreed. The popular image of the nineteenth century as a period of laissez-faire, in which antimajoritarian judges restrained legislatures by striking down economic regulation, is exaggerated. Perhaps the Supreme Court of the 1890s better fit the stereotype, but for most of the century, legislative regulation of the economy was profuse and was more often than not upheld by the courts.[65] Even private property, often considered a bulwark of individual liberty, was consistently subject to takings and other kinds of regulation for the good of the whole.[66] In 1889, one observer, reviewing the Supreme Court's then-recent Fourteenth Amendment cases, remarked with approval that the Court "has merely given the benefit of the doubt to the State, rather than to the individual; to the people, rather than to the person."[67]

The concept of majority rule was often invoked in litigation over individual liberties. The bulk of the century's civil rights cases were claims brought by minorities with whose freedoms the majority was interfering. Jews and Seventh-Day Baptists sought relief from Sunday laws; Catholics tried to purge the public schools of the King James Bible; nonbelievers challenged blasphemy laws. In nearly all of these cases, the courts affirmed the right of the majority qua majority to have its way. In *Donahoe v. Richards*, an influential Bible-reading case from Maine, a Catholic girl challenged her expulsion from school for refusing to read the prescribed King James Bible.[68] The state supreme court upheld the expulsion, in part because it viewed the claim to minority rights as anarchic:

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[64] James Madison Porter, *Review of "Reports of Cases Argued and Determined in the Circuit Court of the United States, for the Second Circuit"*, *in* THE LEGAL MIND, *supra* note 49, at 160, 163.

[65] In a recent study, William J. Novak illustrates the pervasiveness of regulation throughout the nineteenth century in areas as diverse as fire safety, public spaces, temperance, public health, and the market economy. *See generally* NOVAK, *supra* note 9. Novak's work is valuable in further debunking the myth of laissez-faire and in showing how willing the nineteenth century was to hand over regulatory power to government. *See generally id.* *See also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 448–49 (1985); HURST, *supra* note 2, at 32, 50–51; KELLER, *supra* note 2, at 162–81; Albert S. Abel, *Commerce Regulation Before* Gibbons v. Ogden*: Interstate Transportation Facilities*, 25 N.C. L. REV. 121 (1947).

[66] *See* HURST, *supra* note 2, at 26–28. Other examples of regulation collected by Hurst include bankruptcy laws, court rulings leaving the taxing and police powers free from constraint by the Contracts Clause, and the pro-public construction of public grants, as in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). *See* HURST, *supra* note 2, at 26–28.

[67] A.H. Wintersteen, *The Sovereign State*, 37 AM. L. REG. 129, 139 (1889).

[68] Donahoe v. Richards, 38 Me. 379 (1854).

> The right as claimed, undermines the power of the State. It is, that the will of the majority shall bow to the conscience of the minority, or of one. If the several consciences of the scholars are permitted to contravene, obstruct or annul the action of the State, then power ceases to reside in majorities, and is transferred to minorities.[69]

In a similar Texas case, the court rejected a challenge to Bible-reading brought by Catholic and Jewish parents because to give these minorities their way "would be to starve the moral and spiritual natures of the many out of deference to the few."[70] In *State v. Chandler*,[71] a Delaware blasphemy prosecution, the court explained that Christianity could command the respect of the courts not only because of its truth, but also because of the majority's desires:

> [T]he people of Delaware have a full and perfect constitutional right to change their religion as often as they see fit. They may tomorrow, if they think it right, profess Mahometanism or Judaism, or adopt any other religious creed they please . . . [W]hen that distant day shall arive [*sic*] (if come it must) in which the people shall forsake the faith of their forefathers for such miserable delusions, no human power can restrain them from compelling every man who lives among them to respect their feelings. . . . [B]lasphemy against [Christianity] is punishable, while the people prefer it as their religion, and no longer.[72]

Majorities, then, possessed inherent authority to govern in the name of their beliefs, whatever those beliefs might be.

But the wide scope given to majorities was not merely a function of raw numerical power. It was also a function of the majority's collective individual rights. While minority rights were protected to some degree, often by express constitutional language, it was a central premise of the time that the freedoms of the few could be understood only in connection with the rights and freedoms of the many.[73] The

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[69] *Id.* at 409.

[70] Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908).

[71] 2 Del. (2 Harr.) 553 (1837).

[72] *Id.* at 567–68, 571, 572.

[73] Barry Alan Shain has identified a similar outlook in what he calls the "reformed Protestant and communal" politics of eighteenth-century America. BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 4 (1994). According to Shain, eighteenth-century Americans were less individualistic than they are often portrayed and more committed to a Christian model of the public good that required the subordination of selfish interests to the benefit of the whole. Shain suggests that this model was

Supreme Court captured this spirit in the *Charles River Bridge* case, holding that a vested property right could be modified for the public weal: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."[74] The same concerns applied to claims of non-economic rights. Rights of conscience or religious freedom, "like every other right, must be exercised with strict regard to the equal rights of others,"[75] and could only be enjoyed "in reasonable subserviency . . . to the paramount interests of the public."[76]

As these quotations suggest, an important corollary to the majority-rights principle was the subordination of the individual to the whole. John Pomeroy, in his constitutional law treatise, exhorted the citizen to remember that "[s]econd only to his duty to God, stands that to his country; the welfare of the body-politic has a stronger claim upon him than even that of family or of self."[77] His contemporary Theophilus Parsons likened the body politic to a family and explained "that the family may be happy, each individual member gives up somewhat of his or her own mere will and pleasure."[78] Black took pains to point out that personal liberty "is limited, in accordance with law, in so far as may be necessary for the preservation of the state and the due discharge of its functions."[79] This belief was also reflected in many state constitutions. It was common for guarantees of religious freedom to be qualified by statements that religious license could not be allowed to disturb unduly the community. New Hampshire's constitution was typical: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience . . . provided he doth not disturb the public peace or disturb others in their religious worship."[80] Other states followed suit, cautioning that liberty could not

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challenged by the rise of Romanticism and other forms of individualism in the early nineteenth century, but he notes that communalism continued even in the face of such challenges. *See id.* at 81–83, 113–15, 149–50. My view, that Shain's "reformed Protestant communalism" persisted in the law well into the nineteenth century, is both supported by the sources and consistent with the unsurprising notion that the pace of cultural change among the lawyering classes tends to be conservative and slow rather than rapid. The constitutional law of individual rights did not become fully Romantic until the mid- to late twentieth century, as I hope to illustrate in a sequel to this article. *See also* NOVAK, *supra* note 9, at 11 (discussing the harmony of freedom and regulation).

[74] Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 548 (1837).

[75] Lindenmuller v. People, 33 Barb. Ch. 548, 561 (N.Y. Ch. 1861) (upholding a conviction for operating a theater on Sunday).

[76] Ferriter v. Tyler, 48 Vt. 444, 467 (1876) (upholding the expulsion of Catholic schoolchildren for attending church on a school day).

[77] JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 17 (4th ed. 1879).

[78] PARSONS, *supra* note 63, at 41.

[79] BLACK, *supra* note 40, at 397.

[80] N.H. CONST. of 1792, pt. 1, art. V.

