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## THE NEED FOR A LAW OF CHURCH AND MARKET

NATHAN B. OMAN†

### INTRODUCTION

The study of law and religion has tended to focus on debates over “church and state.” The central question has been how the law ought to structure the relationship between religion and the government. Many of the legal conflicts over religion, however, take place in a commercial context. They are thus not simply puzzles of how God and Caesar should interact. They also present the question of how the law should structure the relationship between God and Mammon.<sup>1</sup> The exploration of co-religionist commerce by Professors Michael Helfand and Barak Richman<sup>2</sup> is important because it places the law of church and market at center stage. Rather than viewing the intersection of commerce and religion as simply one more stage for church-state conflicts, they focus on the legal regulation of religious commerce. Their work reveals the dangers of uncritically applying law developed in other contexts to religious commerce. In so doing, they demonstrate the need for explicit reflection on the proper relationship between religion and the market and how the law should structure that relationship.

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† Professor of Law and Robert & Elizabeth Scott Research Professor, William & Mary Law School. I would like to thank Michael Helfand, Paul Horwitz, and Barak Richman for helpful comments on an earlier draft of this Essay. All errors are mine. As always, I thank Heather.

1. Mammon is a Biblical term meaning material wealth or possessions that have a debasing influence.

2. Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015).

This Essay uses Helfand and Richman's fine article to raise the question of the law of church and market. In Part I, I argue that the question of religion's proper relationship to the market is more than simply another aspect of the church-state debates. Rather, it is a topic deserving explicit reflection in its own right. In Part II, I argue that Helfand and Richman demonstrate the danger of creating the law of church and market by accident. Courts and legislators do this when they resolve questions religious commerce poses by applying legal theories developed without any thought for the proper relationship between church and market. Finally, in Part III, I examine one of the few areas in our law where we do explicitly try to structure the relationship between commerce and religion: antidiscrimination laws. I argue that the assumptions about the proper role of religion in the market on which these laws are predicated are actually quite different than the ultimately contractual regime that Helfand and Richman assume. While antidiscrimination laws do not directly implicate the doctrinal issues flagged in their article, the theoretical gap between their approach and antidiscrimination law illustrates the need for greater attention to the law of church and market.

#### I. THE LAW OF CHURCH AND STATE AND THE LAW OF CHURCH AND MARKET

The "law of church and state" is a familiar part of the intellectual landscape for American lawyers, judges, and professors. We are well equipped with theories, metaphors, and intuitions about the proper relationship between the state and religious believers and institutions. This does not mean, of course, that there is any widespread agreement on precisely what shape this relationship should take. Brian Leiter, for example, argues that there is no reason to afford any particular legal solicitude to religious exercise, yet Congress enacted the Religious Freedom Restoration Act, exempting religious believers from otherwise neutral laws burdening activities required by their faith.<sup>3</sup> We also have an abundance of metaphors: walls of separation,<sup>4</sup> public squares from which religion should or should not

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3. See generally BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012) (arguing that the idea of specifically religious toleration is incoherent); see also 42 U.S.C. § 2000bb-1(a) (2006) (The Religious Freedom Restoration Act).

4. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

be excluded,<sup>5</sup> and even the marketplace of religious competition from which the state remains aloof.<sup>6</sup> Most everyone comes to the subject with well-formed opinions of either the separationist or accomodationist variety, and debates on church and state tend to play out with the comforting predictability of a well-practiced minuet.

When it comes to the proper relationship between religion and the marketplace—the real, commercial marketplace, not the metaphor of First Amendment doctrine—the issue becomes more interesting. Here, we lack a clear set of theories and metaphors specifying what role, if any, religion should play in commerce. To be sure, we have a great deal of law that deals with religion and a great deal of law that regulates the market.<sup>7</sup> There are thus no shortage of arguments and theories that can be repurposed from one field or another to guide the law on how it should mediate the relationship between religion and the market. We have, however, a paucity of theories that are native to the problem.<sup>8</sup> Hence, when we look at laws regulating religion in the commercial context we tend to view them as simply another example of a “church-state” problem. We then proceed with our analysis, not pausing to consider that in resolving

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5. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 907 (Scalia, J., dissenting in part and concurring in part) (“Perhaps in recognition of the centrality of the Ten Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square.”). *But see generally* RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1988) (arguing that religion has been wrongly excluded from the public square in American political debates).

6. See *Rosenberger v. Rector & Bd. of Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (expressing that when the state creates “an expressive marketplace” it cannot exclude religious viewpoints).

7. In support of this claim, I can cite treatises or casebooks on law and religion. The mind, however, boggles at what one should cite to summarize the law regulating the market because of the sheer size of the literature. See *generally* MICHAEL MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* (2002) (collecting key cases and materials on law and religion).

