ESSAY

CONSTITUTIONAL COMMITMENTS AND RELIGIOUS IDENTITY

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At a time when we are inundated daily with accounts of fundamentalism in various guises, and when those purporting to speak for religion often engage in attacks on secular government, Steve Shiffrin's book, *The Religious Left and Church-State Relations*,[1] has supplied an invaluable corrective to the prevailing views about the relationships that can be constructed between religion and the public sphere. Both constitute, for Shiffrin, realms of vigorous debate—debates that may sometimes overlap, but not in the ways to which we are accustomed. While concerned with generating citizens skilled in and desirous of participating in the public sphere, the book simultaneously eschews the idea that such participation must assume a resolutely secular form. Instead, Shiffrin revitalizes the notion of a religious Left that might engage in the civic arena without checking religion at the door. Under Shiffrin's account, this "religious Left," or the class of "religious liberals," could furnish justifications for certain positions on church-state relations that would appear more plausible coming from their vantage point and would not be feasible for secular liberals to offer.[2] It is with this latter suggestion that I part ways with *The Religious Left*. In my view, the articulation of the church-state views in question does not require religious liberals; additionally, I am not convinced that recourse to a religious liberal position can serve as broad a discursive function as Shiffrin seems to suggest.

Before explaining why I disagree with Shiffrin about these issues, I would like to focus on three particular ways in which Shiffrin has cleared the ground for further exploration of the relationship between religious individuals and the public sphere. First, he has managed to disassociate religious believers from a particular orientation toward the Free Exercise

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1 STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2009).

2 *See id.* at 100–36.

and Establishment Clauses of the U.S. Constitution.[3] As he explains, "My particular interest here is to focus on those citizens who favor free exercise and oppose tight connections between church and state in accordance with their religious premises."[4] Religious conservatives who can claim membership within one of the currently more dominant religious traditions, such as Justice Antonin Scalia, often appear to support closer relations between church and state and to advocate a less separationist construction of the Establishment Clause.[5] At the same time, someone like Scalia, who authored the majority opinion in *Employment Division v. Smith*[6] against which liberals and conservatives alike protested, does not favor broad grants of exemptions for free exercise purposes from neutral, generally applicable laws.[7] Hence, Scalia would occupy the position opposite to the one that Shiffrin describes. There are, presumably, also those who might be called religious conservatives who favor free exercise; in other words, some identified as religious conservatives would probably favor free exercise even if they did not oppose tight connections between church and state.[8] On the secular side, Shiffrin takes Chris

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3 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

4 SHIFFRIN, *supra* note 1, at 1.

5 Like a number of his colleagues on the Supreme Court, Justice Scalia identifies as a Catholic. *See* Charles M. Blow, *The Catholic Court*, By the Numbers Blog, http://blow.blogs.nytimes.com (May 26, 2009, 15:43 EST) (tracking the shift from a primarily Protestant to a majority Catholic Supreme Court) (Justice Scalia's Catholic colleagues include Chief Justice Roberts, Justices Alito, Thomas, Kennedy, and now, Justice Sotomayor, who replaced Justice Souter, a Protestant, shortly after Charles Blow's post was written). Justice Scalia's dissenting opinion in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), articulates his view that expressions of monotheism—and, in particular, honoring the Ten Commandments in a non-denominational manner—"cannot be reasonably understood as a government endorsement of a particular religious viewpoint." *Id.* at 494 (Scalia, J., dissenting). For a commentary on, and critique of, Justice Scalia's dissent in *McCreary County* and its implications for interpreting the Establishment Clause, see Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006).

6 Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

7 *Smith* held that neutral criminal laws of general applicability are per se valid even if they burden the free exercise of religion. *See id.* at 876–79. Assessing the immediate aftermath of the decision, Doug Laycock wrote that "*Smith* produced widespread disbelief and outrage. . . . An extraordinary coalition of religious and civil liberties groups has sought to have *Smith* overturned, first by an unsuccessful petition for rehearing and now by proposed legislation." Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1 (1990). The legislation he mentioned, the Religious Freedom Restoration Act, was indeed passed, and spawned yet further litigation. *See* Religious Freedom Restoration Act of 1993 Public Law 103-141 (1993); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the part of the Religious Freedom Restoration Act applying to the states as exceeding Congress's enforcement powers under the Fourteenth Amendment).

