

MINORITY RELIGIONS AND THE RELIGION CLAUSES

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What is the guiding purpose behind the First Amendment's Religion Clauses? That question has preoccupied scholars and judges for some years now. As critics from various perspectives have remarked, for a long time the Supreme Court's religion jurisprudence suffered from two flaws: a tendency to rely on slogans and catch-phrases rather than arguments from fundamental purposes,¹ and a tendency to treat the two religion provisions, non-establishment and free exercise, separately rather than as a unified framework for relating government to religion.²

Over the last two decades, widespread dissatisfaction with the Court's efforts inspired a number of general theories about the purposes of the two clauses taken together. Scholars have suggested various values, or combinations of values, that the Religion Clauses should be interpreted to serve.³

1. See, e.g., Alan Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 887 (1999) (arguing that "traditional separationist doctrine is sometimes unpersuasive because it resolves cases solely in terms of mega principles and rules" and fails "to explain how and why ostensibly modest connections between government and religion realistically risk the undermining of religious liberty"); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992) ("[C]onflicts over the Religion Clauses [have been] mired in slogans and multipart tests that could be manipulated to reach almost any result.").

2. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 340 (1996) (reading the two clauses as "inconsistent" should be "a last resort interpretation, after exhausting all attempts to reconcile the[m]"); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, 32 CATH. LAW. 187, 195 (1989) (arguing that the Court has made "a fundamental mistake" by "looking at the two clauses in isolation and giving them a different cast"); see also Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1007-08 (1986) (arguing that conflict between the two clauses can be easily avoided).

3. These include at least four predominant views. First, equal treatment between religion and nonreligious conscientious views. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79. Second, protection of individual liberty and choice in religious matters. See, e.g., Laycock, *supra* note 2; Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115 (1992); Gail Merel, *Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978). Third, strict separation of church and state. See, e.g., Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035 (2002); Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111 (2002). Fourth,

One plausible candidate for a unified principle is the protection of America's minority religions and their adherents. Under such a theory, the Religion Clauses together should be read to protect minority religious beliefs and practices from being burdened by government and, as much as possible, to equalize the status of minority religions before the government with that of majority faiths. Such an approach starts with plausibility because the rights provisions of the Constitution are, in significant part, measures to protect minorities from the majority. Not surprisingly, therefore, a number of commentators have already analyzed the Religion Clauses through the lens of protecting minority faiths.⁴

A minority-protection approach can make important contributions to Religion Clause analysis. For example, the protection of religious minorities may provide the most compelling normative reason for strictly separating church and state.⁵ Strict church-state separationism has lost much influence among the courts recently; but if there are good arguments for the strict separation ideal, one of them is that religious minorities will fare better when majoritarian government is kept far from religious life.

Protection of minority faiths and their adherents might also provide the best normative argument for an active judicial role in cases concerning government and religion. At this moment, Religion Clause doctrine leaves

protection of society from intrusions by powerful religion. *See, e.g.*, Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123.

Various combinations of liberty, church-state separation, and equality or "neutrality" are urged in, for example, Brownstein, *supra* note 1 (combination of liberty and equality); Frederick M. Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002) (neutrality theory with components of separationism); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (combination of neutrality and separationism); Steven Shiffin, *A Pluralistic Theory of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004).

4. *See, e.g.*, STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF SEPARATION OF CHURCH AND STATE* (1997); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003) [hereinafter Feldman, *Religious Minorities*]; Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Laws Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996); Rosalie Berger Levinson, *First Monday—The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47 (1998); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991).

I am grateful to Professor Feldman for making kind comments on my previous work tracing attitudes toward Roman Catholicism in modern religious freedom decisions and for challenging me to undertake a similar examination of religious freedom doctrine and minority faiths. *See* Feldman, *Religious Minorities*, *supra*, at 224–27 (citing Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOYOLA CHI. L. REV. 121 (2001)).

5. *See infra* Part I.C.

the resolution of two central issues to the political branches, which may put the liberties and equal civil status of minority faiths at risk. With respect to government aid to religious education, *Zelman v. Simmons-Harris*⁶ holds that states may provide vouchers to families who will use them at religious schools;⁷ but last Term's decision in *Locke v. Davey*⁸ holds that states do not have to extend educational aid to students who will use it to train for the ministry.⁹ *Zelman* and *Locke* together suggest that states will have discretion over questions of financial aid such as school vouchers. But such discretion will tend to produce majoritarian results: religious schools will fare well in voucher debates in states where their sponsoring denominations are politically powerful, and fare poorly where their denominations have less power.

Likewise, after *Employment Division v. Smith*,¹⁰ the government may exempt religious practices from the restrictions imposed by laws of general applicability,¹¹ but in most cases, it does not have to do so.¹² *Smith* conceded that this combination of rules—"leaving accommodation to the political process"—"may place at a relative disadvantage those religious practices that are not widely engaged in."¹³ If there is a compelling case for judicial intervention in religion cases, it must rest heavily on the protection of religious minorities.

I should make clear that, in my view, the protection and equalization of minority faiths should not be the sole criterion for Religion Clause cases. The First Amendment guarantees free exercise of religion, with no qualification limiting the freedom to minority faiths; nor is there any indication that the Establishment Clause becomes inapplicable if a minority faith is established. Under any plausible constitutional interpretation, majority faiths have rights to practice and spread their beliefs in certain basic ways (even though there are, of course, many questions about the outer scope of religious freedom). Such basic rights are protected even when they have effects that members of minority faiths regard as negative.

6. 536 U.S. 639 (2002).

7. *Id.* at 662–63.

8. 540 U.S. 712 (2004).

9. *Id.* at 719–20. For arguments distinguishing vouchers from *Davey*, see Thomas C. Berg & Douglas Laycock, *Davey's Mistakes and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 247–53 (2004).

10. 494 U.S. 872 (1990).

11. *Id.* at 890.

12. *Id.* at 878.

13. *Id.* at 890.

Nevertheless, the protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one. Therefore, it should be valuable to isolate the minority-protection criterion and analyze what it would mean if it were applied consistently to religion cases. This Article explores such an approach and its implications for the leading categories of government-religion disputes. I build on the analyses of other scholars and agree with many of their arguments. But in other respects, I critique them and reach quite different conclusions about where a minority-protection approach, best conceived, leads.

Part I of the Article offers reasons why the protection of minority religions should be an important consideration in interpreting the Religion Clauses. Part II then addresses various difficulties and complications in the idea of protecting minority faiths. In addition to the fact that the constitutional text protects all religious faiths, there are difficulties in the effort to define which faiths are minorities. Because of America's complex patterns of religious identities, who is a minority will often vary depending on the geographical location, on the institutional setting in which a particular legal issue arises, and on how one chooses the key religious differences that sort groups into different categories. Given these difficulties, courts generally should not try to single out certain groups as religious minorities and treat them differently than other groups. Such an approach is too subjective and contestable, in addition to its possible inconsistency with the constitutional text. The only defensible method is to develop principles for various categories of cases that are applicable to all faiths—but that tend to protect *whoever* happens to be a minority in the given geographical location, institution, or cultural atmosphere. The courts should not undertake to determine who is a minority in a particular case, but should follow rules structurally designed to protect whoever happens to be the minority.

Part III then develops such principles for the leading categories of Religion Clause disputes. On many issues I agree with previous commentators about the implications of a minority-protection approach. To ensure that religious minorities enjoy the right to practice their faith, courts should read the Free Exercise Clause expansively and should, in some cases, exempt religiously motivated conduct from laws that impose significant burdens on the conduct.¹⁴ I thus follow other commentators in criticizing the Supreme Court's rejection of exemptions in *Smith*. And

14. See *infra* Part III.A.

under a minority-protection approach, the Establishment Clause should be vigorously interpreted to restrict government-sponsored religious exercises and displays in public schools and other government institutions. Such practices by their nature tend to favor the majority religion and impose burdens on dissenters; and the strict separationist approach that has invalidated these practices is best justified by the rationale of protecting religious minorities.¹⁵

In other categories, however, I question the common wisdom on what will protect minority religions. Most notably, I argue that permitting government assistance for religious education and religious social services has positive aspects for many religious minorities.¹⁶ Thus, the protection of minorities does not necessarily point toward the strict “no-aid” version of church-state separation. The Court’s increasing trend toward approving programs of aid is defensible under a minority-protection approach—at least if the program in question includes measures to protect children or other beneficiaries from being pushed into schools or social services that teach a faith different from their own.

I. THE MINORITY-PROTECTION APPROACH: THE PRIMA FACIE CASE

To begin with, why should the protection and equal status of religious minorities be a central concern in Religion Clause cases? There are several reasons.

A. *Countermajoritarianism*

The first argument for a minority-protection approach is simple: the Constitution, or at least the Bill of Rights, is a countermajoritarian document in general, limiting the actions of the politically accountable branches. If the rights provisions aim to protect minorities against the majority in general, the Religion Clauses aim to protect minorities in religious matters.

Moreover, federal judges, the leading actors in interpreting the Constitution, are insulated by lifetime tenure from democratic pressures. This independence implies, as Alexander Hamilton wrote in *Federalist No. 78*, that one of their central tasks is to block “serious oppressions of the minority party in the community.”¹⁷ In *West Virginia State Board of*

15. *See infra* Part III.B.

16. *See infra* Part III.C.

17. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

*Education v. Barnette*¹⁸—which itself involved a despised religious minority, the Jehovah’s Witnesses—the Supreme Court said that “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . . [Such] fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹⁹ A longtime legal director of the American Jewish Congress, the most active Jewish agency litigating Religion Clause cases, explained why his organization “relied heavily on the courts for the protection of religious liberty”:

[Jews’] influence with most legislatures is weak, particularly when there are countervailing religious pressures. . . . That is not to say that judges are not influenced by currents of popular feelings or prejudice. But judges, unlike legislators, are guided by a tradition of objectivity and independence, a tradition that requires decisions to be based on the record²⁰

The Religion Clauses may be particularly appropriate for a minority-protection approach. Not only does the Free Exercise Clause protect religious exercise against government restrictions; the Establishment Clause limits majoritarian government in promoting religious doctrines or values. On subjects outside of religion, the Free Speech Clause limits only the majority’s ability to restrict individuals’ expression—not the majority’s ability to express and promote its own views through the government. By contrast, the Religion Clauses set up a unique, double-barreled limitation on majoritarian acts.²¹

Majority religions already enjoy *de facto* protection in various ways, since religion is intertwined with culture and moral values. When moral and cultural issues enter the political process, representative democracy will generally respond to majority religious faiths and values. And outside the realm of politics strictly defined, culture will tend to represent widely

18. 319 U.S. 624 (1943).

19. *Id.* at 638.

20. Will Maslow, *The Legal Defense of Religious Liberty—The Strategy and Tactics of the American Jewish Congress* (1973), reprinted in RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 229, 232–33 (Jonathan D. Sarna & David G. Dalin eds., 1997).

21. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (“Speech is [generally] protected by ensuring its full expression even when the government participates” but “[i]n religious debate or expression the government is not a prime participant [T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.”).

held faiths and values, which can create a pervasive sense of discomfort for minorities.

Consider, for example, the list of incidents that law professor Stephen Feldman recounts from his daily life as a Jew in Tulsa, Oklahoma.²² Well-meaning neighbors give his newborn daughter a gift, but “[u]nfortunately, it was a New Testament.”²³ His dental hygienist remarks that his newborn son’s name, Samuel Jacob, “sounds so Jewish.”²⁴ His daughter asks if she can be a Christian when she grows up, “[s]o I can celebrate Christmas.”²⁵ He reads of the first President Bush thanking Christian radio executives “for helping America, as Christ ordained, to be a light unto the world.”²⁶ On one December day, his family attends a play that begins with an impromptu reading of *The Night Before Christmas*; then they visit the city zoo and find Christmas decorations everywhere and Christmas music broadcast throughout the grounds; finally they eat dinner at a restaurant covered with Christmas decorations, where his daughter receives a drawing of a Christmas stocking to color.²⁷

One might question whether all of these episodes evince a “web of power” or “Christian imperialism.”²⁸ The Christmas incidents mostly reflect the holiday’s secular focus, which sometimes distresses devout Christians as well. Only a few of the acts Professor Feldman describes were governmental and thus subject to constitutional limits. Many of the private actions were not only legal, but were also probably well-meaning and, in any event, impossible to eliminate. In a free society, people will celebrate symbols and traditions that they believe are good; and they will wish those goods on others, including strangers, with no ill motive.

Nevertheless, Professor Feldman’s list makes an important point. It “communicate[s] . . . the experience of being an outgroup member. . . , the experience of cumulative frustration in coping” day after day with the actions and assumptions of the majority culture or the majority-elected government.²⁹

In addition, minority religions often qualify as the kind of “discrete and insular” minority that, under the analysis in footnote four of *United States*

22. See FELDMAN, *supra* note 4, at 283–85. Since that time, Professor Feldman has moved from the University of Tulsa to the University of Wyoming.

23. *Id.* at 283.

24. *Id.* at 284 (internal quotation marks omitted).

25. *Id.* (internal quotation marks omitted).

26. *Id.* (internal quotation marks omitted).

27. *Id.*

28. *Id.* at 286.

29. *Id.* at 283.

v. Carolene Products,³⁰ should receive special attention from courts because the political branches are prone to show prejudice or at least indifference to the group's interests.³¹ Only two years after the *Carolene Products* footnote, its author, Justice Stone, identified the Jehovah's Witnesses as a prime example of such a minority: one whose practice "is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern."³²

Religious minorities have certainly faced violent and unreasoning prejudice at times in American history. Consider just the phenomenon of mob violence. When the new Catholic immigrant population grew in Eastern cities in the mid-1800s, nativist Protestant mobs attacked churches and burned convents.³³ During the same period, mobs in New York and the Midwest assaulted Mormons, killed the religion's founder Joseph Smith, and drove the Mormons to seek refuge in unsettled Utah.³⁴ The lynching of Leo Frank in Georgia in 1915 was just the most vicious in a pattern of anti-Semitic acts in various parts of the nation over several decades.³⁵ And as the next section details, Jehovah's Witnesses suffered numerous vigilante attacks across America in the mid-1900s.³⁶ Each of these groups has also faced less violent forms of discrimination—legal restrictions and harassment, exclusion from jobs, ridicule of their children in public schools—in places where they have been a numerical and cultural minority.³⁷

Admittedly, one's religious beliefs and personal worship are not immediately visible to others as is one's race, the classic example of a "discrete" characteristic that unavoidably marks one off as an outsider. But religious freedom implicates more than beliefs and private worship.

30. 304 U.S. 144 (1938).

31. *Id.* at 152 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and [thus] may call for a correspondingly more searching judicial inquiry.").

32. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

33. *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 215–20 (2002); LLOYD JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 78–83 (1987).

34. *See, e.g.*, LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 44–105 (1979); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (2004).

35. *See generally* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA (1994) [hereinafter DINNERSTEIN, ANTISEMITISM]; *see also* LEONARD DINNERSTEIN, THE LEO FRANK CASE (1968); MELISSA FAY GREENE, THE TEMPLE BOMBING (1996).

36. *See infra* Part I.B.2.

37. *See generally* DINNERSTEIN, ANTISEMITISM *supra* note 35; ANDREW M. GREELEY, AN UGLY LITTLE SECRET: ANTI-CATHOLICISM IN NORTH AMERICA (1977); Feldman, *supra* note 4, at 236–37; Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).

Religious identity usually means committing as well to a set of outward practices, which often are quite visible and singular: wearing a head covering, or a beard or long hair, or preaching on the street corner. Such practices can be jarring or offensive to the majority and therefore trigger discrimination or suppression as responses. Likewise, many religious practices insulate or separate the believer from the majority: acts such as receiving education in a faith-permeated school or refraining from certain foods or activities. Moreover, religious identity is likely to be particularly difficult for an individual to shrug off because its demands tend to be all-encompassing and constitutive of an adherent's overall identity.³⁸ Indeed, the "comprehensiveness" or "comprehensive nature" of a set of beliefs forms part of the most common modern judicial definition of "religion."³⁹

I concede that these features may not always render a religious minority "discrete and insular" in the full sense of the term. Some groups having minority religious views are relatively diffuse and interact with people of other views in society in varying ways. But even if such interactions exist and the group is not isolated or oppressed across the board, the group can nevertheless have stark conflicts with majoritarian legal norms on particular issues or sets of issues. If we care about the ability of all religious groups presumptively to practice their faith, then even legal restrictions on particular practices—and the majoritarian hostility or indifference that these reflect—should be treated as serious constitutional matters.

Recognizing what features make religious minorities subject to prejudice—or at least restriction—has implications for just what a minority-protection approach should protect. It is obviously important to invalidate laws that discriminate against persons based simply on their private beliefs or memberships. Because beliefs alone do not directly affect others, such laws cannot be justified by social necessity. But protection of religious minorities should extend beyond beliefs to a second purpose: allowing those minorities that have distinctive ways of practice and living to preserve and pursue those where possible, even in the face of general societal norms.⁴⁰ It is an adherent's outward behavior that can make her vulnerable to hostile reactions and suppression by the majority. Members of minority religions—like those of majority religions—should

38. See, e.g., Alan Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 769, 775 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1997)).

39. See, e.g., *Africa v. Commonwealth*, 662 F.2d 1025, 1032 (3d Cir. 1981); *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring).

40. See *infra* Part III.A.

be able to carry out their beliefs in practice openly, as long as they do not infringe on the rights of others. They should also be able to express their beliefs openly to others, again short of infringing on others' rights or privacy.

I emphasize this point because sometimes proponents of minority religious rights seem concerned mostly with protecting the minority from state imposition of the majority's religious views.⁴¹ This negative conception—protection against being religiously coerced by majoritarian government—is important, but by itself it will not necessarily promote the full religious freedom of religious minorities. The negative conception points logically toward keeping the public sphere wholly secular in its content, so that no religious view can be imposed on others. The logic may extend even to the point of restricting the religious speech of individual citizens in governmental settings like public schools.⁴² But the matter must be approached differently once it is recognized that religious minorities also have a positive interest in practicing their faith, or expressing it, in governmental settings. A wholly secular public sphere can restrict the positive religious exercise of minorities. Analysis of minority religious rights must take into account the positive as well as the negative aspects of liberty in religious matters.⁴³

To be sure, minority status does not always harm a religious group's political or organizational vitality. For one thing, a group's size often matters far less than its cultural status: some groups that are small in numbers nevertheless occupy an elite position in their society, a

41. See, for example, *infra* notes 195–200, 352–57 and accompanying text.

42. See *infra* Part III.B.3.

43. The distinction between negative and positive conceptions of minority rights appears in historian Naomi Cohen's description of the posture of Jewish religious freedom agencies in recent decades. Through the 1960s, there was "a secularist strand within [the personnel of] the defense agencies" that emphasized freeing Jews from having to endure public religious ceremonies; the secularist personnel "spoke for a religious community, but . . . their actions in opposition to public religion reflected their own indifference if not hostility to religion itself." NAOMI W. COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* 126 (1992). By the 1970s, however, with personnel "more committed to Judaism than their immediate predecessors," the agencies "increasingly affirmed that free exercise included the protection of religious behavior, in diverse and multiple forms": they "coupled the older 'thou shalt not' command to government with a 'thou mayest' nod to both Jewish and non-Jewish minorities." *Id.* at 244.

The distinction between positive and negative religious liberty has some analogies to the question whether America should be understood as a "melting pot" in which various groups merge their particularist identities into a general American identity or as a model of "cultural pluralism" in which particularist identities remain distinct and are accommodated. For discussion of this question as applied to religious identities, see WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL 186–95* (2003).

complication I consider in the next section.⁴⁴ Moreover, as Bruce Ackerman has pointed out, a group's insularity can actually strengthen its political effectiveness—for example by “engender[ing a] group solidarity” that encourages efforts on the group's behalf and by making it “cheaper to organize [and communicate with members] for effective political action.”⁴⁵ An example of the political muscle of insular groups can be seen in the various Hasidic Jewish sects that wield considerable power in New York politics because their adherents “have high voter turn-out rates, . . . and frequently vote as a bloc ‘for the candidate selected by the rebbe and community leaders.’”⁴⁶

Dissonance with the broader culture can bolster not only a minority group's political mobilization, but also its general vigor and self-definition. The minority may embrace its outsider status and use it to define the distinct nature and qualities of its community. Among the most obvious examples are “sectarian” groups such as the Amish.⁴⁷ Jews have employed such a strategy for hundreds of years. The urban ghettos and rural *shtetls* of pre-1900 Eastern Europe were unquestionably means by which the dominant society confined and oppressed Jews. But these undeniable burdens also offered some benefits: they helped produce dense religious institutions and customs that reinforced Jews' group identity and solidarity in the face of the majority's hostility.⁴⁸ Conversely, the political emancipation of Jews after the Enlightenment, though certainly an advance for Jewish rights in many ways, also brought costs with it: Jews were expected to give up many aspects of their communal life with direct religious import.⁴⁹ Some of the communal customs that survived were

44. See *infra* Part II.B.2.

45. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724–26 (1985); see also *id.* at 728 (“[F]or all our *Carolene* talk about the powerlessness of insular groups, we are perfectly aware of the enormous power such voting blocs have in American politics.”).

46. See Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 118 (1996) (internal quotation omitted). See generally JEROME R. MINTZ, *HASIDIC PEOPLE: A PLACE IN THE NEW WORLD* (1992).

47. See, e.g., JOHN A. HOSTETLER, *AMISH SOCIETY* (3d ed. 1980); DONALD B. KRAYBILL, *ON THE BACK ROAD TO HEAVEN: OLD ORDER HUTTERITES, MENNONITES, AMISH, AND BRETHREN* (2001).

48. See Benny Kraut, *Jewish Survival in Protestant America*, in *MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM* 15, 19–20 (Jonathan D. Sarna ed., 1998).

49. “Jews, according to the terms of the emancipation, . . . were to give up the civil aspects of Talmudic law; disavow the political implications of Jewish messianism; abandon the use of Yiddish; and most importantly, relinquish their semi-autonomous communal institutions.” Vicki Caron, *French-Jewish Assimilation Reassessed: A Review of the Recent Literature*, 42 JUDAICA 134, 138 (1993) (summarizing SIMON SCHWARZFUCHS, *DU JUIF A L'ISRAELITE: HISTOIRE D'UNE MUTATION, 1770–1879* (1989)).

transferred to the urban Jewish enclaves of the New World,⁵⁰ and current-day Hasidic groups in New York City and elsewhere maintain many such customs.⁵¹ Of course a more common response of Jews in America has been to assimilate, either to Protestant Christian styles of religious practice or to secular American values concerning politics and society.⁵² But even as they have departed from traditional religious customs, many American Jews have sought to replace them with some other form of Jewish particularity—often through nonreligious ideals such as Zionism or social reform, but often through religious forms that combine distinctively Jewish with common American ideals.⁵³ The need for particularity is as basic as the need to follow common ideals.

