I know perfectly well I’m not a prophet, and that’s the point; but I’m a literal-minded guy, and John Witte asked me to predict the next 25 years, and I said, “Okay. Can’t do it, but I’ll give it a shot.”

So what will the world of religious liberty look like in 2032? Damned if I know.

What I can do is examine the past, look at current trends, look at what caused past trends to change, and make some guesses about the future. But I can’t see around the next curve, or even tell you when the next curve is going to arrive.

One thing I do know: religious changes drive changes in the law of religious liberty, and we can see that throughout American history. Changes in the beliefs and behavior, and the religious demography of the American people have caused changes in the alignment of religious conflict, and those changes have driven much of the law of religious liberty.

Thus, the first Great Awakening, beginning in the 1740s, led to disestablishment in the states and to guarantees of free exercise in disestablishment in the federal constitution.

The large Catholic immigration in the 19th century led to intense political conflict over religion in the public schools and over demands for government funding of private schools. The modern legal issues of school prayer and government’s verbal support for religion more generally, and funding for private schools and of religiously-based social services are all directly descended from those 19th century Protestant-Catholic conflicts.

The assimilation of Catholics and Jews into the mainstream and into the governing elite, and the increased acceptance of religious pluralism more generally, led to the school prayer decisions in 1962 and 1963 and to the rule that is generally observed, but subject to exceptions, that government should remain neutral on questions of religion.
There are a lot of people in this room who know a lot more about religion than I do, but I’ll stick my neck out a little further. I’ll say the Fourth Great Awakening began in the 1970s and continues today. It led evangelical Christians to build a set of private schools, and that led them to switch sides on questions of funding private schools, and that change of position contributed powerfully to a reframing of the constitutional issues surrounding aid to religious schools. It was no longer just a Catholic issue. It had the support of a broad coalition that included Catholics, evangelicals, free marketeers, black parents frustrated with inner city schools, and that reframing of the issue helped lead the swing votes on the Supreme Court to change their position from no aid in *Lemon* to vouchers in *Zelman*.

In this Fourth Great Awakening, evangelical religion grew dramatically in activism, visibility, and influence; probably grew somewhat in numbers as well, but the most important thing about this Great Awakening was the evangelical decision to enter into politics and to form litigating organizations to protect religious liberty. That of course was a reaction to secularization. It provoked a counter-reaction from the secular side, and the conflict between those two movements has led to a much higher rate of religious liberty litigation in the courts generally, and the Supreme Court in particular.

Evangelical activism was necessary, but not sufficient, to the enactment of the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, the Religious Liberty and Charitable Donations Act, the American Indian Religious Freedom Act, 13 state religious freedom acts. That movement has powerfully resisted the Supreme Court’s view that government should be neutral on matters of religion.

So those are some very broad-based ways in which, over time, religion has changed the law of religious liberty. We also know that a single group with problems and with determination to face them can make a large difference. That’s most vividly illustrated by the Jehovah’s Witness litigation from the late 1930s to the early 1950s, when they had some two dozen cases in the Supreme Court and won nearly all of them.

The second thing we can say about this history that helps us peek a bit into the future is to note the remarkable persistence of these issues. The details change, the alignment of factions changes, who’s winning changes, but the issues remain. Americans have been fighting over religion in the public schools since the 1820s. We’ve been fighting over whether to fund private religious schools also since the 1820s. The intensity of those fights has waxed and waned and, at times – especially in times of major war – the issues have faded away almost entirely when the country was focused of other things, but the issues have always returned. And even the arguments haven’t changed that much.

One side says the public schools are neutral and acceptable to all, and somewhat inconsistently that the public schools are essential to socializing children and preserving American values. The government should not support the teaching of religion. The religious schools are separatist and divisive. And the other side says the public schools are not at all neutral and they are unacceptable to important religious minorities, that they instill a politically dominant view about religion. The private schools teach the whole curriculum, and not just religion, and that families should not be forced to choose between their faith and their children’s right to a free education.
We’ve been fighting over those issues for 180 years now, and I feel fairly confident in saying we will still be fighting over them in 2032.

The battles over free exercise have been more intermittent, but they have continued for even longer. Here, the central issue is the one that Kent Greenawalt devoted much attention to – whether, and to what extent, religiously motivated behavior should sometimes be exempted from government regulation. That issue in America goes back at least to 1669, when the Carolina Colony exempted conscientious objectors from swearing oaths. There were major and long-running political battles over exemption from military service in the Colonial period and in the American Revolution. There has been constitutional litigation over claims to exemption, at least since 1813, when a New York prosecutor summoned a priest to testify to what he’d heard in the confessional, and that 1813 case was argued and publicized as a test case which shows a movement, shows awareness that it’s a recurring issue in which an organized group had a stake. And I expect we’ll still be arguing over these issues in 2032 as well.

