William & Mary Law Review

Volume 31 (1989-1990)
Issue 2 The Bill of Rights at 200 Years: Bicentennial Perspectives

Article 12

February 1990

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Anita L. Allen, *Alive and Well: Religious Freedom in the Welfare State*, 31 Wm. & Mary L. Rev. 409 (1990), https://scholarship.law.wm.edu/wmlr/vol31/iss2/12

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# ALIVE AND WELL: RELIGIOUS FREEDOM IN THE WELFARE STATE

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## I. INTRODUCTION

According to Professor Richard Epstein, the welfare state[1] is inimical to religious freedom.[2] His perspective is at once radical and traditional. It is radical in its suggestion that a sweeping rejection of widely embraced and entrenched legislation would be necessary to salvage religious freedom and eliminate difficulties inherent in its jurisprudence. His perspective is traditional in its loyalty to classical liberal concepts. However, because Epstein's well-known libertarian interpretations of liberty, property and contract point so uncompromisingly in the direction of the minimal night watchman state,[3] the traditional aspects of his perspective prove equally radical as well.

Professor Epstein's paper contributes insight into familiar first amendment dilemmas engendered by collective bargaining[4] and

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1. A "welfare state" is a state in which the government is actively and paternalistically involved in the economy. In particular, the term "welfare state" denotes the United States since the economic depression of the 1930s, when the government began to take an "active role in matters of public relief, welfare services, medical benefits, old age assistance, redistributive and counter-cyclical spending, and a variety of domestic social functions." R. WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 320 (1988).

2. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990).

3. The minimalist or "night watchman" conception of government associated with libertarian political philosophy takes a narrow view of the legitimate purposes of government. Defending bodily integrity and property rights are the essential functions of a government so conceived. *See, e.g.*, R. NOZICK, ANARCHY, STATE AND UTOPIA 25-28 (1974). *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

4. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (congressional enactment of National Labor Relations Act did not contemplate NLRB jurisdiction over parochial schools refusing to recognize or bargain with lay teachers' unions.).

employment discrimination,[5] but also gives his audience much with which to disagree. This Comment amounts to a rejection of Epstein's central claims. I argue that, in practice, the relationship between religious freedom and the welfare state is largely congenial and mutually reinforcing, rather than hostile and contradictory.

## II. The Trouble Epstein Sees

Epstein contends that when it comes to the constitutional protection of religious liberty, the contemporary Supreme Court is trapped between a rock and a hard place. Efforts to protect religious liberty in employment have cast the Court against the "rock" of majoritarian and egalitarian regulation, represented by the application of collective bargaining statutes and antidiscrimination laws to religious organizations. At the same time, efforts to protect religious institutions from the requirements of regulation have thrown the Court up against the "hard place" of the establishment clause.[6] Epstein argues that a constitutionally problematic state subsidy of religion results when religious organizations are excused on constitutional grounds from legislation routinely permitted to burden their secular competitors.[7]

In other words, the Court faces a dilemma. It can treat religious organizations differently in deference to the free exercise clause, or it can treat them the same way secular organizations are treated out of respect for the establishment clause. If the Court treats religious and secular organizations the same, free exercise of religion under the Constitution becomes meaningless. If the Court treats them differently, religious organizations are effectively subsidized, rendering the anti-establishment provisions of the Constitution meaningless. Viewed in this light, regulation of religion appears to

5. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding Title VII prohibitions against discrimination on the basis of religion inapplicable to Mormon termination of employees who fail to qualify for church membership); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that a Connecticut statute categorically prohibiting termination of employees who refuse to work on their stated Sabbaths and providing no business exceptions violates first amendment establishment clause); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits under state statute may not be denied constitutionally to Seventh-Day Adventists refusing Saturday employment).

6. *See supra* notes 4, 5.

7. Epstein, *supra* note 2, *passim*.

be unconstitutional, but failure to regulate religion appears to be unconstitutional as well.