8 I am not convinced that the category of "religious conservative" is a useful one, or that its application can answer more questions than it raises, but it is a phrase that appears in common parlance. One potential confusion—that between a conservative orientation toward politics and toward a particular religious tradition—is already treated in Shiffrin's account; as

Eisgruber and Larry Sager's book, *Religious Freedom and the Constitution*,[9] as his primary foil. Their recourse to equality leads them to oppose tight connections between church and state but also to favor free exercise rights for religion only to the extent that religious minorities have been discriminated against.[10] Hence we are left with the quandary of whether secularists can strongly favor religious free exercise and whether the religious can endorse the separation of church and state.

Later I will argue that the doctrinal position Shiffrin associates with religious liberals can, indeed, be occupied by secular liberals as well, but here I would like to suggest that even some religious conservatives may take the same approach. The historical roots of the Establishment Clause and some of the impetus behind its enforcement are connected with minority religionists' resistance against imposition of the dominant tradition.[11] Following this logic, religious practitioners who hold positions on

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he elaborates, the designations "religious conservative" and "religious liberal" do not, in his work, refer to theological positions. SHIFFRIN, *supra* note 1, at 1. Several other significant confusions, however, remain. The category of "religious conservative" could embrace those whose politics are conservative *because of* religion and those who simply happen to be both politically conservative and religious. Relatedly, as Kent Greenawalt discusses in his contribution, Shiffrin's model places even religious liberals who do not invoke religious reasons in the public sphere within the category of "secular liberals." *See* Kent Greenawalt, *In Celebration of Steven Shiffrin's* The Religious Left and Church-State Relations, 19 CORNELL J.L. & PUB. POL'Y 746–47 nn.32–35 and accompanying text (2010). There does not, however, appear to be an equivalent category of "secular conservative" that would include conservatives who are religious believers but do not rely on religion in promoting particular political positions. Due to these and other difficulties, I will not attempt to identify anyone as a "religious conservative" per se.

That said, some scholars and jurists who are viewed as conservative do advocate for a more expansive conception of the Free Exercise Clause than Justice Scalia endorses. One example is Michael McConnell, who was generally regarded as a conservative at the time of his resignation from the United States Court of Appeals for the Tenth Circuit in 2009. *See* Tony Mauro, *Judge McConnell to Step Down from 10th Circuit Bench*, LEGAL INTELLIGENCER 4 (May 7, 2009) (explaining that "McConnell is usually categorized as a conservative . . . . But he clerked for the liberal Justice William Brennan Jr., criticized *Bush v. Gore* and has tangled more than once with Justice Scalia over First Amendment doctrine."). McConnell has argued vigorously that accommodations for the free exercise of religion are both normatively desirable and consistent with historical practice. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (criticizing the *Smith* decision on the basis of "the opinion's use of legal sources—text, history, and precedent—and its theoretical argument," and arguing that "*Smith* is contrary to the deep logic of the First Amendment"); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511–12 (1990) (contending that "[t]he modern argument against religious exemptions, based on the establishment clause, is . . . historically unsupportable," and that,"[w]ithout overstating the force of the evidence, it is possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation").

9 CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

10 *See id.* at 13, 16–20.

11 *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 307 (2001) (describing how, from the 1930s onward, "Jewish

other matters that would usually be associated with religious conservatism might also oppose close connections between church and state, precisely because those connections would serve to devalue their own particular religious heritage. To the extent that Shiffrin is defining a religious Left as co-extensive with a particular doctrinal orientation toward the Religion Clauses, I am, for these reasons, not certain that Shiffrin's classification is entirely airtight. Nevertheless, there remains substantial value in demonstrating why religious liberals might endorse positions on the Religion Clauses that are not consistent with those often associated in the popular imagination with religious conservatives.

In addition to disassociating many religious believers from certain positions on the Religion Clauses, Shiffrin writes strongly in favor of the constitutionality of compulsory, non-religious, public education, at least during the adolescent years. Citing the values of "democratic education, autonomy, empathy, creativity and imagination, respect and tolerance, social skills, equality, and justice," he contends that public education could, in most circumstances, constitutionally be required by the state, although the state should not insist on such a power because of the public

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opinion on church-state relations was intensely separationist, and Jews would play a prominent role both in resisting aid to religious schools and in excluding religion from public education"). Justice Brennan further explained the role of religious minorities in increasing sensitivity to perceived government endorsements of religion:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship . . . no God at all. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240–41(1963) (Brennan, J., concurring) (internal citation omitted). Furthermore, as Justice Black noted with regard to the original impetus behind the constitutional restriction on the establishment of religion:

> Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan . . . .

Engel v. Vitale, 370 U.S. 421, 432–33 (1962) (internal citations omitted). *But see* STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1998) (arguing that the norm of separation of church and state pre-dates the First Amendment and that it was connected with a history of anti-Semitism); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (elaborating on how the passage on the state level of the so-called "Blaine Amendments" prohibiting government funding of religious organizations derived from nineteenth-century anti-Catholic sentiment).

backlash this stance would produce.[12] Given that Shiffrin does not believe mandatory public education should be implemented, one might wonder what purpose defending its constitutionality retains. The rhetorical force of Shiffrin's position is, I would contend, quite strong. In recent years, the United States has reached a crucial turning point in public education, not only because of the rise of voucher programs, which Shiffrin discusses, but also because of the vast increase in the amount of religious homeschooling. As Kim Yuracko recently wrote in *Education Off the Grid*,

> Homeschooling was common in the United States before the nineteenth century, but by the early 1980s the practice was illegal in most states. Since then, homeschooling has enjoyed a dramatic rebirth. Today, homeschooling is legal in all states. Estimates of the number of children currently homeschooled range from 1.1 to 2 million. The 1.1 million estimate represents 2.2 percent of the school-age population in the country.[13]

This trend toward homeschooling often carries with it, Yuracko argues, detrimental gender-based effects as well as difficulties in enforcing educational standards.[14]

The trend also stands in contrast to the educational policy of a number of European countries, including Germany and Sweden, which have long traditions of requiring school attendance. Indeed, just last year, a German family wishing to homeschool their children emigrated to the United States and claimed asylum on the ground that deprivation of the right to homeschool constituted persecution on the basis of religion.[15] An immigration judge recently ruled in their favor, determining that homeschoolers constituted a particular "social group" whose members had a "well-founded fear of persecution."[16] Nor has the claim of a right

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12 *See* SHIFFRIN, *supra* note 1, at 68, 80–81.

13 Kim Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124–25 (2008).

14 *See id.* at 134, 156–57.

15 Rose French, *German Family Seeks U.S. Asylum to Homeschool Kids*, USA TODAY, Mar. 31, 2009, *available at* http://www.usatoday.com/news/education/2009-03-31-homeschool-christian_N.htm.

16 Ben Conery, *Home-schoolers Win Asylum in U.S.; Germans Fled 'Persecution'*, WASH. TIMES, Jan. 28, 2010, at A1; Campbell Robertson, *Judge Grants Asylum to German Home Schoolers*, N.Y. TIMES (Feb. 28, 2010) (adding that Immigration and Customs Enforcement has appealed the decision). In order to receive asylum in the United States, individuals must demonstrate that they "are 'refugee[s],' who are people 'unable or unwilling' to return to their home countries 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .'" Weng v. Holder, 593 F.3d 66, 71 (1st Cir. 2010) (quoting 8 U.S.C. §§ 1158(b)(1)(B)(i), 1101(a)(42)(A) (2006)).

to homeschool been restricted exclusively to the immigration context. A 2009 appellate decision in California dealt with whether a child could be ordered to attend public or private school—in other words, any educational option other than homeschooling—as part of a dependency proceeding.[17] Although the court ultimately upheld the underlying order, it did so only after determining that the governmental action would pass muster under a strict scrutiny analysis, and the court decided the case in such a way as to avoid what it deemed the difficult constitutional question of whether home schooling could be prohibited in general.[18] In the face of these increasing claims, in various legal contexts, of a right to religious homeschooling, the arguments that Shiffrin musters in favor of mandatory public education provide an important countervailing force.

Finally, Shiffrin supplies cogent reasons why, contra Rawls, actors in the political sphere may justifiably use religious as well as secular arguments, contending that "[p]ublic reason disease can be fatal in American politics."[19] Citing the efficacy of Christian evangelists' appeals to the American public and the inability of secular liberals to address the central theological arguments animating certain conservative political positions, Shiffrin contends that religious arguments may and should be used persuasively in politics.[20] History supports this conclusion. Anyone familiar with the pamphlet wars of seventeenth-century England, in which readings of John of Patmos's *Revelation* were paired with claims about the contemporary political scene and biblical accounts of paternity were used to justify the political order,[21] will both acknowledge the possibility of conducting sophisticated political debate through the vehicle of religious doctrine and testify to the intensity of commitment to the resultant political positions. In some circumstances, a counter-argument from religion may indeed be the most effective way of responding to an argument from religion.

