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Rethinking Religious Minorities' Political Power

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This Article challenges the assumption that small religious groups enjoy little political power. Based on this assumption, the dominant view is that courts are indispensable for protecting religious minority groups from oppression by the majority. But this assumption fails to account for the many and varied ways in which the majoritarian branches have chosen to protect and accommodate even unpopular religious minority groups, as well as the courts' failures to do so.

The Article offers a public choice analysis to account for the surprising majoritarian reality of religious accommodationism. Further, it explores the important implications of this reality for deeply contested legal doctrines, as well as the insights it offers for recent and looming high-profile cases pitting state law against religious liberty.

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TABLE OF CONTENTS

INTRODUCTION: THE COUNTERMAJORITARIAN ASSUMPTION

The clash between law and religion is once again in the news and the courtroom. Can the government obligate a business to include contraception coverage in its health plans?[1] Must laws prohibiting discrimination on the basis of sexual orientation accommodate religious objectors?[2] Can states ban Sharia law?[3] May a municipality prohibit circumcision of minors?[4] When may a state override parents' religiously motivated healthcare decisions for their children?[5] Is a police department entitled to prohibit recruits from wearing religious garb?[6] When can a religious organization discriminate in employment decisions?[7]

There is a widely shared, if tacit, assumption that such cases present classic minority rights issues, and that this is one reason we should look to courts, rather than the majoritarian branches of government, to resolve them. Justice Stone suggested as much in his famous *Carolene Products* Footnote Four, in which he placed statutes implicating religious rights alongside those directed at national, racial,

[1] *See generally* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (determining that requirements that employers provide contraceptives as part of a health insurance plan represented a substantial burden on the company's free exercise rights), *cert. granted*, 134 S. Ct. 678 (2013).

[2] *See generally* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (finding that a company's free exercise rights, assuming they exist, are not offended by requiring the company to photograph a same-sex union), *cert. denied*, 134 S. Ct. 1787 (2014).

[3] *See generally* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (striking down an Oklahoma anti-Sharia law).

[4] *See, e.g.*, Maria L. La Ganga, *Judge Orders San Francisco Circumcision Ban off Ballot*, L.A. TIMES (July 29, 2011), http://articles.latimes.com/2011/jul/29/local/la-me-circumcision-ban-20110729 (reporting that a California court had ordered a referendum attempting to ban male circumcisions on minors removed from the ballot).

[5] *See, e.g.*, State v. Neumann, 832 N.W.2d 560 (Wis. 2013) (ruling that prosecuting parents for reckless homicide because they did not seek medical treatment for their child did not violate the parents' free exercise rights).

[6] *See* Litzman v. N.Y.C. Police Dep't, No. 12 Civ. 4681 (HB), 2013 WL 6049066, at *7 (S.D.N.Y. Nov. 15, 2013) (ruling that the New York City Police department violated the religious rights of an Orthodox Jew when it terminated plaintiff for refusing to shave his beard).

[7] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 714 (2012) (holding that employment discrimination legislation did not apply to a religious institution's employment of its ministers).

and other discrete and insular minority groups as potentially deserving of heightened judicial scrutiny.[8]

Leading legal scholars have likewise maintained that the courts, because of their countermajoritarian qualities, are indispensable for protecting religious minority groups from oppression by the majority. This view of religious freedom is at the heart of one important scholarly critique of the Supreme Court's decision in *Employment Division v. Smith*,[9] the most significant free exercise case in recent

[8] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Footnote Four spawned a rich body of literature, much of which similarly lumps religious minority groups together with other minority groups that are especially vulnerable in the majoritarian branches of government. *E.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1060 (1974); Lea Brilmayer, Carolene*, Conflicts and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1292 (1986); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1298 (1982); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1091 (1982).

[9] *See* Emp't Div. v. Smith, 494 U.S. 872, 886-87 (1990). Anyone with even a passing interest in free exercise doctrine and discourse is surely familiar with *Smith*, and so I resist the impulse to begin this Article with a large section explaining how *Smith* changed the law. Instead, this footnote will suffice.

For several decades prior to *Smith*, the courts applied (nominally, at least) strict scrutiny to laws that interfered with religious practice. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 608-09 (1989) (noting that the Court "expressly require[s]" strict scrutiny in analyzing inclinations toward one religion over another); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (noting that infringements upon free exercise is subject to strict scrutiny and "could be justified only by proof by the State of a compelling interest"). In *Smith*, the Court rejected the strict scrutiny test and held that preference-neutral laws of general applicability that incidentally interfered with religious practice were presumptively valid and not subject to heightened scrutiny. *See Smith*, 494 U.S. at 886-87. Consequently, a law that prohibited peyote use was not subject to strict scrutiny, even though a Native American religious group's religion called for the use of peyote as part of their religious ceremonies. *Id.* at 903-04.

Instead, according to *Smith* and its progeny, only some kinds of laws that interfere with religious practices are subject to constitutional override. These include laws that discriminate against religious groups, interfere with internal church affairs, implicate so-called hybrid rights, and potentially some others. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (stating that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its [internal decision making]"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 579 (1993) (holding that a city ordinance against animal sacrifice was unconstitutional because it only prohibited animal sacrifice as practiced by adherents of Santería); *Smith*, 494 U.S. at 890 (stating "Oregon may . . . deny respondents unemployment compensation when their dismissal results from use of the drug."); *id.* at 881-82 (stating that laws that implicate both freedom of religion and some other constitutional rights may not be scrutinized under the same standard as challenges based on free exercise alone);

history.[10] *Smith*, which involved Native Americans who wished to use peyote as part of their religious rites, held that neutral laws of general applicability that incidentally burdened religious practice are presumptively valid. This drastically narrowed (at least doctrinally[11]) the reach of the Free Exercise Clause and limited the role of the judiciary in protecting the freedoms of religious minorities. In so doing, it essentially gave license to political majorities to discount and ignore the interests of religious minorities.

In denouncing the *Smith* decision, Douglas Laycock, one of the legal academy's most influential advocates for religious freedom,[12] warned that *Smith* could lead to persecution of minority religious groups because they would be unable to protect their interests in the majoritarian branches of government.[13] After all, legislators "are free to reflect majority prejudices . . . and to ignore problems that have no votes in them."[14] More recently, he has asserted that special judicial protections for religious minority groups are necessary because "legislators [are] hardly ever [willing to protect unpopular minorities]; legislators cannot afford to protect any group that is seriously unpopular with voters."[15] Sounding similar notes, no less a luminary

Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1 [hereinafter *The Remnants of Free Exercise*] (discussing the breadth of *Smith*).

Suffice it to say, whatever the full reach of these exceptions, *Smith* was a doctrinal sea change that asserted that the Free Exercise Clause generally does not require accommodations for religious practices.

[10] As Michael McConnell asserted in 1990, "[t]he *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) [hereinafter *Free Exercise Revisionism*]. No case since then has come close to overshadowing it.

[11] As others have noted, and as discussed *infra*, the practical degree to which *Smith* changed judicial behavior, rather than just rhetoric and doctrine, is debatable. Doctrinally, the move from the pre-*Smith* strict scrutiny test to the post-*Smith* rational basis test is monumental. But the Supreme Court never really applied strict scrutiny, even while professing to do so prior to *Smith*. *See* McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1127 ("[I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test."). As Ira C. Lupu, another leading scholar in the field, has noted, "prior to *Smith*, free exercise principles were not thriving, and . . . after *Smith*, free exercise principles are not dead." Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 568 (1999).

[12] *See* Thomas C. Berg, *Laycock's Legacy*, 89 TEX. L. REV. 901, 901 (2011) (describing Laycock as a "towering figure in the law of religious liberty").

[13] Laycock, *The Remnants of Free Exercise*, *supra* note 9, at 15.

[14] *Id.*

[15] Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1177 (2007)

than Michael McConnell suggested that the Court in *Smith* had "abandon[ed] its traditional role as protector of minority rights against majoritarian oppression"[16] and argued that "practitioners of non-mainstream faiths" are most in need of judicial protection precisely because they "lack the ability to protect themselves in the political sphere[.]"[17] Justice O'Connor leveled a similar challenge in her concurrence in *Smith*, stating that, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[18]

This account of religious liberty, which views small, non-mainstream religious groups as essentially powerless in the majoritarian branches and subject to the whims of the majority, continues to resonate in contemporary debates over religious freedom, and it offers a powerful justification for robust judicial engagement in policy disputes concerning religious liberty.[19]

This view makes intuitive sense. Small religious groups will, by definition, never command majority power. The more discrete, insular, and unpopular a religious group is, and the more unfamiliar and strange its practices, the more likely it is to be perceived as outsiders by those in the majority, and the less likely it is to be able to

[hereinafter *A Syllabus of Errors*].

16 McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1129.

17 *Id.* at 1152.

18 Emp't Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

19 *See* Laycock, *A Syllabus of Errors*, *supra* note 15, at 1177 ("Judges sometimes are willing to protect unpopular minorities, but legislators hardly ever; legislators cannot afford to protect any group that is seriously unpopular with voters.").

To be sure, Laycock, McConnell, and others also assert other bases for rejecting *Smith*, some of which I discuss *infra* at Part III.1. Perhaps most importantly, they suggest that religion deserves special protections and accommodations on liberty and autonomy grounds. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 115, 172-73 (Geoffrey R. Stone et al. eds., 1992) [hereinafter *Religious Freedom at a Crossroads*] ("[I]f we are to understand the theory and principle of the Religion Clauses, we must know what differentiates 'religion' from everything else. The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole. Thus, the Virginia Declaration of Rights defined religion as the 'duty which we owe to our Creator, and the manner of discharging it.' Madison said that the law protects religious freedom because the duties arising from spiritual authority are 'precedent both in order of time and degree of obligation, to the claims of Civil Society.'").

That critique of *Smith* is not the subject of this Article. However, the view that the Free Exercise Clause demands special accommodation of religion is fully compatible with my argument that courts are not typically the appropriate forum for delineating the required accommodations.

protect its religious practices.[20] Yes, this countermajoritarian view of religious liberty protection sounds right. And if it is right, then *Smith* is deeply problematic, as Laycock and McConnell would have it. Just as political powerlessness is a factor in triggering heightened scrutiny in the equal protection context,[21] perhaps it should also trigger heightened scrutiny when it comes religious liberty.

Moreover, even if we are stuck with *Smith*, this account should, at least, encourage courts to be attentive to the rights of religious minorities in close cases. It should operate as a thumb on the scale in favor of protecting religious freedom if the arguments in a particular case are otherwise in equipoise. If nothing else, courts should reverse the burden of legislative inertia in such cases and force the political branches to act more clearly if they wish to restrict religious practices.[22] For instance, in the recent *Hobby Lobby* case challenging the contraception coverage mandate, which presented close questions indeed,[23] the countermajoritarian account might justify the Court's decision to rule for the plaintiffs and to strike down the mandate. If

[20] *E.g.*, McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1136 (stating that "[t]he courts offer a forum in which the particular infringements of small religions" can receive due consideration, which they could not receive in the political process because "[w]hen the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not even care if they do notice").

[21] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (identifying being "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" as a factor triggering heightened scrutiny in the equal protection context); *see also* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1372-78 (2011) (tracing the development of political powerlessness as a factor in the application of heightened scrutiny). To be clear, under equal protection doctrine, laws that incidentally affect minority groups but that are facially neutral are not subject to heightened scrutiny. Thus, my point here is not doctrinal, but rather conceptual: if a reason we are concerned about laws that target racial minority groups is that the majority is willing to sacrifice the welfare of politically powerless minority groups, then if it is true that religious groups are politically powerless, courts should take steps to protect them. Whether, in fact, the courts' current doctrinal approach to facially neutral laws in the equal protection context in fact adequately protects racial minority groups is certainly open to critique.

[22] *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1309 (2005) (arguing that courts may reverse the burden of legislative inertia where statutes affect underrepresented minority groups).

[23] The lower courts split on the issue presented in the case, and the Supreme Court split five to four. *See* Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2755 (2014); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013).

most citizens object, then they can act through the legislature to reinstitute the mandate.[24] After all, they *are* the majority.

But no matter how right it sounds, the countermajoritarian account is wrong. It is wrong because it offers a far too crude and one-dimensional picture of the ability of even small and unpopular religious minority groups to operate within our political system to protect their interests. A skeptical reassessment strongly suggests that, contrary to the countermajoritarian intuition, *majoritarian* institutions at every level of government offer substantial protections and accommodations for religious minority groups — more substantial than courts do or ever have offered. Elected officials are often eager to accommodate even the peculiar needs and practices of small minorities. Not *always*, of course (and as even the staunchest defender of religious freedom would agree, it *should not* always[25]) but often enough that it renders untenable any generalized assertion that judicial intervention is necessary to protect small religious minorities.[26] There may be an important judicial role in securing

[24] This interbranch dialogic approach to religious freedom seems to be what Eugene Volokh prefers. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1489 (1999). Although Volokh disagrees with Laycock's and McConnell's full-throated attack on *Smith*, he agrees that courts must have a role in protecting religious freedom because of their countermajoritarian qualities.

[25] *See* Laycock, *The Remnants of Free Exercise*, *supra* note 9, at 25; McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1123.

[26] I should note that I have the highest regard for Laycock and McConnell. They have been and remain scholars of the first order whose work and character I greatly admire. Their impulse to protect minorities' religious freedom is laudable, and their insights and advocacy have had a profound effect on the academy and judiciary, as well as in the political and public spheres. For example, Laycock has been an articulate and successful advocate for minority religious rights in court, and he was among the driving forces behind Congress' embrace of the Religious Freedom Restoration Act. Moreover, I find myself in substantial agreement with many of their positions, and as a member of a minority religious group myself, I am grateful for their principled stands on behalf of all religious groups.

True, my Article reflects deep disagreement with a core view that they have both expressed, namely, that countermajoritarianism is critical to the preservation of religious freedom in this country. But I understand ours to be a disagreement rooted in a different view of how the world operates in practice rather than one driven by more fundamental philosophical differences. Further, as I have noted, Laycock's and McConnell's background assumption about the relative powerlessness of minority religions in the political domain is a natural and intuitive one. They are far from the only ones to hold it, and it is no vice. Justice Stone shared their view, as he expressed in Footnote Four of *Carolene Products*, as have many other scholars. (I, too, shared this assumption until only recently.) Other leading scholars to have adopted this critique in the wake of *Smith* include Kathleen Sullivan and Robin West. *See* Kathleen

religious liberty,[27] but if so, advocates for that proposition must do a better job of articulating why and when. At bottom, courts only have so much decisional capital. To preserve that capital and put it to its best use, they need to choose carefully where to spend it. It would seem to be a profoundly poor investment to spend that capital in contexts in which the political processes are not dysfunctional.

