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Secularity and Secularism in the United Kingdom: On the Way to the First Amendment*

Iain McLean[†] and Scot M. Peterson[‡]

I. INTRODUCTION: THE POLITICAL SCIENCE OF CHURCH AND STATE

Many academic disciplines, including history, law, sociology, and religious studies, bear on the relationship between society and religion, or more narrowly between the state and faith communities. We approach this question with the tools of political science. This paper examines the evolution of religion-state relations in the United Kingdom. We start with political scientists' general statements: "*Politics [is about] who gets what, when, [and] how,*"¹ and, "*The state . . . successfully claims the monopoly on the legitimate use of physical force within a given territory.*"² As religion may challenge any state monopoly on the legitimate use of physical force, all societies and states where there is religion must address this potential conflict.

Religions make incompatible truth claims which may involve claims over civil power. When a state contains groups of people of different religions, those groups may make incompatible truth claims, not merely against the state, but against one another. This is a near-universal feature of the modern state. Incompatible truth claims created very difficult problems in early-modern Europe, and were reconciled in different ways—many of them bloody, many of them involving mass forced migration.³ In emerging liberal democracies, however, the state learned gradually to accommodate religions, beginning with the unthreatening

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1. H. D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (McGraw-Hill Book Co. 1936) (1911) (emphasis added).

2. MAX WEBER, *Politics as a Vocation*, Lecture Delivered in 1918, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills eds., London, Routledge 1948) (1946) (emphasis added).

3. See RICHARD SLATOR DUNN, *THE AGE OF RELIGIOUS WARS: 1559–1715* (1979); JOHN MARSHALL, *JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE* (2006).

ones. It often took time, sometimes centuries, for states to recognize which religions posed no threats to them, and for religions to cease threatening states. The next sections of the paper trace the evolution of this accommodation in one liberal democracy: the United Kingdom. The accommodation began when the U.K. was neither liberal, nor a democracy—in fact, it began when it comprised two separate states.

We will argue that the U.K. is secular, but not (as three prominent religious leaders have alleged) *secularist*. This complaint confuses secularity (where the U.K. is coming into alignment with the United States) with secularism (as in, e.g., France and Turkey). We follow Professor Scharffs in defining *secularity* as the noun corresponding to the adjective *secular*, and *secularism* as the noun corresponding to the adjective *secularist*.⁴ “Secularism/ist” denotes ideology; “secular/secularity” denotes ideological neutrality. A *secularist* state actively tries to keep religion out of the public arena. A secular state is neutral between religions, and between religion and non-religion.

The structure of this Article is as follows. We first set out relevant facts about the two religious settlements in the treaty-state of Great Britain, with particular attention to the accommodations that had been reached by the time of the American Revolution between English and Scottish conceptions of religious toleration, and between the state and the most recalcitrant religious groups. We then turn to American politics in the Founding era in order to illuminate the British (especially Scottish) antecedents of the Establishment and Free Exercise clauses of the First Amendment. In the final section we return to the United Kingdom and chart the gradual spread of the “First Amendment” principle of secularity there since the 19th century.

II. THE REFORMATION IN THE U.K.

Protestant Christianity was established in (what is now) the United Kingdom by two routes. They were very different. In England, Wales,

4. Professor Brett Scharffs made this distinction at the conference “Bills of Rights: Justiciability, Responsibilities and Democratic Dialogue, Conference on Accountability Under Democratic Constitutions,” Wilton Park, Wiston House, West Sussex, United Kingdom, February 10–13, 2010 (unpublished manuscript on file with author), and developed it further in a presentation, “Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism,” Conference on Law and Religion, Oxford University, United Kingdom, June 7–9, 2010. See also Brett Scharffs, *Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism*, 6 RELIGION & HUM. RTS. 109 (2011).

and Ireland the dominant form was Erastian.⁵ In Scotland, it was Calvinist/Reformed.⁶

The well-known origins of King Henry VIII's quarrel with the Roman Catholic Church were geopolitical. His first, Spanish wife had failed to produce a male heir.⁷ There was a risk that England might therefore fall into the territories of her nephew Charles V, head of the Hapsburg dynasty. Henry's own claim to the throne was shaky, dependent on his father's victory in battle in 1485.⁸ Pope Clement VII refused to annul Henry's marriage, so in the Act of Supremacy (1534) Henry declared himself Supreme Head of the Church of England.⁹ The title was later modified to Supreme Governor under his daughter Queen Elizabeth.¹⁰ From the start, the Church of England, which was also established in Wales and Ireland, was therefore an Erastian state church. Parliament and the secular courts could regulate its doctrine as well as its property.¹¹ Bishops of the church continued to sit in the upper house of Parliament, the House of Lords, as Lords Spiritual. They still do, with a total of twenty-six.¹²

The Reformation in Scotland was quite different. The leading reformers—John Knox and his successor Andrew Melvill—were followers of John Calvin. They took a Calvinist view of church and state. Melvill expressed this forcefully in 1596, having grabbed the sleeve of King James VI (whom he had called “God's Sillie Vassal”), while haranguing him in his own palace at Falkland:

5. *Erastian*, sense B, “An adherent of the (supposed) doctrines of Erastus; one who maintains the complete subordination of the ecclesiastical to the secular power.” OXFORD ENGLISH DICTIONARY (June 2011), <http://oed.com> (enter “Erastian”; then click “Go”) (subscription required).

6. *Reformed*, sense 2b, “Accepting, espousing, or characterized by the principles of the Reformation. As applied to a church or churches, originally used of any Protestant denomination but now more commonly of non-Lutheran churches and esp[ecially] (freq. with capital initial) Presbyterian and Congregationalist ones.” *Id.* (enter “Reformed”; then click “Go”). In this Article we follow the normal practice of church historians and use “Reformed,” with capitals, to denote the *OED* sense 2b of “reformed.” When used without capitals, one of the more general senses is intended.

