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ARTICLE

# JUSTIFYING FREE EXERCISE RIGHTS

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## I. INTRODUCTION

Looking at religion clause doctrine, particularly free exercise doctrine, from the perspective of the entire panoply of constitutional rights, it is hard not to be struck by what seem to be perplexing irregularities. An overview of doctrinal development in other areas, free speech and equal protection, for example, reveals fairly dramatic changes over time, a contemporary focus on a limited, but shifting, set of controversial issues, and what appears to be a settled core of accepted principles. Free exercise doctrine looks very different.[1]

Here, there have been changes in one sense. During the last half century, there have been two sharp doctrinal discontinuities. But the net effect of both—the commitment to a relatively invigorated religion clause juris-

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1. Articles about constitutional rights of religious liberty and equality, subjects that involve a mixture of free exercise, establishment clause, equal protection, free speech and privacy and autonomy doctrine, need to set out basic assumptions and parameters these days if they are going to be articles and not very long books. I envision this article to be the beginning of an inquiry that will continue beyond this particular work, but, even so, there are some foundations and conclusions that I accept, and will simply describe, as given without providing much in the way of additional justification.

First, I approach the question of constitutional rights as a professor of law in the traditional sense, not as a philosopher, historian, story teller, social scientist, or theologian. I do not discount the relevance of all of these professions to the study of law in general and the religion clauses in particular. I simply recognize that I operate from a different perspective. As a law professor, I am primarily interested in studying the development of doctrine that provides a practical meaning for the open-ended language used in the Constitution's text. My job, as I see it, is to attempt to describe and justify the ways in which constitutional provisions limit what governments can do.

Second, I view constitutional law as a mixture of experimental, pragmatic, and political legal judgments that evolve out of a system that respects tradition, stability, and substantive continuity to a significant extent—much more than legislatures and executives do, but certainly far less than any system that claims to pronounce permanent rules. Constitutional law is only long standing (as close to permanent as it gets) to the extent that the pragmatic and political consensus of the national community over time comes to accept it as worthy of respect. I do not propose this as a normative thesis. I think it is an accurate description of what constitutional law is and has been.

prudence exemplified by cases such as *Sherbert v. Verner*[2] and *Wisconsin v. Yoder*[3] in the 1960s and '70s and the repudiation of that commitment in *Employment Division v. Smith*[4] in 1990—leaves us largely in the same place we were before the first discontinuity occurred. Religious beliefs and speech are rigorously protected although not to any greater extent than any other subject or viewpoint of expression.[5] Religious practice is largely unprotected except in the extraordinary circumstance when it is singled out for discriminatory treatment. While free speech and equal protection doctrines have progressed in new directions, free exercise caselaw has traveled in a circle.

Moreover, controversy regarding free exercise doctrine is not limited to a discrete class of unsettled questions. Instead, nothing is settled. The entire meaning of the clause is an open question as to which there is little consensus on anything. History provides few definitive answers.[6] The very idea that there may be a theory on which to base the protection of religious liberty is seriously challenged.[7] The current Supreme Court's interpretation of free exercise rights is under continuous challenge.[8]

That is not all. There is an even more glaring distinction between free exercise jurisprudence and that of other constitutional rights. Looking at rights across the spectrum of constitutional guarantees, it seems clear that rights are complicated political goods. Adjudicating the meaning and application of rights is generally a difficult business. Free exercise rights should not be any different. From my perspective as a constitutional law professor, I think it is self-evident that religion, religious liberty, and the relationship

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2. 374 U.S. 398 (1963).

3. 406 U.S. 205 (1972).

4. 494 U.S. 872 (1990).

5. *See* Mark Tushnet, *The Redundant Free Exercise Clause*, 33 Loy. U. Chi. L.J. 71, 71-73 (2001) (arguing that as a result of recent case law, the scope of the free exercise clause is "quite small" and is largely redundant to the protection provided by other rights).

6. *See e.g.* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1417 (1990).

7. *See* Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford U. Press 1995); *see also* Stanley Hauerwas & Michael Baxter, *A Contemporary Perspective of Religion's Views of the Law of Church and State*, 42 DePaul L. Rev. 107, 110 (1992) (explaining why the authors are "dubious about the intelligibility of 'freedom of religion,' especially when it is put forth as the centerpiece of a political project such as the United States of America").

8. *See e.g.* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 Ind. L.J. 77, 78-81 n. 9 (2000). Much of this criticism of *Smith* is richly deserved. As Chip Lupu explained,

> Prior to *Smith*, lawyers continued to file free exercise complaints, and the existing body of law forced government attorneys and judges to focus with care upon the precise facts and relevant governmental interests in each case. Now, most free exercise claims will be summarily rejected with citation to and brief discussion of *Smith* . . . . *Smith* will no doubt be successful in realizing its author's central objectives—discouraging free exercise litigation and freeing courts from the federal constitutional obligation to weigh state interests against the impact upon religion worked by state policies.

Ira C. Lupu, *The Trouble with Accommodation*, 60 Geo. Wash. L. Rev. 743, 758-59 (1992).

of religion and the state raise complicated constitutional law questions. But from the perspective of constitutional doctrine, this is not an obvious conclusion. Free exercise doctrine is generally expressed as a simple formula, or more accurately, as a debate between two simple formulas. The current regime provides for the rigorous review of laws that single out religion for discriminatory treatment, but offers no protection to religious individuals or institutions against neutral laws of general applicability. The alternative model requires strict judicial scrutiny of all laws that substantially burden the exercise of religion. For the most part, that is all there is.[9] Comparing religion clause doctrine to free speech or equal protection doctrine today is like comparing a Dick and Jane reading primer to *The Brothers Karamazov*.[10]

I am continually astonished by this reality. I believe it is wrong headed and needs to be corrected. I have no easy explanation for the lack of doctrinal development in this area, but I suspect that part of the problem is an unwillingness to recognize the need for compromise in an area that relates so directly to what many people believe are, and experience as, eternal truths. If that is so, it suggests a fundamental misconception about constitutional law. Religion may be about transcendent principles, but constitutional law has a distinct political component to it and, as such, reflects pragmatic compromises[11] as much as it does normative axioms.

Constitutional values are ideals. Constitutional doctrine represents our best attempts to advance those ideals in a rapidly changing world of extraordinarily diverse and conflicting interests and activities. Few rules, and certainly no rights, are going to be absolute and enforced without compromise in this system. But our inability to completely immunize the exercise of a right from regulation, and our recognition that there are other important interests that need to be taken into account in determining the scope of the right and the extent to which it is protected in specific circumstances, does not undermine the validity of our commitment to the right's protected status. The variable protection provided to rights makes legal life more complicated and the justification for doctrinal conclusions more difficult, but it

9. A few judges and commentators have attempted to develop free exercise doctrine by building on the hybrid rights and individualized assessment exceptions recognized in the *Smith* decision. These efforts are well intended. Unfortunately, neither exception provides anything close to a viable foundation for such an attempt. *See* Alan E. Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 138-45 (2002).

10. Establishment clause doctrine has been more complex, but the shift in the case law is toward a reduction in rules and standards in this area toward the adoption of an ill-defined neutrality principle.

11. *See* Catherine Drinker Bowen, *Miracle at Philadelphia* 184-87 (Book-of-the-Month Club, Inc. 1966) (describing the essential compromise between large and small states resulting in creation of the House of Representatives and the Senate); Joseph Story, *Commentaries on the Constitution of the United States* 212-19 (Carolina Academic Press 1987) (commenting on the decision not to include a uniform right to vote in the Constitution).

does not make our attempts to protect the right unworthy of support.[12] We seem to instinctively understand this reality for some rights such as freedom of speech. No serious scholar suggests that freedom of speech should be constitutionally unprotected or that the protection it receives is worthless because of the innumerable accommodations of competing needs and concerns reflected in the case law. The same recognition should hold true for religious liberty.[13] Thus, in my view, if we are serious about protecting religious liberty, we have to start thinking about the development of new and more elaborate free exercise doctrine. This is going to be a difficult undertaking. To some extent, it will have to start from scratch. But the real issue here may not be the difficulty of the task as much as it is convincing the political and legal community that the job is worth pursuing.

Not all the blame for the anemic, simplistic and underdeveloped state of free exercise doctrine can be directed at the courts. Constitutional doctrine does not develop in a vacuum. It responds in part to the crisis and controversies of the time. Much of contemporary free speech doctrine, for example, evolved out of the turmoil of the civil rights and antiwar movements of the 1960s. More importantly, changes in constitutional law reflect new political and cultural understandings. Judicial recognition of the equal protection rights of African Americans and women and of the due process rights of privacy and autonomy emerged from evolving political attitudes in American society. Ultimately, there has to be some resonance between constitutional law and the political sensibilities of the community. New constitutional doctrine sinks roots in the soil of our political culture. It will whither if it is incompatible with its location.

Accordingly, before we can begin developing doctrine, it is necessary to resolve the question of whether serious constitutional protection of religious liberty is justified—a question, which, after over 200 years of constitutional debate and decision making, remains unresolved.

Some of the reasons for this uncertainty are relevant to all constitutional rights. Constitutional law identifies and protects substantive rights against, and imposes structural limits on, what democratically elected governments do—even when the government's decisions are fully responsive to, and fairly representative of, the majority's will. The natural tendency of the majority to assert its prerogatives and reject limits on its authority cre-

12. *See e.g.* Stephen L. Carter, *The Culture of Disbelief* 144 (Basic Books 1993) (recognizing that in implementing free exercise doctrine that takes religious liberty seriously: "Deciding when to allow exemptions would place a tremendous burden on the courts—but there is no reason that the hard work of protecting freedom should be easy, and, certainly, the fact that the task is difficult is no reason not to undertake it.").

13. Judge Noonan accurately describes the development of free exercise doctrine when he states, "By trial and error, by exaggeration and careful qualification, by broad declarations and hairsplitting distinctions, by retreats and reaffirmations, human beings in conflict are developing doctrine . . . . The experiment goes on." John T. Noonan, Jr., *The Lustre of our Country: The American Experience of Religious Freedom* 6-7 (U. of Cal. Press 1998).

ates a continuing burden of justification for those who demand judicial protection of their rights. Rights are antidemocratic. They are also costly. The state and private individuals incur what they consider real losses and thwarted objectives when religious activities are exempted from general legal requirements.

Yet these concerns about the cost and antidemocratic nature of rights have not prevented the courts from vigorously defending freedom of speech against state regulation and suppression of expression and equal protection rights against racial, ethnic, and gender discrimination. While some issues are still hotly debated in these areas, campaign-finance reform and affirmative action, for example, the core justifications for protecting these rights are accepted. If we judge the persuasive power of arguments by the effect they have on their audience, the justifications for religious liberty appear to be more problematic and less convincing than those of their constitutional counterparts. Therefore, the place to begin a project dedicated to the development of adequate and useful free exercise doctrine may be with the question of why it is so hard to persuasively justify protecting religious liberty.[14]

## II. Justifying Religious Liberty

I think most Americans would identify religious freedom as an important part of our constitutional heritage. If that is so, why is it so difficult to successfully justify an interpretation of the free exercise clause that provides meaningful protection to religious practices and institutions against government interference? It may be that while Americans pay lip service to the idea that religious liberty is a basic right, many of us have not been fully persuaded that there really is a right here that deserves the same degree of judicial attention and political respect that other rights receive.

I think there are several related reasons that help to explain this lack of commitment. These include ideological conflicts about the justifications for religious freedom, the difficulty in developing rules that recognize that religion is both a right to be protected *and* the motivating force behind some of the very governmental decisions from which religion seeks protection, the traditional American reluctance to accept the formal privileging of anything and anyone, and uncertainty about how the costs of religious liberty can be taken into account pursuant to some coherent standard of review. In the pages that follow, I hope to explain why and how the first two of these issues undermine support for a rigorously enforced free exercise clause and

14. *See e.g.* Carter, *supra* n. 12, at 145 (concluding that "[a]s with every fundamental human right, the ultimate security of religious liberty lies not in judges' opinions but in citizen's commitments; it is vital that we ourselves, the people of the United States, before allowing our government to trespass on religious freedom, balance the depth of our moral commitment to the policy in question against the value of religious autonomy").

to offer some tentative suggestions as to how these concerns might be mitigated.[15]

### A. *Ideological Conflicts about the Justifications for Religious Freedom*

Sometimes debate about the justifications for protecting a right matters a great deal, because the rationale accepted for protecting the right may substantially determine the scope of the right. Free speech is an obvious example. If free speech is justified solely for instrumental reasons relating to the role of open debate in the operation of democratic self-government, speech that lacks political content or political relevance may not fall within the First Amendment's coverage. Justifying freedom of speech on dignitary or self-realization grounds supports a broader constitutional shield that encompasses a greater range of expression.[16]

Disagreements about the justifications for protecting the free exercise of religion are different. Here there are two competing justifications. One is essentially secular; the other is overtly theological. The secular rationale suggests that religious liberty is a dignitary right. "It is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition."[17] Just as contemporary constitutional law protects self-defining choices about whether a person should marry or decide to have children, it should respect individuals' decisions regarding their religious faith.[18]

The theological rationale is grounded on the existence of a higher authority—divine law—that supercedes the conflicting mandates of civil government. Religious individuals who recognize the commands of G-d should not be confronted with the dilemma of either violating state law and exposing themselves to civil sanction or violating G-d's law and exposing themselves to the consequences of such transgressions.[19] This initial premise cannot support religious freedom standing alone, however. Belief in a higher law that preempts inconsistent government edicts only supports religious liberty for those who correctly understand what G-d requires of us.

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15. I anticipate discussing how the costs of religious liberty can be taken into account in developing free exercise doctrine in a future article. Time and space constraints preclude an analysis of this complex issue in this piece.

16. Equal protection is another example. If the rigorous review of racial classifications is justified under a political process model, there is no need to strictly scrutinize laws that disadvantage the white majority such as affirmative action programs. Equal protection justifications predicated on a "color-blind" model require a broader application of strict scrutiny to all racial classifications regardless of the minority or majority status of the racial group being burdened.

17. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89, 95 (1990).

18. *Id.* at 95-102.

19. *See e.g.* John H. Garvey, *What Are Freedoms For?* 52-53 (Harvard U. Press 1996).

This argument does not explain why religious beliefs and practices the majority rejects as false should be respected and protected under the free exercise clause rather than corrected and discouraged by government sanction.