This Article explores what I call the majoritarian reality of religious freedom and accommodationism in this country. In so doing, I approach the question of religious accommodation differently from other scholars. Many scholars have debated whether the Free Exercise Clause requires state accommodation of religious groups. On this question, some understand the provision to be primarily liberty-oriented, and therefore that it does impose accommodation requirements; others argue for an equality-oriented interpretation, under which accommodations are not typically required.[28] In contrast, I focus on a conceptually distinct question, one elided by others: *whatever* the Free Exercise Clause substantively means and guarantees, what is the proper role of courts in enforcing it? The countermajoritarian assumption, if correct, implies that judges must

M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 195-223 (1992); Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 44 (1990).

I have singled Laycock and McConnell out only because of their standing in the field and my opinion that if they harbor this view, it is perforce worth contending with.

[27] For instance, as I discuss *infra* at Part I.B.1, there are cases in which the countermajoritarian attributes of courts are necessary to protect religious liberty. The thrust of this Article, however, is that the countermajoritarian claims are not persuasive as a general matter. In addition, in Part IV of this Article, *infra*, I discuss several reasons scholars have or may offer for application of heightened scrutiny. For the reasons I briefly discuss there, I do not find these persuasive as a general matter; but those arguments are not the focus of this Article.

[28] For example, Ron Krotoszynski argues that the Free Exercise Clause is best understood only as an "equalitarian" guarantee, whereas McConnell has argued that it requires accommodation on the grounds that it embodies a liberty guarantee. *Compare* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189 (2008) (arguing that "an equalitarian understanding of the [Free Exercise] Clause better comports with [the] historical materials than does an autonomy-based conception of the Clause"), *with* McConnell, *Religious Freedom at a Crossroads*, *supra* note 19, at 172-73 ("[I]f we are to understand the theory and principle of the Religion Clauses, we must know what differentiates 'religion' from everything else. The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole. Thus, the Virginia Declaration of Rights defined religion as the 'duty which we owe to our Creator, and the manner of discharging it.' Madison said that the law protects religious freedom because the duties arising from spiritual authority are 'precedent both in order of time and degree of obligation, to the claims of Civil Society.'").

be active in protecting whatever substantive rights the Free Exercise Clause guarantees. But if, as I suggest, the reality of religious accommodation is far more majoritarian, then perhaps judges' role should be relatively circumscribed.[29]

The Article proceeds as follows. Part I challenges the dominant assumption that minority religious groups are largely powerless in the political branches by showing that this assumption is undermined by the actual experiences of religious minority groups. Part II then considers how, given the intuitive nature of the countermajoritarian assumption, we can account for religious minority groups' relative power within majoritarian institutions. I offer several mutually-reinforcing hypotheses for this dynamic, but suggest that the best explanation lies in a straightforward public choice and interest-group lobbying account.

Next, Part III identifies some important implications of the real-world condition of broad protection of religious liberty in this country. First, I suggest that the majoritarian reality provides a new justification for *Smith*, which has been criticized by scholars for its misuse of precedent and tenuous claims to textualist and originalist interpretation. Understanding the majoritarian reality transforms the *Smith* rule from a troubling substantive interpretation of the Free Exercise Clause into a coherent jurisprudential approach to religious liberty. Reconceived in this manner, *Smith* does not answer the question, "what does the Free Exercise Clause guarantee?," but rather, "what is the role of the courts in delineating the boundaries of

[29] In critical respects, this Article draws on ideas developed by John Hart Ely in his seminal work *Democracy and Distrust*, wherein he argues that the Constitution is primarily a procedural document designed to protect democratic governance, in part by ensuring equal participation and access among citizens. *See* ELY, *supra* note 8, at 135-84. However, this Article offers a subtly but importantly different perspective from Ely's. Ely suggests that the procedural orientation of the Constitution sheds direct light on the meaning of its substantive provisions, which should be understood to provide primarily procedural safeguards and guarantees. *Id.* at 105-34. In his view, the question of what the Constitution *means* is coextensive with the role of the judge in interpreting and enforcing it. In other words, for Ely, the judge should interpret constitutional provisions as primarily procedural because *that is what they mean*. In contrast, I suggest that it is appropriate to disaggregate the judicial function from the substantive constitutional guarantees. The Constitution may (contra Ely) provide a substantive, rather than procedural, right; but we may still insist that the judge focus on defining procedural rights where doing so can engage the majoritarian branches in the substantive question. This is especially so where we have reason to question the judiciary's institutional competence to resolve the substantive question *and* we have reason to believe that, given the right circumstances, the majoritarian branches can meaningfully do so.

religious liberty?" The majoritarian reality supports *Smith*'s minimalist approach. Second, the majoritarian reality helps to resolve a pervasive and challenging post-*Smith* difficulty with identifying those cases that merit heightened scrutiny. And third, it offers direction for contemporary disputes, including *Hobby Lobby* and the looming showdown between gay rights advocates and religious conservatives.

Finally, Part IV considers the limits of my analysis by briefly discussing other possible reasons — beyond the purported political powerlessness of minority religious groups — to treat laws affecting religion differently from other laws.

I. THE MAJORITARIAN REALITY

This Part challenges the dominant countermajoritarian account of religious freedom by uncovering and exploring the majoritarian reality. It begins by framing the discussion with contrasting narrative accounts of experiences of religious minority communities that sought similar accommodations from local government officials. The first story — well known among free exercise scholars — dovetails nicely with the familiar countermajoritarian narrative. The second — captured nowhere in legal discourse — reveals a very different relationship between religious minority groups and government officials.

Having thus set the stage, it proceeds to explore the many significant (and sometimes regrettable) ways in which majoritarian institutions and elected officials have chosen to protect religious freedom and to contrast these to the courts' rather more circumscribed role.

To be sure, proving that religious groups win the "right" number of accommodations in the political sphere is an impossible task, and this Article does not try to do so. Such a project would require data that are unavailable, such as: (1) how many accommodations have religious groups sought?; (2) how many accommodations have been granted?; and (3) under what circumstances are accommodations rejected? Even *with* such data, the question is not susceptible to empirical analysis, because by its very nature the question turns on the underlying normative and controversial presuppositions as to what the baseline for accommodations should be.

Rather, the Article challenges and complicates the assumption that because religious groups represent only a small portion of the population, they are at an inherent structural disadvantage in the political sphere. In fact, religious minority groups in this country

enjoy greater rights than the Constitution and what courts have ever required, thanks to the will of political majorities.[30]

A. Reframing the Discourse: A Tale of Two Eruvs

Jews make up approximately 2% of America's population.[31] Among American Jews, about 10% identify with the Orthodox movement and its institutions.[32] A smaller group actually practices the Orthodox Jewish lifestyle.[33] Practicing Orthodox Jews are thus a fraction of a small minority group within a tiny minority religious population among American citizens.[34]

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[30] To the extent that advocates urge for judicial engagement as a means of combatting their assumed structural disadvantages, the burden is on those advocates to prove that the assumption is borne out by the data and, further, that judicial engagement would indeed achieve this goal. They have not.

[31] Laurie Goodstein, *Poll Shows Major Shift in Identity of U.S. Jews*, N.Y. TIMES (Oct. 1, 2013), http://www.nytimes.com/2013/10/01/us/poll-shows-major-shift-in-identity-of-us-jews.html.

[32] *A Portrait of Jewish Americans*, PEW RESEARCH CTR. (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey.

[33] Dov Fisher, *Making an Orthodox Sense of an Unorthodox Census*, JEWISH JOURNAL (Oct. 4, 2013, 10:23 AM), http://www.jewishjournal.com/opinion/article/making_an_orthodox_sense_of_an_unorthodox_census.

[34] Orthodox Judaism is itself a continuum. On one end of this continuum are the most fundamentalist Orthodox Jews. These groups tend to insulate themselves from secular society to the greatest degree possible. Televisions, the Internet, and participating in secular culture are forbidden. *See* Josh Hack, Taming Technology: Ultra-Orthodox Jewish Families and Their Domestication of the Internet 1, 35 (Sept. 2007) (unpublished MSc dissertation, London School of Economics and Political Science), *available at* http://www.lse.ac.uk/media@lse/research/mediaworkingpapers/mscdissertationseries/past/hack_final.pdf. Secular education is at best a necessary evil. *See* Calev Ben-David & Alisa Odenheimer, *Israeli Ultra-Orthodox Do the Math in Bid to Enter Workforce*, BLOOMBERG (Jan. 22, 2014), http://www.bloomberg.com/news/print/2014-01-21/israeli-ultra-orthodox-find-path-to-work-uses-secular-education.html. Members of such groups may not even speak English, preferring Yiddish instead. *Id.* They are distinguished by their dress, with the men growing long beards and wearing black fedoras or fur hats and long black coats; and the women covering nearly every inch of their bodies (though typically not their faces or hands). Married women conceal their hair with wigs, headscarves, or other head-coverings. *See, e.g.*, Ruth Rosen, *The Modesty Wars: Women and the Hasidism in Brooklyn*, OPENDEMOCRACY.NET (Mar. 25, 2013), http://www.opendemocracy.net/5050/ruth-rosen/modesty-wars-women-and-hasidim-in-brooklyn (comparing the modesty of Orthodox Jewish Hasadim women in Brooklyn, New York, and neighboring areas).

On the other end of the Orthodox continuum are those who identify with Modern or Open Orthodoxy. Modern and Open Orthodox Jews embrace many Western values and participate in much of contemporary culture. *E.g.*, NORMAN LAMM, TORAH UMADDA: THE ENCOUNTER OF RELIGIOUS LEARNING AND WORLDLY KNOWLEDGE IN THE JEWISH TRADITION 142-43 (1990). Their dress tends to reflect modern styles, though

Observance of the Sabbath and its many strictures is a core feature of the Orthodox Jewish lifestyle.[35] On the Sabbath, Orthodox Jews spend much time in synagogue and engage in various ritual practices.[36] Above all, they abstain from work.[37] To Orthodox Jews, the obligation to refrain from work includes the obvious "not engaging in labor," but it goes much further. Orthodox Jews do not cook food on the Sabbath; they do not turn on and off lights; they do not drive their cars; they do not adjust the thermostat; and they do not otherwise manipulate electricity.[38] They also do not move objects between private domains (e.g., from house to house), from a private domain to a public domain (e.g., from a house into the public streets) or vice versa, or within the public domain.[39] This restriction is colloquially known as the prohibition on carrying, and it poses many challenges for Orthodox Jewish communities. Perhaps the most difficult of these challenges is that it prevents parents from carrying their children or pushing them in strollers to synagogue or social gatherings.[40]

Over the centuries, Rabbinic Judaism has developed a way for Jews to overcome these challenges and permit carrying, namely through the construction of an eruv. The operative principle is that an eruv creates a single private domain within which all Jews may carry.[41] In its

the men may wear yarmulkes and the women tend to wear clothing that is not particularly revealing and married women may cover their hair. Michael J. Broyde, *Hair Covering and Jewish Law: Biblical and Objective (Dat Moshe) or Rabbinic and Subjective (Dat Yehudit)?*, TRADITION, Fall 2009, at 97, 97-179 (discussing hair covering and Jewish law).

[35] *Shabbat*, JUDAISM 101, http://www.jewfaq.org/shabbat.htm (last visited Aug. 4, 2014).

[36] *Shabbat Rituals*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/93782/jewish/Shabbat-Rituals.htm (last visited Aug. 4, 2014).

[37] *Melacha — A Unique Definition of Work*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/95906/jewish/Melacha-A-Unique-Definition-of-Work.htm (last visited Aug. 4, 2014); *The Shabbat Laws*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/95907/jewish/The-Shabbat-Laws.htm (last visited Aug. 4, 2014).

[38] *See* sources cited *supra* note 37.

[39] Zachary Paul Levine, *Eruv: The (Nearly) Invisible Borders That Define Religious Jewish Life*, HUFFINGTON POST (Feb. 5, 2013, 11:24 AM), http://www.huffingtonpost.com/zachary-paul-levine/eruv-invisible-border-defines-sabbath-religious-jewish-life-photos_b_2567613.html; *Shabbat: Eruv*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/jsource/Judaism/eruv.html (last visited Aug. 4, 2014).

[40] Simon Rocker, *How the Eruv Liberated Families on Shabbat*, JEWISH CHRONICLE ONLINE (Feb. 7, 2013), http://www.thejc.com/judaism/judaism-features/102301/how-eruv-liberated-families-shabbat; *Shabbat: Eruv*, *supra* note 39.

[41] For an excellent discussion of the importance of an eruv to Orthodox Jewish communities and an overview of its ins and outs, see Alexandra L. Susman, *Strings Attached: An Analysis of the Eruv Under the Religion Clauses of the First Amendment and*

original sense, an eruv was a physical structure, such as a wall, that encircles a broader area to create a single domain. However, an eruv can also be created without a wall, through the use of structures that are already in place in most metropolitan areas.[42] Highway embankments, fences, and even public utility wires can serve as the boundaries of a single domain in which Jews may carry.[43] In order to create an eruv in this manner, an Orthodox Jewish community must typically receive approval from local government authorities and a ceremonial proclamation of sorts, declaring that the enclosed area constitutes a single domain.[44] In addition, the community must receive permission from the owners of the utility poles to use them as part of the eruv and to attach a small plastic piece of piping, called a lechi, to the poles that are to serve as part of the eruv.[45]

All of this must sound very perplexing (if not disconcerting) to the uninitiated, including the local government officials and representatives of utility companies whose permission and assistance is necessary for eruvs' construction. Nevertheless, in contemporary America, many cities with sizeable Orthodox Jewish communities have permitted construction of eruvs in this manner.[46] There are more than 130 eruvs in the United States.[47] These eruvs are essentially invisible,[48] but they are of critical importance to the Orthodox Jewish families who rely on them to allow them to attend synagogue, visit local parks, and socialize with friends on the Sabbath with their children in tow.[49]

What follows are accounts of two different Orthodox communities' experiences with government officials as they sought approval for

the Religious Land Use and Institutionalized Persons Act, 9 U. MD. L.J. RACE RELIGION GENDER & CLASS 93, 97-102 (2009). *See also Shabbat: Eruv*, *supra* note 39 (stating that an eruv creates a legal fiction that allows carrying on the Sabbath).

