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TO WALK A CROOKED PATH: SEPARATING LAW AND RELIGION IN THE SECULAR STATE

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Uncertainty about the proper sphere of influence for religious belief in a democratic society has prompted debate on at least two levels. On the first level—that of general political theory—the exploration is part of a broader attempt to define the ideal nature of democratic society and to understand, within that structure, how government ought to be both empowered and restrained. A second, more particularized, level of debate concerns the correct interplay between religion and the exercise of government power within the United States. On this level, the choices are significantly constrained by the text of the first amendment of the Constitution, which commands government to avoid both the establishment of religion and interference with its free exercise. The issue is how to comply with that command. To what extent, if any, can positive law take account of views grounded in religion without falling afoul of these constitutional limitations? Although Professor Greenawalt gears his provocative arguments toward the more general level of political theory, his claim that religious belief may be a proper foundation for the exercise of legislative power has direct and profound implications for an understanding of the constitutional problem. This Comment will attempt, at least in part, to explore these implications.

A clear understanding of the intended relation between church and state in the United States is difficult to achieve because, both philosophically and historically, attitudes concerning this issue have been profoundly ambiguous. On the one hand, Americans, although not dominated by any particular form of organized religion, have viewed their democratic traditions as intimately related to their general religious traditions. A nation with a strong, predominantly Christian religious coloration understandably has

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anticipated that law ought to be conducive to the religious experience and expression of its citizenry.[1] At the same time, a second powerful conviction exists that, pursuant to constitutional command, government should be secular.[2] It should favor neither particular religions nor irreligion; rather, it should operate independent of the particular belief systems within society. Not surprisingly, the attempt to accomplish this complex task has required courts, scholars, and legislators to tread a rather crooked and uncertain path.

Nowhere has the tension between these inconsistent goals been more acute than when the claim is made that legislation is invalid because it has been influenced improperly by the values of particular creeds.[3] The problem is a large one. In a society in which religion has exerted a powerful influence, many criminal laws, as well as many laws governing family relations or touching on other moral concerns, are congruent with and often derived from the insights of the Judeo-Christian faiths.

No satisfactory scholarly or judicial consensus has emerged to help resolve doubts about the propriety of this influence. The response of the courts to this question has been little short of idiosyncratic. They seem to assume simultaneously that positive law must be independent of sectarian concerns and that it can reflect sectarian concerns, as long as it does not track them too closely. This is not an intelligible standard. Under the Supreme Court's current tripartite test for an establishment clause violation, the first inquiry is whether the relevant legislation or regulation has a "secular" purpose.[4] Under this test, the Court has struck down cer-

1. Alexis de Tocqueville commented extensively on the influence of shared religious traditions on American democracy in the nineteenth century. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287-301 (J. Mayer ed. 1969).

2. For some early examples of manifestations of belief in secular government, see L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 14 (1975).

3. Although the distinction in some sense may be unduly artificial, I mean to distinguish these cases from cases, such as those involving aid to parochial schools, that involve the granting of benefits to religious organizations.

4. The tripartite test is set out in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The second prong of the *Lemon* test is that the law must not have a primary or principal effect of advancing religion. The third holds that the law, to be valid, cannot involve the state in "excessive entanglement" with religion. *Id.*

tain enactments that too closely track religious practices or dogmas. Sometimes the Court has relied on specific evidence of a religious purpose in the legislative history—evidence, for example, in the Alabama "moment of silence" case of an intent to promote prayer in public schools.[5] In other cases, the Court has invalidated laws under the secular purpose test when the only asserted purpose of the legislation was secular,[6] or when the intent was ambiguous because secular and religious influences had become intertwined. The outcomes, however, usually have not been well explained, creating a suspicion that the Court is proceeding more on instinct than on articulable grounds. Because what constitutes an adequate "secular purpose" is not defined clearly, the so-called "test" creates no methodology for distinguishing between permissible secular and impermissible sectarian laws. The test is merely conclusory.