The second part of the theological justification is grounded on two religious truths: "the belief that faith, to be valid and acceptable to God, must be uncoerced"[20] and the related conviction that it is futile to coerce people to believe in G-d.[21] Government cannot use force to correct false faiths, because insincere worship is worse than unsatisfactory to G-d. The use of coercion to encourage or discourage religious beliefs and rituals is itself a transgression of higher law.

The interesting thing about this debate as to justifications is that it does not appear to relate to the degree to which we should protect religious liberty. If either the secular or theological justification is accepted, it is capable of providing support to a vigorously enforced free exercise clause of substantial scope. Yet the debate over these competing justifications is taken very seriously by its participants. It seems to matter a lot whether the secular or theological justification is offered in defense of free exercise rights, even if the doctrinal consequences of adopting one justification or another are limited or nonexistent.

In part, I suggest the disagreement over justifications represents something of a status war. Proponents of one set of justifications over another want the foundation of the right to resonate with the beliefs and understandings on which they ground their identity and their perception of the world. This is not a concern that should be treated lightly. One's status in society matters a great deal to people. American history involves a continuing struggle over whether the diverse groups that make up our extraordinarily heterogeneous society should be included in, or excluded from, the public life of our communities. Whether citizens are of equal worth, in the eyes of the state, notwithstanding differences based on race, religion, national origin, and gender has been a defining question for American society and its legal system. When the government or the courts act for reasons that reinforce a group's core beliefs, it communicates a message of inclusion and affirmation that most groups value highly.

In the area of religious liberty,[22] the problem of inconsistent justifications tends to manifest itself with regard to two related issues: the ability of speakers to express authentic arguments and disagreement as to the audience to whom these arguments should be addressed.

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20. Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?* 21 Cardozo L. Rev. 1243, 1250 (2000).

21. *See e.g.* Garvey, *supra* n. 19, at 49-51.

22. I focus primarily on free exercise rights here. Obviously, debates over the meaning of the establishment clause raise many other status conflicts.

*1. Who can speak in defense of religious liberty?*

One obvious answer to this question is, of course, "Anyone who wants to." But, this obvious answer does not really address the reality that the way we conceptualize the justifications for religious liberty may substantially influence who can participate in the discussion. There is a strange variation of a common problem here. It is not unusual to witness a debate in which the two opposing sides are so far apart in their positions that they cannot really talk to each other. Persuasive dialogue is impossible because of the lack of common ground shared by the speakers. What is distinct in the religious liberty area is that even people on the same side have trouble talking to each other.

Part of the problem reflects the status concern I mentioned earlier, the feeling that the reasoning offered and accepted in an argument validates the beliefs and identity of the persons who share that world view and marginalize those who do not. But there is another aspect to this issue. Most people, including lawyers and academics, feel a strong need to speak authentically about issues that matter to them. They are reluctant to base arguments on a foundational premise to which they do not adhere, and this reluctance seems particularly acute when the subject of the debate involves religion. Moreover, when speakers base their argument on premises they do not believe, and are known to affirmatively reject, their contentions may lack persuasive force. Thus, nonreligious individuals may have difficulty expressing arguments defending religious liberty that are grounded explicitly on theological foundations.[23] Conversely, many religious people reject the primacy of personal autonomy on theological grounds,[24] and, accordingly, feel conscientiously disabled from offering autonomy-based arguments in support of religious freedom.

I do not want to overstate this limitation. Some people are quite comfortable expressing both justifications. Further, as we shall see, I think

23. To the extent that the argument is grounded on the tenets of particular faiths, some form of Christianity, for example, the problem is arguably exacerbated because the size of the group disabled from utilizing the argument increases. Thus, religious people who do not subscribe to Christian beliefs cannot authentically profess arguments grounded on a theology to which they do not adhere.

24. *See e.g.* Garvey, *supra* n. 19, at 42-57; Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 172 (1992). I admit that I have some difficulty understanding these condemnations of autonomy as a justification for free exercise rights. McConnell himself, for example, cites Elisha Williams, a prominent Protestant clergyman in colonial America, as someone whose ideas were reflected in political thought about religion at the time the Constitution was drafted and ratified. McConnell, *supra* n. 20, at 1246-47. Yet McConnell also quotes Williams as arguing that from a Protestant perspective, any "faith and practice which depends on the judgment and choice of any other person, and not on the person's own understanding judgment and choice, . . . [will not] pass for any religion at all. No action is a religious action without understanding and choice in the agent." *Id.* at 1250. On its face, at least, language like this does not seem to be inconsistent with the idea that religious freedom is grounded on the liberty of the individual to exercise judgement and choice (personal autonomy) in reaching conclusions about religion.

there is more room for bridging theological and secular arguments in favor of protecting religious freedom than is sometimes recognized. But I recognize that not everyone will be able to cross that bridge.

Moreover, aside from the social awkwardness presented by this situation, it is not clear that the "speaker problem" has to undermine support for free exercise conclusions. There is nothing intrinsically problematic about different people offering inconsistent, alternative arguments to support a position in this circumstance. This is not the legal game of alternative defenses based on inconsistent factual predicates, which, while legally permissible, will undermine our intuitions about the truth of either. (My client did not kill the murder victim, and even if he did, his actions were not premeditated.) Indeed, when inconsistent rationales are offered by different speakers to support the same legal principle, there is a sense in which the validity of the principle is reinforced—since it is justified notwithstanding the controversy and uncertainty surrounding the competing justifications for it. Even if we do not know whether the theological rationale or the justifications based on personal autonomy offer a more accurate account of the reasons why religious liberty should be protected, we can still be assured that in either eventuality the free exercise of religion ought to receive constitutional protection.

The theological justification arguably raises a problem if it is insisted that government may not take any action grounded on the state's determination of religious truth. But the higher-law justification remains powerful even if the state draws no conclusion as to the merit of the religious person's beliefs—as long as it recognizes the sincerity and conviction with which the belief is held and the possibility that some set of religious convictions may be true. If an agnostic position by the state is acceptable on this issue, (and it is hard to see why it should be impermissible), the dilemma of the religious individual still deserves our attention and concern. Moreover, while government may not have the authority to validate the truth of any theological proposition, it is generally recognized that it can reach decisions that are supported by both secular and religious justifications.

With that understanding, the "speaker problem" is simply one of communication logistics. Different speakers may urge support for free exercise rights from either a religious or a secular perspective. The issue becomes much more difficult to resolve, however, if either the theological or the secular argument is accepted as the exclusive foundation for protecting free exercise rights.

This is an unlikely event, particularly with regard to the theological justification. Carried to its ultimate conclusion, if the only explanation for protecting religious liberty is that doing so is in accord with G-d's will, and no secular argument supporting an interpretation of the right will be considered relevant, the free exercise clause would conflict with the constitutional mandate prohibiting government from adjudicating or declaring religious

truth.[25] Moreover, there are other problems with exclusive reliance on either the secular or theological justifications. If only one justification is relevant, arguments to maintain, reduce, or expand the scope and rigor of free exercise protection must be couched in terms of that frame of reference. Depending on which justification is adopted, either secular or religious individuals supporting religious liberty may find this result more than disconcerting. A right they value is dependent on arguments they do not believe, and will be interpreted pursuant to a discourse in which they can not meaningfully participate.[26] Indeed, it appears that the audience empowered to decide the issue is one to which they do not and cannot belong. This is a more serious problem than one of mere logistics. Resolving it requires us to direct our attention to the audience to which these constitutional arguments should be addressed.

### 2. *Who decides whether and why religious liberty should be protected?*

In a sense, the "audience problem" represents a conflict over ownership. Whose vision of this right should control our understanding of its meaning? Who should get to decide why and whether we should protect the free exercise of religion?

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25. Commandment number six of Judge Noonan's Ten Commandments of religious liberty asserts that "You shall mark that government when it seeks to adjudicate the truth of a religion falls afoul of the First Amendment." Noonan, *supra* n. 13, at 357. I assume that this principle applies to judicial pronouncements explaining the purpose and meaning of constitutional principles themselves. To be sure, individual framers may have been motivated to provide protection to religious liberty based on their own religious convictions. But that historical account does not permit a branch of government, here the constitutional courts, to ground its interpretation of a constitutional provision on an explicit declaration of religious truth. *See* Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 88 (2002) (concluding that it is unconstitutional for government to "declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth"). Steven Smith has argued that this unwillingness to ground law or constitutional doctrine on a religious rationale substantially undermines our constitutional commitment to religious freedom since it precludes "government from recognizing and acting upon the principle justification supporting that commitment." Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 181-88 (1991). As I suggest later in this article, I believe there may be persuasive justifications for protecting religious liberty that bridge theological and secular arguments. *See infra* nn. 32-52 and accompanying text.

26. My intuition, based solely on personal experience, is that this is more a problem for the secular individual than the religious citizen. Many devoutly religious people appear willing and able to argue public policy and constitutional law issues on secular terms. To some, there is a recognized split of authority that relegates certain issues to Caesar's control and as to which secular arguments likely to be influential to Caesar may be presented. I see far less evidence of nonreligious people couching their arguments in explicitly theological terms, even if the decisionmaker being addressed is recognized to be a seriously religious person, or of members of a minority faith comfortably explaining public policy arguments in terms of the theological beliefs accepted by the religious majority. *See* Jay D. Wexler, *Book Review*, 91 Geo. L.J. 183, 208 (2002) (asking with regard to a religiously clothed public square, "What can a Taoist bring to a debate over the proper meaning of the Gospel of Mark? What can a Shintoist say about the meaning of Jesus's resurrection?").

A few years ago in his book, *What Are Freedoms For*, John Garvey proposed an answer to these questions. Religious freedom should be justified by theological premises persuasive to religious believers, rather than by reference to theories about personal autonomy, which would be rejected by many devout individuals. It does not make sense, Garvey argued to

> base[ ] religious freedom on a view of human nature that many religious people would reject . . . [because] religious believers play a crucial role in free exercise law. . . . They are like the New England town meeting—the paradigm around which the theory is built. If the theory does not work for them there is probably something wrong with it.[27]

Further, Garvey explained, religion-based justifications for protecting free exercise rights provide:

> the most convincing explanation for why our society adopted the right to religious freedom in the first place. It is possible to imagine a society of skeptics insisting on a free exercise clause, but the idea is far-fetched.
>
> The religious justification is also the reason why many, perhaps most, religious believers claim the right to freedom today. It enables them to perform their religious duties, and to avoid religious sanctions. It allows them to pursue the truth, as God allows them to know the truth. And no other course could bring them closer to God.[28]

I wrote a review of Garvey's book in which I criticized the above analysis. In essence, I suggested that religious people have a vested interest in protecting free exercise rights because they are often the direct beneficiaries of a vigorously enforced free exercise clause. Focusing justifications for protecting religious liberty on this constituency misunderstands the problem. The people who need to be convinced about the value of protecting religious liberty are nonreligious individuals who see free exercise rights as something that imposes costs on them without providing them any benefit. These people, I suggested, are the audience that needs to be persuaded that religious liberty merits constitutional protection.[29]

Looking back on the question, I think that Garvey and I were both about half-right (maybe a bit less than half). Garvey was correct that the justification for protecting religious liberty needs to be persuasive to religious individuals. But he failed to adequately explain why this must be so. Religious people must be convinced that religious liberty needs to be protected by the Constitution, and taken out of the hands of the political branches of government and the majority—not because religious individu-

27. Garvey, *supra* n. 19, at 45-46, 56-57.

28. *Id.* at 57.

29. Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 Cornell L. Rev. 767, 811-13 (1998).

als understand and experience the value of religion and benefit from the protection offered by this right, but rather because they represent the majority in the United States and cannot be trusted on this issue. As Judge Noonan notes, "It is easy to be tolerant if you don't believe."[30] What history demonstrates is that for those who do believe that they know G-d's truth, the desire to suppress false representations and practices can be a powerful source of oppression. Religious communities, accordingly, are a particularly critical audience to convince of the need to protect the beliefs and practices of what they would characterize as false faiths.[31]

For my part, while I failed to appreciate the importance of developing justifications for free exercise rights that are meaningful to religious audiences, I think I was correct that nonreligious constituencies also represent critically relevant audiences. Arguments on this issue have to be directed at, and persuasive to, secular and agnostic members of the polity as well as religious adherents.

If both audiences need to be persuaded, however, there may be a serious problem with the way that justifications for religious liberty are currently presented. Commentary defending religious liberty does not seek to identify common ground among diverse audiences. Instead, each constituency seems to implicitly insist that the justification for religious liberty is a zero-sum-game as to which only the arguments that resonate with their own beliefs deserve to be accepted. From that perspective, alternative justifications are far more likely to contradict each other rather than mutually reinforce their common conclusion. What needs to be determined is whether there are justifications for religious freedom that might be more broadly accessible than either the basic autonomy or higher law justification summarized earlier. In brief, can we do better than presenting distinct, competing arguments to separate groups of citizens?

### *a. Bridging Autonomy and Higher Law Justifications for Religious Liberty*

I think there are acts of government oppression that most religious and nonreligious Americans would agree are basic abridgements of the sphere of personal freedom that the Constitution protects. Consider George Orwell's classic novel of a totalitarian state *1984*.[32] Everyone recognizes that the authoritarian society controlled by "Big Brother" involves an unacceptable deprivation of human freedom and dignity.

In *1984*, the hero, Winston, is tortured by Big Brother's ruling party until he admits that two plus two equals five. When his torturer holds up

30. Noonan, *supra* n. 13, at 4.

31. This issue will be addressed in greater depth in a subsequent section. *See infra* nn. 53-126 and accompanying text.

32. George Orwell, 1984 (Penguin Books 1981).

four fingers in front of Winston's face, Winston must actually see five fingers. Numbed by pain, Winston can only scream at his torturer, "Four! Four! What else can I say? Four!"[33]

This is not the end of Winston's suffering. Finally, he is taken to room 101, "the worst thing in the world." For Winston, this is having a cage of starving rats placed over his face. Winston breaks. To avoid this, his greatest fear, Winston begs his torturers to place the cage over his lover's face instead of his own. "Do it to Julia! . . . Tear her face off . . .! Not me!" he cries.[34]

These are terrible scenes, but the brutality of the torture inflicted on Winston is only part of what makes them so frightening. It is not only the inhumane methods of repression that are so devastating about *1984*, it is also the object of the repression. Big Brother uses torture to destroy the essence of Winton's liberty and dignity. Winston is forced to deny what he knows to be true (that two plus two equal four), and he has to betray the person he cares for most in the world, his lover, Julia.