[42] *See Shabbat: Eruv*, *supra* note 39.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] A list of eruvs in the United States can be found on *Wikipedia*. *List of Eruvin: United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_eruvin#United_States (last modified Jan. 5, 2015). I do not take this list to be authoritative, and I do not offer it here as such. There may be eruvs in the United States that are unaccounted for on this list, and some of the eruvs on this list may no longer exist or may be subject to controversy among religious authorities. However, this list demonstrates, at least, that there are indeed a large number of eruvs throughout the United States.

[47] YOSEF GAVRIEL BECHHOFER, THE CONTEMPORARY ERUV: ERUVIM IN MODERN METROPOLITAN AREAS 6-9 (1998).

[48] Levine, *supra* note 39.

[49] Rocker, *supra* note 40.

construction plans. I draw on these accounts to reflect on the broader experience of religious freedom in modern America.

1. The Countermajoritarian Eruv: Tenafly, New Jersey

If you had walked the streets of Tenafly, New Jersey on a December Saturday in the mid-1990s, you might have noticed a sign, nailed to a utility pole, directing you to the local Presbyterian church.[50] Underneath that sign, advertisements for yard sales or a play at Tenafly High School might have caught your attention. Perhaps the festive Christmas wreaths topping the utility poles would have lightened your spirits.[51] What you would not have seen were very many Orthodox Jews walking to Synagogue. This absence might have surprised you given that the streets of the neighboring boroughs of Englewood and Teaneck were at the same time teeming with Orthodox Jews on their way to religious services.[52]

Tenafly is a small, northern New Jersey community just across the Hudson River from the Bronx and a short drive from Manhattan. It encompasses an area of about 4.4 square miles and has a religiously diverse population of around 14,000.[53] Like Englewood and Teaneck, it attracts successful young professionals and families seeking a slice of suburban living in close proximity to New York City.[54] For decades, Englewood and Teaneck had robust and growing Modern Orthodox Jewish communities made up of families with children of all ages.[55]

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[50] *See* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 151-53 (3d Cir. 2002) (describing the state of affairs prior to the attempt to erect an eruv in Tenafly).

[51] *Id.* at 152.

[52] *See* Jerry Cheslow, *If You're Thinking of Living in/Teaneck, N.J.; A Town That Champions Its Diversity*, N.Y. TIMES (June 11, 2000), http://www.nytimes.com/2000/06/11/realestate/if-you-re-thinking-of-living-in-teaneck-nj-a-town-that-champions-its-diversity.html (describing the sidewalks of Teaneck as "congested" by Orthodox Jews on Saturdays and Jewish Holidays); Nathaniel Popper, *Orthodox Boom Burb Wins Over Locals*, JEWISH DAILY FORWARD (Dec. 15, 2006), http://forward.com/articles/9646/orthodox-boom-burb-wins-over-locals/.

[53] For an overview of Tenafly, see *About Tenafly*, BOROUGH OF TENAFLY, N.J., http://www.tenaflynj.org/content/7596/default.aspx (last visited Mar. 1, 2015).

[54] *See* Popper, *supra* note 52 (listing Englewood and Teaneck as two communities to attract young, affluent Orthodox couples away from New York); *see also Jew v. Jew*, PBS: RELIGION & ETHICS NEWSWEEKLY (Feb. 21, 2001), http://www.pbs.org/wnet/religionandethics/2001/02/21/february-2-2001-jew-v-jew/15737/ (describing Tenafly as a New York suburb that attracts affluent professionals with its schools, nature preserves, and diversity).

[55] *See* Cheslow, *supra* note 52 (reporting that an eruv and Orthodox presence in the Teaneck community existed at least as early as 1992 and describing the presence

Typically, one or both of the parents in these families worked as successful professionals — bankers, stockbrokers, lawyers, doctors, teachers, accountants, and so forth — in New York City or the immediately surrounding areas. Synagogues, kosher restaurants and markets, Jewish schools, and other institutions popped up all over the area to serve these communities.[56]

By the late 1990s, some Orthodox families began to move to Tenafly, which boasted many of the same welcoming and attractive features as Teaneck and Englewood.[57] As the Tenafly Orthodox Jewish community grew, some of its members sought to construct an eruv that would allow them to walk to synagogue, to the park, and to friends' houses on the Sabbath with their young children in strollers.[58] They created the Tenafly Eruv Association to work towards gaining the necessary government permissions and the cooperation of the utility companies.[59]

In June of 1999, representatives of the Eruv Association approached Mayor Ann Moscovitz, a Reform Jew and the first Jewish mayor of Tenafly, to discuss their interest in establishing an eruv and to seek official support.[60] Mayor Moscovitz indicated that there would likely be no problem with the project, but that she would have to speak to the borough council — Tenafly's legislative body — before making the necessary official proclamation.[61] However, when the eruv issue came

of many families with young, school-aged children); Popper, *supra* note 52 (describing a growing Orthodox presence in Englewood over the last two decades).

[56] *See Jew v. Jew*, *supra* note 54 (reporting an increase in the number of businesses in Teaneck and Englewood that cater to the Orthodox community).

[57] Certification of Charles Agus in Support of Plaintiff's Application for a Temporary Restraining Order at 3, Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 155 F. Supp. 2d 142 (D.N.J. 2001) (Civ. No. 00-6051 (WGB)), 2000 WL 35599378 (describing a conversation between the Mayor of Tenafly and a real estate broker in which the broker claimed that forty Orthodox families were looking to move into Tenafly).

[58] *See* Certification of Chaim B. Book in Support of Plaintiff's Application for a Temporary Restraining Order at 13-14, *Tenafly Eruv Ass'n*, 155 F. Supp. 2d 142 (Civ. No. 00-6051 (WGB)), 2000 WL 35599376 [hereinafter Certification of Chaim B. Book] (explaining that one of the reasons Chaim Book sought the creation of an eruv was to allow his family, which included young children, to attend synagogue services, visit friends, or go to parks together on the Sabbath).

[59] *See id.* at 2 (describing the mission of the Tenafly Eruv Association).

[60] Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 152 (3d Cir. 2002) (documenting the meeting between two Orthodox Jews and the mayor in which the erection of an eruv was discussed); *see* Tyler Maroney, *No Boundaries*, LEGAL AFFAIRS (Sept.–Oct. 2003), http://www.legalaffairs.org/issues/September-October-2003/scene_maroney_sepoct03.msp (describing Moscovitz as the first Jewish mayor of Tenafly).

[61] *Tenafly Eruv Ass'n*, 155 F. Supp. at 149, *rev'd*, 309 F.3d 144 (describing the

before the borough council at a public meeting, it was immediately met with hostility.[62]

At this meeting and others that followed, citizens of Tenafly expressed a variety of concerns about the proposed eruv. Some maintained that the eruv would negatively affect the borough's economy. They suggested that, if the eruv was constructed, there would be an increase of the Orthodox population, and that "those people" would establish their own businesses and boycott those that were open on the Sabbath, leading to the closure of many stores owned by citizens of Tenafly.[63] It was also suggested that an influx of Orthodox Jews would have a negative impact on the public school system.[64]

Opponents of the eruv pointed to the experience of nearby Teaneck as a cautionary tale for how an eruv and a growing Orthodox Jewish community would negatively affect the character of the borough. Following the establishment of its eruv, Teaneck saw a steady increase in the Orthodox Jewish population.[65] Opponents of Tenafly's eruv claimed that this influx had led to a racial imbalance in the population of Teaneck's school systems and the replacement of many local businesses with those geared toward the Orthodox. Further, they argued that Teaneck was no longer a good place to live and asserted that Orthodox families would not allow their children to play in the same parks or playgrounds as children from Reform or Christian families.[66]

Given these sentiments, the borough council delayed making any decision about the proposed eruv. Seeing the writing on the wall, the Tenafly Eruv Association decided not to submit a formal request to the council.[67] Instead, the association sought and received a proclamation

initial meeting between representatives of the Eruv Association and the mayor).

[62] *Id.* at 151-54 (recounting the proceedings of the public forum and describing the hostile statements made toward the possible establishment of an Orthodox community in Tenafly).

[63] *Id.* at 153 (listing closure of non-Orthodox stores as a concern of the citizens).

[64] *See id.* at 162 (detailing the fears of some citizens that the public schools in Tenafly would suffer because Orthodox Jews send their children to religious schools and do not support the local public schools).

[65] *See* Cheslow, *supra* note 52 (indicating that the eruv in Teaneck was erected in 1992); Maroney, *supra* note 60 (indicating that membership at one of the Orthodox synagogues in Teaneck grew 50% between 1994 and 2001); *Jew v. Jew*, *supra* note 54 (indicating that the populations of both Teaneck and Englewood became predominantly Orthodox following the erection of an eruv).

[66] *See* Maroney, *supra* note 60 (describing the feeling of some Tenafly residents that they were becoming outsiders in their own community and that the Orthodox community was segregating itself from the rest of Tenafly by, for example, not allowing their children to play with non-Orthodox children).

[67] *See* Certification of Chaim B. Book, *supra* note 58, at 6-7 (recounting the steps

from the Bergen County Executive that allowed it to proceed with the construction of the eruv.[68] The local utility companies, for whom eruvs were already old hat, quickly gave their approval as well.[69] With the cable company assisting in its construction, the eruv was completed in 2000.[70]

When Tenafly's borough council and the mayor discovered that the eruv had been completed without their cooperation, they were not pleased. Mayor Moscovitz vowed that the eruv would be dismantled and requested that the Bergen County Executive immediately rescind its proclamation.[71] But the County Executive, also responsible for Teaneck and Englewood, understood the significance of the eruv to the Orthodox Jewish community and refused her request.[72] Thus stymied, the mayor and the borough council turned to the cable company and demanded an explanation for its actions in assisting with the eruv construction. They also requested that the cable company remove the lechis. According to some accounts, the borough leaders threatened not to renew the cable company's franchise agreement if it did not comply with the request.[73] The company did not want to jeopardize its relationship with the borough and apologetically informed the association of its intent to comply. The borough gave the company thirty days to remove the lechis in order to give the eruv association an opportunity to work things out with the borough government.[74]

During this period, the eruv association formally applied for permission to maintain the eruv. Public hearings were held. Along with the concerns expressed during the earlier council meetings, citizens voiced concerns that an influx of Orthodox Jews would lead to decreased home values, increased welfare, and the creation of a ghetto.[75]

It was at the final meeting of the council that a local ordinance was brought to the attention of the council by the mayor. Ordinance 691, among other things, prohibited the attachment of any objects to poles

the Tenafly Eruv Association took to construct its eruv); *see also* George James, *Church and State; Drawing a Line in Tenafly*, N.Y. TIMES (Dec. 31, 2000), http://www.nytimes.com/2000/12/31/nyregion/church-and-state-drawing-a-line-in-tenafly.html.

68 *See* Certification of Chaim B. Book, *supra* note 58, at 3.

69 *See id.* at 6-7.

70 *Id.* at 7-8.

71 *Id.* at 8.

72 *See id.* at 9.

73 *Id.*

74 *Id.* at 11.

75 *Id.* at 12.

that were located in the public right of way.[76] Following this discovery, the council unanimously rejected the eruv association's application and ordered the cable company to remove the lechis.[77] The association filed suit and contentious litigation followed.[78]

The case made its way to the U.S. Court of Appeals for the Third Circuit. In a long and careful ruling that is among the most important appellate court decisions applying *Smith* and its progeny, the court held in favor of the Tenafly Eruv Association.[79] The court observed that although Ordinance 691 was neutral on its face, it was applied in such a way as to target the Orthodox Jewish community.[80] After all, private citizens, local schools, and churches had used the utility poles to post signs, house numbers, and holiday decorations for years without objection from the borough government.[81] Having done so, the Constitution's Free Exercise Clause prohibited the borough council from applying the ordinance in a discriminatory manner designed to punish or exclude Orthodox Jews.[82]

In Tenafly, the court and the Constitution served as a countermajoritarian bulwark against a local majority's discriminatory treatment of an outsider minority religious group. This case thus fits comfortably within the dominant religious freedom narrative. Without the courts and the Constitution, members of a minority religious group would have had nowhere to turn.

2. The Majoritarian Eruv: Memphis, Tennessee

Memphis, Tennessee might conjure images of Elvis Presley, the Blues, the Mississippi river, the Civil Rights movement, or southern barbecue. It probably does not immediately bring Orthodox Judaism to mind. Geographically located a thousand miles from the great Jewish mecca of New York City and its neighboring communities, and culturally separated by a distance as great, one might be surprised to

[76] "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 151 (3d Cir. 2002) (quoting TENAFLY, N.J., ORDINANCE 691, art. VII(7) (1954)).

[77] *See* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 155 F. Supp. 2d 142, 159-60 (D.N.J. 2001), *rev'd*, 309 F.3d 144.

[78] *Tenafly Eruv Ass'n*, 309 F.3d at 151-56.

[79] *Id.* at 178-79.

[80] *Id.* at 167-68.

[81] *Id.* at 151-52.

[82] *Id.* at 178-79.

learn that Memphis has much of a Jewish population at all, let alone a vibrant Orthodox community.

In large measure, the statistics match this intuition. The metropolitan area's Jewish population, numbering around 9,000, represents less than 1% of the more than 1.3 million people living there.[83] And it is unlikely that there have ever been more than 150 strictly observant Orthodox Jewish families in Memphis at any time in its history.[84] Yet Memphis's Orthodox Jewish community has always punched above its weight class.