7. DAVID STARKEY, *SIX WIVES: THE QUEENS OF HENRY VIII* 158 (2004).

8. JOHN A. WAGNER, *ENCYCLOPEDIA OF THE WARS OF THE ROSES* 33–34 (2001).

9. J.J. SCARISBRICK, *HENRY VIII* 324 (1968).

10. ALPHEUS TODD & ARTHUR HORATIO TODD, *ON PARLIAMENTARY GOVERNMENT IN ENGLAND* 504 (1887).

11. *Id.*

12. NORMAN W. WILDING & PHILIP LAUNDY, *AN ENCYCLOPAEDIA OF PARLIAMENT* 449 (1971); LORDS INFORMATION OFFICE, *THE MEMBERSHIP OF THE HOUSE OF LORDS* 4 (2009), available at <http://www.parliament.uk/documents/lords-information-office/hoflbpmembership.pdf>.

[T]hair is twa [two] Kings and twa Kingdome in Scotland. Thair is Chryst Jesus the King, and his kingdome the Kirk [Church], whase [whose] subject King James the Saxt [Sixth] is, and of whase kingdome nocht [not] a king, nor a lord, nor a heid [head], bot a member!¹³

Shortly afterwards, on the death of Elizabeth in 1603, James VI became King James I of England.¹⁴ He had shaken Melvill off (and only visited Scotland once again).¹⁵ One of his moves to accommodate the incompatible truth claims of the two main Protestant religions in his territory was to sponsor an English bible translation that the already divergent Reformed and Sacramentalist wings of the Church of England might both accept¹⁶—hence the King James Bible.¹⁷ The King approved a new translation while traveling from Scotland on his accession to the English throne.¹⁸ The principal instigator of the translation was the Puritan John Rainolds.¹⁹ The translation that James sponsored did not immediately become the “Authorized Version,” but from 1660 it was authorized, or at least accepted, in both countries.²⁰

III. 18TH CENTURY RELIGIOUS CRISES AND ACCOMMODATION IN U.K.

In the 17th century, civil war broke out in all three of James’s kingdoms: England, Scotland, and Ireland.²¹ The war ended with two separate settlements in 1688–89. The parliaments of both England and Scotland contracted with the Dutch Stadtholder William of Orange and his wife Mary to be their monarchs.²² William and Mary agreed to two

13. JAMES MELVILL, *THE AUTOBIOGRAPHY AND DIARY OF JAMES MELVILL, WITH A CONTINUATION OF THE DIARY* 370 (Robert Pitcairn ed., 1842).

14. Robert A. McColgan, *The Arms of the King of Scots and Selected Heraldry*, in *GENEALOGICA & HERALDICA* 401, 403 (Claire Boudreau & Auguste Vachon, eds. 1998).

15. Jenny Wormald, *James VI and I (1566–1625), King of Scotland, England, and Ireland*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Jan. 2008), <http://www.oxforddnb.com/view/article/14592>.

16. GLEN G. SCORGIE, *THE CHALLENGE OF BIBLE TRANSLATION: COMMUNICATING GOD’S WORD TO THE WORLD* 205–06 (2009).

17. *Id.* at 199.

18. *Id.* at 205.

19. DAVID NORTON, *A TEXTUAL HISTORY OF THE KING JAMES BIBLE* 5 (2005).

20. Mordechai Feingold, *Rainolds [Reynolds], John (1549–1607), Theologian and College Head*, *OXFORD DICTIONARY OF NAT’L BIOGRAPHY* (Oct. 2006), <http://www.oxforddnb.com/view/article/23029>; Vivienne Westbrook, *Authorized Version of the Bible, Translators of the (act. 1604–1611)*, *OXFORD DICTIONARY OF NAT’L BIOGRAPHY* (Oct. 2009), <http://www.oxforddnb.com/view/article/74199>.

21. *THE ENGLISH CIVIL WAR* 47–49 (Peter Gaunt ed., 2000).

22. WILLIAM GIBSON, *THE CHURCH OF ENGLAND: 1688–1882*, at 61 (2001); BRUCE P.

different sets of conditions. The English conditions (the Bill of Rights) included parliamentary sovereignty and a degree of religious toleration, while reinstating the establishment of the Anglican Church.²³ The Scottish conditions (the Claim of Right) insisted on the legal monopoly of the Reformed Church of Scotland.²⁴ The Act of Union 1707, which created the United Kingdom of Great Britain, resulted from shrewd and hard bargaining by Scottish as well as English delegates.²⁵ As a consequence, it contains two sets of clauses to protect the “true Protestant religion” in England and Scotland. However, these are two different religions. A philosopher might argue that there can be at most one true Protestant religion. But the Act of Union is an act of constitutional diplomacy, not of theology. It created the situation still in force today. In England, the established church is Erastian, with the monarch as its Supreme Governor. The monarch retains the right to make senior appointments (now delegated to the monarch’s advisers, i.e., the U.K. government of the day), and Parliament retains the right to govern its doctrine, although that right is normally delegated to internal church bodies.²⁶ In Scotland, the established Church of Scotland is Reformed in governance as well as theology. Its Reformed theology was finally embedded in the Church of Scotland Act 1921. Importantly for Reformed theology, the following statement, in a schedule to the Act, was drafted by the church, not by the state:

This Church . . . receives from [Jesus Christ], its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the

LENMAN, THE REVOLUTION OF 1688–1689: CHANGING PERSPECTIVES 255 (Lois G. Schwoerer ed., 1992).

23. Bill of Rights Act 1689, 1 W. & M., c. 2.

24. Claim of Rights Act 1689, 1 W. & M., c. 28. References to the Acts of the Parliament of Scotland (APS) are to Thomas Thomson, Cosmo Innes, and Archibald Anderson, eds., *The Acts of the Parliaments of Scotland* (Edinburgh: 1814–1875). References to the Records of the Parliament of Scotland (RPS) are to the *Records of the Parliament of Scotland to 1707*, U. OF ST ANDREWS, <http://www.rps.ac.uk/> (last updated May 2011).