Two well-known Supreme Court establishment opinions illustrate this lack of clear analytical structure. These decisions involved legislation supported by a mixture of sectarian and nonsectarian purposes. The first concerned the validity of Sunday closing laws, the second the teaching of evolution in the public schools.

In *McGowan v. Maryland*,[7] the Supreme Court acknowledged both that Sunday closing laws originated as an enforcement of religious beliefs[8] and that they were retained in deference to the preferences of the Christian majority.[9] But the Court carefully avoided finding that such laws constitute an impermissible establishment by concluding that their religious aspects were not pertinent. The

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5. Wallace v. Jaffree, 472 U.S. 38 (1985).

6. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41-42 (1980) (per curiam) (finding that, although the sole stated legislative purpose in requiring posting of the Ten Commandments in school rooms was that it was the basis for legal codes in Western civilization and in the United States, the law's actual purpose was to introduce a religious text into the classroom).

7. 366 U.S. 420, 431 (1961).

8. *Id.* at 431-33.

9. *Id.* at 433-35. Chief Justice Warren further argued in his majority opinion that the fact that the chosen day of rest is "a day of particular significance for the dominant Christian sects, does not *bar* the State from achieving its secular goals." *Id.* at 444-45. He added that requiring states to choose a day other than Sunday merely because Sunday also is a day of religious observance "would give a constitutional interpretation of hostility rather than one of mere separation of church and State." *Id.* at 445.

legally relevant—and impeccably secular—motive, according to the Court, was the state's desire to establish one uniform day of rest.[10]

By contrast, in *Epperson v. Arkansas*,[11] the Court struck down as religiously motivated a state law barring the teaching of evolution from the public school curriculum, despite the availability of nonreligious reasons to justify the statute. Many voters who supported the initiative in which the statute was passed undoubtedly were motivated by religious beliefs.[12] As the court below pointed out, however, states have broad authority to dictate the curriculum of public schools.[13] No school system must teach everything; selection of subjects for the curriculum is an ordinary governmental function, and seldom does a school system have only one potential justification for preferring one subject over another.[14] Some Arkansas voters may have concluded that evolution was relatively unimportant compared to other subjects, while others might have decided that the school system should avoid the subject solely on the ground that it was highly controversial, and hence inappropriate for a public school curriculum. Nevertheless, in the Court's view this law remained impermissibly sectarian.

Whatever one's view of the propriety of these opposing outcomes, logically credible arguments can be made, based on existing precedent, for finding establishments in both cases, for finding establishments in neither, or for reversing the outcome of both deci-

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10. *Id.* at 450.

11. 393 U.S. 97 (1968). For a more recent lower court decision concerning a statute providing that if evolution is taught, creation science must be taught as well, see Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986), in which the court rejected the argument that the "balanced treatment" statute protected academic freedom.

12. 393 U.S. at 108-09 & nn.16-17.

13. Arkansas v. Epperson, 242 Ark. 922, 416 S.W.2d 322 (1967) (finding that Arkansas law banning the teaching of evolution was a "valid exercise" of the state's power to specify the curriculum of its public schools), *rev'd*, 393 U.S. 97 (1968).

14. The Court addressed a somewhat similar controversy, this time arising under the free speech clause of the first amendment, in Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion). In that case, the justices splintered badly trying to decide whether the Constitution imposes limitations on the broad discretion of school boards to remove books from school libraries. The dissenters argued for broad discretion in establishing curriculum and in choosing materials and teachers for the school system. The plurality did not reject the arguments for broad discretion, arguing instead that the elimination of books already purchased by the schools was subject to constitutional review.

sions. In short, we have yet to devise a coherent way to think about the problem of religious purpose in legislation.