Or consider the posture of one much larger religious body, Protestant evangelicals. A recent study of American evangelicalism finds it vigorous, “not because it is shielded against, but because it is—or at least perceives itself to be—embattled with forces that seem to oppose or threaten it.”⁵⁴ Evangelicalism “*thrives* on distinction, engagement, tension, conflict, and threat”⁵⁵: in particular, on its members’ sense that they are dissenters from a dominant culture that has embraced “narcissistic, licentious, and self-destructive values and lifestyles.”⁵⁶ Since as far back as the 1920s, historians have noted, evangelicals have characterized themselves “as a ‘beleaguered minority fighting with their backs to the wall.’”⁵⁷ Without such challenges, evangelicalism “would lose its identity and purpose and become aimless and languid.”⁵⁸ The example of evangelicals shows, the study concludes, how “[i]ntergroup conflict in a pluralistic context typically strengthens in-group identity, solidarity, resources mobilization, and membership retention.”⁵⁹

50. See Kraut, *supra* note 48, at 20.

51. For description of various communities, see, for example, MINTZ, *supra* note 46.

52. See, e.g., WILL HERBERG, *PROTESTANT CATHOLIC JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 191 (rev. ed. 1960) (describing elements in Reform services, such as organ music, mixed choir singing, and centrality of sermon, that “obviously reflected the influence of familiar Protestant practice”); Kraut, *supra* note 48, at 22–35. The matter is complicated, of course, because modern notions of equality, democracy, and individual freedom are themselves outgrowths, in part, of the Hebraic Biblical tradition.

53. See, e.g., HERBERG, *supra* note 52, at 186–95 (describing mid-20th-century Jewish religion as “return” of American Jews to Jewishness within the context of “the American pattern of religious life”).

54. CHRISTIAN SMITH, *AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING* 89 (1998).

55. *Id.*

56. *Id.* at 131.

57. R. LAWRENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* 163 (1985) (quoting *Interview with Timothy L. Smith*, *CHRISTIANITY TODAY*, Nov. 19, 1976, at 24).

58. SMITH, *supra* note 54, at 89.

59. *Id.* at 113.

These advantages of minority status call for caution about a minority-protection approach, but they do not undermine it. As I have said, protection of minority religions should not be the only consideration under the Religion Clauses, but it should be an important one. Even with the advantages of minority status, there remain many reasons to be concerned about government impositions on religious dissenters. Professor Ackerman admits that the strengths he sees in insular minorities depend on an assumption: that “however oppressed the [group’s members] may be in other respects, they have not been prevented from building up a dense communal life for themselves on their tight little island.”⁶⁰ Strong constitutional protection may be necessary to ensure that such communal islands can survive. Likewise, the study of evangelicals emphasizes that their vitality depends on their not experiencing too much pressure from the culture. If a group “becom[es] genuinely countercultural,”⁶¹ it may become obsessively defensive, unable to act effectively in the broader world—as the authors say has happened with Protestant fundamentalists, the more separatist cousins of the evangelicals.⁶² Moreover, although tension with the culture can be invigorating, it is crucial that “[o]utright persecution is minimized,” that “pluralism does not exterminate evangelicalism.”⁶³ This Article and the First Amendment are concerned not with mere tensions between a religion and the majority culture, but with legal restrictions and impositions on religious activity. And legal restriction and impositions raise precisely the potential for persecution that may decimate a minority religious group rather than strengthen it.

B. Constitutional History

The constitutional history of religious freedom in America also suggests the importance of protecting religious minorities. Such protection has been central in at least two crucial stages in the development of religious freedom.

1. The Founding Era

The years around the Constitution’s framing saw widespread agitation for religious freedom, most effectively by the Baptists of New England

60. Ackerman, *supra* note 45, at 724–25.

61. SMITH, *supra* note 54, at 118–19 (italics in original omitted).

62. *Id.* at 146.

63. *Id.* at 150.

and the South. The Baptists were a distinct minority in Congregationalist-dominated New England, and although they were more numerous in the southern colonies, they stood outside the dominant Anglican culture.⁶⁴ The Baptists were “largely lower class”, they followed exotic worship practices, and they angered mainstream citizens with aggressive street preaching and “ope[n] disdain[for] the established religion and gentry mores.”⁶⁵ As a result, the Baptists “were reviled” and “were met with violence.”⁶⁶ The imprisonment of itinerant Baptist preachers in rural Virginia in 1774 first impressed on young James Madison the immorality of coercion in religious matters.⁶⁷ The Presbyterians were also outsiders at the time, dismissed as “dangerously ‘enthusiastic’ (meaning fanatical) by the authorities.”⁶⁸

Baptists and Presbyterians were key proponents of religious freedom and disestablishment at the founding. Aggrieved by the requirement of paying taxes to support clergy, they provided the largest number of votes in Virginia to defeat the proposed tax assessment for religious teaching in 1785.⁶⁹ Baptist leaders, such as Isaac Backus in Massachusetts and John Leland in Virginia, took the lead in calling for an amendment guaranteeing religious freedom against the federal government.⁷⁰ Their voting power in James Madison’s congressional district undoubtedly helped prod Madison to introduce what became the First Amendment.⁷¹ The original

64. See, e.g., ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA 1776–1990*, at 29 tbl.2.3 (1992) (noting that Baptists made up 15 percent of religious congregations in New England in 1776 compared with Congregationalists’ 63 percent); *id.* (noting that Baptists and Anglicans each made up 28 percent of congregations in southern colonies). Not until after the revivals of 1800 to 1830 did Baptists become a culturally mainstream—and in the South, a numerically and culturally dominant—group. See, e.g., NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* 3–4, 93–95, 204–07 (1989); CHRISTINE LEIGH HEYRMAN, *SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT* 189, 236–47 (1997) (detailing transformation of evangelicals in South from outsider status to numerical and cultural dominance).

65. “[T]hey were at first largely lower class; . . . their worship sometimes caused their members to cry, bark like dogs, tremble, jerk, and fall to the ground; . . . and . . . as one Virginian charged, ‘they cannot meet a man on the road but they must ram a text of Scripture down his throat.’” J. LEWIS, *THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON’S VIRGINIA* 49 (1987), *quoted in* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438 (1990).

66. McConnell, *supra* note 65, at 1438; see also WILLIAM G. McLoughlin, *SOUL LIBERTY: THE BAPTISTS’ STRUGGLE IN NEW ENGLAND 1630–1833*, at 196–227 (1991) (describing mob violence against Baptists in Massachusetts in late 1770s and early 1780s).

67. Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 *THE PAPERS OF JAMES MADISON* 104, 106 (R. Rutland & C. Hobson eds., 1977).

68. McConnell, *supra* note 65, at 1438.

69. *Id.* at 1439–40.

70. See *id.* at 1476 & n.333 (quoting Leland); William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392 (1968) (discussing Backus).

71. “On advice of his political adviser,” Madison, who was running for Congress in 1789,

understanding of the Religion Clauses is a complicated matter, but the clauses grew in significant part out of a concern that the new federal government might impose on religious minorities. During the congressional debates, Madison explained that his proposal was based on the fear not only that one single sect “might obtain pre-eminence,” but also that “two [might] combine together, and establish a religion to which they would compel others,” presumably thereby the minority, “to conform.”⁷²

2. *The Origins of Modern Religion Clause Jurisprudence*

The Religion Clauses began to assume their prominent modern role in the 1940s when the Supreme Court applied the clauses to the vast range of state and local actions. This step came first in situations involving the Jehovah’s Witnesses, a despised religious minority. The Witnesses were then a relatively small sect—approximately 40,000 members in America in 1940, many scattered in small groups around the nation⁷³—preaching the message of a coming kingdom of God. Even more than the founding-era Baptists, the Witnesses triggered intense public hostility because of their aggressive and loud street-corner and door-to-door preaching, their dogmatic attacks on other faiths, and their unpopular stands such as refusing to salute the flag or serve in the military.⁷⁴ Jehovah’s Witnesses across the nation faced firing from their jobs, arrests by the police, destruction of their meeting halls, and beatings from local vigilantes.⁷⁵ The violence escalated after the Supreme Court held in June 1940 that public schools could require Witness children to salute the flag as a means of fostering “the binding tie of cohesive sentiment.”⁷⁶ Observers of the day concluded that the *Gobitis* decision served, even if by misinterpretation, “to kindle mob violence against Jehovah’s Witnesses.”⁷⁷ As already noted, Justice Stone, dissenting in *Gobitis*, recognized the Witnesses as a prime

contacted Baptist leaders and eventually “championed a constitutional provision for religious liberty as a campaign issue. The Baptist leaders responded by giving him their electoral support, which contributed to his narrow margin of victory.” McConnell, *supra* note 65, at 1477. He kept his promise by introducing the proposal that became the First Amendment.

72. 1 ANNALS OF CONGRESS 731 (Aug. 15, 1789) (Joseph Gales ed., 1834).

73. SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 30 (2000).

74. For accounts of the Witnesses’ evangelistic campaigns and the hostile and often violent public responses, see, for example, DAVID MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962); PETERS, *supra* note 73.

75. *Id.*

76. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597 (1940).

77. PETERS, *supra* note 73, at 84 (quoting Beulah Amidon, *Can We Afford Martyrs?*, SURVEY GRAPHIC, Sept. 1940, at 457, 460) (internal quotation marks omitted).

example of the discrete and insular minorities who needed protection under the logic of his *Carolene Products* footnote.⁷⁸

When the justices switched three years later in *Barnette* and upheld a child's right to refuse the flag salute,⁷⁹ they likely reacted to the wave of violence that had followed *Gobitis*, even though a number of references in early drafts to the violence were removed by the time the *Barnette* opinion issued.⁸⁰ The Witnesses' experience provided the classic modern lesson that majorities cannot be trusted to tolerate minorities with infuriating beliefs and practices, and that courts must play a significant role in ensuring legal protection.

The Jehovah's Witness cases laid the foundation for the modern law of freedom of speech and religion, beginning with the incorporation of the Free Exercise Clause in *Cantwell v. Connecticut*.⁸¹ Other decisions involving the Witnesses identified religious expression and practice as a "preferred freedom" and introduced a now familiar array of protective devices: forbidding the state to regulate speech because of its message,⁸² distinguishing between "peaceable" and unpeaceable behavior,⁸³ requiring a truly "clear and present danger" of public disorder to justify restriction of speech,⁸⁴ and demanding that regulation be "narrowly drawn" and precise in its terms.⁸⁵

The modern Court's approach to religious freedom was influenced by the experiences and activities of another prominent religious minority, Jews. The full horror of the Holocaust did not deeply affect Americans until well after World War II,⁸⁶ but even during the war people clearly knew that the Axis powers mistreated Jews and other minorities. Some of the Justices may have concluded that it was crucial to protect Jehovah's Witnesses and other minorities precisely in order to reaffirm the difference between America and its dictator enemies.⁸⁷

78. *Gobitis*, 310 U.S. at 606 (Stone, J., dissenting).

79. *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

80. See PETERS, *supra* note 73, at 251.

81. 310 U.S. 296, 303 (1940).

82. *Id.* at 308.

83. *Id.*

84. *Id.* at 311. See generally Douglas Laycock, *The Clear and Present Danger Test*, 25 J. SUP. CT. HIST. 161 (2000).

85. *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943); *Cantwell*, 310 U.S. at 311.

86. See generally PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (2000).

87. For example, Justice Murphy, the Court's strongest proponent of the Witnesses' rights, wrote a draft dissent in *Gobitis* emphasizing that First Amendment protections were vital "[e]specially at this time when the freedom of individual conscience is being placed in jeopardy by world shaking events." PETERS, *supra* note 73, at 65–66 (quoting SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS 185–90* (1984)). Although he ended up joining the *Gobitis* majority, he quickly switched to voting on

Whatever the Justices' attitudes toward Jews as a minority, the major Jewish organizations played a central role in the development of constitutional church-state doctrine after World War II. Led by the American Jewish Congress—and imitating civil rights agencies like the ACLU and the NAACP—the Jewish bodies initiated and financed “planned, strategic litigation”⁸⁸ to challenge religious programs in public schools and other government actions that pressured Jews as a religious minority.⁸⁹ Jews developed wide consensus that strict church-state separation, with an active enforcement role by courts, was necessary to protect their equal status against the Christian majority. The AJCongress's remarkable church-state counsel, Leo Pfeffer, led the way, as advocate and scholar, in crafting arguments for strict separationism. Pfeffer argued more religion cases in the Supreme Court than anyone in history—including, by the 1970s, several decisions invoking strong church-state separation to strike down government aid to parochial schools.⁹⁰ Indeed, strict separationism and the Court's pre-1980s doctrine have sometimes been referred to (mostly by critics) as the “Pfefferian” approach.⁹¹

The leading Jewish organizations likely had an effect on the Court when it began constructing Religion Clause doctrine in the mid-1900s. The Jewish organizations presented an articulate account from a prominent and credible group of why the religious freedom of minorities demanded a strong separation of church and state enforced by an active judiciary.

the Witnesses' side. *See also* MANWARING, *supra* note 74, at 158 (quoting *Christian Science Monitor* article after *Gobitis* warning that “in excited times a great deal may be done under the name of general welfare, which leads in the direction of State religion, or State irreligion as in Nazi Germany or Soviet Russia”).

88. GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* 53 (1995).

89. For accounts of the litigation and other strategies of the major Jewish defense organizations, see, for example, COHEN, *supra* note 43, at 131–213; IVERS, *supra* note 88.

90. IVERS, *supra* note 88, at 184–85 (noting Pfeffer's role as lead counsel in cases striking down school aid); *Leo Pfeffer: Apostle of Strict Separationism*, in *RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE* 233 (Jonathan D. Sarna & David G. Dalin eds., 1997). On Pfeffer's life, see LEO PFEFFER, *RELIGION, STATE, AND THE BURGER COURT* (1984) (autobiographical introduction by Pfeffer); Thomas C. Berg, *Leo Pfeffer*, in *THE OXFORD AMERICAN NATIONAL BIOGRAPHY* (John A. Garraty & Mark C. Carnes eds., 1999).

91. *See, e.g.*, Richard J. Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 *J. L. & RELIG.* 115, 118 (1990); *see also* ROBERT CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 15 (1982) (describing the “Pfeffer school of thought”).

C. Minority Protection as a Foundation for Strict Separationism

The minority-protection emphasis not only is associated with the principle of strict church-state separation, it may well be indispensable to that principle. Strict separationism today stands in serious need of a normative rationale. Even commentators sympathetic to the approach have criticized its traditional formulations for relying too heavily on slogans, catch phrases, and abstract manipulable tests divorced from underlying values and purposes.⁹² Strict separationism has also been criticized for giving courts too much power and restricting the political branches too severely.⁹³

If there is a convincing normative rationale for strict separationism enforced by an active judiciary, protection of minority religions is a likely candidate. The argument is that democratic government will likely reflect and favor majority religious values, and therefore the further that government keeps from religion, the better for minority faiths. “[T]he wall of separation . . . is viewed by members of religious minorities as a safeguard against practices which tend to favor those majority religious faiths that have the political power to enact laws for their own benefit.”⁹⁴ Prayers or other religious exercises chosen by the government will reflect the religious view of the majority and will impose pressure, subtle or overt, on those who dissent from that general sentiment. Therefore, the argument goes, government ought scrupulously to refrain from sponsoring religious ceremonies and expression.⁹⁵ Government funding of religious schools, it is argued, should be limited because it will disproportionately benefit those denominational schools whose views are close to the majority’s, and will disfavor those faiths that are too small to operate their

92. Brownstein, *supra* note 1, at 887 (arguing that “traditional separationist doctrine is sometimes unpersuasive because it resolves cases solely in terms of mega principles and rules” and fails “to explain how and why ostensibly modest connections between government and religion realistically risk the undermining of religious liberty”); Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1118 (2002) (noting that separation “has always lacked a coherent definition”); see also Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 951 (2003) (arguing that justices who oppose all school voucher schemes are “mired in now-antiquated and unpersuasive theories of church-state separation”).

93. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (criticizing separationist decisions of 1960s and 70s for creating a “Scylla and Charybdis” that few legislative actions could survive).

94. Levinson, *supra* note 4, at 52.

95. For a closer evaluation of such arguments, see *infra* Part III.B.

own school systems.⁹⁶ Conversely, strict separationism, at least historically, has affirmed strong protection for the free exercise rights of adherents, a principle especially important for minority faiths.⁹⁷

Notwithstanding these arguments, there have been counterarguments that strict separationism does not necessarily protect the interests of minority religions. For example, although most American Jews have supported strict separation,⁹⁸ some strong voices have claimed that the approach produces a secularized public square that is ultimately negative for Jews and other religious minorities.⁹⁹ These critics have claimed that Jews, as a group “with whom religion has traditionally been conceived as coterminous with life,” should not promote an approach that separates religion from matters of public life such as education.¹⁰⁰ The critics have objected that strict separation denies state assistance to the Jewish religious day schools that constitute the best “source of Jewish identity for Jewish children in America.”¹⁰¹ Critics have also argued that basic monotheistic principles should receive endorsement from government because they form an essential foundation for the very principles of freedom and toleration that protect religious minorities.¹⁰²

96. See *infra* Part III.C.

97. As one leading separationism proponent puts it, “[p]ursuant to the [1970s] ‘separationist’ holdings, churches and religious organizations were left alone to determine their own beliefs and governance, were accommodated in their practices, and were exempted from taxation and intrusive regulation.” Green, *supra* note 92, at 1112. As Douglas Laycock has noted, however, there is a strand of thought that “call[s] itself separationist” but nevertheless opposes any distinctive autonomy for religious exercise; “its defining commitment seems to be to secular supremacy and religious subordination, or at least to religious marginalization.” Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 47 (1997).

98. See, e.g., Jonathan D. Sarna, *Church-State Dilemma of American Jews*, in *JEWS AND THE AMERICAN PUBLIC SQUARE: DEBATING RELIGION AND REPUBLIC* 47, 57 (Alan Mittelman et al. eds., 2002) [hereinafter *JEWS AND THE AMERICAN PUBLIC SQUARE*]; Jack Wertheimer, *The Jewish Debate Over State Aid to Religious Schools*, in *JEWS AND THE AMERICAN PUBLIC SQUARE*, *supra*, at 217.

99. See, e.g., ELLIOTT ABRAMS, *FAITH OR FEAR: HOW JEWS CAN SURVIVE IN CHRISTIAN AMERICA* (1997); *AMERICAN JEWS AND THE SEPARATIONIST FAITH: THE NEW DEBATE ON RELIGION IN PUBLIC LIFE* (David G. Dalin ed., 1992) [hereinafter *AMERICAN JEWS AND THE SEPARATIONIST FAITH*]; Will Herberg, *The Sectarian Controversy over Church and State: A Divisive Threat to Our Democracy?*, reprinted in WILL HERBERG, *FROM MARXISM TO JUDAISM: THE COLLECTED ESSAYS OF WILL HERBERG* 187 (David G. Dalin ed., 1989).

100. Herberg, *supra* note 99, at 208; see also Jerold S. Auerbach, in *AMERICAN JEWS AND THE SEPARATIONIST FAITH*, *supra* note 99, at 15, 17 (describing separationism as a “form of Jewish self-denial whose primary function is to separate religion from life, precisely contrary to Jewish teaching”).

101. David Novak, in *AMERICAN JEWS AND THE SEPARATIONIST FAITH*, *supra* note 99, at 93, 94; see also Herberg, *supra* note 99, at 206–07; *infra* notes 377–78 and accompanying text (describing arguments of Orthodox groups in favor of government aid for religious schools).

102. Will Herberg, *Religion and Public Life*, reprinted in HERBERG, *supra* note 99, at 215, 217; see also COHEN, *supra* note 43, at 182 (noting critics’ argument that “Jewish history, particularly persecution at the hands of Nazis and Communists, taught that Jews fared best in ‘God-fearing’ nations”). See generally *infra* Part III.B.2, notes 325–50 and accompanying text.

Part III explores such debates as they apply to particular areas of Religion Clause jurisprudence. In some respects, I argue, the traditional association of minority rights with strict church-state separationism makes logical and empirical sense. But I also argue that in some situations, such as aid to private religious schools, it is far less clear that strict separationism on balance protects religious minorities: it may even hamper them.

II. DIFFICULTIES AND COMPLICATIONS IN THE MINORITY-PROTECTION APPROACH

Despite the above reasons for making the protection of minority religions a central theme of the Religion Clauses, this approach also presents difficulties and complications.

A. *The First Amendment Protects All Religions*

The most obvious difficulty is that the First Amendment protects all faiths, not just minorities. The unqualified term “religion” in the text contains no suggestion of a difference between faiths—as if only minority faiths had a right to free exercise, and only majority faiths were barred from being state-established. Although religious freedom is certainly concerned with minorities, it is fundamentally a substantive liberty possessed by people of all faiths. Indeed, if courts adopted a rule explicitly protecting minority religions alone, or more than larger faiths, this would itself fly in the face of the deeply ingrained principle that government should treat all religions equally. In striking down a law that facially regulated solicitations by some faiths but not others, the Court said that equal treatment among religions is “the clearest command of the Establishment Clause.”¹⁰³

The response might be that a minority-protection approach aims for equality—but in substantial effect rather than in formal terms. Majority faiths already enjoy advantages from the background legal and cultural arrangements, as I argued earlier.¹⁰⁴ Facially equal constitutional rules may simply ratify those preexisting advantages, while special rules for minority faiths might work to equalize the situation in reality.

This response invokes an analogy to affirmative action programs for racial minorities. Notwithstanding the general presumption against racial

103. *Larson v. Valente*, 456 U.S. 228, 244–45 (1982).