8. This is not entirely true, of course; there are scholars who have examined the legal relationship between commerce and religion. See *generally* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) (discussing religious activity by for-profit corporations); Alan Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA persons*, 127 HARV. L. REV. F. 273 (2014) (same); Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887 (2009) (discussing commercial activities by religious organizations); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (discussing religious activity by for-profit corporations); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59 (2013) (same); Mark Tushnet, *Do For-Profit Corporations Have Rights to Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2014) (same).

such conflicts we are inevitably instantiating a particular vision of how religion and commerce ought to relate to one another. We create the law of church and market by accident, without thinking about it. The proper relationship between commerce and religion and the law's role in shaping that relationship, however, is a topic worthy of concern in its own right. To be sure, any time we consider how the law should treat religion, we are dealing with the "law of church and state." When we look at religion and the market, however, we are doing more than simply playing out the minuet of church-state arguments on yet another stage. The market is a central social institution, one meriting careful reflection in its own right, including reflection on the role of the religion.

The problem is exacerbated when we take note of the way that religion has come to be understood over the last few centuries, particularly in legal discourse. For Western legal thinkers prior to the end of the seventeenth century, "religion" was an all-embracing category of life and thought—the primary context in which other activities, including the activity of "law," occurred.<sup>9</sup> With the dénouement of the wars of religion and the rise of modernity, however, religion increasingly came to be conceptualized by legal thinkers as a fairly circumscribed area of life, one whose heartland lay in the realm of private worship and belief. The "law of church and state," as we currently view it, rests on the assumption that there is some fairly circumscribed corner of social life that we can label "religious." Under this assumption, the only question is how the law should relate to this limited sphere. The problem, however, is that many religious traditions have never really accepted the idea that "religion" is an activity confined to a relatively circumscribed space. Rather, for many believers, religion is a vital force that informs their activity in counting houses just as much as in houses of prayer. The "law of church and state" as a category of thought, however, tends toward a far more circumscribed—and, hence, less realistic—view of religious activity.

Professors Helfand and Richman have done a great service by bringing co-religionist commerce—and with it the question of the proper relationship between religion and the market—to center stage.

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9. Strikingly, in the Middle Ages the term "law" was used to refer to what today we would call "a religion." Hence, Christianity was referred to as "the law of Christ," Judaism as "the law of Jews," and so on. See REMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* 107 (2008).

In thinking about the law of church and market, their article does two things. First, it offers a straightforward and attractive model of how religion and commerce ought to interact. Stated briefly, Helfand and Richman implicitly assume that the relationship of church and market ought to be mediated by autonomous choice. It is for the participants in market transactions to decide for themselves what role religion should play in commercial agreements. The law should seek to discern the intent of contracting parties and enforce their agreements. So long as the resulting legal obligations were agreed to, the law should enforce co-religionist contracts, even if they have religious content. Second, they demonstrate how law developed in a non-commercial context—in this case the New Formalism in contract law and Establishment Clause doctrine—tends to undermine freedom of contract for co-religionist commerce.

## II. ACCIDENTAL LAWS OF CHURCH AND MARKET

According to Helfand and Richman, the central legal challenge for co-religionist commerce is the “translation problem” that arises when religious actors call on the courts to give legal effect to religiously infused commercial transactions.<sup>10</sup> This translation problem is exacerbated by two legal developments—the New Formalism and Establishment Clause Creep—that limit the ability of courts to take notice of the religious content of commercial arrangements. There are two things worth noticing about this framing of the problem. First, it implicitly offers up contract as the proper regime for structuring the law of church and market. Second, both the New Formalism and Establishment Clause Creep offer alternative models for the law of church and market, models that are to some extent inhospitable to religious commerce. Neither of these models, however, is native to the question of the proper relationship between church and market. Rather, they were developed with other questions in mind, and the answers they give to the questions posed by co-religionist commerce do not represent any reasoned conclusion about the proper relationship between faith and commerce.

### A. *The New Formalism*

In adopting contract as the mechanism for structuring the relationship between religion and commerce, Helfand and Richman

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10. Helfand & Richman, *supra* note 2, at 782.

implicitly defend a vision of the market that is essentially pluralistic. In this vision, the market does not serve a single purpose.<sup>11</sup> Rather, it is a space in which mixed motives abound and individuals with potentially very different visions of life cooperate voluntarily.<sup>12</sup> Hence, a religiously themed business—say, a producer of Kosher meat products—exists both to make a profit and to facilitate the living of a pious Jewish life. A Sharia-compliant investment instrument exists both to earn a reasonable rate of return for Muslim savers without violating the Qur’an’s prohibition on *riba* and to provide financing to thoroughly secular enterprises, such as municipalities.<sup>13</sup> None of these aims can claim pride of place. A Kosher butcher who adheres with perfect fidelity to the laws of *kashrut* but fails to make a profit is a failure. Likewise, an Islamic bank cannot substitute junk bonds for a *bai’ al’inah* (sale and buy-back agreement) even though the junk bonds might earn a higher rate of return.<sup>14</sup> Rather, the “correct” treatment of a given transaction can only be given by the actual agreement of the parties. It is their choice that legitimizes the balance struck between religion and commerce, not the particular content of their agreement.

This view is familiar to autonomy theorists of contract, who ground contractual obligation in the free choices of contracting parties.<sup>15</sup> As Helfand and Richman demonstrate, however, the New Formalism in contract interpretation frequently frustrates the intentions of religious parties by adopting aggressive versions of textual interpretation and the parol evidence rule.<sup>16</sup> The New Formalism ultimately flows from a far less pluralistic vision of the

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11. For an exploration of pluralistic, non-efficiency based defenses of the market, see DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 15–26 (2010); see also Nathan B. Oman, *Markets As a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183 (2012) (discussing non-efficiency based defenses of the market).