The basic legal issues are persistent. Changes in religious behavior, in religious belief, yield changes in how those issues are treated. So can we foresee any changes in religious belief and behavior?

So now I’ll really stick my neck out, actually make a few predictions. The Fourth Great Awakening will come to an end. It will gradually fade away. It will likely leave important changes behind it: new universities, new megachurches, new statutes on religious liberty, new litigating organizations, but the religious intensity of the last generation will not continue. I base that prediction on very little more than the fact that the first three Great Awakenings all came to an end.

You know, they seem to have a life span, and this one is getting a little long in the tooth. I’m an outside and theologically unsophisticated observer, but to me, the movement seems to be diffusing. The controversy over evangelical environmentalists is one example. The lack of a viable socially conservative candidate in the Republican primary is another example suggesting that the leadership can’t deliver the votes at the rank and file. The theology of worldly riches emerging in some quarters seems to me to be another example.

So the fourth great awakening will end unless, of course, this one is different. That’s what they say about stock market bubbles. I doubt that it’s any more true here, but maybe.

This great awakening arose in reaction to very specific political and moral threats, and perhaps those threats can serve as a focal point that sustains the movement. We forget that it was actually the threat to take away the tax exemption of the segregation academies that first roused evangelicals to aggressive political action, but other, more respectable, issues soon replaced that one. The most obvious and most important is abortion, now joined by same-sex marriage. There’s also evolution, but evolution was around for the Third Great Awakening and didn’t sustain it. There are issues of sexual morality more generally, secularism in the public schools, but those seem to be more diffuse issues. There are the end-of-life issues, but on those, the Right to Life movement will simply lose. Americans in overwhelming numbers fear being tortured by the medical establishment in their last days on earth. We have polling data on that. Every
demographic group – young, old, people close to death, people far from death – people most fearful of the medical establishment are the doctors.

I'll come back to same-sex marriage, but I think it’s abortion or nothing is a galvanizing opponent for evangelical activism, and my guess is that the abortion issue itself will look quite different by 2032. If Roe v. Wade is overruled or whittled in insignificance, then the issue will be turned to legislatures. The current Republican coalition will be destroyed, and in most states, abortion will remain generally legal, but subject to more restrictions than it has been.

Conversely, if new appointments to the Supreme Court reaffirm Roe by a wide margin and put its overruling out of reach – I don’t think that’s very likely, but that could happen. If that happens, the Right to Life movement will be much harder to sustain. The intensity of conflict over abortion for the last 30 years has partly been a function of the profound moral stakes on both sides of the issue, and partly a function of the sense of dramatic change was just within reach -- a potential or a threat, depending on which side you’re on, that motivated both sides to very intense effort.

Technological change could transform the abortion issue. If medical advances make it possible to sustain early term fetuses outside the womb, abortion will no longer be necessary to preserve women’s control of their bodies, but taxpayers will be quite unwilling to pay the cost of supporting all those fetuses, and then both parties’ coalitions will be under enormous pressures. If pharmaceutical advances move abortion into the home or into the offices of ordinary gynecologists and internists, effective regulation will become impossible.

Of course, it’s easy to over predict dramatic changes, as well as it is to totally fail to see them coming. It may be that abortion is one of those persistent galvanizing issues that in 2032, abortions will still be performed in clinics surrounded by protesters. I would not be astonished at that outcome, but I would bet against it.

Second prediction is a corollary of the first: religious conflict between Americans will subside. What it means for the Fourth Great Awakening to come to an end is that religious intensity will subside and religious intensity is the principal line of religious conflict in the country.

The dominant religion in this country is low intensity theism. The middle of the theological spectrum is filled by nominal believers and by serious believers without much fervor, and with only the vaguest idea of the theology of their denomination. This vast middle tends to be suspicious of the intensity at each end -- hostile and fearful, both of the non-believers on one end and of the intense and outspoken believers on the other. And of course, the sharpest religious conflict is between the two ends of the spectrum, between the intense secularists and the intense believers. When the intensity is reduced on one end, the resulting religious conflict will also be reduced. I don’t say eliminated, just reduced. The Center’s second 25 years should be quieter than its first 25 years.
And I’m talking only about the United States; the international religious conflicts are much more difficult, and I know much less about them. I suspect that those, too, will eventually subside, but I wouldn’t begin to predict it’ll happen within 25 years.