### *b. The First "Bridge" Justification*

These two demands, I suggest, tell us a lot about the basic nature of human freedom in general and religious liberty in particular. Consider the first coerced statement. Winston is told to deny part of his core reality—to deny something that is central to his place in the world and his understanding of the way the world works. There are lots of truths that Winston could have been asked to repudiate that would have diminished the dramatic effect of this episode and the impact the denial had on Winston's personality. If Big Brother had required Winston to admit that at some point in the distance parallel lines meet, I doubt such an admission, repugnant as it may be for a person to deny any statement he believes to be true, would have had the same consequences for Winston. Two plus two equals four is a truth that Winston cannot reject because his belief in it is part of his daily life. It is part of the way he understands everything. If the government forces individuals to deny beliefs that play such a central role in their lives, it has abridged their freedom in the most fundamental of ways.

There is a parallel here to attempts by government to force devoutly religious individuals to deny the existence of G-d or their understanding of religious truth. I think the parallel extends to government mandates that force religious individuals to act as if G-d does not exist or, at least, does not exist in the way that the individual understands and experiences G-d. For many devout individuals, religious precepts are like "two plus two equals four." They represent the basic truths by which persons order their

33. *Id.* at 206-13.
34. *Id.* at 232-36.

lives and their place in the world.[35] A similar parallel applies if a government forces nonreligious individuals to worship and obey what is for them a nonexistent G-d.

Note here that it is entirely irrelevant to this argument whether Winston chooses to believe that "two plus two equals four" through an autonomous act or developed that belief in a variety of other ways. What is key is that the belief exists and that it is a core premise of Winston's life.

Both religious and nonreligious people should be willing to repudiate this kind of an abridgement of liberty. Religious people probably have little difficulty recognizing that people can not be forced to deny basic truths like "two plus two equals four," since this mathematical truism is so accepted generally. They may have more difficulty accepting that an atheist's conviction that G-d does not exist should be treated in a similar way because they believe what the atheist claims to be true is false. A nonreligious person may raise the same objection to conceptualizing religious truths as having any equivalence to "two plus two equals four"; the former to the nonbeliever is myth, the latter is mathematical fact.

But the critical commonality of all three beliefs—"two plus two is four," G-d exists, and G-d does not exist—does not relate to the objective truth of any of the three statements. As my parallel lines example suggests, what is essential here is the role the belief plays in the life of the individual. Asking a religious person to deny the existence of G-d, or to act as if G-d does not exist; asking a nonreligious person to affirm the existence of G-d, or to act like G-d does exist, is like Big Brother insisting that two plus two equals five. All the religious person or nonreligious person can do in response to government pressure to deny his core beliefs is to affirm what he knows to be true and to cry out, as Winston did, "What else can I say?"

This is the first bridge justification I propose for protecting religious liberty. Big Brother can crush human liberty in this way. Our government should be prohibited from doing so. In a free society, government bears a significant burden of justification when it coerces the repudiation of such central beliefs.

### *c. The Second "Bridge" Justification*

In addition to coercing Winston to say that two plus two equals five, Big Brother also forces him to betray Julia, his lover. The core liberty interest here is relational. The relationship at issue is grounded on the love that Winston feels for Julia. Winston is forced to sever the bonds of that relationship in the most fundamental way—by offering Julia as a substitute victim to his torturers.

35. A religion need not acknowledge the existence of a deity for this argument to be persuasive. Adherents of Buddhism, for example, hold beliefs that play the same role in their lives as do the beliefs of monotheistic faiths under this analysis.

It is easy to condemn the brutal destruction of the bond between Winston and Julia. However, Orwell's description of Big Brother here also tells us something important about human dignity and religious liberty. People live in a world of core relationships: friends, lovers, spouses, children, parents. The affection or love they feel for their co-participants in these relationships is an essential part of their lives. Moreover, loving relationships are a source of duty. They create obligations that bind our lives in important ways. If government forces us to breach those obligations, it is forcing us to betray the underlying relationship on which the bond or duty is based. Coercing someone to betray their lover or parent or child infringes on his or her freedom in a profoundly debilitating way. There is a terrible parallel in what happens to Winston in room 101. He is confronted by what he experiences as "the worst thing in the world"[36] because he is being coerced into sacrificing the freedom he values most—the freedom to be faithful to those he loves.

Breaches of relationship-based duties typically involve far less serious betrayals than offering one's lover to be horribly tortured, of course. And not all duties are of comparable importance. Yet we take each breach seriously. Most of us experience some form of these duties and obligations in our lives, and the pressure to breach them, on a regular basis. One commonplace example involves the conflict we experience between the demands placed on our time by our employers and our families. As lawyers, judges, or academics, for example, we may feel pressured by supervisors and our own feelings of accomplishment to succeed in our professional endeavors. Yet we are also bound by obligations that require us to be at home—fulfilling our roles as parents, or spouses, or satisfying our responsibilities to care for our aging parents. The only torture we confront in these situations is entirely internal, but these are not easy conflicts to resolve.

To relate this discussion to religious liberty, let us return to the religious justification for religious freedom. Religion, at least theistic religion, is relational. This essential understanding permeates Judge Noonan's writing in *The Lustre of Our Country*. As Judge Noonan explains,

> [R]eligion is . . . a response to another, an other who is not a human being, an other who must have an intelligence and a will and so be, analogously, a person. Heart speaks to heart . . . There is a heart not known, responding to our own.[37]
>
> [R]eligion is a relationship to God; God is not a category; and categorization misses the living communication between believer and God that is at the heart of the matter.[38]
>
> . . .

36. Orwell, *supra* n. 32, at 233.
37. Noonan, *supra* n. 13, at 1-2.
38. *Id.* at 2.

> For Jews, for Christians, religion is a relation to a Being conceived of as having intelligence and volition. Intelligent, willing human beings respond to an intelligent, willing God. The relation requires a response to a Person.[39]

The conventional religious justification for religious freedom recognizes a relationship between the believer and G-d and that there are duties that arise out of this relationship. However, it describes the source of those duties as a relationship between sovereign and subject: between the lawgiver, the author of the higher law, and the subject who is bound to obey it. Religious liberty must be protected to avoid placing the believer in the untenable position of having to violate either civil law or the obligations imposed on him by a divine sovereign.[40]

It is not clear to me that this justification, however powerful it may be to religious believers, has persuasive force for nonbelievers. The problem is not only that they reject the premise of divine sovereignty. It is that they see the reliance on higher authority as a source of religious oppression, rather than as a foundation for freedom. The recognition that a higher law exists which supercedes civil authority does more than justify respect for the religious liberty of those individuals who demand the right to follow the dictates of their faith. It also raises the specter that adherents of powerful faiths, based on the certain conviction that followers of their faith have correctly determined religious truth, will attempt to impose the requirements of this higher law on non-adherents.[41] As noted previously, the religious justification for religious liberty offers a response to these concerns, and I will discuss it shortly. For the moment, however, let us assume for the sake of argument, at least, that for nonbelievers, the contention that people have the ability to determine divine truth, and that such truths may constitute a higher authority than positive law, represents as much of a threat to religious liberty as it does a justification for religious liberty.

I think there is another way to think about, and to talk about, the relationship between the believer and G-d. We can describe this relationship as one based not only on hierarchy, but also on love. Certainly, both Jewish and Christian theologies recognize this dimension to the relationship between Jews or Christians and their G-d. Jews are told that "And thou shalt love HaShem thy God with all thy heart, and with all thy soul, and with all thy might."[42] Christians follow a similar mandate.[43]

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39. *Id.* at 246-47.

40. *See e.g.* McConnell, *supra* n. 20, at 1247.

41. While Judge Noonan rejects the contention that "persecution was the logical corollary of the absolute conviction of the truth of one's faith drawn by those with the power to persecute," Noonan, *supra* n. 13, at 46, he acknowledges that the history of Christianity including governments in the American colonies often involved the persecution of nonbelievers and religious dissenters by authorities holding absolute convictions as to the truth of their own faith. *Id.* at 46-58.

42. *Deuteronomy* 6:5 (JPS).

The exact nature of this bond of affection may not be that easy to describe. Nothing related to the divine or transcendent is easily discussed because all normal analogies are necessarily imperfect. Still, several analogies are possible. Many religious people describe G-d as the Father, for example. Thus, the loving relationship between parent and child may provide one useful perspective, a perspective that recognizes that duties and discipline are intrinsic to this relationship.[44] The covenant between G-d and the Jewish people has sometimes been analogized to the covenant of marriage.[45]

We can recast the theological argument in support of religious liberty from this alternative perspective. The religious individual will still confront the same dilemma. He or she may still be torn by conflicting obligations owed to the state and to G-d. But now the duty owed to G-d is expressed as a manifestation of a relationship grounded on love.[46] This does not make

43. When asked what is the greatest commandment, Jesus replies "Love the Lord your God with all your heart and with all your soul and with all your mind." *Matthew* 22:36-37 (New Intl.).

44. Both Jewish and Christian Biblical text recognizes this analogy. *See Proverbs* 3:11-12 (JPS) ("[D]espise not the chastening of HaShem, neither spurn thou His correction; for whom HaShem loveth He correcteth, even as a father the son in whom he delighteth."); *Hebrews* 12:5-6 (New Intl.) ("[D]o not make light of the Lord's discipline and do not lose heart when he rebukes you, because the Lord disciplines those he loves, and he punishes everyone he accepts as a son.").

*See also* Blu Greenberg, *Va-Ethanan Deuteronomy 3.23-7.11* in *Learn Torah With . . . : 1994-1995 Torah Annual* 337, 340 (Rabbi Stuart Kelman & Joel Lurie Grishaver eds., Alef Design Group 1996) (explaining that from the perspective of participants within a loving relationship, Jews were able to understand biblical admonitions "[n]ot as texts of terror, nor as emanations from a God of Wrath (as some have described the God of Deuteronomy) but as the voice of a momentarily disappointed lover or a distressed parent, sometimes stern but always loving").

From a slightly different perspective, Harold Kushner answers the question "What does God demand from us?" this way:

> God wants us to choose goodness, to exercise our uniquely human power to sanctify the world. He doesn't expect us to be perfect, but He expects us to be serious about our lives. I have never understood those theologies that picture God as waiting to catch us in a single mistake and send us to hell . . . . For me, the notion of 'God watching' makes me think more of the child learning to ride a bicycle, calling out to her mother, 'Watch me!' so that the mother will take pride in her achievements and will be available to pick her up if she should fall.

Harold Kushner, *To Life! A Celebration of Jewish Being and Thinking* 153 (Little, Brown & Co. 1993).

45. Reuven Hammer describes as follows the meaning of Lecha Dodi, a prayer chanted at the beginning of Sabbath services, which includes the verse "Come, my beloved to greet the bride–Let us welcome the Sabbath."

> Who is the beloved to whom this is addressed? The answer lies in . . . a set of mystic symbols with an ancient history. Judaism has pictured Israel as the bride of the Holy One—so that in some parables we are the husband of the Sabbath and in some we are the bride of God. From the earliest times the Torah and the Prophets utilized the language of marriage, love and faithfulness to describe the exclusive relationship God demands of the people of Israel.

Reuven Hammer, *Entering Jewish Prayer—A Guide to Personal Devotion and the Worship Service* 215 (Schocken Books 1994); *see also* Thomas Cahill, *The Gift of the Jews* 145 (Doubleday 1998) (describing how medieval rabbis conceptualized the relationship between Jews and G-d as being very much like a marriage).

46. This relationship between love of G-d and religious obligation has often been recognized in Judaism.

the duty any less demanding. To state the matter simply, and I hope without undue sentimentality, love can be as powerful a source of duty as fear. It can be a source of duty and obligation as powerful as any mandate imposed by a ruler or sovereign.

Nor should this change in perspective make the conflict for the believer any less severe or the believer's predicament any less deserving of our empathy and respect. It should not reduce our commitment to relieving religious individuals of such burdens by vigorously protecting free exercise rights. It may, however, provide a more accessible way to persuasively present this argument for religious liberty to nonreligious individuals and to religious persons of diverse faiths.

I think there are several reasons why this justification for religious liberty may resonate more effectively to a secular and diverse audience. First, love is considered a more personal and subjective relationship than that of subject and sovereign. It represents a feeling that need not be shared to be believed and respected. If A loves B, I do not need to share those feelings or to believe that B is worthy of A's love to recognize the strength of the obligations that arise from that relationship. Similarly, the truth of love applies only to those who are part of the relationship. An outsider would typically not deny the real affection that A has for B solely because the outsider does not experience similar fondness for either party.[47] Love is particular, not universal.

Second, love is a less threatening basis for a duty-creating relationship for those persons who are not part of the relationship. The obligations created by it are internally driven, not externally imposed. The primary consequence for breaching obligations grounded on affection is the sundering of the bonds of the relationship. Those outside the relationship do not fear such a loss because they do not experience the relationship in the first place.

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> How does one love God? In what ways? The early sages themselves pondered this and found no answer except to assert that, of all possible motivation for worshiping God and doing His will, love was the highest and most desirable. Fear, awe, and respect may be part of the human attitude toward God, but love is the strongest motivation and the one that will endure even under the most difficult circumstances.

Hammer, *supra* n. 45, at 124. The covenant between G-d and the Jewish people has also been explained in terms of a loving relationship. Thus, Blu Greenberg writes, "What is the basis of the covenantal relationship, its underpinning? It is love, mutual love. The covenant is both fruit of love and expression of love." Greenberg, *supra* n. 44, at 337, 339.

47. It is in this sense that people of different faiths can appreciate and be respectful of the differing beliefs of their neighbors. Harold Kushner writes,

> I once heard a Buddhist theologian tell a Christian minister with whom he appeared on a panel, "To say that Christianity is the only way to God is like saying your wife is the only woman in the world." For me to claim that my wife is the most wonderful woman in the world, or that my mother is the best cook, or that my local baseball team is the best in the country is a statement of loyalty, not of fact. Such statements do not conflict with what *you* may choose to say about your wife, mother, or basketball team. It is at least in that sense, the sense that religious claims are statements of loyalty rather than historical fact, that two or more religions can be true even if they see the world differently.

Harold Kushner, *Who Needs God* 195-96 (Summit Books 1989).

Third, concentrating on the caring relationship underlying religious commitment makes an important part of the theological justification more persuasive—particularly to nonbelievers and members of minority faiths. There has always been an intuitive dissonance between the two key principles in the theological justification. The first part of the argument recognizes that G-d, the creator and sovereign of the world, exists, and that religious truth, the nature of G-d's commands, are knowable. These commands or duties are superior to any civil authority, and accordingly, "human beings [must] obey God as they understand Him,"[48] notwithstanding any state mandate (or for that matter constitutional requirement) to the contrary. The second part of the justification asserts that coerced worship and belief is unacceptable to G-d. But this second argument is hardly an obvious corollary to the first premise.

