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## Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion

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**RATIONALIZING RELIGIOUS EXEMPTIONS:  
A LEGISLATIVE PROCESS THEORY OF STATUTORY  
EXEMPTIONS FOR RELIGION**

Zoë Robinson\*

This Article proposes a new theory of religious liberty in the United States: it hypothesizes that a person’s religious freedom is dependent on their political power. Following the Supreme Court’s 1990 decision of *Employment Division v. Smith*, the legislature has sole control over the enactment of accommodations and exemptions from laws of general application for religious adherents. This Article argues that post-*Smith* accounts of religious liberty and pluralism fail to systematically analyze the relationship between religious liberty and legislative exemptions. To this end, the Article proposes a unique public choice model that hypothesizes that legislative accommodations and exemptions may result from a complex process in which legislators weigh the gains derived from the prospective exemption or accommodation—in terms of constituent voting support—against the costs borne. By modeling legislative accommodations as the result of benefit-maximizing behavior, this Article proposes a significant paradigm shift that postulates a new, and unasked, question: whether the legislature is overly responsive to majoritarian interests at the expense of minority religious liberty.

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\* Assistant Professor of Law, DePaul University College of Law. J.D., The University of Chicago Law School; LL.B. (Hons), The Australian National University College of Law; B.A., The Australian National University; B.Mus. (Perf.), Queensland Conservatorium, Griffith University. The author is indebted to Steven Art, Lisa Bernstein, Alexander Boni-Saenz, William Buss, Peter Cane, Rosalind Dixon, Carolyn Evans, David Franklin, Jacob Gersen, Tom Ginsburg, Andrew Gold, Philip Hamburger, Mike Jacobs, Michael Robinson, Adam Samaha, Jane Stapleton, David Strauss, John Roberts, Terry Smith, Diane P. Wood, and Carolyn Zabricki for their helpful comments and discussions on earlier drafts. In addition, I am grateful to participants of workshops at the University of Chicago Law School and the DePaul University College of Law, as well as Nitin Datt for his excellent research assistance.

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## INTRODUCTION

Legal scholars have failed to systematically analyze the ways in which political majorities affect the regulation of religion in the United States. This neglect is unfortunate because, following the Supreme Court's 1990 decision of *Employment Division v. Smith*,<sup>1</sup> the regulation of religion—specifically, the enactment of exemptions and accommodations for religion—is almost the sole responsibility of the legislature.<sup>2</sup> Although there is clearly awareness that majoritarianism is a real concern with respect to the content and scope of exemptions and accommodations for religious adherents, there has yet to be any serious attempt to challenge the dominant paradigm of legislative process involving religion—the public interest model. The public interest model presumes that while the scope and content of legislation involving religion may generally align with majority interests, there continues to exist a sense of a common legislative mission of protecting the public good *writ large*. That is, unlike legislation that at base involves an economic transaction,<sup>3</sup> legislation that involves religion is not subject to barter and sale.

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<sup>1</sup> 494 U.S. 872 (1990).

<sup>2</sup> For more on the decision and its precise holding, see *infra* notes 27–41 and accompanying text. For commentaries on the *Smith* decision, see, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995); cf. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117 (1993).

<sup>3</sup> See, e.g., Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–3503 (2006); Allan W. Vestal, *Public Choice, Public Interest, and the Soft Drink Interbrand Competition Act: Time to Derail the “Root Beer Express”?*, 34 WM. & MARY L. REV. 337, 338–39 (1993).

This Article proposes an alternative model of legislative process for legislation involving religious accommodations and exemptions—a public choice model. Public choice is a positive theory that applies economic methodology and techniques to political processes.<sup>4</sup> Public choice is also a behavioral analysis of political actors (including voters and politicians), and rests on the assumptive premise that political actors act rationally to maximize the value of political outcomes for themselves.<sup>5</sup> The public choice model supposes that any exemptions and accommodations for religion enacted by the legislature are the product of the conflation of religious lobbying efforts and the individual self-interest of legislators. Ultimately then, the public choice perspective asserts that a person’s religious liberty is dependent on their political power. This, of course, tends the unsavory conclusion that minority religious interests are accorded less protection than majority religious interests in the United States.

Public choice theory remains highly controversial.<sup>6</sup> For the purposes of this Article, however, I take the current theory on its own terms and propose a basic internal hypothesis: legislators may trade religious accommodations and exemptions for votes promised by lobbyists just as they would trade other legislation for votes promised.

To examine the possibility that religious accommodations and exemptions are bartered and traded on the “legislative market,” this Article utilizes public choice theory and develops its own unique model. The model in this Article is based on the proposition that legislative exemptions and accommodations result from a subtle and complex process through which the suppliers of legislation (the legislators) weigh the gains derived from the prospective transfer (votes gained) against the costs borne (votes lost). By assuming that legislative exemptions and accommodations are the result of benefit-maximizing behavior, the model is the first step in attempting to address the basic

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<sup>4</sup> DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991) (specifying that public choice is “the application of the economist’s methods to the political scientist’s subject”); see also Dennis C. Mueller, *Public Choice in Perspective*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 1 (Dennis C. Mueller ed., 1997).

<sup>5</sup> Laurence R. Iannaccone, *Rational Choice: Framework for the Scientific Study of Religion*, in *RATIONAL CHOICE THEORY AND RELIGION: SUMMARY AND ASSESSMENT* 26 (Lawrence A. Young ed., 1997); Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case of the “Nobel” Lie*, 74 VA. L. REV. 179, 180 (1988). However, there is a large body of research that refutes the maximization principle. See, e.g., Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 200 (1988); Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 167–68 (1988); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 138 (2000). On the public choice model, see, for example, Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1139–40 (2002).

<sup>6</sup> Because public choice theory implicates difficult legal, political, philosophical, and economic concerns, the controversy arrives on many fronts. For objections to public choice theory, see Ginsburg, *supra* note 5.

question: whether the political process is overly responsive to majority religious interest group lobbying and under-responsive to the needs of minority religious groups.

The proposition that an economic theory of legislation such as public choice is relevant to issues of religious freedom may seem incongruous.<sup>7</sup> Economic principles of rationality and optimizing behavior are instinctively antithetical to ideas of religious faith and religious reasoning, and religious freedom seems unquantifiable and beyond the reach of any economic methodology.<sup>8</sup>

To the extent that these issues raise questions about the truths of religion, this Article takes no position. Instead, what this Article does is identify and articulate a new theory and mode of analysis for thinking about legislative exemptions and accommodations for religion. This Article is primarily concerned with outlining the beginnings of a new theory as a way of identifying potential process concerns, rather than as a way of solving them. By developing a public choice model of legislation with respect to religious accommodations and exemptions, this Article suggests that there is an alternative reason for enactment of such legislation that is at least as possible as the status quo and is, therefore, worthy of further study and consideration. Importantly, however, this Article does not attempt to conclude or develop a practical answer or account of whether the public choice model (or the public interest model) best fits what *actually happens* in the legislative branch. That is, this Article does not provide a rigorous application of the model to current religious accommodations and exemptions; that is simply beyond its scope. Instead, this Article proposes a descriptive model from which subsequent applications can be drawn about the process by which religious accommodations and exemptions are enacted.

Given the prevailing view that the United States was founded on—and continues to support—the idea of religious pluralism,<sup>9</sup> the claim that legislative exemptions could

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<sup>7</sup> Indeed, although there is a growing body of literature that applies economic analysis to religion and the church, there is a surprising dearth of literature on the intersection of religion and the law in law and economics literature. For economic studies on the intersection of law and religion, see Dean Kelley, *Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom*, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 114 (Robert A. Goldwin & Art Kaufman, eds., 1987); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEGAL THEORY 33 (1996). On the economic analysis of religion and the rise of religious liberty, see especially Corry Azzi & Richard Ehrenberg, *Household Allocation of Time and Church Attendance*, 83 J. POL. ECON. 27 (1975). See also ANTHONY GILL, THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY (2008); Laurence R. Iannaccone, *Voodoo Economics? Reviewing the Rational Choice Approach to Religion*, 34 J. SCI. STUDY RELIGION 76 (1995); Laurence R. Iannaccone, *Religious Practice: A Human Capital Approach*, 29 J. SCI. STUDY RELIGION 297 (1990); Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1 (May 1987).

<sup>8</sup> McConnell & Posner, *supra* note 7, at 1–2.

<sup>9</sup> See, e.g., MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 2 (2008).

be animated by self-interested politicking has two possible and significant ramifications. First, the claim could shift our understanding of the current state of religious liberty in the United States; rather than being a nation tolerant of religious freedom, religious freedom may in fact be an ideal lacking substance. Second, if in fact democratically elected officials cannot be trusted to act in the general public interest to protect generalized religious liberty, and if we continue to value broad religious liberty, we would be forced to consider various institutional alternatives. Foreshadowing a positive application of the public choice model in subsequent scholarship, this Article considers two possibilities. First, it examines the possibility that any finding that interest groups control religious exemptions justifies more intrusive judicial review. Indeed, there is an intuitive attraction to the notion that if the political process does not reflect the will of the people, the judiciary should not defer to it.<sup>10</sup> Second, it suggests that intra-legislative arrangements could be modified so as to heighten transaction costs for interest groups.<sup>11</sup> Specifically, this Article suggests that modifications to the deliberative process—for example, altering the committee process at which religious exemptions are at issue—could temper any interest group influence.

This Article proceeds as follows: Section I starts with some necessary background on the current state of free exercise jurisprudence, as well as on statutory exemptions and accommodations. Section II presents a novel religion and public choice model. Although a rigorous application of the model is outside the scope of this Article, a preliminary review of some legislative accommodations and exemptions for religion suggests that a public choice model may accurately capture the behavior of legislators and interest groups. Finally, Section III addresses the ramifications of a positive application of this theory for religious liberty. Specifically, this Section considers the implications of public choice theory for process theories of constitutional design and any impact on judicial interpretation of statutory exemptions for religion.

## I. RELIGIOUS ACCOMMODATIONS

Before proceeding further, some background may be useful. It is well known that the United States Constitution enshrines a Bill of Rights that protects various fundamental rights including free speech and association, equal protection of the law, and religious liberty.<sup>12</sup> The protections for religious liberty are contained within two clauses in the First Amendment: the “Free Exercise Clause” specifying that Congress shall not prohibit the free exercise of any religion, and its “Establishment Clause” counterpart

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<sup>10</sup> See generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 33 (1991).

<sup>11</sup> See generally Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472 (1988).

<sup>12</sup> U.S. CONST. amends. I–X.

stating that Congress “shall make no law respecting an establishment of religion.”<sup>13</sup> Together, the clauses have been described as requiring that “government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.”<sup>14</sup> By virtue of the Fourteenth Amendment, the religion clauses have also been held to be incorporated and applicable to the states.<sup>15</sup>

A central question under the religion clauses is the question of “accommodation” of religion.<sup>16</sup> The term “accommodation” (or “exemption,” noting that the two terms are used interchangeably) refers to “government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion.”<sup>17</sup> Michael McConnell outlines that the key difference between a permissible accommodation and an impermissible establishment is that a legitimate accommodation “merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government’s action,”<sup>18</sup> whereas an impermissible establishment “creates an incentive or inducement . . . to adopt that practice or conviction.”<sup>19</sup>

The issue of religious accommodation arises under both the Free Exercise and Establishment Clauses. However, the question of accommodations is distinct in each context: the question of accommodation under the Establishment Clause asks whether (or when) accommodations are constitutionally permitted, whereas the question under the Free Exercise Clause asks whether (or when) accommodations are constitutionally compelled.<sup>20</sup> It is the answer to this latter question—whether or when accommodations are constitutionally compelled—that Free Exercise Clause jurisprudence, and *Smith*, are fundamentally concerned with.<sup>21</sup>

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<sup>13</sup> U.S. CONST. amend. I.

<sup>14</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

<sup>15</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring). On the incorporation of the religion clauses, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–41, 42–45 (1998).

<sup>16</sup> Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991) (noting that accommodation is “the central motif of religion clause thought”).

<sup>17</sup> McConnell, *supra* note 16, at 686–87. The conception of “accommodation” is a highly contested issue, and one that is beyond the scope of this Article. On the definitional debate, see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 1169 (2d ed. 1988); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 744–45 (1992); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985).

<sup>18</sup> McConnell, *supra* note 16, at 686.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 708–09.

In the 1990 decision of *Employment Division v. Smith*,<sup>22</sup> the Supreme Court rejected the protectionist frame it had applied since 1963 to determine whether a law impinged on the free exercise of religion. Prior to *Smith*, beginning with the seminal case of *Sherbert v. Verner*,<sup>23</sup> the Court held that the Constitution mandates that the government accord religious groups and individuals a special protection or exemption from laws of general application.<sup>24</sup> If such a protection or exemption was not forthcoming, the government was required to demonstrate that there was a “compelling state interest” to justify the “substantial infringement” on the free exercise rights of the plaintiff.<sup>25</sup> The Court also indicated that “the State would have to prove the futility of non-infringing alternatives.”<sup>26</sup>

However, despite the broad coverage of the Free Exercise Clause established in *Sherbert*, claims for religious accommodation rarely succeeded.<sup>27</sup> The Supreme Court almost always denied claimants the protection of the Free Exercise Clause, holding either that there was no burden on the claimant’s free exercise of their religion<sup>28</sup> or that there was a compelling governmental interest.<sup>29</sup> In *Smith*, then, the Court completed its retreat from free exercise protectionism by effectively revoking the *Sherbert* doctrinal test.<sup>30</sup>

In *Smith*, the plaintiffs were denied unemployment compensation following their retrenchment from their jobs with a private drug rehabilitation center after being found to have used peyote in contravention of an Oregon law prohibiting the knowing or intentional possession of a controlled substance.<sup>31</sup> The respondents argued that their peyote use was limited to religious worship for sacramental purposes during ceremonies

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<sup>22</sup> 494 U.S. 872 (1990).