25. Union with Scotland Act 1706, 5 & 6 Ann., c. 11; Act Ratifying and Approving the Treaty of Union 1706, 6 Ann., c. 7; IAIN MCLEAN & ALISTAIR MCMILLAN, STATE OF THE UNION: UNIONISM AND THE ALTERNATIVES IN THE UNITED KINGDOM SINCE 1707, at 13–60 (2005).

26. COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 195–96 (2007).

mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers.²⁷

The U.K. monarch is indeed not a king, nor a lord, but a member of the Church of Scotland when in Scotland. Thus, Andrew Melvill lost in 1596, but won in 1921.

IV. THE CLANDESTINE MARRIAGES ACT 1753

The settlement of 1707 was a compromise. In the religious wars of the seventeenth century in the British Isles, each religion had tried to impose itself on the other's country: the English in Scotland in 1637, and the Scots in England in 1643.²⁸ The 1707 settlement was, among other things, a recognition that these efforts had failed and would not be renewed. The path to toleration of other religions was slow: in particular, to this day, the British monarch must swear his or her Protestantism and may neither be, nor marry, a Roman Catholic.²⁹ However, a symbolic step in the separation of church and state came in 1753 with the Clandestine Marriages Act, also known as Lord Hardwicke's Act.³⁰ From 1534 to 1753 (except during the Civil War), the Church of England had claimed a statutory monopoly on marriage in England.³¹ The power to say who is married and who is not obviously grants enormous social control and is part of core politics as defined by Weber and Lasswell.

Two groups which had refused to accept this were the Quakers and the Jews. Quakers had refused to report their marriages to the state, or to

27. Church of Scotland Act, 1921, 11 & 12 Geo. 5, c. 29, sch.1, Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual, art. IV.

28. G.E. SEEL, *THE ENGLISH WARS AND REPUBLIC 1-2* (1999); Avihu Zakai, *Religious Toleration and Its Enemies: The Independent Divines and the Issue of Toleration During the English Civil War*, 21 *ALBION* 1, 1 (1989).

29. Act of Settlement 1701, 12 & 13 Will. 3, c. 2; Act of Succession to the Crown Act 1707, 6 Ann., c. 7.

30. An Act for the Better Preventing of Clandestine Marriages 1753, 26 Geo. 2, c. 33, § XVIII: ("Provided likewise, That nothing in this Act contained shall extend to that Part of Great Britain called Scotland, nor to any Marriages amongst the People called Quakers, or amongst the Persons professing the Jewish Religion, where both the Parties to any such Marriage shall be of the People called Quakers, or Persons professing the Jewish Religion respectively, nor to any Marriages solemnized beyond the Seas.").

31. Judicial doctrine concerning marriage was not uniform during the seventeenth and early eighteenth centuries. Stephen Parker, *The Marriage Act of 1753: A Case Study in Family Law-Making*, 1 *INT'L J. L. & FAM.* 133 (1987). We have been unable to locate any instances in which Quaker marriages were recognized prior to the 1753 Act in order to confer a benefit, as opposed to imposing a liability. *See, e.g., Fuller v. Say*, (1747) 125 Eng. Rep. 1356 (C.P.) (requiring Quakers to make Easter Offering to the Church of England).

be married in parish churches. As a result they lost property rights.³² However, after persecution of Quakers in the 17th century, the state gradually came to accept that the costs of persecution outweighed the benefits.³³ The 1753 Act regulated marriage in England, but specifically exempted “the people called Quakers” and Jews.³⁴ Quakers and Jews in England retained the legal right to conduct marriages, with neither state nor established church intervention, and were required to simply report them to the state from time to time.³⁵ The state declined to use force to coerce them. Other religions did not receive comparable exemptions until a process of civil marriage was introduced in the 1830s.³⁶

V. DAVID HUME AND ADAM SMITH

In the eighteenth century there was probably more religious freedom in Scotland than in England. The state had packed its bags and gone to London. The church had neither armies nor police. This made it easier for the philosophers of the Scottish Enlightenment, beginning with Adam Smith’s teacher Francis Hutcheson, to divorce ethics from religion. According to a student pamphlet written in his defense, Hutcheson taught his class (including Adam Smith):

[W]e have a Notion of Moral Goodness, prior, in the Order of Knowledge, to any Notion of the Will or Law of God. . . . We count God morally Good, on this Account, that we justly conclude, he has essential Dispositions to communicate Happiness and Perfection to his Creatures [W]e must have another Notion of moral Goodness, prior to any Relation to Law, or Will. . . . Otherways, when we say, *God’s Laws are Good*, we make no valuable Encomium on them; and only say, God’s Laws are conformable to his Laws, or, his Will is conformable to his Will. . . . So, when we say God is *morally good*, or *excellent*, we would only mean, he is conformable to himself; which would be no Praise, unless he were previously known to be good.³⁷

32. BONNELYN YOUNG KUNZE, MARGARET FELL AND THE RISE OF QUAKERISM 158 (1994).

33. David Lemmings, *Marriage and the Law in the Eighteenth Century: Hardwicke’s Marriage Act of 1753*, 39 HIST. J. 339 (1996).

34. An Act for the Better Preventing of Clandestine Marriages, *supra* note 30.

35. See Joanna Nicholson, *The Law of Church and State Relations in the United Kingdom*, 12 SRI LANKA J. INT’L L. 181 (2000).