104. *See supra* Part I.A, notes 22–29 and accompanying text.

classifications under the Equal Protection Clause,¹⁰⁵ limited race-conscious measures may be justified if they redress past discrimination against such minorities or seek to ensure a diversity of voices in educational institutions or legislative bodies.¹⁰⁶ Similarly, different Religion Clause rules could apply to minority faiths based on the analogous goal of rectifying the ways in which facially equal rules exclude minority faiths or leave them worse off than majorities. David Steinberg has drawn the analogy with respect to exemptions from laws that burden the free exercise of religion: “[J]ust as elected officials may adopt affirmative action programs, the government should be allowed to adopt religious exemptions that accommodate members of minority religions.”¹⁰⁷ In contrast, “[p]opular religions burdened by a statute or an agency rule should not receive such a religious exemption” but should instead seek to repeal the law altogether.¹⁰⁸

This approach, however, has serious flaws. Any rule that explicitly gives large or “popular” faiths lesser or no free exercise rights contradicts the First Amendment’s text and the moral principle of equal liberty for all faiths. Steinberg’s proposal would refuse legal protection by exemption—whether from courts or legislatures—to any “popular” religious group. A Catholic diocese would have no constitutional claim if a state antidiscrimination law were applied to require it to accept hiring female priests; indeed, Catholics could not even seek or invoke legislative relief in the form of a statutory exemption for clergy. But a smaller or “unpopular” group with a male-only clergy could raise the constitutional claim or invoke the statutory exemption. Steinberg acknowledges that such a rule “might seem terribly unfair” to mainstream faiths.¹⁰⁹ To return to the race analogy: although the Court has permitted some race-conscious measures to benefit minorities, it has insisted that such measures satisfy strict scrutiny, the same standard governing measures favoring the white majority.¹¹⁰ The Court has followed Justice Powell’s argument in his decisive plurality opinion in *Regents of University of California v.*

105. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989).

106. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding some race consciousness in higher-education admissions for purpose of ensuring diversity of student body); *Easley v. Cromartie*, 532 U.S. 234 (2001) (upholding some race-consciousness in legislative districting).

107. David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 120 (1991).

108. *Id.* at 121. Although this passage speaks of exemptions being “allowed,” the proposal actually mandates minority-faith exemptions in many cases.

109. *Id.* at 118.

110. *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003); *Grutter*, 539 U.S. at 326–27; *Croson*, 488 U.S. at 493.

Bakke:¹¹¹ “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”¹¹² Similarly, persons of minority faiths cannot be governed by different First Amendment rules than persons of other faiths.

Even so, a minority-protection approach may be defensible in a different form. Although the same rule must apply to all faiths, the initial choice of that rule can be informed by the importance of protecting minority faiths. We cannot have a constitutional rule that schools run by minority faiths may receive government financial assistance while others may not; but in deciding whether religious schools in general may receive funds, we can inquire whether minorities will be better protected overall if funding is permitted or is forbidden. Part III follows this approach in developing rules for various categories of Religion Clause disputes.

Even with this refinement, I still agree that the goal of the Religion Clauses should not be reduced simply to protecting or equalizing minority religions. The clauses embody other values: free exercise rights for all faiths; equality of status between religious and nonreligious citizens; recognition of the relevance of religion to public life; and others. In various contexts, these other considerations may collide with the interests, preferences, and comfort of religious minorities—as I will note from time to time in Part III.¹¹³ Nevertheless, for the reasons I have given, the protection of minority faiths should remain a significant consideration, and it can be helpful to isolate that consideration and analyze its implications, leaving aside for the moment other principles that might conflict with it. Therefore, this Article concentrates on the arguments and conclusions that follow from the minority-protection approach, even though that should not be the only emphasis in interpreting the Religion Clauses.

B. Problems in Defining Religious “Minorities”

Even if it is legitimate to have constitutional principles that specially aim to protect religious minorities, there remains another difficulty: how to define who is a “minority.” It may seem simple to identify certain faiths as majorities or insiders—Christians, for example—and others as minorities

111. 438 U.S. 265 (1978).

112. *Croson*, 488 U.S. at 494 (quoting *Bakke*, 438 U.S. at 289–90 (opinion of Powell, J.)); see also *Gratz*, 539 U.S. at 271–72 (following Powell’s analysis); *Grutter*, 539 U.S. at 322–24 (following Powell’s analysis).

113. See, e.g., *infra* text following note 366 (noting that religious speech by individual at school event may be protected speech even though it causes discomfort to dissenters who have to listen to it).

or outsiders—Jews, for example. But in fact, the matter is often complicated.

Consider again the issue of race-conscious measures to benefit racial minorities and Justice Powell's decisive opinion in *Bakke*. In another passage, Powell argued that "varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority"¹¹⁴ would raise "intractable" problems:

The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments . . . [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. . . . The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence.¹¹⁵

Powell added that

[d]isparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place."¹¹⁶

The definition problems that Justice Powell described also complicate, perhaps even more seriously, the effort to develop different rules and

114. *Bakke*, 438 U.S. at 295 (opinion of Powell, J.).

115. *Id.* at 295–97 (citations omitted).

116. *Id.* at 298–99 (citations omitted) (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)). For a later critique based on somewhat similar arguments, see Viet Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289 (1998) (arguing that current biracial classifications are inadequate to analyze the problems of multiracial individuals in a multiracial nation).

special protections for minority religious groups. The difficulties fall into several categories.

1. *Geographic Differences*

First, whether a particular religious group constitutes a minority may vary according to geographic location. In the complex patchwork of religious identities in America, a group that is marginal in one region may dominate in another. Indeed, in *Federalist No. 10*, James Madison relied on the diversity of localized majorities, including religious majorities, to argue that a single faction would find it difficult to gain preeminence across the nation.¹¹⁷ As one prominent study of American religion puts it, “[g]eography is [d]estiny”¹¹⁸: there are substantial “regional differences in religious preferences.”¹¹⁹ Consider, for example, how the status of Mormons varies by region. They obviously constitute the dominant faith in Utah and a few other parts of the West.¹²⁰ But almost everywhere else in the nation, they are a small minority,¹²¹ vulnerable to religious discrimination.¹²²

117. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 51, at 351–52 (James Madison) (Clinton Rossiter ed., 1961) (“The degree of security in both cases [civil rights and religious rights] will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.”).

118. BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY ch.3 (1993).

119. *Id.* at 50.

120. In 2000, Mormons made up 66.4 percent of Utah’s population and 88.9 percent of its religious adherents. *See* RELIGIOUS CONGREGATIONS AND MEMBERSHIP IN THE UNITED STATES 2000, at 38–39 (Dale E. Jones et al. eds., 2002) [hereinafter RELIGIOUS CONGREGATIONS]. They also constituted the largest religious group in about 50 other counties in Idaho and the Pacific Northwest. *Id.* at 547 (maps).

121. *Id.* at 6–13. Outside of the Mountain West, Mormons make up at most 1.9 percent of the population and generally less than one percent. *Id.* at 6–13 tbl.2 (Religious Congregations by Region and Group).

122. For example, a study showed that around most of the nation, Mormon churches, like those of other minority groups, have disputes with zoning authorities at a significantly higher rate than their proportion in the overall population. *See* Brief of Amicus Curiae Church of Jesus Christ of Latter-Day Saints at 5a–6a, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), available at 1997 WL 10290 (noting that Mormons make up 1.4 percent of population nationwide but had nearly double that percent of zoning disputes).

Fred Gedicks has pointed out, in conversation, that a group that is marginal in one locality may nevertheless benefit from its numbers and power nationally or in other localities. For example, when Mormons face discrimination in the Southeast, they (unlike, say, Sikhs) can call on a national group of Mormon Church lawyers to assist in defending them. This limits my argument but does not defeat it. A locally small or unfamiliar group will still lack direct electoral influence on local officials. National lawyers can mount defenses, but that ability depends significantly on whether they have constitutional or other legal arguments to raise. Thus Religion Clause doctrine should protect these groups as well.

To take another example, evangelical Protestant Christians dominate numerically and culturally throughout much of the South and the rural Midwest.¹²³ In these areas, evangelically minded officials in public schools sometimes impose dramatically on religious dissenters—as when Jewish students in rural Alabama were required to attend an in-school “birthday party” for Jesus, bow their heads during prayer at school assemblies, and write an essay on “Why Jesus loves me.”¹²⁴ There are reported instances of evangelical student religious clubs receiving favored treatment from the school in ostensibly neutral student club programs. For example, in one Oklahoma grade school, the student Christian club, though not formally school sponsored, was the only organization that met before classes.¹²⁵ When students arrived on buses in the morning, only those attending the religious club were permitted to enter the building; others waited outside, or in bad weather in the gym or cafeteria.¹²⁶ The school’s favoritism in practice pressured students to join the group. In these and other cases, objecting students have faced peer stigmatization at best, and official harassment and abuse at worst. In the Oklahoma case, children who complained about the arrangements for the Christian club were called “devil-worshippers” by other students; two complaining children who had played school sports were omitted from recognition by school officials at the annual sports banquet; one child “was the victim of a hair pulling incident committed by a school employee”; and the family’s home “was destroyed by a fire of suspicious origin.”¹²⁷

123. In thirteen states of the former Confederacy (including Kentucky and Missouri) as of 1990, Baptists—who are largely evangelical in orientation in the South—ranged from 29 to 55 percent of the population. KOSMIN & LACHMAN, *supra* note 119, at 52 map 1A; *id.* at 88–89 tbl.3-1. Baptists, of course, make up only a part of the overall coalition of evangelical Protestants.

124. Sue Ann Pressly, *Tough Lessons in an Alabama Town; Jewish Children Persecuted at School, Parents Charge in Lawsuit*, WASH. POST, Sep. 2, 1997, at A3 (detailing allegations, never controverted, in lawsuit eventually settled).

125. See *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1405 & n.13 (10th Cir. 1985).

126. See *id.* at 1405, n. 13.

127. *Id.* at 1397. Likewise, in the Alabama case, it was alleged that “[the children] have been taunted as ‘Jewish jokers’ and ‘Jew boys’; swastikas have been drawn on their lockers, book bags and jackets; and their yarmulkes have been ripped from their heads during High Holy Days, as classmates played ‘keep away’ with them.” Pressly, *supra* note 124, at A3. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), where Mormon and Catholic families challenged a Texas school district’s policy of prayer by an elected student before football games, “[t]he District Court permitted [the plaintiffs] to litigate anonymously to protect them from intimidation or harassment.” *Id.* at 294. For further evidence of the harassment of dissenters in official-prayer cases, see, for example, Frank S. Ravitch, *A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools*, in *LAW & RELIGION: A CRITICAL ANTHOLOGY* 296, 298–303 (Stephen M. Feldman ed., 2000).

But by contrast, evangelical Protestants scarcely dominate in an area such as, say, metropolitan New York.¹²⁸ New York public school officials have repeatedly tried, with backing from courts, to exclude evangelical groups from meeting in the schools on the same terms as other voluntary groups.¹²⁹ Most of the cases involved no indication that the evangelicals would dominate the forum or coerce other students.¹³⁰ In each case, the restrictive position of the schools and lower courts was overturned as discriminatory by the Supreme Court.¹³¹ The New York officials were nearly as recalcitrant in restricting evangelicals as Southern officials have been suppressing dissenters in their communities.¹³²

One is tempted to recommend that student religious clubs be treated with suspicion in the rural South but highly protected in New York. But we cannot have explicitly divergent rules: as Justice Powell pointed out in *Bakke*, constitutional doctrine must stand above “the pragmatic political judgments of a particular time and place”¹³³ and, at least in some form, must be uniform across the nation. It is a challenge to develop a set of rules that will maximize the protection of religious minorities across the wide variety of America’s religious contexts.¹³⁴

128. According to statistics, New York is not highly irreligious, but more than almost any other major city, its makeup is non-Protestant and especially non-evangelical, with relatively large percentages of Catholics, Jews, Muslims, Hindus, and Buddhists. KOSMIN & LACHMAN, *supra* note 119, at 75–76.

129. See, e.g., *Good News Club v. Milford Cent. Sch. Dist.*, 21 F. Supp. 2d 147 (N.D.N.Y. 1998), *aff’d*, 202 F.3d 502 (2d Cir. 2000) (upholding school policy forbidding religious meeting of elementary-school students in classrooms after school on same terms as other groups), *rev’d*, 533 U.S. 98 (2001); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, No. 95 Civ. 5501 (LAP), 1996 WL 700915 (S.D.N.Y. Dec. 5, 1996), *aff’d*, 127 F.3d 207 (2d Cir. 1997) (upholding school policy barring church from applying to use classrooms on weekends for services on same terms as other groups); *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991), *aff’d*, 959 F.2d 381 (2d Cir. 1992) (upholding school policy forbidding church group to meet in classrooms after hours on same terms as other community groups), *rev’d*, 508 U.S. 384 (1993); *Brandon v. Bd. of Educ.*, 487 F. Supp. 1219 (N.D.N.Y.), *aff’d*, 635 F.2d 971 (2d Cir. 1980) (holding that a school may and even must forbid evangelical student religious club to meet in high school classroom before hours).

130. The possible exception is *Good News Club*, where the dissent cited evidence that only four other outside groups had met in the school, and the religious club was the only one meeting immediately after school in classrooms. 533 U.S. at 144–45 (Souter, J., dissenting).

131. The exclusion of high-school religious groups in *Brandon* was effectively reversed in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act. 20 U.S.C. §§ 4071–4074). The *Lamb’s Chapel* and *Good News Club* exclusions were directly reversed by the Supreme Court. See *supra* note 129. The *Bronx Household of Faith* exclusion fell as a result of the Supreme Court’s decision in *Good News Club*. See *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 331 F.3d 342 (2d Cir. 2003).

132. See *Good News Club*, 533 U.S. at 109 n.3 (noting the “remarkable” fact that the Second Circuit did not cite the earlier *Lamb’s Chapel* ruling “despite its obvious relevance to the case”).

133. *Bakke*, 438 U.S. at 299.

134. Professor Schragger questions the contention that “local political institutions are often hostile to religious minorities and therefore particularly in need of central oversight—judicial or otherwise,”

2. Numerical Minority, Cultural Power

To add to the complications, geographical numbers do not tell the whole story of whether a group is vulnerable to political or legal pressure. For one thing, a group may be small and still have power as a political or cultural elite. The Episcopal Church, for example, makes up only 0.8 percent of the total population,¹³⁵ but it can claim roughly one quarter of the nation's 42 presidents (including two of the last six),¹³⁶ 30 of its 114 Supreme Court justices (two or three on the current Court),¹³⁷ and 13 of the 100 senators as of 1999.¹³⁸ Few would suggest that Episcopalians are especially vulnerable to coercion by law or pressure by the culture. For an accurate map of vulnerable faiths, the majority-minority distinction needs to be supplemented and qualified by a distinction between political, social, or cultural "insiders" and "outsiders." But the latter distinction is far less objective than are the simple membership statistics. The insider/outsider distinction is much more like "the variable sociological and political

and instead "argues that local government—and more generally the decentralization of power—is a robust structural component of religious liberty." Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1815 (2004). I have at least two problems with this analysis as applied to the protection of religious minorities. First, I do not believe that Professor Schragger rebuts the Madisonian argument that oppressive factions on religious matters form more easily at smaller levels of government. See *supra* note 117. The evidence of local treatment of various groups—oppression of Jews or atheists in the rural South, hostility toward serious evangelicals in schools in parts of the urban Northeast—indicates that Madison's insight remains valid. See *supra* notes 120–32; see also *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526–28 (1993) (describing local hostility in south Florida toward Santeria sect). By contrast, we have not seen legislation or policies attacking small religious groups emerge from Congress; indeed, much of Congress's recent activity in the area of religion, such as the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(b) (2000), has sought to protect minority faiths, has done so through across the board standards applicable to all faiths, and has left room for governmental interests to limit religious freedom where necessary. For a policy defense of RFRA and similar laws as a "moderate" approach to religious freedom issues, see Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, And Why They Are Wrong*, 21 CARDOZO L. REV. 415, 417–32 (1999).

Second, when the article argues that "dispersal of political authority . . . guard[s] against governmental overreaching", I believe that it underestimates the costs of hostility to small groups in a particular locality. See Schragger, *supra*, at 1815. A group whose practice is substantially restricted by local laws may be able to avoid them, but only by "migrat[ing] to some other and more tolerant region." See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). The First Amendment's solution is to protect religious adherents' ability to live as a minority in a locality, not their ability to uproot and move somewhere more in line with their religious practices.

135. RELIGIOUS CONGREGATIONS, *supra* note 120, at tbl.1 (Religious Congregations by Group for the United States).

136. *Religious Affiliation of U.S. Presidents*, at http://www.adherents.com/adh_presidents.html (last visited Nov. 15, 2004) (listing 11 Episcopalians presidents, including Ford and the first Bush).

137. See William G. Ross, *Supreme Court Justices and Their Religious Beliefs*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 495, 495 (Paul Finkelman ed., 2000).

138. See *Religious Affiliation of 106th Congress*, at http://www.adherents.com/adh_congress.html (last visited Nov. 15, 2004).

analysis” that Justice Powell warned falls outside the judicial competence.¹³⁹

Moreover, a group may have numerical or cultural power in some institutional sectors of society and lack such power in other sectors. Therefore, the sector in which the particular religious freedom issue arises can be crucial. For example, often a state university reflects a very different culture and power alignment than does the overall state in which it is located. Traditionalist Christian beliefs on theological and social matters, from Biblical literalism to the creation-evolution debate to the immorality of homosexuality, are widespread in many states in the South and Midwest. But such views are the decided minority among faculty and administrators in higher education.¹⁴⁰

Such patterns of belief appear not only statistically in polls, but anecdotally in reported cases. Nebraska’s overall population may include a high percentage of conservative Protestants,¹⁴¹ but that did not help Douglas Rader, an evangelical student at a state university campus who complained about the University’s requirement that he live in a dormitory as a freshman.¹⁴² When Rader asked permission to live in an evangelically-oriented rooming house because the dorms’ permissive atmosphere on sex and drinking interfered with his faith, officials replied that the evangelical house lacked the “diversity of thought” that the University desired, and that students with religious objections to the dorms should simply not attend the University.¹⁴³ Likewise, even though most Alabamians likely believe in divine creation rather than evolution, a University of Alabama physiology professor was sanctioned by his department for introducing creationist ideas in his classes.¹⁴⁴ And even though Mormons predominate in Utah, a Mormon drama student at the University of Utah who objected to repeating profanities in a play was denied an accommodation by her professor, who remarked that she should

139. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 297 (1978).

140. See, e.g., Fred Thalheimer, *Religiosity and Secularization in the Academic Professions*, 46 SOC. OF EDUC. 183, 184 (1973) (“[T]here is strong evidence . . . that adherence to traditional religious beliefs and practices is considerably less widespread among academicians than among the general population.”).

141. See KOSMIN & LACHMAN, *supra* note 119, at 51 (citing religious-affiliation statistics, describing Nebraska as “a Republican, patriotic, God-fearing, socially conservative middle-American state with traditionally defined male and female roles and a belief in the validity of old-fashioned family values”).

142. *Rader v. Johnston*, 924 F. Supp. 1540, 1554 n.26 (D. Neb. 1996).

143. *Id.*

144. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding University’s discretion to prohibit such remarks).

speak with “other good Mormon girls” on how to reconcile her beliefs with the demands made of actors.¹⁴⁵ This apparent sarcasm, coupled with the drama department’s willingness to accommodate other student requests, led the Tenth Circuit to find a genuine issue of fact about whether the department acted out of “anti-Mormon sentiment.”¹⁴⁶

My point here is not that university officials acted out of religious bigotry in these particular cases (although they may well have). I raise the cases only to confirm that sometimes religious views common in the general population are, in the eyes of academic officials, unfamiliar, unattractive, and even worthy of restriction. A majority view in the broader culture may be a minority in the government institution acting in the particular case.

3. *Defining the Relevant Competing Faiths*

Finally, the determination of which is a minority or outsider faith depends on a prior determination of how to define and categorize religious groups. What are the relevant “faiths”? The answer is not always self-evident, as the case of evangelicals again shows. As Steven Smith points out, if evangelicals are lumped together with all other Christians, they qualify as “insiders” within a large majority, but if they are distinguished from other Christians such as Catholics and liberal Protestants, they may sometimes be an outsider minority.¹⁴⁷ Smith concludes from this that categories like minority or outsider “are so elastic and manipulable as to be almost useless.”¹⁴⁸ Although I will try to show how a minority-protection emphasis can be viable, I agree that distinctions of minority/majority and outsider/insider are highly contestable and manipulable. This is largely because there are several different possible “maps” for defining the key religious distinctions and categories in America today. Each map leads to a different categorization of the relevant competing faiths, and therefore to a different judgment about who constitutes the minority. And choosing which of these maps best reflects a particular situation is, again, the kind of variable analysis that probably exceeds the competence of courts.

145. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004).

146. *Id.* The case has since settled.

147. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 217 (1991) (“If one frames a category broadly—‘Christian,’ for example, or ‘theist’—then nearly all American citizens will be ‘insiders.’ If one defines categories more specifically—by denomination, for instance—then everyone will be part of a religious minority.”).

148. *Id.*

a. Traditional Denominational Differences

Many analyses of church-state relations rest on a traditional map of American religions that emphasizes differences of “creed, religious observance, or ecclesiastical politics.”¹⁴⁹ In this model the key distinctions lie between Christians and Jews (and other non-Christian faiths), and in some instances between Protestants and Catholics.

Under the Christian-Jewish distinction, obviously Christians constitute the overwhelming majority and Jews or other non-Christians the outsider minority.¹⁵⁰ Many analyses of religion and the state from a minority-rights perspective employ this model. Historian Naomi Cohen writes that Jews have been “the quintessential outsiders” in “a society whose culture was steeped in Christianity.”¹⁵¹ Stephen Feldman writes of “the Christian domination of American society and culture” and of Jews as “the prototypical religious outgroup,” and he generally equates “religious outsiders” with “non-Christians.”¹⁵² Suzanna Sherry writes that “modern American Judaism” differs in numerous ways from Christianity, “the dominant religious sect in the United States,” and therefore that permitting more religion in the public square would harm Jews and benefit Christians.¹⁵³

A second traditional religious division, between Protestants and Catholics, is the central motif of Michael Newsom, who argues that America “was and still is a Protestant Empire.”¹⁵⁴ Professor Newsom sees the dominance of Protestantism as not merely historical legacy, but as “present reality.”¹⁵⁵ This dominant Protestantism is marked by “an opposition to Roman Catholicism” and “a dedication to convert the people of the United States to Protestantism,” although it usually pursues these goals through “attrition and restraint . . . rather than the use of the most

149. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 105 (1991).