<sup>23</sup> 374 U.S. 398 (1963).

<sup>24</sup> *Id.* at 409–10.

<sup>25</sup> *Id.* at 406.

<sup>26</sup> Adam Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1335 (2004); *see also* *Sherbert*, 374 U.S. at 403, 406–09.

<sup>27</sup> *See* Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. REV. 611, 611 (2001). Note, however, that this statement excludes decisions involving employment claims, which was the factual context of the *Sherbert* decision.

<sup>28</sup> *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–52 (1998) (logging of forest to create a road near enough to sacred Native American lands to be a disturbance did not violate the Free Exercise Clause); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303–05 (1985) (requiring religious volunteers to accept a minimum wage did not violate the Free Exercise Clause).

<sup>29</sup> *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (holding that the government interest in military uniformity and morale overrode the appellant’s religious liberty claim to wear the yarmulke while in uniform); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that eradication of racial discrimination in educational policies was sufficient to override the religious claims and allow the government to deny tax benefits to a discriminatory institution).

<sup>30</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 883–85 (1990).

<sup>31</sup> *Id.* at 874.

of the Native American Church, and was therefore protected by the Free Exercise Clause.<sup>32</sup> The Court disagreed, holding that

[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes)."<sup>33</sup>

The Court stated that a law will not be invalid unless it discriminates against a religion or religions, either on the face of the legislation or at its purpose.<sup>34</sup> According to the Supreme Court, generally any special accommodation for religious practice is not constitutionally mandated; subject to two limited exceptions, it is discretionary and emanates only from legislative will.<sup>35</sup>

The United States Code is filled with examples of statutory exemptions and accommodations for religion. Indeed, from the outset, "American colonies, state legislatures, and Congress have carved out many statutory exemptions" for religious adherents.<sup>36</sup> The accommodations and exemptions were generally formed independent from and in advance of judicial decisions, although some statutory exemptions were reactionary—created to overcome restrictive judicial decisions.<sup>37</sup> These accommodations can be general or they can favor a particular religion.<sup>38</sup> For example, early accommodations for

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 878–79 (citations omitted).

<sup>34</sup> *Id.* For a "pure" application of the *Smith* doctrine, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–37 (1993). Note that Justice Scalia's majority opinion in *Smith* qualified the general rule with two exceptions: first, claims that combine free exercise claims and claims arising from other constitutional provisions (or "hybrid" claims); and second, claims in contexts that "invite consideration of . . . particular circumstances" (specifically, unemployment compensation cases). *Smith*, 494 U.S. at 884–85. For commentary on the "exceptions" to the *Smith* doctrine, see 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 80–81 (2006), noting that "*Employment Division v. Smith* marks a crucial divide in free exercise law."

<sup>35</sup> *Smith*, 494 U.S. at 884. Note also that some commentators consider it possible to read *Smith* more narrowly. See, e.g., Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 26 (2000); Samaha, *supra* note 26, at 1336.

<sup>36</sup> Louis Fisher, *Statutory Exemptions for Religious Freedom*, 44 J. CHURCH & ST. 291, 291 (2002).

<sup>37</sup> *Id.*

<sup>38</sup> It is this aspect of religious accommodation under the Free Exercise Clause that has caused the most controversy, with scholars and judges claiming that this creates an Establishment Clause problem. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005); *Zorach v. Clauson*, 343 U.S. 306, 310–12 (1952); Ira C. Lupu, *supra* note 16, at 556.

conscientious objectors targeted Quakers and Mennonites, whereas more recent accommodations have focused on the religious needs of Native Americans and the Amish.<sup>39</sup> Even before *Smith*, then, the strongest protection available to individual religious adherents and religious groups was legislative protection given that, as noted above, litigation under the Free Exercise Clause was rarely successful.

This does not mean that the pre-*Smith* constitutional doctrine lacked value. In fact, the value of the pre-*Smith* doctrine was significant: it guaranteed judicial oversight, a second, at any generally applicable law that an individual claimed infringed their religious freedom.<sup>40</sup> As McConnell has noted, although religious liberty pre-*Smith* was generally reliant on the “ability of religious individuals and groups to persuade government officials to provide reasonable accommodations to their religious needs,” the pre-*Smith* doctrine “helped persons aggrieved by neutral and generally applicable laws to obtain a second look from an official who might be less impressed by the bureaucratic imperative of enforcing the rules as written, all the time, without exception.”<sup>41</sup>

The traditional model of government would predict that, following *Smith*, the legislature would cease to enact accommodations and exemptions for religion. After all, without any constitutional imperative, the legislature has no reason to act to protect religious liberty more generally. Basic political science characterizes judicial review as essential to strong protection of individual rights from majority rule,<sup>42</sup> and the capacity of individuals to challenge legislative action in the courts affords an opportunity for minority interests to overcome majoritarian rule.<sup>43</sup> However, when we look at the legislative record of Congress post-*Smith*, this is not the way it has played out.

The foremost example of legislative accommodative action can be seen in Congress’s legislative response to the Court’s ruling in *Smith*. Following the Court’s decision that there were no constitutionally mandated exemptions from generally applicable and neutrally expressed laws, and under the influence of unified and diverse religious groups,<sup>44</sup> Congress enacted the Religious Freedom Restoration Act (RFRA), to effectively reverse the decision.<sup>45</sup> RFRA’s purposes were to “restore the compelling

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<sup>39</sup> LOUIS FISHER, *RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS*, 87–91 (2002).

<sup>40</sup> *Id.* at 5; McConnell, *supra* note 27, at 612.

<sup>41</sup> McConnell, *supra* note 27, at 612.

<sup>42</sup> FISHER, *supra* note 39, at 4–5.

<sup>43</sup> *Id.*

<sup>44</sup> There was broad unification between Democrats, Republicans, the ACLU, Americans United, American Center for Law and Justice, the Christian Legal Society, the American Jewish Congress, and the National Association of Evangelicals. *See, e.g.*, FISHER, *supra* note 39, at 80; MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 180 (2d ed. 2006).

<sup>45</sup> *See* MICHAEL W. MCCONNELL ET AL., *supra* note 44, at 180. On judicial supremacy, *see*, for example, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). *Cf.* RONALD DWORKIN, *LAW’S EMPIRE* 373–79 (1986); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

interest test . . . guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”<sup>46</sup> President Clinton stated at his signing of the legislation into law that:

[T]his act reverses the Supreme Court’s decision Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.<sup>47</sup>

This example flips the basic concerns of post-*Smith* majoritarianism on its head: whereas the Supreme Court in *Smith* discarded any significant claim over protection of minority religious rights and decreed that the political branches could enact majoritarian policy without regard to minority concerns, Congress—the traditional majoritarian institution—explicitly determined that all interests should be taken into account when they do not impact on government interests. Moreover, the RFRA passed the House of Representatives with a unanimous vote, and the Senate with a near unanimous, 97–3 vote.<sup>48</sup>

The change of predictive roles becomes even more stark when one considers the Court’s decision in *City of Boerne v. Flores*,<sup>49</sup> which held that the RFRA was unconstitutional insofar as it applied to the States based on the principles of separation of powers and federalism.<sup>50</sup> The Court stated that the RFRA was “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”<sup>51</sup> It is not the point of this Article to address the correctness of the decision—indeed, others have done so.<sup>52</sup> Rather, what *Flores* indicates is the absolute failure of the normative predictions of the institutional capacity (and aspirations) of the political branches vis-à-vis the judicial branch of government—that is, judicial review is not providing the presumed safeguard for minorities against majoritarian interests, but rather the judiciary is imposing “majoritarian” judgments on a rights-conscious legislature.

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<sup>46</sup> Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb(b) (2000).

<sup>47</sup> Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993).

<sup>48</sup> Peter Steinfeld, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

<sup>49</sup> 521 U.S. 507 (1997).

<sup>50</sup> *Id.* at 536; see William G. Buss, *Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391 (1998).

<sup>51</sup> *Flores*, 521 U.S. at 532.

<sup>52</sup> See, e.g., Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 153–57 (1997).

Although the RFRA exchange is perhaps the most prominent example countering the standard predictive claim of institutional capacity and competence, it is not isolated. Looking more broadly, there are countless examples of statutory accommodations enacted by the democratic branches on broad and diverse subjects.<sup>53</sup> However, the simple existence of these exemptions does not tell us much about the scope of religious liberty in America. It does not, as McConnell claims, demonstrate that the post-*Smith* exemptions were enacted “precisely in order to provide protection for individual rights that the courts failed to provide.”<sup>54</sup> An examination of legislative outputs is insufficient. A simple observation that the number of legislative outputs accommodating religion is greater than zero does not answer the question of the scope and content of those accommodations. Further, there is no imperative to accept the implicit assumption of scholars, such as McConnell and Fisher,<sup>55</sup> that the legislature is animated by virtue when it enacts religious accommodations and exemptions. There is no reason to necessarily assume that the mere existence of statutory accommodations demonstrates a desire on the part of the legislature to protect religious liberty. Evaluation is an important part of rights practice and scholarship, and if the goal remains strong protection of religious liberty, we must examine and challenge the standard account with alternative theories that assess the capacity of the legislature to protect the religious liberty of all Americans. This is the goal of Section II.

## II. PUBLIC CHOICE MODEL

Law and religion scholars, as well as legislators, often claim that religious groups and religious accommodations and exemptions are animated by the “public interest.”<sup>56</sup> “Public interest” is the notion that individuals and groups set aside their narrow self-interest and act as “civic republicans,” supporting wide-ranging protections for all religious actors.<sup>57</sup> However, at first glance this public interest model seems falsifiable on its own terms. Religious interest groups are formed precisely for the purpose of lobbying Congress for benefits for the denomination or church that they represent. It seems artificial, then, to claim that these interests groups are acting in the public interest *writ large*.

This Section proffers an alternative model to explain the behavior of religious interest groups and the legislators that perpetuate religious accommodations and exemptions

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<sup>53</sup> Indeed, a relatively recent survey of accommodation provisions in U.S. state and federal laws found that more than 2,000 statutes protect religious minorities. See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

<sup>54</sup> McConnell, *supra* note 27, at 614.

<sup>55</sup> FISHER, *supra* note 39, at 231–32 (2002).

<sup>56</sup> See, e.g., Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 435 (2010).

<sup>57</sup> *Id.* at 59–61, 70–73.

post-*Smith*—a public choice model. Public choice theory is a positive theory that applies economic methodology and techniques to political processes.<sup>58</sup> Public choice is also the analysis of the behavior of political actors (including voters, politicians, and government officials), and rests on the assumptive premise that political actors act rationally to maximize the value of political outcomes for themselves (taking into account the costs and benefits of the political activity).<sup>59</sup> The maximization premise is, of course, “a simplifying assumption to be employed and assessed within the context of predictive models that are themselves simplified representations of reality.”<sup>60</sup> However, the maximization premise has proved valuable in law, economics, and the social sciences more generally, and is well suited to building and testing models of political behavior.<sup>61</sup> In short, the public choice model is helpful for developing a descriptive paradigm for examining the relationship between religion and politics, something that has yet to be done despite the extensive literature addressing the relationship between law and religion.<sup>62</sup>

Public choice theory, then, is not concerned with normatively idealized institutions;<sup>63</sup> rather, it is concerned with identifying the strengths and weaknesses of real world institutions as a means of conducting meaningful assessments of current political institutions. A public choice analysis of statutory accommodations and exemptions enables us to challenge the standard intuition that religious accommodations and exemptions are parceled out by the legislature in order to benefit the public welfare.

The idea that religion operates outside the realm of politics can be traced back to the 1776 Virginia Declaration of Rights<sup>64</sup> and James Madison’s Memorial and Remonstrance Against Religious Assessments.<sup>65</sup> In the Memorial, Madison specified that a just government “will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and property.”<sup>66</sup> Since then, a romanticized vision of religion and politics has persisted

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<sup>58</sup> See *supra* note 4 and accompanying text.

<sup>59</sup> See *supra* note 5 and accompanying text; Daniel A. Farber, *Introduction to PUBLIC CHOICE AND PUBLIC LAW* ix–x, (Daniel A. Farber ed., 2007).

<sup>60</sup> Iannaccone, *supra* note 5, at 26–27.

<sup>61</sup> See sources cited *supra* note 5.

<sup>62</sup> But see generally GILL, *supra* note 7.

<sup>63</sup> Indeed, a choice between an idealized banana and an imperfect pear is no choice at all; that is, comparing actual things with idealized alternatives is a false dichotomy, tipping the scales in favor of the idealized choice. This “choice” has been termed the “nirvana fallacy.” See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1–2 (1969).

<sup>64</sup> VA. CONST. of 1776, pmb1.

<sup>65</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 63 (2002). Of course, theories of religious liberty can be traced back much further than this, but at least with respect to the modern constitutional foundations of religious liberty, these documents provide salient examples of the political ideology with respect to religious liberty around the time of the enactment of the Constitution.