### *A. A Way Out*

If the Court—first amendment jurisprudence, really—is stuck between a rock and a hard place, how do we get it out? Epstein's proposed escape hatch is to retreat from the welfare state. Specifically, he suggests that we get rid of majoritarian and egalitarian labor laws. This would free religious organizations from legislation that contradicts free exercise. It would also free American society from the evil of state establishment of religion. Secular and religious organizations would operate in the same realm of freedom.

Epstein believes, however, that the escape route he proposes is unlikely to find favor with the moderate and liberal mainstreams. Epstein would dynamite what he views as the constrictive innovations of the welfare state[8] in order to let constitutional and market values flow freely. To let "our conception of religious liberty" flourish, he says, we must free organized religion *and* secular enterprise.[9] Whereas Thomas Jefferson stressed that the Constitution erects a wall between church and state,[10] Epstein's Constitution erects a wall between everything and state. Viewed from the mainstream, the direction of Epstein's thinking is not only radically libertarian, it is wrong for reasons I will consider shortly.

Epstein argues that his proposed way out of the first amendment dilemma is especially appropriate on at least two counts. First, "no external or objective test demarcates religious freedom from the

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8. Epstein maintains that, prior to the New Deal, the purpose of government was conceived to be the protection of property and the freedom of contract. Antitrust, zoning, rent control and land use laws were exceptions in place prior to "the 1937 watershed." Epstein, *supra* note 2, at 375-76. In the realm of redistribution and public finance, progressive taxation and welfare for the poor had already been endorsed. *Id.* at 378.

The New Deal represented a constitutional regime that interpreted expansively the federal government's commerce clause powers and widened the scope of permissible labor regulation open to state and federal authorities. Accordingly, "Congress had plenary power in the economic sphere, including labor markets, as individual rights to resist such regulation had eroded." *Id.* at 377. As for redistribution, the requirement that the taxed must benefit specifically from the burden of taxation eroded with the New Deal. *Id.* at 378.

9. *Id.* at 375.

10. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

more mundane world of secular affairs"[11]—no sharp divide exists between the institutions and practices we call religious and those we call secular. To challenge Epstein on this point, one might attempt to come up with a plausible criterion for distinguishing religious activities from secular ones. The legendary difficulties of doing so need not be rehearsed: Is a Christmas tree a religious or seasonal symbol; is secular humanism a religion or a philosophy; are sincere, but bizarre, new cults fads or infant religions?

Second, according to Epstein, religious tolerance and the free market are both appropriate modern political responses to the same moral reality.[12] Lacking any other objective measure, the best measure of value is the subjective preferences of individuals expressed through actual choices: preeminently, voluntary market transactions. Each person must be free to pursue his or her own conception of the good life. Thus, "[the] justification of religious liberty depends upon the same subjective theories of value that were once used to defend economic liberties more generally."[13] Unsurprisingly, therefore, the "dialogue over church and state" reflects the "principles of liberty and property that animated the resistance to an unlimited state police power before 1937" and the "concerns with redistribution through taxation."[14]

Epstein's second argument concerning the special propriety of his proposed solution is more philosophical and hence more controversial than his first. Epstein assumes that the best or only argument for religious tolerance is premised on a theory of value akin to Hume's subjectivism[15] or Mill's utilitarianism.[16] Needless to say, not everyone would agree with Epstein that there is no bet-

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11. Epstein, *supra* note 2, at 379.

12. *Id.* at 386-88.

13. *Id.* at 379; *cf.* R. WUTHNOW, *supra* note 1, at 241-67 (common grounds for concepts of religious freedom and economic freedom).

14. Epstein, *supra* note 2, at 378-79.

15. *See* D. HUME, A TREATISE OF HUMAN NATURE 470 (L. Selby-Bigge ed. 1978) ("[M]orality, therefore, is more properly felt than judg'd of . . . ."). *But see, e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985) (interpretive premises necessary to decide any case can and should be derived in part by recourse to the dictates of "moral reality"); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (discussing the objectivity of moral judgment).