Founded in the early nineteenth century as a trading post along the Mississippi river, Memphis quickly grew into a busy port city and center of trade for the cotton and lumber industries. These industries and the attendant opportunities they created attracted newly arrived ethnic immigrants, Jews among them. Memphis developed into a hub of commerce in the region, and the twelve-block Pinch District neighborhood in downtown became Memphis's answer to New York's Lower East Side as a haven for ethnic immigrant groups.[85]

Early Jewish immigrants arrived as peddlers. They soon established successful retail dry goods, department, and grocery stores.[86] By the late 1850s they had begun to found Jewish institutions, including a benevolent society and the city's first synagogue, B'nai Israel, which adopted a Reform Jewish character.[87] Shortly thereafter, dissatisfied members of B'nai Israel broke away to form a competing synagogue, one that was more traditional in its religious practices.[88]

The late nineteenth and early twentieth centuries saw further growth in the Memphis Jewish community. As new waves of immigrants from Eastern Europe began to arrive, they brought with

[83] *See* S. CONSULTING SERVS., THE 1977 CENSUS OF THE JEWISH POPULATION OF MEMPHIS, TENNESSEE (1977) [hereinafter THE 1977 CENSUS], *available at* http://www.jewishdatabank.org/studies/downloadFile.cfm?FileID=2427 (noting that the Jewish community accounted for 3.7% of Memphis' population in 1949, but this percentage dropped significantly to less than 1.5% by 1977); *Encyclopedia of Southern Jewish Communities — Memphis, Tennessee*, GOLDRING/WOLDENBERG INST. OF S. JEWISH LIFE, http://www.isjl.org/tennessee-memphis-encyclopedia.html (last visited Mar. 1, 2015) (discussing a 2006 study which estimated that 7,800 Jews lived in the Memphis metropolitan area).

[84] Interview with A. Mark Levin, former Rabbi, Congregation Anshei Sphard Beth El Emeth, in Memphis, Tenn. (Dec. 26, 2013).

[85] *See Encyclopedia of Southern Jewish Communities — Memphis, Tennessee*, *supra* note 83.

[86] *Id.*

[87] *Id.*

[88] *Id.*

them a more traditional Orthodox form of religious practice.[89] New synagogues opened across the Pinch District to serve the needs of the immigrants from different Eastern European communities. Galician Jews, Polish Jews, and Lithuanian Jews had their own synagogues.[90]

Over the decades, Jewish Memphians achieved considerable economic and political success and relative social acceptance. In the first half of the twentieth century, entrepreneurs built businesses in retail, wholesale, real estate, and other industries.[91] Synagogues and other Jewish organizations — charitable associations, leisure clubs, old age homes, newspapers — opened and closed, merged and moved, grew and shrank, as the neighborhood changed.[92] But in contrast to Jewish communities in other American cities, in which economic success translated to religious assimilation, Memphis's Jews maintained an unusually high Jewish affiliation rate, particularly with the Orthodox synagogues.[93]

After World War II, America's economic boom brought with it increased wealth and suburbanization for Memphis's Jewish community.[94] Joining the ranks of its successful entrepreneurs were newly minted doctors, lawyers, accountants, and professionals of all kinds. Inexorably, Memphis's Jews moved east, leaving behind the poor Pinch District.[95]

The synagogues and other Jewish institutions that survived this upheaval slowly relocated with them. By the 1980s, two Orthodox congregations, the Baron Hirsch Congregation, boasting well more than 500 member households, and Congregation Anshei Sphard Beth El Emeth, serving more than 350 member households, were well ensconced in impressive buildings on large plots of land in suburban Memphis.[96] Other Jewish institutions, including relatively large Conservative and Reform congregations, a vibrant Jewish Community Center, and more, moved east as well.[97]

These synagogues and Jewish organizations, which together with an affiliated day school and high school were funded by philanthropically minded Memphis Jews, formed the center of a vibrant Orthodox

89 *Id.*
90 *Id.*
91 *See id.*
92 *Id.*
93 *Id.*; *see* Interview with A. Mark Levin, *supra* note 84.
94 *Encyclopedia of Southern Jewish Communities — Memphis, Tennessee*, *supra* note 83.
95 *Id.*
96 *Id.*
97 *See id.*

Jewish community in Memphis.[98] But the synagogues' membership rolls were always somewhat misleading. The vast majority of members did not maintain strictly Orthodox practices. Most attended synagogue for prayer services a handful of times each year, and when they did attend, they often arrived by car.[99] Strict observance of Sabbath and Kosher laws was hardly the norm even among members of the Orthodox synagogues.[100] Indeed, although more than 40% of Memphis's self-identified Jews affiliated with Orthodox congregations[101] — a much higher percentage than the national average[102] — there were likely fewer than one hundred and fifty families who strictly adhered to the Orthodox Jewish lifestyle.[103] In other words, the religiously observant community in Memphis was akin to a rounding error within the metropolitan area's population.

By the mid-1980s, the Rabbinic and lay leaders in the Orthodox Jewish community began to consider the need for an eruv to serve this small population.[104] They consulted Rabbinic experts on eruv design, plotted a route for the eruv, and developed construction plans. Armed with maps and funding, all they needed was authorization from the city and the utility companies. The community's Rabbis asked respected lawyers in their congregations who had longstanding relationships with city officials and other elites to assist.[105]

The lawyers, led by one Michael Kaplan, found the utility companies easy to work with and quick to assent.[106] City leaders, however, expressed concerns and initially balked. The city's chief attorney, Clifford Pierce, with whom Kaplan had a good working relationship, expressed concern that granting permission for the construction eruv would invite a lawsuit against the city.[107] This was at a time when the city was reeling from the after-effects of high

98 *Id.*

99 Interview with A. Mark Levin, *supra* note 84.

100 *Id.*

101 *See* THE 1977 CENSUS, *supra* note 83 (noting that more than 40% of those surveyed were affiliated with the Anshei Sphard and Baron Hirsch synagogues); *Encyclopedia of Southern Jewish Communities — Memphis, Tennessee*, *supra* note 83 (stating that Anshei Sphard and Baron Hirsch remained Orthodox).

102 *A Portrait of Jewish Americans*, *supra* note 32 (noting that only 10% identified as Orthodox nationally).

103 Interview with A. Mark Levin, *supra* note 84.

104 Interview with Michael Kaplan, Lawyer, Harkavy Shainberg Kaplan & Dunstan PLC (Jan. 3, 2014); Interview with A. Mark Levin, *supra* note 84.

105 Interview with Michael Kaplan, *supra* note 104.

106 *Id.*

107 *Id.*

profile and taxing lawsuits,[108] and Pierce perhaps did not feel he could justify walking the city directly into more contentious litigation.[109] To be sure, Pierce and the city council appreciated that the eruv would provide a great service to the strictly observant Orthodox Jews of Memphis, and they had no quarrel with assisting the Jewish community. They were eager to help where they could. But like any good attorney, Pierce saw his first duty as to protect his client. He felt obligated to guard the city from the potential expense, divisiveness, and poor publicity that this kind of litigation would generate.[110]

Despite these concerns, Pierce never shut the door on the possibility of providing support for the eruv. And to Kaplan, there was no question that Pierce's support was key. Indeed, he recognized that if Pierce advised the city council to give its consent, the council would do so.[111] So Kaplan quietly kept at it for the better part of two years. With the assistance of prominent lawyers from around the country who were devoted to Jewish community causes, he provided Pierce with the legal materials designed to demonstrate that the city would be on firm legal ground in approving the eruv's construction.[112] He also gave Pierce the time and space he needed to become comfortable with the concept of the eruv.[113]

Kaplan's patience paid off. The breakthrough finally occurred when Pierce and Kaplan agreed that if the city was ever subjected to a lawsuit on account of the eruv, and if the city declined to defend itself, then the Jewish community would either provide the defense or dismantle the eruv.[114] With his key concerns addressed in this way, Pierce gave his approval.[115] The city council quickly followed suit, and

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[108] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 404-06 (1971) (litigating over statutes that prohibit the Secretary of Transportation from authorizing the use of government financing for highway construction through public parks if an appropriate alternative route exists). Although the Supreme Court case concerning Overton Park was decided in 1971, the political and legal wrangling concerning the proposed construction of the highway at issue in the case lasted until the late 1970s. And, according to Kaplan, the expensive and draining experience of waging that high-profile legal battle — as well as other racially charged legal and social disputes — continued to reverberate in Memphis's politics well into the 1980s. Interview with Michael Kaplan, *supra* note 104.

[109] Interview with Michael Kaplan, *supra* note 104.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

the eruv was completed in 1988.[116] It took time and effort, but in the end city officials were pleased to help the small Orthodox Jewish community with their idiosyncratic eruv project.

Needless to say, the countermajoritarian narrative concerning religious freedom has little to say about the Memphis eruv.

3. Tenafly vs. Memphis

The differences between the experiences of the Orthodox Jewish communities of Tenafly and Memphis in building their eruvs are stark. Whereas local officials in Tenafly were hostile to the eruv, officials in Memphis were receptive. Tenafly's government searched for ways to block the eruv's construction, while Memphis's was eager to support the project so long as the city's interests could be protected. Tenafly's concerns were social, while Memphis's were purely legal. The Orthodox Jewish community in Tenafly faced a "keep out" sign, but the one in Memphis was welcomed with a "let's see if we can work this out" attitude. And, of course, Tenafly's case turned into a bitter and groundbreaking lawsuit about constitutional free exercise, while Memphis's was just another bit of city business amicably conducted without resort to courts or constitutional clauses.

In contrast to the fight over Tenafly's eruv, Memphis's eruv story was not chronicled in the *New York Times* or in any other newspaper. Westlaw and Lexis searches turn up no important judicial opinions about events in Memphis for lawyers and students to parse. There was no fight, no lawsuit, and no city council members who fought the efforts to build an eruv in Memphis. Tenafly's is the quintessential countermajoritarian story, familiar to students and scholars of constitutional law. Memphis's is something quite different and unaccounted for in legal discourse, perhaps because stories like this one are not readily captured in legal texts and because legal scholarship is attuned to disputes and court cases rather than to ways in which the majoritarian branches readily accommodate small religious groups.

And here's the rub: contrary to what legal discourse would lead one to believe, the *Memphis* experience is the rule, while Tenafly's is the exception. There are eruvs in large and mid-size cities all around the country.[117] The vast majority of them were built without rancor, without objection from government authorities, and without resort to

[116] *Id.*

[117] *See* BECHHOFER, *supra* note 47, at 6-9; *List of Eruvin: United States*, *supra* note 46.

the legal system.[118] Indeed, in cities across the country, public officials have gone out of their way to work with Orthodox Jewish communities and communal leaders in their construction, even where, as in Memphis, the religiously observant Jewish community makes up an insignificant minority of the population. The Tenafly experience is not, so to speak, the tip of the iceberg of religious bigotry. Rather, despite all the headlines and consternation that accompanied it,[119] it is an ice cube of intolerance floating in an ocean of accommodationism.

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[118] A 2009 review of eruv litigation found only two relevant cases (other than the Tenafly litigation) challenging eruv construction. *See* Susman, *supra* note 41, at 108-09 (citing Smith v. Cmty. Bd. No. 14, 491 N.Y.S.2d 584 (Sup. Ct. 1985) and ACLU v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987)). Even these cases, however, underscore the point: in both of these cases, unlike in Tenafly, the local governments worked with the Orthodox Jewish communities and supported the construction of the eruvs. *Cmty. Bd. No. 14*, 491 N.Y.S.2d at 945; *ACLU*, 670 F. Supp. at 1294.

More recently, there has been at least one additional effort by three local governments in the New York Hamptons that went to court to prevent the construction of an eruv, mostly unsuccessfully. *See* Hody Nemes, *Hamptons Eruv Passes Key Legal Hurdle*, JEWISH DAILY FORWARD (June 18, 2014), http://forward.com/articles/200350/hamptons-eruv-passes-key-legal-hurdle/. There was also an effort in Palo Alto, CA to prevent an eruv from being constructed, but this was resolved through courts. *See* Molly Tanenbaum, *Palo Alto Eruv Approved — After Eight Years*, PALO ALTO ONLINE (June 19, 2007, 1:49 PM), http://www.paloaltoonline.com/news/2007/06/19/palo-alto-eruv-approved——after-eight-years.

[119] *See* SOPHIE WATSON, CITY PUBLICS: THE (DIS)ENCHANTMENTS OF URBAN ENCOUNTERS 21-28 (2006); Press Release, Am. Jewish Comm., American Jewish Committee Supports Eruv in Tenafly, New Jersey, (Nov. 7, 2001), *available at* http://www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=12480323; Eric Fettmann, *Tenafly's Subtle Racism*, N.Y. POST (Jun. 25, 2003, 4:00 AM), http://nypost.com/2003/06/25/tenaflys-subtle-racism/; James, *supra* note 67; *Jews Complain of Vandalism Against Eruv*, PENINSULA CLARION (Apr. 27, 2001), http://peninsulaclarion.com/stories/042701/rel_042701rel0030001.shtml; Steve Lipman, *Tenafly Eruv Wins Again*, N.Y. JEWISH WEEK, (Nov. 29, 2002), http://www.thejewishweek.com/features/tenafly_eruv_wins_again; *N.J. Town May Remove Jewish Ritual Enclosure, Rules Federal Judge*, FIRST AMENDMENT CTR. (Aug. 10, 2001), http://www.firstamendmentcenter.org/n-j-town-may-remove-jewish-ritual-enclosure-rules-federal-judge; *N.J. Town Wrong to Disallow Jewish Ritual Enclosure, Federal Appeals Panel Finds*, FIRST AMENDMENT CTR. (Oct. 25, 2002), http://www.firstamendmentcenter.org/n-j-town-wrong-to-disallow-jewish-ritual-enclosure-federal-appeals-panel-finds; *Religious Enclosure Pits Jewish Law vs. N.J. Town's Zoning Law*, FIRST AMENDMENT CTR. (Sept. 29, 2000), http://www.firstamendmentcenter.org/religious-enclosure-pits-jewish-law-vs-n-j-towns-zoning-law; Lori Silberman Brauner, *Eruv Controversy Divides N.J. Community*, ZIPPLE (Dec. 29, 2000), http://zipple.com/religion/20001229_eruv.shtml; *Tenafly, New Jersey Eruv Controversy*, JEWISH PRESS (Dec. 7, 2001), http://www.jewishpress.com/indepth/editorial/tenafly-new-jersey-eruv-controversy/2001/12/07/; Charles Toutant, *Third Circuit Hears Arguments on Constitutionality of Tenafly Eruv*, N.J. L.J. (Mar. 25, 2002), http://www.njlawjournal.com/id=900005371416/Third-Circuit-Hears-Arguments-on-Constitutionality-of-Tenafly-Eruv.

Unfortunately, the discourse and assumptions about the relative powerlessness of minority religious groups fails to account for the Memphis eruv and its ilk. And so a reappraisal is in order.