You don’t have to be a rocket scientist to predict this one: gay rights will present serious religious liberty issues. Even though religious conflict should ameliorate in general, on some specific issues it is likely to intensify. The gay rights movement will continue to make progress. It has momentum and it has demography. Young people are much more tolerant of same-sex relationships than older people. Young people are also less religious than older people, and always before, that has been an age effect, not a true difference in cohorts of the population. Young people become more religious as they get older, and it’s possible that today’s young people will also become less tolerant of gays as they get older, but my guess is it’s not going to work that way. I think this one is a genuine difference in cohorts. The older generation grew up at a time when hostility to same-sex relationships was endemic. People absorbed those attitudes and sometimes became hardened in them before they were ever exposed to the gay rights movement or to the argument that sexual orientation is generally immutable. Today’s young people had a very different socialization.

Further progress of the gay rights movement will present issues of exemption that we’ve already seen. There is no very good reason for there to be conflict between religious liberty and gay rights, but there is. My view is the only consistent civil libertarian position is to support both religious liberty and gay rights. Both movements are fundamentally based on the view that some features of human identity and commitment are so personal that the state should not interfere without extraordinary reason.

I’ve supported both gay rights and religious liberty throughout my career. I think what we need is strong gay rights laws with strong religious exemptions, but almost no political actor sees it that way. The leaders of the gay rights movement and the leaders of the evangelical religious movement both want a total win. They don’t want to have to litigate over exceptions. They don’t want to have to risk an occasional loss. It was the gay rights movement that rallied the broader civil rights movement to kill the proposed Religious Liberty Protection Act. That was a case where the evangelicals were willing to put much more on the bargaining table, surrender much more than the gay rights side was. The evangelicals still lost. Gay rights said we want an absolute exception or we’ll kill the bill, and they killed the bill.

So there will be gay rights laws with absurdly narrow religious exemptions, perhaps eventually with no religious exemptions at all, and there will be conservative believers who impose enactment of those laws, who resist compliance, who seek exemptions. As the gay rights movement continues to make progress, we are likely to see more and more serious religious liberty issues arising out of its success.

And then there are the marriage issues. The problem with marriage is that this is the one major institution of society in which we make absolutely no pretense of separation of church and state. We don’t even have institutional separation, which hasn’t been controversial for centuries. But with respect to marriage, we totally ignore even institutional separation.
Marriage is both a religious institution and a legal institution, but we do not separate the two. Marriage is jointly administered by church and state. The state has delegated the clergy the power to solemnize legal marriages; most Protestant churches have de facto delegated to the state the power to dissolve religious marriages. Catholics and Orthodox Jews persist in refusing to give religious effect to secular divorce. That shows it is possible to separate the two statuses — legal marital status from religious marital status if we have the will, but most Americans never distinguish religious marriage from legal marriage. The two institutions are entirely combined in our thought, and that means that the issues over same-sex marriage are much more difficult than they ought to be.

If we properly distinguish the religious and legal relationships, it would be perfectly clear that the state can authorize legal marriages between persons of the same sex, but it can say nothing about religious marriages. Clergy do not have to perform same-sex marriages. Religious organizations do not have to give religious recognition to same-sex marriages. And similarly, where the disagreement is reversed, states do not have to recognize religious marriages between same-sex partners, but neither can they prohibit or penalize religious marriages that lack legal effect.

All of this should be clear, but none of it appears to be clear. Already, there have been conflicts in litigation in both directions. The Becket Fund is publishing a fine volume of essays on further conflicts to be anticipated. The nature of marriage, the relationship between religious and legal marriage will be important issues for the Center’s second 25 years, provoked by increasing acceptance of same-sex marriage. The only solution will be to begin separating the two statuses, recognizing the rights of both church and state to make their own rules.

The Muslim population will grow, unless we shut down immigration persistently and effectively, which is verily possible with respect to Muslims, but I think not likely. Muslims have been worried about active persecution, and so they haven’t been aggressive about free exercise litigation, but some such cases have already been filed and I think we can foresee more litigation over veils and head coverings and employment, in airports, on driver’s license and identification cards, perhaps in public schools. Litigation over regulation of Islamic schools, and if voucher programs get off the ground — which I don’t think is going to happen — but if they do, then over more intense regulation of Islamic schools that take government money. Conceivably, litigation over sacrifice and at Eid-ul-Adha. There’s a pending Santeria sacrifice case in a trial court in a Dallas suburb right now. Two sides of that issue haven’t gone away either.