<sup>66</sup> *Id.* at 66.

in democracies more generally, and the literature has been generally dominated by “optimistic pluralists”<sup>67</sup> who presume legislative actors to be reasonable pluralists, passing legislation protective of religious liberty for the good of the general public.

Public choice theory calls into question this romanticized view of the relationship between religion and politics.<sup>68</sup> Instead, a public choice analysis suggests that legislation protective of religious liberty is the consequence of an economic transaction whereby religious interest groups demand protective legislation that is supplied by legislators, whose primary concern is to secure the number of votes sufficient for reelection.<sup>69</sup> Legislation affording religious accommodations and exemptions, then, arises from a subtle and complex process through which the suppliers (the legislators) weigh the gains derived from the prospective transfer (votes gained) against the costs borne (votes lost).

#### A. *The Model*

This Section proposes a simple deductive model of the religious marketplace to assess the nature of religious accommodations and exemptions. The religious marketplace model contains two tiers. The first tier is best termed the “adherent marketplace,” and focuses on the social arena where churches and denominations act as religious firms (i.e., produce and distribute religious goods) and compete for individual adherents—that is, the first tier focuses on the interplay between individuals and religious firms. The second tier will be referred to as the “policy marketplace,” and is concerned with the relationship between the religious firms and government, whereby religious firms compete for policy outcomes.

The two tiers are necessarily interrelated. At tier one, the religious firms attempt to convince individuals that they can supply the ultimate religious good—a deep spiritual connection to some supernatural force.<sup>70</sup> However, religious firms need to convince individuals to purchase their religious good (with, for example, financial and time contributions). At tier two, religious firms seek regulation that assists them in marketing their religious good to individuals. The policy is integral in a religious firm’s efforts to retain or attract adherents. The focus of this Article is tier two, though tier one will be briefly discussed.

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<sup>67</sup> William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276 (1988).

<sup>68</sup> See GILL, *supra* note 7, at 7–8; Anthony Gill, *The Political Origins of Religious Liberty: A Theoretical Outline*, 1 INTERDISC. J. OF RES. ON RELIGION. 1 (2005); Anthony Gill, *Religion and Comparative Politics*, 4 ANN. REV. POL. SCI. 117 (2001). See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975); FARBER & FRICKEY, *supra* note 4; MAX STEARNS & TODD ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009); Brennan & Buchanan, *supra* note 5.

<sup>69</sup> See generally DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 1974).

<sup>70</sup> See discussion *infra* note 76.

### 1. Tier One: Adherent Marketplace

Tier one is ultimately concerned with the relationship between individuals and the religious firm. The fundamental task is to define the players and the playing field.<sup>71</sup> Therefore:

*Adherent Definition 1: The adherent marketplace is the social arena where religious firms compete for members.*<sup>72</sup>

*Adherent Definition 2: A religious firm is a church or denomination that produces and distributes religious goods.*

*Adherent Definition 3: Religious goods are, ultimately, the fundamental answers to philosophical questions having at base some appeal to supernatural forces.*

Religious firms, then, are suppliers, or sellers, of religious goods. Pursuant to the maximization premise, religious firms are market optimizers, seeking to maximize members, resources, government support, or any other determinant of institutional success.<sup>73</sup> Because a seller cannot long survive without a buyer, the core function of the religious firm is to attract those individual buyers. Given that public choice assumes that individuals are benefit maximizers, the model makes the following assumption:

*Adherent Assumption 1: Individuals will act rationally, weighing the costs and benefits of selecting any given religious firm, and will choose the firm that maximizes their net benefit.*

*Adherent Premise 1: Costs and benefits include explicit and implicit prices, e.g., income level, time availability, and geographical restrictions.*<sup>74</sup>

There are many diverse rational choice models that seek to explain an individual's cost-benefit balancing.<sup>75</sup> It is unnecessary to recite these options here. It is sufficient for the purpose of this Article to simply assume that individuals are benefit maximizers who will select the religious firm that best responds to their individual calculus, which includes at least both financial and time constraints.

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<sup>71</sup> GILL, *supra* note 7, at 41.

<sup>72</sup> Note that the notion of "competition" does not simply refer to proselytizing. Competing could simply be a presence in the marketplace and the desire to practice in peace. The term "compete for members" will be used to incorporate all of these senses.

<sup>73</sup> Iannaccone, *supra* note 5, at 27.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 26–27.

Similarly, religious firms are benefit maximizers:

*Adherent Assumption 2: Religious firms are profit-maximizers, with profit defined in terms of adherents.*

To this end, religious firms seek the most efficient ways in which to attract individual adherents. For the purposes of this Article, this can be stated thus:

*Adherent Assumption 3: Governmental regulation represents an efficient means by which religious firms can maximize the number of adherents.*

*Adherent Assumption 4: Majority religious firms will seek high levels of regulation over the religious marketplace (i.e., restrictions on minority firms and high barriers to entry), whereas religious minorities will prefer limited regulation (i.e., broader religious liberty and low barriers to entry).*

Adherent Assumptions 3 and 4 together claim that religious firms utilize regulation as a central method for attracting and/or retaining individual adherents. Specifically, Assumption 4 states that religious firms that hold a large stake of the religious marketplace (i.e., that have captured a portion of the market) prefer regulation that puts limits on new entrants and minority firms. After all, if the ultimate goal of a religious firm is adherent maximization, any firm with a sizable market share will be unlikely to promote regulation that could potentially diminish that share. Conversely, Assumption 4 assumes minority religious firms will seek regulation that broadly favors religious liberty and allows for easy access to the religious market. Ultimately, then, the model assumes the following:

*Adherent Assumption 5: The degree of religious liberty is dependent on the composition of the religious market. A highly pluralistic market will result in a high degree of religious liberty. A religious market that is captured by one or a few religious firms will result in a low degree of religious liberty.*

## 2. Tier Two: Policy Marketplace

Tier two is ultimately concerned with the relationship between religious firms and government:

*Policy Definition 1: The policy marketplace is the regulatory arena where religious firms compete for favorable regulation.<sup>76</sup>*

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<sup>76</sup> Even if the religion is non-proselytizing, it will still seek favorable regulation. For example, Judaism is a non-proselytizing religion that does not actively (or perhaps openly)

*Policy Definition 2: Favorable regulation describes both offensive legislation (favorable exemptions and accommodations from generally applicable laws) and defensive regulation (defeating competing legislative proposals or at least achieving restrictions on competing legislative proposals).*

*Policy Axiom 1: Religious firms compete in the policy marketplace through religious interest groups ("RIGs").*

*Policy Axiom 2: Government is represented in the policy marketplace by individual legislators.*

The above definitions and axioms establish a policy market that involves two political actors: RIGs and legislators. The critical task is to identify the interests of the political actors. The general assumption as to interests can be stated thus:

*Policy Assumption 1: Political actors behave rationally, weighing the costs and benefits of potential political actions and choosing those actions that maximize their expected net benefits.*

This is a broad assumption and it is generically applicable to political actors. However, for the purposes of this model, the assumption needs refinement in order to accurately describe the interests of each individual actor. The specific interest assumption, and consequent premise, for the legislator can be stated as follows:

*Policy Assumption L1: Legislators are primarily interested in their personal political survival (i.e., reelection).*

*Policy Premise L1: Legislators enact legislation protective of religious liberty when they believe that it will increase the probability of reelection.*

Policy Assumption L1 is the baseline assumption of public choice theory and envisages legislators as "single-minded seekers of reelection."<sup>77</sup> Put another way,

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compete for members in the public square; however, there are numerous interest groups representing the interests of Judaism in the governmental arena, such as the American Jewish Committee or the American Jewish Congress.

<sup>77</sup> MAYHEW, *supra* note 69, at 5; *see also* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); Eskridge, *supra* note 67, at 288. *But see*, RICHARD F. FENNO, CONGRESSMEN IN COMMITTEES I (1973) (arguing that legislators have three goals: reelection, prestige within the legislature, and a desire to contribute to policy debates constructively).

Policy Assumption L1 characterizes reelection as legislators' ultimate preference. The primacy of the reelection goal does not deny that legislators can be motivated by ideational goals (e.g., public good, religious belief); rather, it acknowledges the simple truism that reelection must be the proximate goal of every legislator because, without reelection, all other goals are largely unachievable.<sup>78</sup> Because reelection is so important, legislators must act to maximize its probability. This maximizing assumption is what distinguishes prior normative scholarship on legislative outcomes from public choice analyses of the same outcomes. By focusing on reelection as the ultimate preference of each individual legislator, public choice enables a direct focus on each individual responsible for passing or denying legislation protective of religious liberty, and goes some distance in explaining why legislators would choose to curtail legislative power by providing accommodations and exemptions.

Policy Premise L1 is a statement of belief: in order for each legislator to satisfy her preference for reelection, she must act on a belief that a given action will maximize the probability of that preference. Specifically, Policy Premise L1 states that the legislator will enact legislation protective of religious liberty when she believes it will lead to reelection. As discussed below, the model assumes that religious accommodation statutes are supplied in response to RIG demand. Policy Premise L1, then, builds in a presumption that RIGs are sufficiently influential in the general voting community such that a RIG can generate an increase in votes sufficient to increase the probability of reelection.

The specific interest assumption and consequent premise for the RIG is:

*Policy Assumption RIG1: Religious interest groups form political coalitions when the benefits from achieving wealth transfers from the legislature outweigh the costs of organizing and lobbying.*

*Premise RIG1: Religious interest groups seek legislation that maximizes their utility.*

Policy Assumption RIG1 is a fundamental premise of public choice theory.<sup>79</sup> This assumption simply states that interest groups formally organize into selective political lobbying groups when the benefits of organizing outweigh the costs of organizing.

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<sup>78</sup> MAYHEW, *supra* note 69, at 16–17. Note that although Assumption L1 assumes that politicians want to be reelected, it does not limit the motivations for this desire to “goals achievement”; for example, the legislator could desire reelection for money, power, or fame. The presumption is, however, that all of these things are unachievable if the legislator is not in office.

<sup>79</sup> See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 6, 125–26 (1965); Elhauge, *supra* note 10, at 32–44; Eskridge, *supra* note 67, at 285–89; William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

Interest group theory specifies that formally organized groups that are “willing to spend money to obtain or block the passage of legislation will tend to monopolize the attention of the legislator, at the expense” of both the general public welfare and less organized groups.<sup>80</sup> Further, public choice theory argues that interest groups are likely to have focused interests in order to maximize the benefits and minimize the costs to themselves. Narrowly targeted legislative goals ensure that the legislative benefits are, wherever possible, divisible and excludable, minimizing any “free riders.”<sup>81</sup>

Cost minimization is the *raison d'être* for interest group lobbying of the legislature for targeted legislation: the interest group gains the benefit and the cost is broadly disbursed across the general public through consolidated revenue.<sup>82</sup> The interest group is unlikely to face significant opposition to the cost *because* of its wide disbursement; assuming all political actors act rationally, the cost of organizing to oppose the interest group is irrational. RIGs, then, organize around specific issues that are of the most benefit to their interests, avoiding, wherever possible, the possibility of other RIGs free riding on their lobbying efforts.<sup>83</sup>

Policy Premise RIG1 states that RIGs will demand rent-seeking legislation that maximizes their utility. Utility preferences for RIGs will vary depending on market conditions;<sup>84</sup> however, it is possible to generalize RIGs as preferring legislation that indirectly maintains or increases the number of adherents to the religion that the RIG represents, as well as legislation that directs maximum financial gain to that religion (e.g., exemption from general taxation laws).<sup>85</sup>

Although it is acknowledged that rent-seeking statutes can serve a legitimate end apart from the redistributive calculus of the RIG<sup>86</sup>—and further, that it can be difficult

<sup>80</sup> Eskridge, *supra* note 67, at 286–87.

<sup>81</sup> Free riders are groups or individuals who would benefit from certain legislation, but that do not contribute to the effort. *Id.*; see also FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 137–41 (1997); STEARNS & ZYWICKI, *supra* note 68, at 14–15; Ginsburg, *supra* note 5, at 1145–48.

<sup>82</sup> STEARNS & ZYWICKI, *supra* note 68, at 251.

<sup>83</sup> See generally MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 99–126 (1981); JAMES Q. WILSON, POLITICAL ORGANIZATIONS 332–37 (1973).

<sup>84</sup> See *infra* notes 88–89 and accompanying text.

<sup>85</sup> There is growing literature on the notion of a “religious market.” See, e.g., JOHN ANDERSON, RELIGIOUS LIBERTY IN TRANSITIONAL SOCIETIES: THE POLITICS OF RELIGION (2003); ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776–2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY (2005); GILL, *supra* note 7; CHARLES HANSON, NECESSARY VIRTUE: THE PRAGMATIC ORIGINS OF RELIGIOUS LIBERTY IN NEW ENGLAND (1998); RATIONAL CHOICE THEORY AND RELIGION (Lawrence A. Young ed., 1997); Roger Finke, *Religious Deregulation: Origins and Consequences*, 32 J. CHURCH & ST. 609 (1990); Roger Finke & Laurence R. Iannaccone, *Supply-Side Explanations for Religious Change*, 527 ANNALS 27 (1993) Anthony Gill, *The Economics of Evangelization*, in RELIGIOUS FREEDOM AND EVANGELIZATION IN LATIN AMERICA 70–84 (Paul E. Sigmund ed., 1999); cf. STEVE BRUCE, CHOICE & RELIGION: A CRITIQUE OF RATIONAL CHOICE (1999).