B. The Norm of Accommodationism

Thus far, I have offered only an anecdote about the openness of a local government to a particular minority religious community. But of course, this Article is not really about Tenafly or Memphis or eruvs or Orthodox Jews. Rather, it is about the profound and underappreciated tolerance and accommodation of religious minority groups of all kinds all over this country that the Memphis eruv embodies and represents. Having offered the stories of Tenafly's and Memphis's eruvs as an entry point for thinking about our baseline assumptions, this section considers the myriad ways in which majoritarian officials have chosen to accommodate religious minority groups, even where the Constitution, as interpreted by courts, imposes no such requirement.

1. Legislatures vs. Courts

In assessing the necessity for judicial protection of religious minorities, it is critical to note at the outset that the track record for those who seek religious accommodations in court is not particularly favorable as compared to that of the majoritarian branches. Religious groups often lose adjudicated cases.[120] What is more, the smallest religious minority groups are the *least* likely to benefit from judicial protection, despite the claim inherent in the countermajoritarian account that the courts should be most active in protecting the religious liberties of the least popular religious groups.[121] As Mark Tushnet has put it, "the pattern of the Court's results in mandatory accommodation is troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do."[122]

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[120] *See* Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374-75 (2013) (noting that Muslims experienced high rates of adverse outcomes before courts); *see also* John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, 40 J. FOR SCI. STUDY RELIGION 427, 427-44 (2001) (concluding based on empirical evidence that unpopular minority religious groups typically lose in the courts, whereas relatively more popular religious groups tend to win). For careful discussion of this phenomenon, see Krotoszynski, *supra* note 28, at 1195.

[121] Heise & Sisk, *supra* note 120, at 1386.

[122] Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 381.

Against this backdrop, consider the record of majoritarian institutions in comparable cases. In fact, these institutions often respond to judicial decisions that are unfavorable to religious groups by expanding religious minority groups' rights. And these contrasting approaches to religious minorities' needs suggest that constitutional scholars may be counting on the wrong institutions to address a problem that does not really exist.

Take, for example, the case of *United States v. Lee*, in which an Amish employer asserted that the obligation to withhold social security taxes from his Amish employees' paychecks violated his free exercise rights.[123] The Supreme Court nominally applied strict scrutiny to the law and accepted that the plaintiff had a sincere religious objection to paying the tax.[124] But the Court nevertheless rejected Lee's claim, holding that the government had a compelling interest in obligating all qualifying employers to participate in the social security system.[125] The Court thus vindicated the Constitution's equality norm — everyone shall be treated equally under the law enacted by the majority — at the expense its religious liberty norm.

What happened next, though, is quite telling: Congress amended the Social Security scheme to provide precisely the exception that Lee sought.[126] Subsequently, the executive branch went even further in accommodating the Amish, working closely with them to develop a new system for tracking and processing their exemption requests in order to ameliorate religious objections to being assigned social security numbers.[127] Congress and the executive thus responded to the Supreme Court's majoritarian-empowering decision by vindicating minority rights.

Congress responded similarly to the Supreme Court's decision in *Goldman v. Weinberger*.[128] In that case, the Court held that the military's interest in unit cohesion and uniformity was a compelling government interest that overrode an Orthodox Jewish service-member's sincerely felt religious obligation to wear a religious head covering.[129] As in *Lee*, the Court vindicated the equality norm that gives a majoritarian institution — the executive branch in this case — the right to

123 United States v. Lee, 455 U.S. 252, 255 (1982).

124 *Id.* at 257.

125 *Id.* at 259-61.

126 26 U.S.C. § 3127 (2012).

127 *See* U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS) § RM 10225.035 (2011), *available at* https://secure.ssa.gov/poms.nsf/lnx/0110225035.

128 475 U.S. 503 (1986).

129 *Id.* at 509-10.

incidentally burden the religious obligations of a minority group.[130] But, once again, Congress responded to the decision by passing legislation that obligated the military to generally allow religious service members to wear religious clothing.[131] Congress concluded, in essence, that there was in fact no compelling interest in prohibiting a Jew in military uniform from wearing a small cap on his head.

More recently, some activists in San Francisco pushed for a public referendum that would ban the circumcision of male minors in the city.[132] Had the referendum passed, it would have undoubtedly burdened the religious liberties of many Jews, Muslims, and other groups for whom circumcision is a core religious obligation.[133] The initiative was struck from the ballot by a judge (though not on grounds of religious freedom).[134] And the issue could have ended there, but the California legislature entered the fray to pass a law expressly establishing the right of parents to circumcise their male children.[135] These events once again demonstrate that legislatures are often deeply responsive to religious liberty arguments of religious minority groups.[136]

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[130] *Id.*

[131] 10 U.S.C. § 774 (2012).

[132] *See, e.g.*, Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES (June 5, 2011), http://www.nytimes.com/2011/06/05/us/05circumcision.html (reporting that the required 7,100 signatures were obtained to get the circumcision ban on the November 2011 ballot).

[133] *See id.*

[134] *See, e.g.*, La Ganga, *supra* note 4 (noting that Judge Loretta M. Giorgi ruled the measure was "expressly preempted" by the California Business and Professions Code which says that only the state is allowed to regulate medical procedure and evidence showed "circumcision is a widely practiced medical procedure").

[135] A.B. 768, 2011 Gen. Assemb., Reg. Sess. (Cal. 2011), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB768.

[136] Although the legislation does not explicitly couch the right of parents to circumcise their male children in religious freedom terms, there is no doubt that the legislature was responding, at least in part, to the lobbying of religious organization. *See, e.g.*, *California Slaps Down Attempts to Ban Circumcision*, RAW STORY (Oct. 3, 2011, 9:26 PM ET) http://www.rawstory.com/rs/2011/10/03/california-slaps-down-attempts-to-ban-circumcision/ (noting that California banned local authorities from outlawing male circumcision in response to lobbying); Jason Dearen, *Circumcision Bans May Be Blocked by New CA Bill*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/07/21/circumcision-bans-may-be-_n_906002.html (last updated Sept. 20, 2011, 5:12 AM) (noting that ban on male circumcision came from recent efforts at the local level); Adam Weintraub, *California Circumcision Ban: Lawmakers to Debate the Issue*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/08/23/circumcision-ban-california_n_934348.html (last updated Oct. 24, 2011, 5:12 AM EDT) (noting that California Senate blocked local jurisdictions from banning male circumcision after a divisive ballot measure in San Francisco).

The most obvious and striking example of majoritarian responsiveness to religious minority groups, of course, came in the wake of the Court's decision in *Employment Division v. Smith*.[137] When the Supreme Court declared in *Smith* that neutral laws that incidentally interfere with religious practices are presumptively valid and not subject to strict scrutiny, and consequently, that a law prohibiting the use of peyote applied equally to Native Americans,[138] Congress responded in two ways. First, just as it provided an Amish exception to social security in the wake of *Lee* and a religious garb exception for military service-members after *Goldman*, it passed a narrow law to explicitly accommodate Native Americans who used peyote as a part of their religious services.[139] This addressed the narrow holding of *Smith*.

More significantly, Congress sought to undo the doctrinal change wrought by the *Smith* decision by enacting the Religious Freedom Restoration Act ("RFRA").[140] This statute represents the most sweeping legislative assertion of religious liberty yet and re-imposed the strict scrutiny test for any laws that substantially burdened religious practices. Astonishingly, at a time when both chambers were deeply divided on virtually every major public policy issue, the House voted unanimously for RFRA and the Senate by a margin of ninety-seven to three.[141] This was not a narrow or contentious victory for religious liberty. Rather, it was an overwhelming response to the Supreme Court's vindication of majority rights, with the majority effectively responding by saying, "thanks, but we'd like to give special rights to the minority."

The story of Congress's insistence on protecting religious minorities in response to judicial decisions does not end there. When the Supreme Court held in *Boerne v. Flores*[142] that RFRA could not constitutionally apply to the states, Congress again responded to defend minority groups' religious freedom rights by enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA")

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137 *See* 494 U.S. 872, 872 (1990).

138 *Id.* at 890.

139 *See* 42 U.S.C. § 1996 (2012).

140 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

141 *See* 139 CONG. REC. 26,416 (1993) (reporting 97–3 Senate vote in favor of passage of RFRA); 139 CONG. REC. 27,239-41 (1993) (reporting no objection to unanimous consent request in the House).

142 521 U.S. 507 (1997).

pursuant to its Spending Clause power.[143] Under RLUIPA, states must make religious accommodations in administering any prison or land use program that receives federal funds, absent a compelling interest to the contrary.[144] In addition, since the *Smith* decision, twenty-one states have enacted their own RFRAs, some of which go beyond the federal RFRA.[145] Several more states recently considered (or are currently considering) passing their own RFRAs.[146] And one reason that even more have not done so is that they already have robust state constitutional provisions that offer greater protections for religious minority groups than the federal Constitution requires, rendering statutory RFRAs unnecessary in those states.[147]

None of this is to say that majoritarian institutions *always* respond to judicial decisions that potentially limit religious exercise by vindicating religious liberty. Sometimes proponents of religious liberty and accommodations lose in majoritarian institutions, just like all groups sometimes lose.[148] Nevertheless, these responses from

[143] Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

[144] *See id.*

[145] Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 490 (2010). For an updated list of states that have enacted RFRAs, see Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://www.volokh.com/2013/12/02/1a-religious-freedom-restoration-act/. Since these articles were published, additional states have enacted RFRAs as well. *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURE, (Apr. 6, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx; *State Religious Freedom Restoration Acts*, WIKIPEDIA, http://en.wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts (last modified Apr. 17, 2015, 3:26 PM).

[146] *See, e.g.*, Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html (announcing that Arizona Governor vetoed bill that would give business owners the right to refuse service to homosexuals on religious grounds); Adam Serwer, *States Fight to Push Anti-gay Bills. But Will They Pass?*, MSNBC (Apr. 2, 2014, 11:34 AM), http://www.msnbc.com/msnbc/states-push-anti-gay-bills-will-they-pass (providing a list of all states pushing bills allowing types of discrimination in the name of religious freedom for individuals and corporations, and the status of those bills in each state, including Arizona, Georgia, Idaho, Kansas, Maine, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, and Utah).

[147] Lund, *supra* note 145 at 479.

[148] *E.g.*, Exec. Order No. 11,478, 3 C.F.R. 446 (1966–1970); Exec. Order No. 11,246, 3 C.F.R. 406 (1964–1965). President Obama's recent executive order prohibiting discrimination on the basis of sexual orientation among government contractors did not include an exemption for those with religious objections, despite heavy lobbying on their part. Peter Baker, *President Calls for a Ban on Job Bias Against*

majoritarian institutions suggest more complexity concerning the relationship between religious groups and political power than the dominant countermajoritarian narrative and religious freedom discourse allows. Both before and after *Smith*, legislatures and other majoritarian institutions have been far more accommodating of religious minority rights than the courts have been.

Make no mistake about it: groups like Orthodox Jews, the Amish, and Native Americans are all decidedly non-mainstream religious groups. Their practices are unfamiliar to the majority and in many ways countercultural. These are precisely the kinds of groups that the countermajoritarian account of religious liberty tells us are in greatest need of judicial protection. Yet they secured majoritarian accommodations after suffering defeat in the courts. Likewise, RFRA is hardly just protective of mainstream and majority religions, most of which rarely require accommodations in court in any case, since their interests are generally reflected in the law already.[149] By enacting RFRA, a nearly unanimous legislature embraced religious liberty and granted privileged treatment for even the most marginal and countercultural religious groups. At the least, then, the political powerlessness account of religious freedom does not hold up to close scrutiny.

2. Proactive Legislative Accommodationism

It might be argued that focusing on majoritarian responses to judicial rulings overstates majoritarian receptiveness to religious groups. After all, it may be that the high-profile nature of a Supreme Court loss is what thrusts a minority religious group's plight into the public consciousness and the legislative agenda, and that without such

Gays, N.Y. TIMES (July 21, 2014), http://www.nytimes.com/2014/07/22/us/politics/obama-job-discrimination-gays-executive-order.html.

[149] *See generally* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 430 (2011) (arguing for gay rights legislation with religious liberty exemptions and protection for nonbelievers who do things analogous to the exercise of religion); Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. REV. 611, 612 [hereinafter *Religious Freedom*] (noting that minority religious groups often are given accommodations that allow them to practice their faith); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) [hereinafter *The Problem of Singling Out Religion*] (noting that scholars have asked that the government treat minority religions with equal regard to major religions); Volokh, *supra* note 24, at 1468 (arguing that a state RFRA approach implementing a common-law exemption model, rather than the constitutional model, gives more to exemption supporters despite possible legislative override).

a galvanizing event, religious minority groups are indeed powerless in the political sphere. Fair enough.

But not *quite* right.[150] When we consider the degree to which majoritarian institutions are responsive to religious minorities' concerns in the absence of a high-profile event like the issuance of a Supreme Court opinion, we find that these majoritarian institutions are often attuned to religious groups' interests. One analysis conducted shortly after *Smith* discovered that there were thousands of religious exemptions and accommodations to generally applicable laws.[151] In federal statutes alone, the study found:

> [E]xemptions exist in food inspection laws for the ritual slaughter of animals, and for the preparation of food in accordance with religious practices. The tax laws contain numerous exemptions for religious groups and allow deductions for contributions to religious organizations. Federal copyright laws contain an exemption for materials that are to be used for religious purposes. Antidiscrimination laws . . . contain exemptions for religious organizations.[152]

The list of federal legislative exceptions, exemptions, and accommodations granted to religious institutions and individuals goes on and on, reaching virtually every sphere of government regulation, including military service, immigration, drug laws, and others.[153] Likewise, while religious organizations are often statutorily permitted to discriminate, public and private employers and service providers are prohibited from discriminating on the basis of religion.[154]

Such exemptions, exceptions, and accommodations are not limited to those sought by "popular" religions. *All* religious institutions are entitled to discriminate and to benefit from favored tax treatment. *All* religious people benefit from nondiscrimination laws.

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[150] Even if this assertion were correct, it would not follow that a robust strict scrutiny doctrine would be necessary to provide such a galvanizing event. Even after *Smith*, thanks to the Supreme Court's decision in *Lukumi* (discussed *infra*), many religious groups that have been denied accommodations have brought cases asserting violations of the *Lukumi* doctrine. Even when they lose such cases, the ability to bring them in the first place can stimulate political engagement just as well as cases like *Lee* and *Goldman* did prior to the *Smith* decision.