"excuse acts of licentiousness,"[81] nor justify "pernicious practices, inconsistent with morality."[82] By 1943, things had changed so much that Justice Robert Jackson could trace American constitutionalism to the premise "that the individual was the center of society."[83] But such a phrase would have sounded strange to most nineteenth-century lawyers. Individual responsibility was part and parcel of individual freedom.[84]

The strength of majority rule, combined with the majority's commitment to Christianity, raised a problem of minority rights. How should a majoritarian society treat those who did not share the majority's faith? The Enlightenment and the Revolution had made it impossible for government to enforce belief as it had in the Puritan era, and the diversity (and sometimes the contentiousness) of the American populace made it impractical to do so in any event.[85] It is a measure of the era's pragmatism — and its commitment to individual liberty — that an ostensibly clear answer was provided: there must be complete freedom of belief. In this the constitutions, the commentators, and the judges were in accord. Typical of many state constitutions was Pennsylvania's: "[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . [and] no human authority can, in any case whatever, control or interfere with the rights of conscience . . . ."[86] Both Story and Cooley spoke for the scholars in condemning attempts to dictate belief as opposed to regulating behavior:

> [T]he duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires. . . . The rights of conscience are, indeed, beyond the just reach of any human power.[87]

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[81] GA. CONST. of 1868, art. 1, § 6.

[82] IDAHO CONST. of 1889, art. I, § 4. For other examples of such qualifications, see ME. CONST. of 1819, art. I, § 3; MD. CONST. of 1867, Declaration of Rights, art. 36; MASS. CONST. of 1780, pt. 1, art. II; MINN. CONST. of 1857, art. I, § 16; MISS. CONST. of 1817, art. I, § 3; MO. CONST. of 1820, art. XIII, § 4; N.Y. CONST. of 1846, art. I, § 3; N.D. CONST. of 1889, art. I, § 4; S.C. CONST. of 1868, art. I, § 9.

[83] W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[84] *See* Michael Les Benedict, *Foreword* to GOLD, *supra* note 12; *see also* GOLD, *supra* note 12, at 82, 169; HURST, *supra* note 2, at 26–28; Benedict, *supra* note 10, at 103–04.

[85] AHLSTROM, *supra* note 17, at 379–80; MARTY, *supra* note 15, at 35–43.

[86] PA. CONST. of 1790, art. IX, § 3. For other similarly broad statements, see ARK. CONST. of 1864, art. II, § 3; ILL. CONST. of 1818, art. VIII, § 3; KY. CONST. of 1799, art. X, § 3; N.C. CONST. of 1868, art. I, § 26.

[87] Story, *supra* note 49, at 700–01. *See also* COOLEY, *supra* note 49, at 469–70 ("No external authority is to place itself between the finite being and the Infinite, when the former is seeking to render that homage which is due . . . .").

Judges agreed, as typified by the Massachusetts Supreme Court: "Any attempt, by legislation, to control or dictate the belief of individuals, is so impracticable, so perfectly futile, as to show at once, how entirely above all civil authority are the operations of the human mind, especially in the adoption of its religious faith."[88]

While minorities were thus protected on paper, in practice things were not so clear. Nineteenth-century judges, unlike those of the twentieth, did not strain to expand constitutional texts to encompass previously unrecognized rights. Minority protections were to be enforced as they appeared, without attention to their penumbras or emanations or other unwritten aspects. While it was therefore easy for nineteenth-century judges to disallow obvious violations of minority rights,[89] in the less flagrant cases their instincts usually went counter to our own. Dissenting schoolchildren could be forced to stand for Bible readings in class; protections of free speech and free belief were not extended to blasphemy; and Jews could be forced to close their shops on Sundays because their working was unacceptable to the Christian majority.[90] In modern times, we have reached a stage where even these less blatant forms of state control are considered unacceptable infringements on belief.[91] To the nineteenth-century mind, however, such controls on behavior did not trespass on the protected realm of individual conscience. Central to this understanding was the century's concept of individual moral autonomy.

C. Moral Autonomy, the Belief/Action Distinction, and the Role of Law

The nineteenth century viewed the individual as an independent moral agent, both capable of and responsible for choosing what was right. This was in part an inheritance from Puritanism and other strains of Calvinist Protestantism, which had

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[88] Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 235 (1838). *See also* McGatrick v. Wason, 4 Ohio St. 566, 571 (1855) ("[N]o power whatever is possessed by the legislature over things spiritual, but only over things temporal . . . .").

[89] *See, e.g.*, Donahoe v. Richards, 38 Me. 379, 403 (1854) (noting that the state constitution would "prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions"); Specht v. Commonwealth, 8 Pa. 312, 322 (1848) ("No man . . . can be coerced to profess any form of religious belief, or to practise any peculiar mode of worship, in preference to another."); Ferriter v. Tyler, 48 Vt. 444, 465 (1876) (noting that the state constitution was designed to "secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant . . . should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice").

[90] *See supra* notes 68-72 and accompanying text.

[91] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (striking down prayer at a school's graduation); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding a Maryland Sunday closing law but noting that the law now serves secular rather than religious purposes); State v. West, 263 A.2d 602 (Md. Ct. Spec. App. 1970) (overturning a Maryland blasphemy law as a violation of the First Amendment).

made salvation dependent on the individual's internal experience of grace. Entering a personal relationship with God was of paramount importance, and this required constant self-observation in the quest for indications of the Spirit within. In this process each man became, if not an island, then at least a responsible party where his own salvation was concerned. At the same time, however, the Calvinist doctrines of predestination and natural depravity taught that man was limited in what he could hope to accomplish, thereby imposing the burden of spiritual responsibility while to some extent denying man the moral tools to carry out his charge.

This dilemma was resolved for the nineteenth century by the softening of Calvinism discussed above. The emergent general Christianity saw man as responsible for himself but also as capable of discerning the right and acting accordingly. Channing exemplified the new hopefulness in "Unitarian Christianity," his famous 1819 sermon:

> We believe that all virtue has its foundation in the moral nature of man, that is, in conscience or his sense of duty, and in the power of forming his temper and life according to conscience. We believe that these moral faculties are the grounds of responsibility and the highest distinctions of human nature, and that no act is praiseworthy any further than it springs from their exertion.[92]

The great error of Calvinism, by contrast, was its failure to endorse "*the confidence which is due to our rational and moral faculties in religion.*"[93] Other religious leaders bolstered this theme. Timothy Dwight and Nathaniel William Taylor, who spearheaded the optimistic New Haven Theology, emphasized "man's moral and intellectual agency,"[94] and taught that all had the freedom to choose the right and to avoid sin.[95] The revivalist Finney likewise preached that sin was a choice, not an inevitable natural condition, and all could seek the good through conscious moral decision-making.[96] Man was no longer the victim of the overbearing will of a predestining God; instead, he was capable of making the kinds of judgments and choices that could lead him to virtue and happiness. Predestination was out; self-regulation was in.