<sup>86</sup> See, Macey, *supra* note 11, at 508; Vestal, *supra* note 3, at 347.

to distinguish between “‘amorally redistributive’ rent seeking” and “‘wealth-increasing ‘public interest’ governmental activities’”<sup>87</sup>—to ensure a simple and effective predictive model, and in keeping with public choice modeling more generally, it is necessary to assume these issues away.<sup>88</sup>

In reality, the legislation that RIGs will demand, and the legislation that the legislator will supply, is dependent on the condition of the market in which the political actors operate.

The rational legislator will act to reduce restrictions on religious liberty only when it maximizes the probability that she will be reelected. That is:

*Policy Assumption L2: To the extent that political survival is hindered by restrictions on religious liberty, religious restrictions will be liberalized (i.e., when there is high opportunity cost of religious restrictions, deregulation of the religious market will result). Conversely, restrictions on religious liberty will increase if it increases the chance of political survival.<sup>89</sup>*

The market conditions under which the legislator operates depend on the nature of the religious marketplace. Therefore:

*Policy Assumption RIG2: All RIGs are not equivalent and RIGs separately represent majority religious firms (“MARIG”), and minority religious firms (“MIRIG”).*

*Policy Axiom 3: MARIG can refer to one dominant religious firm and representative interest group or one of a small number of dominant religious firms (holding a significant market share) and representative interest groups.*

*Policy Assumption RIG3: Assuming some level of religious freedom, whereas religious liberty represents the degree to which a government regulates the religious marketplace, hegemonic religions will prefer targeted beneficial laws and high levels of government regulation over religious minorities. Religious minorities will prefer generalized laws favoring greater religious liberty.<sup>90</sup>*

Whereas Policy Assumption RIG1 outlined that RIGs are benefit maximizers, Policy Assumptions RIG2 and RIG3 state that there is diversity between RIGs (driven

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<sup>87</sup> Vestal, *supra* note 3, at 348.

<sup>88</sup> Macey, *supra* note 11, at 472–73.

<sup>89</sup> The characterization of this assumption derives from GILL, *supra* note 7, at 232.

<sup>90</sup> *Id.*

by the religious firm that they represent) and, consequently, the nature of the benefit being sought from the legislator. Assumption RIG2 makes a simple division between majority religious firms (and their RIGs) and minority religious firms (and their RIGs) and specifies that the utility of the RIG is dependent on whether it is characterized as majority or minority within any religious marketplace. Given that RIGs are benefit maximizers, it would be expected that utility will align with current market share.

Therefore, a MARIG, although perhaps rhetorically in favor of freedom of religious liberty, would favor the status quo (whatever that may be), or perhaps lobby for narrowly tailored marginal positive shifts from the status quo, as well as seeking laws that keep the barriers to entry into the religious marketplace high (for example, by imposing zoning restrictions on minority churches, or restricting visas on foreign missionaries).<sup>91</sup> A MIRIG, on the other hand, would seek broad religious freedom, enabling regulation-free proselytizing, the ability to build churches, and the ability to access governmental grants (albeit within the limits of any constitutional establishment clause).<sup>92</sup> Importantly, a MIRIG that is aware of its market position will also seek to broaden the scope of any MARIG lobbying to include religious groups generally (either by independent lobbying appealing to the legislator's utility probability or by free riding).

Policy Assumption L2 responds to these market conditions and suggests that a legislator will carefully weigh the costs and benefits in terms of reelection by examining the religious marketplace as a whole. This assumption states that when there is a strong religious majority operating on the religious market, a rational legislator is likely to be less responsive to religious minority demands for broader religious liberty up to the point of utility maximization.

### *B. Predictive Results*

Taking the model on its terms, with political players maximizing their self-interest, what type of results should such a system generate? There are two dimensions to the

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<sup>91</sup> This distinction is suggested, although not modeled by GILL, *supra* note 7, at 44–45. To buttress his claim that religious groups act differently depending on their position in the “religious market,” Gill provides the example of the Catholic Church. For Gill, if the Catholic Church was preferencing morality, or spirituality, its policy would remain consistent across nations. *Id.* at 45–46. Gill examines the policy of the Church in Latin America, where the Catholic Church has been dominant for over five centuries, and in post-Soviet Russia, where the Church is an expanding denomination. *Id.* at 45. He finds that in Latin America, the Church has actively sought restrictions on evangelical and Pentecostal religions, whereas in Russia, the Church has been pressing for greater religious liberty and access to the religious market. *Id.* Gill claims that this behavior on the part of the Catholic Church is indicative of interest-based, rather than ideational, behavior whereby the Church's policy is determined by market position rather than some theological precept. *See id.* at 45–46. On the notion of a religious market, see generally, Gill, *supra* note 85.

<sup>92</sup> *See supra* notes 16–26 and accompanying text.

answer: the first involving the process by which the legislation is enacted, and the second involving the substance of the legislation produced.<sup>93</sup>

### 1. Predicted Legislative Process

The process dimension involves examining the flow of value to the legislators who assisted in the enactment of the statute providing religious accommodations or exempting religious actors from generally applicable laws.<sup>94</sup> The legislator's willingness to supply the legislation is dependent on the legislator's belief that the legislation lobbied for by the RIGs will in fact maximize, or at least increase, the probability that the legislator will be reelected.

In order to maximize her opportunity for reelection, the legislator is faced with a number of choices when a RIG presents RIG-beneficial legislation. First, the legislator faces the "dilemma of the ungrateful electorate," in which the positive things the legislator does for an interest group are more easily forgotten than any negative action<sup>95</sup>—that is, refusing the RIG is likely to decrease the probability of reelection. Conversely, the legislator will be aware of countervailing interests in the electorate (either from another RIG or the public more generally), which have significant potential to inversely affect the legislator's utility.

To avoid this dilemma, and to universally maximize votes, the legislator will typically attempt to help the group that will attract the most votes for the legislator, as well as the least attention of the legislator's other constituents. The legislator will attempt to avoid divisive issues while maximizing votes by finessing or avoiding conflicting demands, either by doing "casework" (whereby the legislator assists "harmed" constituents on an individual basis) or by pork barreling (whereby the legislator gives "tangibles" to buy off the constituents).<sup>96</sup>

When it is impossible to avoid the conflicting demands of the RIGs, once the cost is measured against the benefits in terms of votes, the legislator will attempt to satisfy all groups by supporting "compromise legislation."<sup>97</sup> When this is impossible, the legislator will likely support an ambiguous law in which the statute is drafted in broad terms, with the details to be filled in by the courts or regulatory agencies. In this way, the legislator can reassure each RIG it has won, and can pass the blame to the courts or administration if the outcomes belie the promises made.<sup>98</sup> Thus, the legislator maximizes the probability of her reelection by calculating the votes gained versus votes lost for each religiously protective legislative action.

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<sup>93</sup> See Vestal, *supra* note 3, at 347.

<sup>94</sup> Eskridge, *supra* note 67, at 287–88; Vestal, *supra* note 3, at 349.

<sup>95</sup> Eskridge, *supra* note 67, at 287–88.

<sup>96</sup> *Id.*

<sup>97</sup> Compromise legislation is legislation that substantially meets the utility of the lobbying RIG, as well as balances the needs of the countervailing RIGs or the community more generally.

<sup>98</sup> Eskridge, *supra* note 67, at 287–88.

## 2. Predicted Legislative Outcomes

On the whole, the substance dimension of the model predicts that we would expect to see rent-seeking statutes that overwhelmingly benefit MARIGs. Given that MARIGs presumably have the greatest potential to maximize the legislators' utility, it seems likely that this power advantage will systematically yield laws that are beneficial for MARIGs. Examples of laws that benefit MARIGs include exemptions from generally applicable laws that increase the wealth and availability of MARIGs to the populace. However, as outlined in the above section, in deciding whether to enact the legislation lobbied for by MARIGs, the legislator must weigh the votes lost against the votes gained if she were to enact the statute. Hence, it would be expected that outcomes would include legislative compromises, such as applying the MARIG-desired legislation more broadly to religious firms in general. Additionally, we would expect that broadly applicable legislation passing responsibility to the courts and the administrative branch would emanate from the legislature.

Further, given the utility demands of MARIGs and the power of MARIGs to maximize the legislator's utility, expected outcomes would also include monopolistic legislation whereby MARIGs intentionally seek to limit access to—and competition in—the religious marketplace. Examples include statutes imposing restrictions on which firms qualify as “religious firms” under beneficial legislation and statutes requiring permission for religiously motivated practices.

The expected result under the model, then, is that “the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends.”<sup>99</sup> Generally, it is expected that there will be statutes serving majority religious welfare over the interests of minority religions, secular interests, or the public more generally.

### *C. Case Study*

As noted above, a rigorous application of the model is beyond the scope of this Article. However, it is worthwhile to briefly review the model vis-à-vis some of the more significant accommodations and exemptions for religion on the statute books. Because even the most preliminary application is impossible without at least a basic overview of a sample of statutory accommodations and exemptions, what follows is a capsule overview of a sample of statutory accommodations and exemptions in five key policy areas: social security, taxation, conscientious objection, indigenous religious freedom, and employment discrimination. There is no blind selection means by which to select topical genres for this kind of case study; therefore, the five genres were drawn from leading Supreme Court religion clause cases. These policy areas represent the five topics most regularly litigated in religion clause cases before the Supreme Court.

This approach does, of course, attract the criticism that it cherry-picks legislation that demonstrates the effectiveness of the model. The most that can be said in response

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<sup>99</sup> *Id.* at 277.

to this concern is that this Section presents preliminary observations as to the possible applicability of a public choice analysis. Future work will provide a detailed application of the model. For now, these observations serve to demonstrate that a public choice theory is plausible as a descriptor for the existence of religious accommodations and exemptions.

First, a note: the case study draws on legislation both pre- and post-*Smith*. The Supreme Court's protectionist period lasted from 1963 to 1990; that is, accommodations and exemptions were only constitutionally required under the Court's interpretation of the Free Exercise Clause between these dates.<sup>100</sup> All but one of the examples in the case study fall outside this protectionist period; in other words, there was no "judicial overhang"<sup>101</sup> to which the passage of the legislation can be attributed. Further, the sole statute that falls within this period, the Civil Rights Act of 1964, was tabled prior to the 1963 decision of *Sherbert v. Verner*.<sup>102</sup> Finally, even if legislation in the case study fell within the Court's protectionist period, it would be difficult to conclude that it was passed *because of* the Court's protectionist doctrine. Given that the legislature demonstrated its competence and willingness to enact accommodations and exemptions prior to the statement of constitutional mandate to do so, any example of legislative action falling within the constitutionally protectionist period—when not judicially ordered—is simply correlation, not causation.<sup>103</sup>

### 1. Conscientious Objectors

Almost from Federation, the U.S. legislature took up the issue of exemptions from military service on the basis of religious conscientious objection.<sup>104</sup> At the First Congress, James Madison offered up a list of Amendments to the Constitution, including the following:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best

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<sup>100</sup> See *supra* notes 19–35 and accompanying text.

<sup>101</sup> This term was coined by Mark Tushnet to describe constitutional arrangements by which the possibility of judicial review may necessitate rights-positive actions by the legislature. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–58 (1999).

<sup>102</sup> The Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000), was introduced on June 11, 1963. The *Sherbert* decision was handed down on June 17, 1963. *Sherbert v. Verner*, 374 U.S. 398 (1962); see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* 132–34 (1990).

<sup>103</sup> An illustrative metaphor is a situation in which a child is instructed by her parents to practice the piano for one hour every day. The child practices for six hours every day. If her parents reduce the requirement to a half hour every day, given her previously held commitment beyond the minimum requirement, it is arguable that there is no concern that she will cease to practice. Thanks are due to Jacob Gersen for this helpful metaphor.

<sup>104</sup> See S. JOURNAL, 1st Cong., 1st Sess. 136 (1789); 2 ANNALS OF CONG. 1817–18 (1790).

security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.<sup>105</sup>

The proposed exemption was ultimately excluded from the now Second Amendment because Congress determined that the matter was more appropriately left to the state governments.<sup>106</sup> It was not until the Civil War that the first national draft was introduced, and although the conscription bill did not mention conscientious objection *per se*, it did enable a drafted religious objector to provide an acceptable substitute or pay \$300 to hire a substitute.<sup>107</sup> One year later, in response to concerns of Quakers that payment for a substitute was equivalent to military service, Congress amended the law so that religious objectors—defined as those forbidden by their denominations' articles of faith from bearing arms—would be designated non-combatants and assigned to appropriate duties, and objectors would be obliged to pay \$300 for “the benefit of the sick and wounded soldiers.”<sup>108</sup>

Subsequent national conscription laws contained increasingly more permissive accommodations for religious objectors. The World War I conscription law<sup>109</sup> included an exemption from military service (and an obligation to perform non-combatant duties) for members of “any well-recognized religious sect or organization at . . . whose existing creed or principles forbid its members to participate in war in any form . . .”<sup>110</sup> Following derision from members of Congress who protested the limitation of objectors to members of recognized sects or organizations, President Wilson expanded

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<sup>105</sup> 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

<sup>106</sup> 2 ANNALS OF CONG. 1821–22 (1790). Notably, many state legislatures had already enacted, or subsequently enacted, conscientious objector protections; for example, Rhode Island, North Carolina, and Massachusetts. See Richard Wilson Renner, *Conscientious Objection and the Federal Government, 1787–1792*, 38 MIL. AFF. 142 (Dec., 1974). On the early history of conscientious objectors, see, for example, GREENAWALT, *supra* note 34, at ch. 4; CHARLES C. MOSKOS, *A CALL TO CIVIC SERVICE: NATIONAL SERVICE FOR COUNTRY AND COMMUNITY* (1988); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1112–15 (1998); Charles C. Moskos, *Conscientious Objectors*, in *A HISTORY OF NATIONAL SERVICE IN AMERICA* (Peter Shapiro ed., 1994).