36. See generally OWEN CHADWICK, THE VICTORIAN CHURCH (1966).

37. A VINDICATION OF MR. HUTCHESON FROM THE CALUMNIOUS ASPERSIONS OF A LATE PAMPHLET. BY SEVERAL OF HIS SCHOLARS 7 (1738) (in Special Collections, Glasgow University Library). Assuming that this accurately represents what Hutcheson taught, the final sentence entails that not only can the state not unconditionally declare what is good, but also that even God must

This climate enabled the two greatest thinkers of the Scottish Enlightenment, the close friends David Hume and Adam Smith, to discuss matters of church and state without restriction. Hume was an atheist; the more cautious Smith may or may not have been an atheist, but he was almost certainly not a Christian.³⁸

Hume produced an ironic argument in favor of church establishment in a digression in his six-volume *History of England*, embedded in a discussion of Henry VIII's Act of Supremacy:

[T]his interested diligence of the clergy is what every wise legislator will study to prevent; because in every religion, except the true, it is highly pernicious, and it has even a natural tendency to pervert the true by infusing into it a strong mixture of superstition, folly, and delusion. Each ghostly practitioner, in order to render himself more precious and sacred in the eyes of his retainers, will inspire them with the most violent abhorrence of all other sects And in this manner ecclesiastical establishments, though commonly they arose at first from religious views, prove in the end advantageous to the political interests of society.³⁹

In his *Wealth of Nations*, published in 1776, Smith quotes this passage from his friend, whom he calls "by far the most illustrious philosopher and historian of the present age."⁴⁰ He nonetheless disagrees vigorously:

The interested and active zeal of religious teachers can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects But that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many thousand small sects, of which no one could be considerable enough to disturb the publick tranquillity.⁴¹

meet an independent standard of goodness. This destroys any claim to grant religion or divine inspiration a monopoly on the legitimate use of force.

38. R. H. Coase, *Adam Smith's View of Man*, 19 J.L. & ECON. 529 (Oct. 1976).

39. 3 DAVID HUME, HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688, at 129 (Boston, Phillips, Sampson, & Co. 1851) (1789).

40. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 790–95, V.i.g.3 (Roy Harold Campbell & Andrew S. Skinner, eds., Liberty Fund 1981) (1776).

41. HUME, *supra* note 39, at 135–36; SMITH, *supra* note 40, at V.i.g.8; Iain McLean & Scot M. Peterson, *Adam Smith at the Constitutional Convention*, 56 LOY. L. REV. 95 (2010).

The *Wealth of Nations* is all about the advantages of free trade. Smith argues that free trade in religion is as valuable as free trade in anything else.

Smith was described as “very zealous in American affairs,”⁴² advising British ministers in a tone of wry detachment that the rebellious colonies should be made to pay for their own defense, and (arguing almost uniquely in Britain) that American independence would be no loss for Great Britain.⁴³ The tone of his remarks on America in the *Wealth of Nations* made him no friends there, and he was never quoted at the Convention that drafted the U.S. Constitution in Philadelphia in 1787.⁴⁴ Nevertheless his books were closely read there.⁴⁵

One of his closest readers was James Madison.⁴⁶ With his friend Thomas Jefferson, Madison sponsored the overthrow of state support of religion in the Virginia Assembly.⁴⁷ His *Memorial and Remonstrance against Religious Assessments* (1785)⁴⁸ is clearly derived from Adam Smith. Madison repeated these arguments twice in 1787: first in *Vices of the Political System of the United States*,⁴⁹ which was a briefing note for the Virginia delegation to the Constitutional Convention, and then in the celebrated *Federalist No. 10*.⁵⁰ The *Federalist Papers* were published in New York newspapers by James Madison and Alexander Hamilton to try to persuade New Yorkers to ratify the Constitution. Madison had to write *Federalist No. 10* in a hurry because the press date was upon him, so he quickly adapted his arguments about factions to apply to political as well as religious factions.⁵¹ Worried by the possibility of tyranny of the majority, Madison argued that in an “extended republic,” such as the United States of America, it could not arise because there was no group,

42. JOHN RAE, *LIFE OF ADAM SMITH* 281 (1895).

43. 4 ADAM SMITH, *CRITICAL ASSESSMENTS* 22 (John Cunningham Wood ed., 1996).

44. McLean & Peterson, *supra* note 41.

45. *See generally id.*

46. Roy Branson, *James Madison and the Scottish Enlightenment*, 40 *J. HIST. IDEAS* 238 (1979).

47. JOHN A. RAGOSTA, *WELLSPRING OF LIBERTY* (2010).

48. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in RALPH LOUIS KETCHAM, *SELECTED WRITINGS OF JAMES MADISON* 21 (2006).

49. James Madison, *Vices of the Political System of the United States* (1787), in JAMES MADISON: *THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT* 329 (Samuel Kernell ed., 2003).

50. THE FEDERALIST NO. 10, at 78 (James Madison) (Roy P. Fairfield ed., 1961); Iain McLean, *Before and After Publius: The Sources and Influence of Madison's Political Thought*, in JAMES MADISON: *THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT*, *supra* note 49, at 14.

51. DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (2007).

neither political nor religious, that could form a majority in the whole republic.⁵² Smith's two or three hundred sects were already to be found in the new republic, and they still are today.

The ratification of the Constitution, which required nine states, seemed improbable at the outset. Several states said they were unwilling to ratify unless a bill of rights was added to protect individual freedoms against the state. In the first session of the U.S. House of Representatives in 1789–90, Madison became floor manager for the Bill of Rights. As finally passed, reconciling the versions sought by the House and the Senate and ratified by the states, the Bill of Rights comprises the first ten amendments to the U.S. Constitution. Perhaps the most important is the First Amendment, which opens, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁵³ For over 200 years, the First Amendment has protected religious freedom and prevented religious tyranny. It creates what Jefferson called a "wall of separation"⁵⁴ between church and state.

VI. THE SUPERMAJORITY COALITION TO ENACT THE FIRST AMENDMENT

Of course, Madison did not enact the First Amendment single-handedly, and Jefferson was not even in Congress at the time, being U.S. Minister in Paris before returning to be Secretary of State. Professor Mark David Hall has recently complained that the Virginians have received all the glory, overlooking the role of Reformed Christians, such as Roger Sherman, in enacting the Establishment and Free Exercise clauses.⁵⁵ That is a good point, which nevertheless merely heightens the achievement of the Virginians. Madison and the other authors of the First Amendment had to construct a supermajority coalition, agreeing on a text that was acceptable to the constitutionally required supermajorities in both houses of Congress and the required number of states. To be sure, therefore, the Establishment and Free Exercise Clauses meant different things to different members of that coalition. To Virginian Deists,

52. THE FEDERALIST NO. 10, *supra* note 50.

53. U.S. CONST. amend. I.

54. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson (Jan. 1, 1802) (original located in the Library of Congress), *available at* <http://www.loc.gov/exhibits/religion/f0605as.jpg>. How high that wall should be is contested. This paper does not attempt to intervene in that debate.