16. *See* J. MILL, UTILITARIANISM 52-53 (G. Sher ed. 1907) ("[T]he sole evidence it is possible to produce that anything is desirable [and hence morally good] is that people do actually desire it.").

ter way to value human options than by appeal to what human beings seem to want most. Nor would all agree that the underlying normative arguments for religious and economic liberties are precisely the same.[17]

### *B. Alternatives*

Epstein is not the first to find contradiction and chaos in the religion clauses and their jurisprudence.[18] Nor is he alone in recognizing that the welfare state has exacerbated certain tensions in first amendment jurisprudence.[19]

Few have concluded, however, that the tensions in first amendment jurisprudence attributable to the welfare state warrant its elimination. Typically, those who catch sight of Epstein's Scylla and Charybdis react by throwing up their hands and concluding that courts must and shall continue to do the best they can in balancing divergent interests—public and private, individual and institutional—while protecting the uncontroverted core of religious practices. One difficulty with this approach, not at all unique to religion clause jurisprudence, is the opacity of the mandate to balance interests. It is unclear precisely what task we are asking courts to perform, and what norms ought to govern it. A further difficulty is unique to this field. In the face of inevitable controversy, it is unclear how we are to decide what constitutes the core of religious practice.

Epstein denies that sanctuary can be found in judicially identified "cores" of religious practice.[20] However, in great measure, prevailing conceptions of religious liberty presuppose some such intuitive core. Thus, while *Epstein's* conception of religious liberty may not have survived the welfare state, others' surely have. On one familiar conception, freedom of religion is the liberty of belief and

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17. *See, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION 247 (1986) (freedom of religion defended as an individual's inalienable right of conscience).

18. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1166-79 (2d ed. 1988); *Special Issue: Religion and the State*, 27 WM. & MARY L. REV. 833 (1986).

19. *See, e.g.*, L. TRIBE, *supra* note 18, at 826-28 (1st ed. 1978)("[I]n the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required . . . lest all 'humane' programs of government be deemed constitutionally suspect.").

20. Epstein, *supra* note 2, at 401.

conscience, strictly limited to self-regarding conduct.[21] Religious liberty is a modest-sized sphere of private association and self-regarding conduct. It is not a far-reaching domain, free of state intervention, in which other-regarding nonconforming conceptions of the good life hold sway in the face of reasonable collective opposition.

Yet Epstein is correct that a more individualized, "private conscience" interpretation of religious freedom is descriptively out of sync with widespread, conservative understandings of religion as institutional, familial and evangelical.[22] It is also out of line with philosophical understandings of religious freedom, which have often stressed that belief without the right to act on those beliefs is an empty liberty.[23] Because religious practice is and, to a degree, should be allowed to be outward-reaching, an attack on Epstein premised on the narrower conception of religion is problematic from the beginning. Not plainly hopeless, but problematic.

Professor Laurence Tribe has sought to impose order in first amendment jurisprudence by urging a unitary reading of the religion clauses as promoting values of church-state separatism and participatory voluntarism.[24] Voluntarism, being more fundamental in our liberal democracy, would have priority over separatism in cases of conflict. Accompanying this unitary reading is a descriptive analysis of the religion clauses as providing for spheres of permissible accommodation, spheres of required accommodation and spheres of prohibited accommodation.

Although Tribe's descriptive analysis and unification proposal illuminate the source of chaos, they do not eliminate the tension between the welfare state and free religion that concerns Epstein. Nor do they tell us how to resolve controversies over how much the welfare state may justifiably intrude, and whether courts have allowed it to intrude too far. Viewed in this light, Tribe's approach takes us but a little beyond the mandate to balance.

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21. *Cf.* L. TRIBE, *supra* note 18, at 120-28, 1183-84 (judicial acceptance of belief-conduct/belief-action distinction).

22. *See* Epstein, *supra* note 2, at 382-83.

23. *Cf.* L. TRIBE, *supra* note 18, at 1184 (stating belief-action dichotomy is simplistic). *But see* Reynolds v. United States, 98 U.S. 145, 166 (1878) (utilizing belief-action distinction).