After all, if G-d is the sovereign of the world and his commands are knowable and supercede civil authority, why is it impermissible for religious majorities, convinced of the accuracy of their own beliefs, to coerce compliance with what they "know" to be G-d's law? Isn't that what sovereigns conventionally do? They use force to command obedience to their will. Further, on its face, such coercion often seems to be successful.[49] Indeed, the second part of the theological justification for religious freedom regarding the unacceptability and futility of religious coercion seems inconsistent with the concept of G-d as a sovereign ruler. If obedience to moral laws grounded on religious beliefs may be coerced even when citizens reject the merits of the law, why should direct coercion of religious allegiance be any different? For nonbelievers and members of minority faiths, grounding religious liberty on the traditional theological justification may seem like an inadequate shield against oppression.

The alternative justification may be more convincing. While loyalty to sovereigns may be coerced, it is much more difficult to forcibly create a loving relationship. Love is intrinsically voluntary. We cannot even control it for ourselves, much less subordinate it to the control of someone else. Our intuitions support the idea that loving relationships that have the power to obligate us must be based on voluntary commitments. When proponents of religious liberty contend that the coerced affirmation of religious beliefs and practices is unacceptable to G-d, that argument makes intuitive sense when the relationship between human beings and G-d is expressed in terms of a loving relationship.[50] The idea that a sovereign will only be satisfied by voluntary obedience to his laws requires much more faith to accept.

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48. *See* McConnell, *supra* n. 20, at 1247.

49. *See e.g.* Noonan, *supra* n. 13, at 45.

50. "Man depends on God for all things; God depends on man for one. Without Man's love, God does not exist as God, only as creator, and love is the one thing no one, not even God Himself, can command. It is a free gift, or it is nothing." Harold S. Kushner, *When Bad Things*

Finally, defending religious liberty in these terms links this right with other interests that secular individuals deem worthy of recognition, such as the right to marry, the right to be a parent and raise one's children, and, after the recent decision in *Lawrence v. Texas*,[51] the right to engage in intimate associations. Under this analysis, those who do not practice a religion or hold religious beliefs indirectly benefit from a vigorously enforced free exercise clause because the constitutional commitment to religious liberty reinforces the commitment to other rights that they perceive to be of value. Accepting the idea that free exercise rights may overlap other protected interests does not deny the distinctive nature of religious liberty.[52] It does recognize that there may be underlying principles that support the protection of more than one right, including religious liberty. This does not undercut the reasons why it is important to protect religious liberty. Instead, it reinforces the degree of protection that should be afforded religious liberty by identifying the common roots it shares with several other rights.

### *B. Religion as a Protected Interest and as the Source of Oppression or Subordination*

#### *1. State Mandated Religious Coercion*

An analysis of the problems encountered in justifying the protection of religious liberty cannot be limited to arguments about why religious freedom deserves constitutional respect. It is also necessary to consider why government and social institutions are so willing to substantially burden the exercise of religion. One important answer to that question suggests that religion itself may be a significant motivation for conduct that threatens religious liberty and equality. The religion of one group or community may be a source of the oppression and subordination of another religious group or community.

Religiously motivated interference with religious liberty can occur in various ways. Most egregiously, faiths constituting the religious majority in a polity may act to suppress what they deem to be false or competitor faiths. Other burdens may be less direct, but are still damaging. Minority faiths may be permitted to practice their faith, but will be assigned a secondary or inferior status. Through government speech and regulatory accommodations, certain faiths will be endorsed while others are disfavored. Some burdens will not even be a result of government action. State toleration of

*Happen to Good People* 146 (Schocken Books 1981) (quoting Archibald MacLeish's explanation of what he was trying to say in his play, "J.B.," about the story of Job).

51. *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003).

52. *See* Brownstein, *supra* n. 29, at 817-18. Indeed, I would argue that the fact that protecting religious liberty invokes support from so many other areas of constitutional law is part of the distinctive nature of religious freedom. *See e.g.* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 Notre Dame J.L. Ethics & Pub. Policy 243, 256-57 (1999).

private religious discrimination can isolate and subordinate a minority faith. Privately determined ghettos are still ghettos.

The reality that religion can be the instrument of interference with the free exercise of religion creates a constitutional conundrum that is not easily resolved, as the pages that follow suggest. The rigorous protection of the exercise of religion empowers religious constituencies by freeing them from the burdens of state interference and regulation. In doing so, however, it may facilitate the ability of some faiths to use their power to burden the exercise of religion by other faiths. The risk that a reinvigorated free exercise clause can operate as a sword as well as shield may explain the reluctance of some members of minority faiths and many nonbelievers to support such a doctrinal development.

Consider the following comment by a Protestant clergyman discussing non-Christian religious groups in his community, particularly Hindus, Moslems, and Jews. "[T]heir different religions cannot all be right," he explained. "Some, or all of them, are wrong. And if wrong, [they] are the monstrous lies and deceits of Satan—devised to destroy the life of the believers."[53] The next day, in response to criticism of these comments by clergy of other faiths, a co-religionist of the original speaker defended his remarks.

> What he said was what I understand to be the way in which the New Testament sees other religions: that outside of Christ people are enslaved to sin or to spiritual forces . . . . If all people have a terrible disease and you believe that God has provided a particular cure for everybody that worked—but others were hawking cures that didn't work—you can't just say it doesn't matter. It's false and it's dangerously false in a spiritual sense.[54]

Strong words. They happen to have been expressed by clergy outside of the United States, but such beliefs are not restricted to any geographical location. Similar views are part of our own religious heritage.[55]

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53. Kelly Burke, *No Sacred Cows in Dean's Tirade*, The Sydney Morning Herald A4 (Mar. 10, 2003).

54. Kelly Burke, *Faithful Upset at Dean's Hostile Sermon*, The Sydney Morning Herald A3 (Mar. 11, 2003).

55. Judge Noonan describes the views of Monsignor John A. Ryan, a leading authority on the relationship between the Catholic Church and government, who argued in the early 1940s that the state had a duty to defend the "only one true religion" from the assaults of false faiths. Noonan, *supra* n. 13, at 26-27. There are numerous other examples. As an example of older comments, *e.g.* McConnell, *supra* n. 20, at 1250 n. 28 (explaining that the term "synagogue of Satan" was a term used by Protestant clergy in colonial America to describe the Roman Catholic Church). There are many more recent examples, *e.g.* Frank Lambert, *The Founding Fathers and the Place of Religion in America* 295 (Princeton U. Press 2003) (quoting Operation Rescue leader Randall Terry as exhorting his followers, "I want you to just let a wave of intolerance wash over you. I want you to let a wave of hatred wash over you. Yes. Hate is good . . . . Our goal is a Christian nation. We have a biblical duty, we are called by God, to conquer this country. We don't want equal time. We don't want pluralism."); Gregory Palast, *'I Don't Have to Be Nice to the Spirit of the Antichrist,'* The Guardian ¶ 5 http://www.guardian.co.uk/Columnists/Column/

These beliefs seem on their face to be inconsistent with any notion of religious freedom for false faiths. What virtue is there in allowing people by word or example to spread "the monstrous lies and deceits of Satan?" If the majority, acting through the state, may legitimately prevent parents from offering their gravely ill children snake oil medicine purchased from charlatans when a recognized life saving cure for their condition is freely available, isn't it also entitled to protect children from indoctrination into false faiths—that carries with it all the dreadful spiritual consequences adherence to erroneous religious beliefs entails.[56]

Appeals to respect the conscience of the individual, fortified by the theological principle that "Almighty God hath created the mind free" and therefore rejects any attempt to advance religious truth through coercion,[57] challenge the logic of the above argument and the promotion of religious orthodoxy through force. Not all religious individuals and communities subscribe to principles of conscience today, however, nor were these principles always accepted 200 years ago.[58] Even those faith communities that did accept them in the abstract often violated them in fact. Religious persecution was often the order of the day in colonial America. As Judge Noonan bluntly acknowledges, "[N]either the soil of America, nor the experience of having suffered persecution, nor explicit belief in freedom of conscience were sufficient in themselves to prevent men carrying out persecution on account of religion."[59]

Thus, we have the core constitutional anomaly on which the commitment to religious liberty was grounded in the United States. Religion was the intellectual foundry out of which the constitutional shield protecting the free exercise of religion was created—but religion also produced the spears and arrows of oppression which that shield was created to deflect. If the

0,5673,238501,00.html (May 23, 1999) (quoting Pat Robertson, a well-known American evangelist, "'You say you're supposed to be nice to the Episcopalians and the Presbyterians and the Methodists and this, that, and the other thing. Nonsense. I don't have to be nice to the spirit of the Antichrist.'"); Laurie Goodstein, *Seeing Islam as 'Evil' Faith, Evangelicals Seek Converts*, 153 N.Y. Times A1 (May 27, 2003) (reporting on an all-day seminar designed to teach Christians how to convert Muslims, the author describes a "snappy Powerpoint presentation showing passages from the Koran that . . . [allegedly] proved Islam was regressive, fraudulent and violent"); William P. Marshall, *Is the Constitutional Concern with Religious Involvement in the Public Square Hostility?* 42 DePaul L. Rev. 305, 307 (1992) (explaining how the religious conviction that "one has discovered the path to truth or salvation . . . might lead to attempts to coerce [nonbelievers] for, in a very real sense, the believer is fighting for what she believes is her neighbor's soul," or for the believer's own spiritual salvation); Stop the Hate, *Religion Based Hate Pages*, http://www.stop-the-hate.org/rel-hate.html (accessed Feb. 7, 2004) (website dedicated to cataloging different "Religion Based Hate Pages").

56. *See* Steven D. Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* 144-62 (N.Y. U. Press 2001) (describing the compelling case for religious intolerance).

57. McConnell, *supra* n. 20, at 1251.

58. *See* Noonan, *supra* n. 13, at 28 (explaining the Catholic Church's position condemning freedom of conscience during the first half of the twentieth century).

59. *Id.* at 54.

commitment to religious liberty of the framers of the Constitution, such as James Madison, was grounded on principles that were religious in nature and motivated by religious conviction, it is also true that the threats to religious liberty they were attempting to constrain were also religious in nature and motivated by religious conviction.[60]

The reality that religious fervor can be a source of religious oppression may help to explain why a free exercise provision was included in the United States Constitution. But does it help us to understand why arguments promoting a rigorously enforced free exercise clause are not more favorably received by the polity? Certainly, there are other reasons why some members of larger faiths may not be fully committed to the support of free exercise rights that have nothing to do with feelings of fear or disdain for false faiths. One obvious pragmatic explanation is that some members of large and powerful religions may not feel any great need for judicial protection of their own religious beliefs and practices; they may believe they can achieve whatever accommodations they require through political means.[61] For these individuals, it may appear that a rigorously enforced free exercise clause imposes on them whatever costs are associated with the accommodation of minority faiths, but provides them little in the way of direct benefits.

However, the same concerns about the "lies and deceits" of false faiths that motivate acts of religious oppression may play a significant role in undercutting any commitment to free exercise rights by larger faith communities. If the existence of minority faiths is perceived as threatening to the certainty and cultural hegemony of the majority,[62] the majority may conclude that exempting those faiths from the obligation to obey general laws will only contribute to the spiritual danger they create by offering alternative, and from the majority's perspective, misleading answers to religious questions.[63] Accordingly, it is easy to understand why the passion of religious certainty may reduce support for free exercise protection among some politically self-sufficient religious communities.

It is also the case that nonbelievers and members of minority faiths may be wary of a vigorously enforced free exercise clause in certain cir-

60. *See* John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* 55 (Westview Press 2000) (describing how the developing principles of religious liberty and equality in colonial America that culminated in the religion clauses of the First Amendment were "designed . . . to provide an interwoven shield against repressive religious establishments"); *see id.* at 7-55.

61. *See Smith*, 494 U.S. at 890 (Even Justice Scalia implicitly recognizes in *Smith* that more popular religions have much less need for constitutional protection for their practices than smaller faiths. "It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.").

62. *See* Smith, *supra* n. 56, at 144-62.

63. William P. Marshall, *The Inequality of Anti-Establishment*, 1993 BYU L. Rev. 63, 69 (noting that the role that religion plays in defining the identity of the believer results in "competing beliefs systems . . . [being] seen as threats to the individual's sense of self").

cumstances. This conclusion may seem counterintuitive at first. After all, while nonreligious individuals receive fewer benefits under the free exercise clause than religious individuals, since they have no religious beliefs or practices to shield from state regulation, one would presume that the free exercise clause protects everyone, including atheists, against having to affirm religious beliefs to which they do not adhere or to perform religious rituals against their will. That protection is hardly *de minimis*. And minority religions would appear to be obvious beneficiaries of such constitutional protection since free exercise rights restrict their religious coercion by majorities. The reluctance to support free exercise rights by these constituencies, to the extent that it exists and is related to the fear of religious power, requires further explanation.

### 2. *Religiously Motivated Coercive Constraints on Nonreligious Activities and Noncoercive Public Sector Subordination*

Like-minded religious people wield political power through their exercise of the franchise in the same way that other citizens do. This power may be used to enforce or promote their religious convictions. The free exercise clause operates as a check on the exercise of this political power, but it is a limited check. It does not prevent the adoption of religiously motivated laws that are directed at subjects other than religious belief, worship, or ritual.[64] It also does not prevent government in many cases from supporting religious beliefs and institutions through speech, subsidies, or regulatory accommodations.

In theory, of course, the establishment clause can be invoked to provide an additional check on the use of political power to further these religious objectives. The scope and rigor of some establishment clause constraints have been substantially undermined by recent judicial decisions,[65] however, and the future understanding of this provision is an open

64. The free exercise clause may protect nonreligious individuals against coerced affirmation of belief or coerced participation in religious worship and ritual. But it does not protect the nonreligious individual against religiously motivated laws that regulate conventionally secular activities. Some litigants have challenged the constitutionality of religiously motivated laws under the establishment clause, but such claims are usually rejected when the subject of the law is not intrinsically religious. *See e.g. Harris v. McRae*, 448 U.S. 297 (1980) (rejecting an establishment clause challenge to a federal prohibition against Medicaid reimbursements for abortions). A law may violate the establishment clause if it lacks a secular purpose. As Andrew Koppelman explains, however, the secular purpose requirement of the establishment clause is extremely limited in its scope and only applies to laws that "plainly signify government endorsement of a particular religion's beliefs." Koppelman, *supra* n. 25, at 89. Necessarily, the only laws that satisfy this criteria are those that "have no plausible secular purpose." *Id.* at 116. It is difficult to imagine a law directed at any subject other than religious belief, worship, or ritual that cannot be justified by a secular rationale.

65. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

and hotly debated question.[66] Certainly, continued reliance on its operating as a meaningful constraint on state action is more tenuous than it has been for several decades.

These doctrinal developments regarding one religion clause have significant consequences for the other. A diminished establishment clause makes a rigorously enforced free exercise clause more difficult to justify.[67] The premise on which the redirection of establishment clause doctrine has been based involves a conception of constitutional "neutrality" in which secular and religious constituencies and perspectives share public power and space. "In such a polity," as Michael McConnell, a powerful critic of earlier establishment clause decisions, has argued, "religion can enjoy no special public role, but religious citizens and religious ideas can contribute to the commonweal along with everyone and everything else."[68]

There is much to commend in this understanding of the role of religion in the marketplace of ideas. Private religious expression, along with all other viewpoints and perspectives, has a place in the public arena. But the space that religion occupies is not a privileged one under this framework. It gets no special protection or access to public property.

It is hard to locate and justify a rigorously enforced free exercise clause under this model, however. One might presume that if religion is not to be privileged, but only treated on similar terms with other points of view in the public square, then the area where religion receives distinctive protection would be in the private sphere. Yet that is also rejected by the proponents of a neutrality model. The conventional argument of religion clause critics such as McConnell is that American society inappropriately attempts to isolate religion in a private sphere. Thus, McConnell writes that "[m]odern liberalism tends to protect religious freedom only when it does *not* matter—when it is private and inconsequential."[69] Yet if religion is

66. *See* Witte, *supra* n. 60, at 163 (describing the Court's failure to bring its "unwieldy mass of [establishment clause] precedents to some semblance of order and predictability . . . [so that] for the moment, an integrated law of disestablishment remains only a distant ideal"). *See generally* Symposium, *Beyond Separatism: Church and State*, 18 J.L. & Pol. 1 (2002).

67. I do not think it is a coincidence that the same Supreme Court that vigorously enforced the establishment clause in the 1960s and '70s also produced the two strongest free exercise decisions in our constitutional history, *Wis. v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). Nor is it coincidental that the current Supreme Court that has so substantially reduced the scope and rigor of establishment clause limits on government promotion of religion also decided *Empl. Div. v. Smith*, 494 U.S. 872 (1990).

68. McConnell, *supra* n. 20, at 1264.

69. *Id.* at 1265 (emphasis added). It is beyond the scope of this essay to fully respond to assertions of this kind, but some of the issues it subsumes ought to be identified. Not everyone agrees that there is anything inconsequential about the "private" sphere in general or religion in the private sphere in particular. What occurs in a person's family life or in a house of worship may be private in one sense, but for many individuals, these are critically important arenas of activity. The social value of what occurs in such "private" venues is also well established. Indeed, conservative critics of modern liberalism routinely argue that church and family are the bedrock foundation on which American society is grounded. There may be sound reasons why

provided distinctive constitutional protection outside of the private sphere, how can this framework be described as a neutral political playing field in which "religion can enjoy no special public role?" Religion can not be publicly privileged and treated neutrally at the same time.

A truncated version of free exercise rights, such as the Supreme Court adopted in *Employment Division v. Smith*,[70] arguably comes closer to satisfying this neutrality criterion. Religious practice receives no constitutional protection against neutral laws of general applicability under this analysis. It is only protected against discriminatory treatment. From this "neutrality" perspective, the free exercise clause parallels the establishment clause. The former provides religion anemic protection from the state; the latter imposes only limited constraints on the state's ability to promote religion. The private-public distinction is largely irrelevant under this approach. Neither of the religion clauses seriously restricts government in either sphere.

If we reject *Smith*, however, and privilege religion not only in private life but also in the public arena "when it does matter," we shatter any pretense of neutrality. This alternative, more robust free exercise model that supports a vigorously enforced free exercise clause provides substantially more protection to religious individuals and institutions than their secular counterparts receive. It is not an even playing field when religious teams do not have to obey the same rules that burden their similarly situated secular counterparts in the public arena.

Under this analysis, free exercise rights involve much more than the right of religious individuals to be left alone.[71] Now, the shield has implications for the sword. Liberty is empowering. Freedom from regulatory interference is an extremely valuable political and economic good. It is hard to measure the full extent to which vigorously enforced free exercise rights may facilitate the pursuit of religiously motivated political goals by religious groups, but surely, at a minimum, in close contests where public opinion is fragmented or evenly divided, marginal advantages may be decisive.

Moreover, in particular circumstances, a vigorously enforced free exercise clause creates more pronounced political disequilibrium. In a political conflict between constituencies whose activities and institutions are pro-

religion should not be relegated to these "private" spheres, but the suggestion that its assignment there places it in an inconsequential area where no decisions of importance are reached can certainly be challenged.

70. 494 U.S. 872.

71. Thus, Douglas Laycock's often quoted comment in support of judicial decisions upholding religious exemptions that "one does not establish a religion by leaving it alone," Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Leg. Issues 313, 332 (1996), needs to be amended to some extent. Laycock's statement does not fully acknowledge the relative advantages freedom from regulatory burdens provide to religious institutions and constituencies in cultural and ideological conflicts.

tected by constitutional guarantees and those that are not, the latter groups are at a distinct disadvantage.

Consider the following hypothetical. Assume a democratic polity is subject to the same kind of culture wars that exist in contemporary American society. To simplify matters, let us further assume that debate is centered around several gay rights issues relating to the protection of homosexuals against discrimination by civil rights laws, the legal recognition of same-sex marriages, and the repeal of laws criminalizing consensual acts of homosexual sodomy between adults. As is true in the United States, while there are religious individuals on both sides of each controversy, a clear majority of religious individuals and faiths oppose gay rights.[72] Further, unlike the United States, in this polity there is a vigorously enforced free exercise clause that protects religious practices and institutions against neutral laws of general applicability. Also, there are no constitutionally recognized rights or equal protection principles that would shield homosexual individuals or activities from discriminatory or restrictive legislation.

Is policy debate relating to gay rights an evenhanded political conflict in this hypothetical polity and legal system? It doesn't appear to be. The interests of one side in this struggle are vulnerable to state regulation and sanction. Sodomy can be criminalized. Civil discrimination against homosexuals is permissible. These sanctions constrain gay individuals from publicly identifying themselves. It is hard to marshal political support and fight a political campaign in hiding. By contrast, the other side of this conflict is protected by constitutional law against state interference with its interests. Direct sanctions on, or discrimination against, religious groups is prohibited. Even state action that only indirectly burdens religious practices and institutions will be strictly scrutinized. Further, laws affirming gay rights against private interference must be limited and cannot burden religious conscience or intrude into the operation of religious institutions. Individual choices regarding homosexual conduct and private institutions that facilitate those choices receive no comparable respect. In a political and legal environment in which the protection of religion is constitutionally mandated, but toleration of secular interests and groups condemned by religious ma-

72. *See e.g.* Alvin C. Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 Geo L.J. 719, 725 (2001) (contending that "most Americans objecting to homosexuality do so on religious grounds"); Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 Colum. L. J. 739, 752 (1999) (asserting that "American attitudes toward homosexuals and homosexuality are predominantly derived from Judeo-Christian values and beliefs. From its inception, Judeo-Christian religion has influenced society's attitudes toward sex and sexuality, and is often cited as the primary source of opposition to homosexuality.").

jorities is not, political compromises will necessarily reflect this one-sided reality.[73]

The above analysis may explain why nonbelievers, particularly those whose values conflict with established religions, might view an expansively defined and rigorously enforced free exercise clause as threatening.[74] But what about members of minority faiths? Here, even if a vigorously enforced free exercise clause politically empowered majority faiths, the same constitutional guarantee would protect adherents of minority faiths against the abuse of that power. They would be shielded against both civil discrimination and criminal sanction.

Minority-faith problems with an expanded vision of free exercise rights reflect status and equality concerns as well as religious-liberty issues. Many of the most contentious church-state issues litigated in our society involve the border between private and public expressive and associational activities. At issue are displays of religious symbols on public property and religious speech (particularly prayer and the communication of proselytizing messages) at public events or activities.

These symbols and speech do not directly and specifically burden religious liberty. Cumulatively, however, they may have an indirect coercive effect. No one likes to feel like an outsider—particularly in his or her own community.[75] If a person accepts the tenets of a majoritarian faith, most

73. The political disequilibrium created by constitutional entitlements demonstrates the degree to which Justice Scalia's dissent in *Lawrence v. Texas* is out of touch with reality. To Scalia, any challenges to the criminalization of homosexual conduct should be pursued "through normal democratic means." 123 S. Ct. at 2497 (Scalia, J., dissenting). Yet Scalia sees nothing inappropriate about laws that subject all sexual acts by homosexuals to criminal sanction. Further, he argues in *Romer v. Evans* that since it is rational to criminalize homosexual conduct, homosexuals may be subjected to significant civil sanctions, whether they engage in such conduct or not, because "homosexual 'orientation' is an acceptable stand-in for homosexual conduct." 517 U.S. 620, 642 (1996) (Scalia, J., dissenting). Scalia does not explain exactly what is *normal* about a political contest in which one side (religious critics of homosexuality) receive special constitutional protection against discrimination while individuals on the other side may be subjected to virtually unlimited civil disabilities if they identify themselves as homosexual and sent to prison if they are found to have engaged in any act of sexual intimacy.

74. Concerns about the political consequences of an expansively defined and vigorously enforced free exercise clause are illustrated by David Smolin's stark view of what he sees as an inescapable conflict between traditional theists and proponents of personal autonomy. Smolin writes,

> There will be no ultimate middle ground, no place of comfort and concord in which traditional theist and modernist liberal can live in equal comfort. One can offer the losers of this conflict the comfort of *some* minimum protections; one cannot offer the loser the vision of a society that will permit and sanction their ways of life. The loser will live in a society that is hostile to the continuance of their ways of life, even if force is not literally used to destroy them.

David Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1096-97 (1991).

75. *E.g.* Jay D. Wexler, *Framing the Public Square*, 91 Geo. L.J. 183, 206 (2002) (explaining "that at least part of the resistance to a religiously clothed public square . . . stems from the fear of many members of minority religious traditions that a religiously clothed public square would be dominated by Christian discourse, symbols, ethics, and scripture"); *see also* Smolin, *supra* n. 74,

public religious messages will resonate with and reinforce the individual's beliefs. Conversely, a continued commitment to minority beliefs becomes more difficult to maintain since it results in ongoing dissonance with the expressive environment of public life.[76] Over time, the experience of dissonance, contrasted as it is with the alternative of reinforcement, may constitute a burden on religious choices.[77]

More commonly, the core concern in this debate relates to status differences. As Justice O'Connor's endorsement test for the establishment clause suggests, government support for the religious messages of certain faith communities implicitly assigns the members of those religions a preferred identity. "Direct government action endorsing religion or a particular religious practice is invalid under this approach because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[78] The adherent of a minority faith remains free to practice his or her faith, but not as a citizen of equal worth.[79]

At the poles of the constitutional continuum, First Amendment requirements regarding religious expression are relatively clear. Government speech endorsing religion violates the establishment clause. Purely private

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at 1097 (explaining that opposition to noncoercive religious acts such as commencement prayers do not reflect a "fear . . . that a commencement prayer will give the *appearance* that America is a Christian nation, but rather that America will in fact again become in substance a Christian nation, a nation whose predominant institutions, including government, reflect Christian presuppositions and Christian morality").

76. Sheldon H. Nahmod, *The Public Square and the Jew as Religious Other*, 44 Hastings L.J. 865, 868 (1993) (arguing from a Jewish perspective that "if the public square is pervaded by [religious] views and perspectives, . . . religious minorities and non-believers can only be the losers").

77. Critics of establishment clause doctrine restricting religious displays in government buildings or supported by state resources suggest that the failure of the state to reinforce their religious beliefs adversely impacts the commitment of believers. In discussing the lack of attention paid to religion in the public schools, for example, McConnell writes that "I sense the effect in my own elementary school age children: they wonder how I can think God and Jesus Christ are so important to the workings of nature and history when they never hear about such things in schools." Michael McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post Modern Age*, 1993 BYU L. Rev. 163, 181. Interpreting religion clause doctrine to permit majoritarian religious displays, however, would have an even more powerful impact on the children of minority faiths. In addition to their own beliefs being either ignored or minimally recognized by government, they would also be routinely confronted with messages reinforcing the tenets of other faiths.

78. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

79. *See e.g.* Daniel O. Conkle, *God Loveth Adverbs*, 42 DePaul L. Rev. 339, 346 (1992) (explaining that "[g]enuine religion is not likely to benefit from governmentally orchestrated acts of worship, prayer, or ritual. Instead, the major effect is to insult religious minorities. And because the 'benefited' religion gains little if anything, this insult is largely gratuitous."); Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DePaul L. Rev. 361, 368 (1992) (describing a Jewish family's report that "they felt 'absolutely humiliated'" when a blatantly sectarian prayer was offered at a high school graduation ceremony they attended).

religious expressive activities are protected against government interference and discrimination. It is in the grey area where the private or public nature of the activities are mixed or indeterminate that most of the controversy lies.[80]

Somewhat surprisingly, the free exercise clause is not always invoked or discussed in the case law adjudicating these disputes. Decisions are grounded almost entirely on either establishment clause or free speech clause doctrine.[81] Part of the reason for this has to do with the procedural posture of the cases. If the government supports the religious speech, the constitutional challenge will be directed at the state, and the focus of the argument will be on the establishment clause or state action. Governments do not have free exercise rights and will rarely assert them for third parties. Further, because the establishment clause prohibits the public promotion of religion, the state will often try to avoid constitutional condemnation by arguing that the message in question is not religious or is only incidentally religious. Asserting the free exercise rights of the speaker would undermine that position.

If the state restricts the religious speech, private individuals involved in the expressive activities will challenge the state's regulations. In the majority of recent cases, however, they will raise free speech claims alleging content and viewpoint discrimination rather than free exercise claims alleging discrimination against religion. The explanation for this one-sided emphasis seems entirely pragmatic. The current Supreme Court has resolved a long line of religious expression on public property cases under a free speech analysis and has assiduously avoided evaluating alternative free exercise claims.[82] Since significant precedent can be marshaled to support a free speech analysis, legal argument increasingly gravitates in that direction.

