Religion, Rationality, and Special Treatment

Jane Rutherford
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Jane Rutherford*

Religion has always played a major role in American society, both politically and socially. Its influence on the Constitution is expressed in the Establishment and Free Exercise Clauses. Why is religion given special treatment by the Constitution? In this Article, Professor Jane Rutherford makes a structural argument for religious liberty. Rutherford posits that religion is treated differently not because of the content of its views, but because of the various other functions it serves, such as providing voices for outsiders and advancing non-market values. Rutherford concludes that we should return to more serious enforcement of the Establishment and Free Exercise Clauses in order to give a more principled basis for preserving important liberties.

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When I was small and my parents promised a “special” treat, I expected something extraordinary. A special treat was more than an ice cream cone or a visit to a local attraction. It was a trip out of town or a treasured gift. “Special” has an entirely different meaning for my children. My daughter works for a special recreation association in the summer. It doesn’t mean that she takes the children on extraordinary trips or provides treasured gifts. Instead, it means that the children who attend her day camp have extra needs for attention. In this way, the word “special” has been transformed from meaning unusually privileged to meaning unusually disadvantaged. Both meanings are captured on the “church lady” skits on Saturday Night Live reruns. When the church lady says, “Well, isn’t that special?,” she is sarcastically implying that her guest is both privileged and misguided.

These dual meanings of the word “special” have carried over into the debates

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about which groups are entitled to have special treatment. Thus, special treatment
sometimes is viewed with disfavor because it creates the impression of groups that
are both uniquely demanding and stigmatized. As a result, outsiders who complain
are characterized as whiners who want special favors rather than righteously
indignant citizens who seek justice. Familiar as these ideas are for the affirmative
action debates on race and gender, it is still slightly jarring to see them applied in
the context of religious freedom. Nevertheless, the crux of the current debate about
religious liberty centers on the issue of whether religion is special. Both the Free
Exercise Clause exemptions and the Establishment Clause limits seem to
presuppose that religion is special and distinguishable from other forms of
philosophy and speech. Some scholars have argued that religion is special because
it makes non-rational claims. That position poses a number of problems for a legal
system that continues to view itself as deeply committed to rationality.

“Law . . . may . . . be defined as ‘Reason free from all passion.’” Although
Aristotle’s definition may be open to question, law continues to be committed to
rationality and therefore, generally prefers rational behavior to nonrational,
emotional, or superstitious behavior. Why then, does the First Amendment create
a preference for the supra-rational in the religion clauses? Arguably, one of the
reasons religion is protected is precisely because it is supra-rational: involving deep
emotional commitments not based solely on logic. Courts, however, carry their
preference for rationality into the interpretation of the religion clauses, and the
result has been to diminish religious liberty in general and to privilege those faiths
that appear more rational.

Any distinction between rationality and irrationality neither explains nor
supports religious liberty. Indeed, the distinction itself is open to serious question.
As leading scholars have suggested, it may be impossible to distinguish religion
from philosophy. What then justifies treating religion as special under either the
Free Exercise Clause or the Establishment Clause? In this Article, I argue that
religion is special not because of the content of its views, but because of the role it
plays in balancing power, providing voices for outsiders, advancing non-market
values, and fostering individual identity and spirituality. Thus, I make a structural
argument for religious liberty. The structural justification for religious liberty
suggests a different set of limits on the scope of religious liberty as well.

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1 See Andrew W. Austin, Faith and the Constitutional Definition of Religion, 22 CUMB.
L. REV. 1, 33 (1991); Dmitry N. Feofanov, Defining Religion: An Immodest Proposal, 23

2 ARISTOTLE, THE POLITICS OF ARISTOTLE 146 (Ernest Baker trans., Oxford Univ. Press
1946).

3 For example, the tax code excludes tort awards for physical injuries from taxable
income, but taxes the income from awards for emotional harm. I.R.C. § 104 (2000).

4 See, e.g., Frederick Mark Gedicks, An Unfirm Foundation: The Regrettable
I. IS THERE A PREFERENCE FOR RATIONALITY?

The commitment to reason is deeply imbedded in Western traditions. Aristotle believed that it was this capacity to reason, or the “rational principle,” that separated humans from animals. Thus, Locke argued that those individuals who can exercise reason are entitled to liberty, while those with diminished reasoning capacity are subject to the control of others.

Although “rationality” is generally perceived positively, while irrationality is considered a fault, the terms are not easy to define. Rationality could be defined narrowly to mean formal logic, including the processes of deduction and induction, like the process of proving a mathematical theorem. This formal method of reasoning requires linear thinking in which one principle follows inevitably from the previous one. This process is enshrined in Western philosophical history in the work of Descartes and even Hobbes. Such narrow linear reasoning is likely to lead to the conclusion that there is only one correct answer to any given question. Thus, Descartes writes: “[T]here is only one truth in any matter, whoever discovers it knows as much about it as can be known.”

A number of disturbing consequences flow from the quest for a single universal truth. First, of course, it privileges one set of views and discards all other perspectives. Contrary views are necessarily untruth or heresy. It is only a short step from labeling an idea as heresy to persecuting individuals as heretics. Thus, it is not surprising that the witchcraft trials emerge about a generation after Descartes. As the witchcraft example demonstrates, finding a single truth often descends into persecuting heretics who are outsiders. In the case of witchcraft, those chosen for persecution often were women who upset the balance of power in their communities, either by living independently or by claiming unusual strength. Hence, women who were healers or midwives were often the target of witchcraft.
prosecutions. Others were labeled as witches because they were social misfits, marked in some way as unattractive. For example, women with visible warts or moles were often called witches, as were women who had defective or stillborn babies. As the witchcraft example illustrates, a strictly linear search for the one truth risks both discarding alternative views and creating a hierarchy of insiders and outsiders.

Not surprisingly, modern and post-modern scholars are more skeptical about the possibility of a single universal truth that can be discovered by linear reasoning. Modern liberal thinkers argue that there are many competing truths, but cling to the idea that there is an objective and knowable world in which autonomous individuals can make choices. Postmodern theorists reject absolute truth altogether in favor of multiple interpretations that are open to debate. Nevertheless, some prominent scholars continue to define the rule of law in terms of the search for truth, and however quixotic the quest, the Supreme Court continues to be committed to the

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11 See, e.g., Martha M. Young, Comment, The Salem Witch Trials 300 Years Later: How Far Has the American Legal System Come? How Much Further Does it Need to Go?, 64 TUL. L. REV. 235, 245-246 (1989) (describing how the Devil's mark, marks on the accused's body, were used to identify witches in witch trials).

12 For example, Anne Hutchinson, Mary Dyer, and Jane Hawkins were all accused of being witches partly because Hutchinson and Hawkins delivered Dyer's stillborn child. See Rosemary S. Keller, New England Women: Ideology and Experience in First-Generation Puritanism (1630-1650), in 2 WOMEN AND RELIGION IN AMERICA 140 (Rosemary R. Ruether & Rosemary S. Keller eds., 1983). Of course, the fact that Anne Hutchinson had emerged as a powerful preacher of anti-nomianist views made her a heretic both for being a woman who exceeded her role, and for challenging existing doctrine. See ROOT OF BITTERNESS: DOCUMENTS OF THE SOCIAL HISTORY OF AMERICAN WOMEN 3-10 (Nancy F. Cott et al. eds., 2d ed. 1996).


15 See, e.g., JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, AND POSTMODERNISM IN THE CONTEMPORARY WEST 199-202 (1990); Jürgen Habermas, Reply to Symposium Participants, Benjamin Cardozo School of Law, 17 CARDozo L. REV. 1477, 1502 (1996) (responding to Thomas McCarthy by rejecting the premise of "one right answer"); Linda Singer, Feminism and Postmodernism, in FEMINISTS THEORIZE THE POLITICAL 466 (Judith Butler & Joan W. Scott eds., 1992) (describing postmodernism as rejecting uniform rationalist views in favor of "communication networks").

16 See FARBER & SHERRY, supra note 14, at 95-117.
search for rationality, if for not absolutely provable truth.\textsuperscript{17}

Generally, rationality means that a proposition can be defended with reason and arguments rather than mere coercion or physical force.\textsuperscript{18} In this sense, rationality is the opposite of arbitrariness. \textit{Black's Law Dictionary} defines "arbitrary" as "capriciously or at pleasure. Without adequate determining principle . . . depending on the will alone; absolutely in power."\textsuperscript{19} This notion of reasoned judgment, as opposed to arbitrary abuse of power, is at the core of the notion of the rule of law and has roots that can be traced back to the Magna Carta.\textsuperscript{20} My favorite example to illustrate the historical distinction between reasoned judgment and arbitrary decisions\textsuperscript{21} is this unexplained entry in King John's ledger of fees from the thirteenth century: "The wife of Hugh de Neville gives the lord King 200 chickens that she may lie with her husband for one night."\textsuperscript{22} From a contemporary perspective, this entry seems completely inexplicable. Greedy King John (the bad guy in the Robin Hood story) seems to have hit upon a truly arbitrary and excessive charge. Unfortunate individuals like Hugh's wife may only have paid such outrageous claims because they feared the King's minions (like the Sheriff of

\textsuperscript{17} See Washington v. Glucksberg, 521 U.S. 702, 765 (1997) (Souter, J., concurring) ("the supplying of content to this Constitutional concept has of necessity been a rational process") (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); Romer v. Evans, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting) ("Discharge of the particular plaintiffs before us would be rational . . ."); United States v. Winstar Corp., 518 U.S. 839, 854 (1996) ("[G]oodwill is recognized as valuable because a rational purchaser would not pay more than assets are worth . . ."); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 741 (1994) (Scalia, J., dissenting) ("This is not a rational argument proving religious favoritism . . ."); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 777 (1990) ("We find the Board's no-presumption approach rational as an empirical matter."); Bowen v. Owens, 476 U.S. 340, 350 (1986) (Marshall, J., dissenting) ("[T]he majority's efforts to imagine plausible legislative scenarios cannot obscure the simple truth . . . that Congress had [no] rational basis for deciding . . . surviving divorced spouses who remarried could not receive the same survivor's benefits allowed to remarried widowed spouses."); Jackson v. Virginia, 443 U.S. 307, 333 (1979) (Stevens, J., concurring) ("Indeed, the very premise of \\textit{Winship} is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt . . ."); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) ("[T]he underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible.").

\textsuperscript{18} See J\textsc{ü}rgen Habermas, \textsc{the} theory of communicative action: reason and the rationalization of society 9-14 (Thomas McCarthy trans., Beacon Press 1984) [hereinafter Habermas].

\textsuperscript{19} \textsc{Black's Law Dictionary} 104 (6th ed. 1990).

\textsuperscript{20} See Jane Rutherford, \textsc{the} myth of due process, 72 B.U. L. REV. 1, 6-8 (1992) [hereinafter Rutherford, Myth].

\textsuperscript{21} Of course, the process of deciding whether a decision is arbitrary or principled is itself subject to the risk of arbitrariness. Thus the quest for principled decision-making is infinite. Like fractals, each decision is part of an infinite series of evaluations of rationality.

\textsuperscript{22} James Clarke Holt, \textsc{Magna Carta} and \textsc{medieval government} 88 (1985) (quoting \textsc{Rotuli de Oblatis et Finibus} 275 (T. Duffus Hardy ed., 1835)).
Nottingham). By definition then, arbitrary actions are backed by superior power rather than persuasion.  

King John’s decision to fine or tax Hugh’s wife for sleeping with her husband appears arbitrary not only because the king was powerful, but also because it does not seem to follow from any fixed principle. Of course, the king could respond that he was relying on a fixed principle: he had prior sexual rights to his tenants under feudal law, and he intended to exercise those rights unless paid. However, the prior sexual rights of a feudal lord are themselves based on power rather than consent or persuasion. Thus, Hugh’s wife might respond that to avoid being arbitrary, the king’s justification must rest on some shared norms or values. Hence, some scholars like Jürgen Habermas argue that although law cannot be reduced to morality, law is necessarily influenced by morality. Thus, it is not sufficient merely to claim principles or reason in order for a decision to be rational; it must also fit within a normative construct shared by the relevant community.

Many philosophers, however, posit law as entirely divorced from morality, which is inherently subjective. For scholars like Max Weber (positivists), law is whatever courts and legislatures say it is. Law is rational to the extent that it is adopted according to previously agreed upon methods, such as legislative enactments or court decisions. Moral limits merely render law subject to open ended debates about legitimacy. Hence, Weber argued that when law relies too heavily on ethics, it becomes “substantively irrational.” Thus, for Weber, rationality is a matter of process rather than content.

Another common way to define rationality is in contrast to emotion. Thus, we

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23 For a discussion of the nature of law as precepts backed by government power to enforce them, see MAX WEBER ON LAW IN ECONOMY AND SOCIETY 14 (Max Rheinstein ed. & Edward Shils trans., 3d ed. 1965) (1920) [hereinafter LAW IN ECONOMY] (“law . . . mean[s] norms which are directly guaranteed by legal coercion”); Robert Cover, Violence and the Word, 95 YALE L.J. 1601 (1986) (characterizing judges’ legal interpretations as imposing violence on others); Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 741 (1982) (“All law is masked power.”).