24. L. TRIBE, *supra* note 18, at 1160-62.

Epstein's proposed solution to the welfare state's incursion into religious freedom is surprisingly similar to Professor William P. Marshall's proposed solution to the problems wrought by the contradictory character of the religion clauses.[25] Marshall has proposed solving the problems of textual contradiction and jurisprudential chaos in the religion clauses by abandoning "a free exercise analysis that allows for the creation of constitutionally compelled free exercise exemptions from neutral laws of general applicability" in favor of speech clause analysis.[26] He maintains that the speech clause has often governed and can continue to govern the "degree of protection for such 'core' religious activities as prayer and worship" and other types of religious activity as well.[27] He argues that the elimination of the free exercise exemption would promote "doctrinal stability, clarification, and sensible results," while also ending the need to inquire into the sincerity of religious belief and the devaluation of secular belief in a world in which "secular and religious belief systems" have similar roles and effects.[28]

Interestingly, despite their differences, Marshall and Epstein's proposed solutions to the chaos in religion clause jurisprudence have the same net result: secular and religious parity. Both create a kind of constitutional parity between religious and secular activity. Epstein's solution requires undoing the welfare state (a big deal), whereas Marshall's solution requires merely shifting the focus of first amendment analysis in religion cases from the free exercise clause to the speech clause, as the courts have frequently done anyway (a lesser, more palatable deal). Epstein might respond that Marshall's solution fails to take the free exercise clause seriously as a norm and interpretative constraint. Marshall might

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25. *See* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. ___ (forthcoming 1990); Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

26. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, *supra* note 25, at ___.

27. *Id.* at ___. Marshall acknowledges but rejects criticism that his argument (1) "turns the free exercise clause into a textual redundancy," (2) ignores the historiography of the religion clauses, (3) ignores the respects in which "the application of neutral regulations creates its own inequality," (4) ignores the pluralist advantages of a vigorous reading of the free exercise clause, and (5) ignores the special nature and meaning of religion to believers. *Id.* at ___.

28. *Id.* at ___.

reply that his solution does take the free exercise clause seriously, just not literally.

## III. A Counterargument

Epstein's argument about the fate of religious liberty faces a major, complex counterargument. My counterargument has three parts or stages. First, the contradictory character of the free exercise and establishment clauses predates the welfare state and did not cause it. Second, direct conflicts between welfare legislation and freedom of religion are more episodic and theoretical than commonplace and actual. Moreover, although the enactment of welfare state legislation created new contexts for first amendment controversy and may have heightened established tensions in first amendment jurisprudence, it did so for the sake of compelling reforms, reforms for which, in some instances, religious activists and organizations had assiduously labored. The belief that these reforms were constitutionally, as well as morally or pragmatically compelling, hinges on the interpretative claim that first amendment liberties are not absolute and permit limited legislative interference to secure individuals' basic economic well-being. Third, welfare state reforms and religious freedom have enjoyed an overwhelmingly peaceful coexistence. In fact, freedom of religion has flourished in the American welfare state.

### *A. Stage One*

Epstein concedes the first stage of the counterargument when he admits that textual tensions and contradictions between the free exercise and establishment clauses preceded the welfare state.[29] His own examples illustrate that before 1937 certain social and economic regulations touching religious practices strained efforts to maintain a jurisprudentially cogent wall between church and state.[30]

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29. *See* Epstein, *supra* note 2, at 383-84.

30. *See id.* at 385-86. One of the cases he discusses in this connection is Reynolds v. United States, 98 U.S. 145 (1878) (upholding polygamy ban).

*B. Stage Two*

Epstein does not concede stage two of the counterargument. Stage two rejoins that the welfare state has interfered with constitutional freedom of religion, but for good and constitutionally compelling reasons. Stage two represents the perspective of those who view the economic interests protected by collective bargaining and Title VII as paramount; they characterize the resulting interference with religious freedom as partial, indirect or minor, and thus constitutionally defensible.