[151] James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445-46 (1992).

[152] *Id.* at 1446 (internal citations omitted).

[153] *See id.*

[154] *Id.* at 1447.

Indeed, unpopular religious groups sometimes receive special consideration in the legislature. Take, for example, the experience of Native Americans. Throughout our history, Native Americans have been among the country's most oppressed and persecuted groups.[155] Their treatment by federal and state governments continues to be dismal in many respects.[156] Their religious beliefs and practices are radically different from the monotheistic, westernized Judeo-Christian mainstream that dominates American politics.[157] And their numbers and political visibility are relatively small.[158] In other words, if ever there were religious groups who need the protection of the courts, Native American religious groups would seem to fit the bill.

Nevertheless, Congress has gone to substantial lengths to accommodate Native Americans' religious traditions. The American Indian Religious Freedom Act,[159] Bald Eagle and Golden Eagle Protection Act,[160] National Historic Preservation Act,[161] and Native American Graves Protection and Repatriation Act,[162] among others, all contain special protections and accommodations for traditional Native American religious practices and direct federal agencies to do the same. In other words, legislative concern for Native Americans' religious beliefs and practices has been extensive (though not at all

[155] *See, e.g.*, Kaylee Ann Newell, *Federal Water Projects, Native Americans and Environmental Justice: The Bureau of Reclamation's History of Discrimination*, ENVIRONS ENVTL. L. & POL'Y J., June 1997, at 40, 40 ("Native Americans have been looked upon as savage, uncivilized people.").

[156] *See, e.g.*, *id.* (noting that despite constitutional outlaw of discrimination on the basis of race, the Bureau of Reclamation continues to disregard the rights of Native Americans).

[157] *See generally* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991) (discussing Native American religious beliefs and practices).

[158] For information concerning demographics of Native Americans, including their relatively small numbers, high rates of poverty, and low educational attainment levels, all of which are typically indicators of relatively little political influence, see TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

[159] American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (Supp. V 1987)).

[160] Bald Eagle and Golden Eagle Protection Act, Pub. L. No. 92-535, 86 Stat. 1064 (1972) (codified at 16 U.S.C. §§ 668 to 668d (1976)).

[161] National Historic Preservation Act, Pub. L. No. 96-515, 94 Stat. 2987 (1980) (codified as amended at 16 U.S.C. §§ 470 to 470w-6 (1982)).

[162] Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. § 3001 (1994)).

absolute) and has translated into a comprehensive approach that takes their interests seriously.

The pervasiveness of accommodationist laws relating to the provision of medical services offers yet another example of legislatures' solicitude for religious minority interests. Several federal statutes allow health care professionals and institutions with religious objections to refuse to provide care related to abortion and sterilization procedures.[163] States have overwhelmingly followed the lead of the federal government, and in some respects have gone much further. According to the Guttmacher Institute, forty-six states allow individual health care providers to refuse to provide abortion services. Of these, thirty-one allow even public health care institutions to refuse to provide such services, while thirteen give such a dispensation to private institutions. Moreover, eighteen states allow providers to refuse to provide sterilization services; ten allow providers to refuse to provide services related to contraception; between six and twelve permit pharmacists to refuse to dispense contraceptives; and nine allow health care institutions to refuse to provide contraceptive services.[164] Once again, the point is not that such provisions are universal or absolute — they are not — but rather that federal and state legislatures have demonstrated that they take matters of religious conscience seriously and give them a fair hearing.

Beyond these statutory schemes, government officials privilege and accommodate religious groups in other ways as well. For example, each year I receive an email from my employer, the University of Georgia (a state institution), reminding me that the University has a policy of accommodating students' religious beliefs and practices. Under this policy, faculty members are required to "make every reasonable effort to allow members of the University community to observe their religious holidays without academic penalty."[165] This policy is in some tension with the directives of the American Bar Association (law schools' accrediting organization), which provide

163 42 U.S.C. § 238n (2012); 42 U.S.C. § 300a-7 (2012); 45 C.F.R. § 88.1 (2014); *see* Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 781 (2007).

164 GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2015), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. Many of these exceptions extend to those who object on non-religious grounds as well.

165 E-mail from Victor K. Wilson, Vice President for Student Affairs, Univ. of Ga., & Laura D. Holly, Vice President for Instruction, Univ. of Ga., to Deans, Dirs., Dep't Heads, & Faculty, Univ. of Ga. (Aug. 7, 2014, 9:11 AM) (on file with author).

that class attendance must be mandatory,[166] as well as with familiar law school attendance policies.

Like most professors, each semester I have students who miss class for a variety of reasons. One is suffering from a bout with the flu. Another is taking care of a sick roommate or pet. A third has an interview with a potential employer. And a fourth is participating in a moot court competition in another state. Someone else's sister is getting married. Yet another had car trouble on the way to school and is at the repair shop. Their classmate is attending a great aunt's funeral. And finally, one is observing a religious holiday. But only the last of these students is apparently entitled by University policy to special accommodation.[167] This example of religious accommodationism is unremarkable, of course, and perhaps even banal. Yet it puts into stark relief the hospitability our political processes extend to religious supplicants. And, like the Memphis eruv experience, it is one of the many accommodations that are unobserved (and perhaps unobservable in any systematic manner) in the scholarly literature, and thus unaccounted for among proponents of the leading countermajoritarian theory of religious liberty.

3. Majoritarian *Over*-Accommodation

The previous sections have observed that majoritarian institutions are often surprisingly solicitous towards minority religious groups individuals to a much greater degree than the courts and Constitution require or than the prevailing countermajoritarian account suggests. Arguably, though, the real problem is the reverse of the countermajoritarian assumption: majoritarian institutions are *too* attentive to religious minorities' needs, especially in comparison to their attentiveness to the needs of other groups and individuals.

Consider again the policy for University of Georgia students who profess a need to miss class on grounds other than religion. Are their felt obligations to care for sick loved ones, deal with the curveballs that life throws their way, participate in important family events, and pursue career opportunities of lesser value than those of students who

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166 *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014, at 159 (2014), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_consultants_memos_revised.authcheckdam.pdf.

167 Certain other statutes require accommodations as well. For example, the Americans with Disabilities Act requires accommodation on the basis of disability. Americans with Disabilities Act, Pub. L. No. 101-336, §§ 301–310, 104 Stat. 327, 353-65 (1990). However, it does not appear that these would apply to the examples I have offered.

observe religious holidays? Perhaps the understanding professor would treat all of them the same, thus mitigating the problem. But the State's policy expresses that only one — religious observance — is entitled to legal protection.

A rich literature has emerged in recent years addressing this question, with some theorists maintaining that religion is indeed special and must be specially accommodated;[168] others arguing that it is akin to other obligations imposed by one's conscience and that all should be accommodated alike;[169] and still others suggesting that personal requirements imposed by both religious beliefs and conscience are indeed special, but that *neither* of them should be specially accommodated.[170] If one adopts either of the latter positions, the fact that in some cases majoritarian institutions are far quicker to grant religious accommodations and exceptions to generally applicable law than they are to other kinds of claims of conscience suggests that the problem is not that majoritarian institutions are systematically non-responsive to religious needs, but that they are over-responsive. Generally, the Supreme Court has held that this sort of preferential treatment of religion is fully constitutional.[171]

Moreover, even if one believes that government officials *should* give special consideration to religious claims — whether purely as a matter of constitutional interpretation or for other reasons — a strong case can be made that majoritarian institutions sometimes go too far in accommodating them at the expense of public health and safety. Take,

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168 *See, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 689-94 (1992) (arguing that religion must be given more than formal neutrality); McConnell, *The Problem of Singling Out Religion*, *supra* note 149, at 3 ("My thesis is that 'singling out religion' for special constitutional protection is fully consistent with our constitutional tradition."); Michael Stokes Paulsen, *Book Review: God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1609 (1997) (commenting that the core reason for religious liberty is that the founding generation singled out religion for special protection because of its intrinsic importance).

169 *See, e.g.*, ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 1 (2013) (arguing for protection of conscience claims under the Free Exercise Clause, in part to achieve true neutrality towards religion).

170 *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? 8 (2013) ("I do not 'tolerate' my neighbors who are nonwhite or gay because I am indifferent as to the race or sexual orientation of those in my community.").

171 *See* Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

for example, states' treatment of mandatory vaccination laws for children. When the federal government enacted the Child Abuse Prevention and Treatment Act of 1974 and adopted related regulations, it conditioned federal funding for states upon their inclusion of religious exceptions to mandatory vaccination laws.[172]

Although the Act's mandate was later repealed, the vast majority of states had by then adopted such exceptions. Fully forty-seven states now accommodate religious objectors by allowing them to opt out of childhood vaccination schemes.[173] Most of these states limit these exemptions to *religious* objectors rather than to all who might object, once again suggesting that religion has received special treatment.[174] And these exceptions carry with them an enormous social cost. Failing to inoculate children puts them at grave risk for deadly diseases[175] and, as epidemiologists have long known, imposes substantial risk on others.[176] Indeed, there have been recent deadly outbreaks of fully preventable diseases in communities in which people have chosen not to vaccinate their children.[177] Even among those scholars who support religious accommodationism in general, the cost that this particular accommodation imposes on children and society at large may be too much to bear.[178]

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[172] Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 282-83 (2003).

[173] *Id.* at 282.

[174] Only seventeen states appear to extend these exemptions to non-religious objectors. *Id.* at 284.

[175] *Id.* at 278-79.

[176] *See generally* Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 75-76 (2011) (noting that widespread exemption from vaccination can result in epidemics); Lesley Stone, Lance Gable & Tara Gingerich, *When Right to Health and the Right to Religion Conflict: A Human Rights Analysis*, 12 MICH. ST. J. INT'L. L. 247 (2004) (stating that although some religious practices are in line with healthcare laws, some may conflict with health promotion); Christine Parkins, Note, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 440 (2012) (noting that risks to the community's health is growing due to parents who take advantage of the religious exemptions from mandated childhood vaccines).

[177] Alexandra Sifferlin, *4 Diseases Making a Comeback Thanks to Anti-Vaxxers*, TIME (Mar. 17, 2014), http://time.com/27308/4-diseases-making-a-comeback-thanks-to-anti-vaxxers/; Michaeleen Doucleff, *How Vaccine Fears Fueled the Resurgence of Preventable Diseases*, NPR (Jan. 25, 2014, 1:13 PM ET), http://www.npr.org/blogs/health/2014/01/25/265750719/how-vaccine-fears-fueled-the-resurgence-of-preventable-diseases.

[178] *See* Douglas S. Diekema, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, 107 MICH. L. REV. FIRST IMPRESSIONS 90, 90-91

Consider also the astonishing solicitude that state legislatures demonstrate towards religious groups and individuals who choose to withhold medical care from their children in favor of what is often called spiritual healing. "Nearly every state provides exemptions in their child abuse, neglect, or endangerment statutes for spiritual healing[,]"[179] while three states go so far as to allow parents to "assert their religious beliefs as an affirmative defense to murder."[180] In other words, although the state typically demands, at pain of criminal sanction, that parents provide appropriate health care and treatment for their children, virtually every state legislature has decided to accept greater risk to the health and life of children of religious parents.[181]

These accommodations are wholly the creature of statute. In neither the vaccination nor the medical treatment context have the federal courts interpreted the Constitution to require such accommodations, whether before or after *Smith*.[182] Even if courts applied the most

(2009); Linda E. LeFever, Comment, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PENN ST. L. REV. 1047, 1048 (2006); Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1102 (2005); *see also* Michael Poreda, Comment, *Reforming New Jersey's Vaccination Policy: The Case for the Conscientious Exemption Bill*, 41 SETON HALL L. REV. 765, 766 (2011).

[179] Jennifer L. Hartsell, Comment, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 509 (1999).

[180] *Id.*

[181] *See, e.g.*, James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denial of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1353-65 (1996) (showing that forty-six states carve out exemptions from child neglect laws for parents who are religious objectors); Janna C. Merrick, *Spiritual Healing, Sick Kids, and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 298-99 (2003) (arguing that the government should educate the public about when medical care is required and noting that society must decide whether one person may choose to withhold medical care from another person); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 50-51 (1994) (arguing that religious exemptions should only apply when a child is not at risk of death or serious bodily harm); Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73, 75-78 (1999) (arguing that religious accommodations sometimes put the life and health of children at risk).

[182] Pre-*Smith* cases include: Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961); and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Post-*Smith* cases include: Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006); Cutter v. Wilkinson, 544 U.S. 709 (2005); and City of Boerne v. Flores, 521 U.S. 507 (1997).

searching form of strict scrutiny to universal vaccination and medical treatment laws, they would surely conclude that religious people are not constitutionally entitled to exceptions. Not even those constitutional scholars most committed to religious liberty have seriously suggested it should be otherwise. Yet legislators in these cases have almost universally responded to the demands of religious minority groups for preferential treatment. Simply put, there has been too *much* majoritarianism favoring religious liberty claims in these cases. Strikingly, it has been the *courts* that have represented the majority's interests by narrowing these exceptions to protect the interests of children and the public.[183]

Indeed, there is a line of cases in which the Court has interpreted the Establishment Clause to limit the ability of the majoritarian branches to accommodate religious practice at the expense of third parties or in ways that favor one religious sect over another or religion over non-religion.[184] The Court has never adequately delineated the boundary between permissible religious accommodations and impermissible ones. And arguably, today's Court may be much more likely to allow for religious accommodations even at the expense of third parties than have earlier courts. That is, even when the courts have held back in these areas, rightly recognizing the competing nature of some public interests that might trump free exercise concerns, political decisionmakers have pushed forward nonetheless — effectively protecting religious autonomy even at the expense of

[183] Hartsell, *supra* note 179, at 501.

[184] *See, e.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U. S. 687, 714 (1994) ("The clearest command of the Establishment Cause is that one religious denomination cannot be officially preferred over another." (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)) (internal quotation marks omitted)); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (holding that "when government directs a subsidy exclusively to religious organizations . . . that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion" it is invalid); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding that a statute that provides Sabbath observers with an absolute and unqualified right not to work on the Sabbath violates the Establishment Clause).