24 See BLACK’S LAW DICTIONARY, supra note 19 at 104-05 (“A[n] arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things.”).


26 See HABERMAS, supra note 18, at 15-18.


28 LAW IN ECONOMY, supra note 23, at 61-67; see also JEREMY BENTHAM, THE THEORY OF LEGISLATION 27-28 (Richard Hildreth trans., N.M. Tripathi Private Ltd. 1975) (1843); HART, supra note 27, at 100-10.


30 LAW IN ECONOMY, supra note 23, at 63.

31 See Martha C. Nussbaum, The Use and Abuse of Philosophy in Legal Education, 45
could define rationality more broadly to include all arguments designed to appeal to cognitive as opposed to emotional decision-making.\textsuperscript{32} However, some scholars argue that emotion cannot fully be separated from cognitive decisions and that any attempt to make the distinction creates a false dichotomy.\textsuperscript{33} Others argue that divorcing cognitive functions from emotion renders the process cold and insensitive, so that we should privilege rather than penalize emotional appeals.\textsuperscript{34}

Rationality also is associated with autonomy. An individual can only base her conduct on reasoned arguments if she has the freedom to choose how to act or speak.\textsuperscript{35} When she obeys higher authority without question, she acts on trust, duty, or fear, rather than reason. Obedience can be rational in the sense that it is based on the reasoned judgment that the higher authority is better informed, more experienced, wiser, or more powerful and therefore to be trusted or feared. Nevertheless, the actions themselves are justified not by rational argument, but by trust, faith, or fear of the higher authority.

Finally, rationality often has an empirical component: it works in the real world. An assertion is only well-grounded when there is some evidence to support it. Often this evidence is drawn from practical experience. Thus, when courts examine whether a legislative act is rationally related to its purposes, they often ask how well the statute achieves its goals.\textsuperscript{36} Statutes that completely fail in their

\begin{itemize}
  \item STAN. L. REV. 1627, 1634 (1993); D. Don Welch, Ruling with the Heart: Emotion-Based Public Policy, 65 S. CAL. INTERDISC. L.J. 55, 56 (1997).
  \item See LAW IN ECONOMY, supra note 23, at 63.
  \item See HABERMAS, supra note 18, at 14-15.
  \item See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 539 (1993) (noting that the City's stated interest was to prohibit cruelty to animals, but a ban solely on animal sacrifice and not other forms of cruelty did not achieve that goal); City of
objectives may be held to be "irrational" and set aside. Although the legal tests
for rationality need not follow the strict rules of science, to be rational a decision
must have some empirical basis.

Courts rarely use the narrow definition of formal logic when defining
rationality. Instead, courts tend to use a much broader definition of rationality that
includes any argument supported by reason, common sense, or evidence. In
order for legislation to be considered rational, the legislators need not prove the truth of
the underlying assumptions. Instead, it is sufficient if a reasonable legislator could
believe the assumptions to be true. Indeed, in other contexts the Supreme Court

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449-450 (1985) (holding the City's goal of
preventing construction in a five-hundred-year flood plain was not achieved by requiring a
special building permit for a home for the mentally retarded but not for a nursing home,
sanitarium, or hospital); Craig v. Boren, 429 U.S. 190, 204 (1976) (holding Oklahoma's
prohibition on males under age twenty-one buying 3.2% beer did not achieve the state's goal
of preventing drunk driving because the statute only applied to the purchase and not
consumption of beer); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (holding that Illinois did
not serve any state goal when it separated children from fit parents).

granting veterans' preferences to persons who were New York residents at the time they
joined the military but not to non-resident veterans is an irrational denial of equal
protection); Cleburne, 473 U.S. at 446 (holding that the "State may not rely on a
classification whose relationship to an asserted goal is so attenuated as to render the
distinction arbitrary or irrational"); Hooper v. Bernalillo County Assessor, 472 U.S. 612
(1985) (holding the "distinction New Mexico makes between veterans who established
residence before May 8, 1976, and those veterans who arrived in the State thereafter bears
no rational relationship to [any] one of the State's objectives"); Metropolitan Life Ins. Co.
out-of-state companies to protect the domestic market); Williams v. Vermont, 472 U.S. 14
(1985) (holding a Vermont statute permitting a tax exemption for vehicle registration, which
distinguished between residents and non-residents who later became Vermont residents, to
be arbitrary and irrational); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding a
gender-based distinction between widows and widowers with minor children who elected
to stay at home irrational); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (holding
that a rule requiring pregnant teachers to quit is arbitrary and irrational); USDA v. Moreno,
413 U.S. 528, 537 (1973) (holding a classification invalid because it "simply does not
operate so as rationally to further the prevention of fraud").

that empirical evidence is not sufficient to overcome the presumption that legislatures act
rationally so long as the issue is debatable).

See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282
(1981); Clover Leaf Creamery, 449 U.S. at 464-65; N.Y. City Transit Auth. v. Beazer, 440

("[W]here we find that the legislators, in light of the facts and testimony before them, have
a rational basis for finding a chosen regulatory scheme necessary to the protection of
commerce, our investigation is at an end.") (quoting Katzenbach v. McClung, 379 U.S. 294,
enough that there is an evil at hand for correction, and that it might be thought that the
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has described rationality very broadly to include any plausible support for an argument.\(^4^1\)

The problem with such a broad definition is that “rational” and “irrational” merely become labels for personal preferences. When decision-makers agree with an argument, they find it to be persuasive, and therefore supported by reason. Accordingly, they call the argument rational. When they disagree, the argument seems unsupported by reason, and they label it irrational, or emotional. For example, when abolitionists mounted constitutional challenges to slavery, the arguments were dismissed as “emotional,” while the arguments for the status quo were viewed as rational.\(^4^2\) More recently, in Romer v. Evans,\(^4^3\) Justice Scalia dismissed the majority’s opinion protecting the political rights of homosexuals as “emotive utterance.”\(^4^4\) To the extent that rational means fitting within a recognized paradigm, arguments to sustain the status quo will always seem more rational than arguments to create new paradigms.\(^4^5\)

Fitting faith into a legal system that treasures rationality is a challenge. Religion usually contains numerous non-rational components. Not all principles are supported by reasoned argument. Instead, many religious views are accepted and taught as matters of faith or received authority. Although some religious rules or principles may be supported by arguments from sacred texts or religious tradition, in general, these traditions and texts are not subject to empirical criticism or autonomous decision-making. Indeed, many religious practices are transcendental experiences that cannot be captured in the form of an argument at all. For instance, meditation, sweat lodge ceremonies, and sacraments are all spiritual experiences that cannot be reduced to logical arguments or explanations. Thus religion poses several problems for a system committed to rationality.

II. HOW DOES THE COMMITMENT TO RATIONALITY AFFECT RELIGIOUS LIBERTY?

Has the preference for rationality diminished religious liberty? The commitment to rationality might affect religious freedom in three different ways. First, the emphasis on rationality may risk marginalizing most religions because they are based on faith. Second, the emphasis on rationality may unduly empower government to enact limits on the scope of religious behavior. Third, the emphasis on rationality may create preferences for those religions that are perceived to be

\(^{4^1}\) See, e.g., Clover Leaf Creamery, 449 U.S. at 464; Williamson, 348 U.S. at 490-91.

\(^{4^2}\) See, e.g., State v. Post, 20 N.J.L. 368, 369 (1845). The court stated:

I have listened . . . to the arguments . . . and the pathetic appeals . . . in support of [abolition] . . . and whilst I most sincerely respect the zeal and humane spirit by which they were dictated . . . I am nevertheless constrained to say, that much of the argument seemed rather addressed to the feelings than to the legal intelligence of the court.


\(^{4^4}\) Id. at 639 (Scalia, J., dissenting).

more rational and disadvantage those faiths that are seen as irrational or superstitious.

A. Has the Commitment to Rationality Created a Generalized Hostility to Religion?

Relatively little direct evidence exists. Some commentators have tried to link diffuse cultural secularism to a decline in religious liberty. Although we tend to think of reason and rationality as peculiarly secular, that has not always been the case. For example, Locke, who argued that reason was the well-spring of liberty, used specifically religious references to support his arguments. Certainly our culture is substantially more secularized now than at the time of the founding, and the Court is less likely to use expressly religious language in its opinions. Of course, the prevailing cultural ethic that is secular, rational, and arguably hostile to religion may permeate the Court without express evidence in opinions.

47 References to God and to biblical stories are woven throughout Locke's work. See LOCKE, TWO TREATISES, supra note 6, at 7, 267-82, 285-86.


50 It is not clear that the public is hostile to religion. Public attitudes toward religion are complex and varied both among the general population and elite groups. For a detailed discussion of such attitudes, see generally TED G. JELEN & CLYDE WILCOX, PUBLIC ATTITUDES TOWARD CHURCH AND STATE (1995) [hereinafter JELEN & WILCOX] (describing statistical data demonstrating variance between the general population and elite groups on attitudes about the role of religion in society, the separation of church and state, and establishment issues).

51 Michael W. McConnell has argued that Justice Stevens' opinions are expressly anti-religious. Michael W. McConnell, "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age, 1993 BYU L. REV. 163; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1132 n.108 (1990)
However, the Court's recent rulings give little evidence of such generalized hostility to religion.

In fact, mainstream religions have fared very well before the Supreme Court in the face of Establishment Clause claims. For example, Christian student groups were entitled to claim funding from the University of Virginia; municipalities were permitted to erect Christian religious displays like nativity scenes in public parks; public schools were required to provide space for religious groups on the same basis as they were provided to secular organizations; and parochial schools were entitled to claim public funding for some of their students. Although the Court draws the line at prayer in public school settings, generally most Establishment Clause cases are decided in favor of the religion. Indeed, Establishment Clause objections are most likely to be sustained when they are raised as defenses to illegal conduct by religious entities. For example, when religions are accused of discrimination, courts often refuse to decide the issue in order to avoid entangling the government in religious affairs in violation of the Establishment Clause. Such rulings unduly benefit organized religion, especially Christian groups. Accordingly, there is little evidence of general hostility to religion.

B. Has the Commitment to Rationality Unduly Limited Religious Behavior?

Religions have not fared as well under the Free Exercise Clause. The problems have a long history. The early disputes over free exercise were not cast as contests


56 See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (prohibiting a public high school from having a rabbi say a prayer at graduation); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that a moment of silence for meditation or prayer was unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (holding that a non-denominational prayer in public school violated the Establishment Clause).
58 It is hard to measure the extent to which the Establishment Clause doctrine has benefited non-Christian groups. When the Satmar Hadasim, an orthodox Jewish group, created a public school for their disabled children, it was struck down on Establishment Clause grounds. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994).
between rationality and faith. Instead, they were seen as conflicts between belief and conduct. Individuals were free to believe whatever they wanted, but they had to comply with the majority’s rules for conduct. For example, in Reynolds v. United States, the Court drew a sharp distinction between Mormon faith and the practice of polygamy. Mormons were free to believe that polygamy was divinely inspired and encouraged, but were not free to act on those beliefs. Although the Supreme Court rhetoric reflected this distinction between belief and conduct, the federal government’s attempt to seize the church property was a direct attack on the institution of the church itself. Only when the church changed the formal doctrine to reject a belief in polygamy did the government relent.

As the Mormon example suggests, these conflicts raised the specter of government coercion to force believers to act contrary to their faith. No such coercion was necessary for mainstream Protestants because their moral standards of conduct were enshrined in law. Thus, insiders could comfortably comply with both their faith and their legal duties, while outsiders had to limit their religious lives. The distinction between faith and conduct enabled the Court to maintain the appearance of tolerance while enforcing mainstream Protestant values. These values were not perceived to be religious. Rather, they were the rational choices of majoritarian legislatures. This distinction between the “rational” choices of legislatures and courts, and the “religious” choices of outsider faiths enabled the government to maintain a formal commitment to religious freedom while limiting outsider religions.

As the Supreme Court struggled with this history of favoritism, it relied increasingly on the concept of “neutrality,” which the Court interpreted as formal

60 Id. at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).
61 See, e.g., Act of March 3, 1887, § 17, 24 Stat. 638 (dissolving the Church of Latter-Day Saints and authorizing seizure of its property); see also Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding congressional legislation that dissolved the church and forfeited its property).
62 See, e.g., Cleveland v. United States, 329 U.S. 14 (1946) (noting that polygamy had been outlawed by the Mormons since 1889 and that Mormon fundamentalists practicing polygamy were in violation of Church law and the Mann Act).
equality theory. The government acted neutrally toward religion if it treated religion the same as non-religion or if it treated all sects the same. This line of cases culminated in *Employment Division, Department of Human Resources of Oregon v. Smith.* There, the Court held that no free exercise claims could arise against any "neutral law of general applicability." Specifically, it meant that Native Americans could not claim religious freedom for their sacramental use of peyote. From 1963 to 1990 the general rule had been that the government needed a compelling state interest to justify an intrusion on the free exercise of religion. Although the rule seemed to require strict scrutiny, most free exercise challenges were unsuccessful. Nevertheless, governments were obliged to confront the balance they had struck between individual conscience and public interest. In theory, at least, this requirement created an incentive for the state to accommodate faith-based conduct and discouraged the state from strictly enforcing laws that impeded religious practice. After *Smith,* the presumption shifted in favor of state regulation, and a claimant was required to prove that the state had singled out a specific religion for discrimination.