This view of man as both morally capable and morally responsible influenced nineteenth-century society in ways beyond theology. It showed in the rise of reform movements dedicated to the suppression of vice and the improvement of human beings, a movement which Calvin Woodard has called "probably the greatest character

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[92] WILLIAM ELLERY CHANNING, *Unitarian Christianity: Discourse at the Ordination of the Rev. Jared Sparks, Baltimore, 1819*, *in* CHANNING, *supra* note 34, at 3, 30.

[93] CHANNING, *supra* note 34, at 46 (emphasis in original).

[94] AHLSTROM, *supra* note 17, at 419.

[95] *Id.* at 418–20; *see also* NOLL, *supra* note 27, at 278–80, 290, 314–16.

[96] AHLSTROM, *supra* note 17, at 460.

building program of all times."[97] It led to the adoption in many colleges of a senior-year course in moral philosophy, designed to cap an undergraduate career by equipping students for moral thought and action.[98] It promoted the equation of wealth with virtue and poverty with vice, attributing to moral character conditions that we now tend to ascribe to market forces.[99] Self-control, as historians have observed, was a fundamental tenet of nineteenth-century morality.[100]

The belief in moral autonomy resonated in the law as well. Tort doctrines such as contributory negligence and the fellow-servant rule limited one's right to recover where one's own choices had played a role in the injury.[101] An insistence on mens rea in criminal cases reinforced notions of moral accountability.[102] Where laws came into conflict with personal beliefs, the nineteenth century did not assume, as ours often does, that law must yield. Rather, the individual must choose. In the words of one prominent judge: "When a conflict arises, as it may, between the requirements of law and the obligations of conscience, each man must determine his course of action according to his views of duty and of right."[103]

In the area of individual rights, the concept of autonomy led to an important distinction between external behavior and internal belief. Cooley summarized the dichotomy: It is the province of the state "to enforce the obligations and duties which the citizen may owe to his fellow-citizen, but those which he owes to his Maker are to be enforced by the admonitions of the conscience, and not by the penalties of human laws."[104] Where law was concerned, a boundary was marked between the regulation of human activity and the regulation of personal belief. While this distinction may have kept law from forcing conscience, it also gave majorities a great deal of latitude. For if action was separate from belief, then it followed that government could regulate the former without trespassing on the latter. As John Burgess explained in a nineteenth-century treatise:

> The free exercise of religion secured by the constitution . . . is, therefore, confined to the realm of purely spiritual worship; *i.e.*, to relations between the individual and an extra-mundane being.

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[97] Woodard, *supra* note 9, at 299. *See also* AHLSTROM, *supra* note 17, at 422–28; BARTLETT, *supra* note 31, at 42; KELLER, *supra* note 2, at 122–31 (discussing social reform for criminals, the poor, public health, and temperance).

[98] *See generally* MEYER, *supra* note 44.

[99] Benedict, *supra* note 10, at 97; Woodard, *supra* note 9, at 291–93, 298–99, 316–18.

[100] Benedict, *supra* note 10, at 93–95, 103; Przybyszewski, *supra* note 19, at 489–91; *see also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 133 (1985); LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 151–53 (1989); MEYER, *supra* note 44, at 68.

[101] FRIEDMAN, *supra* note 100, at 52–63; Benedict, *supra* note 10, at 103–04.

[102] HURST, *supra* note 2, at 18–19; Przybyszewski, *supra* note 19, at 491–94.

[103] Donahoe v. Richards, 38 Me. 379, 412 (1854).

[104] COOLEY, *supra* note 49, at 469.

> So soon as religion seeks to regulate relations between two or more individuals, it becomes subject to the powers of the government and to the supremacy of the law; *i.e.*, the individual has in this case no constitutional immunity against governmental interference.[105]

The U.S. Supreme Court made the same point in *Reynolds v. United States*, upholding a federal law forbidding polygamy:

> [W]hile [laws] cannot interfere with mere religious belief and opinions, they may with practices. . . . To permit [otherwise] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[106]

The distinction between internal beliefs and external behavior solved the problem of protecting minorities while preserving majority rule. Dissenters remained free on the inside, even as their outward activities were being regulated or penalized.

The belief/action distinction also served to de-emphasize the role of law in policing individual freedom. Barry Alan Shain has made the point with respect to the eighteenth-century Protestant consensus: "Most Americans' understanding of human fulfillment was not intrinsically linked to political life. Most who concerned themselves with such questions held instead that politics was of instrumental importance, and that human fulfillment could only be achieved through surrender to Christ and the intercession of God's grace."[107] In other words, true freedom was found within, not in the external structures of law or government. A similar view was carried forward into the nineteenth-century legal culture, as Lawrence Friedman has noted in explaining the era's sometimes lax policing of vice: "The nineteenth century . . . relied on self-control, which it tried to support through legal institutions, as well as other social processes. The enforcement power of law was used rather sparingly; law was unnecessary for most people, who were, after all, quite successful in controlling themselves."[108] It was not that the Victorians ignored the problems of vice, but they had social tools other than law for protecting public values. The same phenomenon accounts for the century's seemingly lax approach to non-economic individual rights. It was not that the age was indifferent to such rights — its written

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[105] 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 194–95 (1893).

[106] Reynolds v. United States, 98 U.S. 145, 166–67 (1878). For an analysis of the *Reynolds* Court's use of the belief/action distinction, see GORDON, *supra* note 13, at 132–35. *See also supra* notes 5, 7–8 (citing sources that criticize *Reynolds*).

[107] SHAIN, *supra* note 73, at 320.

[108] FRIEDMAN, *supra* note 100, at 133. *See also* KOHL, *supra* note 100, at 151.

laws and judicial rhetoric belie such a view. But the commitment to the Protestant culture, combined with the belief in the moral autonomy of dissenters, meant that conflicts between majorities and minorities were to be resolved by means other than the imposition of new rules of law. Timothy Walker, a protégé of Story and the author of a prominent legal textbook, summarized the limits of law and the glories of conscience in an 1837 lecture:

> They commit an egregious error, who consider jurisprudence as looking forward into eternity. It begins and ends with this world. It regards men only as members of civil society. It assists to conduct them from the cradle to the grave, as social beings; and there it leaves them to their final Judge.... Religion and morality embrace both time and eternity in their mighty grasp; but human laws reach not beyond the boundaries of time. As immortal beings, they leave men to their conscience and their God. And though this consideration may seem, at first view, to detract from their dignity, I rejoice at it as a consequence of our absolute moral freedom.[109]

Walker's words capture perfectly the relationship between moral autonomy and the limited role of law. Worldly matters, including codes of social behavior, were the domain of law; matters eternal, including the exercise of conscience, were beyond law's sphere. The separation of the internal and the external, the spiritual and the temporal, was a way to respect the rights of majorities while honoring the individual's moral faculties. The battles between orthodoxy and dissent were to be fought not in the courts, but in the realm of politics, personal morality, and individual choice.

II. LAW, CULTURE, AND INDIVIDUAL RIGHTS IN THE NINETEENTH CENTURY

Once the main themes of nineteenth-century legal culture are understood, it becomes possible to appreciate the century's approach to individual rights on its own terms. As these themes influenced concrete cases, they gave shape to a vision of the role of law that by modern standards is limited, but which by nineteenth-century standards struck the appropriate balance between majority rights and minority freedoms. As we shall see, time and again, from a twenty-first century perspective, the courts refused to intervene to protect minorities. But we react that way because we have been conditioned to expect a great deal from law; the nineteenth century could act as it did because much of what we now expect from the courts it expected from the interplay of the majority culture and the autonomous individual.