55. Mark David Hall, *Vindiciae, Contra Tyrannos: The Influence of the Reformed Tradition on the American Founding*, Paper Presented at the Annual Meeting of the American Political Science Association (2010).

Pennsylvania Quakers, and New England Baptists, they probably meant what Madison and Jefferson intended them to mean, which was likely the strict separation and non-establishment that the U.S. Supreme Court majority has supported since *Lee v. Weisman*.⁵⁶ New England Congregationalists likely heard the words with a different stress: *Congress* shall make no law, implying that the states remained free to do so.

The supermajority for the First Amendment was likely only made possible because as Madison had observed in *Federalist No. 10*, there was no majority religion in the thirteen states, nor was it foreseeable that there was ever likely to be.⁵⁷ If each sect knew that it could not be considerable enough to disturb the public tranquility, it had a vested interest in protecting itself from the risk that any other sect might seize the levers of state power. Hence, sects had a common interest in both non-establishment and free exercise.

VII. RELIGIOUS CRISES AND ACCOMMODATION IN THE U.K. FROM THE 19TH CENTURY UNTIL NOW

In the U.K. in Madison's day, the Church of England was still dominant. The Treaty of 1707 protected the establishment of the Reformed church in Scotland,⁵⁸ but it did so weakly. The first problem area was Ireland, which was predominantly Catholic, with a large Reformed (Presbyterian) minority in the northeast and a, perhaps, smaller Anglican minority evenly spread around Ireland. But it was the Anglican Church that was established in the Act of Union 1800.⁵⁹ This establishment became intolerable as soon as enough Irish people had the vote to protest effectively against it, beginning with "Catholic Emancipation" in 1829, which allowed Catholics to vote and to sit in Parliament, and shortly followed by the Reform Act of 1832.⁶⁰ The Church of Ireland was disestablished in 1869.⁶¹ When W.E. Gladstone

56. *Lee v. Weisman*, 505 U.S. 577 (1992). See discussion, especially of Justice Souter's magisterial analysis, in McLean & Peterson, *supra* note 41.

57. THE FEDERALIST NO. 10, *supra* note 50.

58. Union with Scotland Act, 1706, 5 & 6 Ann., c. 11; Act Ratifying and Approving the Treaty of Union 1706, A.P.S. XI, 406, c. 7.

59. Union with Ireland Act, 1800, 39 & 40 Geo. 3, Art. V.

60. Roman Catholic Relief Act, 1829, 10 Geo., c. 7, available at <http://www.legislation.gov.uk/ukpga/Geo4/10/7/data.pdf>; Representation of the People Act 1832, 2 & 3 Will., c. 45, available at <http://books.google.com> (search "an act to amend the representation of the people"; then follow first hyperlink).

61. Irish Church Act, 1869, 32 & 33 Vict., c. 42, available at <http://www.legislation.gov.uk>

first proposed devolution (“Home Rule”) to Ireland in 1886, he had to fend off Irish Protestant anxieties that the Catholic Church would seize the organs of the state and discriminate against non-Catholics.⁶² Therefore, he incorporated the wording of the Establishment and Free Exercise clauses into his bill.⁶³ That bill failed, as did all subsequent attempts to keep all of Ireland within the U.K.⁶⁴ But in 1921, when the territory of Northern Ireland remained in the U.K., the clauses were applied there.⁶⁵ They still apply in Northern Ireland, albeit no longer in the wording of the First Congress or W. E. Gladstone.⁶⁶

A series of evangelical revivals in Wales seriously weakened the Church of England there.⁶⁷ As in Ireland, as soon as a sizeable number of Welsh people in both boroughs and county areas had the vote (in 1885), they elected Members of Parliament who campaigned for the disestablishment of the Church of England in Wales.⁶⁸ However, Welsh disestablishment was blocked in the unelected house, the House of Lords, not least by the Lords Spiritual, who although bishops only of English dioceses, voted with at most two dissenters against both Welsh disestablishment and Irish Home Rule. Disestablishment was not enacted until 1914, and then was suspended because of the outbreak of World War I, coming into force only in 1920.⁶⁹

Therefore, since 1920, the Church of England has been established only in England itself. A series of internal reports considered the advantages for the church of moving to a looser Scottish establishment,⁷⁰ but there has been no change until recently. A significant reason is that

gov.uk/ukpga/1869/42/pdfs/ukpga_18690042_en.pdf.

62. ALVIN JACKSON, HOME RULE: AN IRISH HISTORY 1800–2000, at 38–105 (2003).

63. Government of Ireland Bill, 1886, cl. 4(1) (“The Irish Legislature shall not make any law respecting the establishment or endowment of religion, or prohibiting the free exercise thereof.”); 2 Britain Parliamentary Papers 461–81 (1886).

64. JACKSON, *supra* note 62.

65. Articles of Agreement for a Treaty Between Great Britain and Ireland, U.K.-Ir., art. 16, Dec. 6, 1921, available at http://www.nationalarchives.ie/topics/anglo_irish/dfaexhib2.html.

66. Government of Ireland Act, 1920, 10 & 11 Geo. 5, c. 67 § 5 (subsequently repeated in Northern Ireland Constitution Act, 1973, c. 36, pt. III, and currently in Northern Ireland Act, 1998, c. 47, § 6).

67. 5 ERWIN FAHLBUSCH, THE ENCYCLOPEDIA OF CHRISTIANITY 617 (2008).

68. *Wales Religion and Belief*, BBC U.K. (Dec. 2006), http://www.bbc.co.uk/wales/religion/sites/timeline/pages/religion_in_wales_12.shtml.

69. Welsh Church Act, 1914, 4 & 5 Geo. 5, c. 91; Government of Ireland Act, 1920, 10 & 11 Geo., c. 67; Welsh Church (Temporalities) Act, 1919, 9 & 10 Geo. 5, c. 65.