From the point of view of constitutional theory, several responses are open to Epstein. He can assert, implausibly in our jurisprudence, that first amendment religious liberty is absolute, admitting no exceptions of policy or principle.[31] Yet on this fanciful rendering, any legislative enactment compromising religious freedom to the slightest degree would be, to that degree, unconstitutional.

Alternatively, Epstein can agree that first amendment freedoms are not absolute, but disagree that the economic "needs"—as opposed to "rights"—of labor, women or minorities are compelling. Indeed, the notion that mere "needs" could be morally and constitutionally compelling reasons to limit liberty is incompatible with the libertarian tenets Epstein embraces.[32] Finally, Epstein can agree that first amendment freedoms are not absolute, but disagree as an empirical matter whether putatively ameliorative welfare legislation actually assists targeted beneficiaries. In this vein, the gains for white and black women that liberals attribute to Title VII, conservatives will commonly attribute to gains in market productivity.[33]

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31. *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963).

> If, therefore, the decision of the [state] Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ."

*Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

32. *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

33. *See generally* P. BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS 125-26, 150-51, 167-68 (1985).

In his paper, Epstein was not content to defend his stance against welfare legislation on legal grounds. He did not limit himself to arguments that the legislation he opposes is, for example, irreconcilable with the bare text or intent of the first amendment, or judicial precedent. He reached deeper to make his case. Consequently, stage two of the proposed counterargument and Epstein's likely responses to it implicate perennial philosophical debates over constitutional interpretation, the legitimacy of government redistribution and the entailments of having and protecting rights. As previously mentioned, even meta-ethical debates over the subjectivity of values play a role in Epstein's argument and replies to it.

By way of political philosophy, Epstein characterizes religious liberty as the freedom to do what one likes in the name of sincere religiosity, within a perimeter of mutually consistent rights, such as property and liberty short of force or fraud, without having to justify choices so made to any other individual.[34] Coercive governmental interference with religious freedom is governed by rules "designed to preserve and advance individual and subjective conceptions of value."[35] These rules permit policing and paternalism by government through measures calculated "to prevent [total] coercion" by anyone and to "secure social arrangements that cannot be brought about by consent, but only when the persons coerced are made better off . . . ."[36]

So conceived, religious liberty is just a special case of constitutionally protected moral liberty generally. The Constitution contemplates various overlapping spheres of appropriately private, nongovernmentally controlled conduct, of which religious belief is but one. Within these private spheres, individual rather than collective conceptions of the good life are determinative. One complication is that private groups as well as private individuals are constitutionally protected in the name of freedom of association and religion. Indeed, some of the cases most interesting to Epstein are

34. Epstein, *supra* note 2, at 384.

35. *Id.* at 387.

36. *Id.*

those in which the leadership of organized religious groups seek constitutional exemption or powers.[37]

David A. J. Richards' work emphasizes a theme of constitutional tolerance, linking the jurisprudence of free religion, free speech and decisional privacy.[38] All three freedoms are prima facie requirements of respect for the moral independence of rational persons.[39] By comparison, Epstein sees common justifications for these broad spheres of private conduct as well; but when it comes to tolerating individual preferences, he sees private enterprise as no less justified and sacrosanct than religion or sexual privacy. Consequently for Epstein, the needs-based and egalitarian economic intervention of the welfare state that many applaud is an outrageous interference with moral rights.

Because provable or objective standards of value are lacking, our political institutions ought to rely upon the most functionally reliable indicator of human value, namely, what individuals value *de facto*, as expressed in their market preferences.[40] He urges that individuals ought to have a right to decide for themselves how they shall live, both when it comes to economic and commercial life, and when it comes to religious life. His opponents, as reflected in stage two of the proposed counterargument, insist that limitations on liberty are sometimes warranted to achieve redistributive and egalitarian ends. In my view, failure to limit liberty in this way works to arbitrarily overvalue the preferences of some and undervalue the preferences of others who lack the material basis for full, meaningful participation in politics, social life and the economy.