<sup>107</sup> Enrollment Act of 1863, ch. 75, 12 Stat. 731, 733 (1863). For the congressional debate over the inclusion of an exemption that would satisfy the Quakers and Shakers, see CONG. GLOBE, 37TH CONG., 3D SESS. 994 (1863).

<sup>108</sup> Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9 (1864). On conscientious objectors in the Civil War, see, for example, EDWARD NEEDLES WRIGHT, *CONSCIENTIOUS OBJECTORS IN THE CIVIL WAR*, 6 (1931).

<sup>109</sup> National Defense Act, ch. 134, § 59, 39 Stat. 166, 197 (1916).

<sup>110</sup> Selective Draft Act, ch. 15, § 4, 40 Stat. 76, 78 (1917) (enabling the President to set the conditions for any religious exemption). This Act amended the National Defense Act, which was more restrictive. *Id.*; see National Defense Act § 59.

the definition of objectors to include those “who profess religious or other conscientious scruples,” regardless of whether they belonged to a sect or organization.<sup>111</sup>

Interestingly, the recognized sect or organization limitation was also challenged in the Supreme Court as a violation of the Free Exercise Clause.<sup>112</sup> The Court held that “we pass without anything but statement [on] the proposition that” the provision infringed the religion clauses, “because we think its unsoundness is too apparent to require us to do more.”<sup>113</sup> Additionally, in a subsequent 1931 Supreme Court challenge to the draft laws, the Court held that “whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides.”<sup>114</sup>

The expanded Executive definition of conscientious objector carried over to the Selective Training and Service Act of 1940, which exempted any person who “by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”<sup>115</sup> The Act also enabled objectors to elect to perform non-arms bearing military service or alternate civilian service.<sup>116</sup> Following considerable debate over the meaning of “[r]eligious training and belief,” Congress defined the phrase in the 1948 Selective Service Act as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>117</sup>

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<sup>111</sup> Exec. Order No. 2,823 (Mar. 20, 1918), in 18 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8475, 8476 (James D. Richardson ed., 1921). For commentary on President Wilson’s executive order, see FISHER, *supra* note 39, at 91–96; MULFORD Q. SIBLEY & PHILIP E. JACOBS, CONSCRIPTION OF CONSCIENCE: THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR, 1940–1947 12–14 (1952); Comment, *The Legal Relationship of Conscience to Religion: Refusals to Bear Arms*, 38 U. CHI. L. REV. 583, 586–87 (1971). See generally LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF THE EXPERIENCES OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR (Peter Brock ed., 2002) (detailing an early history of conscientious objectors in America).

<sup>112</sup> Selective Draft Law Cases, 245 U.S. 366 (1918).

<sup>113</sup> *Id.* at 389–90.

<sup>114</sup> *United States v. MacIntosh*, 283 U.S. 605, 623 (1931), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

<sup>115</sup> Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885, 889 (1940). On the pressure that religious groups exerted on Congress to exclude a membership requirement, see, e.g., JULIEN CORNELL, THE CONSCIENTIOUS OBJECTOR AND THE LAW, ch. 1 (1943); FISHER, *supra* note 39, at ch. 4.

<sup>116</sup> § 5(g), 54 Stat. at 889. On civilian public service, see, for example, HEATHER T. FRAZER & JOHN O’SULLIVAN, “WE HAVE JUST BEGUN TO NOT FIGHT”: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS IN CIVILIAN PUBLIC SERVICE DURING WORLD WAR II (1996).

<sup>117</sup> Selective Service Act of 1948, ch. 624, § 6(j), 62 Stat. 604, 613 (1948). The phrase apparently mimicked the Ninth Circuit Court’s interpretation of the Selective Training and Service Act of 1940 in *Berman v. United States*, 156 F.2d 377, 380 (9th Cir. 1946) (en banc) *cert. denied*, 329 U.S. 795, which limited exemptions from service conscientious beliefs “based upon an individual’s belief in his responsibility to an authority higher and beyond any worldly one.” *Id.*

Subsequent challenges to the meaning of “religious training and belief” propelled Congress to remove the requirement that an objector demonstrate a belief in a Supreme Being.<sup>118</sup> As the law currently stands, a person who conscientiously opposes “war in any form,” “by reason of religious training and belief,” will not be subject to combatant training.<sup>119</sup> There is no requirement that objectors demonstrate a belief in a Supreme Being or belong to a religious sect. The President can assign objectors to non-combatant roles, and those objectors who are opposed to non-combatant roles can be assigned by the President to “such civilian work contributing to the maintenance of the national health, safety, or interest” as the Director of Selective Service deems appropriate.<sup>120</sup> The law is silent on selective conscientious objectors—that is, objection to a particular war, rather than war generally—and the Supreme Court has rejected a reading of the statute that would enable selective objection.<sup>121</sup>

## 2. Income Tax

From the date of the enactment of federal income tax—contained in the Tariff Act of 1894—accommodations for religious organizations have existed.<sup>122</sup> Following a constitutional skirmish between the Supreme Court and Congress as to the congressional power to lay and collect taxes and the subsequent adoption of the Sixteenth Amendment,<sup>123</sup> Congress’s scheme of income taxation stipulated that the income tax provisions did not apply to any association or corporation “organized and operated exclusively for religious, charitable, scientific, or educational purposes.”<sup>124</sup> Subsequent

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<sup>118</sup> The phrase was most famously challenged in *United States v. Seeger*, 380 U.S. 163, 165 (1965), which was in fact a combination of three appeals from circuit courts on the constitutionality of the draft laws. The circuit court decisions were: *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), and *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963). See also *Welsh v. United States*, 398 U.S. 333 (1970). Note that the requirement of belief in a “Supreme Being” was removed by Congress in 1967. See Universal Military Training and Service Act, Pub. L. No. 90-40, 81 Stat. 100, 104 (1967).

<sup>119</sup> 50 U.S.C. app. § 456(j) (2006).

<sup>120</sup> *Id.*

<sup>121</sup> *Gillette v. United States*, 401 U.S. 437, 439–41 (1971). See generally Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 31–94 (1971); Charles J. Reid, Jr., *John T. Noonan, Jr., on the Catholic Conscience and War: Negre v. Larsen*, 76 NOTRE DAME L. REV. 881 (2001).

<sup>122</sup> Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

<sup>123</sup> See U.S. CONST. amend. XVI (empowering Congress to lay and collect taxes without apportionment among the states); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 586 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988) (striking down the law as unconstitutional). On the passage of the Sixteenth Amendment, see, for example, Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1107–19 (2001).

<sup>124</sup> Tariff of 1913, ch. 16, § 2(G), 38 Stat. 114, 172 (1913).

income taxing legislation, including the War Revenue Act of 1917 and 1918 revenue raising law, also exempted religious associations and corporations maintained for religious purposes.<sup>125</sup>

Within the current Internal Revenue Code (the Code), there are numerous other distinctions based on religion and the nature of a religious organization. Charles Whelan has identified almost twenty distinctions, including “churches, their integrated auxiliaries, and conventions or associations of churches,” “religious purposes,” “religious order,” and “exclusively religious activities of any religious order.”<sup>126</sup> The exemption from income tax currently appears in section 501(c)(3) of the Code, stipulating that organizations “organized and operated” for “religious . . . purposes” are exempt from liability for income tax.<sup>127</sup> The provision in full provides an exemption for:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.<sup>128</sup>

The various restrictions in section 501(c)(3) were added sporadically to the original exemption. For example, the “inures to the benefit” preclusion was adopted in 1909 pursuant to the Tariff of 1909,<sup>129</sup> the restriction against political activities was added in 1934,<sup>130</sup> and the political campaigning restriction was added in 1954.<sup>131</sup> Further, a “church” (including a mosque or a synagogue)<sup>132</sup> meeting the requirements

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<sup>125</sup> Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1057, 1076 (1919); War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

<sup>126</sup> Charles M. Whelan, “Church” in the *Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 887–90 (1977); see also Terry L. Slye, *Rendering Unto Caesar: Defining “Religion” for Purposes of Administering Religion-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL’Y. 219, 242 (1983).

<sup>127</sup> I.R.C. § 501(c)(3) (2000).

<sup>128</sup> *Id.*

<sup>129</sup> Ch. 6, §38, 36 Stat. 11, 113 (1909).

<sup>130</sup> Revenue Act of 1934, ch. 277, §101(6), 48 Stat. 680, 700 (1934).

<sup>131</sup> Internal Revenue Code of 1954, ch. 1, § 201(c)(1), 68A Stat. 163 (1954).

<sup>132</sup> The IRS notes that the term “church” is not defined; it is used by the IRS in a generic sense to mean places of worship, including mosques and synagogues. See INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 2 (2009), <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

of section 501(c)(3) is automatically considered tax exempt, and is not required to apply for recognition from the Internal Revenue Service (IRS).<sup>133</sup> Religious organizations, however, must apply to the IRS for tax-exempt status when their gross annual receipts normally exceed \$5,000.<sup>134</sup> Notably, a considerable restriction on the scope of the exemption for churches and religious organizations exists under sections 511–514 of the Code, which subjects unrelated business income to taxation; unrelated income is income derived from a trading or business activity regularly carried on and unrelated to the organization’s exempt purpose.<sup>135</sup> The IRS notes that the fact that “the organization uses the income to further its charitable or religious purposes does not make the activity substantially related to its exempt purposes.”<sup>136</sup>

Once an organization is exempt, it can also qualify for exemptions from state and local income tax, as well as other taxation exemptions and benefits, including: property tax, preferential postal rates, and exemptions under the Federal Employment Tax Act.<sup>137</sup> A significant related benefit is the deductibility from the income tax of donors for contributions made to an exempt church or religious organization, including: hospitals, medical research foundations, and educational institutions.<sup>138</sup> This deduction was enacted in 1917 and remains unaltered.<sup>139</sup>

### 3. Employment Discrimination

The U.S. has comprehensive federal laws prohibiting employers from discriminating against persons for employment purposes based on race, sex, color, religion, or national origin.<sup>140</sup> However, since the inception of the Civil Rights Act in 1964, Congress has provided for an exemption from these anti-discrimination provisions for both religious organizations and religious educational institutions.<sup>141</sup> Enacted to alleviate concerns that the Civil Rights Act would enable Congress to regulate the employment

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<sup>133</sup> *Id.* at 3.

<sup>134</sup> *Id.*

<sup>135</sup> I.R.C. §§ 511–514 (2000); see Nina J. Crimm, *Shortcomings in America’s Federal Tax Regulatory Regime of Private Foundations: Insights for Australia*, 31 AUSTL. TAX REV. 90, 97 n.57 (2002).

<sup>136</sup> INTERNAL REVENUE SERV., *supra* note 132, at 12.

<sup>137</sup> Slye, *supra* note 126, at 220.

<sup>138</sup> I.R.C. § 170(b)(1)(A) (2000). Contributions are deductible to the extent that the aggregate of the contributions does not exceed fifty percent of the donor’s adjusted tax base in the case of contributions to a church, or twenty percent in the case of contributions to a religious organization. *Id.* at §§ 170(b)(1)(A), (D).

<sup>139</sup> War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

<sup>140</sup> See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

<sup>141</sup> *Id.* § 2000e-2(e) (stating that the exemption applies when the educational institution is “in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion”).

practices of churches,<sup>142</sup> the exemption, as originally passed, allowed religious organizations to discriminate on the basis of religion in relation to employment decisions that would affect religious activities. The original exemption specified that:

This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.<sup>143</sup>

However, for many members of Congress, the exemption was insufficient to protect the needs of religious organizations and, in 1972, the Act was amended to provide that religious organizations and educational institutions could discriminate on the basis of religion in relation to all activities of the organization.<sup>144</sup> As amended, the exemption specifies that the prohibition against employment discrimination:

. . . shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.<sup>145</sup>

Although ambiguities remain—for example, whether the exemption applies to commercial activities of religious institutions or to for-profit activities—the exemption itself is a solid example of Congress providing for religious free exercise beyond what is constitutionally required. The breadth of the exemption withstood Supreme Court scrutiny in 1987 when a non-religious employee of a not-for-profit facility of the Mormon Church was discharged for not being a member of that Church.<sup>146</sup> The Court implicitly held that any interference with the employment decisions of the Church would infringe its free exercise of religion, and Congress’s decision to accord religion

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<sup>142</sup> See *Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974, 976 (D. Mass. 1983); see also Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587, 592 (1990).

<sup>143</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964), amended by Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e-16 (2000).

<sup>144</sup> See McClure, *supra* note 142, at 592 (providing the history of the amendment and a detailed examination of the exemption).

<sup>145</sup> 42 U.S.C. § 2000e-1(a).