150. In the 2001 American Religious Identification Survey (ARIS) by the City University of New York, 76.5 percent of Americans gave their religious identity as Christian. *ARIS*, http://www.gc.cuny.edu/studies/key_findings.htm (last visited Nov. 15, 2004) [hereinafter *ARIS Survey*]. However, this is a significant drop from the 1990 figure of 86.2 percent. *Id.*

151. COHEN, *supra* note 43, at 3.

152. FELDMAN, *supra* note 4, at 229; Feldman, *Religious Minorities*, *supra* note 4, at 7–8 n.27.

153. Sherry, *supra* note 4, at 508, 501.

154. Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L. J. 219, 222 (2002) [hereinafter Newsom, *Common School Religion*]. See generally Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187 (2001) [hereinafter Newsom, *Protestant Empire*].

155. Newsom, *Protestant Empire*, *supra* note 154, at 264.

violent forms of coercion.”¹⁵⁶ Newsom particularly focuses on activity in public schools by evangelical Protestants, whom he describes as “aggressive, typically majoritarian religious groups” visiting “psychological harm . . . upon school children belonging to minority religious groups and their families.”¹⁵⁷ Whether the religious activity in public schools is initiated by students or by school officials, in both cases he sees the schools providing “instrumental assistance to the forces of the Protestant Empire.”¹⁵⁸

This creedal-liturgical-denominational map certainly reflects aspects of religious identity and difference in America. These traditional lines of religious conflict came over from Europe and have remained important in America. The struggle in the founding era involved established Protestant denominations imposing upon Catholics, Jews, and Protestant dissenters.¹⁵⁹ A generalized Protestant consensus throughout the nineteenth and early twentieth centuries surely marginalized Catholics and Jews around the nation.¹⁶⁰ Moreover, this model still captures important features of religious difference and conflict in many places today, for example in the Alabama school where teachers forced Jewish children to celebrate Jesus’s birthday. The frequent issues where government actions affect non-Sunday worshipers—employment requirements, scheduling of government events on Friday and Saturday, and so forth—also generally involve Christian majority assumptions conflicting with the practices of non-Christian adherents.

But the creedal-liturgical-denominational model fails to explain many other issues and disputes in American religion and culture. It assumes too much of a homogeneous Christian or Protestant majority, and it overlooks how believers of different creeds align with each other on important

156. Newsom, *Common School Religion*, *supra* note 154, at 222–23 (adding, however, that methods of violent coercion “remain in the background”). In Professor Newsom’s view, the Protestant Empire also is characterized by “pan-Protestantism”—a pattern of cooperation between Protestant groups, even where there may also be conflict and competition between them—and by “a belief in social reform.” Newsom, *Protestant Empire*, *supra* note 154, at 195 n.60. For further discussion, see *infra* notes 187–93 and accompanying text.

157. Newsom, *Common School Religion*, *supra* note 154, at 225.

158. *Id.* at 225–26, 227 (calling any distinction between student-initiated and school-sponsored activity “a distinction without a difference” and “empty formalism at its worst”).

159. *See, e.g.*, COHEN, *supra* note 43, at 22–30 (describing Sunday laws, restrictions of office to Christians, Christian official oaths, and other disabilities on Jews); Gaffney, *supra* note 37, at 279–80 (describing Protestant tests for office in several states, coercive Protestant establishment in Maryland, and other impositions on Catholics); McConnell, *supra* note 65, at 1437–49 (describing struggle of Baptists and other evangelicals for religious freedom in Virginia and New England).

160. *See supra* notes 33, 35 and accompanying text; *see also* COHEN, *supra* note 43, at 65–92 (describing effect of nineteenth century “Christian agenda” on Jews).

cultural and political issues. Several very different models are necessary to capture other key points of religious difference today. The other models produce different conclusions about who is a religious minority or outsider.

b. Traditionalist Versus Progressive and Religious Versus Secular

In his book *Culture Wars*, sociologist James Davison Hunter argues that “it is increasingly difficult to speak of the Protestant position or the Catholic position or the Jewish position (or, for that matter, the Mormon or Buddhist position) vis-à-vis American public culture.”¹⁶¹ Rather,

the politically consequential divisions are those that separate the orthodox from the progressive *within* religious traditions. And orthodox and progressive factions of the various faiths do not speak out as isolated voices but increasingly as a common chorus. In this, the political relevance of the historical divisions between Protestant and Catholic and Christian and Jew has largely become defunct.¹⁶²

Douglas Laycock agrees that in many cases, “[t]he principal fight is no longer between Catholics and Protestants, or between Christians and Jews, or even between believers and nonbelievers,” but between “‘orthodox’ and ‘progressive’ elements of all these groups.”¹⁶³ He further explains the “religious dimensions” of the conflict:

In Hunter’s terminology, the orthodox remain committed “to an external, definable, and transcendent authority.” Usually this transcendent authority is religious, but for culturally conservative nonbelievers, it may be natural law or some other source of moral absolutes. The progressives tend to view truth “as a process, as a reality that is ever unfolding.” Religious progressives thus tend to “resymbolize historic faiths according to the prevailing assumptions of contemporary life.”¹⁶⁴

161. HUNTER, *supra* note 149, at 105.

162. *Id.*

163. Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1073 (1996) (citing HUNTER, *supra* note 149, at 42–66).

164. *Id.* at 1073 (quoting HUNTER, *supra* note 149, at 44–46); see also, e.g., Gregory C. Sisk, Michael Heise & Andrew Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Analysis of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 565–66, 580 (2004) (distinguishing between denominational and traditionalist-progressive divides and describing importance of latter).

The traditionalist/progressive divide has replaced the older creedal-liturgical-denominational divides in many contexts. Progressives of various faiths were the first ones to engage in ecumenical dialogue and work together to advance shared views on moral-political issues.¹⁶⁵ More recently, traditionalists among Protestants, Catholics, Jews, and even Muslims—who once fought or at best ignored each other—have come to share views on issues such as abortion and homosexuality and cooperate to advance those views politically.¹⁶⁶ Correspondingly, traditionalists and progressives within each faith or denomination wrestle with each other so much that denominational identity often matters very little. Within American Protestantism, the two camps regularly take sharply opposed positions on church-state relations, abortion, gay rights, and various theological matters.¹⁶⁷ The homosexuality debate has generated serious talk of schism in two major Protestant denominations, the Episcopal and Methodist.¹⁶⁸ Similar debates contribute to divisions between the Orthodox and Reform camps of Judaism.¹⁶⁹

Alongside the traditionalist/progressive divide lies a “religious/secular” divide: between citizens who derive their social-political commitments from religious norms and those who derive them from secular norms. This distinction overlaps some with the traditionalist/progressive conflict. Although many progressives are inspired by religious faith, they tend, as Hunter notes, to “resymbolize historic faiths according to the prevailing assumptions of contemporary life.”¹⁷⁰ Religious progressives are more willing than religious traditionalists to draw explicitly on secular norms and insights for their moral and political beliefs.

Nevertheless, the religious-secular divide differs from the traditionalist-progressive. Churches that are left-leaning theologically and politically resist some secular trends that traditionalists tolerate or embrace. For

165. HUNTER, *supra* note 149, at 99–101.

166. *See, e.g.*, Laycock, *supra* note 163, at 1073–74; Carolyn Lochhead, *Alliance Backs Ban on Gay Marriages; Religious, Ethnic Leaders Join Forces*, S.F. CHRON., Sept. 18, 2003, at A3, available at 2003 WL 3763160 (noting presence of Muslim groups in coalition seeking constitutional amendment against same-sex marriage).

167. *See generally* HUNTER, *supra* note 149 (describing the conflicts at length). Just two of the other works describing this realignment include DEAN HOGE, *DIVISIONS IN THE PROTESTANT HOUSE* (1976); and ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* (1988).

168. *See* Laurie Goodstein, *Conservative Methodists Propose Schism Over Gay Rights*, N.Y. TIMES, May 7, 2004, at A16; Jane Lampman, *Anglicans Gather to Confront Historic Rift*, CHRISTIAN SCIENCE MONITOR, Oct. 14, 2003, at 1.

169. Carlyle Murphy, *A Haven for Gay Jews: After 25 Years, Congregation Is Thriving*, WASH. POST, Apr. 1, 1999, at B1; *see also* COHEN, *supra* note 43, at 232, 241 (noting disputes between Orthodox and other Jewish bodies on church-state issues).

170. HUNTER, *supra* note 149, at 44–45.

example, liberal churches recently challenged portions of a Minnesota “conceal-carry” law that gave non-felons the right to carry guns in public and that limited the ability of property owners, including churches, to bar guns from their premises.¹⁷¹ The law’s “conservative” proponents made secular arguments that increased carrying of guns reduces crime; the “progressive” churches in the minority appealed to biblical themes of peacemaking and sought a free exercise exemption from the general norm.¹⁷² The same is true on other issues: for example, some proponents of same-sex marriage make Biblical arguments about equality and inclusion, while defenders of traditional marriage often argue their position in secular rather than religious terms.¹⁷³

It might seem that the religious are the overwhelming majority everywhere in America, and the secular the minority. The share of Americans who say they have no religious affiliation, though rising, had still reached only 14 percent in 2001; and 81 percent identify with a particular religious group.¹⁷⁴ The numbers who believe in God are substantially higher.¹⁷⁵ But the numbers who take their religion seriously are, and always have been, substantially smaller. In the 2001 survey, only 37 percent described their outlook on life as “religious”; 38 percent chose the more ambivalent response of “somewhat religious.”¹⁷⁶ Although this doubles the numbers of those with a secular outlook, it suggests that a large group identifies with religion but not vigorously. Further supporting this is the fact that “nearly 40 percent of respondents who identified with a religion indicated that neither they themselves nor anyone else in their household belongs to a church or some other similar institution.”¹⁷⁷ The researchers conclude that a prominent feature of modern America is “invisible religion,” which “legitimizes the retreat of the individual into

171. See, e.g., Karen Youso, *Religious Groups Tackle New Conceal-and-Carry Gun Law*, MINN. STAR-TRIB., May 24, 2003, at 1B.

172. *Id.*

173. Compare Walter Wink, *To Hell with Gays?*, THE CHRISTIAN CENTURY, June 5, 2002, at 32, available at 2002 WL 9378511 (claiming that “the Bible has no sex ethic,” but rather behavior “is to be critiqued by Jesus’ love commandment,” which calls for behavior that is “responsible, mutual, caring and loving”); with Stanley Kurtz, *Beyond Gay Marriage: The Road to Polyamory*, THE WKLY. STANDARD, Aug. 4, 2003, available at 2003 WL 6818991 (claiming a “rational basis for blocking both gay marriage and polygamy, [preserving a stable family environment for children, that] does not depend upon a vague or religiously based disapproval of homosexuality or polygamy”).

174. ARIS Survey, *supra* note 150 (noting rise in “no affiliation” category from 8 percent in 1990).

175. See Bill Cessato, *9th Circuit Didn’t Diminish God*, WICHITA EAGLE, Mar. 6, 2003, at 3, available at 2003 WL 4194939 (citing “Gallup Organization’s 2002 Index of Leading Religious Indicators [finding that] 95 percent of Americans believe in God or a universal spirit”).

176. ARIS Survey, *supra* note 150, at Exhibit 3.

177. *Id.*

the ‘private sphere’ and sanctifies his (or her) subjective autonomy.”¹⁷⁸ The divide between basic religious identity and serious religious commitment is familiar and longstanding. In 1980 polls, 94 percent of Americans reported professed belief in God, but only 58 percent reported that religion was “very important” to them.¹⁷⁹ Even in the 1950s, a high point for American religiosity in which large majorities of Americans described religion as “very important,” 54 percent of those who claimed such importance nevertheless said that their religious beliefs had no effect “on [their] ideas of politics and business.”¹⁸⁰

Thus the real “religious-secular” divide may be between citizens who take religion seriously as a guide to beliefs and behavior and those who do not. And although the seriously religious may be too diffuse and widespread to constitute a true “discrete and insular minority,” they are sometimes the cultural outsiders, singled out by a secular-oriented society for discrimination that milder adherents do not receive. The Third Circuit recently ruled that although prosecutors could not use peremptory challenges to exclude a potential juror based on his mere religious affiliation, they could exclude him based on his “strong religious beliefs” and “heightened involvement” in religious matters (he attended church and read the Bible regularly).¹⁸¹ More controversially, it can also be argued that a distrust of deeply felt religion appears in Supreme Court decisions denying aid to “pervasively sectarian” schools.¹⁸² Likewise, it is at least disconcerting that the Court in *Locke v. Davey*¹⁸³ has now allowed states to deny students college scholarship aid, available to students pursuing hundreds of different majors, solely because the students in question are pursuing ministerial training—in Justice Scalia’s words, solely because their “belief in their religion is so strong that they dedicate their study and their lives to its ministry.”¹⁸⁴

178. *Id.* (quoting THOMAS LUCKMANN, *THE INVISIBLE RELIGION* (1967)).

179. KOSMIN & LACHMAN, *supra* note 119, at 9 tbl.1-1.

180. HERBERG, *supra* note 52, at 73 (citing polls).

181. *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003).

182. *See Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion) (finding that a rule against aid to pervasively religious schools “reserve[s] special hostility for those . . . who think that their religion should affect the whole of their lives”).

183. 540 U.S. 713 (2004).

184. *Id.* at 733 (Scalia, J., dissenting). Of course, the exclusion of students pursuing clergy training from state aid programs may be defensible under other Religion Clause criteria. But it should be recognized that under at least one important map of religious differences, those students are in the religious minority because of the seriousness of their faith commitment. If a minority-protection approach governs, this exclusion should be treated as constitutionally suspect.

Compared with the longstanding creedal or denominational patterns, these other maps of religious divides—traditional/progressive, religious/secular—produce different conclusions about who is a religious minority or outsider. For example, although fundamentalists and evangelicals belong to an overwhelming Christian majority, they may be a minority or outsiders in some places and on certain issues. In some jurisdictions, progressive Christians join with progressive Jews and nonbelievers to pass gay-rights laws, which raise significant religious freedom questions if they are applied to traditionalist religious organizations or to relatively private economic conduct like the rental policies of small landlords.¹⁸⁵ These struggles will surely escalate in coming years as gay rights become more widely accepted. Similarly, although Christians as a whole dominate the religious map of Nebraska, the traditionalist views of Douglas Rader were outsider views to state university officials. One of them, a Baptist minister, said that in his judgment the atmosphere in the dorms posed no threat to students of Christian faith¹⁸⁶—an example of how beliefs among Christians sharply conflict. I use evangelical Christians as only one example. In other settings, like most of the rural South, non-Christians and religious progressives would constitute the minority, vulnerable to pressure by an evangelically oriented majority.

This variety of maps undercuts many of the premises of other scholars who identify “religious minorities” and argue for their protection. Professor Newsom discusses the differences between evangelical and liberal Protestants,¹⁸⁷ but at crucial points in his argument the distinction disappears. For example, he states that “the Protestant Empire”—Protestant, unqualified by “evangelical”—“seeks to convert [other Americans] to evangelical Protestantism.”¹⁸⁸ This is important to his

185. See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (1999), *vacated as unripe*, 220 F.3d 1134 (9th Cir. 2000) (landlord refusing to rent to unmarried cohabiting couple); *Walker v. First Orthodox Presbyterian Church of San Francisco*, No. 760-028, 1980 WL 4657 (Cal. Super. Ct. Apr. 3, 1980) (church refusing to hire openly gay organist); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) (same).

186. *Rader*, 924 F. Supp. at 1553–54 (noting that the official unconstitutionally “judg[ed] Rader’s petition in terms of his own religious experiences”).

187. See, e.g., Newsom, *Common School Religion*, *supra* note 154, at 236–37 (describing how, although liberal Protestants in 1800s supported religious exercises in public schools, the policies ultimately were “shaped by evangelical Protestants, rather than liberal[s]”); *id.* at 237 (recognizing that “[l]iberal Protestantism of the present day . . . tends to” oppose evangelical attempts to impose religion in public schools); see also Newsom, *Protestant Empire*, *supra* note 154, at 249.

188. Newsom, *Common School Religion*, *supra* note 154, at 226; see also *id.* (arguing that Protestant forces “strive to convert school children belonging to minority religions to some form of evangelical Protestantism”).

argument. He calls evangelicalism a “majoritarian religion” that “visit[s] psychological harm on the followers of minority religions,”¹⁸⁹ but in many locations and institutional contexts it would require a combination of very disparate evangelicals and liberals to produce any Protestant majority. Professor Newsom asserts that “pan-Protestantism”—“a pattern of cooperation between Protestant groups, even where there may also be conflict and competition between them”—continues to be a powerful force in American religious life, but the evidence for this is not very strong.¹⁹⁰

The image of a dominant, proselytizing Protestantism fails to capture conditions in much of America today. With traditionalist and progressive Protestants often at each other’s throats, there is typically no single set of “goals and objectives of an American Protestant empire,” no common “social reform that serves the interests of the Protestant empire,” and little “affinity of various Protestant sects” that can be reinforced by “their shared political and legal control of the common schools.”¹⁹¹ As for proselytization—or in more neutral language, preaching to seek conversions—mainline Protestant bodies now tend to be at least lukewarm on it and often to oppose it as a form of triumphalism inconsistent with Christian tolerance and humility.¹⁹² Proselytizing faiths dominate only in

189. *Id.*

190. See Newsom, *Protestant Empire*, *supra* note 154, at 195 n.60. His historical examples of common projects among Protestants include the 19th-century development of public schools, the revivalism of the first and second Great Awakenings, and the movement to prohibit alcohol. See, e.g., *id.* at 195 n.60, 242–43, 253–54. But today large numbers of evangelicals regard the public schools as hostile, while most liberal Protestants reject any kind of revivalistic efforts to convert others to Christianity, and significant alcohol prohibitions are limited to a few places in the rural South and Midwest (where, I have already conceded, evangelical Protestantism tends to hold a dominant position alone). See *supra* notes 123–27 and accompanying text; *infra* note 192. Today liberal and evangelical Protestant views on contested social issues are usually in conflict, with a few exceptions such as opposition to state-sponsored gambling. Professor Newsom also emphasizes the widely shared Protestant doctrine concerning the Christian Eucharist: that the bread and wine merely represent or memorialize Christ’s body and blood, as opposed to becoming the body and blood as in Catholic doctrine. Newsom, *Protestant Empire*, *supra* note 154, at 248. This difference is real, but it plays very little role in disputes over religion and public life. The few exceptions may be cases where the sacramental use of wine is at issue, and the question whether Catholic student groups will be barred from meeting in schoolrooms like other student clubs because they must have a non-student—a priest—to celebrate Mass. On the latter question, Professor Newsom raises a valid point. See *infra* notes 361–63 and accompanying text.

191. See Newsom, *Common School Religion*, *supra* note 154, at 226.

192. See, e.g., Milton J. Coalter, *Presbyterian Evangelism: A Case of Parallel Allegiances Diverging*, in *THE DIVERSITY OF DISCIPLESHIP: THE PRESBYTERIANS AND TWENTIETH-CENTURY CHRISTIAN WITNESS* 33, 53 (Milton J. Coalter et al. eds., 1991) (describing how mainline denominations concluded in 1960s that “evangelical outreach had ignored serious social evils . . . in an effort to bolster the size and financial strength of their particular institutions,” and how denominations adopted “a muted verbal witness in the interest of cooperation with non-Christians for social justice”); Ernest Tucker, *Planned Baptist Gathering Touches Off Controversy*, CHI. SUN-TIMES, Dec. 1, 1999, at

places where evangelicals dominate, and where evangelicals are marginal so is proselytism. Recall the stiff resistance to student religious clubs in New York, where evangelicals are at their weakest.¹⁹³

Likewise, Professor Feldman's description of a unified dominant conservative Christianity¹⁹⁴ probably captures the situation in Oklahoma, but in other contexts it is inapplicable. The numbers for Christianity include the two groups of progressive and traditional Christians, and in many places and on many issues, these two camps are far too busy fighting each other to focus on anything that unifies them as against Jews.

Similar criticisms apply to Professor Sherry's account of how to protect religious minorities. Sherry has long advanced the ideal of a secular public sphere from which religious perspectives are excluded.¹⁹⁵ Most recently she has argued that "allowing religious reasons to justify public policy will have a negative effect on religious minorities, especially Jews."¹⁹⁶ She explains that most Jews, those in the Reform and Conservative bodies, have embraced the ideal of secular reason stemming from the Enlightenment. Thus, the increased use of religion in public arguments will expand the influence in society of "unquestioning faith"—which she associates with Christianity¹⁹⁷—and conflict with the method by which most Jews reason about public matters.¹⁹⁸

Sherry's argument partly reflects the erroneous premise that there is a single set of "faith"-based Christian arguments. But her argument also oversimplifies the position of American Jews. She concedes, as she must, that the "inclination toward reason . . . is of great concern to some Orthodox Jews," the Jews "opposed to the rationalism of the Enlightenment."¹⁹⁹ Her answer? "But fewer than eight percent of American Jews consider themselves Orthodox."²⁰⁰ In other words, we should identify the interest of Jews as a minority group by means of what most Jews think, ignoring the smaller group of Jews who think quite differently. This is an ironic argument indeed in an article whose titular concern is to make America "safe for religious minorities."

18, available at 1999 WL 6568641 (describing opposition of Chicago mainline Protestants to proposed Southern Baptist evangelistic campaign in city).

193. See *supra* notes 128–32 and accompanying text.

194. See FELDMAN, *supra* note 4, at 282–86.

195. See, e.g., Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996).

196. Sherry, *supra* note 4, at 502.

197. *Id.* at 508.

198. *Id.* at 508–09 ("Thus, to appeal to religious belief is to appeal to faith rather than to reason, and in the United States the appeal to faith necessarily excludes most Jews.").

199. *Id.* at 511, 513.

200. *Id.* at 513.