12. See JULES L. COLEMAN, RISKS AND WRONGS 5 (1992) (discussing markets as an institutional mechanism for cooperation in pluralistic societies).

13. See generally MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE (2006) (providing a summary to the current practice of Islamic banking); TIMUR KURAN, ISLAM AND MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM (2004) (discussing the role of Islam in Muslim thinking about commerce and the rise of so-called Islamic economics).

14. See HANDBOOK OF ISLAMIC BANKING 135 (M. Kabir Hassan & Mervyn K. Lewis eds., 2007) (discussing *bai’ al’inah* transactions in Islamic finance).

15. See STEPHEN A. SMITH, CONTRACT THEORY 54–77 (2004) (summarizing promissory theories of contract).

16. See Helfand & Richman, *supra* note 2, at 788–89.

market than the one that Helfand and Richman implicitly assume.<sup>17</sup> Consider the work of Robert Scott and Alan Schwartz, who have argued for a particularly stringent view of the parol evidence rule, one that would frustrate the kind of highly contextual interpretation favored by Helfand and Richman for co-religionist commerce.<sup>18</sup> Scott and Schwartz in effect argue that profit-maximizing firms that are repeat players in contract litigation view their contracts like an investment portfolio.<sup>19</sup> When these contracts end up in litigation, courts sometimes err by either deciding the case in way that hurts the firm or by deciding the case in way that helps the firm and provides a windfall. As long as the errors are randomly distributed, “bad” decisions will cancel out “good” decisions. By adopting a stringent version of the parol evidence rule, courts lower litigation costs while creating greater volatility in litigation outcomes. Firms, however, diversify away the risk of such volatility by having many contracts and, thus, reaping the benefits from lower litigation costs generated by the strict parol evidence rule.

This is not the place to pass judgment on Schwartz and Scott’s argument. Rather, I want to note that it—along with similar arguments offered by partisans of the New Formalism—rests on a relatively monistic conception of markets.<sup>20</sup> On this view, markets exist to efficiently allocate resources, and the law that structures the market should be specified so as to maximize profits narrowly construed. Notice that, in order for the argument of Scott and Schwartz to work, firms must regard contracts as essentially fungible and commensurable. In effect, each contract becomes little more than a security in a diversified portfolio—a legal right that will deliver a certain amount of cash depending on the vagaries of law and the market. This is what allows firms to net out the gains and losses from judicial errors and reap the benefits of lower dispute-resolution costs. This monistic conception of the market, however, runs up against the

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17. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–45 (2003) (arguing that the sole concern in contracts between corporations should be economic efficiency); see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (arguing that efficiency should be the sole concern in specifying contract law, property law, and other legal regimes).

18. See generally Schwartz & Scott, *supra* note 17 (arguing against contextual interpretation in commercial contracts).

19. See *id.* at 574–78.

20. See *id.* at 544–45 (arguing that efficiency should be the sole concern in contracts between corporations).



more pluralistic approach implicitly taken by Helfand and Richman, who are willing to incur greater litigation expenses in order to get outcomes that more closely conform with the religious intentions of the parties in each transaction.<sup>21</sup> As they demonstrate, co-religionist commerce has in at least some cases been a victim of a narrow conception of the market. The New Formalism, of course, in no sense developed as a normative theory of the relationship between religion and commerce. Rather, in this instance co-religionist commerce is a victim of legal theories developed to address quite different problems and repurposed without much thought to serve as a law of church and market.

### *B. Establishment Clause Creep*

The same is true of the Establishment Clause Creep that Helfand and Richman identify.<sup>22</sup> The decades before and after the Civil War marked a period of religious schism. American denominations such as the Baptists, Methodists, and Presbyterians split along regional lines over the issue of slavery.<sup>23</sup> In 1871, one of these disputes reached the U.S. Supreme Court in *Watson v. Jones*.<sup>24</sup> The case involved a split within a Louisville, Kentucky congregation between supporters of the Presbyterian Church of the United States of America and the Presbyterian Church of the Confederate States of America.<sup>25</sup> The rival factions both claimed to be the true successors of the original church and therefore the owner of its property.<sup>26</sup> Rather than trying to resolve this issue on the ecclesiastical merits, the U.S. Supreme Court ruled that because the Presbyterian Church was a hierarchical organization, the courts had to defer to the larger denomination's judgment as to which of the rival factions represented the true successor to the original church.<sup>27</sup> In adopting this rule, the Court

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21. Helfand & Richman, *supra* note 2, at 802.

22. *Id.* at 803–10.

23. See Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 358–69 (2014) (discussing schisms over slavery before the Civil War and the resulting litigation involving churches); Lucas P. Volkman, *Church Property Disputes, Religious Freedom, and the Ordeal of African Methodists in Antebellum St. Louis: Farrar v. Finney (1855)*, 27 J. L. & REL. 83, 86–89 (2012) (discussing schisms within the Methodist church over slavery).

24. *Watson v. Jones*, 80 U.S. 679 (1871).