Nevertheless, the seventeenth-century example might give us pause. While seventeenth-century England was doubtless the site of much vigorous and important political debate, it was also the locus of a civil war,

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17 *See* Jonathan L. v. Superior Court, 165 Cal. App. 4th 1074 (2d Dist. 2008).

18 *See id.* at 1101–04.

19 SHIFFRIN, *supra* note 1, at 126.

20 *See id.* at 126–27.

21 *See* Bernadette Meyler, *Theaters of Pardoning: Tragicomedy and the Gunpowder Plot*, *in* 25 STUD. IN LAW, POL., AND SOC'Y 37, 59–73 (Austin Sarat ed., 2002) (discussing the political deployments of *Revelation* in the seventeenth century). *See generally* ROBERT FILMER, PATRIARCHA: THE NATURALL POWER OF KINGES DEFENDED AGAINST THE UNNATURAL LIBERTY OF THE PEOPLE, *in* PATRIARCHA AND OTHER WRITINGS 1, 6–12 (Johann P. Sommerville ed., Cambridge Univ. Press, 1991) (1680) (elaborating the Biblical authority for a patriarchal conception of the state).

as well as a quieter subsequent revolution.[22] Furthermore, while historians have long disputed the dominant cause of the English Civil War, religion has usually been mentioned as a prime factor.[23] This brings me to the point where I part ways with Shiffrin—in the suggestion that religious liberals can offer more persuasive justifications for certain positions on church-state relations than can those on the left who hold a secular position. Although in America today the main divide is often depicted as that between religious adherents and committed secularists,[24] so it might seem more likely that religious believers would listen to those who had not demonstrated skepticism about their world-view, the seventeenth-century example should remind us that relations *among* religious groups have, traditionally, been no less fraught than those between believers and non-believers.

According to Shiffrin:

> [I]t is particularly important to argue that tight church-state relations are bad for religion. But in many contexts that argument requires assumptions about what the mission of religious people might be and what does and does not fit within the mission. This requires a theological discussion. Religious liberals welcome that discussion; even if some secular liberals think such discussion is appropriate, they are generally less equipped to engage in it.[25]

There is a plausibility to this claim; many religious individuals within the United States may consider secular interests to be so different from their own as not to be persuaded by secular justifications for maintaining a strong Establishment Clause. Nevertheless, we have no reason to believe, I would suggest, that some religious groups would be any more persuaded of the value of separation of church and state by arguments from the standpoint of religion than by secular claims. Shiffrin cites Roger Williams' warning about the dangers of merging religion and the

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22 *See generally* CONRAD RUSSELL, THE CAUSES OF THE ENGLISH CIVIL WAR (1990) (detailing the genesis and episodes of the mid-seventeenth-century conflicts).

23 *See, e.g.*, *id.* at 58–82 (considering the extent to which controversy over religion contributed to the occurrence of the English Civil War).

24 *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM 7–8 (2005) (contrasting "values evangelicals" with "legal secularists," and explaining that, while both groups share "[t]he goal of reconciling national unity with religious diversity . . . , the methods for doing it are deeply opposed"); Michael McConnell, *Justice Brennan's Accommodating Approach Toward Religion*, 95 CAL. L. REV. 2187, 2187 (2007) ("In the absurd polarization of American political culture, many have come to treat religion as a partisan matter."); Steven D. Smith, *How is America 'Divided by God'?*, 27 MISS. C. L. REV. 141, 157 (2007) (suggesting a divide between "the cultures of secularism and of strong religion," although not identifying secularism exclusively with a lack of religious belief).

25 SHIFFRIN, *supra* note 1, at 99.

state.[26] Although Roger Williams issued this warning in the seventeenth century, many subsequent religious groups have disregarded it and have not been concerned about the extent to which involvement in politics could corrupt religion itself. Despite the availability of religious arguments against a close connection between church and state, there may always remain religious individuals or groups that strive for closer ties between faith and politics. More effective, however, may be religious liberals' engagement with religious conservatives on other issues of public policy, such as healthcare, the death penalty, birth control, or marriage. Within these contexts, the presence of a religious Left position can demonstrate that the opposition between the secular and the religious has been drawn too starkly in America.