Congress reacted by enacting the Religious Freedom Restoration Act (RFRA) that reinstated the compelling state interest test. The Supreme Court promptly held the RFRA to be unconstitutional and reaffirmed the general applicability test.

64 See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (holding that an ordinance prohibiting animal slaughter was specifically targeted to prohibit Santeria rites and was therefore discriminatory and not neutral); Bowen v. Roy, 476 U.S. 693, 703 (1986) (holding that rules requiring social security numbers were neutral so long as they did not intentionally discriminate against any particular faith); Goldman v. Weinberger, 475 U.S. 503, 521 (1986) (holding that the Army could prohibit soldiers from wearing yarmulkes under a neutral rule specifying a particular uniform); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (holding that tax deductions for contributions to religious institutions were neutral because they did not discriminate among religions).


66 Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

67 See Thomas v. Review Bd. of Ind., Employment Sec. Div., 450 U.S. 707, 718 (1981) (holding that a "state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (holding that "only those [state] interests of the highest order... can overbalance legitimate claims to the free exercise of religion"); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (holding that a compelling state interest was necessary in order to infringe upon the appellant's free exercise rights).


69 See *Smith,* 494 U.S. at 872.

in *City of Boerne v. Flores*. In *Boerne*, the Court held that a Roman Catholic parish could not expand its own church building to provide more space for religious services and functions because the changes were barred by landmark provisions which constituted "neutral laws of general application." Permitting "neutral laws of general application" to supercede religious practices nearly extinguishes the Free Exercise Clause. Now a claimant can only prevail if she can show that a regulation specifically targeted a particular religious group for discrimination.

The very idea that there are "neutral" principles of "general application" is a commitment to traditional notions of rationality. This idea of "objective" lawmakers who are completely independent of their faiths presumes that rationality precedes, and is superior to, non-rational religious views. In a post-modernist world, such an objective position has been seriously questioned. It assumes that general secular norms are available and are uninfluenced by any particular religious viewpoint. Surely all of us are influenced, both consciously and unconsciously, by our backgrounds and beliefs. Empirically, the claim that legislators are religiously independent is hard to sustain given the evidence of religious interest group lobbying and political power. Thus, the problem with an emphasis on rationality is less that religion as a whole is marginalized than that free exercise has been unduly restricted.

### C. Does the Commitment to Rationality Favor Some Faiths Over Others?

As the Mormon example suggests, the commitment to reason sometimes creates

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72 *City of Boerne*, 521 U.S. at 538.


hierarchies of insiders and outsiders. Locke suggested that liberty itself is linked to reason. Those who possess superior reason are free to exercise authority over those whose reasoning is inherently impaired. Hence, fathers govern children; masters govern slaves; and husbands govern wives. Arguably then, those who rely on reason and evidence may exercise authority over those who rely on faith or revelation. Although the courts have not expressly articulated such a position, that is one way to read cases like Reynolds or Smith, which authorize legislatures to limit religious practices. In essence, legislatures are presumed to be "neutral" or "objective" in making "rational" judgments about the general limits on tolerable

76 LOCKE, TWO TREATISES, supra note 6, at 35 ("The Freedom then of Man and Liberty of acting according to his own Will is grounded on his having Reason . . .").

77 Thus Locke argued that those who lack the capacity to develop reason ("lunaticks and idots") are perpetually subject to the authority of their parents or other caretakers, and never truly free. LOCKE, TWO TREATISES, supra note 6, at 33-34.

78 Locke maintained that children were subject to parental control because they lacked the ability to reason that would develop with age. Liberty inhered in the human condition because of the inborn capacity to develop reason, but full liberty did not arise until reason was fully developed at adulthood. LOCKE, TWO TREATISES, supra note 6, at 30-42.

79 Slaves posed something of a problem for Locke. Since the capacity to reason provides the key to freedom, slaves who could reason should be freed. Locke's solution was to then tie liberty to the capacity to hold property. For Locke, the protection of property is the primary purpose of society. Thus slaves, who could not hold property, were subject to others because they were wholly outside civil society. LOCKE, TWO TREATISES, supra note 6, at 45.

80 See LOCKE, TWO TREATISES, supra note 6, at 44 ("But the Husband and Wife . . . will unavoidably sometimes have different wills too; it therefore being necessary, that the last Determination, i.e. the Rule, should be placed somewhere, it naturally falls to the Man's share, as the abler and the stronger.").

81 Reynolds v. United States, 98 U.S. 145 (1878).


83 See, e.g., Hunt v. Cromartie, 526 U.S. 541 (1999) (concluding that districting legislation is ordinarily presumed to be race-neutral); Leathers v. Medlock, 499 U.S. 439, 452-53 (1991) (presuming the Arkansas legislature passed a content-neutral sales tax); Messe v. Keene, 481 U.S. 465, 484 (1987) ("[W]e normally owe [respect] to the Legislature's power to define the terms that it uses . . . [and] we simply view this particular choice of language, [as] statutorily defined in a neutral and evenhanded manner . . ."); Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding a veteran's preference statute was presumed neutral on its face because no overt gender animus was present).

84 See, e.g., Feeney, 442 U.S. at 278-80 (presuming Massachusetts legislature to have acted in an objective manner unless it was demonstrated that they had a "[d]iscriminatory purpose"); Craig v. Boren, 429 U.S. 190, 222 (1976) (Rehnquist, J., dissenting) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.") (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 48-51 (1973) (holding that even though the school funding scheme resulted in inequality it was necessary to demonstrate a discriminatory purpose to overcome the presumption that the legislature acted objectively).

behavior. These supposedly rational, objective, and neutral judgments of the majority are entitled to greater weight than individual religious "beliefs."

In fact, however, the accepted view that is considered "rational" or "neutral" often merely reflects the religious preferences of the majority. Hence, it is "neutral" to permit Sunday closing laws to give workers a day at rest, even though those Sunday closing laws penalize Sabbatarians (like Jews and Seventh Day Adventists), who close their businesses on Saturday. Similarly, it is "neutral" to permit tax exemptions for religious contributions.

Read together, these cases undermine both the Free Exercise Clause and the Establishment Clause. They permit government both to regulate religions as in Boerne, or Smith, and to directly subsidize religious institutions, as in Rosenberger and Agostini. These changes in the law reduce the religion clauses into versions of free speech or equal protection. Religion loses its special place that "States are not required to convince the courts of the correctness of their legislative judgments" even when plaintiffs allege the legislation is irrational; McGowan v. Maryland, 366 U.S. 420, 425 (1961) (holding that legislatures are presumed to have acted constitutionally).


93 See, e.g., City of Boerne, 521 U.S. at 507 (denying a Free Exercise Clause claim and
in the constitutional framework. The new emphasis on rational and universally applicable rules implies that religion is not special.

III. IS RELIGION SPECIAL?

A debate is flourishing in scholarly literature about whether religion should get special treatment from the government.\(^9\) Sometimes religious individuals or entities request exemptions from generally applicable laws citing the Free Exercise Clause,\(^9\) while other times, secular individuals or entities seek to exclude religious groups from government benefits or subsidies as violations of the Establishment Clause.\(^9\) In both instances, the question comes down to why religions should be treated differently. Religions can only be entitled to special treatment if we know what constitutes a religion.\(^9\)

holding that the Catholic Church must be treated equally with other applicants for land use variances); \(\text{Rosenberger, 515 U.S. at 831 (holding that the university must treat all student groups equally, and therefore must pay to print evangelical fliers); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that if a public school permits outside groups like the Boy Scouts to use its facilities, it must permit religious groups to do so on an equal basis).}


\(^9\) See, e.g., \textit{City of Boerne, 521 U.S. at 507 (addressing exemption from landmark status sought for Roman Catholic Church that wanted to expand); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (addressing exemption from employment division rules sought for an individual discharged for use of peyote during Native American sacrament).}

\(^9\) See, e.g., \textit{Rosenberger, 515 U.S. at 819 (denying a challenge to a subsidy for a religious student group at a state university); \textit{Agostini, 521 U.S. at 203 (permitting state-paid special education teachers to teach at parochial schools); Pinette, 515 U.S. at 753; Lamb's Chapel, 508 U.S. at 1 (requiring a school district to provide school facilities for religious groups to the same extent the facilities were provided to secular groups); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (permitting a school district to pay the salary of a sign language interpreter for a deaf child attending Catholic school); Westside Cmty. Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).}

\(^9\) See Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J. dissenting) ("In one important respect, the Constitution is not neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional
A. How Should Religion be Defined?

This question is extremely difficult, and one that the Court has frequently avoided. One way courts have avoided this question is to focus on the sincerity of the adherent’s views, even when they diverge from other members of the same sect. Thus, in *United States v. Seeger*, the Court defined religion as “a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”

Sincerity offers little to distinguish religion from other philosophies. Marxists, Presbyterians, and anarchists may all be equally sincere. Hence, this standard depends on whether the views “occup[y] a place... parallel to... [the] orthodox belief in God.” It is unclear whether that standard is merely a measure of the subjective importance of the faith to the believer, or whether the standard requires a more theistic element. Either way, the definition is likely to be hard to apply to generalized spiritual orders like those experienced by Native American faiths or Eastern religions like Zen Buddhism.

However, a more generalized sincerity standard without a theistic component defines many deeply held moral convictions to be religious. In order to distinguish merely personal morality from religion, Justice Harlan suggested that to be considered religious, deeply held moral views would have to be shared with a “recognizable and cohesive group.” One problem with this approach is that it fails to account for the role of individual conscience in religion. Thus, it risks quashing religious dissent by privileging the views of religious institutions over religious individuals. For example, Sonia Johnson, the prominent feminist who was excommunicated by the Church of Latter-day Saints, remains a faithful and deeply spiritual person. Under Justice Harlan’s group-based approach, such a dissident would not have religious views “shared by a recognizable cohesive group” and would be denied free exercise protection. This poses problems for the many individuals who find themselves unwelcome in any recognized faith even though they are deeply religious.

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rights that other strongly held beliefs do not.”); Thomas v. Review Bd. of Ind., 450 U.S. 707, 713 (1981).

98 See, e.g., *Thomas*, 450 U.S. at 715.


100 Id. at 166.

101 Id. at 163.

102 See, e.g., *Welsh v. United States*, 398 U.S. 333, 340 (1970) (“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content ... those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by ... God’ in traditionally religious persons.”).

103 Id. at 344 (Harlan, J., concurring).


105 Some feminists feel excluded from most religious traditions. For a discussion of this problem, see MARY DALY, *THE CHURCH AND THE SECOND SEX* 53-73 (1985) (discussing the extent to which the Catholic Church oppresses women); Mary E. Becker, *The Politics of*
Justice Harlan may have wanted to define religion communally in order to reduce the risk of self-serving declarations of faith. For example, tax exclusions for parsonages create incentives for enterprising souls to declare themselves “ministers” solely to claim their homes as rectories or parsonages. Requiring evidence of a congregation reduces this risk of fraud. However, other mechanisms exist to control fraud that are less intrusive on individual rights of conscience. For instance, serious Establishment Clause limits may deter some fraudulent claims by forcing those claiming Free Exercise rights to forego government subsidies. Thus, the incentive to claim fraudulently the “rectory” on income tax returns vanishes if the tax benefit is viewed as an unconstitutional subsidy under the Establishment Clause. Because we are unsure of precisely what constitutes a religion, it is impossible to ever weed out all fraudulent or self-serving claims. Ultimately, we may have to decide whether we are willing to err on the side of religious liberty with its concomitant risk of fraud.

Nevertheless, courts have struggled to distinguish religious from moral or philosophical claims. Consequently, scholars have attempted a variety of definitions, none of which seem entirely satisfactory. Kent Greenawalt, who is


See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (distinguishing Amish claims to be free from compulsory high school education from “philosophical and personal” choices such as those embraced by Thoreau); Jacques v. Hilton, 569 F.Supp. 730, 734 (D. N.J. 1983), aff’d, 738 F.2d 422 (3d Cir. 1984) (refusing to “[l]et conscience be your guide” stand as a religion).

skeptical of a complete definition, suggests that religions include "a belief in transcendent reality, forms of worship and contemplation, experiences of the 'Holy,' ideas of sacred authority, myths and doctrines that interpret reality... [and] embody ethical teachings."\textsuperscript{109} Admittedly, Greenawalt's description is patterned on Judeo-Christian religions and seems to omit faiths that place less emphasis on theistic notions of the transcendent, such as Buddhism.\textsuperscript{110} Indeed, in the twentieth century, the theological trend has been away from traditional notions of the deity to a more open form of religion. Thus, for example, one influential theologian has defined "God" as the "ultimate reality" or "inexhaustible depth" claiming that "he who knows about depth knows about God."\textsuperscript{111} Courts have tended to follow these trends, defining religion expansively.\textsuperscript{112} For example, one court defined religion as the "underlying theories of man's nature or his place in the Universe."\textsuperscript{113}

Such broad definitions of the divine make it difficult to distinguish religion from philosophy, ethics, or morality.\textsuperscript{114} Ultimately these distinctions are bound to fail unless we are willing to adopt such a narrow and historical definition of religion that it excludes large categories of individuals who genuinely believe themselves to be engaged in religious practices. If matters of secular conscience are largely


\textsuperscript{109} GREENAWALT, RELIGIOUS CONVICTIONS, supra note 108, at 30-31.