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[109] Timothy Walker, *Introductory Lecture on the Dignity of the Law as a Profession, Delivered at the Cincinnati College, November 4, 1837*, *in* THE LEGAL MIND, *supra* note 49, at 238, 240–41.

A. Sunday Laws

Litigation over Sunday laws provided some of the century's earliest court battles between the claims of individual conscience and the will of the majority. The laws of most states prohibited various activities on Sunday, from the performance of labor to the sale of goods to the formation of contracts.[110] Litigation typically arose when non-Christians violated these statutes or sought to be excused from them. Courts almost universally upheld the laws[111] and, in doing so, brought the themes of Protestantism, majoritarianism, and personal autonomy to bear on the resolution of particular claims of right.

One of the earliest reported Sunday-law cases, *Commonwealth v. Wolf*,[112] was typical of such claims. Wolf, a Jewish resident of Philadelphia, was convicted and fined for unlawfully performing "worldly employment" on a Sunday.[113] On appeal, Wolf attacked the statute under Article 9, Section 3 of the state constitution, which provided that "No human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given, by law, to any religious establishments or modes of worship."[114] Wolf relied on two main arguments, which were typical of those raised in Sunday-law cases throughout the century. First, he contended that his religion regarded Saturdays as holy and required the performance of work on the other six days of the week.[115] Thus, Sunday laws disadvantaged Jews by effectively permitting them to work on only five out of seven days. Second, Wolf argued that being forced to keep the Christian Sabbath could violate the rights of conscience of non-Christians by compelling an act of piety in which they did not believe.[116]

In rejecting Wolf's claim and others like it, the courts expressed several rationales for upholding the Sunday laws. One of these was the need to defer to the choices of the Christian majority. Sabbath-breaking was an affront to majority preferences, as the *Wolf* court explained:

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[110] For a general history and overview of Sunday laws, see DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS (1987).

[111] A conspicuous exception was *Ex Parte Newman*, 9 Cal. 502 (1858), in which the California Supreme Court overturned the state's Sunday law because it impermissibly favored Christianity over other religions. However, the same court reached the opposite conclusion just three years later in *Ex Parte Andrews*, 18 Cal. 678 (1861).

[112] 3 Serg. & Rawle 48 (Pa. 1817).

[113] *Id.*

[114] *Id.* at 48.

[115] *Id.*

[116] *Id.*

> The invaluable privilege of the rights of conscience, secured to us by the constitution of the Commonwealth, was never intended to shelter those persons, who, out of mere caprice, would directly oppose those laws, for the pleasure of showing their contempt and abhorrence of the religious opinions of the great mass of the citizens.[117]

Equally protective was the Arkansas Supreme Court, some thirty years after *Wolf*, upholding a conviction for selling groceries on a Sunday:

> By reserving to every individual the sacred and indefeasible rights of conscience, the [constitutional] convention most certainly did not intend to leave it in his power to do such acts as are . . . necessarily calculated to bring into contempt the most venerable and sacred institutions of the country. Sunday or the Sabbath is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the christian religion. . . . [It] can rightfully claim the protection of the law-making power of the State.[118]

Likewise, the Alabama Supreme Court, construing that state's Sunday law in a contract dispute, noted with approval that "the design of the Legislature" was "evidently to promote morality and advance the interests of religion."[119] The majority was entitled to protect its preferred religion, and minorities would not be allowed to call that choice into question.

The protection of Christianity was not merely a matter of majority fiat; it was also a matter of the majority's individual rights. Nonbelievers' rights of conscience, "like every other right, must be exercised with strict regard to the equal rights of others."[120] One such right, enjoyed by members of the majority, was the right to worship unmolested by the activity of nonbelievers. Without Sunday laws, "[h]ow could those who conscientiously believe that Sunday is hallowed time, to be devoted to the worship of God, enjoy themselves in its observance amidst all the turmoil and bustle of worldly pursuits, amidst scenes by which the day was desecrated, which they conscientiously believed to be holy?"[121] In order to protect "those who desire

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[117] *Id.* at 51.

[118] Shover v. State, 10 Ark. 259, 262–63 (1850).

[119] O'Donnell v. Sweeney, 5 Ala. 467, 469 (1843).

[120] Lindenmuller v. People, 33 Barb. 548, 561 (N.Y. Gen. Term 1861) (upholding a conviction for holding a theatrical performance on a Sunday).

[121] State v. Ambs, 20 Mo. 214, 218 (1854). Similar language appears in *Gabel v. City of Houston*, 29 Tex. 335, 346 (1867).

and are entitled to the day,"[122] the law could forbid activities that might "interfere with the rights of those who choose to assemble for public worship."[123] Thus, the Sunday laws were a means of promoting liberty, not restraining it; "so far from affecting religious freedom, [they are] a means by which the rights of conscience are enjoyed."[124] The majority's religious freedom could not be sacrificed to minority desires.

The pleas of the dissenters were further weakened by the legal culture's belief in personal autonomy. Minorities did not need to strike down the majority's laws to be free because they enjoyed complete internal freedom of conscience regardless of the restraints imposed on their external behavior. In *City Council of Charleston v. Benjamin*,[125] for example, a Jewish merchant was convicted for selling clothing on a Sunday.[126] He claimed in his defense that being required to observe the Christian Sabbath violated his rights of conscience.[127] The court did not dispute that Benjamin was entitled to absolute freedom of belief, but it denied that any such rights had been violated.[128] Benjamin was being forced only to behave in a certain way, not to subscribe to any particular creed:

> But it is said this [Sunday law] violates the free exercise and enjoyment of the religious profession and worship of the Israelite. Why? It does not require him to desecrate his own Sabbath. It does not say, you must worship God on the Christian Sabbath. On the contrary, it leaves him free on all these matters. His evening sacrifice and his morning worship, constituting the 7th day, he publicly and freely offers up, and there is none to make him afraid. His Sundays are spent as he pleases, so far as religion is concerned. No one dare say to him, in the circle of his own fireside, what doest thou? None, as he walks the street, would dare say to him, turn in hither, and worship as we do!
>
> It is however fancied that in some way this law is in derogation of the Hebrew's religion, inasmuch as by his faith and this Statute, he is compelled to keep two Sabbaths. There is the

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[122] *Lindenmuller*, 33 Barb. at 568.

[123] Johnston v. Commonwealth, 22 Pa. 102, 115 (1853). Some states supplemented their Sunday laws with laws specifically prohibiting the disturbance of public worship. *See, e.g.*, State v. Bledsoe, 1 S.W. 149 (Ark. 1886); State v. Edwards, 32 Mo. 548 (1862); State v. Jasper, 15 N.C. (4 Dev.) 323 (1833); Cockreham v. State, 26 Tenn. (7 Hum.) 11 (1846); Kindred v. State, 33 Tex. 67 (1870).

[124] *Ambs*, 20 Mo. at 218.

[125] 33 S.C.L. (2 Strob.) 508 (S.C. Ct. App. 1848).