I predict voucher programs will not grow, and that the fight will be in the states. The Supreme Court has largely returned the question of vouchers to the states, but no general program has been enacted. All the existing programs are tied to failing schools, or to particular cities known to have large numbers of failing schools.

There are also the charter school programs, which differ in a variety of ways, but most importantly, I think, they don’t create an entitlement. They created one school at a time.

There is political resistance to vouchers, and where the programs are enacted, there is litigation under state constitutions. I think this will probably not change. I said there’s a large coalition in
support of vouchers, but there seems to be an even larger coalition on the other side: the public school lobby, the teachers’ unions, the opponents of taxes and government spending, suburban parents who are happy with their schools and fearful the choice programs will bring in children who are difficult to educate and might disrupt the status quo. Republican support for vouchers is half-hearted because they support vouchers, but oppose the means for paying for vouchers. If the fourth great awakening fades away, as I predicted, the evangelical component of the pro-voucher movement will become less intense. The number of evangelical schools will likely decline.

Voucher programs will raise many difficult issues if they are enacted. How intrusively can the state regulate once it is paying the bills? Can some schools be excluded altogether because their curriculum is incomplete – think of schools that teach only religion and very little of the secular curriculum – or can they be excluded because they teach intolerance, or anti-Americanism, or other ideologies that undermine constitutional commitments? If we took those issues seriously, courts and legislators would have to think about a question they have studiously ignored, one of the few things the state has a compelling interest in insisting that every child learn. Those issues will arise sporadically with respect to the small programs in place, but they will not arise in the sustained and focused way that would follow if a populous state enacted a generally applicable voucher program. I think we’re likely to continue to duck those questions.

Let me say just a little bit about the Court. Who will be deciding these cases? Let’s start with the easy part. In 2032, Chief Justice Roberts will be 77. Justice Alito will be 82. Justice Thomas will be 84. Quite possibly, they’ll still be sitting in the Court’s three center seats, and if not, they will have been there for most of the Center’s second 25 years.

Who will be serving with them and with what predilections? That depends on politics, and politics is even harder. We may get a long run of Democratic dominance arising out of Iraq, but just as easily, Iraq will be a disaster in the administration from 2008 to 2012, and Republicans will blame Democrats. Democrats lost Iraq, and if we’d been left in power, we were on the brink of victory. Things would have been different.

Very long-term punishment of political parties is a rare thing in American politics. If a party is blamed for invading a state, destroying its physical capital, destroying its social system, killing and maiming all its young men, it can be punished for a century. That’s what happened to Republicans in the South after the Civil War. But short of that, politics is about what have you done for me lately, and what will you do for me next, and I don’t think it’s very likely that either party is going to have a huge dominance over the next 25 years.

With the longevity expected of Roberts, Thomas, and Alito, Democrats have to fill five of the remaining six seats to have a majority. Could happen; I don’t think it’s very likely. The Supreme Court will remain conservative for the Center’s second 25 years.

Suppose we were sure of that. We knew who will control the White House and the Senate. What would that tell us about the Supreme Court? Well, we’d have a better idea, but it would still be very far from a sure thing. Two political parties have competing visions of the Constitution, and of religious liberty in particular. Those alignments have lasted for 25 years now, which is a long time. They are subject to change. Both party coalitions are fragile. Both
party coalitions have quite inconsistent elements among them. These coalitions could break up, could realign, groups could hive off. We may be seeing some of that in the current Republican primaries.

Both sides have their own theory of why they’re going to dominate the future. Both sides are probably wrong.

The division on the establishment clause has been very clear on party lines. The division of the free exercise clause, much less so. Both liberals and conservatives are divided over free exercise. You know, religious conservatives want strong free exercise protections. Secular conservatives see that as federal judicial activism. Liberals are divided between civil libertarians and people who think that free exercise rights really just benefit conservative believers.

So anything could happen. If, as I predicted, the Great Awakening comes to an end and religious intensity subsides, then the establishment clause may not loom nearly so large in Supreme Court appointments as it has over the last 25 years. The free exercise clause has never loomed very large, and what a justice thinks about free exercise is always a surprise that we learn about after he gets there. But none of that is at all certain, and fundamentally, we don’t know which side is going to be doing the appointing.

Well, so I’ve stuck my neck out and made some real predictions. This is a fool’s errand. If I am right, the only payoff is an old man’s bragging rights.

I, too, will be 84 in 2032. And if I am wrong, the payoff is ridicule. We all remember the 19th century director of the patent office who says it was about time to shut down, everything important has been invented; and I hope I’ve avoided howlers like that, but only time will tell.