One need not look far for the roots of this analytical impasse. Because religious perspectives inform so much law in American society, an approach that invalidates as an establishment any law with religious origins would lead to absurd results. Civil liberties for racial and other minorities received strong support from church groups, both in this century and the last, because the concept of human equality was a tenet of those groups' religious faith. Laws against murder also have partially religious origins; Jews and Christians hold that unjustified killing violates the laws of God expressed in the Ten Commandments.

One way out, of course, would be a rule that presumes a law to be legitimate whenever both secular and sectarian justifications can be articulated. The disadvantage of such a policy of deference, however, is that it could erode all but the mere semblance of separation of church and state. Even the most transparently sectarian laws could be enacted so long as they were insulated by the addition of some religiously neutral purpose. Because "neutral" grounds are exceedingly easy to improvise, this approach would force courts to abdicate altogether their supervisory role in this sensitive area, and is not an attractive solution. Caught in this perceived dilemma, courts have been unable to chart a clear middle course. Consequently, the Court's reasoning in cases in the area remains distinctly ad hoc.

One effect of this analytical cul-de-sac has been to limit establishment analysis to comparatively few religious disputes and to disable it as a vehicle for resolving the more pervasive and complex conflicts that Professor Greenawalt's paper implicates. The most troubling church-state problems are posed by laws embodying visions of moral good that, although widely shared and time-honored, originated in religious beliefs and that are hard to validate on purely rational grounds. The claim of such cases to be viewed as religious conflicts normally either is ignored or affirmatively rebuffed. The Supreme Court, for example, summarily thrust aside an attempt to raise the establishment issue in an abortion case on the ground that a law restricting federal funding of abortions is "as much a reflection of 'traditionalist' values . . . as it

is an embodiment of the views of any particular religion."[15] While this undoubtedly is true, it also begs the fundamental question. Is there a point at which the influence of religion, even if it is mixed in with secular "tradition," violates the principle behind the establishment clause? And if so, how is that point to be identified? The issue is further complicated because tradition in the area of moral values often develops out of religious belief, and the two are difficult to distinguish conceptually.

The absence of an adequate establishment clause analysis, of course, has not prevented society from addressing the problems caused by religiously influenced laws. Many states have modified or repealed laws restricting divorce or prohibiting certain sexual acts because both the traditional and the religious consensus supporting them has weakened. The Supreme Court also has played an important role in eliminating some types of laws with strong sectarian underpinnings. In so doing, however, the Court often has relied on new and evolving constitutional doctrines that are in their own way as problematic as a more vigorous establishment analysis might be. Restrictions on abortion in the early stages of pregnancy and on the availability of contraceptives were found to infringe a right of privacy that the Court derived from the penumbra of the Bill of Rights.[16] The Court struck down laws disfavoring children born outside of wedlock by creating a new level of equal protection analysis, midway between the two traditional tiers of deferential rational basis scrutiny and the strict scrutiny reserved for suspect classifications such as race.[17] Arguably, the Court reached out because these laws had important negative effects on individual freedom and these effects were not readily defensible by reference to an objective moral standard. In each case, the laws reflected traditional values, but values closely interwoven with religious, largely Christian, ideology.[18] As such, their claim to acceptance by non-Christians or by non-traditional Christians was weak.

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15. Harris v. McRae, 448 U.S. 297, 319 (1980).

16. Roe v. Wade, 410 U.S. 113, 152-54 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965) (contraceptives).

17. *See, e.g.*, Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

18. For a discussion of the religious origins of laws dealing with illegitimacy, see L. PFEFFER, *supra* note 2, at 115-24.