\textsuperscript{110} See, e.g., LAROUSSE DICTIONARY OF BELIEFS AND RELIGIONS 78 (Rosemary Goring et al. eds., 1994).

\textsuperscript{111} PAUL TILlich, THE SHAKING OF THE FOUNDATIONS 64 (1962).

\textsuperscript{112} To make the problem of definition even more complex, some have suggested that religion should be defined broadly for purposes of the Free Exercise Clause and narrowly for purposes of the Establishment Clause. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1186 (2d ed. 1988).

\textsuperscript{113} Founding Church of Scientology of Wash. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969), cert. denied, 396 U.S. 963 (1969). A number of courts have followed similar approaches. See, e.g., United States v. Moon, 718 F.2d 1210, 1227 (2d Cir. 1983) (defining religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine" (quoting WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 31 (1910))); Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (referring to religion as addressing fundamental concerns comprehensively).

\textsuperscript{114} Nevertheless, courts have tried to distinguish the two. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (distinguishing Amish claims to be free from compulsory high school education from "philosophical and personal" choices such as those embraced by Thoreau); Jacques v. Hilton, 569 F. Supp. 730, 734 (D.N.J. 1983) (refusing to "[l]et conscience be your guide" stand as a religion), aff'd, 738 F.2d 422 (3d Cir. 1984).
indistinguishable from religious views, then why should religion be treated differently, with special Free Exercise benefits or Establishment Clause limits?

C. Why Should Religion Be Treated Differently than Other Philosophies?

Scholars have posited a number of reasons to treat religion differently from other moral philosophies including the text of the First Amendment, history, the inherent value of religion, eternal consequences, and preventing violence and persecution. For some textualists, it does not matter why religion is special. It is sufficient that the religion clauses were included in the First Amendment. That argument fails to justify the inclusion of religious exceptions in our constitutional scheme. If no rationale remains for including religious preferences, then arguably the Court is correct to minimize the impact of the religion clauses, and we should repeal them. On a more pragmatic level, the argument also fails. We need to have an explanation of why religion is unique in order to help courts decide whether special treatment is warranted and how much special treatment to give religion.

The historical arguments that the Framers of the First Amendment meant to create exemptions from generally applicable laws, or that religions were to receive government benefits on the same terms as others, are contested and suffer from

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115 Gedicks, supra note 4, at 563 (arguing that the moral positions of secular individuals are entitled to the same respect as the moral positions of religious individuals).

116 Gedicks, supra note 4, at 558-68.

117 See, e.g., Douglas Laycock, Religious Liberty as Liberty, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996); McConnell, Accommodation, supra note 63, at 717; Pepper, supra note 94, at 12.

118 Many scholars reject the idea that the Framers of the First Amendment intended the Free Exercise Clause to create exemptions from generally applicable laws. See Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978); Smith, Failure, supra note 74, at 37-43 (1995); Gerard V. Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245, 251-306 (1991); Marc Galanter, Religious Freedoms in the United States: A Turning Point?, 1966 Wis. L. Rev. 217, 234 (noting the absence of Free Exercise Clause exemptions in cases prior to 1940); Gedicks, supra note 4, at 561-62 (arguing that Sherbert v. Verner and Yoder were the exceptions to a long tradition of rejecting religious exemptions to generally applicable laws); Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915, 916, 926, 947-48 (1992) (challenging the historical accuracy of McConnell’s arguments); Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J.L. Ethics & Pub. Pol.’y. 591, 619-20 (1990) (arguing that the Founders had differences of opinion about how to protect religious freedom).

Even those who make originalist arguments in favor of such exemptions have only weak support gathered from the fact that a few exemptions existed at the time. See McConnell, Origins, supra note 51, at 1414-15. But see Mark Tushnet, The Rhetoric of Free Exercise Discourse, 1993 BYU L. Rev. 117 (criticizing McConnell’s historical methods).

Similarly, it is not clear whether the Framers of the First Amendment intended religions to receive government benefits. See, e.g., Arlin M. Adams & Charles J.
some of the same problems as the textualist arguments. Whatever the views of the Framers, we need a plausible current explanation for treating religion differently in order to justify continued adherence to these principles. Otherwise, the argument comes down to one of pure interest group politics; religious groups had the clout to get exceptions written into the Constitution hundreds of years ago, and we are all bound by that until we can get a sufficient super-majority to change it in favor of current secular interest groups. To be worthy of continued respect and application, the religion clauses must provide a more principled case for special treatment.

Those who argue that religion must be treated differently because religion is inherently good make precisely such a principled argument, but it is one that cannot be evaluated objectively. Indeed, the subjective nature of virtue is precisely the kind of policy question that is traditionally left up to legislatures to decide under rubrics like the "general welfare." Nor does inherent virtue explain why religious institutions were singled out for special treatment. Other institutions like the

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Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clause 21-31 (1990) (noting that Thomas Jefferson opposed government funding for religion, and James Madison, while President, vetoed incorporating the Episcopal Church in Washington, D.C., and reserved federal land for a Baptist Church); Daniel L. Dreisbach, Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations, 69 N.C. L. REV. 159, 163-68 (1990) (noting that Patrick Henry supported a bill that would have given funding to churches. This bill was disliked by Thomas Jefferson and died in committee.).

Nevertheless, it does seem more evident that the Establishment Clause originally was meant to prevent the adoption of a national religion, leaving open the possibility of state-established religions. See Smith, Failure, supra note 74, at 26-30 (1995); Raoul Berger, Federalism: The Founders' Design—Response to Michael McConnell, 57 Geo. Wash. L. Rev. 51 n.3 (1988) (noting that during the First Congress’ debates on the First Amendment, “[s]tate authority over religion was left intact”); Van Foreman McClellan, Comment, Edwards v. Aguillard: The Creationist-Evolutionist Battle Continues, 13 Okla. City U. L. Rev. 631, 637 n.42 (1988) (analyzing the First Congress’ views on financial support for religion and noting that the Senate rejected a suggested amendment by James Madison due to a concern with “preserving the idea that the various states were free to govern their own relationships with the church, free from any interference by the federal government.”).

119 Note that a stronger case can be made that the framers of the Fourteenth Amendment intended to create free exercise exemptions that would apply to the states. See generally Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment, 88 NW. U. L. REV. 1106 (1994).


121 See, e.g., U.S. Const. art. 1, § 8 (the spending clause which gives Congress the power to collect taxes for the “general Welfare”).
family, that historically were perceived to be inherently good; did not receive comparable constitutional protection. As other critics have noted, religions do not have the monopoly on virtue, nor are all religions necessarily virtuous. Many moral actors are motivated by secular purposes, like non-religious pacifists, while some religions have acted in manifest disregard of virtue. Defending religious liberty on the basis that religion is inherently good raises the specter of a legislature deciding which religions are good enough to warrant special protection.

Those who argue that religion can be distinguished from other philosophies by its emphasis on the supernatural offer a more persuasive justification for special treatment. For example, one scholar notes: "[R]eligion stands for an array of different trends and traits bound together by their reference to a supposed supernatural reality." Supernatural events are rarely discoverable by observation or reason. Hence, there is a long tradition of trying to access the supernatural through trances, psychedelic substances, or vision quests. Other faiths rely on divine revelation for information about the supernatural world. However, some religions do not require any commitment to the supernatural. For example, Unitarian Universalists do not necessarily place any emphasis on other worldly experiences and are largely indistinguishable from secular humanists.

Some faiths focus on a particular aspect of the supernatural: eternal consequences. Individuals who adhere to these religions are uniquely subject to

122 Gedicks, supra note 4, at 566-68.
127 See id.
129 In the ten articles of faith published by the Unitarian Universalists, there is no mention of God or any other deity or supernatural event. Instead, Unitarian Universalists express belief in freedom of religion, toleration, reason, equality, dignity, good works, love, democracy, and community. See Unitarian Universalist Association, What Do Unitarian Universalists Believe?
130 Of course, if the religious are correct on this score, some non-religious individuals may
the risk of divine and eternal punishment.\textsuperscript{131} Less discussed is the similar idea that religion can also offer eternal rewards that may induce the truly faithful to place religious commands over secular ones.\textsuperscript{132} Of course, many religions do not expressly incorporate theories of eternal reward or punishment, and therefore arguably would be excluded from any such justification of the First Amendment. At the core of this approach is the notion that reason alone cannot persuade those bound by eternal consequences.

This supra-rational approach has pragmatic consequences. If an individual believes that he is going to Hell for all eternity, no earthly punishment, even the death penalty, will act as a sufficient deterrent to religiously mandated conduct. Thus, those who are religiously motivated are, at least theoretically, less likely to be deterred by law. Therefore, supra-rational religious disputes are less likely to be resolved by rational deliberative politics. The persistence of mutually devastating religious disputes in Ireland and the Middle East attest to the difficulties of rational resolution of such problems. Once the deeply held and supra-rational nature of religious belief is acknowledged, then religion poses a threat of serious divisiveness and, all too often, violence.\textsuperscript{133} Pragmatically, this threat of violence has been a strong motivator for religious liberty. Nevertheless, this analysis is troubling. Privileging religion because religious individuals hold irrational preferences that cannot be deterred is like giving in to a bully. We know that this behavior cannot be justified, but we tolerate it because it is too hard to control. We need a more principled basis for religious liberty than mere fear of violence.

Of course, the duty to obey God is not solely dependent on eternal consequences. Obedience to a higher authority is a crucial part of many faiths, and was argued to be part of the legal definition of religion: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."\textsuperscript{134} An over-arching duty to God renders religion less susceptible to state control. Religious adherents are subject to a conflict of loyalties between


\textsuperscript{132} For example, Muslims believe that if they die during a holy war or Jihad, they will go to heaven. See, e.g., The Harper Collins Dictionary of Religion 687 (Jonathan Z. Smith et al. eds., 1995); Geoffrey Parrinder, A Dictionary of Non-Christian Religions 143 (1971).


their government and their God that the non-religious do not suffer.\textsuperscript{135}

Legislatures, as arms of the government, are peculiarly unsuited to mediate conflicts between church and state, both because they have no claim to authority and because they have a conflict of interest. Without a valid claim to authority, government attempts to regulate religious behavior seem illegitimate and likely to prevail only if the measures to enforce the rules are sufficiently coercive.

If attempts to regulate religiously motivated conduct are more likely to fail, then such regulations may pose more danger than they are worth because they undermine the legitimacy of the rule of law. They do so in two different ways. First, unenforceable rules highlight the limits of the rule of law and may encourage disobedience in general. Second, the attempt to impose government authority over the omnipotent authority of God places government in the role of immoral usurper. Hence, concepts of the supernatural and the possibility of eternal consequences have been used to explain carving out a special role for religion.

Such arguments rest on a pragmatic judgment that religious views are likely to be strongly held, highly valued, and not easily susceptible to change. In that regard, they may not be significantly different from non-religious moral views. For instance, a secular pacifist may hold his views just as strongly, value them just as highly, and be equally resistant to state coercion. Similarly, he may be just as convinced that the state's attempt to force him to engage in warfare is immoral.

D. \textit{Does the Supra-Rational Character of Religion Make it Special?}

Religion is often distinguished from other philosophies in part because it is peculiarly non-rational. Recall the various definitions of rationality: (1) decisions are based on reasoned argument, not coercion or obligation; (2) decisions cannot be encompassed within arbitrary edicts, but must be supported by principled norms; (3) decisions are based on cognitive, as opposed to emotional, appeals; (4) decisions are made autonomously, not in response to authority; and (5) decisions are empirically based. Religion arguably defies each of these definitions of rationality.

Rational decisions can be contrasted with arbitrary ones. Arbitrary decisions are made without supporting reasons so they must be imposed by power or authority. Many religions rely on claims of authority to impose rules with or without detailed explanations. For example, the United Methodist Church relies on its Book of Discipline to establish the rules of membership.\textsuperscript{136} Similarly, the Amish have a strict duty to obey the elders,\textsuperscript{137} as do the Mormons.\textsuperscript{138} Notions of authority

\textsuperscript{135} Lupu, supra note 133, at 357, 359; McConnell, Religious Freedom, supra note 51, at 125.


\textsuperscript{137} See JOHN A. HOSTETLER, AMISH SOCIETY 14-15, 159, 167 (4th ed. 1993) ("[W]isdom of the aged carries more weight than the advice of younger men . . . authority is vested in the old people. This arrangement naturally lends itself to control of life by the aged."); DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 98-99 (1989) ("Abandoning self and bending to the collective wisdom place the obedient in touch with God."); Maryann Schlegel Ruegger, An Audience for the Amish: A Communication Based Approach to the
are closely tied to articles of faith for many religions. For some religions, the authority is thought to derive originally from God, and then be passed literally down to the religious hierarchy. Thus, obedience to religious authority may rest partly on power rather than reason. Indeed, at one point in our history the Supreme Court defined religion as “reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”

To the extent that religion depends on unexplained obedience to authority, it is non-rational.