70. Iain McLean & Scot M. Peterson, *A Uniform British Establishment*, in THE FUTURE OF ESTABLISHMENT (M. Chapman & W. Whyte eds., forthcoming 2011).

the Lords Spiritual have no interest in surrendering their seats in the legislature, and the state has had no interest in throwing them out. Recent developments have, however, disturbed this equilibrium.

VIII. CHALLENGE TO THE LORDS SPIRITUAL 2000–2010

If the U.K. had an elected legislature, the position of the Lords Spiritual would clearly become anomalous. Out of office, politicians routinely call for the replacement of the House of Lords by an elected house. In office, they become coy: the very fact that the Lords are unelected makes them a weaker obstacle to a determined government. The current cycle of change began in 2000 with a report on the reform of the Lords commissioned by Labour Prime Minister Tony Blair. That report, authored by the Wakeham Commission, said that faith leaders should remain in the House of Lords, which should remain mostly unelected.⁷¹ They proposed a reduction of Anglican bishops to sixteen, to be joined by ten other Christian leaders (five of them from outside England) and five representatives of non-Christian faiths.⁷²

These numbers were wildly wrong. To scale up from sixteen Anglican bishops would have required seventy-seven faith representatives, most of them female (because Wakeham also endorsed gender equality). Wakeham ignored the evidence in front of it.⁷³ Almost no religious body, and absolutely no secular body, wished for religious representation in the House of Lords to remain.⁷⁴ The Church of Scotland explained how it was incompatible with Reformed theology; the Catholic Church explained how it was incompatible with canon law; the Baptists explained how it was incompatible with separation of church and state.⁷⁵ All these representations were ignored.⁷⁶

By 2010, the Wakeham report was utterly discredited. The only U.K. public body that still supports an unelected House of Lords is, unsurprisingly, the House of Lords.⁷⁷ The Commons has voted for either

71. ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS, *A HOUSE FOR THE FUTURE*, 2000, Cm. 4534.

72. *Id.* at 192.

73. IAIN MCLEAN & BENJAMIN LINSLEY, *THE CHURCH OF ENGLAND AND THE STATE: REFORMING ESTABLISHMENT FOR A MULTI-FAITH BRITAIN* 15 (2004) (U.K.).

74. *Id.* at 14.

75. ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS, *supra* note 71, at 153.

76. MCLEAN & LINSLEY, *supra* note 73.

77. Meg Russell, *House of Lords Reform: Are We Nearly There Yet?*, 80 *POL. Q.* 119, 119–25 (U.K.).

an all-elected or an eighty-percent elected House.⁷⁸ All three main party manifestoes in 2010, and the post-election Coalition program for government, call for an elected House.⁷⁹ Furthermore, Prime Minister Gordon Brown, the fourth Scottish Presbyterian to hold that post,⁸⁰ unilaterally withdrew from making Church of England appointments in 2007.⁸¹ The days of establishment in the U.K. are numbered.

Contemporary issues in secularity and secularism came into sharp relief with the Lords' debates on the Equality Act 2010.⁸² The U.K. has been a signatory to the European Convention on Human Rights since shortly after it was drafted in 1950, which was done mostly by British lawyers and in response to Nazi atrocities in World War II.⁸³ The Convention protects classical negative human rights such as those protected in the U.S. Bill of Rights. These include freedom of speech, assembly, religion, privacy, and freedom from discrimination. Several rights in the European Convention on Human Rights (ECHR), including the freedom to manifest one's religion or beliefs, are qualified: "subject only to such limitations as are prescribed by law and are necessary in a democratic society."⁸⁴ Through the Human Rights Act 1998, Convention rights were incorporated in British law, and now must be considered, when relevant, by U.K. courts. The 1998 Act, like the U.S. Bill of Rights, often protects unpopular and stigmatized minorities.⁸⁵ Until the

78. *MPs Back All-Elected Lords Plan*, BBC U.K. (Mar. 7, 2007, 8:03 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/6420965.stm.

79. CABINET OFFICE, *THE COALITION: OUR PROGRAMME FOR GOVERNMENT* 27 (2010); CONSERVATIVE PARTY, *THE CONSERVATIVE MANIFESTO 2010*, at 67 (2010); LABOUR PARTY, *THE LABOUR PARTY MANIFESTO 2010*, at 9:3 (2010); LIBERAL DEMOCRATS, *LIBERAL DEMOCRAT MANIFESTO 2010*, at 88 (2010).

80. U.K. Prime Ministers from a Church of Scotland Presbyterian background have been Sir Henry Campbell-Bannerman (1905–08); Andrew Bonar Law (1922–23); Ramsay MacDonald (1924, 1929–35); and Gordon Brown (2007–10).

81. Paul Richardson, *Britain Is No Longer a Christian Nation*, *THE TELEGRAPH* (June 27, 2009, 11:36 PM), <http://www.telegraph.co.uk/comment/5662294/Britain-is-no-longer-a-Christian-nation.html>.

82. See Questions and Statements from Lords' Debates Relating to Equality Act 2010, *Parliamentary Business*, U.K. PARLIAMENT, http://www.publications.parliament.uk/pa/ld201011/ldhansrd/ldallfiles/allsubject_e-j.html#e (last visited Aug. 10, 2011).

83. IAIN MCLEAN, *WHAT'S WRONG WITH THE BRITISH CONSTITUTION?* 201–02 (Oxford Univ. Press 2010).

84. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), *opened for signature* Nov. 11, 1950, CETS No.: 005, 213 U.N.T.S. 222, art. IX, § 2; EDWARD LAWSON & MARY LOU BERTUCCI, *ENCYCLOPEDIA OF HUMAN RIGHTS* 463 (1996).