[126] *Id.*

[127] *Id.* at 527.

[128] *Id.*

> mistake. He has his own, free and undiminished! Sunday is to us our day of rest. We say to him, simply, respect us, by ceasing on this day from the pursuit of that trade and business in which you, by the security and protection given to you by our laws, make great gain. This is a mere police or municipal regulation.[129]

Benjamin had no cause for complaint, for he could enjoy the freedoms of his conscience even while the city imposed limits on his activities. The same reasoning underlay *Specht v. Commonwealth*, in which a Seventh-Day Baptist was convicted of unlawfully hauling manure on the Sabbath.[130] His claim for an exemption was rejected, in part because of the distinction between action and belief: "So long as no attempt is made to force upon others the adoption of the belief entertained by the governing power, or to compel a practice in accordance with it, so long is conscience left in the enjoyment of its natural right of individual decision and independent religious action."[131] Specht's mistake, said the court, was conflating the spheres of belief and behavior: "The error of the plaintiff's position is that it confounds the reason of the prohibition with its actual effect, and thus mistakes the mere restraint of physical exertion for the fetters that clog the freedom of mind and conscience."[132] The Texas Supreme Court drew the same distinction in upholding a prohibition against selling beer on Sundays:

> The right to worship God according to the dictation of the conscience has not at all been interrupted; nor is it enjoined upon any inhabitant of the city to attend the religious exercises of any denomination; and he may decline to attend any, and amuse himself with the metaphysical reflections and deductions of the infidel.[133]

Individual autonomy thus proved fatal to claims for the expansion of constitutional protections. Moral self-help, not judicial interference, was the order of the day.

The legal culture's commitment to Christianity, majority rule, and individual autonomy thus led the nineteenth-century courts to uphold Sunday laws under theories that today would be unacceptable as First Amendment violations. Sunday laws are still with us, but they have survived for secular reasons, not religious ones. Many nineteenth-century courts had bolstered their Sunday opinions by pointing out that the laws could also be justified as an exercise of the secular police power. A uniform day of rest was thought to be healthful and salutary. "It humanizes, by the help

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[129] *Id.*

[130] 8 Pa. 312, 324 (1848).

[131] *Id.* at 324.

[132] *Id.*

[133] Gabel v. City of Houston, 29 Tex. 335, 346 (1867).

of conversation and society, the manners of all classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit."[134] The Sunday laws merely standardized the day of rest. Accordingly, their validity was "neither strengthened nor weakened by the fact that the day of rest . . . is the Sabbath day."[135] This secular rationale became increasingly prominent toward the end of the nineteenth century, as the ties between Christianity and the state began to fray.[136] And in a kind of culmination, it enabled the U.S. Supreme Court to uphold Sunday closing laws on secular grounds in the mid-twentieth century.[137] By that time, the Christian legal culture was nearly gone, but for most of the preceding century, it had propagated a very different view of individual freedoms and the power of the state.

B. Blasphemy Laws

The nineteenth century's blasphemy prosecutions reflect the same cultural themes as the Sunday cases. An early and influential blasphemy case was *People v. Ruggles*,[138] in which a New York court upheld Ruggles's conviction, fine, and imprisonment for calling Jesus Christ a "bastard" and the Virgin Mary a "whore."[139] The state argued that blaspheming Christ was a common law crime, while Ruggles claimed the protection of Article 38 of the New York Constitution, which provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind."[140] Ruggles maintained that the state could no more punish him for reviling Jesus and Mary than for reviling "*Mahomet* or the grand *Lama*."[141] Chancellor Kent, writing for the court, invoked the themes of Christian culture and majority rule to reject Ruggles's argument. The state was not required to treat Christianity like other religions because "we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors."[142] In light of this popular preference, said Kent, the majority were entitled to guard Christianity against those who did not share their beliefs: "The free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but

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[134] Johnston v. Commonwealth, 22 Pa. 102, 111 (1853).

[135] Bloom v. Richards, 2 Ohio St. 387, 391 (1853). *See also* Frolickstein v. Mayor of Mobile, 40 Ala. 725 (1867); State *ex rel.* Walker v. Judge of Section A, 1 So. 437 (La. 1887); Lindenmuller v. People, 33 Barb. 548 (N.Y. Gen. Term 1861); Specht v. Commonwealth, 8 Pa. 312 (1848).

[136] Way, *supra* note 24, at 517–18.

[137] McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

[138] 8 Johns. 290 (N.Y. Sup. Ct. 1811).

[139] *Id.* at 292.

[140] *Id.* at 296.

[141] *Id.* at 295.

[142] *Id.*

to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."[143] As in the Sunday cases, freedom of belief did not include the right to attack the majority's religion.

The same ideas appeared in other blasphemy cases. In *Updegraph v. Commonwealth*, the defendant was convicted for calling the veracity of the Scriptures into doubt.[144] The conviction was reversed for a defect in the indictment,[145] but the court took pains to affirm the validity of the statute.[146] The court somewhat defensively treated the case as a referendum on the entire Christian culture: "We will first dispose of what is considered the grand objection — *the constitutionality of Christianity* — for, in effect, that is *the question*."[147] After a long disquisition on the religious history of the Pennsylvanian people, the court had no difficulty concluding that "it is irrefragably proved, that the laws and institutions of this state are built on the foundation of reverence for Christianity."[148] Part of this Christian tradition included religious freedom and "complete liberty of conscience,"[149] but such liberty did not confer the right to act against the dominant religion: "While our own free constitution secures liberty of conscience and freedom of religious worship to all, it is not necessary to maintain that any man should have the right publicly to vilify the religion of his neighbors and of the country; these two privileges are directly opposed."[150] These views reappeared a decade later in *Commonwealth v. Kneeland*,[151] a Massachusetts case, and *State v. Chandler*,[152] a Delaware prosecution. In *Kneeland*, the defendant had published a newspaper article denying the reality of God and Christ,[153] while in *Chandler*, one Thomas Jefferson Chandler had taken a page out of Ruggles's book by calling Jesus a "bastard" and Mary a "whore."[154] Both courts upheld the convictions against constitutional challenges, again stressing the need to safeguard the rights of the majority.[155] Although minorities were free to hold whatever opinions they wished, they crossed a line when they willfully disturbed Christian society. Consequently, the state "may pass laws to punish those who, under the pretense of exercising [freedom of conscience], shall wantonly and wickedly invade the enjoyment of it by others."[156]

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[143] *Id.*

[144] Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).

[145] *Id.* at 410.

[146] *Id.* at 408 ([T]he act against blasphemy is neither obsolete nor virtually repealed . . . .").

[147] *Id.* at 400 (emphasis in original).

[148] *Id.* at 403.

[149] *Id.*

[150] *Id.* at 408.

[151] 37 Mass. (20 Pick.) 206 (1838).

[152] 2 Del. (2 Harr.) 553 (1837).

[153] *Kneeland*, 37 Mass. (20 Pick.) at 206–07.

[154] *Chandler*, 2 Del. at 553.

[155] *See id.* at 579; *Kneeland*, 37 Mass. (20 Pick.) at 246.