If reliance on authority renders religion non-rational, it is not uniquely so. Law also requires unexplained obedience to authority. For example, if a judge issues an injunction without notice or hearing, the injunction must be followed, even if the judge lacked the authority to issue it. Failure to obey such an injunction is punishable by criminal contempt that can result in fines and jail. Indeed, a number of non-religious settings required unreasoned obedience to authority. For example, soldiers must follow orders, regardless of how reasonable, and employees often must obey their supervisors.

Religion is also viewed as non-rational because spirituality may be felt rather than thought. Religion often makes both cognitive and emotional appeals. Although we do not necessarily describe religion as emotional, it makes expressly spiritual, as opposed to purely cognitive, demands on religious adherents. These spiritual demands often stress transcendental experiences that depend more on feeling than thought. Often the goal of these experiences is to remove individuals from their self-centered thoughts onto a higher spiritual plane. For example, Buddhists use meditation; Native Americans use peyote or sweat lodges; and

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139 See, e.g., THE ENCYCLOPEDIA OF WORLD FAITHS: AN ILLUSTRATED SURVEY OF THE WORLD’S LIVING RELIGIONS 152 (Peter Bishop & Michael Darton eds., 1988); THE HARPER COLLINS DICTIONARY OF RELIGION 653 (Jonathon Z. Smith et al. eds. 1995).


143 See id. at 320.

144 See, e.g., THOMAS BERRY, RELIGIONS OF INDIA: HINDUISM, YOGA, BUDDHISM 155-57 (1992) (describing the highest form of meditation as empowering, cleansing, and joyful); CARL BIELEFELDT, DÖGEN’S MANUALS OF ZEN MEDITATION 134 (1988) (discussing one approach to meditation that sees it as the “actualization of complete enlightenment”).

145 See, e.g., RAYMOND A. BUCKO, THE LAKOTA RITUAL OF THE SWEAT LODGE: HISTORY AND CONTEMPORARY PRACTICE 253 (1998) (referring to the sweat lodge ritual as a “bridge” to the past and suggesting “In crossing this bridge, individuals are better prepared to return anew to the present world with regenerated strength and optimism.”).
Christians and Muslims use fasting. These transcendental experiences may be closer to emotions than to thoughts. Many religions convey some notion of this connection in their description of "ecstasy" or "bliss."

Reason also demands empirical evidence. Some have tried to establish such evidence for faith. For instance, Descartes tried to apply his logic to prove the existence of a Christian God. Inevitably, the attempt was less than fully successful because beliefs are difficult, if not impossible, to prove. Therefore, using a narrow definition of reason, religion seems supra-rational because faith is not susceptible to empirical or mathematical proof.

Nevertheless, according to a broad definition of rationality, nearly all religions can claim to be rational in the sense that a reasonable person could believe them to be true. However, religions vary greatly on the extent to which they rely on reason as an inherent part of the faith. Many faiths specifically claim to base their faith on reason. For example, Protestants base their faith on the "Word" that can be read, interpreted, and followed. Evangelical Protestants perceive it to be their job to spread the Word by persuading others. This endeavor is based on reasoning with others to teach them the meaning of the Word. Similarly, Roman Catholics believe that reason is an essential part of their faith, and that personal conscience must be the final arbiter of sin. Muslims also are encouraged to use their own reason in determining virtue, and the Qur'an uses logic to persuade believers. However, few of these religions would rely on reason alone to support their claims. Thus, it seems that religion, like many other philosophies, combines rational and non-rational elements.

E. What Problems Arise from Treating Religion as Uniquely Supra-Rational?

Courts and commentators treat religion as special under the First Amendment precisely because it is viewed as non-rational. Unfortunately, this label carries

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147 See THE MODERN CATHOLIC ENCYCLOPEDIA 264 (Michael Glazier & Monika K. Hellwig eds. 1994) (describing ecstasy as "a mystical experience marked by a distinct consciousness of the Divine Presence"); THE WESTMINSTER DICTIONARY OF CHRISTIAN SPIRITUALITY 125 (Gordon S. Wakefield ed. 1983) (describing ecstasy as "[a] sense of being taken out of oneself ... and united with some higher power").

148 For example, the highest form of meditation in Buddhism is described as a kind of joy or bliss. See, e.g., BERRY, supra note 143, at 155-62.

149 See DESCARTES, supra note 5.

150 See THE NEW DICTIONARY OF THEOLOGY 1097-98 (Joseph A. Komonchak et al. eds., 1987) (referring to the word of God as the written word from the Bible, or the "Word" as "interior power within the individual" that transcends human words).

151 See, e.g., LAROUSSE, supra note 110, at 166; Jackson W. Carroll, A Tale of Two Seminaries, in 114 THE CHRISTIAN CENTURY 126-63 (Feb. 1997).

152 See JOHN PAUL II, supra note 128.

153 See KHOUI, supra note 146, at 246-48.

154 See, e.g., United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) ("Religious belief
a stigma. Characterizing religion as inherently supra-rational seems to marginalize religion in a culture strongly committed to the value of reason. Indeed, the Western emphasis on reason has a shameful history of labeling unpopular notions as illogical, irrational, or emotional. Hence, labeling religion as non-rational raises the risk that religion will be considered not only different from other philosophies, but also less valuable and therefore less worthy of protection.

It also raises the risk that popular religions will be viewed as more “rational” while unpopular or rare religions will be viewed as “irrational” or frightening. Empirical studies have demonstrated that public attitudes about religious freedom vary with the groups which claim the freedom. This public preference for the fact of the majority is reflected in Supreme Court opinions that give preference to mainstream religions over minority faiths. For example, American Indians nearly always lose religion clause cases. Familiar faiths seem “rational” while less familiar ones seem “irrational.” What is known and understood seems rational, and individuals who seem like the decision-makers are more easily perceived to be rational or reasonable. So long as rationality is broadly defined as what a reasonable person might believe, this problem is inherent in the very definition.

Finally, the distinction between rational and non-rational belief systems fails.

arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe.”); Austin, supra note 1, at 33; Feofanov, supra note 1, at 385-90.

155 See generally STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZ RELIGIOUS DEVOTION (1993) (arguing that religion has been marginalized by the courts).

156 For an excellent discussion of the way reasonableness or rationality have been used to subordinate outsider groups including women, African-Americans, and Native Americans, see Anita Bernstein, Treating Sexual Harassment with Respect, 111 HARV. L. REV. 445, 456-70 (1997). Justice Scalia has used similar language in his dissent in Romer, where he disparaged the majority's opinion protecting the rights of homosexuals, accusing the Court of basing the ruling on “emotive utterance.” Romer v. Evans, 517 U.S. 620, 639 (1996).

157 JELEN & WILCOX, supra note 50, at 79.


160 Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1256 (1994) (“Religious belief need not be founded in reason, guided by reason, or governed in anyway by the reasonable.”); Fish, Get Along, supra note 13, at 18, 23 (“[R]ationality and
Rationality requires evidence to establish each proposition, but religion often supplies such reasons. Consider, for example, the injunction not to steal. Criminal law tries to deter thieves by threatening them with prosecution and jail. Religious law tries to deter thieves by threatening them with God's disapproval and hell. Both systems provide similar reasons for the injunction not to steal: if you do, bad things will happen to you. In both cases the outcome is uncertain. The thief may not be caught, or if caught may not be convicted, or if convicted may not serve time in jail. Similarly, God may not exist, or if God exists, God may forgive the thief. In a religious society, the possibility of eternal damnation may be a more effective deterrent than criminal prosecution because it is more inevitable. In any event, the religious law is rational in the sense that it gives reasons and establishes consequences in much the same way that secular law does. Religion only seems non-rational because we do not accept the kind of evidence offered to support it. When a shaman describes his visions, we are more likely to be skeptical than when a physicist describes the big bang theory. Yet the shaman is describing an event he personally has observed and experienced, while the physicist is describing a theory about the source of the universe that is not yet proven. Nevertheless, one is considered religion, and the other science. Both religion and non-religion make arguments supported by contested evidence and resting on unprovable assumptions. Both are simultaneously rational and non-rational. Therefore, the distinction between rational and non-rational approaches cannot justify religious liberty.

Similarly, the issue is not whether religion and philosophy can be distinguished as an abstract principle. Even if the two overlap, we have a general idea of what comprises religion and various techniques are available for resolving any ambiguities. If there are other philosophies that are so close to religion as to be indistinguishable, then they too should get First Amendment protection. For
example, it is unclear why religious conscientious objectors should be exempt from military service while secular pacifists are required to serve.\textsuperscript{163} The general argument against extending the Free Exercise Clause protections to secular rights of conscience is a risk of anarchy. The fear is that each individual would evaluate for herself whether it was morally appropriate to follow the law and would assert the right to "freely exercise" her conscience. The Court has tried to limit such expanded Free Exercise Clause exemptions by applying rights of conscience only to philosophies that function in the same way as religions do in an individual's life.\textsuperscript{164} Although this approach risks privileging mainstream faiths at the expense of more unconventional views, it at least focuses on the relevant question: what functions do religions perform that justify religious liberty?

**IV. A STRUCTURAL APPROACH TO RELIGIOUS LIBERTY**

Religious liberty may be necessary in order to enable religion and religious institutions to serve important independent societal functions. I can identify at least four related functions that religion serves: (1) religion helps balance power and limit the power of both the government and organized faith; (2) religion sometimes enables disempowered groups to organize and increase their power; (3) religion produces values that are neither market-driven nor controlled by the government; and (4) religion provides a source of spirituality and personal identity that enables individuals to live with purpose and dignity.

A. *Religion as a Mechanism to Balance Power*

One reason to carve out a special role for religion is to help divide power among various factions. Religions, like political parties and states, can amass substantial amounts of power.\textsuperscript{165} Any significant concentration of power can become a threat. The Constitution created a sophisticated structure designed to divide and distribute power among various contingents. Thus, federalism principles divide power between the state and federal governments, while separation of power principles


\textsuperscript{164} See, e.g., id. at 166 (permitting a conscientious objector exemption when a "given belief... occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"); Welsh v. United States, 398 U.S. 333, 343 (1970) (permitting conscientious objector status where the belief was held "with the strength of more traditional religious convictions" (quoting Welsh v. United States, 404 F.2d 1078, 1081 (1968), rev'd, 398 U.S. 333 (1970)).

\textsuperscript{165} "[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." McDaniel v. Paty, 435 U.S. 618, 641 n.25 (1978) (Brennan, J., concurring) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 866-67 (1978)); see also KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 33-34 (1989) (discussing the long tradition of churches fostering political change, including abolition, reconstruction, and the Civil Rights Movement).
divide power among the three branches of the federal government. The religion clauses of the First Amendment also disperse power in several different ways. They divide power so that government cannot combine either with a single faith or with religion in general (the Establishment Clause); they divide power among several different faiths (the Free Exercise Clause); and they limit the power the government can exercise over religions and religious individuals (the Free Exercise Clause). The religion clauses are constitutionally unique both because they recognize the importance of limiting private power, and because they acknowledge group as well as individual rights.

The structure of the religion clauses enables them to regulate two different kinds of power: hierarchical power and cooperative power. Hierarchical power is derived from one's position at the top of a pyramid, and tends to be coercive. In contrast, cooperative power is derived from one's position in the center of an interconnected web, and tends to be more cooperative. Hierarchy, by its very nature creates insiders and outsiders. The insiders are those who either control the hierarchy or have access to those with control. In contrast, cooperative power is less likely to generate insiders and outsiders because it arises from connections between members of the group. The net becomes stronger as more people are incorporated within it. Everyone can be an insider. Each participant exchanges information to persuade others to act in concert for a common goal. While hierarchical power is exclusive, cooperative power is inclusive. Because several


167 See 2 Max Weber, Economy and Society 926 (1968) ("In general, we understand by 'power' the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action.").


169 Crain, Images, supra note 166, at 511. For a fuller development of these contrasting views, see Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982); see also Rutherford, Meek, supra note 159, at 913.

webs can be joined, many individuals may share power in complex ways.

Sometimes individuals possess both kinds of power simultaneously. The distinctions I have suggested between hierarchical power and cooperative power may be somewhat overstated because hierarchical power can be used to acquire cooperative power and vice versa. For example, organizational skills (a form of cooperative power) can be used to generate funding (a source of hierarchical power). Capital then can be used to purchase the cooperative skills of an organizer. Power begets power in all its forms.

These models of hierarchical and cooperative power help explain the relationship between the Free Exercise Clause and the Establishment Clause. The Establishment Clause limits the cooperative power generated when government joins forces with religion, while the Free Exercise Clause limits the hierarchical power the government may exercise over religion.