For scholarly treatments of this difficult issue, see Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1071 (2002); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 928 (2000); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274, 276-77 (2010); Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1908 (2011); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 705 (2005).

countervailing public health and safety interests. These cases once again illustrate that the majoritarian branches are often eager — *overeager*, perhaps — to accommodate religious groups' interests.

4. Putting the Matter to Rest

If doubts remain that the majoritarian approach to religious liberty has greater general descriptive power than the countermajoritarian view, they ought to be put to rest by the fact even the most eloquent promoters of judicial engagement have acknowledged that legislatures are surprisingly open to protecting minority religious interests.

For example, Michael McConnell observed that "[l]egislatures have shown a remarkable degree of solicitude for minority religious interests," while courts have been far less protective, a condition that "seems to defy our usual expectations about judicial review and about the comparative competence of governmental institutions."[185] He goes so far as to describe the degree of legislative protections of minority religious interests as "mind boggling."[186] Likewise, Douglas Laycock has written at length about a deep American "political commitment to free exercise."[187] These are remarkable views for scholars who have been among the most tireless advocates for judicial engagement in the religious liberty arena and who have never renounced their claims that majoritarianism is a threat to religion. Given that the facts have turned out quite differently from what they predicted, it is reasonable to have expected them to modify their arguments that are grounded in those facts.

There is another point, too. Patrons of religious liberty have staunchly maintained that laws that accommodate religious liberty cannot violate the Establishment Clause precisely because they are deeply rooted in American history and that such a holding would threaten "thousands of legislative religious accommodations."[188] The observation that the majoritarian institutions have a robust tradition of accommodating religion is in some tension with the claim that religious liberties cannot get a fair shake in the majoritarian branches. And yet that is where we are.

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185 McConnell, *Religious Freedom*, *supra* note 149, at 612-13.

186 *Id.* at 616.

187 Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1803 (2006).

188 Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby and Conestoga, et al. at 22, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 356639 (capitalization in original).

C. The Majoritarian Puzzle

As previously suggested in this Article, the dominant countermajoritarian narrative is easy enough to understand and intuitively appealing. Therefore, the majoritarian reality is conceptually problematic. Why have the courts effectively rejected their role as countermajoritarian protectors of minority rights in the religious freedom context? And why are majorities so considerate of religious minorities? If the majority is free to ignore the interests of religious minorities in favor of majoritarianism, as the Supreme Court held in *Smith*, then it is quite surprising that the majority has not embraced that power.

There is a broader context to this apparent paradox. The United States is perhaps the most religiously diverse country in the world, if not in history. There is no unity of religious belief and practice, and indeed, some beliefs and practices are decidedly foreign to mainstream society. Under these circumstances, one might fairly expect the tension between secular law and religion to be consistently high, and for politically responsive institutions to be indifferent to the interests of idiosyncratic religious individuals and groups. Yet counterintuitively, ours is among the most religiously tolerant and accommodating country in the world, with religious minority groups enjoying overwhelming liberty, thanks largely to the beneficence of the majoritarian branches of government.

Why?

II. SOLVING THE MAJORITARIAN PUZZLE

This Part seeks to account for the majoritarian dynamic documented in Part I. There are three possible explanations. Each may have some explanatory power. The most compelling account, however, is one offered by a simple public choice approach. It explains not only why the majoritarian dynamic generally accommodates religious minorities, but also why religious minorities sometimes lose.

A. The False Promise of Countermajoritarianism

There is a rich literature that challenges the countermajoritarian account of judicial behavior. Courts have not consistently interpreted the Constitution to protect the interests of minority groups throughout society, often vindicating majority will at the expense of

minority rights.[189] Many of the most vulnerable groups in society, including racial minorities, felons, the poor, gays and lesbians, children, and people who espouse distinctly minority views, have not found the Constitution and courts particularly protective.[190]

According to this revisionist account, the countermajoritarian story is just that, a story. In reality, courts have been at best inconsistent in protecting minority rights. More often than not, courts wait to exercise their power to overturn legislation and other government action until the majority will supports judicial intervention.[191] For example, courts did not robustly protect gay and lesbian rights until only recently, when public sentiment began to move in favor of gay and lesbian equality. Likewise, the Court did not decide *Brown v.*

[189] For a review of the literature challenging the countermajoritarian bona fides of the courts, see Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 12-32 (2005). *See also* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362 (2004). The leading voice among these renegade-revisionists has surely been Michael J. Klarman. His books and articles on the civil rights movement and the battle for same-sex marriage cast a critical eye on the common narrative of judicial heroism. *See, e.g.*, MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 213 (2007) ("*Brown v. Board of Education* was possible in 1954 because dramatic changes in racial attitudes and practices had already occurred. . . . Because southern whites were generally resistant to changes in racial practices, pressure was required to effect them. Southern blacks supplied some of that pressure, aided by improvements in education . . . ."); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 443 (2004) ("[C]hanges in the social and political context of race relations preceded and accounted for changes in judicial decision making. This is not to say that the [civil rights] Court decisions did not matter, only that they reflected social attitudes and practices more than they created them. . . . This book has identified a wide variety of political, economic, social, demographic, ideological, and international causes of racial change."); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 208 (2014) ("[G]ay marriage litigation has undeniably advanced the cause of gay rights in a number of ways. . . . Litigation put gay marriage on the table. . . . Without such litigation to make the issue salient, it seems unlikely that more than 50 percent of Americans would support gay marriage in 2012. This salience-raising effect of litigation is different from the so-called educational effect of court decisions. . . . Americans did not change their views on school segregation because of *Brown*, [or] abortion because of *Roe* . . . ."); MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 206 (2007) ("Black activism alone has been insufficient to generate progressive racial change; auspicious social and political conditions have also been necessary."); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 67 (1996) [hereinafter *Rethinking the Civil Rights and Civil Liberties Revolutions*] (stating that constitutional history is out of balance).

[190] *See* Hutchinson, *supra* note 189, at 20-32.

[191] *See id.*

Board of Education until public sentiment had turned against de jure segregation.[192] Thus, the foundational idea that courts are hospitable places in which minority groups can seek protection of their interests is deeply controversial.

If this view of judicial behavior is correct, then one reason that religious groups have not found much by way of protection in the courts is that the courts are *generally* unreliable protectors of minority rights. In other words, it is not that the courts are countermajoritarian for some minority groups, but not for religious minorities. Rather, the countermajoritarian account rarely reflects reality.

Whether one agrees or disagrees with the broader revisionist story, it offers at best only an incomplete response to our quandary. First, courts do apply the Constitution to protect the rights of disfavored minority groups in at least some cases. Consider the recent trend towards increased protection of speech rights on the part of the Supreme Court.[193] Those punished for their speech are almost invariably members of a marginalized minority group, namely people with unpopular opinions.[194] Yet the Court has been exceedingly and increasingly protective of their rights, vindicating them at the expense of the majority will.[195] If nothing else, one may ask why the Court is more protective of the interests of speakers with minority opinions,[196] applying strict or heightened scrutiny to laws that punish them, than of those with minority religious beliefs and practices, who, under *Smith*, enjoy no special protections. The contrast is particularly apt given that speech and religious rights both appear in the First Amendment.

Second, even with respect to other minority groups, courts at least *claim* to protect some of them — whether or not they do so in reality

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[192] *See, e.g.*, Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131 (1994) (noting that *Brown* constituted one of the dominant civil rights issues of Eisenhower's presidency); Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, *supra* note 189, at 7-8 ("[B]y the time of the Court's intervention [in *Brown v. Board*,] roughly half of the country supported racial integration in public schools.").

[193] *See* Benjamin P. Pomerance, *What Are We Saying? Violence, Vulgarity, Lies . . . and the Importance of 21st Century Free Speech*, 76 ALB. L. REV. 753, 755-56 (2013) (noting that, in his Foreword, Ronald Collins discusses the multiple cases decided by the Roberts Court and their trends).

[194] *See* Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 1218-19 (2011) (protecting the Westboro Baptist Church); United States v. Stevens, 559 U.S. 460, 474-76 (2010) (protecting producers of crush videos by striking down a federal statute that criminalizes the commercial creation, sale or possession of depictions of animal cruelty).

[195] *See* Pomerance, *supra* note 193, at 755.

[196] *See Snyder*, 562 U.S. at 1218-19; *Stevens*, 559 U.S. at 499.

— on countermajoritarian constitutional grounds.[197] But in the wake of *Smith*, they have disclaimed constitutional protection altogether. That is, the courts *view themselves* as a countermajoritarian bulwark against the tyranny of the majority, but not when it comes to protecting religious minorities. So why are courts treating these minority groups differently, even if only rhetorically?

Finally, recall that there are two parts to the central question: (1) why are courts protective of some minority groups but not of minority religious groups? and (2) why are majoritarian institutions so accommodating of religious minorities? To the extent the revisionist challenge to countermajoritarianism is relevant, it is only responsive to the first part of the question. It offers nothing to explain why legislatures and other government officials are so attentive to religious interests.

B. The American Ethos of Religious Tolerance

One reason that majoritarian institutions are eager to make special accommodations for religious groups might lie in Americans' collective self-conception. Perhaps religious tolerance is deeply embedded in our collective identity. Our national story is, after all, that of a nation founded by oppressed religious groups who came to the "New World" seeking the freedom to live according to their religious values.[198] These groups differed dramatically in their core beliefs and practices, but they found common cause in building a country in which they could all flourish without government interference.[199]

Perhaps these foundational experiences and values continue to shape our society to this day, and whether consciously or not, the ruling majority of Americans is prepared to sacrifice some of its own power in order to respect and vindicate minority religious rights. Thus, political leaders work with religious leaders and organizations, listen to their concerns and needs, and try to accommodate them when possible. Their constituents, in turn, whether religious or not, accept and respect these accommodations.

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[197] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (identifying being "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" as a factor triggering heightened scrutiny in the equal protection context); *see also* Schacter, *supra* note 21, at 1372-78 (2011) (tracing the development of political powerlessness as a factor in the application of heightened scrutiny).

[198] *See* Charles A. Wills, *The Earth Is the Lord's*, DESTINATION AM., PBS, http://www.pbs.org/destinationamerica/usim_wy_01.html.

[199] *Id.*

This account of the American political environment is attractive and provocative — and worth exploring — for it suggests that purely political institutions can and do preserve some minority liberties as a result of broadly shared commitments and a collective identity. This is a hopeful interpretation of American politics at a time when the general picture is that of partisan rancor, ideological division, and dysfunctional politics.

However, one must be cautious in accepting this explanation. First, it is, after all, an easy story to tell but a difficult one to test. Moreover, this account is at best incomplete. Americans would surely identify many other abstract foundational commitments — to equality, individual liberty, free speech, and so on — that do not consistently express themselves in governing policy, because they bump up against competing practical interests and demands. The "American ethos" explanation defies the basic logic of American politics, which asserts that legislators are responsive to their constituents because they wish to be reelected, and constituents are concerned most of all about the issues that affect them most directly.

Thus, the question remains: why is religion different?

C. A Public Choice Approach

To fully explain why majoritarian institutions are eager to accommodate religious minorities, it is useful to reframe the question. Let us begin by assuming that majoritarian accommodation of religious minority groups *does* comport with the internal logic of American politics. If so, why is it that elected officials view it as within their own interests to vindicate minority religious interests? Presented this way, the answer is perhaps less elusive and the majoritarian reality less surprising.

1. Why American Politics Produces Religious Tolerance, Accommodationism, and Over-Accommodationism

The key to understanding the majoritarian reality lies in elementary principles of public choice theory. Public choice theory seeks to explain the generation of regulation through the application of economic principles. It posits that minority groups can often achieve their goals in the majoritarian branches even if the policy they support is contrary to the interests and preferences of the majority.[200] To see

[200] For background on public choice theory, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 16-22 (1971); Gary S. Becker, *A Theory of Competition*

why this is the case and how it applies in the context of religious accommodations, let us examine the dynamic political relationship between religious minority groups, government officials, and the public at large.

In many cases, politicians stand to gain politically by accommodating the religious beliefs and practices of even small religious groups. Although every religious sect in America is a minority, religious groups collectively represent a solid majority of American citizens.[201] Different religious groups may not agree on much, but one thing that many of them do agree about — especially those whose practices and beliefs are such that they might require special accommodations — is that the law should accommodate religious beliefs and practices. They therefore tend to work together to lobby for religious accommodations, both in the legislature and in the courts.

For example, for contemporary Catholics and Orthodox Jews, animal sacrifice is an odd and even religiously objectionable — downright sinful — practice.[202] But the leading institutions representing Catholics and Orthodox Jews filed amicus briefs in support of Santería's adherents' right to engage in animal sacrifice.[203] Likewise, they supported Amish exceptions to social security and Native Americans' right to use peyote,[204] even though neither Catholics nor Orthodox Jews have any direct interest in those practices. For them, a victory for accommodation of *one* religious group is a victory for accommodation of all religious groups. If

Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

201 *Pew Research Religion & Public Life Project: Religious Landscape Survey*, PEW RESEARCH CTR., http://religions.pewforum.org/affiliations (last visited Feb. 17, 2015).

202 Cedric Pulford, *Debate Continues on Incorporating Animal Sacrifices in Worship*, CHRISTIANITY TODAY (Oct. 1, 2000), http://www.christianitytoday.com/ct/2000/octoberweb-only/34.0c.html (discussing Catholic and Christian views on animal sacrifice); *Qorbanot: Sacrifices and Offerings*, JUDAISM 101, http://www.jewfaq.org/qorbanot.htm (last visited Mar. 2, 2015) (stating that animal sacrifices have not been a part of the Jewish tradition since the second century).

203 For an example of the amicus brief, see Brief of Amicus Curiae of Americans United for Separation of Church and State et al., in Support of Petitioners, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeleah, 508 U.S. 520 (1993) (No. 91-948), 1992 WL 12008578.

204 Brief Amicus Curiae of the American Jewish Congress in Support of Respondents at *20-22, Emp't Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126849; Brief of Council on Religious Freedom as Amicus Curiae in Support of Respondents at *2-4, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126852.

nothing else, even nationally popular religious groups are small or unpopular minorities in some places — towns, states, or regions. By advocating for religious accommodation everywhere, their own interests are served. Thus, while any single religious group may not have the political clout necessary to win an accommodation, religious groups collectively wield substantial lobbying power.