### C. *Stage Three*

While stage two of the counterargument reduces to a series of philosophical debates, stage three reduces to mainly empirical debates. The thrust of this final stage is that religion is alive and well in the American welfare state.

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37. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

38. *See, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

39. *Id.* at 243-44.

40. Epstein, *supra* note 2, at 387.

By all appearances, religion is thriving in the United States today.[41] Epstein fears otherwise, but he does not indicate by what standard he measures the impact of the welfare state on religious liberty. He seems to base his claim of adverse impact solely on the existence of a relatively small number of lawsuits and an even smaller number of Supreme Court cases in which plaintiffs have alleged interference with religious liberty.[42]

Strictly speaking, one cannot quantify religious freedom to measure whether it has increased or decreased since the rise of the welfare state.[43] However, one should be prepared to conclude that religious liberty is in serious trouble in the era of welfare legislation if there is evidence of widespread governmental or government-tolerated acts of repression of religion. Because the concept of repression carries so much normative freight, however, an even better basis for concluding that religious liberty is in trouble is evidence that religion is less *pervasive* or less *diverse* now than prior to the New Deal.

One point is beyond cavil. Religion is pervasive and diverse in the United States today.[44] Whether it is more pervasive and more diverse now than before 1937 is a more difficult question.[45] A

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41. *See, e.g.*, YEARBOOK OF AMERICAN & CANADIAN CHURCHES (C. Jacquet, Jr. ed. 1988).

42. *See, e.g.*, Goldman v. Weinburger, 475 U.S. 503 (1986); United States v. Lee, 455 U.S. 252 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972).

43. Annual statistics, however, on changes in church attendance, church membership, number of clergy, enrollment in seminaries, new church construction and annual giving to churches are suggestive. Also suggestive is the rate of new religions or religion-sponsored groups formed for worship, charity, community services or public reform. YEARBOOK OF AMERICAN & CANADIAN CHURCHES, *supra* note 41.

44. *See generally* R. WUTHNOW, *supra* note 1, at 20-25.

45. Decline in church attendance and other plausible indicia of institutional and spiritual decline have led some commentators to conclude that religion is less pervasive today than it was in the 1930s. *See generally* B. BECKWITH, THE DECLINE OF U.S. RELIGIOUS FAITH 1912-1984 39-40 (1985) ("Gallup polled U.S. adults on church or synagogue membership repeatedly from 1936 to 1980, and reported an almost steady decline from 77% in 1936 to 69% in 1980."); *cf.* W. ROOF & W. MCKINNEY, AMERICAN MAINLINE RELIGION: ITS CHANGING SHAPE AND FUTURE 148-50 (1987) (membership in mainline churches declined, but decline appears to have bottomed out); Roof & McKinney, *Denominational America and the New Religious Pluralism*, 480 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (1985) (three major religious groups, Catholic, Protestant and Jewish, experienced decline in religious participation in 1970s and 1980s). At the same time:

> 1. Americans continue to identify with the historic religious traditions. . . . 90 percent of the population expresses a religious preference and two-thirds are members of a local church or synagogue. . . .

twenty-five year proliferation[46] of new,[47] and sometimes controversial religions[48] is evidence of increased diversity. Moreover, traditional, mainstream religions have begun to open their doors and leadership to women[49] and ethnic minorities[50] who were formerly excluded. These trends toward diversification on the levels of both practice and participation suggest that in one important respect more religious freedom exists today than before 1937.[51]

Just possibly, as a result of Title VII and collective bargaining legislation, more religious freedom obtains for more individuals, including the religious freedom not to practice a religion or to modify religious traditions to suit one's individual taste. I would conjecture that union membership has left workers freer to adopt unpopular life styles and to express beliefs in and practice religions of which employers disapprove. Better wages and shorter hours undoubtedly position wage laborers to donate more time and money to their churches, synagogues or other religious organizations. Title VII gave a comparable vitality to the women's movement, and the

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2. For Americans, religious groups continue to fulfill important quasi-ethnic functions providing millions with a sense of meaning and belonging. . . .