25. See *id.* at 690–94.

26. See *id.* at 684–86.

27. See *id.* at 727–28. In this case the Court held that civil courts had to defer to the decision of the Presbyterian Church of the United States. While the Presbyterian Church of the

rejected the approach taken by the British courts in disputes over church property.<sup>28</sup> The practice in the British courts was for the judge to determine which claimant to church property was the theologically true successor to the original congregation.<sup>29</sup> The Court rejected this approach because in America, it stated, “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”<sup>30</sup> A short time later, the Court heard a case involving a schism within a Methodist congregation, in which it ruled that because Methodism adopted a congregational rather than a hierarchical model of church governance, the civil court should award control of church property to the faction that commanded a majority of the original congregation’s members.<sup>31</sup> While these cases were not decided on Establishment Clause or Free Exercise Clause grounds, in the twentieth century *Watson v. Jones* was repurposed as a First Amendment precedent and the Court issued a series of decisions that limited the ability of courts to inquire into religious questions in the context of disputes over church property.<sup>32</sup> Tellingly, these decisions shifted away from *Watson v. Jones*’s emphasis on neutral principles in favor of a regime in which courts were deemed to simply lack the competence to judge disputes between religious parties.

My goal here is not to comment on the doctrinal intricacies of the Court’s church-property cases or to question Helfand and Richman’s analysis of how that doctrine has been expanded to frustrate co-religionist commerce.<sup>33</sup> Rather, I wish to call attention to

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Confederate States still existed as late as 1866, the Court never explained why civil magistrates shouldn’t have deferred to the Confederate ecclesiastical organization. *See id.* There are two possibilities. By the time of the litigation, the Presbyterian Church of the Confederate States may have ceased to exist. Alternatively, the Court may have decided that it must defer to the Presbyterian Church of the United States because it was undisputed that the Louisville congregation had originated with this denomination.

28. *See id.* at 727–29.

29. *See Pearson v. Attorney General*, [1835] 58 Eng. Rep. (Ch) 848, 854–55, *aff’d*, *Shore v. Attorney General*, [1839] 8 Eng. Rep. (H.L.) 450 (holding that church property of a dissenting sect could not be controlled by church members that rejected Trinitarianism in favor of Unitarianism).

30. *Watson*, 80 U.S. at 729.

31. *See generally Bouldin v. Alexander*, 82 U.S. 131 (1872) (resolving a dispute over church property involving an African-American Methodist congregation in the District of Columbia).

32. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 710–12 (1976); *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 367 (1970) (per curiam); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 445–46 (1969); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 190 (1960) (per curiam); *Kendroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 115 (1952).

33. Helfand & Richman, *supra* note 2, at 803–08.

the fact that none of the case law developed by the Supreme Court in this area arose out of commercial disputes. Indeed, this is the quintessential example of a church-state problem where the government is called on to make decisions regarding the allocation of power and control within a religious organization. The courts speak of neutral principles of contract law, but originally the framework was not developed in the context of commercial contracts but ecclesiastical schisms. As Helfand and Richman demonstrate, when an expansive reading of these cases is applied to co-religionist commerce, it tends to have the effect of disabling the courts from providing support to such commerce in the form of contractual enforcement.<sup>34</sup> The Court developed these doctrines in order to separate—insofar as possible—secular courts from internal theological disputes within religious organizations. When this effort to separate church and state is applied to co-religionist commerce, however, it tends to have the effect of separating church and market. There is no reason to suppose that this was the intention of the Court in promulgating these doctrines, and in any case none of the courts applying these doctrines offer any sustained defense of legal hostility to religiously infused commerce. Rather, we end up with a separationist stance on church and market that arose accidentally by repurposing a set of legal doctrines to answer a set of questions that they were never designed to resolve.

The challenges of New Formalism and Establishment Clause Creep to co-religionist commerce demonstrate the problems of constructing a law of church of market without thinking about it. Courts import legal approaches from contexts unrelated to religious commerce and in effect construct the law of church and market by accident. Helfand and Richman seem to have a theory about the proper relationship between commerce and religion. Their article accepts contract as a proper law of church and market. Freedom of contract is so closely associated with a market regime that it seems a natural way of structuring the relationship between religion and commerce. The desirability of this approach, however, cannot be taken as self-evident. Freedom of contract has not always structured even ordinary commercial relationships. Strikingly, in the one area where our law does rest on explicit reflection about the proper relationship between commerce and religion, namely

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34. *Id.* at 803–10.

antidiscrimination law, it has rejected freedom of contract as a master norm.

### III. AN INTENTIONAL LAW OF CHURCH AND MARKET

At times partisans of freedom of contract romanticize the legal world before the rise of the modern regulatory state as a period when voluntary private ordering structured the market.<sup>35</sup> Such a view tends to oversimplify the past. Rather, as Henry Sumner Maine famously remarked, the “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”<sup>36</sup> One can envision market participants as occupying certain roles, roles that impose on those participants legal duties in the absence of consent and even in the face of an unwillingness to contract. Blackstone gave the example of common carriers and innkeepers. “[I]f an inn-keeper, or other victualer, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way,” he wrote.<sup>37</sup> “[U]pon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuse to admit a traveller.”<sup>38</sup> Such a duty implies the inability of certain market actors to resist contracting with someone without good cause. The duty in some circumstances to contract with all comers existed at common law, and has been enacted in modern antidiscrimination statutes.<sup>39</sup> These statutes often include religion as a protected category and thus seek—in part—to structure the relationship between church and market on a non-contractual basis.