[156] *Kneeland*, 37 Mass. (20 Pick.) at 236.

It is worth noting that the blasphemy cases took a broader view of these disputes than merely minority versus majority. Also at stake was the rule of law in a free society. The *Updegraph* court urged, "No free government now exists in the world, unless where Christianity is acknowledged, and is the religion of the country."[157] Christianity is thus "the purest system of morality," and the "only stable support of all human laws."[158] The *Chandler* court agreed, pointing to respect for Christianity as a necessary condition for the freedoms of the common law: "[The common law] is emphatically a law for the protection of religious liberty; and no law can be truly such which does not equally protect the public peace from insults and outrages upon public opinion . . . ."[159] On this view, blasphemy laws, far from being oppressive, were enacted during "the breaking forth of the sun of religious liberty, by those who had suffered much for conscience' [*sic*] sake, and fled from ecclesiastical oppression."[160] On a more quotidian level, the administration of the laws also depended on Christianity. "In the Courts over which we preside," wrote one nineteenth-century judge, "we daily acknowledge Christianity as the most solemn part of our administration."[161] The swearing of oaths was "essential to the peace and safety of society"[162] and required "religious sanction" to be effective.[163] To attack Christianity, then, was "to weaken the confidence in human veracity, so essential to the purposes of society."[164] While it may now seem ironic to preserve freedom by limiting dissent, the motive was nonetheless sincere: free society itself would stand or fall with Christianity.

The blasphemy cases also relied on the distinction between the internal realm of conscience and the external realm of behavior. The laws could be upheld because the preservation of public order was seen as posing no threat to the exercise of individual belief. As the *Kneeland* court explained, the blasphemy laws were "not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace."[165] Likewise, in *Chandler*, the court acknowledged that "we cannot

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[157] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 406 (Pa. 1824).

[158] *Id.* at 407.

[159] *Chandler*, 2 Del. at 572.

[160] *Updegraph*, 11 Serg. & Rawle at 407.

[161] City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 523 (S.C. Ct. App. 1848).

[162] Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 221 (1838).

[163] People v. Ruggles, 8 Johns. 290, 298 (N.Y. Sup. Ct. 1811).

[164] *Updegraph*, 11 Serg. & Rawle at 407. *See also Ruggles*, 8 Johns. at 297–98. At least in the first half of the century, it was common for courts to require that witnesses believe in God, on the theory that such belief made their oaths more reliably binding on their consciences. *See* Perry's Admin'r v. Stewart, 2 Del. (2 Harr.) 37 (Del. Super. Ct. 1835); Commonwealth v. Hills, 64 Mass. (10 Cush.) 530 (1852); Jackson, *ex dem.* Tuttle v. Gridley, 18 Johns. 98 (N.Y. Sup. Ct. 1820).

[165] *Kneeland*, 37 Mass. (20 Pick.) at 221. *See also Updegraph*, 11 Serg. & Rawle at 408 (noting that blasphemy was prohibited "not to force conscience by punishment, but to preserve the peace of the country by an outward respect to the religion of the country").

keep the consciences of men,"[166] but its approval of the defendant's conviction made clear that men's *actions* could be kept without trespassing on their consciences. As in the Sunday cases, law was thereby relieved of the duty to intervene against majorities, and the courts saw no occasion to expand constitutional rights to protect blasphemers.

The blasphemy cases further illustrate the major themes of nineteenth-century rights law and show how greatly the resulting vision of rights differs from that to which we are accustomed. It is now virtually inconceivable that a blasphemy conviction could stand. Modern courts would likely reverse it either as a violation of free speech or a violation of the Establishment Clause.[167] Moreover, the line between belief and behavior has been greatly eroded in First Amendment law, which means that limits on religiously motivated conduct are now more readily treated as forbidden limits on freedom of religion.[168] The fact that no such things were contemplated in the nineteenth-century cases is a measure of the century's commitment to both the Protestant culture and a different vision of individual rights. The courts were bound by the letter of the law, but they were not bound to upset the careful balance between majority and minority rights by upsetting cultural norms or by expanding existing concepts of liberty.

C. Religion in the Public Schools

The public schools were a third focal point for litigation over individual rights in the Christian culture, especially in the latter half of the nineteenth century. Much of this controversy reflected rising tensions between Catholics and Protestants over matters such as the recognition of Catholic holidays and the use of the Protestant King James Bible in school exercises.[169] Like the Sunday laws and blasphemy cases, the school cases turned on the themes of Protestant culture, majority rights, and personal autonomy.

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[166] State v. Chandler, 2 Del. (2 Harr.) 553, 575 (1837).

[167] *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing a breach-of-peace conviction for speech denigrating Catholicism and religion in general); State v. West, 263 A.2d 602 (Md. Ct. Spec. App. 1970) (declaring a Maryland blasphemy statute unconstitutional on both Establishment Clause and Free Exercise grounds). The federal First Amendment has been applied against the states since the 1930s. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939); Stromberg v. California, 283 U.S. 359 (1931).

[168] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (overturning a law prohibiting religious animal sacrifice); McDaniel v. Paty, 435 U.S. 618 (1978) (overturning a law barring clergy from holding public office); Sherbert v. Verner, 374 U.S. 398 (1963) (finding a Free Exercise violation where the state denied unemployment benefits based on a religiously-motivated refusal to work). *But see* Employment Div. v. Smith, 494 U.S. 872 (1990) (applying minimal scrutiny to a law of general applicability having only an incidental effect on the free exercise of religion).

[169] On the roots of Catholic-Protestant conflict over the public schools, see BILLINGTON, *supra* note 16, at 142–59.

Majoritarian themes ran strongly through the school cases. As in the Sunday and blasphemy cases, the courts were committed to defending the role of Christianity in public life against those who wished to separate the two. "Christianity," declared the Texas Supreme Court, "is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy."[170] Another court justified school prayer with a history lesson in the Christian influence:

> [S]ince the admission of this state into the Union, a period of more than half a century, the practice has obtained in all the state institutions of learning of not only reading from the Bible in the presence of the students, but of offering prayer; . . . the text-books used in the public schools of the state have contained extracts from the Bible, and numerous references to Almighty God and his attributes; and all this without objection from any source.[171]

The Christian consensus held that "[t]he noblest ideals of moral character are found in the Bible," and "[t]o emulate these is the supreme conception of citizenship."[172] That being so, how could the Bible be excluded from the schools where civic values were to be encouraged? So deep was the presumption of Christianity that one court allowed the Bible to be used in schools because it was not "sectarian," even in its King James translation.[173] Protestantism was not a "sect," but the baseline of American culture.

Such a central institution was not to be excluded from the public schools based on the wishes of a few. An 1854 Maine case, *Donahoe v. Richards*,[174] typifies the courts' distaste for minority challenges. The school board of the town of Ellsworth had required the reading of the King James Bible in classroom exercises.[175] Bridget Donahoe, a Catholic schoolgirl, believed that the King James translation was inaccurate and that reading it was a sin.[176] She refused to do the required reading and

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[170] Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908).

[171] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 252 (Mich. 1898) (rejecting a challenge to Bible-reading in classrooms).