This alternate route to resolution does not substitute for an adequate definition of which intertwinings of God and Caesar are "establishments." One problem is that not all cases fit neatly into other available categories for purposes of constitutional analysis. Another problem is that an alternative analysis presupposes recognition of injustice, often in areas in which judges may be least prone to acknowledge it because of the religious influences in their own cultural backgrounds. A jurist's or legislator's individual reactions to homosexuality may influence powerfully whether that individual believes that restrictions against private homosexual acts between consenting adults—laws that receive substantial support from Judeo-Christian tradition—offend constitutional protections for privacy to the same degree as laws banning access to contraceptives.[19] For example, laws against obscenity, which also rest heavily on religious grounds,[20] may remain so obdurant to attack in part because a majority of the Supreme Court does not empathize with would-be consumers.[21] If, however, a principled standard were available to identify whether these laws are so infected with religious belief as to be establishments, courts could decide their validity with less reliance on variable value judgments. The issue would not turn as much on the "acceptability" of homosexuality or of sexually explicit literature as on the legitimacy of the legislative power exercised in these areas.

The appeal of the liberal political theory questioned by Professor Greenawalt was its promise as a new source of insights into the development of a principled establishment analysis. This body of theory generally agrees that exercises of political power in a liberal democracy should be rationally explicable and defensible to every-

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19. The Supreme Court recently upheld a Georgia sodomy statute barring private, consensual homosexual acts between adults in the face of a claim that the statute violated the constitutional right of privacy. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). The Court noted that "[p]roscriptions against that conduct have ancient roots." *Id.* at 2844. In dissent, Justice Blackmun explicitly recognized the religious nature of those "ancient roots." *Id.* at 2854-55 (Blackmun, J., dissenting).

20. For an argument that obscenity laws are religious in nature, see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

21. Some support for this suspicion can be found in Justice Stevens' opinion for the Court in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). He wrote: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* at 70.

one in that society. From this follows the conclusion that, because no individual's private, nonrational insights are entitled to bind others, particularized religious beliefs cannot be used to justify law.[22] Emerging from this line of reasoning are possible operative principles for thinking through the otherwise unclear imperative of the establishment clause. Under these principles, political decisions could reflect religious insights or traditions and remain valid, but only if they could be justified convincingly on independent, objective grounds.

This approach would avoid the indiscriminate invalidation of all laws supported in part for religious reasons. For example, people with religious beliefs and those with none may share a common secular ground for outlawing slavery or offering equality of opportunity and legal treatment without regard to race, gender, or ethnicity. That religious individuals also may support these outcomes because they perceive them to flow from the commands of God does not offend liberal democratic, or constitutional, principles, because the claim of such laws to acceptance in society does not depend on those religious beliefs. On the other hand, laws restricting obscenity, which are difficult to support on rational grounds, might well be found to violate the establishment clause.

I do not pretend to offer the precise design of such an analysis, or to have answers to such difficult questions as how to define clearly what is rational or what is religious. Not every question posed under the rubric of religious motive may be addressed readily by this analysis.[23] In other cases in which the approach *is* applicable, the results may be too controversial as a political matter for

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22. A representative statement of these theoreticians' point of view can be found in the writings of L.W. Sumner:

> In a free society [religious] groups are entitled to enforce their belief among their members, as long as membership itself is genuinely voluntary. But they are not entitled to enforce their belief among those who dissent from it. The enforcement by public law of the moral creed of some religious sect is out of place in a pluralistic and secular state.

L. SUMNER, ABORTION AND MORAL THEORY 17 (1981). Many of these theorists would argue that any nonrational moral or ethical belief would be similarly disabled as a source of authority for legislation, without regard to whether it was "religious" in origin. *See, e.g.*, D. LYONS, ETHICS AND THE RULE OF LAW 191 (1984).

23. I am uncertain, for example, whether the liberal political theory under discussion would resolve the religious motive questions posed by *Epperson* and *McGowan*. *See supra* notes 7-14 and accompanying text.

ready adoption.[24] My strong sense, however, is that without some firm limit of this general sort on the influence of religion on political decisionmaking, a meaningful vision of the secular state could be difficult to preserve.