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35. See Richard A. Epstein, *Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT*, 25–26 (F. H. Buckley ed., 1999) (suggesting that prior to the rise of the post–New Deal regulatory state a largely laissez-faire approach to markets prevailed).

36. SIR HENRY SUMNER MAINE, *ANCIENT LAW* 165 (4th American ed. 1906).

37. 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 164 (1769).

38. *Id.* at 164 (emphasis omitted).

39. Joseph Singer has argued strenuously that the duty at common law prior to the Civil War to serve the public without discrimination included not just innkeepers and common carriers but all retailers and others holding themselves out to the public. See Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303–48 (1996). His argument is weakened by the fact that he is unable to cite to a single case in which such a duty was imposed on a party other than a common carrier or innkeeper. However, Singer is surely correct that the common law imposed duties on market participants on the basis of status and that at least some commercial actors at common law could not refuse to contract with customers without cause.

### A. Antidiscrimination Law

Modern antidiscrimination laws are a product of the civil rights movement and take racial animus as the paradigmatic case of pernicious discrimination.<sup>40</sup> Nevertheless, when the Civil Rights Act of 1964 forbade racial discrimination in employment, by common carriers, and in public accommodations, it also prohibited discrimination on the basis of religion.<sup>41</sup> Other antidiscrimination laws promulgated at the federal, state, and local level similarly include religion as a protected category. These laws replace freedom of contract with a set of legal duties that have the effect of making commerce both less religious and more religious or at least more overtly pluralistic religiously. Employers can no longer refuse to employ someone on the basis of the person's religious beliefs, even if the discrimination is religiously motivated.<sup>42</sup> Likewise, state laws prohibiting discrimination may require business owners to participate in transactions they find religiously objectionable. Hence, a landlord in Alaska was required to rent to an unmarried couple by

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40. For example, the committee report on the House version of the Civil Rights Act of 1964 contained an exhaustive discussion of the problems faced by African Americans in seeking employment and access to public accommodations, but contained no discussion of religious discrimination. *See generally* EQUAL EMP'T OPPORTUNITY COMM'N, THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 (1997) (collecting the committee reports and floor debates on the Civil Rights Act). As one treatise has noted, "[e]fforts to eradicate discrimination based on religion do not appear to be inspired by a history of economic disadvantage of religious groups." LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 2.04 (2d. ed. 2014). The treatise does note the existence of widespread employment discrimination against Jews and Catholics. *See id.* at § 2.04.

41. *See* 42 U.S.C. § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion"); 42 U.S.C. § 2000a(a) (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of . . . religion"). Contrary to the assumption of most laypersons and many lawyers, there is no federal law that bars discrimination by retailers and businesses that are not public accommodations. *See Singer, supra* note 39, at 1288 ("Title II of the Civil Rights Act of 1964 regulates restaurants, innkeepers, gas stations, and places of entertainment. Retail stores are not covered."). Some scholars suggest that the Civil Rights Act of 1866 might bar racial discrimination by retailers, but the Supreme Court has never addressed the issue. *Id.* at 1288–89. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that the Civil Rights Act of 1866 barred private discrimination in the sale of real estate).

42. *See, e.g., Fischer v. Forestwood Co.*, 525 F.3d 972, 987 (10th Cir. 2008) (holding a father liable for employment discrimination for refusing to hire his son because of the son's apostasy from the Fundamentalist Church of Jesus Christ of Latter Day Saints).

antidiscrimination laws despite religious objections to assisting the couple to “live in sin,”<sup>43</sup> a doctor in California was required to provide fertility treatments to a lesbian couples despite religious objections to homosexuality,<sup>44</sup> and a photographer in New Mexico faced liability for refusing to photograph a homosexual couple’s nuptials based on her religious objections to same-sex marriage.<sup>45</sup> In all of these cases, a regime of freedom of contract would have allowed the objecting religious actor to avoid contracting, and in all of these cases the religiously motivated refusal to contract was in fact a legal wrong. In such situations, antidiscrimination laws tend to exclude religious considerations from commercial contexts.

At the same time, antidiscrimination laws can at times make commercial contexts more rather than less religious by creating legal support for an overtly religious albeit pluralistic market. Title VII states that:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.<sup>46</sup>

Employers thus have a legal obligation to accommodate the religious practices of employees so long as doing so does not create an “undue burden.” The Supreme Court has interpreted this standard in a way that makes it relatively easy for employers to show the presence of such a burden.<sup>47</sup> Nevertheless, the religious accommodation

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43. See *Swanner v. Anchorage Equal Rights Comm’n*, 847 P.2d 274, 276 (Alaska 1994) (holding that the landlord was not entitled to a religious exemption from municipal antidiscrimination statutes); see also *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 931 (Cal. 1996) (reaching the same conclusion under a California law analyzed under the First Amendment, the Religious Freedom Restoration Act, and the California state constitution).

44. See *N. Coast Women’s Care Med. Grp. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 962 (Cal. 2008) (holding that the doctor’s refusal to serve the lesbian couple violated California’s Unruh Civil Rights Act and that there was no First Amendment exemption from the law).

45. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (holding that application of the antidiscrimination statute to the photographer did not violate either state or federal protections for religious freedom), *cert. denied*, 2014 WL 1343625.

46. 42 U.S.C. § 2000e(j) (2012).

47. See generally *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (providing a narrow interpretation of Title VII’s duty to accommodate religious practices); see also LARSON, *supra* note 40, at §§ 56.02–56.06 (discussing the application of the *Hardison* standard in accommodation litigation under Title VII).

requirement has some bite. Hence, those with religious objections to abortion have successfully demanded exemptions from employer requirements that they provide abortion counseling.<sup>48</sup> In some cases, sabbatarians of various stripes have been able to demand different work schedules to accommodate Sabbath observance.<sup>49</sup> Abercrombie & Fitch was successfully sued by a Muslim employee who objected to the company's dress code, which barred her from wearing a hijab.<sup>50</sup> In other cases, Muslim employees have successfully demanded that employers allow them to pray five times each day, as required by Islamic law, as well as allow an employee to make the hajj—the once in a lifetime pilgrimage to Mecca required of all pious Muslims—without losing her job.<sup>51</sup> In all of these cases, employers were required by law to take steps that made their workplaces more welcoming to religion, in effect making commerce more rather than less religious.

Antidiscrimination laws envision a relationship between commerce and religion that is ultimately quite different than the one envisioned by the ideal of freedom of contract. Under a regime of freedom of contract the market is seen as a largely “private” space, one that need not conform to democratic norms of secular equality so long as the relationships are consensual. In contrast, the antidiscrimination laws rest on the view that the market is a “public” space in at least two senses.

First, they rest on the implicit denial that the ordering of commerce can be left to private agreements without excluding some classes of individuals from meaningful participation in the market.

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48. *See* *Grant v. Fairview Hosp. & Healthcare Servs.*, No. Civ. 02-4243, 2004 WL 326694, at \*3–5 (D. Minn. Feb. 18, 2004) (holding that employer must provide reasonable—but not unreasonable—accommodations to an employee with religious objections to abortion).

49. *See, e.g.*, *EEOC v. Sterling Merch. Co.*, 46 Fair Empl. Prac. (BNA) 1448, at \*10–11 (N.D. Ohio 1987) (holding that employer must at least make an effort to accommodate the Sabbath observance of a Jehovah's Witness employee).

50. *See* *EEOC v. Abercrombie & Fitch Stores Inc.*, 966 F. Supp.2d 949, 971 (N.D. Cal. 2013) (holding that requiring the employers to allow the plaintiff to wear a hijab would not have imposed an undue burden); *see also* *Muhammad v. N.Y.C. Transit Auth.*, 450 F. Supp. 2d 198, 211–12 (E.D.N.Y. 2006) (holding that a Muslim employee was not required to wear a NYTA baseball cap over her hijab).

51. *See* *Hasan v. Threshold Rehab., Inc.*, No. 13-cv-00387, 2014 WL 1225921, at \*8–9 (E.D. Pa. 2014) (holding that plaintiff had pled sufficient facts on a failure to accommodate claim based on her pilgrimage to Mecca); *EEOC v. JBS USA LLC*, 940 F. Supp.2d 949, 956–61 (D. Neb. 2013) (detailing the efforts of employer to accommodate prayers by Muslim employees); *Haliye v. Celestica Corp.*, No. 06-cv-4769, 2009 WL 1653528, at \*10 (D. Minn. 2009) (refusing to certify class of Muslim employees alleging failure to accommodate religious duty to pray five times daily).

Defenders of antidiscrimination laws insist that “it is a distinctly romantic notion that competition necessarily ensures that someone will provide the service.”<sup>52</sup> Likewise, the House Report on the Civil Rights Act of 1964, relying on the old common law rules governing innkeepers, stated that it was “ludicrous” to talk of the private conduct of those subject to the law because they were “open to the public in general.”<sup>53</sup> According to the Report there was “little basis for urging [the principle of freedom of association] in [*sic*] behalf of owners of business who regularly serve the public in general.”<sup>54</sup>

Second, antidiscrimination laws see the market as an important public space from which one cannot be excluded on the basis of certain characteristics, including religion. Like voting or a public forum, the market is a space to which citizens have a publically secured right of access, notwithstanding confounding “private” arrangements. Likewise, religiously motivated commercial activity will not be tolerated if it has the effect of inhibiting access to the market by others. These norms are closely analogous to constitutional rules prohibiting religious tests for public office and requiring that citizens be treated equally.<sup>55</sup> It is no accident that the protected classes under antidiscrimination laws overlap substantially with the classes that trigger strict scrutiny under the Equal Protection Clause.<sup>56</sup> Such a

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52. Singer, *supra* note 39, at 1329–30; see Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 22–37 (1991) (arguing that markets are not a good system for promoting antidiscrimination practices). Richard Epstein, however, disputes this assumption, arguing that discrimination in the Jim Crow South resulted from state action and quasi-state action rather than market failure. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 126–27 (1995) (“No firm could have entered the market in the face of the political forces that were arrayed against it. The dog that did not bark gives the best evidence of pervasive government involvement in this area.”).

53. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 40, at 2130.

54. *Id.*

55. See U.S. CONST. art. IV, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the law.”).

56. Compare *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that racial classifications are inherently suspect), *Oyama v. California*, 332 U.S. 633, 647 (1948) (striking down a law that discriminated based on national origin), *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (holding that classifications on the basis of gender are subject to heightened scrutiny), and *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (holding the laws may not discriminate on the basis of religion), with 42 U.S.C. § 2000e-2(a)(1) (2012) (“It shall be an unlawful employment practice . . . to discriminate against any individuals with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).



view also rejects a monistic conception of the market as serving only to efficiently allocate resources. To be sure, some have argued that antidiscrimination laws make markets more efficient, but one suspects that few would abandon their support for such laws even if they became convinced that they were inefficient.<sup>57</sup> Antidiscrimination laws thus reject the notion that religious believers should be able to pursue religious goals in the commercial sphere so long as they do so contractually. Rather, religiously motivated commercial activity is a legal wrong when it violates norms of equal access to the market, even if such activity is contractual.

### *B. Beyond the Antidiscrimination Model*

Recent debates over religious exercise by for-profit corporations suggest a vision of the law of church and market that grows out of antidiscrimination norms but takes a more restrictive stance toward religion and commerce. Rather than insisting that religious norms and freedom of contract must be subordinate to antidiscrimination norms of universal access, this more aggressive approach suggests that there is something presumptively suspect about religion in the for-profit context. In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>58</sup> a divided Supreme Court ruled that for-profit corporations could claim religious exemptions from neutral laws burdening religious exercise, in this case regulations promulgated by the Department of Health and Human Services requiring that certain employers provide their employees insurance coverage for all FDA-approved forms of contraception, including those that the plaintiffs in *Hobby Lobby* regarded as abortifacients.<sup>59</sup> For purposes of this Essay, what is

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57. For the debate over the efficiency of antidiscrimination laws, compare John Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1411–31 (1986) (arguing that Title VII is economically efficient), with Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 513–21 (1987) (expressing skepticism as to the efficiency of Title VII).

58. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

59. *See id.* at 2762–64 (describing the HHS mandate). I have no desire to comment on the merits of the outcome in the case here. For the record, I largely agree with Justice Alito’s analysis of religious exercise by corporations. *Compare id.* at 2768–70 (holding that for-profit corporations can exercise religion and are “persons” for purposes of the Religious Freedom Restoration Act), with Meese & Oman, *supra* note 8 (arguing that for-profit corporations can exercise religion and are “persons” for purposes of the Religious Freedom Restoration Act). On the other hand, I am critical of Justice Alito’s analysis of burdens on religious exercise imposed by laws that create complicity in the actions of others. *Compare Hobby Lobby*, 134 S. Ct. at 2775–80 (holding that courts cannot inquire into the substantiality of the burden created by forced complicity in the actions of others), with Nathan B. Oman, *Hobby Lobby: The Problem of Complicity*, THE CONGLOMERATE (Mar. 24, 2014), <http://www.theconglomerate.org/>

interesting about the decision is the vision of the law of church and market revealed by the rhetoric of the losers in the case. At the outset, it's striking that both the majority opinion and the principal dissent in the case invoke antidiscrimination norms. Writing for the majority, Justice Alito claimed:

The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.<sup>60</sup>

Likewise, in her dissent Justice Ginsburg claimed that the Court's holding threatened "[t]he ability of women to participate equally in the economic and social life of the Nation."<sup>61</sup>

Justice Ginsburg's dissent, however, suggests a vision of the market in which a legally constructed pluralism precludes religiously infused businesses. Distinguishing for-profit corporations from "nonprofit religion-based organizations,"<sup>62</sup> she wrote:

Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.<sup>63</sup>

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2014/03/hobby-lobby-the-problem-of-complicity.html (arguing that recognizing religious burdens created by required complicity in the acts of others risks undermining religious freedom), and Nathan B. Oman, *Religious Freedom, Commerce, and Complicity*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/religious-freedom-commerce-and-complicity.html> (same).

60. *Hobby Lobby*, 134 S. Ct. at 2783. It is also worth noting that Justice Alito was eager to reject the claim that the Court's holding would threaten antidiscrimination laws:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

*Id.* (internal citation omitted).

61. *See id.* at 2787–88 (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

62. *Id.* at 2794.

63. *Id.* at 2795–96 (internal citations omitted).

In this passage, Justice Ginsburg takes note of the way that antidiscrimination norms structure the relationship between religion and markets. Her claim regarding the legal impermissibility of religious discrimination in hiring is largely correct, although in some instances lower courts have found that religion is a bona fide occupational requirement.<sup>64</sup> As a factual matter, however, Justice Ginsburg's vision of a market consisting only of religiously pluralistic firms devoid of a structuring religious mission is false. Such firms exist and have long existed.<sup>65</sup> We should thus understand it as a normative claim rather than an empirical observation.