<sup>146</sup> *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330–31 (1987).

a broad exemption from laws of general application was accepted as legitimate by the Court.<sup>147</sup>

#### 4. Indigenous Religious Freedom

It seems almost contradictory to the purpose of this Article—to demonstrate the superiority of legislative protection of religious freedom over judicial protection—to include a section on indigenous religious freedom. The protection of the native peoples and their religion has, until recent times, been lax at best.<sup>148</sup> The European settlers attempted to “civilize” the indigenous people and inculcate them with Christianity, with no regard for traditional beliefs.<sup>149</sup> However, in recent times, the legislative and executive branches have expanded the protection of indigenous religious rights, contrary to the persistent limitations on those rights imposed by the judiciary.<sup>150</sup>

The early Americans did not value the equality of Native American religion. As early as 1606, the American colonies legislated to propagate Christianity among American Indians.<sup>151</sup> The first united Congress, the Continental Congress, resolved on February 5, 1776, that persons would be selected to live amongst the Native Americans and “instruct them in the Christian religion.”<sup>152</sup> It was not until 1962 that Congress acted to pass the first statute, in what would become a series of legislation, protecting Native American religious freedom.<sup>153</sup> The first Act of Congress protecting the religious rights of Native Americans was an extension of the 1940 law protecting the bald eagle.<sup>154</sup> Although the original legislation did not refer to a need to protect the religious

<sup>147</sup> See GREENAWALT, *supra* note 34, at 383–84.

<sup>148</sup> FISHER, *supra* note 39, at 147.

<sup>149</sup> *Id.*

<sup>150</sup> This does not purport to be a comprehensive overview of the history of Native American religion. For a comprehensive history of the protection (or lack of) of the religious freedom of American Indians, see FISHER, *supra* note 39, at 147.

<sup>151</sup> The Virginia Charter of 1606 specified that colonists were to be active in “propagating of *Christian* Religion to such People . . . and may in time bring the Infidels and Savages, living in those parts, to human Civility.” THE FIRST VIRGINIA CHARTER, 1606, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HEREFOR FORMING THE UNITED STATES OF AMERICA 3783, 3784 (Francis Newton Thorpe ed., 1909); *see also* THE CHARTER OF MASSACHUSETTS BAY, 1629, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HEREFOR FORMING THE UNITED STATES OF AMERICA 1846, 1846 (Francis Newton Thorpe ed., 1909). *See generally* R. PIERCE BEAVER, CHURCH, STATE, AND THE AMERICAN (1983); R. PIERCE BEAVER, INTRODUCTION TO NATIVE AMERICAN CHURCH HISTORY (Rev. David Keller ed., 1983); R. Pierce Beaver, *Church, State, and the Indians: Indian Missions in the New Nation*, 4 J. CHURCH & STATE 11 (1962).

<sup>152</sup> 4 JOURNALS OF THE CONTINENTAL CONGRESS 111 (1906).

<sup>153</sup> Golden Eagle Protection Act, Pub. L. No. 87-884, § 2, 76 Stat. 1246 (1962).

<sup>154</sup> Bald Eagle Protect Act, ch. 278, 54 Stat. 250 (1940).

freedom of Native Americans,<sup>155</sup> the 1962 legislation extending the protection to the golden eagle referred to the prominent place of the eagle in Native American religions.<sup>156</sup> Further, the legislation enabled the Secretary of the Interior to temporarily remove the protections for various grounds, including “the religious purposes of Indian tribes.”<sup>157</sup>

The second important piece of protective legislation was an act, passed in 1970, that granted the Pueblo de Taos Indians in New Mexico trust title to over 48,000 acres of federal land, taken by presidential order in 1906 without any compensation.<sup>158</sup> Although Congress had granted a fifty-year permit for the Taos Indians to use the area for sacred purposes,<sup>159</sup> the Taos petitioned the legislature for a “more permanent arrangement in 1933.”<sup>160</sup> In enacting the law passing trust title to the Native Americans, Senator George McGovern stated:

What . . . is involved here is a deeply spiritual and religious matter, which goes right to the heart of freedom of religion and freedom of conscience in our country, because the . . . area which is in dispute, and which has been in dispute for so many years, is regarded as the most sacred of all places by the Indian people . . . .<sup>161</sup>

Subsequently, in 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), specifying that religious freedom is an “inherent right” for all Americans and “fundamental to the democratic structure[s] of the United States.”<sup>162</sup> Congress explicitly stated that Native American religion is one of the many diverse religions in the United States and, in light of past breaches of the religious freedom of Native Americans, it was necessary to pass legislation enshrining the protection and preservation “for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>163</sup>

Unfortunately, judicial enforcement of the Act has been weak, and since 1980 there have been significant rejections of Native American claims of infringements on their religious liberty by the judiciary. The most prominent of these is the Supreme Court’s 1988 decision in *Lyng v. Northwest Indian Cemetery Protection Association*,<sup>164</sup> in

<sup>155</sup> H.R. REP. NO. 2104, at 1–2 (1940); 86 CONG. REC. 6446–47, 7006–07 (1940).

<sup>156</sup> H.R. REP. NO. 1450, at 1–2 (1962).

<sup>157</sup> Golden Eagle Protection Act § 2.

<sup>158</sup> Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970).

<sup>159</sup> Act of May 31, 1933, ch. 45, § 4, 48 Stat. 108, 109 (1933).

<sup>160</sup> FISHER, *supra* note 39, at 167.

<sup>161</sup> 116 CONG. REC. 39331 (1970).

<sup>162</sup> American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

<sup>163</sup> *Id.*

<sup>164</sup> 485 U.S. 439 (1998).

which the Court held that the federal government did not breach AIRFA or the Free Exercise Clause by constructing a road near an Indian sacred site.<sup>165</sup> The Court held that the government had selected the least intrusive route, and that “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.”<sup>166</sup>

More recently, Congress has enacted legislation to “protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands.”<sup>167</sup> The 1990 Native American Graves Protection and Repatriation Act<sup>168</sup> requires persons seeking to undertake archeological digs or excavation work on federal lands to obtain a permit, and enables Native American tribes to reclaim any remains located at the sites.<sup>169</sup> Further, the Act protects Indian religious and cultural symbols by providing for criminal sanctions for any person trafficking in artifacts or Indian human remains.<sup>170</sup>

## 5. Social Security

In 1935, in response to the economic crisis of the Great Depression, Congress passed the nation’s first comprehensive social security legislation—the Social Security Act.<sup>171</sup> Under the original Act, Congress provided insurance for those who had been employed in industry and commerce. The scheme was funded through taxation, or premium payments of workers, who were then eligible to receive those payments upon attaining the age of 65, becoming widowed, or becoming disabled.<sup>172</sup>

Following a series of major amendments in the 1950s, the insurance was extended in 1954 to cover self-employed farm operators, thereby bringing the government’s legislation into conflict with the beliefs of the Amish people.<sup>173</sup> The Amish people, though not opposed to taxation, are opposed to commercial insurance. The Amish believe that insurance is a worldly operation and an indication of a lack of trust in God.<sup>174</sup>

During the ongoing conflict between the Amish and the IRS, the Amish and their supporters lobbied the democratic branches for an exemption from the Social Security

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<sup>165</sup> *Id.* at 447.

<sup>166</sup> *Id.* at 452.

<sup>167</sup> H.R. REP. NO. 101-877, at 8 (1990).

<sup>168</sup> Pub. L. No. 101-601, 104 Stat. 3048 (1990).

<sup>169</sup> *Id.* at § 3.

<sup>170</sup> *Id.* at § 4.

<sup>171</sup> Social Security Act, ch. 531, 49 Stat. 620 (1934). Note that although the 1935 Social Security Act was the first comprehensive, generally applicable social security law, there existed targeted predecessors. On this point, see Social Security Online, Historical Background and Development of Social Security, <http://www.ssa.gov/history/briefhistory3.html> (last visited Oct. 10, 2011).

<sup>172</sup> Social Security Act, ch. 531, 49 Stat. 620 (1934).

<sup>173</sup> Brad Igou, *Valentine Byler v. the IRS, Pay Unto Caesar—The Amish & Social Security*, AMISH COUNTRY NEWS (July 1, 2007), <http://www.amishnews.com/amisharticles/amishss.htm>.

<sup>174</sup> *Id.*

provisions.<sup>175</sup> Congress responded with an accommodation in 1965, which exempted the Amish and any other members of a religious organization who objected to the government insurance scheme from payment of social security tax.<sup>176</sup> The exemption applied to individuals rather than religious groups because, as the House Ways and Means Committee specified, exclusion of a group in its entirety “would not take account of the variances in individual beliefs within any religious group, and would deny social security protection to those individuals who want it.”<sup>177</sup>

The exemption was tested before the Supreme Court in 1982, when the federal government challenged the failure of an Amish employer to pay social security for Amish employees.<sup>178</sup> The Supreme Court held that, as a matter of statutory interpretation, the exemption applied only to self-employed farmers and not to their Amish employees.<sup>179</sup> The Court held that the government had a compelling interest in limiting the exemption to self-employed individuals because the taxation and social security system depended on universal participation, and allowing for voluntary participation would be a “contradiction in terms.”<sup>180</sup> “The Court exaggerated the problem in [a number of] ways,” including failing to recognize both the limited number of persons who would ultimately claim the exemption and that the Amish did not object to taxation as a whole; rather, they only objected to the government insurance scheme providing for old age pensions and disability benefits.<sup>181</sup>

In response to the Court’s narrow interpretation, Congress enacted a broader exemption in 1988,<sup>182</sup> which remains in force, by providing an exemption from social security tax for individuals who are members of religious organizations that are opposed to participation in the social security insurance scheme. The current exemption provides that ordained, commissioned, or licensed ministers of churches or religious orders, including Christian Science practitioners, as well as any member of a recognized religious sect or division who believes that the teaching of their religion mandates non-payment of social security tax may file for an exemption.<sup>183</sup>

## 6. Other Statutory Exemptions and Accommodations

There is an extensive list of statutory exemptions for religious belief in the United States.<sup>184</sup> A key example is the religious exemption in the Humane Slaughter Act,

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<sup>175</sup> See, e.g., PETER J. FERRARA, *THE AMISH AND THE STATE* 128–32 (Donald B. Kraybill ed., 2d ed. 1993) (discussing the skirmish between the Amish and the IRS).

<sup>176</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, § 319, 79 Stat. 286, 390 (1965).

<sup>177</sup> H.R. REP. NO. 213 at 102 (1965).

<sup>178</sup> *United States v. Lee*, 455 U.S. 252 (1982).

<sup>179</sup> *Id.* at 256.

<sup>180</sup> *Id.* at 258.

<sup>181</sup> FISHER, *supra* note 39, at 215–16.

<sup>182</sup> 26 U.S.C. § 3127 (2006).

<sup>183</sup> 26 U.S.C. § 1402(d) (2000).

<sup>184</sup> See generally Ryan, *supra* note 53, at 1445.

which was enacted in 1958 in response to inhumane slaughter practices by some slaughterhouses.<sup>185</sup> Following the concerns of Jewish groups of the impact of the Act on ritualistic slaughtering practices,<sup>186</sup> Congress included an exemption for Jewish ritualistic slaughtering and stated that ritualistic slaughtering is “one of the most humane methods yet devised.”<sup>187</sup> The final bill provided an exemption not only for Jewish ritualistic slaughter, but also for “any other religious faith that prescribes a method of slaughter.”<sup>188</sup> The legislation also provided that nothing in it “shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group,”<sup>189</sup> and, in order to ensure the protection of religious freedom, “ritual slaughter and the handling or preparation of livestock for ritual slaughter are exempted from the terms of this Act.”<sup>190</sup> Following its amendment in 1978, the Act now provides that to qualify for a religious exemption, an application must be made to the Department of Agriculture, identifying the religious dietary laws at issue.<sup>191</sup>

Other examples of religious exemptions include Medicare and Medicaid protections for religious persons who do not believe in medicine so that they may still take advantage of some programs,<sup>192</sup> exemptions allowing religious persons who are also members of the military to wear religious attire with their uniforms,<sup>193</sup> and an exemption from the federal prohibition on peyote use for bona fide religious ceremonies of the Native American church.<sup>194</sup>

#### *D. Preliminary Observations*

As a preliminary matter, it is necessary to establish a theory about the religious marketplace in the United States.<sup>195</sup> A 2001 survey by the Pew Forum on Religious and

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<sup>185</sup> FISHER, *supra* note 39, at 222–23. Louis Fisher notes that many companies were following old slaughtering methods of hoisting the animal by a single hind leg, and moving it into a “sticker,” who knifed the jugular vein (which would not kill the animal, only cause it to bleed), and “knockers,” who swung sledge hammers into the animal’s head. *Id.*

<sup>186</sup> 104 CONG. REC. 1654 (1958).

<sup>187</sup> *Id.*

<sup>188</sup> Act of Aug. 25, 1958, Pub. L. No. 85-765, § 2, 72 Stat. 862 (1958).

<sup>189</sup> *Id.* at § 6.

<sup>190</sup> *Id.*

<sup>191</sup> 21 U.S.C. § 464(a)(3) (2000).

<sup>192</sup> Phil Galewitz, *Consumer’s Guide To Health Reform*, KAISER HEALTH NEWS (Apr. 13, 2010), <http://www.kaiserhealthnews.org/stories/2010/March/22/consumers-guide-health-reform.aspx>.

<sup>193</sup> National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086–87, (1987). The provision was enacted in response to the Supreme Court decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the Court held that the military had a compelling interest in pursuing a single standard of dress. *See supra* note 29 and accompanying text.