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80. The exact practical contours of this grey area are indeterminate, but the nature of the problem can be clearly identified. As Steven Gey explains, preventing the government itself from endorsing religion

> without an additional restriction on ostensibly private religious expression undertaken in conjunction with the government . . . would be meaningless because it would not foreclose the capture of the government by the dominant religious group in a community. In the absence of constitutional limitations on private religious expression and activity, public officials who seek to circumvent the rules prohibiting government involvement with religion could simply declare their neutrality with regard to religion and permit private individuals within the community to infuse the public sphere with their own religious doctrine.

Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 Minn. L. Rev. 1885, 1892 (2001).

81. *See id.* (discussing the problem of religious expression on public property by carefully examining the tension between free speech and association concerns on the one hand and establishment clause principles on the other without ever considering the implications of the analysis for free exercise doctrine).

82. Brownstein, *supra* n. 9, at 138-45.

Still, notwithstanding all of the above, free exercise doctrine may influence this debate about religious symbols and speech, and, of equal importance for the purpose of this article, it is often perceived as doing so. Part of this perception is created by the rhetoric used to defend such public displays. To cite just one recent example, when the Ten Commandments monument installed by Chief Justice Moore in an Alabama courthouse was moved, under the pressure of a federal court order, to a less public location, some of Moore's supporters condemned its relocation as an assault on religious freedom. Albert Mohler, president of the Southern Baptist Theological Seminary in Louisville described the event as "one more blow 'by secularists to hammer religious liberty to nothingness.'"[83] Contentions of this kind may not be lost on members of minority faiths who viewed Moore's monument as unacceptable religious favoritism.[84]

The tension between free exercise rights and an anti-endorsement principle is also reflected in the case law. Litigants and jurists do assert that the free exercise clause protects the right to communicate religious messages in the grey area in which private and government speech are sufficiently interconnected to suggest state action and endorsement of the religious beliefs being expressed. At a minimum, they suggest that free exercise principles undermine any attempt to construe the establishment clause to prohibit such religious communications.

In the first school prayer decision, *Engel v. Vitale*,[85] Justice Stewart, the lone dissenter, focused his attention on "whether school children who want to begin their day by joining in prayer must be prohibited from doing so." Essentially ignoring the state's authoring and sponsoring of the challenged prayer, Stewart argued, "to deny the wish of these children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."[86] One year later, Stewart dissented when the Court struck down a Pennsylvania law directing the reading of the Holy Bible to children at the beginning of the school day.[87] Again, Stewart explained, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."[88]

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83. Cathy Lynn Grossman, *Struggle Over "The Rock" Divides Evangelical Leaders*, USA Today A3 (Aug. 29, 2003).

84. *Id.* (quoting Rabbi James Rudin of the American Jewish Committee as stating that the nation's founders wanted to avoid "religious imperialism . . . not by ruling God out but by preserving religious freedom without favoritism"; also quoting critical comments by AJC general counsel, Jeffrey Sinensky, alleging that the installation of the monument constituted an "inappropriate endorsement of particular Protestant religious beliefs").

85. 370 U.S. 421 (1962) (Stewart, J., dissenting).

86. *Id.* at 445.

87. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

88. *Id.* Stewart did explain later in his dissenting opinion that strictly speaking what was at issue for those students who wanted to have the Bible read to them was a privilege not a right.

In subsequent cases, plaintiffs have asserted a free exercise right to engage in religious activity in various contexts that raise religious endorsement concerns.[89] When student speakers, for example, assert a religious-liberty right to deliver proselytizing religious messages at high school graduations—proclaiming to fellow students " 'the wages of sin is death, but the gift of God is eternal life in Christ Jesus our Lord.' Have you accepted the gift, or will you pay the ultimate price?"[90]—arguments urging an expansive enforcement of free exercise rights may become less persuasive to religious minorities.[91]

Finally, the conflict between free exercise and establishment clause values frequently arises in the case law, and is discussed in legal commentary, in terms of the meaning of the establishment clause itself. Part of this debate parallels the preceding discussion regarding the right to communicate religious messages in a context that may imply state endorsement of their content.[92] The argument here, however, is not that the free exercise clause creates a right to communicate religious messages on public property, but rather that the establishment clause must be understood as serving religious-liberty values and has no other constitutional purpose.[93] In doctri-

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The Constitution did not give them the power to compel the school to offer Bible reading at the beginning of each school day. *Id.* at 316.

89. *See e.g. Wigg v. Sioux Falls Sch. Dist.*, 274 F. Supp. 2d 1084 (D.S.D. 2003) (rejecting free exercise claim by teacher challenging school district policy prohibiting her from participating in meetings of religious club that took place immediately after school hours in the building in which she taught her own classes).

90. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981-82 (9th Cir. 2003) (quoting portion of student's speech which quoted *Romans* 6:23).

91. *Id.* at 981-82 (holding that religious liberty rights of student speaker are not infringed when school authorities prohibit him from expressing a proselytizing religious message at high school graduation ceremony). *See also Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1104 n. 9 (9th Cir. 2000) (rejecting free exercise argument by student denied the right to express religious speech at high school graduation); *Skarin v. Woodbine Community Sch. Dist.*, 204 F. Supp. 2d 1195 (S.D. Iowa 2002) (enjoining high school choir from singing "The Lord's Prayer" at high school graduation notwithstanding free exercise claim of student interveners or School Board's decision to include the Prayer because "We are Christians"); *ACLU of N.J. v. Black Horse Pike Regl. Bd. of Educ.*, 84 F.3d 1471, 1489, 1497 (3d Cir. 1996) (Mansmann, Nygaard, Alito, & Roth, JJ., dissenting) (arguing that free exercise clause protects right of graduating class to express a prayer at graduation ceremony).

92. *See e.g.* W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DePaul L. Rev. 71 (1992) (suggesting that student offered prayer at a high school graduation arguably prohibited by the establishment clause reflects a call of conscience).

93. *See e.g.* Andrew A. Chang, *The Inherent Hostility of Secular Public Education Towards Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, U. Haw. L. Rev. 697, 703-04 (1997) (asserting that "[t]he principle of liberty of religious conscience is arguably the 'core' value of the First Amendment. Indeed, the concept that government must be neutral between religions merely serves the greater goal of protecting individuals from coercion of conscience"); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 477 n. 6, 497-99 (1991) (arguing that the religion clauses serve "a single fundamental freedom . . . the 'free exercise' of religion"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 313 (1986) (asserting that "the establishment clause protects religious liberty; it safeguards much

nal terms, the meaning of the establishment clause is limited to prohibiting religious coercion.[94] It is little more than a redundant reiteration of what the free exercise clause requires.[95] Government endorsements of religion, if they are not coercive, have no constitutional significance.[96]

At a more abstract level, this analysis disputes the idea that there is any real tension between free exercise and establishment clause guarantees. To the extent that the religion clauses protect religious equality among faiths, they do so incidentally to their primary mission of protecting religious liberty. To be sure, there is some truth to this contention. There is certainly a sense in which a vigorously enforced free exercise clause promotes religious equality and a strong commitment to establishment clause values furthers religious liberty.[97] But for religious minorities, a commitment to

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the same interests as the free exercise clause, but in a slightly different way. The free exercise clause defines the important individual liberty of religious freedom, while the establishment clause addresses the limits of allowable state classifications affecting this liberty. The two clauses, naturally enough, address a single, central value from two different angles.").

94. *See e.g. County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., Rehnquist, C.J., White, J. & Scalia, J., concurring in judgment, and dissenting in part) (insisting that government displays of religious symbols do not violate the establishment clause unless they are at least indirectly coercive); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1985/1986).

95. *See e.g.* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 922 (1985/1986) (recognizing that the coercion test "makes the two religion clauses redundant [because] religious coercion by the government violates free exercise [and] if coercion is also an element of the establishment clause, establishment adds nothing to free exercise"); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555, 576-77 (1991) (arguing that attempts to require coercion as an element of the establishment clause would render that constitutional provision "superfluous" and "redundant" to the free exercise clause).

96. *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U. L. Rev. 37, 40 (1991). Laycock notes that proponents of a coercion test, noncoercionists, have little regard for endorsement concerns (which Laycock describes as "nonpreferentialism"). He explains,

> One of the more visible issues that noncoercionists seek to resolve is the government-sponsored creche, or nativity scene. The creche symbolizes the alleged miracle of Christ's Incarnation, a claim that is central to Christianity, heretical or blasphemous to Judaism and Islam, and largely irrelevant to the world's other great religions. If noncoercionists mean to permit government creches, they plainly mean to permit government to endorse particular religions.

*Id.*

97. The vigorous enforcement of free exercise rights protects religious equality by providing members of minority faiths the same protection for their religious practices as a matter of constitutional mandate that members of larger faiths receive as a result of their political influence. Thus, in *Sherbert v. Verner*, the Court's rejection on free exercise grounds of South Carolina's decision to deny unemployment compensation benefits to a Seventh-Day Adventist who refused to accept work on Saturday, her Sabbath, also furthered religious equality principles. 374 U.S. 398. South Carolina law shielded Sunday Sabbath observers from being placed in a similar predicament by enforcing Sunday closing laws generally and providing statutory protection to anyone subjected to pressure to work on Sunday in the event their employer operated on Sunday during an emergency. *Id. See also Islamic Ctr. of Miss. v. City of Starkville*, 840 F.2d 293, 294 (5th Cir. 1988) (holding that denial of exception from zoning laws to Islamic Center violated free exercise clause when Christian churches received more favorable treatment from land use authorities); McConnell, *supra* n. 6, at 1515 (stating that the free exercise clause "protects the interests of religious minori-

religious liberty that incidentally benefits religious equality is not sufficient. "Equality . . . [is] simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary."[98]

Of course, the vigorous enforcement of free exercise rights does not necessarily imply a corresponding subordination of establishment clause values. And not all challenges to the idea of religious equality are predicated on a commitment to free exercise values.[99] Still, arguments that portray the interpretation of the religion clauses as a zero sum game create a powerful perception that the expansive interpretation of one clause requires the diminishment of the other.[100] It is difficult to ignore the often repeated argument that any perceived tension between the religion clauses should be resolved by recognizing that both the free exercise clause and the establishment clause serve the singular purpose of protecting religious liberty. For some religious minorities, the value of a strongly enforced free exercise clause may be well worth the price of potentially increasing the state's ability to endorse majoritarian religious messages. For others, political goods are like economic goods. Increased costs or prices result in reduced demand—or in this case, reduced support for expansively defined and vigorously enforced free exercise rights.

### *3. Private Sector Subordination*

The arena in which a vigorously enforced free exercise clause may be most obviously burdensome to the religious liberty of minority faiths involves private sector religious discrimination. The attention directed at the increased role of government in American society sometimes distorts the reality of just how much of the economic and social life of our communities remains under private control. Here, private power can be employed restrictively to deny disfavored religious groups access to a broad range of valued opportunities and goods including jobs, housing, and social and recreational pursuits. It is difficult to maintain that religious choices are uncoerced if they result in the loss of employment and other sought after benefits.

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ties in conflict with the wider society and thereby encourages the proliferation of religious factions").

Similarly, protecting religious equality pursuant to the establishment clause doctrine may directly or indirectly further religious liberty goals. *E.g. Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) (explaining that the Framers of the Constitution "deemed religious establishment antithetical to the freedom of all . . . [because government involvement in the] expression of religious views may end in a policy to indoctrinate and coerce").

98. Brownstein, *supra* n. 52, at 257.

99. *See e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 331 (1987).

100. *See e.g.* Derek H. Davis, Editorial, *Resolving Not to Resolve the Tension Between the Establishment and Free Exercise Clause*, 38 J. of Church & St. 245, 255 (1996) (arguing that in order to resolve the conflict between the religion clauses, the coercion test "elevates free exercise values by minimizing establishment values").

There can be little doubt that exercises of private power threaten the religious liberty of faith communities burdened by exclusionary and discriminatory practices. This reality cannot help but influence how the religion clauses of the First Amendment will be interpreted. To the extent that developments in free exercise doctrine increase the potential harm caused by discrimination against religious minorities, the utility of such doctrinal change, and the persuasiveness of arguments to justify it, are undermined.

Constitutional law protects private individuals, groups, and institutions against government regulation. When private individuals and entities exercise rights, the government must justify any action it takes to abridge those rights under rigorous judicial scrutiny. The very same conduct that the Constitution protects also can be burdened by private actors, however, and constitutional law erects no shield against such private interference. This is constitutional law 101. Speakers, for example, cannot invoke the First Amendment if private individuals and institutions try to suppress their speech. Thus, a speaker attacked on his soap box by an angry mob must rely on the political branches of government to defend his liberty to speak, not the judiciary applying constitutional law.

Private interference with speech or other constitutionally protected interests, however, may itself be protected by the Constitution. Expressive activities such as boycotts or heckling, for example, can be directed at unpopular speakers in an effort to silence or shout down their message.[101] Should the state attempt to regulate a boycott in the name of freedom of speech, the organizers of the boycott may reasonably claim that the First Amendment protects their speech silencing activities.[102]

But the protection the First Amendment provides to such speech silencing expressive activities is not unlimited. At some point, courts will allow the state to regulate hecklers in order to maintain an environment where voices that cannot shout the loudest will still have an opportunity to be heard.[103] Deciding where that line should be drawn, when the expressive activities of certain private speakers interfere so substantially with the ability of other speakers to communicate that state regulation of speech is

101. *See e.g.* Stuart Taylor, *It's Time to Junk the Double Standard on Free Speech*, Natl. J., 2002 WL 7094564 (Jan. 19, 2002) (recounting an instance where a rowdy graduating class booed a newspaper publisher as she gave an unpopular commencement address, compelling her to exit the stage in the middle of her presentation); The Young Earth Creation Club, *Boycott Levi-Straus For Pulling Funding From The Boy Scouts*, http://www.creationists.org/boycotts_levistraus.html (accessed Feb. 13, 2004) (Christian web-site advocating the boycott of Levi-Straus products because the jean making company ended its support of the Boy Scouts of America after the Boy Scouts publicly adopted a discriminatory policy toward homosexuals).

102. The Court has made it clear that in at least some circumstances consumer and political boycotts are protected by the First Amendment. *See e.g. NAACP v. Claiborne Hardware Co.*, 485 U.S. 886, 907 (1992).