85. See MCLEAN, *supra* note 83, at 210 tbl.10.1.

2010 General Election, it was Conservative Party policy to repeal it. However, the current coalition government has dropped that proposal.⁸⁶ The Human Rights Act has also wrought a change in judicial culture; judges are more willing than previously to challenge executive and legislative acts on human rights grounds. This was predicted immediately upon the passage of the Act.⁸⁷

One piece of human rights compliance undertaken in the last year of the Labour government (2009–10) was to amalgamate various pieces of antidiscrimination law into an Equality Bill that would create a single body to oversee the law prohibiting discrimination on grounds of gender, ethnicity, sexual orientation, disability, religion, age, and caste (a late addition).⁸⁸ The bill was undertaken in part to ensure that the U.K. complied with Article 14 of the European Convention. It was enacted on the last day before the dissolution of the Parliament, so it now forms the Equality Act 2010.

Convention rights obviously have to be balanced in any jurisdiction. For instance, freedom of religion, if it is to mean anything, must permit religious bodies to restrict their ministry to those who share the principles of their religion.⁸⁹ Some religions impose restrictions that would not otherwise be permitted under the 2010 Act: such as appointment of members to single-sex religious communities. Arguments about the proper boundary of such restrictions have given rise to contemporary claims that the U.K. is “aggressively secularist” and similar phrases.⁹⁰ Although these claims come from a former Archbishop

86. CABINET OFFICE, *supra* note 79, at 11.

87. K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 M.L.R. 79 (1999); Conor Gearty, *11 September 2001, Counter-terrorism, and the Human Rights Act*, 32 J.L. SOC'Y 18 (2005).

88. Equality Act 2010, c. 15, (U.K.) (“An Act to make a provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; [etc.]”) (introduced 8 Apr. 2009), available at <http://services.parliament.uk/bills/2008-09/equality/documents.html>.

89. See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16–17 (1929).

90. *McFarlane v. Relate Avon Ltd.*, [2010] EWCA (Civ) B1 (appeal taken from U.K.EAT) (quoting Lord Carey, former Archbishop of Canterbury, in a witness statement); *Cardinal Kasper Dropped from Papal Entourage*, THINKING ANGLICANS (Sep. 15, 2010), <http://www.thinkinganglicans.org.uk/archives/004616.html#comments> (“England ist heute ein säkularisiertes, pluralistisches Land. Wenn Sie am Flughafen Heathrow landen, denken Sie manchmal, Sie wären in einem Land der Dritten Welt gelandet. . . . Vor allem in England ist ein aggressiver Neu-Atheismus verbreitet. Wenn Sie etwa bei British Airways ein Kreuz tragen, werden Sie benachteiligt”) (translation: “Today’s England is a secularized, pluralistic country. When you land at Heathrow Airport, you sometimes think you have landed in a Third World country. . . . In

of Canterbury, the former head of the Pontifical Council for Christian Unity, and Pope Benedict XVI, we believe that they are incorrect.

There have been two flashpoints: one concerns alleged discrimination against Christians in employment; the other, the proper boundary of the religious exemptions from anti-discrimination law. A series of employment tribunal cases have been decided against Christians in the workplace, and the decisions have been affirmed in the higher courts. In *Ladele v. London Borough of Islington*,⁹¹ the claimant was a registrar of births, deaths, and marriages, who refused to officiate at civil partnerships, a U.K. form of civil union available only to same-sex couples which gives them essentially the same legal rights as marriage.⁹² In *Eweida v. British Airways*,⁹³ the claimant was a British Airways check-in employee who refused to remove a jewelry cross, contrary to her employers' dress code. Also, in *McFarlane v. Relate Avon Industries*,⁹⁴ the claimant was a relationship counselor dismissed for refusing to offer sexual counseling to same-sex couples. In each case, the court balanced the ECHR Article 9 freedom to manifest one's religion against the "limitations" permitted in the same article and, in *Ladele* and *McFarlane*, against the right of same-sex couples to be protected from

England especially an aggressive new atheism has spread. If you bear your cross on British Airways you will be at a disadvantage . . ."); Benedict XVI, Pope, Catholic Church, Address at Westminster Hall during meeting with the Representatives of British Society (Sep. 17, 2010), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile_en.html ("Religion, in other words, is not a problem for legislators to solve, but a vital contributor to the national conversation. In this light, I cannot but voice my concern at the increasing marginalization of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance. There are those who would advocate that the voice of religion be silenced, or at least relegated to the purely private sphere. There are those who argue that the public celebration of festivals such as Christmas should be discouraged, in the questionable belief that it might somehow offend those of other religions or none. And there are those who argue – paradoxically with the intention of eliminating discrimination – that Christians in public roles should be required at times to act against their conscience. These are worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the legitimate role of religion in the public square. I would invite all of you, therefore, within your respective spheres of influence, to seek ways of promoting and encouraging dialogue between faith and reason at every level of national life.").

91. [2009] EWCA (Civ) 1357.

92. Civil Partnership Act, 2004, c. 33 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2004/33/contents>. Civil partnerships are legally distinct from marriage, which is not available to same-sex couples in the U.K. *See also* U.K. GOV'T EQUALS OFFICE, CIVIL PARTNERSHIPS ON RELIGIOUS PREMISES: A CONSULTATION, *available at* <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-0584.pdf>.

93. [2010] EWCA (Civ) 80. The case referred to by Cardinal Kasper.

94. [2010] EWCA (Civ) 880.

discrimination. In *McFarlane*, Lord Carey, former Archbishop of Canterbury, filed a witness statement in support of the claimant. The statement requested a panel of judges with a “proven sensitivity and understanding of religious issues” to hear the case.⁹⁵ This call was fiercely dismissed by the appeal judge Lord Laws (who happens to be a senior lay Anglican) as “divisive, capricious and arbitrary.”⁹⁶

During discussion of the Equality Bill in the House of Lords, in January 2010, eight Lords Spiritual attended—an unusually large number—to oppose a clause in which the government defined the ministerial exemption from antidiscrimination law.⁹⁷ They were successful. One of the three votes to delete the clause was carried by a majority of only five, so each vote was pivotal. In view of the pending dissolution of Parliament for the 2010 General Election, the government did not seek to reinstate the clause. The degree of religious exemption from antidiscrimination law therefore remains undefined until it is tested in future courts (which will, however, be guided by the outcomes of the cases discussed in the previous paragraph and recent ECHR jurisprudence).⁹⁸

In the same debate, two of the Lords Spiritual addressed another amendment, which had been advanced by the Labour backbench peer Lord Alli on behalf of three sects: the Religious Society of Friends (Quakers), Liberal Judaism, and the Unitarian Church.⁹⁹ Those three sects, after internal discussion, had all decided to request an amendment of the Civil Partnership Act 2004.¹⁰⁰ That Act prohibits religious language from being used in civil partnership ceremonies and forbids them from being conducted on religious premises; the amendment would have removed these restrictions. The Quakers had discussed the matter over several days at Britain Yearly Meeting 2009.¹⁰¹ They considered

95. *Id.* at [17].