[172] Billard v. Bd. of Educ., 76 P. 422, 423 (Kan. 1904) (upholding the reading of the Lord's Prayer and the 23rd Psalm in school).

[173] Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 793–94 (Ky. 1905). The court sustained a Bible reading against a challenge that it promoted "sectarian" instruction in violation of statutory and constitutional law. *Hackett*, 87 S.W. 792.

[174] 38 Me. 379 (1854).

[175] *Id.*

[176] *Id.*

was expelled.[177] Donahoe then brought suit, relying on the provision of the Maine constitution that "no one shall be *hurt, molested* or *restrained* in his person, liberty or estate *for worshiping God* in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments."[178] Donahoe's assertion of her rights of conscience set up a conflict between her beliefs and the beliefs of the majority. Writing for the Court, Chief Justice Appleton summarized: "The claim, on the part of the plaintiff, is that each and every scholar may set up its own conscience as over and above the law. It is the claim of an exemption from a general law because it may conflict with the particular conscience."[179] As Appleton's tone suggests, such a claim did not evoke sympathy, and Donahoe lost her case. The court pointedly refused "to subordinate the state to the individual conscience,"[180] for if conscience could trump state action, "then power ceases to reside in majorities, and is transferred to minorities."[181]

Other school cases show a similar unwillingness to allow minorities to interfere with majority rule. In *Ferriter v. Tyler*, a school board expelled 150 Catholic students for skipping school at the direction of their parish priest to attend church on the Feast of Corpus Christi.[182] The Vermont Supreme Court upheld the expulsions, affirming the power of the majority to set limits on the actions of minorities: "[W]hile the individual may hold the utmost of his religious faith, and all his ideas, notions, and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others, and to the paramount interests of the public . . . ."[183] And in a Texas case, rejecting a challenge by Jewish and Catholic parents to Bible-reading, hymn-singing, and prayer in the schools, the state supreme court fretted that to allow minority preferences to control "would be to starve the moral and spiritual natures of the many out of deference to the few."[184] In this context, as in the others we have seen, minority claims of right were not to be used as a means of upsetting majority desires.

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[177] *Id.*

[178] *Id.* at 402 (emphasis in original).

[179] *Id.* at 408.

[180] *Id.* at 410.

[181] *Id.* at 409. Bridget's father, in addition to sponsoring the lawsuit, had sent the state a bill for the costs of home-schooling Bridget after her expulsion. *See* BILLINGTON, *supra* note 16, at 293–94. The case was so divisive that it brought violent mobs to the streets of Ellsworth. *Id.* at 294.

[182] 48 Vt. 444 (1876).

[183] *Id.* at 467.

[184] Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908) (rejecting a challenge to Bible-reading in schools). *See also* Commonwealth v. Cooke, 7 Am. L. Reg. 417, 422 (Boston, Mass., Police Ct. 1859) (rejecting conscience-based challenge to the recitation of the Ten Commandments in schools to prevent education being "taken from the State government and placed in the hands of a few children").

While the school cases were extremely deferential to Protestant majorities, it bears repeating that majorities were never wholly unrestrained. The courts were not in the business of recognizing unwritten liberties, nor were they in the business of nullifying what *was* written. Express protections against state regulation would be enforced according to their letter, though the letter of the law was often read less expansively than our twentieth-century sensibilities would require. In *Donahoe*, the court made a point of noting that the state constitution was designed "to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions."[185] Likewise, the Michigan court in *Pfeiffer* reiterated that the state constitution was meant "to exclude religious tests, and to place all citizens on an equality before the law as to the exercise of the franchise of voting or holding office."[186] There were limits beyond which the state could not go, but as these examples suggest, they tended to be phrased in terms of freedom in one's person, property, or civil status from religious disadvantage.[187] In other words, they tended to focus on the kinds of bodily, material, or political impositions that were the proper domain of the law, rather than on matters of internal belief, which were foreign to law's empire. In the school cases, as in the Sunday and blasphemy cases, one can see the disinclination of the courts to stretch the meaning of religious disadvantage to cover instances not enumerated or commonly understood within the constitutional framework.

Such literalness, if one might call it that, was a direct outgrowth of the century's view of individual autonomy, and the resulting distinction between belief and action. If people had the capacity to form and hold their own moral beliefs, then the courts did not need to change the law to protect them. The theme of moral autonomy was as prominent in the school cases as it was in other cases of conscience. One of the keys to *Donahoe* was the argument that nothing about reading the King James Bible required Donahoe to give up her Catholicism:

> [R]eading the bible is no more an interference with religious belief, than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the

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[185] *Donahoe*, 38 Me. at 403.

[186] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 251 (Mich. 1898).

[187] Maryland's constitution is an example of the express protection of bodily and material interests: "[N]o person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession . . . ." MD. CONST. of 1867, Declaration of Rights, art. 36. For similar language, see GA. CONST. of 1868, art. I, § 6; ME. CONST. of 1819, art. I, § 3; MASS. CONST. of 1780, pt. 1, art. II; N.H. CONST. of 1792, pt. 1, art. V. The Arkansas Constitution is an example of the express protection of civil status: "[T]he civil rights, privileges or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion." ARK. CONST. of 1864, art. II, § 4. *See also* IDAHO CONST. of 1889, art. I, § 4; KY. CONST. of 1799, art. X, § 4; N.J. CONST. of 1844, art. I, § 4.

> pagan creeds. . . . No one was required to believe or punished for disbelief, either in [the Bible's] inspiration or want of inspiration; in the fidelity of the translation or its inaccuracy — or in any set of doctrines deducible or not deducible therefrom.[188]

Donahoe was free not only to believe as she wished, but she was also free to make the moral choice between defying the law or complying with it: "When a conflict arises, as it may, between the requirements of law and the obligations of conscience, each man must determine his course of action according to his views of duty and of right."[189] The same responsibility was laid upon schoolgirls. Moral autonomy separated the realm of belief from the realm of behavior, and moral autonomy enabled the dissenter to decide for herself what should be Caesar's and what should be God's. It was not the job of the law to ease such conflicts.

Other school cases reflected this theme. The Vermont court in *Ferriter* flatly rejected the notion that the expulsion of the Catholic students had interfered in any way with their rights of conscience:

> [T]he action of the [school district] touches not nor affects the worship of Almighty God by the orators, whether such worship be one way or another, or not at all; nor does it touch or affect their religious sentiments or peculiar mode of religious worship; nor does it in any manner interfere with or control the rights of conscience in the free exercise of religious worship. That article in the constitution looks only to the personal conscience of the individual, as related to his personal worship of Almighty God. It looks only to the personal relation of the individual to his God, both as to belief and worship, and not to the relation that the individual may sustain to others in respect to their belief and worship. The [action of the school district] . . . did not touch the belief of the orators as to the character of that day, nor did it touch or control the free exercise by them of religious worship according to their belief and conscience . . . .[190]

The Board's actions could be upheld because, despite being expelled, the students remained free to believe whatever religious doctrine they wished. For the same reasons, a Massachusetts court in *Commonwealth v. Cooke* upheld the beating of a schoolchild for refusing, on the instructions of his priest and his father, to recite the

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[188] *Donahoe*, 38 Me. at 399. This passage was quoted and relied upon in *Pfeiffer*, 77 N.W. at 253, in which the Michigan Supreme Court rejected a father's challenge to Bible reading in the Detroit public schools. *See* 77 N.W. 250.