Similarly, some commentators have suggested that there is a kind of social contract involved when religious believers enter the market by creating a for-profit corporation. When they do this, so goes the argument, they give up the ability to pursue religious goals. Writing in response to the Court's decision in *Hobby Lobby*, for example, Erwin Chemerinsky argued that "[b]y creating a corporation, the owners chose to get the benefits of having an entity separate from themselves; they should accept the burdens of not being able to claim that the business is an extension of their religious views."<sup>66</sup> As a matter of corporate law, Chemerinsky is wrong. Under general incorporation statutes, a corporation can be formed for "any lawful purpose."<sup>67</sup> There is nothing in general business incorporation statutes suggesting a quid pro quo in which the benefits of the corporate form are conditioned on accepting limitations on otherwise lawful activity. Furthermore, there is nothing in corporate law that prohibits owners from running a corporation as "an extension of their religious

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64. See *Kern v. Dynaelectron, Corp.*, 577 F. Supp. 1196, 1201 (N.D. Tex. 1983) (holding that an employer's requirement that an employee convert to Islam in order to work as a helicopter pilot in the City of Mecca in Saudi Arabia, where non-Muslims can be executed, was a bona fide occupational requirement).

65. See Meese and Oman, *supra* note 8, at 278–80 (providing examples of religiously themed for-profit businesses); Sarah Barringer Gordon & Nomi Stolzenberg, *Hobby Lobby, Wheaton College, and a New Religious Order*, RELIGION & POLITICS (July 14, 2014), <http://religionandpolitics.org/2014/07/14/hobby-lobby-wheaton-college-and-a-new-religious-order> ("The Methodist Book Concern, for example, whose operations were based in New York City and Cincinnati, was the largest publishing house in the world by 1850.").

66. Erwin Chemerinsky, *The Broad Reach of the Narrow Hobby Lobby Ruling*, L.A. TIMES (June 30, 2014, 6:41 PM), <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-hobby-lobby-supreme-court-20140701-story.html>.

67. See DEL. CODE ANN. tit. 8 § 101(b) (2014). ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.").

views.”<sup>68</sup> Justice Ginsburg, however, adopted an analogous view, claiming that “for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers.”<sup>69</sup>

For my purposes, the interest of these statements does not lie in their empirical or legal accuracy. Rather, it lies in the strong normative vision of the law of church and market that they present. Although both Justice Ginsburg and Professor Chemerinsky are making arguments about the corporate form, clearly the “for-profit” rather than the “corporate” aspect of Hobby Lobby’s activities drives their analysis. Justice Ginsburg, for example, goes out of her way to note that churches, which are organized as corporations, do not fall within her analysis.<sup>70</sup> Furthermore, the antidiscrimination laws on which she bases her argument are not limited to corporations but include natural persons, sole proprietorships, and partnerships.<sup>71</sup> Rather, their argument rests on a vision of the relationship of religion to the market, one in which religious considerations must be excluded in commercial contexts—or at least marginalized—in order to ensure that the market remains a widely accessible and largely secular domain.

It would be dangerous, of course, to generalize too much from the arguments surrounding the *Hobby Lobby* decision. It is a single case and—as with any major Supreme Court decision—it represents the intersection of several different strands of political and legal argument. Nevertheless, it is a striking instance of explicit reflection on the proper relationship between religion and commerce. Narrowly conceived, *Hobby Lobby* was a pretty traditional church-state case. Indeed, this is precisely how the majority treated it. The government passed a law, and religious citizens claimed that the law violated their right to exercise their religion. The case, however, was not simply about the relationship between religious believers and the state. It

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68. See Meese and Oman, *supra* note 8, at 281–85 (discussing the various corporate law mechanisms for infusing a firm with religious goals and practices).

69. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797–98 (2014) (Ginsburg, J., dissenting) (internal quotations and citations omitted).

70. See *id.* at 2793–95.

71. Compare *id.* at 2795–96 (arguing that for-profit corporations cannot represent a community of religious believers because of the antidiscrimination requirements of Title VII), with 42 U.S.C. § 2000e(b) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .”).

was also about the relationship between religion and commerce, and how the law should structure that relationship. There is one generalization from *Hobby Lobby* I am willing to hazard: The case has not resolved our conflicts over the proper relationship between church and market, and, increasingly, scholars of law and religion will need to do more than simply recapitulate the traditional arguments over church and state in the commercial context. Rather, they will need to think deeply about how the law should structure markets and the role that religion should play in that structure.

#### CONCLUSION

My goal in this brief Essay has been to raise a question: How should the law structure the relationship between commerce and religion? Helfand and Richman's article reveals the necessity of addressing this question directly. Importing legal theories from other fields, in effect, creates a law of church and market without thinking about it. Their work illustrates the costs of doing so. However, once one begins reflecting on the law of church and market in its own right—rather than as simply a commercial instantiation of familiar debates over church and state—the difficulty of the issues becomes manifest. Helfand and Richman implicitly offer contract as a paradigm for thinking about religion and commerce. This approach, however, is far from the only one available in our legal culture. Antidiscrimination norms provide a powerful alternative in which the social construction of a particular kind of market—one that is pluralistic, open to all, and in some sense “secular”—takes priority over freedom of contract. The tension between these two approaches illustrates the need for more and better reflection on the relationship between commerce and religion. Before we decide which of these approaches is best, we must bring their assumptions out into the open, examine them, and decide whether they are justified. This is a task that neither scholars nor judges have yet undertaken. It is time that they did.