Not surprisingly, therefore, I am uneasy with the implications of the contrary position so compellingly set out by Professor Greenawalt. He argues that people in a democratic society must decide at least some moral questions for which rational bases are unavailable — for example, what degree of protection to give to animals or to the environment. Because a rational resolution cannot be found, according to Professor Greenawalt, citizens have no choice but to rely instead on nonrational beliefs and preferences, and their doing so offends no democratic principle. He then goes on to assert that, if nonrational beliefs must be relied upon, no valid reason exists to exclude reliance on those nonrational beliefs that happen to be religious.

Insofar as they relate to decisionmaking by individual members of a democratic state, I find Professor Greenawalt's arguments persuasive. My difficulties arise from the next step in his analysis. Although he does not develop this theme in detail, I understand him to assert that individual moral choices, although founded on sectarian grounds, may be translated into positive law without violating the first amendment of the Constitution.

Regardless of whether one agrees or disagrees with either the structure or conclusions of Professor Greenawalt's arguments, in my view he makes several important points. First, he demonstrates that assumptions about the availability of rational grounds on which political decisions can be based may have been overly optimistic or in need of further defense. Second, he reminds us that, even as to questions that are amenable to reasoned answers, reliance on purely rational grounds may be impossible to achieve. The mental processes of the human mind are not like discrete, overlapping sheets of mica. One's nonrational belief systems may profoundly influence what one accepts as "rational" in the arena of moral choice and may indeed not be fully segregable.

Having said that, I fear my overall response to his thesis is to doubt whether some types of protection for animals and the envi-

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24. *See, e.g., infra* notes 28-35 and accompanying text.

ronment legitimately can be legislated, absent a rational basis, rather than to be convinced that legislation based on religious beliefs in fact may be valid. Let me try to articulate the reasons for my discomfort by shifting the ground somewhat from that taken by Professor Greenawalt.

In my opinion, Professor Greenawalt's arguments may be colored by the perspective from which he approaches the analysis. He looks at the question entirely from the point of view of the individual believer who must decide a public moral question, and asks what one can fairly expect of religious citizens if one accepts the premises that underlie our political institutions.[25] At a number of points, he emphasizes, quite correctly, that the demand that political debate be limited to rational or at least nonreligious nonrational grounds exacts a toll on the integrity of the religious believer's personality.[26] Perhaps because he focuses on the claims of believers to bring their religious insights to bear on political choices, he does not, in my view, sufficiently consider the toll his analysis would exact from those who do not share the same insights.

He acknowledges, but does not discuss, the possible injustice of binding others by religiously-grounded moral choices, apparently because of his judgment that religious traditions are widely shared in this country and that, historically, they have not been an important source of division and hostility.[27] Given this starting position, one might conclude that allowing religious beliefs a role in political debate is consistent with the intent of the Constitution. Allowing religious beliefs such a role maximizes religious freedom and respects individual autonomy and conscience. Because I am not convinced that this notion of religious freedom is complete and am less confident than Professor Greenawalt about the issue of serious religious divisiveness, I would argue that religious freedom may be better served in the long run by denying it political effect.

Ordinarily, the laws governing a democracy reflect the viewpoints of the majority but are not seen as working some inherent

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25. Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment* 27, WM. & MARY L. REV. 1011, 1040-47 (1986).

26. *Id.* at 1046-47, 1061.

27. *Id.* at 1064.

unfairness on the minority. In a few areas, however, our political assumptions are structured differently. Certain protections for individual rights, including the right to freedom of religious belief, require a limitation on the majoritarian principle. If nonrational religious beliefs can support public moral choice consistent with the Constitution, I am not sure how, if at all, the results can be squared with this notion of limitation. What account is to be made of dissenters?

Let us take the example of sexual behavior. Like others,[28] I do not believe that an argument can be made on rational grounds for preferring as morally correct any particular arrangement of sexual relations between or among consenting adults. Different societies, and even the same society at different times in its history, have approved of a wide variety of possibilities. Because systems could be devised to deal with such matters as care of children or division of property, regardless of which forms of sexual union are permitted, the claim of any one form is difficult to validate objectively.