96. *Id.* at [24].

97. 716 Parl. Rep., H.L. (2010) 1217 (U.K.).

98. *Schüth v. Germany*, 2010-LII Eur. Ct. H.R. 32; *Obst v. Germany*, Eur. Ct. H.R. Appl. No. 425/03 (2010) (slip copy); Carolyn Evans, Paper to 17th Law and Religion Symposium, Provo, UT (Oct. 2010); *see also Lautsi & Others v. Italy*, E. Ct. H.R. (GC) Appl. No. 30814/06 (2011) (slip copy).

99. 716 Parl. Rep., H.L. (2010) 1197 (U.K.).

100. Civil Partnership Act 2004, c. 33, *available at* <http://www.legislation.gov.uk/ukpga/2004/33/contents>.

101. QUAKER COMM. FOR CHRISTIAN AND INTERFAITH RELATIONS OF BRITAIN YEARLY MEETING OF THE RELIGIOUS SOC’Y OF FRIENDS, *WE ARE BUT WITNESSES 2* (2009), *available at* <http://www.quaker.org.uk/sites/default/files/We-are-but-witnesses.pdf>.

the words of George Fox, the main founder of Quakerism, who said in 1669:

For the right joining in marriage is the work of the Lord only, and not the priests or magistrates; for it is God's ordinance and not man's and therefore Friends cannot consent that they should join them together: for we marry none; it is the Lord's work, and we are but witnesses.¹⁰²

Fox's claim is that Quakers, gathered in their meeting for worship, sense whether or not the Lord has joined the couple in marriage. If the Lord has done so, the Quakers at the meeting act as witnesses to the marriage. In a Quaker marriage, therefore, no official declares the couple to be married. They simply rise, in either order, and declare that each takes the other as spouse. All Friends at the meeting sign the declaration of marriage as witnesses, it is entered by a Quaker registrar into a register book of weddings, and from time to time the registers are reported to the state. Accordingly, Britain Yearly Meeting 2009 decided that the Lord worked to marry some same-sex couples, and therefore to allow Quaker marriages conducted under the exemption granted in 1753 to include same-sex marriages, and in the interim, to press for the Alli amendment in order to allow civil partnership ceremonies to be conducted in Quaker meeting houses. However, the Bishop of Winchester, who spoke in favor of allowing the Church of England an undefined exemption from antidiscrimination law, opposed the Alli amendment on the grounds that the amendment would

blur the characteristics of the civil partnership as distinct from marriage . . . [and present] the likelihood of a steady and continuing pressure on, if not a forcing of, the churches, the Church of England among them, to compromise on our convictions that marriage has a character that is distinct from that of a civil partnership. Churches of all sorts really should not reduce or fudge, let alone deny, that distinction.¹⁰³

In a single debate, the Lord Spiritual therefore asserted the spiritual independence of the Church of England and denied that of the Quakers, Liberal Jews, and Unitarians. This is the sort of thing that helps a Quaker, for instance, to remember why religious dissenters emigrated to the U.S. in the seventeenth century and why the Establishment and Free Exercise Clauses entered the U.S. Constitution in 1791. The Alli

102. *Id.* at 6.

103. 25 Jan. 2010, PARL. DEB., H.L. (5th ser.) (2010) 1202 (U.K.).

amendment was later carried, on a free vote, by ninety-five to twenty-one, against the opposition of the duty bishop and both front benches. It now forms section 202 of the Equality Act 2010.

IX. CONCLUSION

The protests by eminent religious leaders against the “secularism” of the U.K. seem therefore to be misplaced. Correctly understood, they are protests against its growing secularity. From the perspective of a minority religion, secularity is to be welcomed. It protects adherents of that religion from the sort of overbearing behavior just described. If an analogue to the First Amendment were in place in the U.K., the ban on conducting civil partnerships in meeting houses would likely be unconstitutional under both its Establishment and Free Exercise clauses.

The special establishment of the Church of England is likely to disappear in the near future. The free exercise of religion in the U.K. is protected under the ECHR. Only 220 years late, the U.K. is about to catch up with the First Congress of the United States.

What about the alleged legal discrimination against Christians? Though there is room to pick holes in the detailed legal reasoning in some of the cases, the freedom to *manifest* religion is not absolute in states signatory to the ECHR,¹⁰⁴ nor has it been so judged in the United States.¹⁰⁵ It must be balanced against other ECHR rights. Even when no other ECHR right is alleged (as in *Eweida*), a court must decide whether a discriminatory regulation is proportionate to achieving a legitimate objective. Only courts are fitted to such balancing exercises. Legislatures and executives are not. The bishops’ defeat of the proposed proportionality clause in the Equality Act will push more, not fewer, alleged discrimination cases into the courts because there will be no common “proportionality” standard, which would easily have accommodated the requirements of religious believers; instead, religious organizations will remain an anomaly, subject to an absolute, either/or,

104. The latest in this line of cases at the time of writing is *Hall & Anor v Bull & Anor* [2011] EW Misc 2 (CC) (civil partners turned away by a Christian-run guest house had suffered direct discrimination). The County Court judge has given the defendants leave to appeal.

105. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to bb-4 (1993); *see also* Religious Freedom Restoration Act, 42 U.S.C. 2000bb to bb-4 (2006); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc to cc-5 (2006); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

or black letter standard of decision, into which some form of proportionality requirement will have to be grafted by the courts.