Where the most relevant divide is Christian-Jew, Jews may possess a single interest. But where the more relevant cultural divide is traditionalist-progressive, one sector of Judaism may align more with the cultural majority, the other with the cultural minority. Although Sherry treats Jews as a core religious minority, she simultaneously argues that “being Jewish has always been at least as much a question of culture and ritual, of community and heritage, as of faith,” and she quotes approvingly the thesis that “Jews lost their faith so easily because they had no faith to lose.”²⁰¹ These statements betray the possibility she never considers: that secularized Jews sometimes operate less as a minority than as part of the very large group in America that has fully embraced the Enlightenment. In many places and institutions, this group is the numerical and cultural majority; Sherry herself proclaims that “[t]he Age of Reason has replaced the centuries-long age of religion.”²⁰² Often the traditionalist wing of Orthodox Judaism, divorced from a dominant secular culture, constitutes the religious minority that most needs protection from imposition of majoritarian values through government. Significantly, when Sherry criticizes the Court for refusing to protect Jewish practices from burdensome general laws, the cases she cites all involve Orthodox litigants.²⁰³ She has no case in which a less traditionalist Jewish group—Reform or Conservative—was subjected to a burdensome general law.

Let me repeat: I agree that in many places and institutions in the nation, evangelical Christians dominate culturally and politically and non-Christians constitute minorities. But in many other places and institutions, and on certain issues, traditionalist Christians join traditionalist Orthodox Jews as the outsiders. No sound minority-protection approach to the Religion Clauses can rest on one single account of religious alignments.

c. Church Versus Sect and Acculturated Versus Unacculturated

A final important model of religious difference distinguishes between groups (usually large) whose views harmonize with the general culture and other groups (usually small) who dissent and withdraw from the

201. *Id.* at 512, 513 (quotation omitted).

202. *Id.* at 511.

203. *Id.* at 504–06; *Bd. of Educ., Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (invalidating creation of special school district to educate Satmar Hasidic children separate from other children); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying exemption for Orthodox soldier from uniform policies that forbade wearing yarmulke), *superseded by* 10 U.S.C. § 774 (2004); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (denying exemption for Orthodox merchants from Sunday closing laws).

culture. Theologian Ernst Troeltsch, chronicling the relation of Christian denominations toward state and society, drew a famous distinction between “church” and “sect.”²⁰⁴ The church seeks to be “universal,” and to achieve mass membership it “to a certain extent accepts the social order, . . . utilizes the state and the ruling classes, and weaves these elements into her own life.”²⁰⁵ Sects, by contrast, “are comparatively small groups [that] aspire after personal inward perfection [and] a direct personal fellowship between the members” and accordingly “renounce the idea of dominating the world” and adopt an “indifferent” or even “hostile” attitude toward state and society.²⁰⁶ The prototypical church was the Roman Catholic Church or the established Protestant churches of northern Europe; the prototypical sects were the medieval monastic movements or the Anabaptists of the Reformation.

More recently, theologian H. Richard Niebuhr refined Troeltsch’s two categories into five, including the alternatives of “Christ of culture”—groups that harmonize Christian ideals with the broader culture—and “Christ apart from culture”—groups that withdraw from culture because it is unredeemable.²⁰⁷ Sociologists of religion agree “that marginal religious groups or sects are characterized by 1) an emphasis on doctrinal purity; 2) hostility to or disassociation from the prevailing culture; and 3) a strict code of behavior.”²⁰⁸ Whatever the precise framework, we can speak of religious groups as relatively “acculturated,” comfortable with the dominant culture, or “unacculturated,” antagonistic to or withdrawn from the culture.²⁰⁹

This map of religions may be the most useful of all for a minority-oriented approach to religious freedom. By definition, acculturated groups fall in the cultural mainstream and unacculturated groups outside it. Unacculturated faiths are the outsiders, alienated from dominant values, whom courts should be particularly concerned to protect. Unacculturated faiths also tend to be numerical minorities, because they maintain a demanding purity in doctrine and behavior rather than seeking mass

204. 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 331 (Harper & Brothers 1960) (1911).

205. *Id.*

206. *Id.*

207. See generally H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951).

208. Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 654 (1983).

209. For discussion of the distinction, and an insightful application to free exercise cases, see Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 21, 29–37 (James E. Wood & Derek Davis eds., 1993).

membership. It is true that numbers and acculturation can diverge; as mentioned above, some small religious bodies enjoy cultural power or share the dominant values.²¹⁰ But that may simply prove that acculturation matters more than numbers. Even a small group needs little protection from the majority if its views track the majority's. Thus lack of acculturation is a *prima facie* indicator of minority status.

However, a map of religions based on acculturation still has complications that make it difficult to use to categorize faiths for constitutional purposes. First, "[t]he sect-church typology is a continuum"; some faiths fall in the middle (as, for example, with Jews who observe many Jewish laws but are non-Orthodox), and many faiths are evolving, commonly toward greater acculturation as their membership rises in numbers and in social standing.²¹¹ Such evolution may again destabilize constitutional doctrine in the way that Justice Powell warned.

Even more important, many religious groups harmonize with the broader culture on some clusters of issues and conflict with it on others. As the University of Nebraska case exemplifies, serious evangelical Protestants often conflict with the majority culture on questions of sexual ethics such as abortion and premarital sex.²¹² But evangelicals largely share widespread middle-class values about money and lifestyle.²¹³ Conversely, liberal Protestant churches are commonly identified as the most acculturated religious bodies, but their leaders often take an adversarial stance toward the majority on social issues such as war and peace, immigration, and welfare policy.²¹⁴ Finally, as I have emphasized already, a religious group may be alienated from the majority in one location but quite in line with the majority in another.²¹⁵

210. See *supra* notes 135–38 and accompanying text (discussing Episcopalians).

211. Way & Burt, *supra* note 208, at 652 (citing as examples "[t]he nineteenth-century transformation of rural Methodism [from a revivalist movement to a mainline denomination]" and "the more recent transformation of Mormonism" from a despised sect to a mainstream, socially conservative church).

212. See, e.g., The Barna Group, *Born Again Adults Remain Firm in Opposition to Abortion and Gay Marriage*, at <http://www.barna.org/FlexPage.aspx?=&BarnaUpdate&BarnaUpdateID=94> (last visited Dec. 16, 2004) (reporting that evangelicals oppose abortion at significantly higher rate than non-evangelicals).

213. See, e.g., Joel Carpenter, *Contemporary Evangelicalism and Mammon: Some Thoughts, in MORE MONEY, MORE MINISTRY: MONEY AND EVANGELICALS IN RECENT NORTH AMERICAN HISTORY* 399, 401 (2000) ("[T]he whole ethos of postwar evangelicalism is driven by the adage [that] more money means more ministry. . . . [Evangelicals] are deeply infused with the American capitalist cultural understanding of the gospel.")

214. See, e.g., THOMAS C. REEVES, *THE EMPTY CHURCH: THE SUICIDE OF LIBERAL CHRISTIANITY* 158 (1996) (criticizing this tendency).

215. See *supra* Part II.B.1.

4. *Rules to Protect Whoever is the Minority*

The factors just discussed complicate the task of defining particular groups as inherently minority-outsider or majority-insider. Some groups may be consistent outsiders in America: perhaps Muslims, or the even smaller, less familiar immigrant religions such as Sikhs or Hindus. But the majority/minority status of many groups will vary, depending on which of the above “maps” of American religion most accurately describes the geographical or institutional context in which the dispute arises. As a result, a minority-protection approach to the Religion Clauses should not rest on defining certain faiths as everywhere and always “minorities,” as previous commentators have sought to do, and then asking what will be best for those groups.

To put it another way, a minority-protection approach in religion cases should not rest on the method characteristic of race-based affirmative action: identifying certain groups as disadvantaged and adopting a different constitutional rule for them than for others. The objections that Justice Powell raised in *Bakke* apply with at least equal force to the project of singling out some religious groups as disadvantaged. Indeed, the objections are probably stronger in the religion context. Notwithstanding the civil rights advances of the last fifty years, African-Americans as a group unquestionably remain more subject to racial prejudice, and lower on the social and economic scale, than whites; the pattern of disadvantages is strong and cuts across various aspects of life.²¹⁶ By contrast, given the complexity of religious identities and differences in America, it is even more the case in religion that “the variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence.”²¹⁷ Continuing with Powell’s terms, I can think of few better ways to “exacerbate [religious] tensions”²¹⁸ than to pick out some groups, characterize them in a certain contestable way, and define them as always dominant and in need of restraint. Blanket judgments about who is a majority and minority are overinclusive or underinclusive too often to serve as the basis for constitutional rules.

But the flaws in this “affirmative action” approach to religion do not mean that a minority-protection approach is impossible. As I argued earlier, the approach should not identify particular faiths as inherent

216. See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 17–30 (1992).

217. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 297 (1978) (opinion of Powell, J.).

218. *Id.* at 298.

minorities, but should adopt constitutional rules for various categories of disputes that work to protect and equalize minority rights, *whoever* the minority happens to be. The rule for a given category of issues must apply to all faiths, as the text of the Religion Clauses strongly implies. But the choice of rule can be influenced by what course will best protect whoever is in the minority in the relevant context. The goal should be to identify the dynamics of government action that impose burdens upon minorities, and the dynamics of constitutional rules that protect and equalize minorities.

Such an approach resembles the “veil of ignorance” that John Rawls proposed as a tool for constructing basic political institutions.²¹⁹ Rawls abstracted away from knowledge about persons’ ideological, social, or economic position as a device to avoid special pleading and ensure that political institutions are fair to all citizens. Similarly, analysis of minority religious rights should, as much as possible, avoid the premise that any given faith is always a majority or minority. But into the veil of ignorance, Rawls built assumptions designed to favor the least well off, on the theory that all of us rationally would want to avoid ending up in such a position.²²⁰ Similarly, one can build Religion Clause doctrines that protect the religious liberty and equal standing of religious minorities, whoever that happens to be in a given context.

Even this proposed method sometimes requires judgments about the nature of religious differences in America. Choosing a rule that most protects minority faiths involves determining what practices and conditions are particularly important to minority faiths, which in turn requires some evidence of what particular minority faiths over the years have viewed as important. Thus in analyzing legal questions in Part III, I refer back to the various maps of the religious landscape to suggest how constitutional rules would affect various faiths that are likely to be minorities in particular contexts. But I will try to give weight to all of the maps set out above: to take seriously both the fact that in some contexts Christians still impose on non-Christians, and the fact that in other contexts a secular society imposes on rigorous or countercultural believers of all faiths.

219. JOHN RAWLS, A THEORY OF JUSTICE 12 (4th prtg. 1980) (1971). Thanks to Mike Paulsen for pointing out the analogy to Rawls.

220. *Id.* at 18–19.

C. Differing Goals in Protecting Religious Minorities

A final complication is that a minority-protection approach can include different goals that compete with each other. As already noted, the protection of religious minorities can include both positive protection of their ability to practice their faith and negative protection against the imposition of a different, majoritarian faith.²²¹ In addition, a third objective may be to equalize the status of minority faiths with that of the majority.

These goals are largely consistent, but they can conflict. For example, minority faiths might be equalized with majority faiths by giving special attention to the minority's claims of religious freedom. But equalization could also be accomplished by restricting the majority's freedom. Such a restriction produces equality, but it does nothing for the minority's positive religious freedom. In my view, such an approach misplaces the priorities; the positive religious liberty of minorities should be the most important goal. If members of a religious minority cannot engage in a practice important to their faith, it should be little consolation to them that adherents of other faiths cannot engage in practices important to them either. Prohibiting all religious practices of all faiths would be equal, but it would scarcely help minority religions.

What about the distinction between negative and positive protection: between ensuring that minorities can practice their faith and ensuring that they are not imposed on by other faiths? Both goals are important. Fortunately, they usually coincide. When government pressures a minority to participate in a majoritarian religious ceremony such as an official prayer, it not only imposes an alien faith on the minority, but also typically interferes with the minority's independent development of its own religious views. The two goals come in conflict only if the negative protection against religious imposition is taken to the extreme of shielding minorities from any religious speech or activity by purely private individuals—for example, if public schools single out student religious clubs for exclusion from general school-club programs in order to protect students of other faiths from any sort of exposure to the religious speech. As I will argue below,²²² such an exclusion is likely to suppress the positive religious exercise of some minority adherents as well. Contrary to what some commentators have argued, a minority-protection approach does not provide support for such suppression.

221. See *supra* notes 41–43 and accompanying text.

222. See *infra* Part III.B.2.

III. MINORITY PROTECTION IN CATEGORIES OF RELIGION CASES

Having discussed in general terms how to define and defend a minority-protection approach, I turn to how such an approach might apply to the major categories of recurring disputes under the Religion Clauses.

A. *Religious Exercise and Exemptions from Law*

The first major Religion Clause category concerns how the government should act when the general laws it passes come in conflict with religiously motivated conduct. One question is whether the government is constitutionally mandated to exempt such conduct so as to avoid prohibiting the free exercise of religion. The Supreme Court's current doctrine, set forth in *Employment Division v. Smith*,²²³ says that an exemption is usually not required,²²⁴ although the doctrine has ambiguities that I will discuss shortly. A second question is whether the government constitutionally has discretion to exempt religiously motivated conduct by its own choice. Current doctrine holds some statutory exemptions valid and others invalid, without clear lines for distinguishing the two. The division between mandated and discretionary exemptions is a division between judicial decisions and legislative or administrative decisions.

1. *Constitutionally Mandated Exemptions*

A minority-protection approach provides a strong case for constitutionally mandated exemptions declared by courts. General laws enacted by democratic bodies will, almost by definition, reflect the values of the majority or at least the politically powerful. The laws may thereby conflict with the values and practices of minority or outsider religions. Without exemptions, therefore, generally applicable laws inevitably will impose from time to time on the liberty of the religious minority. The imposition is no less because the law is general in its form. As Justice Souter recognized in *Church of the Lukumi Babalu Aye v. City of Hialeah*,²²⁵ “[n]eutral, generally applicable’ laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government.”²²⁶

223. 494 U.S. 872 (1990).

224. *Id.* at 879–81 (holding that Free Exercise Clause seldom if ever “bars application of a neutral, generally applicable law to religiously motivated action”).

225. 508 U.S. 520 (1993).

226. *Id.* at 577 (Souter, J., concurring in part and concurring in judgment).

Constitutionally mandated exemptions also serve the goal of equalizing the status of minority religions with that of the majority. Because laws tend to reflect the majority's values, rules that on their face treat all faiths equally, and reflect no intent to discriminate, will nevertheless have an unequal impact on different faiths. Wearing headgear or other religious garb is not a religious duty for most Christian groups, but it is for observant Jews and other minorities, who are therefore disproportionately harmed by the facially neutral military uniform requirements upheld in *Goldman v. Weinberger*.²²⁷ Alcohol is a more familiar substance than peyote, and therefore the controlled-substance laws, without exemptions, impact Native American worshipers but not Roman Catholic or Episcopalians. Constitutionally mandated exemptions allow "the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process."²²⁸

Free exercise exemptions recognized by courts under a general, across-the-board constitutional standard operate in the way advocated in Part II of this Article. They work to protect whoever is a minority faith in a given situation. Whichever group finds its religious practices in conflict with majoritarian laws can demand that the government articulate a sufficient reason—a "compelling" reason, in the phrase used by many constitutional decisions²²⁹—for restricting those practices.

Some commentators have denied that free exercise exemptions doctrine works to protect and equalize minority religions. Mark Tushnet, for example, has argued that exemption claims will more likely succeed for "the kinds of worship that the Justices of the Supreme Court are accustomed to" than for "non-mainstream denominations, sects, and cults."²³⁰ He and other critics observe that the winners of free exercise accommodation cases in the Supreme Court before *Smith* were all Christians in some form—Seventh-Day Adventists, Amish, and Jehovah's

227. 475 U.S. 503 (1986) (refusing to apply heightened scrutiny to burdens imposed by military regulations, or to exempt an Orthodox air force officer from uniform requirements that prevented him wearing his yarmulke).

228. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1132 (1990).

229. See, e.g., Religious Freedom Restoration Act, § 3(b), 42 U.S.C. § 2000bb-1(b) (2000) (compelling-interest standard under federal statute); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (compelling-interest standard under Free Exercise Clause); *Humphrey v. Lane*, 728 N.E.2d 1039, 1045 (Ohio 2000) (compelling-interest standard under state constitution).

230. Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 382–83.

Witnesses²³¹—and that non-Christians always lost.²³² The critics chalk this up to the fact that judges are simply part of our “predominantly Christian nation.”²³³

But this attack on exemptions doctrine is unwarranted. There were only fifteen Supreme Court free exercise decisions before *Smith*, too small a data set to generate very strong conclusions. After *Smith* the Court protected animal sacrifices by the unfamiliar Afro-Caribbean religion of Santeria²³⁴ but ruled against a mainstream Catholic parish’s challenge to a landmark preservation ordinance.²³⁵ In the broader set of appellate decisions, non-Christian faiths won several times before *Smith*.²³⁶ And since *Smith*, courts have mandated exemptions for Muslims, Native Americans, Jews, and other minorities, whether under the Free Exercise Clause or the Religious Freedom Restoration Act (“RFRA”).²³⁷ Indeed, the most systematic regression analysis of religious freedom decisions, done by my colleague Greg Sisk and others, concludes that in lower federal courts from 1986 to 1995, “the proposition that minority religions experience a significantly lower success rate was found to be without empirical support.”²³⁸

231. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. 398.

232. See FELDMAN, *supra* note 4, at 246 (“Members of small Christian sects sometimes win and sometimes lose free exercise claims, but non-Christians never win.”); Sherry, *supra* note 4, at 506 (“All these Christian sects can find solace in the Constitution, but the Constitution offers no protection for Jews in the military.”); Tushnet, *supra* note 230, at 381 (“[P]ut bluntly, the pattern is that sometimes Christians win but non-Christians never do.”).

233. James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 248 (1999) (explaining “that Christian judges should be more likely to be sympathetic to the plight of fellow Christians”).

234. See *Lukumi*, 508 U.S. at 524–25 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1469–70 (S.D. Fla. 1989)).

235. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (dismissing Church’s claim under Religious Freedom Restoration Act on ground that Act was unconstitutional).

236. See Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 11–12 n.40 (1994) (collecting cases).

237. 42 U.S.C. § 2000bb-1 to -4 (2000); see, e.g., *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc) (relying on RFRA to exempt small sect’s sacramental use of tea containing hallucinogenic substance listed under federal drug laws); *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (exempting Orthodox *eruv*, or demarcation of area in which pushing and carrying are religiously permitted to observant Jews, from city rule against attachments to utility poles); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (exempting Muslim police officer from department rule against wearing beards); *Horen v. Commonwealth*, 479 S.E.2d 553 (Va. Ct. App. 1997).

238. Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, U. COLO. L. REV. (forthcoming 2005) (draft manuscript at 3, on file with author); see Sisk, Heise & Morriss, *supra* note 164, at 562–67.

In addition, as I argued in Part II, the label of “Christian” is often too simplistic to reflect the reality of American religion. The “Christian” groups that the Supreme Court has protected—Amish, Seventh-Day Adventists, and Jehovah’s Witnesses—are most plausibly classified as “outsiders” and minorities.²³⁹ The most likely reason why non-Christian claims usually lose is that free exercise accommodation claims overall usually lose, including claims by mainstream Christians. The proper response is not to eliminate religious exemptions—which would almost certainly make minority faiths worse off—but to strengthen the exemptions so that minorities receive real protection.²⁴⁰

Thus the recognition of some constitutionally mandated exemptions is important to protecting and equalizing minority religions. But it is less clear what the standard for declaring exemptions should be. Current law offers two alternatives. First is the balancing test used under the Free Exercise Clause before *Smith*,²⁴¹ which still applies in certain cases under federal religious freedom statutes and under state provisions both constitutional and statutory.²⁴² Under this approach, any substantial burden by government on religious exercise must be justified as the least restrictive means of promoting a compelling or overriding governmental interest.²⁴³

The compelling-interest balancing test has been criticized, with some reason, for being too vague and prone to manipulation by judges.²⁴⁴ I concede that the open-ended nature of the compelling interest test could permit manipulation, conscious or unconscious, to grant claims by insider or familiar faiths while denying minority claims. But as I have just noted, this concern is not really borne out by the facts. Indeed, the regression analysis of religious-freedom decisions by Professor Sisk and his colleagues shows that most minority faiths fared no worse in federal court than larger faiths did—and that the two groups that fared most

239. Way & Burt, *supra* note 208, at 657 (treating these groups as marginal, and finding that free exercise victories tended to be for marginal groups).

240. McConnell, *supra* note 228, at 1152–53.

241. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

242. See, e.g., Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(b) (2000) (applying to federal-law burdens on religion); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2004) (overriding burdens on religion from state and local zoning and landmarking laws and prison regulations); MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 196 (2002) (summarizing state constitutional rulings and state RFRA).

243. See, e.g., RFRA, 42 U.S.C. § 2000bb-1.

244. See, e.g., Tushnet, *supra* note 230; see also McConnell, *supra* note 228, at 1144 (calling the pre-*Smith* doctrine “poorly developed and unacceptably subjective”).

significantly worse than others were the stereotypically “mainstream” Catholics and Baptists.²⁴⁵

One explanation for these results is that the compelling interest test has components tilting strongly toward the prosecution of minority faiths and less toward the protection of majorities. Properly conceived, the test measures the government’s interest “at the margin”: by “the effect of excepting religious claimants from the legal provision,” not by “the importance of the provision in general.”²⁴⁶ That approach follows both from the text of RFRA-type statutes and from *Wisconsin v. Yoder*,²⁴⁷ the decision on which they are modeled.²⁴⁸ RFRA requires the government to show a compelling justification for “the application of the burden to the” claimant, not for the law in general; it thereby follows *Yoder*’s direction that the state had to prove “the impediment to [its] objectives that would flow from recognizing the claimed Amish exemption.”²⁴⁹

Under this marginal-cost analysis, the smaller the group being burdened, the harder it should be for the government to justify denying an exemption. Exemptions prompt the worry that granting one will invite a series of future claims whose cumulative effect on social interests will be damaging.²⁵⁰ But the smaller and more unconventional the group, the fewer the likely prospective claims. Critics also worry that exemptions will encourage self-interested behavior and create a constitutionally troubling incentive for people to practice religion or pretend to do so.²⁵¹ But the smaller and more countercultural the claimant, the less attractive her practice is likely to be to others. Where the practice is sufficiently attractive that too many exemption claims will follow, this can be taken into account in judging whether the state’s interest is compelling.

245. Sisk, *supra* note 238, draft at 15–16; Sisk, Heise & Morriss, *supra* note 164, at 562–67.

246. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 311; see also Berg, *supra* note 236, at 40–41.