103. *See e.g. McIntosh v. Ark. Republican Party*, 766 F.2d 337, 441 (8th Cir. 1985); *In Re Kay*, 464 P.2d 142 (Cal. 1970); *Iowa v. Hardin*, 498 N.W.2d 677 (Iowa 1993).

justified, is no easy task. Still, it cannot be avoided. Sometimes freedom of speech requires allowing the state to regulate speech.[104]

The same quandary applies with regard to the free exercise of religion. Indeed, it may be that no constitutional guarantee raises the issue of the need to restrict the exercise of the right by some individuals in order to protect the exercise of the right by other individuals as much as the free exercise of religion.

Religion is exclusionary. It doesn't have to be, but it often is.[105] Accordingly, many religious organizations demand the right to discriminate on the basis of religion in conducting their activities.[106] At the most basic level, this is rarely an issue. People of one faith do not typically demand admission to the house of worship or services of a different faith. They certainly would not seek to be selected as clergy for a different religion.

Religion extends far beyond the confines of a church or temple and ecclesiastical organizations, however. It permeates the life of devout individuals and may serve as a foundation for almost any institution or entity in which they participate. Schools, recreational facilities, medical clinics and hospitals, youth programs, child care centers, social welfare programs, charities, and almost any kind of commercial enterprise may be organized around religious principles.[107] One of those principles may require that all

104. A similar analysis applies to property rights protected by the takings clause. If the use of one person's property interferes so substantially with the use and enjoyment of the property of his neighbors that it constitutes a nuisance, the state may regulate the offending owner's property to protect the property rights of his neighbors. The state need not pay just compensation to the owner of the property creating the nuisance, even if abating the nuisance has the effect of denying the owner any economically beneficial use of his land—notwithstanding the fact that regulations burdening land use to such an extent are commonly considered compensable regulatory takings. Thus, the goal of protecting property against private interference can justify government regulations of property that would otherwise constitute a taking. *E.g. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-32 (1992).

105. *See e.g.* Robert Justin Lipkin, *Reconstructing the Public Square*, 24 Cardozo L. Rev. 2025, 2066 (2003) (asserting that "religions are themselves exclusionary, typically committed to a discourse that disrupts and is generally incompatible with other discourses"); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 Harv. L. Rev. 1397, 1397 (2003) (asserting that "religions, like other private associations, are often biased, intolerant, exclusionary, zealous and insular").

106. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding amendments to Title VII that exempted religious organizations from the civil rights statute's prohibition against discrimination in employment on the basis of religion. Numerous religious denominations and organizations including the Christian Legal Society, the Lutheran Church-Missouri Synod, the National Association of Evangelicals, United States Catholic Conference, General Conference of Seventh-Day Adventists, and the American Association of Christian Schools submitted amicus briefs supporting the amendments. *Infra* n. 110 (describing government attempts to permit discrimination in hiring on the basis of religion by faith-based organizations).

107. Web searches provide numerous illustrations of the range of religiously affiliated nonprofit and commercial enterprises. *See e.g.* nonprofit organizations: Notre Dame Elementary School, http://www.belmont.gov/educ/ndes/ (accessed Jan. 22, 2004); St. Charles Borromeo Academy, http://www.stcharlesborromeo.us/ (accessed Jan. 22, 2004) (schools); Lord's Gym, http://lordsgymjax.com/timesunion.htm (accessed Jan. 22, 2004) (recreational facilities); Praise

participants and employees must adhere to the same religious tenets.[108] Nonbelievers and religious individuals of other faiths need not apply for

and Workout, http://www.praiseandworkout.com/ (accessed Jan. 22, 2004) (recreational facilities); Holy Cross Hospital, http://flohwy.com/m/md100073.htm (accessed Jan. 22, 2004); Loma Linda University Medical Center, http://www.llu.edu/mission/mcmission.html (accessed Jan. 22, 2004); Jewish Hospital Healthcare West, http://www.jewishhospital.org/index.asp (accessed Jan. 22, 2004) (medical clinics and hospitals); Wisconsin Online, *Wisconsin Summer Camps and Youth Programs*, http://www.wisconline.com/attractions/camps/typereligious.html (accessed Jan. 22, 2004) (cataloging Christian summer camps and youth programs); Congregation Beth El-Keser Israel, *Children's Programs and Youth Programs*, http://beki.org/youth.html (accessed Jan. 22, 2004) (youth programs); Ecumenical Child Care Network, http://eccn.org/mission.htm (accessed Jan. 22, 2004); Des Moines Area Religious Council, *Child Care Assistance*, http://www.dmreligious.org/programs/child%20care/childcare.htm (accessed Jan. 22, 2004) (child care centers); Christian Relief Services, http://www.dmreligious.org/programs/child%20care/childcare.htm (accessed Jan. 22, 2004); Loaves and Fishes Ministries, http://www.orgsites.com/mi/loavesandfishes/ (accessed Jan. 22, 2004) (welfare programs); Catholic Charities, *Catholic Charities Mission*, http://www.catholiccharitiesoregon.org/503-231-4866/about/mission.asp (accessed Jan. 22, 2004) (religious charities); commercial enterprises: Law Offices of Franklin Radoff, *Christian Divorce*, http://www.christiandivorce.net/ (accessed Jan. 22, 2004) (Mr. Radoff "sees himself as a 'counselor & minister' in the broadest sense of the word") (law firms); Christian Real Estate Network, http://www.hismove.com/ (accessed Jan. 22, 2004) ("As committed believers, and as Real Estate Professionals, we Agree to provide a level of service to our clients which will glorify our Lord and Savior, Jesus Christ.") (real estate professionals); Sherry Miller's Golden Chair Salon, http://www.sherrymillerssalon.com/ (accessed Jan. 22, 2004) ("We believe in enhancing the natural beauty that God gave to each individual.") (Christian hair salons); Christianity Freebies, *Christianity freebies*, http://christianityfreebies.com/freebies1/Business/LHPPT73K-EF.cfm (accessed Jan. 22, 2004) (Christian job board claiming to have "OVER 130,000 OPEN POSITIONS!") (Christian job boards); Blessed Hope Communications, http://www.lowermyphonebill.com/christiantimesld/right_main.htm (accessed Jan. 22, 2004) ("A Christian Long Distance Consulting Company") (long distance phone services); Lifeline Communications, http://www.lifeline.net/index.cfm (accessed Jan. 22, 2004) ("Serving God. Connecting People. Changing Lives.") (communications companies); The Timothy Plan, http://www.timothyplan.com/home.htm (accessed Jan. 22, 2004) ("The Timothy Plan is a family of mutual funds offering individuals, like yourself, a biblical choice when it comes to investing. . . . The Timothy Plan avoids investing in companies that are involved in practices contrary to Judeo-Christian principles. . . . We are America's first pro-life, pro-family, biblically-based mutual fund group") (investment firms); Christian Credit Counselors, Inc., http://www.christianccc.org/ (accessed Jan. 24, 2004) (debt consolidators).

108. *See e.g.* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99, 150 (contending that "when the government intervenes in religious group membership decisions on behalf of nonmembers or nonconforming members, it 'kills' the group, causing it to change a fundamental aspect of its character or even physically to disband. Religious pluralism, and the choices of those individuals whose personal identity and life are tied to the group, are reduced because the group that stands behind the personal identity of conforming members no longer exists."); Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 Hastings Const. L.Q. 1, 17 (2002) (asserting that religious organizations have a speciál interest in discriminatory hiring because "[t]he ability to associate with co-believers by enforcing membership requirements and to restrict leadership to those who share the same beliefs is crucial for a body's religious identity, expression, and self-survival"); Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Services Efforts*, 12 Geo. Mason U. Civ. Rights L.J. 159, 169 (2002) (contending that "[f]aith-based organizations cannot be expected to sustain their religious drive without the ability to employ individuals who share the tenets and practices of their faith") (footnote omitted). See also the biblical admonition "be ye not unequally yoked together with unbelievers." 2 *Corinthians* 6:14 (King James).

benefits, membership, or employment. If free exercise rights encompass such discrimination, and those religious groups that constitute the majority in a community elect to utilize their freedom to discriminate against people of other faiths, a significant part of the social and economic environment may be barred to members of minority faiths.[109]

The burden created by exclusionary requirements is exacerbated by current proposals to privatize programs and services previously provided by government institutions, to use faith-based institutions as state funded conduits for the provision of public services, and to authorize discrimination on the basis of religion by faith-based organizations receiving government funding to provide those services.[110] Not only is the scope of activities from which one might be excluded expanded by these developments, but the fact that a person is denied access to state subsidized employment opportunities makes the impact of the exclusion particularly unjustified. I have written critically and at length about these programs from a constitutional and policy perspective.[111] I do not intend to restate those arguments in this article. My point here is the more limited one; rigorously enforcing free exercise rights that include the right to discriminate on the basis of religion in these circumstances will have adverse, religion burdening consequences for many individuals of minority faiths.[112] The burden of belief-

109. Elbert Lin et al., *Developments in Policy, Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 Yale L. & Policy Rev. 183, 221 (2002) (asserting that "faith-based charities could lock entire protected classes—religious, racial, or otherwise—out of federally-funded social service positions without investigation. In particular, if faith-based social services replace rather than augment traditional government services, this worst-case scenario brings some credence to the civil libertarians' fears that protected classes in some cities could legally be locked out of a large section of federally-funded jobs.").

110. With regard to religious discrimination in hiring by publicly funded religious organizations *see e.g.* 42 U.S.C. § 604a (2000 & Supp. 2003) (extending exemption for religious organizations from Title VII prohibition against discrimination in hiring on the basis of religion to faith-based grantees receiving government funds to provide public services under Charitable Choice legislation); Exec. Or. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002) (amending earlier executive order that prohibited government contractors from discriminating on the basis of religion in hiring); White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved*, http://www.whitehouse.gov/government/fbci/booklet.pdf (accessed Jan. 22, 2004).

111. *E.g.* Brownstein, *supra* n. 52.

112. *See e.g.* Alan Brownstein, *The Souter Dissent: Correct but Inadequate* in *Church-State Relations in Crisis: Debating Neutrality* 151, 159 (Stephen V. Monsma ed., Rowman & Littlefield Publishers, Inc. 2002) (arguing that "[r]eligious liberty is . . . burdened by discriminatory policies. Denying people jobs because of their faith is a form of economic coercion. No one would challenge this description if a state educational institution refused to hire Jews or Catholics because of their faith. Yet the coercive impact surely does not change if a religious institution, providing equivalent secular educational services at the public's expense, engages in similar discrimination."); Steven K. Green, *supra* n. 108, at 49-50; Richard A. Posner & Michael W. McConnell, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 5 (1989) (observing that "[r]eligious believers . . . are not insensitive to considerations of cost. So if the state, whether through pecuniary or nonpecuniary exactions, makes it more costly to adhere to one creed than to another . . . this may cause a shift in religious affiliation."); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Relig-*

based exclusion makes a constitutional commitment to free exercise rights very much a mixed blessing.

There is another side to this equation, of course. Minority religions recognize the value of exclusive institutions for their own faith communities. Jewish parents, for example, appreciate the importance of maintaining the religious integrity of the religious camps and day schools to which they send their children.[113]

Nevertheless, the consequences of using the free exercise clause to protect private discrimination on the basis of religion may outweigh the benefits for minority faiths that do not seek to separate themselves from the general community. First, as noted previously, the range of potentially restricted opportunities is extraordinary. In practical terms, it is a mistake to suggest, as some commentators do, that allowing religious organizations to discriminate on the basis of religion is equivalent to the freedom we extend to ideological organizations to pick and choose as members and employees only those persons whose views are consistent with the organization's own political perspective.[114] Leaving religion aside, there is little that one can point to in American society that supports this comparison. I would be hard pressed to identify many businesses, hospitals, educational institutions, or athletic clubs, for example, which have a discrete political identity and claim the right to discriminate in hiring and membership on ideological grounds. American society does not organize itself in terms of political affiliation, and, accordingly, free speech rights are seldom the basis for excluding third parties from core private sector opportunities.

Religion is different. It does support a substantial social and economic infrastructure[115] that may extend into commerce, and, as a result of charita-

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*ion*, 81 Cornell L. Rev. 1049, 1087 (1996) (suggesting that permitting religious organizations to discriminate on the basis of religion in hiring employees "places pressure on those excluded to change their faith in order to pursue their" livelihood).

113. Marc D. Stern, *The Establishment Clause, Religion, and Vouchers*, Am. Jewish Congress Mthly. 16-17 (Nov./Dec. 2000).

114. Carl Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. Annual Surv. Am. L. 17, 22 (2000) (stating that "[a] religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization favoring employees devoted to environmentalism, a feminist organization hiring only those devoted to the cause of expanded opportunities for women, or a teachers' union hiring only those opposed to school vouchers"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 47 (2002) (contending that "Planned Parenthood most assuredly has a philosophy of responsible sexuality, which the government may help to support with programs for adolescent counseling, and Planned Parenthood no doubt limits its hiring to those who share its secular views").

115. For example, in 1995 over 1,400,000 students, about 45% of the students attending private colleges in the United States, were enrolled at religiously affiliated schools. During the same year, over 4,250,000 students attended religious elementary and secondary schools. Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 Conn. L. Rev. 871, 934 n. 157 (1999). There are over 500 religiously affiliated hospitals in the United States. *Id.* at 938 n. 163; *see also supra* n. 107. *See generally* Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money*

ble-choice legislation, through government-funded services.[116] Exclusion from religiously affiliated programs and institutions involves far more than an occasional ideological restriction. A sizeable piece of the private-sector pie may be placed off limits. If the largest, or indeed, the only hospital in an area is affiliated with a religious faith, does anyone doubt that denying hospital privileges to physicians who worship differently would substantially burden the exercise of their faith?

Moreover, as an historical and cultural matter, exclusionary policies based on race, ethnicity, and religion in the United States have been a tool of subordination.[117] In our society, the way you keep a group down is to keep it out—out of the right side of town, out of schools, out of the public life of the community. In a land of immigrants, where travel to new locations starting with the decision to come to the United States in the first place was the vehicle for opening doors of opportunity, exclusion based on the characteristics we identify and protect against discrimination in civil rights laws, has a special meaning. One can argue with some legitimacy that certain exclusionary policies serve different purposes and deserve to be understood differently.[118] But the experience of America makes it hard to assign benign meaning to a closed door.[119]

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(Rowman & Littlefield Publishers, Inc. 1996) (describing the scope of government financial support going to religious service providers and the extent to which those organizations discriminate on the basis of religion, notwithstanding constitutional constraints).