1. The Establishment Clause as a Mechanism to Balance Power

If the goal is to limit power concentrations, then the greatest threat comes when government allies itself with coalitions of organized religions. Government power is strong not only because it is hierarchical, but also because it has a monopoly on the legitimate use of force. Although the source of religious power varies with how hierarchal or cooperative the church polity is, most religions claim heightened moral authority. Thus, the Court has praised religious positions for their moral qualities, and cited religious sources to bolster moral claims. In contrast, the Court has tended to view other identity-based groups as less legitimate special interests. Hence, attempts to organize politically around common issues that face racial groups have consistently been invalidated.

The consequence is to give religious groups disproportionate power in setting the cultural and political agenda. This increased power is especially troubling

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171 Rutherford, Meek, supra note 159, at 914.
172 See Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986) (characterizing judges' legal interpretations as imposing violence on others); see also Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 741 (1982) ("All law is masked power.").
173 See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 222-24 (1972) ("[M]embers [of the Amish community] are productive and very law-abiding members of society . . . .").
because leaders who shape religious views have a form of political power as well. This dual power reflects the fact that religion and politics are overlapping spheres. Religions are affected by the values of the polity.\textsuperscript{176} Similarly, the political community is influenced by the values of the religious communities. Indeed, one way to view religions is to see them as intermediary political institutions that enable their members to organize for political change in favor of their shared moral views.\textsuperscript{177} That is quite close to James Madison's view of religions as factions.\textsuperscript{178} Religions are conduits for communication between individuals and the state.\textsuperscript{179} De Tocqueville recognized this role when he described American religion as "the first of their political institutions."\textsuperscript{180}

When coalitions of religions form around an issue such as abortion, the hierarchical power of one faith (i.e., Roman Catholics) may be added to the cooperative power of another (i.e., Southern Baptists). When such potent coalitions unite with the hierarchical power of government, power is extremely concentrated. So long as these coalitions are perceived as only influencing or persuading government of the wisdom of their proposals, it seems inappropriate to interfere. At some point, however, government risks being captured by these religious coalitions. Occasionally judges have suggested that these cooperative ventures between religion and the state have crossed the line. For example, Justice Stevens has argued that enforcement of abortion limits are an unconstitutional establishment of religion,\textsuperscript{181} and Judge Posner has suggested that Connecticut's ban on contraceptives was motivated solely by the sectarian interests of the Roman Catholic Church.\textsuperscript{182} Such arguments are difficult for pragmatic reasons. First, these religious coalitions are very appealing to those who agree with the values advanced.

\textsuperscript{176} Barbara B. Zikmund, \textit{Winning Ordination for Women in Mainstream Protestant Churches}, in \textit{3 WOMEN AND RELIGION}, \textit{supra} note 12, at 339, 347 ("In 1920, the women's suffrage amendment was ratified and women became voting citizens. Church women began to wonder, [i]f women can go to the polls to vote for the [P]resident and [C]ongress, why can't we vote and serve as leaders in our churches?").

\textsuperscript{177} See, \textit{e.g.}, Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (noting that the Jaycees, like some churches, have a right of expressive association to help preserve cultural and political diversity); \textit{see also} MARK TUSHNET, \textit{RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW} 248 (1988) ("Religion . . . is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between individuals and the state.").

\textsuperscript{178} \textit{See} \textit{THE FEDERALIST} NO. 51 (James Madison).


\textsuperscript{180} ALEXIS DE TOCQUEVILLE, \textit{DEMOCRACY IN AMERICA} 153 (George Lawrence trans., 2d ed. 1990).

\textsuperscript{181} Webster v. Reprod. Health Servs., 492 U.S. 490, 566-67 (1989) (Stevens, J., concurring and dissenting). \textit{But see} Harris v. McRae, 448 U.S. 297, 319-20 (1980) (holding that "the fact that the funding restrictions [on abortions may] coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause").

\textsuperscript{182} RICHARD A. POSNER, \textit{SEX AND REASON} 327 (1992).
For instance, few would criticize organized religion for forming coalitions to support abolition. However, those who disagree with coalition positions on other issues like abortion often think the power is abused. Second, to oppose coalition power seems to be anti-democratic. Organizing around common issues is precisely what good citizens are supposed to do.

The real problem is when government lends its hierarchical power to religion. Then the Establishment Clause should be strictly enforced. Sometimes, as in *Board of Education of Kiryas Joel Village School District v. Grumet*, the religion takes control of a political subdivision of the state (in that instance a school district). More frequently, however, combined power is used to fund religious enterprises. The government has enormous taxing power, so it wields a great deal of economic power. If it lends that power in the form of subsidies to religious entities, large concentrations of power can result.

Increasingly, the Supreme Court dismisses Establishment Clause concerns when the subsidy is provided to religion in general or to all religions equally. However, from a power-based perspective, government financing of a broad coalition of religious groups may concentrate financial power even more than individual subsidies. This reasoning suggests that the Court erred in *Rosenberger*. There, the Commonwealth of Virginia combined its taxing power with the persuasive power of the most pervasive religion in the region. The Court required a state

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184 512 U.S. 687, 692-95, 702 n.6, 706-07 (1994) (plurality opinion). For a more nuanced discussion of *Kiryas Joel* that considers the Establishment Clause in terms of the balance of power, see Rutherford, *Meek, supra note 159*, at 921-25.

185 See *supra* note 96 and cases cited therein.

186 See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (requiring equal funding to secular student publications and a Christian student publication); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (requiring equal access to school property when it is not in use for school purposes for secular groups and an evangelical church group showing a six-part film series).


188 Religions called “Evangelical” are comprised of five religious sects including Pentecostals, Anabaptists, Reformed and Independent Fundamentalists, and Baptists. See *BARRY A. KOSMIN & SEYMOUR K. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 295 (1993). In Virginia, 31.2% of the population are Baptists. In three southern states, Alabama, Georgia, and Mississippi, Baptists alone comprise over 50% of the population. In Kentucky, North Carolina, South Carolina,
university to use its hierarchical power to force students who did not share the religious perspective of a Christian group to pay to publish the avowedly Christian texts. Objecting students possessed relatively little cooperative power compared to the well-organized Christian group. As a diffused population with no common cohesive group, the objectors would find it difficult to organize. Consequently, objecting students had little cooperative power, and virtually no hierarchical power. In contrast, the Christian group wielded significant cooperative power which they were able to augment with the substantial hierarchical power of the state. That combined power largely isolated non-Christian and secularist students as powerless outsiders at the university.

Government subsidies increase the power of groups that can accumulate substantial cooperative power because cohesive groups can organize efficiently. These groups can use techniques like bloc voting to increase their power and acquire more benefits. More diffused groups, however, are less likely to organize and so they are less likely to vote as a bloc or obtain the subsidy. As a result, government subsidies may tend to marginalize less organized groups like secular individuals. Often, religious groups are more cohesive than larger, isolated, and more disorganized groups of individuals defined by race, gender, disability, or secular views. Thus, religious entities may have more cooperative power that should not be enlarged with government subsidies. My critique of Rosenberger illustrates the first principle derived from balancing power in the religion clauses: that the combined power of church and state poses the greatest danger, and should therefore be the most strictly limited. Accordingly, compliance with the Establishment Clause is a compelling state interest that may justify some intrusions on other liberties like free speech.

But the discussion so far has ducked the original question: what makes religion special? Shouldn’t we worry just as much about subsidies for strong secular groups? Won’t such subsidies also concentrate power? Of course, we should be concerned about such concentrations of power. Madison and the Founders were right about limiting the power of religion to co-opt government, but they were less prescient about the other powerful organizations. Hence, we now find ourselves struggling with legislative attempts to limit power such as campaign financing rules or antitrust laws. History teaches us that religious groups have often tried
to co-opt government power and have triggered violent uprisings in an attempt to garner more power.\textsuperscript{192} The religion clauses have served us relatively well in avoiding such concentrations of power. The fact that we may also need to cabin power in the secular sector does not mean we should abandon the Establishment Clause.

2. The Free Exercise Clause as a Mechanism to Balance Power

If one goal of the religion clauses is to divide power, then the tension between the Establishment Clause and the Free Exercise Clause makes sense. Because both governments and religions can be powerful, we need both the Free Exercise Clause and the Establishment Clause. The Establishment Clause prevents government from combining power with organized religion.\textsuperscript{193} The Free Exercise Clause disperses power in three ways: (1) it increases the power of individuals to follow their own consciences; (2) it limits the power of government to intrude in religious matters; and (3) it limits the power of the church by encouraging religious pluralism.

Religion increases the power of personal conscience. When individuals act on personal religious convictions, they are less likely to upset the balance of power. Harmless individual religious conduct does not pose a threat of abusive hierarchical or cooperative power. Accordingly, we should grant the broadest possible freedom to individual Free Exercise Clause exemptions and we should not be overly concerned about narrow definitions of religion. Permitting broad Free Exercise Clause exemptions helps to diffuse power and favors privatized religion.

For example, when Smith used peyote in a sacrament of the Native American Church, he did not combine religious power with government power, nor did he use the organizational structure of the church to garner increased cooperative power to further a political or cultural agenda. On the contrary, the fact that religious peyote use was subject to criminal sanctions is evidence of how little power the Native American Church had. Making such relatively harmless religious conduct subject

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to "neutral laws of general applicability"\textsuperscript{194} divests Smith and other religious individuals of the right to ask courts to see that society accommodates the free exercise of religion. The only protections or accommodations must come from legislatures. Thus, cases like Smith\textsuperscript{195} and Boerne\textsuperscript{196} encourage organized faiths to combine their cooperative power with the hierarchical power of legislatures to protect their religious practices. Popular faiths are more likely to be able to convince legislatures to grant accommodations. Once strong lobbying machinery is organized, it is likely to be used for broader purposes than protecting harmless religious rituals. Thus, allowing individuals to claim Free Exercise Clause exemptions increases individual liberty, diminishes the incentive for religions to concentrate their power, and avoids legislative religious favoritism.

Unfortunately, favoritism is not necessarily limited to legislatures. Court-enforced Free Exercise Clause exemptions merely may substitute the hierarchical power of courts for the hierarchal power of legislatures. While private interest groups often manipulate legislatures, courts structurally privilege wealthier parties.\textsuperscript{197} Although courts seem relatively unresponsive to the plight of outsider faiths, in a few instances, notably those involving Jehovah's Witnesses, the courts have preserved Free Exercise Clause freedoms.\textsuperscript{198}

Strong Free Exercise Clause exemptions serve another purpose as well. They

\textsuperscript{194} Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring). Of course, whether the use of peyote is harmless is itself a debatable proposition. In her concurrence in Smith, Justice O'Connor argued that the state had a compelling state interest to regulate peyote use because of the dangerous nature of the drug. \textit{See id}. The majority, however, rejected that theory and held that the state had the right to impose any neutral law of general application regardless of the extent of harm involved. \textit{See id}. at 878-82.

\textsuperscript{195} 494 U.S. 872 (1990).

\textsuperscript{196} City of Boerne v. Flores, 521 U.S. 507 (1997).

\textsuperscript{197} \textit{See, e.g.}, Bliss Cartwright et al., \textit{Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970}, 21 LAW & SOC'Y REV. 403, 437-38 n.3 (1987) (reporting on a one hundred-year sample of cases that revealed that those with financial resources fared better than those without); Marc Galanter, \textit{Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change}, 9 LAW & SOC'Y REV. 95, 114-24 (1974) (documenting how wealthier parties are able to translate their privilege into litigation victories not only with high priced attorneys but also as repeat players in the system); Rutherford, \textit{Myth, supra} note 20, at 41 (noting that courts purport to consider the relative power of the parties, but in practice the balance is in favor of the powerful); James L. Alststrom, Note, McKnight v. Rees: \textit{Delineating the Qualified Immunity "Haves" and "Have-nots" Among Private Parties}, 1997 BYU L. REV. 335-421 n.2.

\textsuperscript{198} \textit{See, e.g.}, Marsh v. Alabama, 326 U.S. 501 (1946) (reversing the conviction of a Jehovah's Witness for distributing religious literature); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating an ordinance making it a crime for a solicitor to knock on residents' doors); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating a requirement that a student recite the Pledge of Allegiance when it conflicted with their religious beliefs); Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating ordinances forbidding the distribution of leaflets).
foster religious pluralism,\(^{199}\) which limits the power of any single religion to monopolize either the political or the cultural landscape. In essence, Free Exercise Clause exemptions enable religious dissidents to engage in their own religious practices without convincing either established church authorities or the government of the wisdom or legitimacy of their views. In the absence of Free Exercise Clause rights, the powerful faiths would wield both political and cultural control of the public debates on morality. Such religious pluralism also encourages tolerance.\(^{200}\) When no one religion controls the political and cultural landscape, self-interest encourages religious tolerance.

Balancing power, however, is not the only function of the religion clauses. If power concentrations were the only issue, then we would subsidize weak religions and tax stronger ones. Similarly, we would subsidize weak political groups and tax strong ones. Under this approach, Republicans and Catholics might be denied funding as well-organized, wealthy, and relatively powerful groups, while Nazis and Baha’i might receive funding because they are small and relatively powerless. Although balancing power is one function of the religion clauses, it is not the only one. The religion clauses serve other purposes as well.