<sup>194</sup> 21 C.F.R. §1307.31 (2007).

<sup>195</sup> If we assume Adherent Definitions 1 (religious firms compete for adherents), 2 (a religious firm is a church or denomination) and 3 (defining religious goods), as well as

Public Life, based on interviews with 35,000 adult Americans, found that, broadly categorized, 78.4% of Americans identify as Christian, 16.1% as unaffiliated/no religion, with Buddhism, Hinduism, Islam, and Judaism all claiming less than 2% of the population as adherents.<sup>196</sup> Within the Christian denomination, Protestants dominate, accounting for 65.4% of Christian adherents, which equates to 51.3% of the total population.<sup>197</sup> The next largest Christian denomination is the Catholic Church, with 30.5% of Christian adherents, accounting for 23.9% of the total population.<sup>198</sup> Mormons, Jehovah's Witnesses, and other Christian religions each account for less than 2% of the total population.<sup>199</sup>

It seems appropriate, then, to characterize the Protestant and Catholic churches as majority religious firms, and all other Christian denominations (e.g., Church of Jesus Christ of Latter-day Saints, Jehovah's Witnesses), as well as Buddhism, Islam, Hinduism, and Judaism, as minority religious firms.<sup>200</sup>

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Adherent Assumptions 1 (individuals act rationally in choosing a religious firm), 2 (religious firms are profit (adherent) maximizers), and 3 (governmental regulation is an efficient means of profit (adherent) maximization), we are left with Adherent Assumptions 4 (majority religious firms want high levels of regulation, minority firms want limited regulation) and 5 (religious liberty is dependent on the composition of the religious market). Even if we accept the underlying premise of both Assumptions 4 and 5, it is necessary to characterize what in fact the majority religion(s) and minority religion(s) are in the United States.

<sup>196</sup> Luis Lugo et al., *U.S. Religious Landscape Survey*, PEW FORUM ON RELIGIOUS & PUBLIC LIFE, 5 (Feb. 2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> From this, Adherent Assumption 4 can be restated:

*Adherent Assumption 4 (Restated): The Catholic and Protestant Churches will seek high regulation over the religious marketplace (i.e., restrictions on non-Protestant or Catholic firms and high barriers to entry), whereas all other Christian denominations, as well as Buddhism, Islam, Hinduism, and Judaism will prefer limited regulation (i.e., broader religious liberty and low barriers to entry).*

Relatedly, assuming acceptance of Policy Assumption RIG1 (religious interests groups form to represent the interests of related churches and denominations), we can also restate Policy Assumption RIG2 and Policy Axiom 3 as follows:

*Policy Assumption RIG2 (Restated): All RIGS are not equivalent and RIGs separately represent majority religious firms (Catholic and Protestant churches, herein defined as MARIGs), and minority religious firms (all other Christian denominations, as well as Buddhism, Islam, Hinduism, and Judaism, herein defined as MIRIGs).*

*Policy Axiom 3 (Restated): MARIG refers to two dominant religious firms in the U.S. market, the Catholic Church and the Protestant Church, which together hold a significant market share.*

The delineation of religious groups will be antithetical to the instincts of many readers. The United States is commonly characterized as a pluralistic nation—a nation with a high degree of religious liberty.<sup>201</sup> However, even though the United States may be viewed—and indeed may view itself—as a nation tolerant of a diverse range of religions, the question still must be asked whether, in fact, there is a disparity in treatment between different religious groups. Questioning whether the United States prefers the religious liberty of majority religious firms over minority religious firms does not denigrate the protections and facial recognition of religious liberty and tolerance that American culture has engendered. It is, however, questioning the authenticity of the claims, and asking whether religious liberty is universal, or rather, universal for some and conditional for others.

What remains, then, is to ascertain whether the public choice model is at least facially accurate in its assumptions: first, that legislators act to ensure their political survival by enacting religious exemptions when it will increase the probability of reelection; and second, that religious interest groups act to maximize the utility of their representative denomination by seeking either targeted beneficial laws (MARIGs) or generalized religious liberty (MIRIGs).

Examining the legislation in the case study vis-à-vis the public choice model supports further study into the potential for a significant paradigm shift in religious scholarly discourse in the United States. As a preliminary assessment, the legislation can be characterized as favoring the interests of majority religious groups.<sup>202</sup> The employment discrimination legislation, the taxation legislation and, most recently, the RFRA can be analyzed as examples of rent-seeking statutes that will increase both the availability of the majority religion to the population and, indirectly, the wealth of that religion—specifically, via taxation benefits.

The fact that accommodations in these key policy areas might benefit MARIGs is not surprising. Religious lobby groups have been powerful throughout the constitutional history of the United States<sup>203</sup> and, at least through the first half of the

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Returning, then, to Adherent Assumption 5, this assumption proposes that religious liberty is dependent on the composition of the religious market. Specifically, Adherent Assumption 5 proposes that a highly pluralistic market will result in a high degree of religious liberty and, conversely, that a religious market that is captured by one or a few religions will result in a low degree of religious liberty. Based on the composition of the religious market in the United States outlined above, Adherent Assumption 5 can be restated as follows:

*Adherent Assumption 5 (Restated): The U.S. is a religious market that is captured by two dominant religious firms (Catholic and Protestant churches). Consequently, the U.S. has a low degree of religious liberty.*

<sup>201</sup> See, e.g., MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 1 (2008) (discussing America's history of religious liberty).

<sup>202</sup> This is only a preliminary application of the model. A complete empirical study is a large undertaking and the subject of forthcoming research.

<sup>203</sup> See FISHER, *supra* note 39, at 58–81 (showing various examples of religious activism throughout U.S. history).

twentieth century, MARIGs dominated lobbying efforts.<sup>204</sup> In 1950, for example, of the sixteen major religious lobbies in Washington D.C., ten were Protestant, with two Catholic and four interdenominational.<sup>205</sup> Taxation exemptions and employment exemptions from the Civil Rights Act, then, are expected outcomes of both RIGs and legislators acting to maximize their respective utility.

Notably, the RFRA, the taxation exemptions, and employment discrimination exemptions all apply broadly beyond majority religions, equally to minority religious groups. This could be seen to be the result of MIRIG utility maximization, when the MIRIG has lobbied the legislator, the legislator has balanced the cost and benefits of including or excluding minority religions, and the outcome is compromise legislation. The MIRIGs, then, may have been able to free ride on the efforts of the MARIG. Similarly, the RFRA, for example, could be an example of a broader and more ambiguous law passing responsibility to the courts.

Further, it could be claimed that some of the legislation in the case study might support the model's claim that MARIGs will seek to limit access to—and competition in—the marketplace in order to maximize their own utility. An example of this could be the conscientious objector legislation, both in its current form and from its inception. As the legislation currently stands, conscientious objectors, though exempt from combatant training, will be assigned to non-combatant roles,<sup>206</sup> potentially perpetuating tensions for the objector (generally a minority religious believer, e.g., Quaker).

Other examples of barriers on accommodations for minority religious adherents can be seen in the taxation accommodations, in which “religious organizations” are required to apply for tax exempt status, whereas “churches” are automatically exempt. Further, business income continues to be excluded from tax exempt status, seemingly affecting newer evangelical religious groups who utilize technology to proselytize worldwide. Additional barriers may be seen in the humane slaughter regulations, requiring application by religious organizations to conform with their religious tenets, and the restrictions on the use of peyote, limiting use to the worship service.

A more extended analysis of the employment discrimination example from the case study highlights the potential of the public choice model in the religious exemptions context. As noted in the case study, the United States has comprehensive federal laws prohibiting employers from discriminating against persons for employment purposes based on race, sex, color, religion, or national origin.<sup>207</sup> Congress, however, has provided for an exemption from these anti-discrimination provisions for both religious organizations and religious educational institutions.<sup>208</sup> As noted previously,

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<sup>204</sup> LUKE EUGENE EBERSOLE, CHURCH LOBBYING IN THE NATION'S CAPITAL 24–56 (1951) (listing religious organizations); RICHARD E. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA 48–68 (1968) (listing religious organizations).

<sup>205</sup> EBERSOLE, *supra* note 204; MORGAN, *supra* note 204.

<sup>206</sup> 50 U.S.C. app. § 456(j) (2006).

<sup>207</sup> See *supra* notes 140–41 and accompanying text.

<sup>208</sup> *Id.*

this exemption is a good example of Congress providing protection for the free exercise of religion beyond what is constitutionally required.<sup>209</sup>

In addition to the protections offered by the Civil Rights Act, a bill offering legislative protections based on sexual orientation is before Congress at the time of this writing.<sup>210</sup> The Employment Non-Discrimination Act of 2011 (ENDA) proposes to essentially extend Title VII protections to Americans who are gay, lesbian, or bisexual, making it illegal for employers to hire, fire, refuse to promote, or treat in a hostile manner persons based on their sexual orientation.<sup>211</sup> Various versions of ENDA have been introduced in both houses of Congress since 1994,<sup>212</sup> but what all the versions have had in common is the inclusion of an exemption for religious organizations. In its current form, ENDA does not apply to a “corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII.”<sup>213</sup>

What does the public choice model have to say about the exemptions for religious organizations from both Title VII and ENDA? At its strongest, public choice suggests that the religious lobby has used, and continues to use, political muscle to buy carve outs from generally applicable non-discrimination standards.

In terms of substance, the religious exemptions in both Title VII and ENDA can be read to fit the model as classic forms of rent-seeking, subject to criticism on two economic grounds.

First, in the short term, the model predicts that costs would be imposed on one group (MIRIGs) to the advantage of the proponents of the exemption (MARIGs). In the case of the exemptions from employment discrimination laws, the model supposes that the Catholic and Protestant churches, represented by their respective lobby groups, caused the legislature to pass a statute that gives these proponents a concentrated benefit at the expense of the minority religious groups and the populace as a whole. In the context of employment discrimination exemptions, the cost is, of course, a relative one. Though it is plausible to claim that some minority religious groups also prefer to discriminate on the basis of religious—and in the case of ENDA, sexual—orientation, it is certainly correct that, in economic terms, MARIGs benefit more. Given that Catholic and Protestant churches are large-level employers of a multitude of persons across many fields, the inability to discriminate would ultimately lead to a large-level conflict between religious belief and firm behavior. These majority groups, then, would be overtly and instantly less attractive for adherents engaged in a cost-benefit calculus.<sup>214</sup> Looking at it another way, the model would predict that if the legislature

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<sup>209</sup> See *supra* Part I.C.3.

<sup>210</sup> H.R. 1397, 112th Cong. (2011).

<sup>211</sup> *Id.* at § 4.

<sup>212</sup> See, e.g., H.R. 2355, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); H.R. 1863, 104th Cong. (1996); H.R. 4636, 103rd Cong. (1994).

<sup>213</sup> H.R. 1397 § 6.

<sup>214</sup> See Adherent Assumption 1 and Adherent Premise 1, *supra* note 74 and accompanying text.

did not pass the exemption, the Catholic and Protestant churches would lose adherents to various minority religious groups, therefore having relatively less adherents than they would if the exemption passed. Under the model, then, the exemptions yield systematic benefits for the Catholic and Protestant churches and their representative MARIGs. The exemption increases the wealth and availability of these majority groups to the populace.

Second, in the long term, the model would predict that this rent-seeking exemption diminishes competition (e.g., by increasing barriers to entry) and diminishes the ability of society to respond to changing conditions in the population generally, and the religious market specifically. By enacting the religious exemptions and allowing the MARIGs and their represented entities to enforce religious restrictions, Congress condones a restriction on inter-religious competition and erects barriers to the realization of broader religious freedom from changing demographic conditions.

Under the process dimension, it would be expected that there would be an exchange between the MARIGs (and any free-riding MIRIGs) and the legislators in terms of votes promised. In the negative, it might be expected that there exist threats of action by the majority institutions that would undermine a legislator's ability to gain reelection. The circumstances surrounding the introduction and continued passage of ENDA provide an apt example of this type of exchange. For example, the United States Catholic Church Bishops recently sent a letter urging members of Congress to oppose the passage of ENDA.<sup>215</sup> This letter is directly related to the Catholic Church's threat to shut down its open adoption and foster care program, as well as its charitable work in Washington D.C., if ENDA is passed.<sup>216</sup> In another example, *The Washington Post* described an incident involving the Protestant Salvation Army, which hired a Washington lobbying firm to press the issue of discrimination in employment decisions.<sup>217</sup> In documents published by the *Post*, the Salvation Army traded crucial support for President Bush's faith-based initiatives in return for legislative protection for religious and sexual orientation discrimination in religious organizations' employment conduct.<sup>218</sup>

The exemptions from employment discrimination, therefore, can be read to fit within the public choice model as favoring the interests of majority religious groups. The employment discrimination legislation can credibly be characterized as an example

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<sup>215</sup> See, e.g., Tim Craig & Michelle Boorstein, *Catholic Church Gives D.C. Ultimatum*, WASH. POST, Nov. 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111116943.html?referrer=facebook&sid=ST2009042801406>; James Martin, *USCCB Letter on Same-Sex Marriage and ENDA*, AMERICA MAGAZINE, (May 25, 2010, 11:30 AM), [http://www.americamagazine.org/blog/entry.cfm?entry\\_id=2923](http://www.americamagazine.org/blog/entry.cfm?entry_id=2923).

<sup>216</sup> Craig & Boorstein, *supra* note 215; Martin, *supra* note 215.