In addition to contending that those on the religious Left may be able to provide justifications for a particular position on church-state relations that are more persuasive to religious conservatives than those supplied by secular liberals, Shiffrin maintains that religious liberals are able to furnish a more persuasive account of the Religion Clauses as a whole. Part of Shiffrin's argument rests on the premises that "the Constitution favors religion" and that "[t]he Constitution protects religion because it is valuable."[27] A discussion of these premises is beyond the scope of this comment, but even if they are valid, I would contend that at least one stance on constitutional interpretation would allow secular liberals to take those premises into account just as strongly as religious liberals. It would be rare, I think, to find an individual who had thought through every clause of the Constitution and determined that each reflected precisely his world-view; if the Constitution does not exactly embody the vantage point of each and every American, yet we believe it expresses values that structure the nation and allow it to cohere, why should a secular liberal *not* be able to accept that the Constitution might value religion, even if he or she does not?

Furthermore, I believe that secular liberals can offer justifications for strong support of free exercise and rigorous adherence to restrictions on the establishment of religion. Shiffrin seems to acknowledge that secular liberals have, in fact, put forth a number of grounds for resisting the Supreme Court's decision in *Smith* and instead supporting exemptions for religious practice from neutral laws of general applicability.[28] The Establishment Clause, Shiffrin suggests, presents more difficult terrain for secular liberals. As he states, "In the absence of legitimate stability concerns, secular liberalism has a hard time explaining why religion

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[26] *Id.* at 32–33 (Williams "argued that God was not so stupid as to place the fate of religion in the hands of politicians") (internal citation omitted).

[27] *Id.* at 107.

[28] *See id.* at 104–05.

alone is subject to an Establishment Clause."[29] The prefatory clause of this sentence, however, assumes away a lot. Many secular liberals may believe—on the basis of substantial historical evidence—that religion has furnished and continues to furnish the greatest possible threat to the stability of the state. Avoiding as much government entanglement with religion as possible may help to minimize that threat. In addition, secular liberals may hold a more robust notion of what constitutes discrimination against particular religious groups than Shiffrin suggests. As he observes,

> If religion is to be treated equally, . . . one might regard aid to religious churches and schools that is used to promote religious messages as unproblematic (so long as it is part of a program that does not discriminate against nonreligious organizations). Yet most secular liberals balk against any such aid. They want religion to be treated equally in some respects, but not others.[30]

One argument against such aid, as against voucher programs, follows from a particular substantive vision of equality; if aid to religious schools helps to promote already established and mainstream religions—as it may well do—it could contribute to disfavoring minority religions.[31] Hence, through pursuing the equality rationale further, the secular liberal may be able to justify objections against voucher programs as currently constituted, even if not on an absolute basis.

Although I disagree that there exists a fundamental connection between the "religious Left" and a particular position on church-state relations, i.e., "favor[ing] free exercise and oppos[ing] tight connections between church and state," and that religious liberals will always be able to be more persuasive than secular liberals in arguing against positions espoused by religious conservatives, I am delighted that *The Religious Left and Church-State Relations* has brought the large group of people on the religious Left in America to public attention. If Steve's own writings

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29 *Id.* at 106.

30 *Id.*

31 Some evidence suggests that Catholic schools are over-represented among voucher recipients, as might be anticipated from their long-standing existence. *See* V. Dion Haynes, *Vouchers Breathe New Life Into D.C. Catholic Schools: Tuition Rates, Morals Appeal to Parents*, WASH. POST, June 13, 2005, at A1. ("Of the 983 students in the voucher program, which provides federal grants to District children to use toward tuition and fees at private or religious schools, 61 percent are attending Catholic schools—a percentage that is expected to remain roughly the same when the program expands to about 1,600 students this fall."); *see also* Joseph M. O'Keefe, S.J., *Catholic Schools and Vouchers: How the Empirical Reality Should Ground the Debate*, *in* SCHOOL CHOICE: THE MORAL DEBATE 195, 195 (Alan Wolfe ed., 2003) (explaining that the proponents of vouchers include "pro-market think tanks and political action organizations associated with the Republican Party, inner-city parents, and the Roman Catholic Church").

from a religious Left vantage point provide even a partial model, I have no doubt that many important contributions of the religious Left will follow.