247. 406 U.S. 205 (1972).

248. RFRA 42 U.S.C. § 2000bb(b)(1) (stating that RFRA’s purpose is to restore the compelling interest of *Yoder*).

249. *Yoder*, 406 U.S. at 221.

250. See, e.g., *United States v. Lee*, 455 U.S. 252, 260 (1982) (relying on this argument to deny Amish claim for exemption from tax to which they objected); *Smith*, 494 U.S. at 916–17 (Blackmun, J., dissenting) (rejecting this argument on facts of claim to engage in peyote use); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 950–51 (1989); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 312 (1991).

251. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1016–17 (1990) (noting the criticism as to some exemptions); Marshall, *supra* note 250, at 326 (arguing that exemptions make religion “the tool for fraudulent or specious claims”); Pepper, *supra* note 246, at 327–28.

Consider, for example, cases involving religious objections to elements of compulsory schooling. The Amish prevailed in *Yoder* in keeping their teenagers out of school,²⁵² but in *Mozert v. Hawkins County Board of Education*²⁵³ fundamentalist parents were refused the right to withdraw their children from particular classes or assignments they found objectionable.²⁵⁴ The court explained that the Amish were more insular and countercultural than were the fundamentalists.²⁵⁵ *Yoder* found that the Amish were uniquely burdened by compulsory schooling because they withdrew from society into “a separated agrarian community,” a showing “that probably few other religious groups could make.”²⁵⁶ *Mozert* noted that the fundamentalists wanted their children to attend school and participate in the broader society; it cited *Yoder*’s argument that “compulsory education [is more] necessary when its goal is the preparation of the child” not for life with the Amish, but “for life in modern society as the majority live.”²⁵⁷ In my view, *Mozert* was wrongly decided; the court should have recognized that continual forced exposure of the children to objectionable materials significantly burdened the families’ religious exercise, and that there were ways to accommodate both the families’ and the school’s interests.²⁵⁸ But *Mozert* illustrates how the compelling interest analysis logically tilts toward the smaller, more insular group.

My colleague Professor Sisk, in interpreting the results of his empirical study, agrees that in judges’ views, “the larger the religious group, the greater the potential effect on governmental interests from accommodation, and therefore the higher (and [more] unacceptable) the costs to society in tolerating” the group’s behavior.²⁵⁹ He warns that this logic, taken to its conclusion, can make the compelling-interest analysis “short-hand for repressing religious conscience whenever it cannot easily be contained and isolated within a small sect.”²⁶⁰ I wholeheartedly agree that free exercise rights for “mainstream” faiths should remain vigorous as

252. *Yoder*, 406 U.S. at 234.

253. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

254. *Id.* at 1065.

255. *Id.* at 1067 (noting that while the Amish “attempt to shield their children from all worldly influences,” the *Mozert* parents “want their children to acquire all the skills required to live in modern society [and] also want to have them excused from exposure to some ideas they find offensive”).

256. *Yoder*, 406 U.S. at 222, 235–36.

257. *Mozert*, 827 F.2d at 1067 (quoting *Yoder*, 406 U.S. at 222).

258. Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 550–57 (1999).

259. Sisk, *supra* note 238, draft at 23.

260. *Id.*

well. Recall that the Free Exercise Clause protects all faiths, not just religious minorities.²⁶¹ My point here is only a relative one: even though larger faiths should retain vigorous free exercise rights, their claims do logically tend to implicate government interests to a greater degree than do the claims of minority faiths.²⁶²

The alternative route to free exercise exemptions is to require that the government exempt religious conscience from legal burdens when exemptions are already provided for comparable secular interests. Douglas Laycock has described this as a “most favored nation” approach, because it requires that, absent a compelling interest, religious conscience receive the same solicitude as the most protected secular interests.²⁶³ This method has shielded the practices of classic minority faiths in several cases. It has protected a Muslim police officer’s right to wear a beard, notwithstanding a departmental grooming rule, when beards were permitted for officers with skin conditions.²⁶⁴ It has protected Native American religious practitioners’ rights to possess and use owl feathers for ritual purposes, notwithstanding endangered species laws, when researchers and taxidermists were already permitted to possess feathers for their secular purposes.²⁶⁵ It has protected Orthodox Jews’ ability to use markers to indicate the area within which they are permitted to push baby carriages or use walkers, when other groups could similarly use city utility poles for their purposes.²⁶⁶ The minority-protective nature of this approach is also not surprising. The legislature is likely to give exemptions for familiar interests, and an obvious way to shield religious minorities is to require that the same solicitude extend to them as well.

Which of the two exemptions tests applies—the RFRA approach or the “other exemptions” approach—probably matters less than the attitude the court brings to either test. Professor Samuel Levine has offered a number

261. See *supra* Part II.A, notes 103–13 and accompanying text.

262. Professor Sisk offers other explanations for the lower success rate of Catholics and Baptists in court: (1) judges may think that these groups can protect themselves politically and do not need judicial assistance; and (2) some judges are hostile to the substantive positions of these groups. Sisk, *supra* note 238, at 17–23. I agree with these warnings—especially the warning that judges should not simplistically classify a group as “majority” or “insider” and overlook that it may be on the “outside” of the dominant culture in the relevant geographic or institutional setting. See *supra* Part II.B.

263. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49.

264. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

265. *Horen v. Commonwealth*, 479 S.E.2d 553 (Va. Ct. App. 1997).

266. *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).

of recommendations, which I would simply like to second, for how courts can “consider[r] the minority religious perspective.”²⁶⁷

First, Levine argues, courts should analogize unfamiliar religious practices to familiar ones, to help the majority understand the importance of the practice to the minority.²⁶⁸ For example, the Jehovah’s Witnesses’ practice of preaching and distributing tracts in the streets can be analogized to more traditional church sermons,²⁶⁹ and the use of peyote at Native American Church rituals can be analogized to the consumption of wine at the Catholic mass.²⁷⁰ Related to this, courts should approach religious freedom cases from the viewpoint of the minority. For example, Justice Brennan in *Braunfeld v. Brown*²⁷¹ specifically adopted “the point of view of the individuals whose liberty is—concededly—curtailed by [Sunday-closing] enactments.”²⁷² To understand and communicate the effects of laws on religious minorities, courts should turn to narratives: minority adherents’ own descriptions of how things are for them. For example, the Court quoted Edward Schempp on why merely exempting his children from the Lord’s Prayer rituals in public schools still left them vulnerable to pressure from their peers;²⁷³ and Justice Brennan described the predicament that Captain Simcha Goldman faced when military regulations prevented him from covering his head in humility before God.²⁷⁴

Finally, Levine emphasizes, courts should be alert to avoid devices of decision that tend to work against minority faiths. They should reject annoyance or distaste as grounds for restricting religious practice, as the Court eventually realized in the Jehovah’s Witnesses cases.²⁷⁵ Judges should also look behind form to the actual effect of the law on minorities, which can often be hidden behind familiar categories that reflect the

267. Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL. RTS. J. 153, 155 (1996).

268. *Id.* at 165.

269. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943); *Jones v. Opelika*, 316 U.S. 584, 621 (1942) (Murphy, J., dissenting) (“While perhaps not so orthodox as the oral sermon, the use of religious books is an old, recognized and effective mode of worship and means of proselytizing. . . . The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit.”).

270. *Employment Div. v. Smith*, 494 U.S. 872, 913 n.6 (1990) (Blackmun, J., dissenting).

271. 366 U.S. 599 (1961).

272. *Id.* at 610 (Brennan, J., dissenting).

273. *Sch. Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 208 n.3 (1963).

274. *Goldman v. Weinberger*, 475 U.S. 503, 514 (1986) (Brennan, J., dissenting) (concluding that Goldman “was asked to violate the tenets of his faith virtually every minute of every work day”).

275. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940).

assumptions of the majority. As Justice Brennan put it in the *Goldman* case:

Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in a pluralistic society such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority. . . . A critical function of the Religion Clauses [i]s to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.²⁷⁶

2. *Specific Legislative Exemptions*

Accommodations of religion may also be provided by the legislature's discretion, in the text of a specific law. The Religion Clause question is at what point, if ever, such exemptions amount to impermissible favoritism for religion. The Court has held several times that the Establishment Clause permits legislatures to remove legally imposed burdens on religion even where the Free Exercise Clause does not compel it.²⁷⁷ But the Court has occasionally struck down exemptions that were not necessary to remove significant burdens, that imposed excessive burdens on others, or that unjustifiably favored one religious sect over other sects similarly situated.²⁷⁸

Specific legislative exemptions, like constitutionally mandated exemptions, will have some tendency to protect religious minorities. If the general terms of a democratically enacted law tend to reflect the majority's views and practices, then an exemption will tend to address the needs of a minority. Examples include the statutory accommodations of peyote use

276. *Goldman*, 475 U.S. at 523–24 (Brennan, J., dissenting).

277. *Smith*, 494 U.S. at 890 (indicating approval of legislative exemptions of sacramental peyote use); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335–38 (1987) (approving exemption for religious organization from laws against religious discrimination in employment); *Gillette v. United States*, 401 U.S. 437, 440 (1971) (approving exemption from military service for conscientious objectors to all wars).

278. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down special school district created solely to educate disabled children of Satmar Hasidic sect); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989) (invalidating sales-tax exemption limited to religious publications); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating provision imposing absolute requirement on employers to accommodate employees' chosen Sabbath).

that the Court referred to approvingly in *Smith*,²⁷⁹ and the exemption from the draft laws for those who “by religious training and belief” are opposed to all wars.²⁸⁰ Even a statutory accommodation that the Court struck down—the special school district for the disabled Satmar Hasidic children of Kiryas Joel, New York—likely protected an insular minority from the pressures imposed by secular society. Before the statutory accommodation, the Satmar children had to receive special education services in a public-school environment whose modern, secular features concededly had caused them “panic, fear, and trauma.”²⁸¹ That the legislature might sometimes accommodate even small, insular groups is not surprising given, among other things, the political-organizational advantages of such groups noted in Part I.²⁸²

Some commentators, however, worry that exemptions by the legislature are inherently majoritarian. A leading critic, Ira Lupu, has warned that “[c]ustomary practices are likely to be accommodated,” “unusual ones are less likely to be so treated,” and the legislative distinctions “will frequently rest on religious prejudice, ignorance, or other unacceptable grounds.”²⁸³ This concern is legitimate given the basically majoritarian orientation of legislatures. Moreover, even a legislature that is responsive to minority groups can favor those groups that are politically savvy and disfavor those that are so small or oppressed that they cannot organize politically.

These concerns are real, but to eliminate discretionary religious exemptions is an unwarranted and misguided response. Legislative exemptions often protect true minority groups and their practices. To invalidate large numbers of such exemptions would be to elevate technical equality over the positive liberty of religious minorities, as Part II cautioned against doing.²⁸⁴ A far better approach is to use constitutional rules as backstops to legislative action, to ensure that small or less well organized groups receive exemptions as well. The first such constitutional rule is that “sectarian discrimination is presumptively unacceptable. Any accommodation for faith-healing, for example, thus cannot be limited to respectable, educated, middle and upper-middle class sects like the Christian Scientists, but must be extended to their grubbier or less well-

279. *Smith*, 494 U.S. at 890.

280. Universal Military Training and Service Act, 50 U.S.C. § 456 (j) (1958).

281. *See Kiryas Joel*, 512 U.S. at 692.

282. *See supra* notes 45–46 and accompanying text; *see also* Ackerman, *supra* note 45, at 724–28.

283. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 586–87 (1991).

284. *See supra* Part II.C.

known counterparts.”²⁸⁵ A legislative exemption that has been unjustifiably limited to one religious sect can be judicially extended to others, as the Court did in the case of Minnesota charitable-solicitation laws whose exemptions were drafted to exclude “new religions” such as the Unification Church.²⁸⁶ The decision, *Larson v. Valente*, makes clear that discrimination between similarly situated religious sects violates “the clearest command of the Establishment Clause” and is subject to strict scrutiny.²⁸⁷

The second constitutional backstop is the judicially mandated free exercise exemption itself. As Michael McConnell has pointed out, the requirement of equality between sects is insufficient to protect minority adherents’ ability to practice their faith: it may ensure not “that all religious faiths receive equal solicitude,” but rather “that all receive equal indifference.”²⁸⁸ Moreover, legislatures can favor majority groups “by inaction just as it can by action”:

[Legislatures] can simply refrain from passing laws that burden the exercise of religion by mainstream groups, and there is nothing the Establishment Clause can do about this. In the end, the only hope for achieving denominational neutrality is a vigorous Free Exercise Clause.²⁸⁹

Given the possible inequalities from legislative exemptions, judicially mandated exemptions provide an important backstop. But because judicial exemptions are not always vigorously enforced—and are not required in many free exercise cases after *Employment Division v. Smith*—discretionary legislative exemptions also play an important role in protecting religious minorities.

3. *Protection of Atheism and Agnosticism*

A final recurring question concerning free exercise protection is whether it should encompass not only those who believe in a theistic God, but those who specifically disbelieve: atheists and explicit agnostics. Of course, atheists and agnostics, like all other citizens, receive protection from state-imposed religion because of the Establishment Clause. But the

285. Lupu, *supra* note 283, at 585–86.

286. *Larson v. Valente*, 456 U.S. 228 (1982).

287. *Id.* at 244.

288. McConnell, *supra* note 228, at 1132.

289. *Id.*

question is whether the Free Exercise Clause extends to these systems of nonbelief, protecting them even from nominally secular laws that conflict with their conscience. The Supreme Court has suggested that it should,²⁹⁰ but has never settled the question directly.

If protection of religious minorities is the dominant Religion Clause criterion, then atheists and agnostics should receive free exercise protection. Atheists and agnostics hold explicit positions on a central—perhaps the central—religious question, the existence of a deity, and their position is quite uncommon. As I noted earlier, more than 90 percent of Americans continue to believe in God or a universal spirit.²⁹¹ Therefore, those who explicitly deny that a deity exists, and those who explicitly deny that we could ever know if one does, make up two of the smaller religious minorities around the nation. As political commentator Michael Kinsley observed a few years ago, “the noisy village atheist, the missionary of unbelief, is a virtually extinct social type.”²⁹²

Free exercise protection for atheists and agnostics means, most obviously, that government cannot restrict meetings of their organizations, suppress distribution of their literature, or forbid them from holding office. But in addition, under a minority-protection approach, atheists and agnostics should be included in religious exemptions from generally applicable laws, as the Supreme Court held under a statutory exemption in the Vietnam-era draft cases.²⁹³

The difficulty with exemption claims by atheists and agnostics lies not in whether their views are religious, but in whether their conduct actually follows from the demands of those views. The nonexistence of a theistic god or a spiritual world may free a person to engage in acts that the deity would have forbidden; but it is less frequent that this nonexistence itself would require or motivate a person to act in a certain way. Only such a connection—the anti-theist belief itself as a motivation for behavior—provides the basis for a free exercise exemption claim. For this reason, religious exemptions for atheists and agnostics might not be frequent.

On the other hand, from a minority-rights perspective, the required connection between the atheist belief and conduct ought not to be overly tight. As Professor Laycock has pointed out, in some cases theistic

290. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 187 (1965) (extending protection for “religious training and belief” under draft-exemption statute to those with nontheistic beliefs on matters of “ultimate concern”); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (including “Secular Humanism” among religions that “do not teach . . . a belief in the existence of God”).

291. *See supra* notes 174–75 and accompanying text.

292. Michael Kinsley, *Martyr Complex*, *NEW REPUBLIC*, Sept. 13, 1993, at 1.

293. *Welsh v. United States*, 398 U.S. 333 (1970); *Seeger*, 380 U.S. 163.

believers receive protection for principles of conscientious conduct even though the principle is not an official tenet of their denomination and even though they may have derived it in part from reading secular or other religious sources—for example, a Christian pacifist influenced by the writings of Gandhi or a secular critic of war.²⁹⁴ Nevertheless, the religious claimant—and therefore the atheist or agnostic claimant—still needs to articulate some connection, even if indirect, between the principle of conscience and the belief on a religious matter.

The draft cases themselves probably met this criterion: conduct that was not just permitted by a belief in God's nonexistence, but followed from the belief. Atheists or agnostic draft objectors can plausibly assert that the nonexistence of a theistic god or an afterlife means that this life is of utmost importance, and therefore that the worst thing a person can do is end another's life. Whether or not the objectors in the Vietnam cases made such an assertion, it should—under a minority protection approach—provide the basis for a religious exemption under either a statutory accommodation provision or the Free Exercise Clause.

B. Religion in Public Schools and Other Government Institutions

A second major category of Religion Clause issues involves religious activities or elements in public schools and other governmental institutions. The Court in these cases has drawn a sharp distinction “between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”²⁹⁵ Government may not speak religiously itself or promote religious ideas over other ideas—at least not in the public schools, although the doctrine is more complicated in non-school settings.²⁹⁶ But private religious groups have the right to meet on school grounds on the same terms as nonreligious groups.²⁹⁷ This government/private distinction makes sense under a minority-protection approach.

294. Laycock, *supra* note 2, at 335.

295. Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion).

296. Compare Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers and chaplaincies), with County of Allegheny v. ACLU, 492 U.S. 573 (1989) (striking down placement of crèche alone in prominent place in city hall).

297. Good News Club v. Milford Central School, 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993); Mergens, 496 U.S. 226; Widmar v. Vincent, 454 U.S. 263 (1981).

1. *Government-Sponsored Religion*

In striking down government sponsorship of religious activities and speech, the Court has accurately emphasized minority rights. Government-sponsored religious speech and activities clash with a minority-protection emphasis in two ways.

First, such practices are inherently likely to reflect the majority's religious views and disregard or conflict with the minority's. Government sponsorship means that the content of religious expression is chosen by a majoritarian body, almost inevitably with an eye toward which religious sentiments are acceptable to a broad majority. These can include familiar religious features like the Lord's Prayer or the Ten Commandments,²⁹⁸ or an exercise composed by elected officials themselves.²⁹⁹

The majoritarian dynamic also operated in *Doe v. Santa Fe Independent School District*,³⁰⁰ even though in that case a student chose whether to deliver a prayer at high school football games.³⁰¹ The student speaker was elected by the student body, giving the majority control over who would formulate and deliver the message.³⁰² It is not hard to imagine the question of whether to give a prayer becoming the focal point in the election, with candidates campaigning on whether or not to pray, thereby putting the decision about prayer itself effectively in the hands of the majority. In this context, the Court emphasized that "the majoritarian process . . . guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. . . . [The] student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."³⁰³ A minority-protection approach rejects policies that, although neutral in theory, have a structure that favors the majority's views.

Under a minority-protection approach, the Court has also been correct to refuse to permit religious exercises in schools whenever they are "nonsectarian" and encompass many faiths through generalized religious language. General references to God still exclude minority religious

298. See *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in schoolrooms); *Sch. Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963) (Lord's Prayer).

299. See *Engel v. Vitale*, 370 U.S. 421, 423 (1962) (involving a "nonsectarian" prayer composed by state school board).

300. 530 U.S. 290 (2000).

301. *Id.* at 297–98.

302. *Id.*

303. *Id.* at 304. The Court then quoted *Barnette's* proposition that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 304–05 (quoting *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

positions. Indeed, as the polls cited above indicate,³⁰⁴ a nonspecific, nondemanding theism may be the quintessential majority position in American religion today. References to God conflict with atheist and agnostic views as well as non-theistic religions, all of which remain distinct minorities in America. And when theistic references are generalized and vague, they may offend highly particularistic theists, those who think, for example, that no prayer has value unless it specifically invokes Allah or Jesus. In modern America, characterized by interreligious contact and cooperation, those who take theological offense at generalized prayers are likely to be the minority; they exemplify the non-aculturated, uncompromising “sects” that courts should protect.³⁰⁵ Thus, under a minority-protection approach the Court was correct in *Lee v. Weisman*³⁰⁶ to hold that government may not “establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds.”³⁰⁷ As *Weisman* recognized, the fact that the state’s religious exercise aims to be “civic or nonsectarian rather than pertaining to one sect” may, because it reduces the number of dissenters, actually “increas[e] their sense of isolation and affront.”³⁰⁸

Second, the Court has justifiably recognized that official religious exercises, especially in the public schools, put dissenters in a very difficult position. The Court’s decisions address the matter from the minority’s perspective, as I suggested earlier was proper under a minority-protection approach.³⁰⁹ *Weisman*, for example, rejected the argument that an objector forced to stand silently during a graduation-ceremony invocation was not being asked to participate in the prayer:

What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . [G]iven our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.³¹⁰

304. See *supra* notes 174–75 and accompanying text.

305. See *supra* notes 205–10 and accompanying text.

306. 505 U.S. 577 (1992).

307. *Id.* at 590.

308. *Id.* at 594.

309. See *supra* notes 272–74 and accompanying text.

310. *Weisman*, 505 U.S. at 592–93.

Earlier decisions also cited objecting parents' testimony and recognized that an official religious exercise in school could pressure them and their children even if they formally were able to opt out.³¹¹

Weisman made these minority-protective points through an expansive understanding of what actions were coercive. Earlier decisions had demanded even more of the government, requiring that it not just avoid coercion, but be "neutral" toward religion or not "advance" or "endorse" it.³¹² The no-coercion test, applied broadly as in *Weisman*, can address one of the two chief goals of the minority-protection approach: preventing actual pressure on minorities from majoritarian government. But the other key goal—that of ensuring citizens of various faiths equal status in the government's eye—can only be accomplished through a more rigorous test like non-endorsement. That test's originator, Justice O'Connor, emphasizes that government endorsement of a religious view "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."³¹³

In contrast, the no-coercion test does not directly capture this concern, however broadly it is applied, and it cannot plausibly extend to all situations in which the government can elevate one religion and denigrate others. The prayer at graduation exercises is coercive because of the practical importance of attending the event; so too, arguably, the football game prayer in *Santa Fe*. But other nonmandatory school events are harder

311. *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (noting "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion"). In *Schempp*, the Court quoted the trial court's summary of testimony:

Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be "labeled as 'odd balls'" before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable "to lump all particular religious difference(s) or religious objections (together) as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism," and has "very bad" connotations, such as "un-American" or "anti-Red," [*sic*] with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their "homeroom" and that this carried with it the imputation of punishment for bad conduct.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 208 n.3 (1963).

312. *Schempp*, 374 U.S. at 222 (neutrality, no advancement); *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (Blackmun, J., for the majority) (no endorsement).

313. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

to call coercive, as are displays or ceremonies “beyond the context of a closed environment” like elementary or secondary schools.³¹⁴ Even Justice Kennedy, the author of *Weisman*, made clear that state-erected crèches or other religious displays are not coercive because “[p]assersby . . . are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”³¹⁵ In such cases the non-coercion rationale “leaves the state free to embark on a program of religious approval and disapproval,” almost certainly in favor of faiths broadly acceptable to the majority.³¹⁶

Under a minority-protection approach, the non-endorsement test too should emphasize the perspective of those in the minority faith. The nativity scene included in a city-sponsored Christmas display may appear to many people simply to acknowledge the origins of the Christmas holiday, as the Court held in *Lynch v. Donnelly*.³¹⁷ But to a non-Christian, the crèche is likely to appear not just to recognize Christ’s birth but to celebrate it. And the very fact that the majoritarian city government has chosen Christmas as the holiday to celebrate reminds everyone that adherents of non-Christian faiths are in the minority.³¹⁸ If the non-endorsement test aims to protect those outside the majority faith from receiving a message that they are “outsiders [to] the political community,”³¹⁹ then their perceptions should receive significant weight. That does not mean deferring to any ultra-sensitive person who thinks a government display favors or celebrates a particular religious view.³²⁰ But it does mean, in Justice Stevens’ words, giving serious attention to “the

314. Matthew A. Peterson, Note, *The Supreme Court’s Coercion Test: Insufficient Constitutional Protection for America’s Religious Minorities*, 11 CORNELL J.L. & PUB. POL’Y 246, 254 (2001).

315. *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

316. Peterson, *supra* note 314, at 256. Likewise, one might argue that at a state university commencement, the coercion to express approval of a prayer is attenuated because the audience is older and there are many more persons there. *Chaudhuri v. Tennessee*, 130 F.3d 232, 233 (6th Cir. 1997); *Tanford v. Brand*, 932 F. Supp. 1139, 1144 (S.D. Ind. 1996), *aff’d*, 104 F.3d 982 (7th Cir. 1997). But to approve the prayer allows the state to embrace and promote majoritarian religion.

317. 465 U.S. 668, 680 (1984); *id.* at 705 (O’Connor, J., concurring).

318. Indeed, the real question in *Lynch* from a minority-protection standpoint is why the government is celebrating Christmas in the first place. It is one thing to accommodate employees’ beliefs by closing government operations on the holiday, and another thing affirmatively to celebrate it.

319. *Id.* at 688 (O’Connor, J., concurring).

320. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring in the judgment) (“[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe.”).

perspective of a reasonable person who may not share the particular religious belief that [the display] expresses.”³²¹

But in *Capitol Square Review & Advisory Board v. Pinette*,³²² Stevens applied this perspective to advocate striking down a display erected not by the government, but by a private group that itself constituted a despised minority: the Ku Klux Klan.³²³ Even under a minority-protection approach, the Establishment Clause should not bar equal permission for privately erected displays, as I will argue shortly.³²⁴ While government-sponsored displays are inherently likely to favor majority faiths, the right to engage in private religious expression in public settings may be essential for small, countercultural religious groups. Of course, if the government gives special favoritism or pride of place to a religious display, the fact that it was erected by a private group should not matter, as the Court held in *ACLU v. County of Allegheny*.³²⁵ In such cases, majoritarian government’s choice still inheres, not in the display itself, but in the government’s favored placement of it.

A broad disapproval of non-coercive religious exercises and symbols sponsored by government would strike down many of the practices of American “civil religion.” Such results obviously clash with an approach that interprets the Establishment Clause primarily according to the specific contemplations of the Framers or to longstanding traditions. But these results do seem to follow if the primary emphasis is on protecting and equalizing minority faiths.

2. Do Government Acknowledgments of Religion Help Religious Minorities?

Yet there is a counterargument: that some non-coercive religious statements by government are consistent with, indeed important to, the protection of religious minorities. According to this argument, religious

321. *Id.* at 799 (Stevens, J., dissenting).

322. 515 U.S. 753 (1995).

323. *Id.* at 799–800 (Stevens, J., dissenting) (“If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.”). Under the facts—the display of a cross in a public square that a number of other organizations used for expression—the likelihood of any reasonable perception of state endorsement was minimal.

324. *See infra* Part III.B.3.

325. 492 U.S. at 600 (“[T]he Establishment Clause does not limit only the religious content of the government’s own communications. It also prohibits the government’s support and promotion of religious communications by religious organizations.”).

freedom itself—for minority as well as other faiths—rests ultimately on a religious rationale, and government must be able to endorse this rationale if it is going to explain and solidify our societal commitment to religious freedom.

Steven Smith, for example, argues that the “principal” foundation for religious freedom in America has been a “religious justification”: that duties to God or a higher reality are more important than duties to the state or society, and that these duties must be left to the individual conscience because faith coerced or influenced by government cannot be real or effective.³²⁶ James Madison, for example, began his landmark *Memorial and Remonstrance Against Religious Assessments* by arguing that “the duty of every man to render to the Creator such homage . . . as he believes to be acceptable to him” is “precedent both in order of time and degree of obligation, to the claims of Civil Society.”³²⁷ Thomas Jefferson’s preamble to Virginia’s 1786 Religious Freedom Statute asserts that “Almighty God hath created the mind free” and that “all attempts to influence it by temporal punishments or burdens . . . are a departure from the plan of the Holy Author of our religion.”³²⁸ Professor Smith argues that such religious rationales not only constituted the primary historical justification for religious freedom in America, but also offer the only convincing normative justification for religious freedom as a distinctive right today. Secular rationales, he argues at length, cannot explain why religion is different from, and therefore more entitled to protection than, any other human activity.³²⁹ Indeed, the Supreme Court continues to ground its constitutional rulings on religious freedom in part on religious propositions.³³⁰

326. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149, 154–55 (1991).

327. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (1785), reprinted in MCCONNELL, GARVEY & BERG, *supra* note 242, at 63, 63.

328. VA. CODE ANN. § 57-1 (Michie 2003).

329. Smith, *supra* note 326, at 196–223.

330. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (religious liberty “derives [in part] from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful”); *Engel v. Vitale*, 370 U.S. 421, 423 (1962) (“[R]eligion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”). For other commentary setting forth the religious rationale for religious freedom, see, for example, John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996); McConnell, *supra* note 65; Michael S. Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597 (1997) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1997)); Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion’s Sake*, 47 DRAKE L. REV. 45 (1998).

However, the religious justification for religious freedom is undermined by the broad interpretation of the Establishment Clause that prohibits government from endorsing or expressing any religious propositions—that is, precisely the broad Establishment Clause interpretation that we have hypothesized is necessary to protect religious minorities. A government that cannot endorse any religious statement cannot explicitly endorse the religious justification for religious freedom. The ironic result, as Professor Smith points out, is to render Jefferson’s statute—a landmark in the development of religious liberty—unconstitutional because of its claims about “almighty God” and “the Holy author of our religion.”³³¹ In Smith’s words, “[o]ur constitutional commitment to religious freedom has been disabled from acknowledging the principal historical justification for its existence.”³³² He further shows how the loss of this justification has directly undermined free exercise rights in *Employment Division v. Smith*. The *Smith* majority opinion rejected strong free exercise protection on the ground that it would produce anarchy with each believer “a law unto himself.”³³³ But if God exists and makes demands on human beings, the believer stands under a duty to God rather than to himself. The Court’s inability to contemplate or articulate this rationale, Professor Smith argues, stems from its belief that it is not permitted to recognize the possible existence of God.³³⁴

A similar argument was raised in *Elk Grove Unified School District v. Newdow*,³³⁵ in which the Court confronted but sidestepped the question whether public schools could conduct recitations of the Pledge of Allegiance with its phrase “one nation, under God.”³³⁶ An amicus brief by the Christian Legal Society argued that the statement that the nation is “under God” reflects principles of limited government and human rights.³³⁷ It can be powerfully argued that rights have the greatest security

331. Smith, *supra* note 326, at 193–96.

332. *Id.* at 188.

333. *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990).

334. Smith, *supra* note 326, at 236–37.

335. 124 S. Ct. 2301 (2004).

336. *Id.* (holding that father lacked standing to challenge recitation in his daughter’s school when girl’s mother, who supported her saying the Pledge, had final decisionmaking authority in cases of conflict under state court custody order).

337. Brief of Amici Curiae Christian Legal Society et al. at 5, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004), available at 2003 WL 23051988. The brief cites the committee report for the 1954 law adding the phrase to the Pledge, which states, among other things, that the phrase reflects “the belief that the human person . . . was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.” H.R. REP. NO. 83-1693, at 1–2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340. For an elaboration of this argument (with misgivings as applied to recitations of the Pledge in schools), see Thomas C. Berg, *The Pledge of Allegiance and the*

in a society that believes that they stem from a source higher than any human authority. Without that foundation, those in power can always ask why they should respect the dignity of those “small or powerless groups” who “can do little to harm [the powerful] in return.”³³⁸ Thus, as Michael Perry has argued, no argument in America for individual rights, especially minority rights, “will begin to have the power of an argument that appeals at least in part to the conviction that all human beings are sacred and ‘created equal and endowed by their Creator with certain inalienable Rights.’”³³⁹

If these arguments are correct, religious freedom as an inalienable right itself rests significantly on the belief in a God who places human conscience beyond the reach of human authority. If that is so, then religious minorities may actually be harmed by broad Establishment Clause holdings disabling government from acknowledging the existence of God or endorsing even the general religious proposition that all human beings were created by God. Although such state endorsements may make some religious minorities (such as atheists) feel excluded in the short run, the argument goes, in the long run they are necessary to ground the commitment to religious freedom—and teach the basis for that commitment to the children who must carry it forward in the future. The weakening of this commitment hurts vulnerable religious minorities more than anyone.

Similar arguments have come from a few voices among minority religions, particularly American Jews. In the early 1960s, sociologist and theologian Will Herberg defended school prayers, “under God” in the Pledge, and other religious exercises and ceremonials on the ground that the state must “constantly remind itself and the people” that “it is subject to a majesty beyond all earthly majesties,” or else it will inevitably tend to “se[t] itself up as its own highest majesty.”³⁴⁰ The lesson of Nazism, he argued, was that such a government was dangerous for Jews.³⁴¹ Other Jewish critics of a highly secularized government agreed that

Limited State, 8 TEX. REV. L. & POL. 41 (2003).

338. *Id.* at 62 (citing MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 32–35 (1998)).

339. PERRY, *supra* note 338, at 34–35.

340. Will Herberg, *Religion and Public Life*, NAT’L. REV., July 30, 1962, *reprinted in* HERBERG, *supra* note 99, at 215, 216–17.

341. Herberg wrote:

Ultimately, man finds the autonomy which secularism offers him an intolerable burden, and he tends to throw it off in favor of some new heteronomy of race or nation, of party or state, that the idolatrous substitute faiths of the time hold out to him. In such idolatrous cultures, the Jew in the world is inevitably the chosen victim; the lesson of history and contemporary

American Jews required a society in which Christians remained true to their faith. Jewish history, particularly persecution at the hands of Nazis and Communists, taught that Jews fared best in ‘God-fearing’ nations. Indeed, the Chofetz Chaim, a renowned Talmudist and moralist in prewar Poland, refused to ride in a carriage whose driver did *not* cross himself before the crucifixes along the roads.³⁴²

Critics also argued that the secularization of government and society would contribute to the secularization of Jewish life itself—destroying, in their view, the identity of Jews as a *religious* minority.³⁴³

Evidence supporting these arguments appears in some current controversies where religious communities have mounted the strongest defense of the freedom of believers of other faiths. Consider the French government’s ban on students in state schools wearing religious clothing, apparently motivated by the desire to ban Muslim girls from wearing headscarves.³⁴⁴ To justify this restriction of wholly peaceful religious expression by a religious minority, France relies on the principle of *laïcité*: that the schools must be wholly secular.³⁴⁵ Meanwhile, Muslim students are free to wear headscarves in France’s Catholic schools, which apparently value the dignity of a minority’s religious choices more than the secular state does.³⁴⁶ America’s understanding of religious freedom, because it is less secularist than France’s, would almost certainly forbid public schools to single out peaceful religious expression for prohibition.³⁴⁷ Likewise, among the strongest proponents of general free

experience seems clear on this head. The way of the Jew is not and never will be easy; it will certainly not be made any the easier by his throwing in his lot with an increasingly total secularism, which both invites and is helpless to withstand the demonic idolatries of our time.

Will Herberg, *The Sectarian Conflict Over Church and State: A Divisive Threat to Our Democracy?*, reprinted in HERBERG, *supra* note 340, at 187, 208–09.

342. COHEN, *supra* note 43, at 182 (quoting Michael Wyschogrod, *Second Thoughts on America*, 5 TRADITION 29 (Fall 1962)).

343. Rabbi Seymour Siegel, for example, warned after the first school-prayer decision that “[i]f we completely desecralize our culture . . . we will be in danger of creating a kind of bland, common Americanism which in the end will progressively wear away Jewish consciousness and commitment.” COHEN, *supra* note 43, at 182–83.

344. Elaine Sciolino, *Ban Religious Attire in School, French Panel Says*, N.Y. TIMES, Dec. 12, 2003, at A1.

345. Elaine Sciolino, *France Has a State Religion: Secularism*, N.Y. TIMES, Feb. 8, 2004, at D4.

346. E.J. Dionne, Jr., *In France, Scarves and Secularism*, WASH. POST, Dec. 23, 2003, at A21, available at 2003 WL 71034909.

347. See, e.g., *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (holding that elementary school’s act of singling out religious club for exclusion from after-hours use of classrooms violated First Amendment); Steve Barnes, *Oklahoma: School District Settles Suit Over Muslim Head Scarf*, N.Y. TIMES, May 20, 2004, at A20 (describing school district’s retreat from banning headscarf worn by female Muslim student).

exercise protection since *Smith* have been conservative religious groups, often in support of religions with which they disagree.³⁴⁸

This makes for a serious argument that some government endorsements of religion protect rather than harm religious minorities in the long run. What can be said in response? First, the argument applies only to government religious statements that are directly tied to political statements about human rights—in the way that “under God” is embedded in the Pledge of Allegiance, a statement of the nation’s aspiration to “liberty and justice.” Only in such contexts do religious statements directly serve the purpose of grounding religious freedom as a human right. The argument provides far less defense for official prayers, scripture readings, and other acts that operate primarily as worship activities rather than political assertions.³⁴⁹

Second, even granting the possible long-term protective effects of certain government religious endorsements, their direct, immediate effect is the opposite: they put the government behind the majority’s religious views and make many in the minority feel ostracized. In evaluating government endorsements from a minority-protection standpoint, we may be wise to give this direct harm to minorities greater weight than the potential long-term benefits, unless the potential benefits are quite certain and cannot be achieved by any other means.

Finally, although the religious bases for human rights are undoubtedly important, government has means to expose students to them without resorting to full-fledged endorsements of religious propositions. Schools can teach young people about the religious rationales for religious freedom and other human rights by presenting those rationales in an objective rather than a devotional manner. The school can teach children that historically, and for many citizens today, religious freedom and other rights have rested on belief in God—which is different from teaching children that they should believe in God. It is questionable whether much is lost when the school refrains from direct inculcation of the belief. Devotional teaching by public schools is unlikely to produce real faith in

348. For example, the Christian Legal Society was active in legislative effort to pass versions of RFRA in the states, and recently, with other conservative organizations, it filed an amicus brief in the Tenth Circuit supporting the right of small sect, under RFRA, to ingest a tea with a hallucinogenic substance as part of its worship ceremonies. See Brief of Amici Curiae Christian Legal Society et al., *O Centro Espirita Beneficente Uniao De Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc), available at <http://www.clsnet.org/clrfPages/amicus/UDV.pdf>.

349. See, e.g., *Newdow v. U.S. Congress*, 328 F.3d 466, 478 (9th Cir. 2003) (O’Scannlain, J., dissenting from denial of rehearing en banc) (defending Pledge and distinguishing it from school prayers and other “religious acts”), *rev’d for lack of standing*, 124 S. Ct. 2301 (2004).

any significant number of students. A common proposition across various American theories of religious freedom is that true religious faith does not grow or thrive easily under the pressure or influence, even the positive influence, of government.³⁵⁰ A non-devotional but fair presentation of religious propositions still serves the important goals of informing students about the religious rationale for human rights—its historical and current significance—and avoiding what Justice Goldberg once called a “passive . . . hostility” to religious ideas.³⁵¹ For these reasons, if protection of minorities is the overriding goal of the Religion Clauses, religious statements or exercises by government should still be viewed with great caution.

3. *Private Religious Speech and Activity*

On the other hand, a minority-protection approach should be much more hospitable to religious speech in public institutions when it is done solely on the initiative of individuals, and is not sponsored by government. Religious minorities need protection from more than just government promotion of other religions. Minority adherents engage in their own religious speech and activity that needs protection. And their speech will be particularly prone to restriction by democratic, majoritarian government.

Private speech differs from government sponsored speech in crucial respects. What the government sponsors will tend to have a majoritarian cast, or at least tend to exclude those ideas offensive or irritating to the majority. Equal protection for private religious speech, by contrast, can extend as well to minority and outsider views. Indeed, it may be particularly important for such views.

The protection of religious expression by private actors should extend to speech that occurs in public institutions, including the public schools. Current law provides that when the school opens an opportunity for students or other private groups to engage in expression, it must not refuse that opportunity to any group based on the content of its expression, including religious content.³⁵² This “equal access” approach has been criticized on the ground that allowing religious speech in schools is the detrimental to religious minorities. Professor Ruti Teitel, for example, has objected that when student religious groups are permitted to meet in

350. See *supra* note 326 and accompanying text.

351. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963).

352. See cases cited *supra* note 297.

school classrooms, “government—a majoritarian entity—[is] assisting in the gathering of religious adherents.”³⁵³ Teitel expressed particular concern that the equal access principle produces unequal effects, favoring religions that proselytize over those that do not.³⁵⁴ Likewise, Michael Newsom argues that evangelical Protestant activities in the public schools visit “psychological harm . . . upon school children belonging to minority religious groups and their families.”³⁵⁵ Students in the minority are pressured by the evangelism of the (assertedly majority) Protestants.³⁵⁶ It does not matter, Professor Newsom says, whether the religious activity in the school is sponsored or favored by government, or pursued entirely by students or other private individuals on the same terms as other private groups. That distinction he calls “empty formalism at its worst,” because in either case the school gives “instrumental assistance” to Protestant religion.³⁵⁷

These arguments greatly oversimplify the circumstances of minorities in government settings such as schools. Often the students seeking to meet for religious study or prayer are far from a majority or dominant group. Even though such groups may be disproportionately evangelical Protestant, that fact, as I have already argued, does not make them insiders by definition; serious evangelicals are outsiders in many places.³⁵⁸ At my own high school in a rock-ribbed Republican Chicago suburb in the late 1970s, it would have been ludicrous to call the small Christian group insiders: the football players, cheerleaders, and student council officers were definitely elsewhere when the group met at 7:30 a.m., and the Christians were looked down upon by many other students. Such evidence is highly anecdotal, but I suspect that if student religious groups typically drew from the high school insiders, there would be many fewer cases of school officials trying to keep them from meeting.

Indeed, in some ways minority groups have a greater need than others to speak in public settings, including public schools. Minority groups must take their message out in public settings precisely because they cannot rely as heavily on established institutions, preexisting memberships, or quiet networking. In the Jehovah’s Witnesses cases, which involved street-

353. Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 188 (1986).

354. *Id.* at 178–79.

355. Newsom, *Common School Religion*, *supra* note 154, at 225.

356. *Id.* at 226–27.

357. *Id.* at 227, 225 (criticizing the protection of religious activity in *Mergens* and *Good News Club*, among other cases).

358. *See supra* notes 128–32, 140–46, 185–93 and accompanying text.

corner and door-to-door campaigns, the Court recognized that the right to preach in public settings can be particularly important to small, marginal, and less established groups. The Court argued that the Witnesses' distribution of tracts on street corners was analogous to "worship in the churches and preaching from the pulpits," the features of "the more orthodox and conventional exercises of religion."³⁵⁹ And it emphasized that "[d]oor to door distribution of circulars," as the Witnesses undertook, "is essential to the poorly financed causes of little people."³⁶⁰ As these arguments show, because minority faiths lack a large preexisting base, they may find it important not just to speak in general, but to seek converts in the public square. Rules that disfavor religious speech or proselytization in public settings will likely hamper some minority faiths and adherents. This is especially so if, as I have argued, many different groups can qualify as minorities in various contexts, including groups that are formally Christian but nevertheless in reality are at odds with the majority ethos (Christian or secular) in a particular location or institution. The argument for the equal access approach, therefore, need not appeal solely to the formal version of neutrality or equality. Protection of minorities also provides a substantive argument for vigorous protection of truly private religious speech in public schools and other government institutions.

Professor Newsom raises the valid point that facially neutral rules may, in their effect, exclude the speech of some religious groups. For example, the Equal Access Act's provision that a group is not protected if "nonschool persons . . . direct, conduct, control, or regularly attend" student meetings³⁶¹ appears to exclude a Catholic student fellowship's celebration of mass, which must be conducted by a priest.³⁶² But as in the cases of unequal effects from religious conduct exemptions, the solution is not to eliminate the statutory religious-liberty right; rather, the right should be extended to the excluded group.³⁶³ A provision in the Act for student groups whose doctrine requires clergy to lead meetings would serve the purpose of protecting a range of student groups without doing serious damage to the interests of school administration.

359. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

360. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

361. 20 U.S.C. § 4071(d).