[189] *Donahoe*, 38 Me. at 412.

[190] Ferriter v. Tyler, 48 Vt. 444, 460 (1876).

Ten Commandments.[191] The school's requirement was not forbidden because it did not prevent the child from believing as he wished: "[N]o scholar is requested to believe [the Bible], none to receive it as the only true version of the laws of God.... To read the Bible in school . . . is no interference with religious liberty."[192] The same distinction between external action and internal belief was used in *Spiller v. Inhabitants of Woburn* to uphold the expulsion of a student who refused to bow her head during school prayer.[193] The court acknowledged that requiring students to join in "any religious rite or observance . . . contrary to their religious convictions" would be unconstitutional, but it determined this was not such a case.[194] The requirement of bowing one's head "did not prescribe an act which was necessarily one of devotion or religious ceremony."[195] Instead,

> [i]t went no further than to require the observance of quiet and decorum during the religious service with which the school was opened. It did not compel a pupil to join in the prayer, but only to assume an attitude which was calculated to prevent interruption by avoiding all communication with others during the service.[196]

Here, too, external restraints on behavior were seen as distinct from matters of internal belief.

The nineteenth-century view of autonomy can be more fully appreciated by contrasting it with the modern approach. The 1992 U.S. Supreme Court case of *Lee v. Weisman*[197] is the polar opposite of *Spiller* and its ilk. In *Lee*, the Court declared unconstitutional the use of nonsectarian invocation and benediction prayers at a public-school graduation ceremony.[198] The Court relied on its perception that the state sponsorship of the prayer "places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."[199] A failure to participate could result in the student's being noticed or singled out, which left non-religious students "in the dilemma of participating, with all that implies, or protesting."[200] It was no answer for the *Lee* Court, as it was for the *Spiller* court and others, that outward participation does not imply internal consent:

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[191] 7 Am. L. Reg. 417 (Boston, Mass., Police Ct. 1859). The eleven-year-old was beaten on his hands "with a rattan stick, some three feet in length, and three-eighths of an inch thick." *Id.* at 419. The beating went on intermittently for thirty minutes. *Id.*

[192] *Id.* at 423.

[193] 94 Mass. (12 Allen) 127 (1866).

[194] *Id.* at 129.

[195] *Id.*

[196] *Id.*

[197] 505 U.S. 577 (1992).

[198] *Id.*

[199] *Id.* at 593.

[200] *Id.*

> It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.[201]

By putting the dissenter to the choice of acquiescence or rebellion, the school caused the student "embarrassment," "intrusion," and a "sense of isolation and affront," forms of psychic hurt which were sufficient to invalidate the state's action.[202]

The nineteenth-century answer to *Lee* would have been that the student's autonomous conscience remained free, whatever her feelings or outward behaviors. As the court had written in *Ferriter* over one hundred years earlier, "It would seem to be trifling with a momentous subject, to claim that [the Constitution] was designed to prohibit the Legislature from enacting any law . . . which might interfere with the wishes, and tastes, and feelings of any of the citizens in the matter of religion."[203] In the modern age, however, the burden of safeguarding conscience has shifted from the individual to the courts. Hence, the Court's ahistorical conclusion in *Lee*: "One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[204] This was an accurate statement of twentieth-century attitudes, but for the nineteenth century, the burden of maintaining conscience in the face of majority opposition lay with the individual, not with the law.

Eventually, the strength of the Christian culture began to wane in the school cases just as it had in the Sunday laws and blasphemy cases. In the late nineteenth century, and into the twentieth, state courts became more willing to disallow Bible readings and other forms of prayer in schools.[205] The U.S. Supreme Court put the matter more or less to rest in the 1960s with its decisions in *Engel v. Vitale*[206] and *Abington School District v. Schempp*,[207] overturning prayer and religiously-motivated Bible reading in public schools. These cases, like *Lee*, further illustrate the divide between the rights law of the twentieth century and that of the nineteenth. In language that would have been almost inconceivable a century before, the *Schempp* Court turned the tables on majorities by subordinating them to the interests of the few:

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[201] *Id.*

[202] *Id.* at 594.

[203] Ferriter v. Tyler, 48 Vt. 444, 465 (1876).

[204] *Lee*, 505 U.S. at 592.

[205] *See* People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910); Herold v. Parish Bd. of Sch. Dirs., 68 So. 116 (La. 1915); State *ex rel.* Freeman v. Scheve, 91 N.W. 846 (Neb. 1902); State *ex rel.* Weiss v. Dist. Bd., 44 N.W. 967 (Wis. 1890); *see also* Way, *supra* note 24, at 520–21.

[206] 370 U.S. 421 (1962).

[207] 374 U.S. 203 (1963).

> [W]e cannot accept that [our holding] . . . collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.[208]

The long reign of the Christian legal culture was coming to an end.

CONCLUSION: CULTURE AND THE ROLE OF LAW

The nineteenth century's approach to individual rights was far different from that of our own time. As we have seen, it is inaccurate to say that nineteenth-century law was unconcerned with individual rights. It is accurate, however, to say that it saw a much smaller role for law in mediating between majority rule and minority claims of conscience. Constitutional provisions guaranteeing freedom of religion and freedom of conscience were taken seriously and were enforced. But they were typically not expanded beyond the narrow confines of their text or the common understanding of their scope. It would be left to a later era to begin the project of discovering unwritten rights in constitutional provisions touching personal freedoms. And it would be for the next century's lawyers and judges to compress belief and behavior into an interest in personal autonomy that must be protected by law. For most of the nineteenth century, freedom inhered in the right of the Christian majority to build a society according to its lights, and freedom inhered in the moral autonomy of dissenters, even when constrained in their actions by the majority's rules. To modern eyes the law's deference to majorities may seem like a way to limit the exercise of personal freedoms. To the nineteenth century, however, that distinction was the appropriate way to honor both the right of the majority to propagate its culture and the freedom of dissenters to act as the morally autonomous beings that they were.

Near the end of the nineteenth century, all of this began to change. Immigration, industrialization, urbanization, and other social trends began to weaken the place of Protestant Christianity as the dominant social institution.[209] The passage of the Fourteenth Amendment and the rise of substantive due process largely federalized the law of individual rights. Throughout the twentieth century, in cases involving free speech, abortion, sexual liberty, and church-state relations, the Supreme Court has departed from nineteenth-century attitudes by invoking principles of conscience and autonomy to restrain majority-driven state action. As cases like *Lee* and *Casey* suggest, the nineteenth-century vision of personal liberty has been replaced with a sort of welfare state of conscience, in which law has become a leading tool for defining and safeguarding individual autonomy. While the result has been an expanding roster of constitutionally protected rights, one might wonder whether this has come at some cost to the notion of moral independence and self-reliance. But that is a story for another day.

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[208] *Schempp*, 374 U.S. at 225–26 (emphasis in original) (footnote omitted).

[209] HANDY, *supra* note 15, at 65; MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 297–317 (1984).