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August 24, 2018: The Coming Desperate Struggle

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Title: The Coming Desperate Struggle

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8/24/2018—Watching recent exchanges on the Law and Religion Law Professor List, it is obvious that liberal legal thinking has not adjusted to the looming loss of the Supreme Court. While liberal political operatives are acting as if Judge Kavanaugh's nomination could be stopped, when his confirmation is actually certain, liberal legal thinkers are still acting as if certain paradigms and analogies are going to be applicable in a few short months. Specifically, in the area of same-sex marriage and religious liberty, these legal observers seem to believe that the new conservative majority on the Supreme Court will not immediately act to protect the religious right to refrain from involvement in same-sex marriage. Even if Obergefell is not itself overruled, there is zero chance that this new conservative majority will allow religious dissenters to be forced by anti-discrimination laws to do anything that compromises religious conscience. And this definitely includes discrimination in the commercial realm. Liberals imagine that there is some rock solid commitment to anti-discrimination law because of the experience of race discrimination, which was not permitted in the commercial realm regardless of religious sincerity. These liberals are about to get a lesson in legal realism. Nothing binds judges when those judges are determined not to be bound. What is shaping up is a very harmful clash between political/legal power, on the one hand, and cultural influence, on the other. Same-sex marriage and other aspects of LGBT rights have won the culture without question. But they have lost in Congress and the Presidency for the moment and that means they have lost the Supreme Court for a generation. This pill is going to be incredibly bitter to swallow, especially because of the refusal to face a reality that is already here. It is already too late to salvage anti-discrimination law. The bitterness should be assuaged by the fact that this religious rearward action is actually completely insignificant as a practical matter. The conservative protection of religious dissenters could be accommodated without the loss of a single same-sex marriage or the loss of a single other right. Yes, religious believers are about to win an unlimited right to discriminate against LGBT persons, but all this will accomplish in the end is the further discrediting of religion, especially in the eyes of the young. It need have no impact on the actual lives of LGBT persons. Unfortunately, that insight will be lost. Despite all the signs, the loss of the Supreme Court is going to be very hard for the Left to take. No plans yet exist to use that loss to finally translate cultural influence into political power.