362. Newsom, *Common School Religion*, *supra* note 154, at 318–19.

363. See *supra* Part III.A.2. It seems likely that the criterion that protected groups under the EAA be student-initiated was demanded not by proselytizing evangelicals, to disfavor Catholics, but by secular separationists who resisted equal access rights for religious student clubs in the first place. For constitutional purposes, groups led by nonschool adults have an equal right to meet in school classrooms. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

At the same time, under a minority-protection approach courts need to remain vigilant for signs that the school is taking steps, even through subtle messages, to encourage students to attend one group over others. Certainly, the equal access principle condemns the kind of official favoritism for evangelical student meetings in the Oklahoma case discussed earlier in this Article.³⁶⁴

The more difficult question arises when an individual student speaks in a setting such as a graduation ceremony, where the number of speakers is limited and the audience must listen to their messages.³⁶⁵ When the school does not review the content of the speech, and the speaker is chosen by neutral criteria—for example, the valedictorian selected on the basis of grades—the speech is best characterized as private rather than government-sponsored.³⁶⁶ Nevertheless, a minority-protection approach is likely to be leery of such speech, far more leery than in the case of religious student clubs meeting during an after-school program. Student clubs can reflect a wide variety of views; but when only one or a few students speak at an event, they will likely reflect the majority's position on religious matters. This will be true simply as a statistical matter, even if, as with the valedictorian, the content of the speech truly stems from the student's choice rather than the school's. Moreover, unlike the situation with student clubs, the minority must listen to graduation speakers as a condition of attending an important school-sponsored event. For these reasons, a minority-protection approach likely supports some restrictions on religious content in speech that is the focus of an important school event.

364. See *supra* notes 126–27 and accompanying text (discussing *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985)). In addition, in at least one of its equal-access decisions the Court suggested that a school's allowance of religious group meetings might be more subject to Establishment Clause constraints if there is "empirical evidence that religious groups will dominate [the] open forum." *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). Of course, such a line would be difficult for courts to draw, and one might object that as long as students choose to attend a religious group without government skewing their decision, the fact that many make this choice should be irrelevant to the Establishment Clause analysis. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) (refusing to examine percentage of neutrally available financial aid that recipients choose to use at religious schools). For these reasons, drawing such a line might not be the best overall interpretation of the Religion Clauses. But examining whether a religious group or groups dominate a forum would be called for if the overriding criterion is the protection of religious minorities. Even so, in most schools there will be so many nonreligious student clubs that religious clubs are unlikely to dominate unless the school somehow gives them (unconstitutional) preferential support.

365. See, e.g., *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 288 F.3d 1092 (9th Cir. 2000).

366. See, e.g., *Doe v. Madison Joint Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir.), *vacated as moot*, 177 F.3d 789 (1999).

Therefore, the valedictorian or other student speaker at a school-wide event may well present one of the cases where the minority-protection emphasis produces a different result than do other Religion Clause principles. Other principles cut in favor of protecting the valedictorian's truly personal speech: the valedictorian's own rights of free exercise and free speech, the equal status of religious perspectives with nonreligious ones, and so forth. But if the decisive principle is the protection of religious minorities, then the student's speech is less likely to be protected.

C. Government Financial Aid to Religious Institutions

The final major category of Religion Clause cases involves the participation of religious entities in government financial-aid programs. The law here has changed dramatically in recent years, more so than in any other area of government-religion disputes. The Court of the 1970s and early 1980s was quite hostile to the receipt of aid by religious schools or the families using them.³⁶⁷ But in the last two decades, a series of decisions have approved the equal inclusion of religious entities in aid programs, culminating with school vouchers in *Zelman v. Simmons-Harris*.³⁶⁸ The shift in decisions can be understood as a shift in the primary value underlying the Court's analysis: from a strong separation of church and state in the no-aid decisions to a greater emphasis recently on equal treatment of religious schools and the choices of parents to use those schools.³⁶⁹

The majority academic view is that the restriction of government aid, like other principles of strict church-state separation, works to protect religious minorities—and conversely, that the greater acceptance of such aid will harm minorities. The arguments against aid fall into several lines. First, even when aid is given under facially religion-neutral criteria, it will tend to benefit majority faiths and not minorities. In part this is because

367. Decisions from that period invalidating aid include *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); and *Aguilar v. Felton*, 473 U.S. 402 (1985).

368. 536 U.S. 639 (2002). Previous decisions in the sequence include *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar*, 473 U.S. 402); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (partially overruling *Meek*, 421 U.S. 349).

369. For fuller accounts, see THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 236–50 (2d ed. 2004); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 *IND. L.J.* 1, 16–21 (2000); Ira C. Lupu, *The Lingering Death of Separationism*, 62 *GEO. WASH. L. REV.* 230, 242–50 (1994).

the criteria for recipient schools will tend to favor schools of familiar faiths like Catholicism and “exclude participation by schools run by smaller, less ‘traditional’ faiths.”³⁷⁰ In part it is because “[t]here simply will not be enough children of a minority faith in many communities to allow for the creation of a religious school” that could benefit from aid.³⁷¹ Second, providing aid to religious and other private entities will drain resources from state institutions, such as the public schools, that accept and appeal to students of all faiths.³⁷² Finally, if religious entities receiving aid continue to be able to favor members of their own faith in hiring, adherents of minority faiths will face increasing limits on their ability to get jobs.³⁷³

Although some of these concerns are substantial, there are also strong arguments that the inclusion of religious entities in benefits programs helps many people with minority religious views. As Alan Brownstein, one of the most thoughtful critics of aid programs, acknowledges, benefits such as school vouchers help families in need: “parents [who are] trying to educate their children according to their religious faith, but [are] worrying about how they can continue to pay their children’s tuition bills.”³⁷⁴ Families with non-mainstream religious views are among those most likely to need financial assistance for their educational choices. First, such families are especially likely to be alienated from the ethos of the public schools and to consider a religious school alternative. The public schools

370. Steven K. Green, *The Illusionary Aspect of “Private Choice” for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 559 (2002); see also Brownstein, *supra* note 1, at 920 (arguing that because of “conditions attached to vouchers, access to religious schools and the resulting benefits such access provides may be far more available to certain religions than others”). See generally Alan Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 252–66 (1999) [hereinafter Brownstein, *Neutrality*].

371. Brownstein, *supra* note 1, at 921; see also *id.* at 877; Green, *supra* note 370, at 559 (“[V]ouchers will benefit those faiths with established private schools and existing support structures: Catholics, Lutherans, and Orthodox Jews. . . . [O]ther faiths desiring to establish private schools will find themselves at a distinct competitive disadvantage, particularly considering the start-up costs associated with creating new schools.”); Levinson, *supra* note 4, at 53 (“[S]ince the vast majority of parochial schools are operated by mainstream religions, i.e., over eighty percent are affiliated with the Catholic Church, the Court’s willingness to allow aid to parochial schools does not really reflect a concern for minority religious interests.”).

372. See Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 350 (1999) (presenting the argument, and then rejecting it); cf. Brownstein, *supra* note 1, at 877 (arguing that religious minorities will suffer “if . . . educational services are fragmented along religious lines”).

373. See, e.g., Brownstein, *supra* note 1, at 877 (objecting that citizens will be “unable to compete for jobs funded by public resources . . . solely because they do not subscribe to a particular religious faith”).

374. *Id.*

are generally majoritarian institutions, subject to the control of elected school boards and responsive to influence from the largest and most powerful voices in the community. Dissenting families' objections to the public school culture may apply to only certain issues, such as sex education, or the objections may extend to the school's overall atmosphere and its lack of explicit religious elements. But if the objections are sufficient to incline the parents to choose a religious school as a matter of conscience, then the parents are cultural dissenters. Perhaps those groups most alienated from majority culture will fall outside the criteria for government aid; but any group that emphasizes the need for separate schooling is countercultural to some degree.

In addition, if religious "minorities" are defined in terms of their outsider cultural status, they may also be disproportionately of modest economic status. As such, they would feel greater pressure from the financial incentive presented by tuition-free public schools; and they may also have less ability to fund private schools within their religious community. The fact that many of these groups do not currently operate private schools is not decisive. The question is what universe of schools would develop once aid is provided on equal terms, including new schools that form as a result of the availability of aid.

In *Zelman*, the school voucher case, several Orthodox Jewish groups—members of a quintessential religious minority—filed an amicus brief explaining their community's interest in participating equally in voucher programs.³⁷⁵ The brief states that "Jewish education is a key, if not the key, to Jewish continuity and survival"; "Jewish religious school education is the most reliable means of teaching the values of the Jewish faith to Jewish children"; but "[m]any Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets," and "many Jewish parents are financially unable to pay even the minimum necessary to gain entrance to a Jewish day school."³⁷⁶ Voucher programs "enable parents with even the most modest means to select [Jewish and other] alternatives to designated public schools."³⁷⁷ The brief reflected the longstanding position of Orthodox

375. Brief of Amicus Curiae National Jewish Commission on Law and Public Policy at 3–4, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), available at 2001 WL 1480708.

376. *Id.* at 3–4.

377. *Id.* at 4.

groups, dating back to the 1960s.³⁷⁸ It rests squarely on the premise that distinctively Jewish schooling is preferable to the secular public schools.

A government aid program not only can protect religious minorities, it can do so, in theory, on an equal basis. Programs of aid to private religious schools can extend to all religious groups that choose to operate schools, subject to criteria ensuring basic educational quality. Government aid to private schools therefore can respect religious minorities far more than does government sponsorship of religion in the public schools. When the government itself speaks religiously, it must choose one religious perspective to advance or promote; and as I have already argued, the government's choice is especially likely to favor majority religious views. By contrast, aid programs can be far more even-handed toward minority views.

The critics' arguments about the impact of government aid on religious minorities do not necessarily show that such aid should be forbidden. First, although some groups will be better situated than others to benefit from school aid, this disparate impact exists as much or more when only public schools are funded. The funding preference for public schools creates, in Eugene Volokh's words, "a powerful 'disparate impact' favoring secular uses and disfavoring religious uses."³⁷⁹ More precisely, public-school-only funding has a disparate impact on those religious groups that cannot accept the secular approaches to education in the public schools and that therefore have a conscientious impulse to create their own schools. If small religious groups find it difficult to create schools with the help of government benefits, they must find it even more difficult to do so without such aid. If families of minority faiths are likely to be left behind in public schools under a voucher program, this is even more likely to happen without vouchers.³⁸⁰ On the face of it, vouchers should make matters easier for religious minorities.³⁸¹

378. See COHEN, *supra* note 43, at 240–41; IVERS, *supra* note 88, at 152, 176–78.

379. Volokh, *supra* note 372, at 348.

380. To quote Professor Volokh again: "True, [under school choice] some poor parents will still be unable to find a school that fits their particular religious beliefs—but under the current system, many more parents are in this boat." *Id.* at 350.

381. The concern that the eligibility standards for government aid programs will disfavor minority religions, see *supra* note 370 and accompanying text, can also be addressed. If a criterion for eligibility excludes minority religious schools from participating because it conflicts with the minority's beliefs or practices, the criterion could be struck down as an unconstitutional condition on the receipt of government assistance, unless it serves substantial state educational interests. As I have emphasized at various points, the best protection for minority religions may come not by strictly separating church and state, but by permitting state accommodation of religion while taking steps to make sure that accommodations extend to minority faiths. See *supra* notes 221–22, 284–89, 362–63 and accompanying text.

The argument that aid to religious entities worsens the position of minority faiths, therefore, depends on the premise that public schools constitute an acceptable option for minority faiths. If the public schools are acceptable to minority adherents, then shifting some share of government assistance to religious schools (among other private schools) produces little added benefit for the minority and merely benefits larger faiths. Indeed, the critics warn, the shift may drain resources from the public schools, impairing their ability to serve as the acceptable educational alternative for families of all faiths.³⁸²

We should not assume, however, that public schools are acceptable for all minority faiths. For the reasons above, those believers who dissent from the dominant culture are especially likely to dissent from various aspects of the public schools and strongly prefer a religious alternative. As I have argued earlier, conflicts between religious and secular orientations, or between countercultural and acculturated perspectives, are among the most important conflicts in American religious life today.³⁸³ The arguments of the Orthodox groups in *Zelman* confirm that some minority faiths regard the secular orientation of public schools as unacceptable for their children. Arguments about what best protects and equalizes minority faiths should not rest on the simplistic assumption that a secular education is “neutral” for people of all faiths.

But the world is not perfect, certainly not for members of minority religions. Religious schools may be the ideal for many groups, but some groups will be unable to start them even with vouchers. Public schools with their secular orientation are not neutral toward religion, but they may offer the “second best” choice for religious minorities—preferable, for many such parents, to sending their children to a school that explicitly teaches them the doctrines of another faith. Thus many minority faiths have opposed aid to religious schools, adopting the notion of a strictly secular government not as a moral or theological ideal, but as a pragmatic

Including exemptions from the eligibility terms of a government aid program will raise objections that the Establishment Clause prohibits any advantages for religion in the provision of affirmative aid. See, e.g., Brownstein, *Neutrality*, *supra* note 370. I concede, as I have throughout this Article, that other Religion Clause principles may need to be taken into account, such as equal treatment between religious and secular beneficiaries. My only point is that if we focus solely on the minority-protection principle, it can call for the provision of aid with appropriate accommodations, rather than the denial of aid.

382. See *supra* note 372 and accompanying text.

383. See *supra* Part II.B.3.

strategy for minimizing the risk of being explicitly oppressed by government promoting the majority faith.³⁸⁴

In addition, minority religious groups may be independently worried that aid programs will “fragment” social institutions along religious lines, reducing the opportunities for minority adherents to interact with those in the majority.³⁸⁵ Such interaction, it is argued, is important because “it serves to dissolve the barriers between groups that permit the abuse of discrete and insular minorities.”³⁸⁶ Decreased integration in important areas of life decreases the “fluidity, mix of relationships, and mutuality of interests” that encourage understanding between groups: as a result, the “needs and interests [of minorities might] be easily isolated from those of others and could be safely ignored without the majority incurring any costs or burdens itself.”³⁸⁷

On the other hand, some religious-minority families may find even the schools of other faiths preferable to a public-school education devoid of any religious elements.³⁸⁸ They may not equal the numbers who prefer public schools as a second best option. But remember that a voucher program would also increase the number of families who would be able to attend schools run by their own faith—and for whom that ability outweighs any decrease in religious integration caused by a move away from public schools.

In other words, calculating the effect of aid programs on religious minorities is quite complicated. Like many of the issues discussed in this Article, the effect will vary in different places around the nation. If constitutional doctrine under the Religion Clauses is to emphasize the protection of minority religions, how should it handle this uncertainty and complexity?

One plausible response in such a situation is to defer to the decisions of the political branches. The uncertainty and complexity of a problem means that judges cannot have confidence that one solution will serve constitutional values better than the alternatives. When no clear

384. See, e.g., Newsom, *Common School Religion*, *supra* note 154, at 334 (defending “strategic separationism” and “strategic secularism” as a posture for religious minorities; arguing “that children need religious instruction, but that it should take place elsewhere than the common schools” so as to foreclose “majoritarian religion subjugating religious minorities”).

385. See Brownstein, *supra* note 1, at 903.

386. *Id.* at 923–24.

387. *Id.* at 924.

388. See, e.g., ANTHONY BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 297–304 (1993) (describing how families of other faiths choose Catholic schools because of schools’ moral teaching, discipline, and sense of community).

constitutional answer exists, the default approach is to leave the decision to the legislature or the relevant executive agency. And the Supreme Court may be settling on this solution with respect to the participation of religious entities in government aid programs. After *Zelman*, states are permitted to include religious elementary and secondary schools in voucher programs. But after *Locke v. Davey*,³⁸⁹ states have discretion to exclude theology students from state programs of college scholarships. *Locke* may be limited to the special case of students training for the ministry.³⁹⁰ But some passages in the opinion indicate the Court's broader desire to give states "room for play in the joints" between free exercise and separationist approaches concerning government aid.³⁹¹ If that emphasis continues, then with vouchers and other benefit programs as well, states would be free to include religious choices but would not have to do so.

But deference to the political branches, however sensible in the abstract, is inappropriate for an approach emphasizing protection and equalization of minorities. As in other areas of church-state disputes, leaving questions concerning government aid to the political branches will tend to produce majoritarian results. Religious schools will be included in aid programs in states where the faiths that operate such schools are numerous or powerful. But religious schools will be excluded in states where many citizens are suspicious of religious education—as is the case in Washington, the state with the exclusion at issue in *Locke*, which has the least religious population in the nation.³⁹² Deference to such political decisions fails to serve the goal of protecting whoever happens to be the minority in the particular state.

A better way to accommodate the varying interests of minority religions is to allow religious education to participate in programs of government educational benefits, but to take steps to ensure that this does

389. 540 U.S. 712 (2004).

390. *See id.* at 721 (describing ministerial training as a distinct category of instruction" with "no counterpart with respect to [secular] callings or professions").

391. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

392. In the 2001 ARIS survey, 25 percent of Washington state respondents indicated "no religion" as their identity—the highest of any state—compared with 14 percent nationwide. *See ARIS Survey*, *supra* note 150 (Exhibit 15); *see also* KOSMIN & LACHMAN, *supra* note 119, at 89 tbl.3-1 (reporting Washington with second highest "no religion" percentage in 1990); *id.* at 83 (describing the Pacific Northwest as "the most unchurched region of the United States," because its mobile population "creates people without ties" and its "pristine environment [acts] as a distraction from organized religion"). When one adds the relatively large number with no religious identity to the always large number with only weak identity, it suggests that those who take their religion seriously enough to desire a religiously grounded education for their children are likely to be a decided minority in the state.

not create pressure for children to be exposed to religious teaching from other faiths against their families' conscientious wishes.

One such measure appears in Milwaukee's school voucher program, which guarantees the parents or guardian of any voucher student the right to opt the child out of "participat[ing] in any religious activity" at her private school.³⁹³ If a family does not wish its child to be exposed to another religion's doctrines, but the other religion's schools are the only available ones with strong educational performance or disciplinary policies, the opt-out right offers protection. It allows the family to reap the educational benefits of the other faith's school without submitting their children to its religious teaching. But the opt-out provision alone is probably not an adequate solution for minorities. Merely by being on the premise of the other faith's school, children will still receive some exposure to its teaching. Moreover, to the extent that the mere fragmentation of education into private institutions hurts minorities, this fragmentation can occur even if minorities in those private institutions may opt out of religious exercises. Finally, the opt-out provision may also interfere with the school's own educational program, since religious teaching may be quite important to its educational philosophy, and therefore may be integrated throughout the curriculum.

Another possible solution is to include religious education in aid programs but to require that there must remain public or other secular entities to serve families who belong to religious groups that cannot or do not wish to establish their own institutions. These schools would continue to serve as the second-best option for such minorities. Of course, almost certainly the public schools will remain in any jurisdiction that adopts a voucher program; the warning that no public or secular alternatives will remain is greatly overblown.³⁹⁴

Admittedly, however, it is a separate question whether the public or other secular entities will be adequate in substance to preserve sufficient choice for religious minorities. To address this concern, the Court can build on the standard it already set forth in *Zelman*. There the majority premised its approval of voucher aid to religious schools in part on the fact that parents had "genuine opportunities . . . to select secular educational options for their school-age children."³⁹⁵ The genuine secular options for parents of Cleveland school children included public magnet schools, public charter ("community") schools, supplemental tutoring in the regular

393. 27 WIS. STAT. § 4008e (1995).

394. Volokh, *supra* note 372, at 350.

395. *Zelman*, 536 U.S. at 655 (2002).

Cleveland public schools, and a number of secular private schools.³⁹⁶ With all these secular alternatives counted, less than 20 percent of the Cleveland students “enrolled in nontraditional schools” in a given year were attending religious schools.³⁹⁷

The requirement of “genuine secular options” articulated in *Zelman* can be used to provide reasonable assurance that members of minority faiths will not be pressured into schools operated by other faiths. To ensure such protection, courts would have to give some content to the requirement of secular options. Both the *Zelman* dissents and subsequent commentators have charged that the majority’s application of the standard was too lax, allowing children to be “steered . . . toward religious experience” because of the poor quality of the public-school alternatives.³⁹⁸ In previous work, I have responded that the requirement of secular options should not read too strictly, lest it rigidly bar voucher programs and therefore guarantee that many families will continue to suffer state discrimination and be “steered” away from their choice of religious education.³⁹⁹ I raised that argument under an approach that did not emphasize protecting religious minorities, but rather emphasized respecting individual choice and the equal status of religion in public life.⁴⁰⁰ But if the focus is instead on protecting minorities (as in this Article), it may call for a somewhat more demanding assessment of whether the secular options are adequate, to minimize the extent to which religious minorities are driven by educational necessity into religious schools that contradict their faith.

But even under a minority-protection approach, the standard for judging the adequacy of secular alternatives should not be strict. Again, to demand too much of the secular options is to prevent any inclusion of religious choices in the program. And that will harm those minority adherents—like the Orthodox Jews who spoke out in *Zelman*—whose consciences demand that they educate their children in an atmosphere that promotes their faith.⁴⁰¹

396. *Id.*

397. *Id.* at 659.

398. Lupu & Tuttle, *supra* note 92, at 947; *see also Zelman*, 536 U.S. at 684–85 (Stevens, J., dissenting) (“[T]he emergency [in Cleveland’s public system] may have given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided.”).

399. Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 162–63 (2003).

400. *See id.* at 156–57, 187–88.

401. The requirement of genuine secular options also addresses the concern that minority religious adherents may be substantially denied job opportunities. *See supra* note 373 and accompanying text. If there remain significant numbers of secular schools or social services—which presumably have no

I do not claim that these arguments for government aid are open and shut. Whether the provision of aid on equal terms to religious entities will protect and equalize minority religions, or harm them, is a complicated question, with no single answer true in all circumstances and locations. But in the past it has too often been assumed that only the “no aid” position protects minorities. If courts and commentators recognize that the issue is complex, and that there is a substantial minority-oriented case in favor of aid, then this Article will have served a worthwhile purpose.

CONCLUSION

Protecting minority religions is an attractive goal for the Religion Clauses: not the only goal, but an important one. But we need to realize two things about such an approach. First, the case for making minority protection an important aspect of the Religion Clauses must be explicitly set forth and defended; I have tried to do so in Part I.

Second, the minority-protection approach is more complicated than most previous scholarship has acknowledged. The complications arise first in defining which religions are “minorities” or “outsiders.” Complexities in those definitions, I have argued in Part II, mean that a minority-protection approach should not try to identify certain groups as everywhere and always minorities, but rather should develop constitutional rules that protect whoever turns out to be a minority in a given context.

The next stage—assessing what constitutional rules will actually protect minorities in the various categories of Religion Clause cases—is also more complicated than previous commentators have acknowledged. Protection of religious minorities equates with strict separation of church and state in some categories of disputes, but not in all. In particular, there is a far better minority-protection case than has been admitted for including religious entities, and the persons who use them, in programs of government financial aid.

religious criteria for hiring decisions—then the effects on the employment opportunities of religious minorities will be limited.