<sup>217</sup> Patrick Martin, *US House Sanctions Anti-Gay Discrimination by Religious Groups*, WORLD SOCIALIST WEB SITE (July 23, 2001), <http://www.wsws.org/articles/2001/jul2001/fait-j23.shtml>.

<sup>218</sup> *Id.*

of a rent-seeking statute that will increase both the availability of the majority religion to the population and, indirectly, the wealth of that religion.

Notably, the employment discrimination exemptions extend beyond majority religions and apply equally to minority religious groups. This could potentially be the result of MIRIG utility maximization, as the MIRIG has lobbied the legislator, the legislator has balanced the cost and benefits of including or excluding minority religions, and the outcome was compromise legislation. The MIRIGs, then, may have been able to free ride on the efforts of the MARIG. Similarly, the RFRA, for example, can be viewed as an example of a broader and more ambiguous law passing responsibility to the courts. This leads to an interesting conclusion: although religious exemptions may be passed by legislators in response to majoritarian demands, this process failure may not actually harm minority religious groups. That is, though the legislative process is overly responsive to MARIGs, the impact on MIRIGs could be positive, rather than negative. An application of the public choice model to a subset of religious exemptions, then, may expose process failures but not outcome failures.

Application of the public choice model to the case study, then, indicates at least a plausible claim that MARIGs have successfully lobbied for classic rent-seeking legislation, protecting their own interests over truly public ends (whereby the public is presumed to be a religious free market).

What is the conclusion that can be drawn from the public choice model and the preliminary observations? At the very least, examining legislation that accords accommodations and exemptions to religious groups through a public choice lens opens up the possibility that the legislative perpetuation of religiously protective legislation is a result of interests rather than ideology. The interest of religious groups is arguably the expansion of their membership (i.e., spreading the Word of God), or, at the least, being able to worship in an unrestricted manner. Both financial wealth and the number of adherents causally affect the likelihood that these goals will be achieved. This provides significant incentive for dominant denominations to lobby to restrict access to the religious marketplace, and, conversely, for minority denominations to lobby to keep barriers to entry low, reducing any restrictions on their "religious trade."<sup>219</sup> The interest of politicians is reelection, and it is the conflation of these two sets of interests that determines how religious groups will be regulated in society. What an interest-based account does, then, is to focus attention on a possible process-dimension dysfunction: that the scope of religious liberty is conditional upon any (electoral) gain to be had by legislators.

### III. IMPLICATIONS

Once it is accepted that interests could potentially play a part in legislator decision-making concerning accommodations and exemptions for religious groups, the focus

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<sup>219</sup> GILL, *supra* note 7, at 44–45.

shifts to the consequent implications and ramifications for both religious liberty and institutional design. Initially, any recognition that interest group politicking has control over legislative exemptions and accommodations may force us to reconsider the general principle that religious liberty is above *quid pro quo* politics. This has significant ramifications for issues of institutional design: if the current institutional arrangements are fundamentally flawed and we continue to value the ideals of religious liberty and religious pluralism, we should consider alternatives to the current institutional arrangements. This Article considers an alternative with the judiciary as the target of change, and an alternative focusing on legislative change.

#### *A. Judiciary-Centered Alternatives*

One possible response to any proved hypothesis that religious interest groups largely control religious free exercise is that the proposition justifies more intrusive judicial review. More generally, the interest group account of the democratic political process has been used by constitutional scholars to argue for heightened judicial scrutiny. These scholars can be generally grouped into three distinct groups.

First, one camp of scholars argues that interest group control of democratic processes justifies heightened constitutional review.<sup>220</sup> For example, Jerry Mashaw argues that the Supreme Court should invalidate “private-regarding” legislation.<sup>221</sup> Martin Shapiro suggests that, at least with respect to the First Amendment, the Court should not defer to a political process controlled by interest groups, but rather should advance the interests of the under-represented minority groups.<sup>222</sup> Cass Sunstein argues that heightened constitutional scrutiny is essential to invalidate laws that, at their core, reward the political power of interest groups.<sup>223</sup> Another camp of scholars invoke anti-trust law as a response to interest group capture of the political process. These scholars contend, for example, that courts should employ some form of hard look efficiency review of legislation claimed to result from interest group capture.<sup>224</sup> Finally, a third

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<sup>220</sup> See, e.g., Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47, 78, 80–81 (1989).

<sup>221</sup> Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874–75 (1980); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 146 n.66 (1989).

<sup>222</sup> See MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 2, 17–25, 31–40 (1966).

<sup>223</sup> See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 55–57 (1986); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689–93 (1984). For other arguments that interest group theory justifies heightened constitutional scrutiny, see RICHARD A. EPSTEIN, *TAKINGS* (1985) (arguing that interest group theory justifies far-reaching judicial review under the Takings and Contract Clauses), and BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265–303 (1980). For an excellent overview of this issue, see Elhauge, *supra* note 10, at 44–48.

<sup>224</sup> See, e.g., Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51–54 (1984); Gary Minda, *Interest Group, Political Freedom, and Antitrust:*

group of scholars contends that courts should utilize the tools of interpretation to offset the impact of interest group dominance in the legislative process. For example, William Eskridge claims that statutes should be narrowly interpreted when it appears that any benefits of the statute are concentrated and the costs disbursed, and vice-versa.<sup>225</sup> Frank Easterbrook and Cass Sunstein contend that statutes should be narrowly construed when they represent interest group transfers.<sup>226</sup> More broadly, Jonathan Macey argues that the reality of interest group capture means that courts should narrowly construe all statutes in derogation of the common law.<sup>227</sup>

Although there are clear differences between these alternatives, at their core all of these groups of scholars are arguing for an expansion of judicial law-making capacity.<sup>228</sup> It is because of this implicit push toward an expanded judicial law-making function that, at least in the context of religious free exercise, this institutional alternative is not plausible.

In the first instance, there are a number of practical reasons why heightened judicial scrutiny is an implausible institutional alternative to the current arrangements with respect to religious accommodations and exemptions. First, the Supreme Court has indicated that, at least in the context of the Free Exercise Clause, it is unwilling to undertake expansive judicial review and is particularly wary of judicial law-making.<sup>229</sup> Second, even under the heightened strict scrutiny *Sherbert* doctrine, the Court has rarely struck down legislation under the Free Exercise Clause, and there is no reason to think that the Court would behave any differently under a post-*Smith* retreat. Third, it is often difficult to identify precisely when legislation is the result of interest group capture. As outlined above, some legislation may in fact be the result of compromises whereby two, three, or four interest groups share in the legislative spoils, and it is unclear how courts are supposed to draw the line between what constitutes capture, and what does not.

In the second instance, there is a deeper theoretical reason why heightened judicial review is not a plausible institutional alternative for the protection of religious liberty: there is no reason to suppose that judges are any more wise or moral than legislators<sup>230</sup>—that is, judges may equally be susceptible to acting with self-interest;

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*A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 935–37, 945–52 (1981); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1109–15, 1122–25 (1981); John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743–44 (1986).

<sup>225</sup> Eskridge, *supra* note 67, at 279, 298–99, 303–09, 324–25.

<sup>226</sup> See Easterbrook, *supra* note 224, at 15–18; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486 (1989).

<sup>227</sup> Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223, 228 n.29, 252 (1986).

<sup>228</sup> Elhauge, *supra* note 10, at 46.

<sup>229</sup> See *supra* note 2 and accompanying text.

<sup>230</sup> See, e.g., Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 34–38 (1993); see also KRAMER, *supra* note 45; MARK TUSHNET, *supra*

for example, although not driven by the goal of reelection, judges may be driven by the desire to perpetuate personal ideology.<sup>231</sup> Indeed, given that judges are isolated by virtue of constitutional tenure, the concerns of interest group animation of governmental actors may in fact be amplified by relocating protection for religious adherents to a democratically unaccountable judiciary. Ultimately, then, it seems strange to replace one collective decision-making process (legislative) with another (judicial) without at least attempting to remedy the democratic collective process.

### *B. Legislature-Centered Alternatives*

As an alternative to judiciary-centered institutional choices, another possibility is that the public choice model demonstrates a need for scholars to focus their attention on the internal processes of the legislature (or “supply side structure”). There are three crucial junctures in the supply side structure that are worthy of attention.<sup>232</sup>

First, the current structure of voting creates the problem of issue bundling.<sup>233</sup> When individuals vote, they normally vote for one candidate from a limited set of candidates, and that vote tends to be based on the candidate’s generalized platform or, to put it another way, the candidate’s bundle of interests. In choosing between candidates based on generalized platforms, individuals tend to vote for the candidate who best represents their most intensely held preferences.<sup>234</sup> This means that on more diffuse issues, individuals are either unable to exercise a preference or is underrepresented, even when we assume the individual voter faces no informational problems and does, in fact, vote.<sup>235</sup>

Second, the current system of representation (i.e., territorial representation) necessarily tends legislators toward pork barreling because each district’s congressional representative is incentivized to support legislation that favors her constituents.<sup>236</sup> It is far

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note 45 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* ch. 10–13 (1999) (providing a historical argument about rights); Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *IND. L.J.* 47 (2003) (disclosing variance in decision-making); cf. RONALD DWORKIN, *FREEDOM’S LAW* 1–38, 352–72 (1996); DWORKIN, *supra* note 45, at 373–79; RONALD DWORKIN, *A MATTER OF PRINCIPLE* ch. 1–2 (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 4–5 (2d ed., 1978); CHRISTOPHER L. EISGRUBER, *supra* note 45; SAGER, *supra* note 45.

<sup>231</sup> See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 *J. POL.* 812 (1995); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *AM. POL. SCI. REV.* 557 (1989).

<sup>232</sup> Elhauge, *supra* note 10, at 41–42.

<sup>233</sup> *Id.* at 41.

<sup>234</sup> ALBERT BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* 155–57 (1974).

<sup>235</sup> See Roger D. Congleton, *Information, Special Interests and Single-Issue Voting*, 69 *PUB. CHOICE* 39, 40 (1991).

<sup>236</sup> See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 53–56 (1974); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 51–52 (1982).

easier for a representative to claim concentrated benefits than distributed benefits, meaning that, in effect, each district operates as an interest group. It is, therefore, easy to see how a legislator whose district comprises eighty percent Catholic voters would act differently than a legislator whose district comprised eighty percent Mormon voters.

Third, the intra-congressional committee system intensifies interest group influence.<sup>237</sup> Membership on committees is generally perpetuated by self-selection, whereby legislators elect to serve on committees in which their constituents and supporters have the greatest stake. Committees, then, are rarely represented by a cross-section of the legislature (and, consequently, the populace more generally). When this self-selection is combined with the heightened influence of committees over the legislation under the auspice of any given committee, interest groups with influence in a single district are able to extend that influence across the state or nation.<sup>238</sup>

The structure of the legislative process ensures that interest groups benefit from organizational advantages that permit disproportionate influence on the legislative process and, consequently, legislative outcomes. This influence results in legislation that does not necessarily benefit the general public, but rather specific interest groups. It seems, then, that if we focus on these structural junctures as sites for change, we may be able to mitigate the influence of MARIGs on accommodations and exemptions. A renewed focus on legislative structure and process seems to be the most promising resolution of the demonstrated tension between majoritarian legislative consequences and the desire for a generalized protection of religious liberty. At least in the context of the Free Exercise Clause, a continued focus on inter-branch solutions simply perpetuates theoretically and practically difficult ideals of judicial review. Instead, this Article suggests that scholarship and debate should focus on progressing a broader protection of religious liberty through tighter constraints on legislators at one or more of the identified junctures. By focusing on intra-legislative constraint mechanisms scholars can progress a response that is not only more likely to achieve greater religious freedom, objectively described, but is also cognizant of the political and institutional realities.<sup>239</sup>

#### CONCLUSION

Prior accounts of religious free exercise post-*Smith* fail to systematically analyze the relationship between religious liberty and legislative exemptions. Indeed, the small

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<sup>237</sup> See Jonathan Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 55 (1988); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 386–87 (1988).

<sup>238</sup> Elhauge, *supra* note 10, at 42.

<sup>239</sup> Whether these observations are generalizable beyond religious free exercise to rights more broadly (e.g., speech, association, equality) is a matter for further research; however, arguably the preliminary findings in this paper suggest a potentially fruitful grounding for future discourse over normative institutional design for rights protection.

body of literature that does examine the impact of *Smith* and the consequent legislative outputs simply states that legislative outputs do exist (i.e., outputs are greater than zero), ergo the legislature is acting in a right protective manner with respect to religious free exercise. A public choice model can rebuff these scholarly accounts of post-*Smith* legislative performance and suggests that although the basic framework for protection of religious liberty originates with, and is perpetuated by, the legislative branch, the impetus for that legislation is legislator self-interest (reelection), resulting in legislation that is more responsive to majoritarian religious interests, rather than religious interests more generally.

The hypothesis could support the proponents of strong judicial oversight. However, this Article concludes that, although the presence of a self-interested legislature preferring the interests of majority religious adherents for self-gain is indeed a cause for concern, theoretical obstacles counsel against pressing for judicial review as the consequent normative lesson. Rather, the preferred course would be to focus on possible intra-legislative remedies for this interest-group lock-up of the legislative actors. By limiting discussion of normative resolutions for interest group lock-up of the legislative branch to intra-legislative remedies, the debate remains within the scope of the current constitutional frame, making it more likely that the desired outcome of strong judicial oversight proponents—heightened religious liberty—will be achieved.