B. Religion as a Mouthpiece for Disempowered Voices

Access to intermediate organizations like religious congregations is particularly important for minorities, women, immigrants, and the disabled groups that tend to have less political power than their numbers would suggest.\(^{201}\) Religion has had

\(^{199}\) See SMITH, FAILURE, supra note 74, at 42 ("the American experience generally, [represents an experience] in which a commitment to broader religious freedom has evolved of necessity out of the fact of religious pluralism"); Rebecca Redwood French, From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law, 41 ARIZ. L. REV. 49, 70 (1999) ("each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion per se but because it values religion among a variety of private, non-profit enterprises that contribute to the diversity of the Nation" (quoting United States v. Lee, 455 U.S. 252 (1982))); McConnell, Accommodation, supra note 63, at 710-12 (arguing that within the constitutional framework "a government committed to religious pluralism should be entitled to recognize and accommodate the religious interest""); Mark Tushnet, The Emerging Principle of Accommodation of Religion (Dubiante), 76 GEO. L.J. 1691, 1699-1701 (1988) (arguing that Madison expressly intended both political and religious pluralism which therefore mandates accommodation of religious beliefs); cf. William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 CASE W. RES. L. REV. 357, 381-83 (1989-90) (arguing that religious pluralism limits the power of religions to control politics and culture, but that does not warrant free exercise exemptions for religion alone).


\(^{201}\) In 1999, the United States Senate had 2 Asian or Pacific Islanders, 1 American Indian, 9 women, and no African-Americans. Similarly, only 39 of the 534 representatives were
mixed success in providing access for the relatively disempowered. Several African-American leaders like Dr. Martin Luther King and Jesse Jackson first gained access to the public as religious leaders. However, many are excluded from access within their religions because of their gender, race, disability, or age.\textsuperscript{202} Nevertheless, religion may provide the opportunity for the relatively powerless to get their agenda expressed in the policy debates. American religion has a long history of embracing the downtrodden and articulating their demands. For example, the abolitionist movement was closely tied to religious groups like the Methodists and the Quakers.\textsuperscript{203} Similarly, African-Americans have found their churches to provide personal empowerment, hope, social services, and stability in the face of widespread societal discrimination.\textsuperscript{204} The Catholic Church provided many of the same services for waves of immigrants.\textsuperscript{205}

Once again, however, the relationship between religions and outsider groups

black, 19 were Hispanic, 5 were Asian or Pacific Islanders, and 58 were women. See Charles Pope, \textit{New Congress is Older, More Politically Seasoned}, 57 \textit{CQ Weekly} 60, 62 (1999). Note that these figures do not include delegates, and there was one vacancy, which is why the total number of representatives was 534 and not 535. \textit{Id.} at 60. In 1993, the United States Senate had only 1 African-American senator and 6 women senators. Similarly, only 8.7\% of the representatives were black and 10.8\% were women. \textit{Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States} 277 tbl. 443 (113th ed. 1993); \textit{see also} STUART A. SCHEINGOLD, \textit{The Politics of Rights: Lawyers, Public Policy, and Political Change} 207-08 (1974).

\textsuperscript{202} See, e.g., Rutherford, \textit{Equality}, supra note 57 at 1056-59, 1087-88 and the cases cited therein.

\textsuperscript{203} See, e.g., SAMUEL G. FREEDMAN, \textit{Upon This Rock: The Miracles of a Black Church} (1993) (discussing the plight of a black church in Brooklyn, New York as it struggles to deal with the social issues and ills that plague black communities by implementing various outreach ministries to deal with poverty, homelessness, disenchantment, violence, crime, and teen pregnancy); RALPH E. LUKER, \textit{The Social Gospel in Black and White: American Racial Reform}, 1885-1912 11 (1991).

\textsuperscript{204} See, e.g., CATHY J. COHEN, \textit{The Boundaries of Blackness: AIDS and the Breakdown of Black Politics} 276-77 (1999) (citing sociological studies showing the importance of the black church in the lives of African-Americans). \textit{See generally FREEDMAN, supra note 203}.

has been mixed. For example, religion was used to both attack and support slavery. Similarly, while some religions championed the causes of civil rights for minorities, others consciously expounded racist doctrines such as labeling African-Americans as cursed with the mark of Cain; prohibiting interracial dating based on the biblical story of the Tower of Babel; issuing commandments to "destroy all Jewish thought and influence;" defending segregation on religious grounds; adopting slogans calling for a racial holy war; or instigating "that white people are the true Israelites," and denigrating blacks and Jews. Some of the very churches that supported abolition resisted the attempts of African-Americans to control their own congregations or church property. Historically,

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208 BRUCE R. McCONKIE, MORMON DOCTRINE 107, 476-77, 554 (1958) (official Mormon text describing "the negro race" as cursed by the mark of their ancestor Cain with dark skin); see also Robert J. Morris, "What Though Our Rights Have Been Assailed?" Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands (Hawaii), 18 WOMEN'S RTS. L. REP. 129, 181-82 (1997) (nineteenth century origins of the Mormon belief in the mark of Cain); Larry B. Stammer, Mormons May Disavow Old View on Blacks, L.A. TIMES, May 18, 1998, at A2 (discussing possible change in Mormon doctrine to state that blacks are not cursed with dark skin); Larry B. Stammer, Mormon Plan to Disavow Racist Teaching Jeopardized by Publicity, L.A. TIMES, May 24, 1998, at A13 (quoting spokesperson for Mormon Church as saying that a change in doctrine is not needed because blacks can become priests); Larry B. Stammer, Religion; Mormon Leader Defends Race Relations; Interview: Gordon B. Hinckley Says Church Does Not Need to Further Disavow its Former Teachings that Blacks are Cursed by God, L.A. TIMES, Sept. 12, 1998, at B4 (quoting the President of Mormon Church as saying that a change in doctrine is not needed because blacks are treated well within the church).

210 John Cloud et al., Is Hate on the Rise; Racist Groups May Not Be Growing, but They're Finding Deadlier Recruits, TIME, July 19, 1999, at 33.


212 Pam Belluck, Hate Groups Seeking Broader Reach, N.Y. TIMES, July 7, 1999, at A16.

213 Parsons, supra note 211, at 656.

214 As one nineteenth-century African-American Methodist minister explained:
some faiths have also branded the mentally ill as possessed by demons or controlled by Satan,\textsuperscript{215} while many religions have embraced views that subordinate women both within the faith and the community.\textsuperscript{216} This mixed history suggests that religions may not be the best vehicle for advancing the cause of outsider groups. Other organizations such as the NAACP or NOW may have been more effective as a voice for those who feel excluded. Religion, however, often provides an underpinning of moral legitimacy to these claims.

C. Religion as a Source of Moral Values

Religion is more than just an organized faction that can balance power in the polity, however. It also is a source for substantive values in the community. Accordingly, some of the Founders, civic republicans in particular, thought that religion could supply the public virtue necessary to govern a republic.\textsuperscript{217} Of course, other sources for values exist, but religion may stress values that get displaced in a market-driven economy and self-interested polity.\textsuperscript{218} Specifically, religion often offers communitarian values that emphasize spirituality, nurturing, and social justice in contrast to the market values that tend to be individual, selfish, and

The conference (as I have understood) have said repeatedly, that the coloured societies was nothing but an unprofitable trouble; and yet, when the society of Bethel Church unanimously requested to go free, it was not granted, until the supreme court of [Pennsylvania] said, it should be so. But again, it will be asked, who could stop them, if they were determined to go. None—Provided they had left their church property behind; to purchase which, perhaps many of them had deprived their children of bread.

Sermon delivered in the African Bethel Church in Baltimore (Jan. 21, 1816), in \textit{I A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES} 68 (Herbert Aptheker ed., 1990); \textit{see also} KATHERINE L. DVORAK, \textit{AN AFRICAN-AMERICAN EXODUS: THE SEGREGATION OF THE SOUTHERN CHURCHES} 140 (1991) (noting the debates among the Methodists about who would own church property); FORREST G. WOOD, \textit{THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY} 316 (1990) (noting that in 1874 in Atlanta, when a Methodist church official ordered blacks to be able to use church facilities that they had been denied previously, the white members of the church left and set up their own church).


materialistic. Unfortunately, religious values also may include intolerance, sexual repression, hierarchy, submissiveness, and sacrifice of the powerless. Indeed, the question of whether the values espoused by any particular religion constitute “virtues” is inherently subjective. Nevertheless, religion provides an alternative basis for value formation beyond personal gain and efficiency.

The values many religions propound often get translated into valuable services provided to the community. Hence, religion plays a practical communal role by providing the social services that government depends upon. For instance, religious groups provide care for the elderly, adoption services, foster home placements, and orphanages under government contracts. Therefore, religion is important as a community organization, both as a source of values and as a source of services.

D. Religion as a Source of Spirituality and Dignity

For some, religion offers moral authority, peace, community, and most importantly, spiritually transformative experiences. Legal rules often trivialize the importance of spirituality. In doing so, law inflicts deep and unnecessary pain, and undervalues the peculiar pleasures of belonging to a community of faith. Once again, Smith serves as a helpful example. The Court applied a version of equality theory that treats members of the Native American Church as if they were the same as recreational drug users even though the two groups are starkly different. To equate the two is to miss the religious significance of an experience that provides both vision and a sense of community. Peyote-induced hallucinations are influenced both by personality and by culture so that religious belief alters the way the visions occur and are perceived. When a member of the Native American Church is prohibited from using peyote, he loses not only the physical experiences and visions, but also the “religious ecstasy” or “rapture.” This hedonic loss is not trivial. It goes to the very essence of what defines an individual and his community.

Laws that intrude on religious practices often cause a deep wound because they rob individuals of their very sense of themselves. Religion, or its absence, helps form us both as children and adults, providing a crucial source of identity. It defines us, both as individuals and as members or non-members of groups. For some, religion provides a community of shared values, concerns, and culture that serves as an anchor in a fragmented society. Hence, government intrusions on the

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free exercise of religion may seem like personal attacks and may be viewed as a form of persecution. Those affected may be viewed as martyrs, while the government may be seen as exercising raw power rather than legitimate authority. The old “compelling state interest” test acknowledged these harms and required the government to provide a justification for any intrusions. Although almost any excuse seemed to be found sufficiently compelling, the standard at least nominally recognized the importance of religious practices. The current rules of neutrality hide the harms imposed on religious individuals. Consequently, even if the substantive results are the same (nearly all government regulations are held to be impervious to religious exemptions), the new rule seems to diminish the respect for religious observance.

Thus, in construing the religion clauses, we should focus on religion as a mechanism to balance power, a source for values, a channel for outsider voices, and a source of individual spirituality and dignity. This functionalist approach to the religion clauses avoids the need to distinguish religion from philosophy. To the extent that philosophy fulfills these functions, it should be treated as a religion. To the extent its functions differ, then it should not be treated as a religion. Typically, most philosophies will not be key players in the balance of power or channels for dissident voices, but to the extent that other philosophies perform these functions, there is no principled reason to exclude them from both the protections and limits of the religion clauses. Religion is entitled to special protections and limits in the constitutional scheme, not because it is rational or non-rational, but because it plays special roles.

V. THE SCOPE OF RELIGIOUS LIBERTY

A functional approach to religion not only distinguishes it from non-religion, but also establishes the scope of religious liberty. Religious freedom, like all other liberties, is not absolute. The limits on free exercise or establishment should reflect the underlying purposes of the religion clauses.

A. The Scope of Religious Liberty Necessary to Balance Power

I have argued that the religion clauses are part of the general constitutional scheme to balance and limit power. Specifically, the Establishment Clause limits combinations of government and religious power. Thus, for Establishment Clause purposes, government subsidies of religion are very troubling. Because the Establishment Clause focuses on aggregated power, general subsidies or tax breaks for all religions are troubling, even when they do not favor any particular sect.

The Free Exercise Clause, in contrast, is designed to protect both individuals and religious groups from state persecution. Functionally, it does not matter whether the state intended to persecute the individuals or not. Religious individuals need to be able to enforce exceptions to generally applicable rules whenever the rules unnecessarily impinge on relatively harmless religious practices. Court-enforced Free Exercise Clause exemptions are necessary to protect religious outsiders from unaware or hostile legislatures.
Faced with its own view of religion as inherently non-rational, the Court has been reluctant to grant Free Exercise Clause exemptions. To permit such exceptions seems especially problematic if religion cannot be narrowly defined. Broadly defined religious exemptions seem to risk anarchy where each individual decides for herself whether to follow the law. Anarchy is unlikely, however, if the Establishment Clause also is strictly enforced. Then claiming religious status permits Free Exercise Clause exceptions, but excludes the claimant from government funding opportunities. The Establishment Clause prohibition on government funding is the price religion must pay for the Free Exercise Clause. That approach is consistent with the need to balance power.