116. *See* 42 U.S.C. § 604a (2000) (providing federal funding for "[s]ervices provided by charitable, religious, or private organizations"); *supra* n. 107.

117. *See e.g. Hernandez v. Tex.*, 347 U.S. 475 (1954) (citing evidence of the exclusion of Mexican-Americans from business, community groups, and places of public accommodation to demonstrate that Mexican-Americans constituted a distinct class that warranted judicial protection); Derek Bell, *Race, Racism and American Law* 272 (Little Brown & Co. 2000) (describing how "state mandated or condoned separation [based on race] bred suspicion and hatred, fostered rumors and misunderstanding, and created conditions that made extremely difficult any steps toward its reduction"); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523, 554 (1999) (stating that "racial subordination through race-based exclusion" was accomplished using Jim Crow laws and other laws which "controlled access to elements of 'the public life of the community' ") (quoting Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 101 (1967)).

118. *See e.g.* Thomas Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. Rev. 1009, 1021 (2002) (suggesting that courts might distinguish broadly between aid to religiously exclusionary institutions and racially exclusionary institutions "on the ground that free exercise of religion has a positive constitutional and moral status that private racial discrimination does not").

119. Religion has often been the basis for exclusion and invidious discrimination in American society. Brownstein, *supra* n. 17, at 106 n. 81 to 107 n. 85. Consider this contemporary description of the city of Minneapolis after World War II:

> Minneapolis is the only city in America in which Jews as a matter of practice and custom are ineligible for membership in the local Kiwanis, Rotary, Lions or Toastmasters. Even the Automobile Club refuses to accept Jews. Jews also faced discrimination in employment . . . —the city's larger corporations maintained a policy of not interviewing Jewish job applicants—and in housing, where certain neighborhoods were quietly and informally designated 'for gentiles' only.

Iric Nathanson, *Making It in Minnesota*, 32 Reform Judaism 46, 52 (2003) (quoting journalist Carey McWilliams writing in the magazine *Common Ground*).

Finally, private sector religious discrimination cuts at the core of what the free exercise clause protects. From the very start, when the Supreme Court in *Cantwell v. Connecticut*[120] first began to recognize that the First Amendment provided religious freedom some form of shield against state interference, it was understood that this liberty had two components: "freedom to believe, which was absolute, and freedom to act, which, 'in the nature of things,' was not. Absolute freedom was beyond any state interference. Regulation of action by a state could not infringe religious freedom 'unduly'—the adverb was deliberately broad and vague."[121]

This dichotomy between belief and practice has virtues and drawbacks. Its weakness is that it has often been used to unreasonably limit the protection provided religious practice against government regulation.[122] Its strength, what should be the core of the distinction, is our commitment to the absolute integrity of religious belief. Burdens on religious practice are troubling and should be rejected when they cannot be persuasively justified. But it shows no disrespect to the importance of religious practice to recognize that burdens on belief itself are the most onerous way that religious liberty can be infringed.[123]

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120. 310 U.S. 296 (1940).

121. *See* Noonan, *supra* n. 13, at 35.

122. *See e.g. Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 534 (1986).

123. The onerousness of belief discrimination is illustrated by an impassioned exchange of posts on the religionlaw list in late January and early February 2003. At issue was the letter of recommendation policy of a science professor at a public university. The professor allegedly informed students seeking such letters, "If you set up an appointment to discuss the writing of a letter of recommendation, I will ask you: 'How do you think the human species originated?' If you cannot truthfully and forthrightly affirm a scientific answer to this question, then you should not seek my recommendation for admittance to further education in the biomedical sciences."

Several list members defended the professor's policy on the grounds that a student who could not comply with the professor's demands held beliefs that were incompatible with the study and practice of medicine. Other list members denounced the policy as religious discrimination. They were particularly distressed at the suggestion that a person's religious beliefs alone could somehow justify denying them an educational or career opportunity for which they were otherwise qualified. These latter posts on the list expressed very personal feelings since the writers recognized that the belief discrimination at issue could be directed at their own families—to deny their children valuable life opportunities.

One list member eloquently expressed these concerns. He wrote, "To say that students who disagree with a professor on this issue are unfit to be physicians is unethical religious prejudice. I find it astonishing and demoralizing that list members . . . believe that state medical schools should discriminate against students on the basis of . . . nonscientific prejudice." The writer went on to explain that while he believed that evolution and natural selection had a substantial role in the development of life on Earth, "I do not think it is the whole story, and, according to some list members, that would make me unfit to do what many religious persons have seen as their life's mission, to treat the sick as a physician."

I wrote the author of this post a private note indicating that I shared many of his concerns and was also disheartened by the apparent support by other list members for what seemed to me to be "a pretty blatant case of religious discrimination." I added that I experienced similar frustration when people discussed the public funding of social services by religious providers that practice religious discrimination in hiring. I explained, "To me, that means millions of dollars of taxpayer

Private religion-based discrimination does exactly that, however. It denies individuals valuable opportunities solely because they hold the wrong religious beliefs.[124] Practice is not the issue. Conformity of belief is the critical requirement that no one outside of the favored faith can satisfy.

It is at this juncture that the theological justification for the free exercise of religion may be subjected to its most difficult test. It is one thing to argue that for faith "to be valid and acceptable to God," it must be voluntary and uncoerced. It is something else entirely to openly confront the full meaning and implication of that principle when it arguably conflicts with other religious tenets to which religious communities adhere. If discrimination on the basis of religion is coercive in its effect on the religious choices of nonbelievers and members of minority faiths, and coercion of belief is unacceptable as a matter of religious principle, why doesn't that reality and principle get taken into account when religious groups contend that they are religiously obliged to discriminate in hiring against people of other faiths?

There are several possible answers to this question. Perhaps, the principle against religious coercion only extends to deliberate and forced conversion. Religiously motivated conduct that is incidentally, albeit substantially, coercive in effect may not violate the anticoercion principle. Alternatively, it may be that religious obligations promoting religious homogeneity supercede religious obligations repudiating coercion. From the perspective of members of minority faiths or nonbelievers, the problem with such arguments is that they undercut the reliability of commitments to the free exercise of religion grounded on a theological foundation. If the

supported jobs that my children will not be able to apply for—no matter how capable they may be for the role—because they are members of the wrong religion." He replied, "If permitting religious service providers to hire only co-religionists gives you and others the same feeling that [the discriminatory letter of recommendation] policy (and the list reaction to it) gives me, then I have to give the issue a lot more thought. Maybe there are ways to soften the effect of such a policy?"

The key point of this anecdote should be self-evident. The impact of religious belief discrimination on the religious liberty of those who are denied valuable opportunities because of their faith is particularly hurtful and coercive. One need only be willing to figuratively stand in the shoes of those who bear the burden of such policies to recognize this reality.

124. For example, Azusa Pacific University requires prospective employees to sign a statement of faith as a condition of employment. The statement declares that the Bible is "the inspired, the only infallible, authoritative Word of God" and that "We believe in the deity of our lord Jesus Christ, in his virgin birth, in his sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in his bodily resurrection, in His ascension to the right hand of the Father, and in His personal return to power and glory." Azusa Pacific University had been slated to receive $3.4 million dollars in public funds from tobacco tax revenue to operate an early education program for disadvantaged children. The contract was not awarded when a job applicant who had been involved in developing the educational program under the auspices of a state university sought employment in the program she had helped to design and objected to being required to sign the statement of faith. Larry B. Stammer, *Los Angeles College Barred From Running Program Because of Christians-Only Hiring Policy*, L.A. Times B3 (Nov. 1, 2003). Restricting employment in a publicly funded program intended to encourage parents to read to their children to only those individuals prepared to affirm the religious tenets described above constitutes basic belief discrimination. Qualified candidates are denied publicly funded job opportunities solely because they hold the wrong religious beliefs.

constitutional shield against state interference with religious practices can so easily be utilized to protect the coercive sword of religious discrimination, minorities may conclude that their interests are more securely protected by the secular principles of equity that underlie most civil rights laws.

The dilemma here cannot be easily resolved, but it also cannot be avoided. Some commentators argue that religious liberty only applies to government. Tolerance of diverse faiths cannot extend to the private sector. When the state requires religious individuals and organizations against their convictions to practice tolerance and inclusion in private life, the government is abridging religious liberty.[125] The argument has merit, but it only tells one-half of the story.

In a society dedicated to religious liberty, an individual's decisions about religion should be based as much as possible on inner conviction developed free from external pressure and constraint. The fact that compulsion is applied by private sources of power does not alter the external nature of the pressure or reduce the power of the compulsion.[126] Private organizations provide most of the material goods on which individuals rely in our society—food, medical care, housing, employment—and many of the intangible goods as well; attempts to communicate to large audiences or to seek electoral office depend on the support of the media and political parties, for example. The ability to control access to these goods is a form of real power. If it is used to deny access to certain individuals because of their religious beliefs, the liberty of those individuals to believe as they chose is seriously burdened. At some point, the state must restrict the liberty of some religious individuals and institutions to discriminate on the basis of religion in order to mitigate the magnitude of the burden created by exclusionary policies on members of minority faiths. If free exercise doctrine does not recognize that the religious liberty of some individuals and groups must in some cases be restricted in order to protect the religious liberty of others, it should come as no surprise that some religious minorities will be ambivalent about the value of a rigorously enforced free exercise clause.

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125. *See e.g.* McConnell, *supra* n. 20, at 1259 (arguing that when government attempts to require private individuals and groups to be "neutral, tolerant, and egalitarian, . . . religious freedom is gravely endangered").

126. Historically, the coercive power of private sector discrimination helps to explain many Jewish conversions to Christianity, a fact that is repeatedly brought to light when some prominent Americans discover they had Jewish ancestors who abandoned their faith. Democratic Presidential candidate John Kerry, for example, recently learned that his grandfather, Fritz Kohn, was Jewish. Kohn was a brewer in Czechoslovakia in the late 1800s in a part of the country that was heavily populated by German Catholics. Religious discrimination made it difficult to succeed in this area as a Jew. "'It was easier to do business as a Christian,' [explained] Prague-based genealogist Julius Miller, who specializes in tracing Jewish lineage. 'Many Jews just stopped practicing Judaism during this period and had no belief at all.'" Jennifer A. Perez, *A Jewish Czech in John Kerry's Court*, 32 Reform Judaism 32, 33 (2003).

## III. CONCLUSION

The first part of this article suggests alternative arguments for justifying a vigorously enforced free exercise clause that both secular and religious audiences might find persuasive. At a minimum, I would hope that the suggested justifications cross the threshold of meaningful and accessible argument for both groups. While that minimal goal may seem to be a relatively limited accomplishment, I believe that it is a harder objective to achieve and a more worthy goal than it might appear to be at first. The substantial polarization that exists even in academic writing about religion and constitutional law reflects a deep and disturbing reality schism in the American polity. Too often today, people act as if they do not share a sufficiently common sense of the world we live in to make it worthwhile for people holding differing views to participate in public discourse with each other. For those of us who do not look forward with enthusiasm to unending culture wars, focusing on ways for secular and religious people to discuss important issues seems like a reasonably worthy pursuit.

The second part of this article explains why people who are members of minority faiths, or do not adhere to any religious faith, or are the subject of condemnation by some significant religious communities in our society reasonably fear that a vigorously enforced free exercise clause may be used to undermine their status in the community or to interfere with their liberty. There is no easy solution to this problem. Ultimately, however, I believe that the foundation for protecting religious liberty in many cases requires the recognition that additional interests need to be taken into account in developing constitutional doctrine in this area.

In particular, I think that the development of vigorously enforced establishment clause doctrine is a critical precondition to the development of serious free exercise doctrine in American constitutional law. Although it may seem counterintuitive at first, our commitment to rights is more persuasively justified as a matter of constitutional law when there are recognized constitutional constraints on how far the scope of the right extends. For reasons relating to both religious liberty and religious equality, establishment clause limits on government promotion of religion are an essential part of the constitutional package for minority faiths that seek inclusion in American society rather than protected isolation from it.

Similarly, free exercise rights cannot stand alone. One need not accept an autonomy justification for protecting free exercise rights to understand that many people perceive that the protection of such a sphere of personal and associational freedom can have a substantial impact on the social and economic interests of third parties as well as political consequences for society as a whole. Free exercise rights both empower religious constituencies and provide a safe haven for them. For groups whose beliefs and autonomy of conduct are challenged by powerful religious groups, the rec-

ognition of rigorously enforced free exercise rights may seem to distort the marketplace of ideas and, ultimately, the political playing field to their disadvantagement.

At least one solution to this concern is to recognize constitutionally protected autonomy rights for individuals with regard to central decisions about the way they live their lives—decisions that are intrinsic to one's identity. These decisions, and I would describe a right of intimate association to be a paradigm example, may or may not be grounded on religion, but they are decisions as to which religion speaks and on which it purports to cast judgment. Accordingly, these are decisions as to which the privileging of religion risks subordinating control over the decision to religious constituencies.[127]

The rationale for this solution does not dispute the distinctive justifications for protecting religious liberty. It does acknowledge that there are other interests worthy of constitutional protection for reasons that may be substantially different than the justifications for protecting religious liberty, but which serve some of the same functions as free exercise rights. Thus, one need not agree that the reason why we protect religious liberty is grounded on respect for personal or communal autonomy to recognize that free exercise rights protect what looks very much like autonomy to nonreligious individuals and seem to serve the same function as autonomy rights for many people. Further, core commitments about important life decisions are shielded from state interference. Rights of this kind have substantial value and convey significant power.[128] In a heterogeneous society such as the United States, a constitutional regime that protects such rights for religious individuals and groups may be more persuasively justified and defended if the shield it provides is more inclusive in its coverage.

127. Obviously, this article is not the place to survey the arguments for and against the recognition of a constitutional right of intimate association of the kind the Supreme Court implicitly recognized in *Lawrence v. Texas*. Determining the scope of the interests to be protected by a constitutional right of privacy and personal autonomy is beyond the scope of this article.

128. The argument here is not an attempt to bring the autonomy justification for supporting free exercise rights in through the back door. It does suggest that although free exercise rights may be justified for reasons other than protecting personal autonomy, they operate very much like an autonomy right and have comparable value and utility. The argument also assumes that the resistance of religious individuals to justifying religious liberty on the basis of personal autonomy does not preclude the recognition that other rights, such as the right to choose the person one marries, may be meaningfully grounded on the idea of personal autonomy.