Viewed in this light, polyandry, polygamy, and unrestricted individual choice seem equally entitled to primacy as moral preferences. In the United States, however, monogamous heterosexual union accompanied by formal marriage has been the legal norm. Because the law intended the marital union to be permanent, divorce in most states was difficult to obtain until recently. Alternatives to monogamous marriage—fornication, adultery, homosexual relations, and bigamy—were proscribed by criminal law. A strong case could be made that the moral beliefs of Christianity profoundly influenced this choice of family form, and the proscription of alternatives.[29]

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28. *See, e.g.*, H. HART, LAW, LIBERTY, AND MORALITY (1963) (generally criticizing legal enforcement of morals, but focusing in particular on sexual morals, which Hart asserts are largely a function of "variable tastes and conventions"); L. SUMNER, *supra* note 22, at 17; Henkin, *supra* note 20, at 402-07; Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662, 675-80, 682-83 (1961); *cf.* D. LYONS, *supra* note 22, at 17 (noting the enormous diversity from culture to culture of "sexual and child-rearing practices, . . . marital arrangements and kinship patterns").

29. Patrick Devlin, who supported the legislation of morality, recognized that "the whole of our moral law is religious in origin and we talk of the sort of marriage which is recognized in [Great Britain] as 'Christian marriage.'" P. DEVLIN, THE ENFORCEMENT OF MORALS 62 (1965). He went on at length to argue that Christian marriage is acceptable as the ideal to "the right-thinking man in western society." *Id.* at 63.

For the sake of argument, assume that laws limiting sexual relations to monogamous marriage unquestionably rest substantially on nonrational religious grounds. If I understand Professor Greenawalt correctly, his theory, on both theoretical and constitutional grounds, would permit lawmakers to bring religious beliefs to bear on a question of public importance when rational grounds for decision are unavailable. In this example, however, would the resulting injury to those who reject the operative religious insights be sufficiently important that it too should be taken into account in thinking about the legitimate sources of law? The answer to this question should be yes, even if the entire society publicly acquiesced in the values supporting monogamous marriage, as Americans seem to have done for generations. In a society dominated economically, socially, and politically by one or more religious groups that accept monogamy as religiously ordained, this belief could powerfully influence those both in and out of the dominant group. Some might assent because they accepted the dominant tradition as a personally satisfactory source of norms; for others, assent would result from spiritual conviction about the ultimate rightness of the norm. Others, however, would accede to the coercive effect of the norm simply because dissent—even purely intellectual dissent—would be too costly to risk.

Religious norms, in a religious society, have special power. Even today, when legal affirmance of permanent monogamous marriage has been eroded seriously, individuals still express concern that divorce would be damaging to their careers or social standing. I am compelled by the argument of political theorists that religious freedom includes a right not to be forced to accept others' beliefs, and I believe that injury in a constitutional sense may result if that right is not preserved. If a minority group voices significant disagreement, without having any effect on the law to which it objects, open strife along religious lines is a real possibility. The example of the struggle between Mormons and the federal and state governments during the nineteenth and twentieth centuries bears this out.[30]

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30. *See, e.g.*, Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Reynolds v. United States, 98 U.S. 145 (1879); *In re* State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955).

One could respond to this dilemma by saying that the proper interests of dissenters are protected fully by the other half of the religion clauses: the right to free exercise. If this were so, then constitutional objections to Professor Greenawalt's analysis would lose much of their force. This argument founders, however, on the realities of current free exercise jurisprudence. Courts decide these cases using a complex system of balancing of interests. One element in the balance seems to be the court's assessment of the moral validity of the free exercise claim itself. In *Reynolds v. United States*,[31] one reason the Supreme Court rejected the claimed right of Mormons to practice polygamy was the moral distaste the justices felt for the practice.[32]