3. Religious themes have taken on new significance in the public arena . . . .

*Id.* at 25-26.

46. *See* J. MELTON, A DIRECTORY OF RELIGIOUS BODIES IN THE UNITED STATES (1977); J. MELTON & R. MOORE, THE CULT EXPERIENCE: RESPONDING TO THE NEW RELIGIOUS PLURALISM 7-28 (1982) (1,500 religious bodies exist in the United States, including 600 alternative religions—"quantum leap" in religious pluralism in 1970s).

47. J. MELTON, *supra* note 46, at 7-15 (identifying 1,275 churches, sects, denominations and cults and showing dramatic increases in number of new religious bodies between 1950s and 1970s).

48. *See generally Colloquium—Alternative Religions: Government Control and the First Amendment*, 9 N.Y.U. REV. L. & SOC. CHANGE 1 (1979-80).

49. *See* Steinfels, *Woman Wins Approval to be Episcopal Bishop*, N.Y. Times, Jan. 25, 1989, at A12, col. 5 (Rev. Barbara C. Harris, a black and the first woman consecrated as Episcopal bishop). *See generally* R. WUTHNOW, *supra* note 1, at 225-35 (1988) (discussing feminism and the impact of the women's movement on religion).

50. *See, e.g.*, DePalma, *Catholic Church Moves to Embrace Blacks*, N.Y. Times, Jan. 24, 1989, at B1, col. 2; Suro, *Hispanic Shift is Changing Face of U.S. Churches*, N.Y. Times, May 14, 1989, at A1, col. 1 (Traditionally Catholic, 4 million out of 20 million Hispanic Americans now practice some form of Protestant Christianity.).

51. *Cf.* Roof & McKinney, *Denominational America and the New Religious Pluralism*, *supra* note 45, at 33 ("Less and less bound to an inherited faith, the present-day believer is able to shop around in a consumer market of religious alternatives and pick and choose among aspects of belief and practice.").

women's movement, has had an impact on religious institutions and practices.[52] God is now a she for some Christian worshipers.[53]

Yet another sign of religious freedom in the welfare state is the impact of organized religion on public life, for example, the contribution of religion to the existence of the caring and egalitarian welfare state.[54] Black, and eventually white, clergy and churches were instrumental in the civil rights movement, and thereby contributed to passage of the Civil Rights Act of 1964.[55] Fundamentalist Christians played a major role in setting the public policy agenda in the late 1970s and 1980s through involvement in mass media ownership, religious schooling and politics.[56]

Recognition of the pervasiveness and diversity of religious practice shifts the burden of proof back to Epstein. The counterargument asks Epstein to substantiate his claim by showing that the theoretical contradiction between free religion and the welfare state is a practical contradiction as well, and in more than a few isolated cases. But the facts are against him. The Supreme Court may be trapped between a rock and a hard place when it comes to the jurisprudence of the religion clauses, but the Rock of Ages remains a towering presence in the welfare state.

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52. *See* Hargrove, Schmidt & Davaney, *Religion and the Changing Role of Women*, 480 ANNALS 117 (1985):

> Sensitized by the civil rights movement and reflecting the rising tide of feminist consciousness developing with the present-day women's movement, feminist theology emerged as a distinctive theological approach during the 1970s. Many voices have been heard, speaking from a variety of perspectives and offering quite diverse proposals for this new understanding of theology and its task.

*Id.* at 127.

53. *See id.* at 128-30 ("growing interest in a Goddess-centered vision of reality").

54. *See* R. WUTHNOW, *supra* note 1, at 321.

55. *See id.* at 145-46; *see also* C. WHALEN & B. WHALEN, THE LONGEST DEBATE xvi-xx (1985) (stressing citizen support in passage of Civil Rights Act).

56. *See* R. WUTHNOW, *supra* note 1, at 173-214.