When religions claim the right to state support in the form of tax breaks and

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225 Mary Ann Glendon, Law, Communities, and the Religious Freedom Language of the Constitution, 60 GEO. WASH. L. REV. 672, 678 (1992) (stating that “free exercise in the broad sense took something of a battering [during the 1940s] from Court majorities who gave a very expansive interpretation to the notion of ‘establishment’ without pausing to consider the costs they might be inflicting on the associational aspects of free exercise”); McConnell, Religious Freedom, supra note 51, at 135 (stating that the “improvements [by the Rehnquist Court] on establishment issues have come at a heavy price: the radical reduction of free exercise rights”); Michael W. McConnell, The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?, 32 CATH. LAW. 187, 200 (1989) (commenting that because of the conflict between the Establishment Clause and the Free Exercise Clause, the only way that poor people can send their children to religious schools is to not receive remedial education: “a heavy price to pay”); Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 369, 371 n.66 (1986) (stating that the “Third Circuit opinion [Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984)] is perhaps the harshest example of Establishment Clause analysis gone awry—promotion of ‘separation’ even at the cost of the obvious denial of equal protection of the free speech of religious students because of the content of their speech”; also stating that the “strict neutrality” approach, [as stated in PHILIP B. KURLAND, RELIGION AND THE LAW (1962)], “while purporting to apply a neutral principle of equality of treatment to both clauses, in effect favors the anti-establishment prohibition ‘at a cost of almost total emasculation of the free exercise provision’” (quoting Gail Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. CHI. L. REV. 805, 808 (1978)); Michael J. Sandel, The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues, 66 FORDHAM L. REV. 1, 18 (1997) (commenting that “the emphasis on neutrality in the religion cases has led to an over-emphasis on the worry about establishment, even at a cost to accommodation of free exercise”); Daniel Parish, Comment, Private Religious Displays in Public Fora, 61 U. CHI. L. REV. 253, 276 (1994) (“The wider interpretation of the reasonable observer . . . admittedly protects Establishment Clause interests at some cost to free exercise.”).

financial subsidies but reject any government regulations, they seem to be reaping the benefits without paying the cost. The result is to increase the inevitable conflicts between government and faith. This scenario is currently being played out in a burgeoning series of cases about zoning and land use. Because church property is not subject to taxes, zoning boards are increasingly reluctant to approve petitions for new churches or expansions of old ones. If religious institutions paid their fair share of the local taxes, municipalities and zoning boards might be much more welcoming. When religions are seen as free riders that demand municipal services without shouldering their share of the cost, they generate more community hostility.

Because every individual or organization that serves the functions would have the choice of whether to be treated as a religion or a secular organization, most of the concerns about neutrality would disappear. One remaining concern might be that politically powerful faiths would not need Free Exercise Clause protections because they could mold the law in their favor. Hence, they might be tempted to declare themselves as secular to qualify for government largesse. In contrast, small and powerless faiths could not wield enough influence to protect their practices and would be frozen out of government support. It is hard to imagine powerful churches like the Roman Catholics announcing their secular status. Indeed, much of their self-image and their moral authority comes from their self-identified religious nature. Hence, fear of larger religions squeezing out the smaller ones by declaring themselves secular seems unlikely.

A more likely scenario, however, is that these new rules might increase the power of large, strong secular groups. In essence, that was the argument of the Christian students in *Rosenberger*. If they had been feminists, they could have received state funding for pro-choice activities, but because they identified themselves as Christian, they were disqualified from state funding for anti-choice positions. The problem illustrates how difficult it is to evaluate who wields the most power in any given context. At the national level, the Religious Right substantially shapes the political agenda, but it is less clear how much power the Christian student group had at the University of Virginia. If unequal funding is their chief concern, however, they would be free under my approach to simply rename themselves Students Against Choice and get the same funds available to the feminists. What they would lose would be the right to claim superior moral

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228 See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting a Free Exercise Clause challenge to landmark limits on church property); *Mount Elliot Cemetery Ass’n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999) (holding that a zoning ordinance did not violate the Free Exercise Clause when the city refused to rezone property for use as a Catholic cemetery); *First Assembly of God of Naples, Fla., Inc. v. Collier County, Fla.*, 20 F.3d 419 (11th Cir. 1994) (holding the zoning ordinances were neutral and so enforcing them did not violate the Free Exercise Clause); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990) (holding that zoning ordinance did not violate church’s right to free exercise); *Rector, Wardens, and Members of Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (holding that landmark laws are not an unconstitutional burden on the free exercise of religion).
authorities for their position and their right to exclude non-Christian, anti-choice students. Those limits would merely help even the odds in the marketplace of ideas.

Religions might well ask themselves which limits their religious liberty more: paying for their activities themselves, but then remaining free of most regulations on their activities, or accepting tax breaks and subsidies that then render them subject to pervasive government regulation. The answer may vary with the wealth of the religious institution and the political power it can wield to shape any regulations.

B. The Scope of Religious Liberty Necessary to Empower Outsiders

Religions sometimes provide both crucial social support and a platform for individuals who otherwise would be cast to the margins of society. Other social, political, and economic institutions have few incentives to serve these groups. Unfortunately, not all religions perform this function. Some faiths, like the World Church of the Creator, openly teach hatred and, at least implicitly, seem to condone racial violence. Others consciously engage in discriminatory practices.\(^2\)\(^9\)\(^2\)\(^3\) Consider, for example, Bob Jones University v. United States.\(^2\)\(^3\)\(^0\) In Bob Jones, the Court permitted the Internal Revenue Service to deny a charitable deduction to a religious university because it discriminated against African-American students.\(^2\)\(^3\)\(^1\) The Court conceded that the discrimination was religiously based, but found that the state interest in eradicating discrimination outweighed the Free Exercise Clause claims of the university.\(^2\)\(^3\)\(^2\) The Court was correct in refusing to grant Bob Jones University a Free Exercise Clause exemption for discriminating against African-Americans. Religions should not be able to hide illegal discrimination behind a Free Exercise Clause shield for two reasons. First, unlike the use of peyote in a religious sacrament, discriminatory conduct seriously harms others.\(^2\)\(^3\)\(^3\) Second, granting a Free Exercise exemption for discrimination is inconsistent with the functions that warrant creating the Free Exercise Clause claim.

C. The Scope of Religious Liberty Necessary to Provide Non-Market Values

One of the functions that religion can serve is to articulate alternative values that may not be captured in the selfish, materialistic, market-driven world. The

\(^{2\text{9}}\) See e.g., Rutherford, Equality, supra note 57, at 1057 n.32 and the cases cited therein.

\(^{2\text{0}}\) 461 U.S. 574 (1983).

\(^{2\text{1}}\) Id. at 595-96.

\(^{2\text{2}}\) Id. at 595.

problem, of course, is that religion and the market are not entirely separate enterprises and the values from one spill into the other. For example, one religion might be expressly capitalist, while another might demand a vow of poverty and communal living. It does not necessarily follow that the capitalist faith should be excluded from Free Exercise Clause claims. Indeed, attempts to distinguish purely market values from religious values is perilous as the litigation involving Scientologists suggest. It leads back to the inherent difficulties of finding an acceptable definition of religion. Accordingly, a value-based assessment is necessarily suspect.

D. The Scope of Religious Liberty Necessary to Foster Spirituality and Dignity

One of the central purposes of religion is to foster spirituality and human dignity. Those aspects of faith that are most directly concerned with spirituality and dignity should get the greatest legal protections. Hence, private participation in religious rituals, sacraments, and practices should generally be permitted unless there is a serious risk of harm. According to this standard, Smith is particularly problematic not only because it intruded on a Free Exercise Clause right, but because that right was bound up with expressly spiritual practices. Pragmatically, that means placing the burden on the government to prove why limiting a religious practice is essential to avoid serious harm. Although that standard may force courts to engage in the difficult task of defining the harm and weighing whether regulations are essential, those are tasks courts routinely perform in other kinds of cases.

When the dispute is less bound up with a particular religious practice, the intrusion seems less severe. Thus, all the land use cases might not implicate the same level of concern for preserving spiritual issues. For example, when Indian Tribal religions ascribe special spiritual significance to particular natural formations, freedom to celebrate spirituality is at the center of the dispute. Thus, cases like Lyng may be wrongly decided because special issues of spirituality are involved. When, however, the issue is how many cars may be parked in a given space, the issue is not necessarily bound up with spirituality at all. There are two problems with excluding these cases. First, the government may become embroiled in deciding what is or is not spiritual for the religious group. Second, the rules on parking may have been created as a pretext in order to persecute the affected group. Neither problem is insurmountable.

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234 This litigation culminated in Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that donations were not tax deductible). Even though the Internal Revenue Service won the litigation, it capitulated and agreed to treat payments as tax deductible contributions. See Douglas Frantz, Taxes and Tactics: Behind an I.R.S. Reversal—A Special Report: Scientology's Puzzling Journey From Tax Rebel to Tax Exempt, N.Y. TIMES, Mar. 9, 1997, § I, at 1.


In a vertical dispute between the government and a cohesive religious group, the courts may rely on the statements the religious group makes about the central spiritual demands of their faith. Although it may be self-serving, it is hard to imagine a Roman Catholic diocese announcing that available parking is part of its core spiritual practices, while it is quite likely that the diocese might claim that sacred ground of a Catholic cemetery is crucial to its sense of spirituality. The public nature of the claims together with the internal consistency of the faith are likely safeguards to insincere claims.

There are other safeguards for pretextual discrimination as well. If the religion need not prove intent, but could rely on comparative analysis of how other organizations were treated (an effects test), it might enable religions to protect themselves from discriminatory rules, while allowing government some leeway in its land use regulations. Thus, if all land in the area has to preserve twenty percent of its surface in unpaved land for adequate drainage, then there is no reason to permit higher density pavement on congregation property. If, however, only a particular congregation or churches in general are limited, then the government regulation looks less legitimate. Some of the conflicts between religion and the state may be mediated by focusing on the function of preserving spirituality.

Another limit of the free exercise right to engage in religious practices is set by the Establishment Clause that preserves the dignity and spirituality of others. The Establishment Clause prevents any religious sect or group of sects from controlling the political and cultural agenda. Accordingly, the right to engage in religious practices is a private right that cannot be imposed on other unwilling participants either by co-opting public space or by using public funds. Thus, under my theory, public religious displays like nativity scenes would be unconstitutional, as would prayer in school settings, and subsidies to religion in the form of vouchers, or tax breaks. Once again, the Establishment Clause is the price religious

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237 See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (holding that the display of a creche at a county courthouse violated the Establishment Clause). But see Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that the display of a creche when combined with candy canes and other seasonal items was constitutional).

238 See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (prohibiting a public high school from having a rabbi say a prayer at graduation); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that a moment of silence for meditation or prayer was unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (holding that a non-denominational prayer in public school violated the Establishment Clause).

239 See, e.g., Strout v. Comm’r, Me. Dep’t of Educ., 13 F.Supp. 2d (D. Me. 1998) (holding constitutional a statute that excluded sectarian schools from receipt of state funds); Bagley v. Raymond Sch. Dep’t, 728 A.2d 127 (Me. 1999) (holding constitutional a statute that excluded religious schools from receipt of state funds). But see Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (upholding a school voucher program that can be used at sectarian and nonsectarian schools).

240 See, e.g., Walz v. Tax Comm’n of the City of N.Y., 397 U.S. 664, 696 (1970) (holding that tax deductions for contributions to religious institutions were neutral because they did not discriminate among religions).
individuals pay for their free exercise exemptions.

A more functional approach to the religion clauses values faith. It acknowledges that both individuals and the society at large benefit from the presence of many diverse religions. Because faith provides important social and spiritual supports, unnecessary intrusions on free exercise are not trivial. Similarly, violations of the Establishment Clause are not trivial.

CONCLUSION

Currently, the Court has seriously eroded both the Free Exercise Clause and the Establishment Clause. *Smith* and *Boerne* diminished the Free Exercise Clause so that nearly any regulation of religious practice is permissible unless it purposely discriminates against a particular sect. Similarly, *Rosenberger* and *Agostini* diminished the Establishment Clause so that it only protects against prayer in school. One explanation for virtually reading the religion clauses out of the Constitution is that the Court is no longer satisfied that it can distinguish a religion from any other philosophy. Whether this fear is construed as an incipient attack of post-modernism or a more doctrinal failure of definitions, it has serious consequences for religious liberty. A functionalist approach to the religion clauses helps solve the problem. It does not matter whether a practice is called a religion or a philosophy, or whether it is perceived to be rational or irrational. If the practice serves the functions religion serves (helping to balance power, speaking for the marginalized, articulating non-market values, and supporting personal spirituality and dignity), then the practice should be entitled to free exercise exemptions and be subject to Establishment Clause limits. If Establishment Clause limits on subsidies, tax breaks, and other forms of government support are enforced, they may limit the risk of insincere free exercise claims. When those claiming religious exemptions pay their own way, there is less temptation to intrude on their choices. Accordingly, it would be appropriate to shift the burden to the government to demonstrate why any government regulation of religious practice is essential to avoid a serious harm. Similarly, those who accept government subsidies, tax breaks, or supports, would then have agreed to greater government regulation of their practices. A return to serious attempts to enforce both the Free Exercise Clause and the Establishment Clause will not make these cases easier to decide, but it will give a principled basis for preserving important liberties.

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