Another element that may affect the balance is the sheer number of potential claimants. If too many people claim exemptions from a law, the state may be unreasonably burdened by the administrative problems of operating a dual system.[33] In addition, the state may be unable to achieve the purposes for which the statute was passed. For instance, the Court dismissed the free exercise claims of Sabbatarians protesting Sunday closing laws on the ground that exempting so many people would defeat the statutory intent to establish a uniform day of rest.[34] More fundamentally, however, numerous exceptions to a statute undercut the very concept of law as uniform and systematically operating rules. The Court complained in *Reynolds* that recognition of a free exercise claim like the one for polygamy would allow "every citizen to become a law unto himself," and would permit "Government [to] ex-

31. 98 U.S. 145 (1879).

32. *Id.* at 164-66. Cases in which claimants argue that they should be allowed to use proscribed drugs in their religious worship also may raise this issue. *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1968); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926).

33. In argument before the Supreme Court on a free exercise claim in a recent case, the effect of the numbers of potential claimants on the Government's administrative burden was discussed fully in colloquy between the justices and counsel. Summary of Oral Argument, Bowen v. Roy, 54 U.S.L.W. 3515, 3516 (U.S. Feb. 11, 1986). Ultimately, the Court concluded that even if only a small number of welfare recipients were to claim exemptions, on religious grounds, from the requirement to obtain and use social security numbers for identification, the risk of a few fraudulent claims was one the government was not required to bear. The Court, therefore, rejected the free exercise claim. Owen v. Roy, 106 S. Ct. 2147, 2157-58 (1986).

34. Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961).

ist only in name."[35] This was not a frivolous argument. As a result, free exercise claims are most easily sustained by small groups of individuals whose behavior is not too noticeably deviant. Thus, comprehensive protection for the beliefs of significant, dissenting majorities under the free exercise clause is doubtful.

This argument also fails because the free exercise clause as currently understood is too limited conceptually to protect religious freedom fully. Free exercise claims ordinarily are thought to arise when positive laws conflict with religiously mandated beliefs or conduct. Many dissenters from laws that rely on religiously based consensus are unable to show that their affirmative religious beliefs require them to behave in a nonlegal way. Nevertheless, their freedom of conscience or spirituality may be infringed because they are compelled to obey the dictates of a religious belief system that they reject. A concrete example of the problem appears in *Harris v. McRae*,[36] a case involving a challenge to restrictions on federal funding of abortions. In that case, the Supreme Court rejected the plaintiffs' free exercise claim because the plaintiffs could not demonstrate that their religious beliefs *required* them to have abortions.[37] Because religious freedom inheres not solely in the right to practice a particular faith, but also in the right to reject particular beliefs or religion altogether, the free exercise clause—without major reinterpretation—does not strike a fair balance.

On the whole, then, I remain skeptical that a pluralistic society can achieve maximum freedom of religious belief unless it accepts significant restrictions on the political role of faith. Perhaps, as he develops his thesis in later work addressed more specifically to the fit between his argument and the religion clauses, Professor Greenawalt will suggest ways to meet these concerns. Perhaps he will demonstrate that my disagreement is in some way premised on an incorrect understanding of religious freedom. Meanwhile, having had the premises shaken hard beneath me, I still will veer toward the position that law should be supported by neutral, rational grounds and that the political role of religion should be limited to

35. 98 U.S. at 167.
36. 448 U.S. 297 (1980).
37. *Id.* at 320.

confirming, rather than to supplementing, the dictates of reason. A society that refuses to tell individuals how to regulate their personal sexuality does not infringe these individuals' freedom to regulate sexuality for themselves, based on their religious beliefs or on other sources of values. Nor does it prevent them, if they can, from trying to persuade others to adopt their vision of right behavior and ultimate good. A society, however, that allows legislators to embody nonrational choices in positive law, particularly choices based on religious belief, creates the possibility that only those whose voices count in the consensus will enjoy freedom of conscience and belief.