A similar explanation applies to the passage of the RFRA and other laws that protect religious minority groups. Fights between the political parties, each of which is made up of the familiar coalitions and interest groups, dominate much of American politics. But the debates concerning religious freedom and accommodation transcend party lines. Political liberals, committed as they are to minority rights, sometimes find themselves making common cause with religious conservatives on questions of religious liberty. This is especially so when protections for religious liberty are presented in abstract, broad terms as they were when RFRA came before Congress. Few Americans would stand up and declare, "I oppose religious liberty." To be sure, the political alliances favoring religious tolerance are uneasy, unstable and unpredictable. But when these groups *do* make common cause, their coalition is a politically powerful one that finds little opposition. RFRA was enacted by near-unanimous acclamation because there was no one to oppose it.[205]

Even in the absence of coordinated lobbying by diverse religious groups, elected officials may still have political incentives to work with small religious groups. In the case of the Memphis eruv, the town council and other officials might have understood that by assisting the observant Jewish community in constructing the eruv they would earn the gratitude of that group — a group that tends to be politically active and that might be counted on to support and vote for officials it considers to be friendly to community interests. At the same time, the broader population was likely unaware of or indifferent to the construction of the eruv. There was thus no collision between the majority's demands and the minority's religious liberty interests. And for public officials, it was an easy call to support the religious community's needs.

[205] Laycock's efforts to account for these interest group politics falls short precisely because he does not consider a dynamic wherein religious groups (and others) present a united front in the name of religious freedom. Instead, he focuses on each religious group as its own independent lobbying interest. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 228-31 (discussing interest group dynamics in cases of religious freedom).

Further, even if some Memphians did or would have opposed the construction of the eruv, they likely had other political causes they cared about more. Economic issues, crime, and any number of other issues were surely more important to them than the construction of the eruv. City officials did not need to worry all that much that their support for the eruv, even if a diffuse majority disfavored it, would lead to an organized and broad-based opposition campaign against them.

Far from being counterintuitive, this account is fully congruent with — perhaps even dictated by — elementary teachings of public choice theory.[206] Where a policy is supported by a concentrated and focused interest group, it will be successful when it faces no opposition. This is often true even in the face of diffuse opposition that ranks the issue low among their priorities.[207]

2. Why and When the State Denies Religious Accommodations

The simple public choice account offered in the previous section is particularly compelling because it also explains why and predicts when religious groups lose in majoritarian institutions. There are essentially only two kinds of cases in which religious interests are vulnerable, and they share one common characteristic: there is a mobilized lobbying group that strongly opposes the religious group's interest.

First, when a religious practice or group is perceived to challenge or threaten the majority's cultural norms, all bets are off. In these conditions, the opposition becomes focused and coordinated enough to defeat the religious interest promoted by the minority. The Tenafly eruv case offers a good example. Those who objected strongly to the construction of the eruv likely did not care about the small attachments that would be made to the public utility poles (these are

[206] There may be differences between how local governments and the federal government treat religious groups under an interest group analysis. It is not altogether clear whether and how these differences should be accounted for in free exercise doctrine, if at all, and there is more work to be done on that question. Interestingly, Richard Schragger has taken the counterintuitive (though quite well-argued) position that local governments do a *better* job of protecting religious groups than does the federal government. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1815 (2004).

[207] *See* OLSON, *supra* note 200, at 16-22 (discussing group and organizational behavior and stating that larger firms are supposed to predominate); Peltzman, *supra* note 200, at 17-19 (discussing the effects of support and opposition), Posner, *supra* note 200, at 343 (examining public interest theory in light of a hypothetical ranking of voter issues); Stigler, *supra* note 200, at 10-13 (analyzing the difficulty of obtaining legislative regulations over certain industries caused by the nature of politics and group voters).

essentially invisible to the untrained eye). Nor were they motivated by a neutral desire to uphold their old law prohibiting attachments to polls (they were unaware of the provision until the very end and had ignored it repeatedly over the years in any case). Nor did they have a political or philosophical objection to the concept of eruv (this had no real bearing on their lives).

Rather, they were motivated by a much more practical and visceral concern. They had observed the growth of the Orthodox Jewish communities in the surrounding boroughs of Teaneck and Englewood, which had been facilitated by the presence of eruvs, and they were not sure they liked what they saw. Their real concern, in essence, was that the people who would be attracted to Tenafly once it had an eruv would change Tenafly for the worse. They stated so explicitly at town meetings. The newcomers' differences represented a threat — whether real or perceived — to the existing community's lifestyle.

Similar conditions were at play in the Supreme Court's most important post-*Smith* case of *Church of Lukumi Babalu Aye v. City of Hialeah*.[208] In *Lukumi*, the city of Hialeah enacted a facially neutral ordinance against animal sacrifice that was nevertheless clearly directed at, and only applied to, adherents of Santería.[209] Citizens were free to kill animals for reasons other than ceremonial sacrifice,[210] and the record was rife with evidence of animus towards practitioners of Santería.[211] To the predominantly Latino and Catholic citizens of Hialeah, Florida, the very notion of animal sacrifice seemed repugnant, representing an altogether foreign set of values. Worse, Santería was a non-westernized religion practiced by people with a backward foreign culture and norms that threatened the assimilationist interests of the dominant majority culture.[212] Is it any surprise that they therefore worked strenuously through their political representatives to keep the adherents of Santería out?

Consider also the recent attempts of some politicians to target Muslim religious tribunals for official censure, as well as the vociferous objections in some parts of the country to the construction of mosques.[213] Here, too, it is easy to see why the baseline political

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[208] 508 U.S. 520.

[209] *Id.* at 526-28.

[210] *Id.* at 528.

[211] *Id.* at 534-35.

[212] *See* Larry Catá Backer, *Not a Zookeeper's Culture: LatCrit Theory and the Search for Latino/a Authenticity in the U.S.*, 4 TEX. HISP. J.L. & POL'Y 7, 27 n.7 (1998).

[213] Danika Fears, *Developer Ditches Plan for 'Ground Zero Mosque*,' N.Y. POST (Apr. 30, 2014, 10:47 AM), http://nypost.com/2014/04/30/developer-ditches-ground-zero-

dynamic that tends to produce religious tolerance and accommodation breaks down. It is no secret that many Americans today look at religious Muslims with distrust, if not disdain. As compared to the majority culture, religious Muslims dress differently, have different religious and cultural practices, and sometimes have different values. The imagined looming Islamicization of America and the association among some Americans of Islam with terrorism and anti-Americanism further magnify the typical wariness towards difference. The normal public choice calculus that produces tolerance changes because a large and motivated group of individuals opposes them. In other words, religious minorities in these cases become subject to the tyranny of the majority or highly motivated minority.

One might readily identify this sort of response to cultural difference as religious intolerance and rank prejudice, and one would not be wrong. But it is perhaps also recognizable as a natural human instinct. The people of Tenafly and Hialeah liked their communities the way they were. They objected to change because people tend to prefer the familiar. Whatever we label it, the majority's sentiment — fear of difference and change — alters the typical political dynamic and yields a focused lobby opposing the religious accommodation. In these circumstances, the religious minority group's interest loses in the political branches.

In some cases, though, the lobbying group opposing religious accommodationism is not the product of this sort of bigotry or the natural human preference for the status quo. In this second category of cases, a majority or a minority interest group that cares deeply about an issue has practical policy interests that conflict with those held by a religious group. Outright bigotry is not in play. Rather, there are simply issues on which different groups hold opposing views very strongly. Such conflicts may present a zero-sum equation in which either the religious liberty interest or the opposing equality interest can prevail, but not both. The typical public choice account and the powerful but unstable coalition favoring religious accommodations may break down in such cases.

The most prominent disputes concerning religious liberty currently in the news — *Hobby Lobby* and the sexual orientation discrimination cases — fall into this category. The laws that limit religious liberty in

mosque-to-create-museum-for-islam/; Tim Fleischer, *Controversy over Proposed Mosque in Norwalk*, ABC 11 NEWS (Apr. 6, 2012, 3:04 PM PDT), http://abc11.com/archive/8611612; Cameron McWhirter, *Tennessee Mosque Opens After Controversy*, WALL ST. J. (Aug. 10, 2012, 6:17 PM), http://online.wsj.com/news/articles/SB10000872396390444900304577581521580249582.

these cases are not the product of bigotry against groups that oppose contraception and same-sex marriage. Rather, there are powerful lobbying groups that view the ready availability of affordable contraception as an important public health concern and a necessary component of gender equality and that see discrimination on the basis of sexual orientation as an affront to human dignity and individual liberty. In addition, some religious groups *favor* the contraception mandate and anti-discrimination laws. Consequently, in the political debates that produced the laws in question, the lobbying power of religious liberty groups was diminished, and the lobbying power that remained was met and exceeded by the lobbying power of the opposing side.

Of course, it does not always work out that way. Sometimes groups lobbying for religious accommodations gain the upper hand. Indeed, one might expect that the contraceptive mandate might be overturned or limited by a future Republican administration. Likewise, several states have recently considered bills that would accommodate religious individuals who object on religious grounds to providing services to gays and lesbians.[214] In other words, in these cases, religious groups were able to fully participate in the political system. But like all lobbying groups, they sometimes lose to opposing lobbies.

In sum, the majoritarian reality should not come as a surprise. Assessing a group's political power cannot be accomplished with a headcount. Instead, careful attention to the political realities in which public officials and religious groups operate illuminates why political majorities so often accommodate religious beliefs and practices, even where the courts do not require them to. It also helps to explain and predict why and when religious accommodations will be denied.

The observations and arguments discussed here are informed by Bruce Ackerman's groundbreaking challenge to the Footnote Four approach to constitutionalism. Ackerman develops critical insights into the limits of the countermajoritarian account of the judicial function and the nature of the political economy (albeit with little said directly concerning religious rights).[215] Based on similar reasoning,

[214] Serwer, *supra* note 146 (listing these states as Arizona, Idaho, Georgia, Kansas, Maine, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, and Utah).

[215] Ackerman, *supra* note 8, at 714-16.

However, there are some weaknesses in Justice Scalia's public choice theories. First, as I argue *infra*, sometimes this dynamic breaks down, such as when groups are targeted based on majoritarian animus toward the group itself. Justice Scalia's refusal to consider legislative history and of intentionalism more generally forecloses him from considering

Justice Scalia has at various times suggested that *all* minority groups operate under this same public choice dynamic.[216] And for this reason he has rejected Footnote Four of *Carolene Products*. For example, in *Schuette v. Coalition to Defend Affirmative Action*, he argued that a group's minority and insularity are political strengths rather than political weaknesses.[217] Likewise, in his dissent in *Johnson v. Transportation Agency*,[218] Justice Scalia lamented the ability of minority groups to capture the political process at the expense of diffuse majority groups like middle-class white males.[219]

That said, it seems that Scalia and Ackerman offer too sanguine a *general* account for minority group power, for they underemphasize the contexts in which interest group lobbying dynamics can break down.[220] In any event, whether the dynamic identified applies to all minority groups — as they maintain — is worth further exploration, but it is not the thrust of this project. As noted at the outset, this

this possibility, but I submit that if he is to take such public choice considerations seriously in his jurisprudence, he must grapple with all of its implications.

Second, there is some tension between his view of public choice and his broader jurisprudential approach. Typically, Justice Scalia argues that legislatures should be empowered to make public policy, and judges should do as little as possible to disturb majoritarian decision-making. Therefore, he is generally mistrustful of arguments derived from the pathologies of the political system. Yet in some cases — *Schuette*, *Weber*, and perhaps *Smith* (though it remains unstated in his opinion) — he apparently views it as part of the judicial prerogative to consider political dynamics and pathologies.

All of this is worth exploring in greater depth elsewhere. For now, it is worth understanding that the public choice account I have identified could have implications in other contexts as well, as Justice Scalia and some legal scholars have argued.

216 *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring); Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

217 *Schuette*, 134 S. Ct. at 1645 (Scalia, J., concurring).

218 *See Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

219 Read as I suggest *infra*, there is something consistent between Justice Scalia's views concerning these opinions and Footnote Four and his decision in *Smith*. Regarding them all, because of the nature of our political system and its receptivity to interest group power, Justice Scalia views with skepticism the notion that minority groups are underserved by the majoritarian branches. Note that there are some weaknesses in Justice Scalia's public choice theories, as I have discussed earlier. *See supra* note 215.

220 Equally important, several scholars have articulated other weaknesses in Ackerman's arguments. *See* Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 823 (2007); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 690-91 (1991); David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1264-65.

Article challenges the prevalent assumption that religious minority groups are disempowered by normal political processes (and consequently that courts should intervene). That this assumption continues to pervade free exercise discourse suggests that Ackerman's skepticism of Footnote Four (whatever its broader merits) has not made its mark in the law and religion context.

III. IMPLICATIONS OF THE MAJORITARIAN REALITY

Having identified, explained, and explored the majoritarian reality, the next task is to consider its implications. First, it suggests a new and powerful justification for *Smith* and its progeny. Second, and relatedly, it helps to resolve a persistent post-*Smith* analytical difficulty that vexes courts. Finally, it provides guidance for new high-profile cases concerning religious liberty.

A. Justifying Smith *and Its Progeny*

Many scholars have harshly criticized the majority opinion in *Smith* on its own terms. They are not wrong in doing so, for it does not have a lot going for it. Its account of precedent is shoddy at best, downright dishonest at worst.[221] Its originalist *bona fides* are questionable at least.[222] Its treatment of the constitutional text is dubious.[223] In short, *Smith* is a law professor's dream, for it makes it easy to be a Supreme Court critic.

Judged on its own terms, *Smith* is a failure. Yet the majoritarian reality may rehabilitate *Smith*, for it suggests a jurisprudential justification for its central holding. As a matter of judicial philosophy, which asks what the appropriate role of judges is, it is enormously significant that religious groups can and do participate and succeed in the political sphere. *Smith*'s general rule is a sensible expression of our preference for policymaking through political engagement rather than

[221] Laycock, *The Remnants of Free Exercise*, *supra* note 9, at 2-3. To give but one specific example, the majority declares that the precedents in which the Court applied strict scrutiny typically involved so-called hybrid rights, where the religion clause together with some other constitutional rights are at stake, suggesting that strict scrutiny may continue to apply in such cases. Emp't Div. v. Smith, 494 U.S. 872, 881-82 (1990). In addition to mischaracterizing such cases, this analysis presents puzzling logic. By what alchemical means does putting two constitutional rights together produce heightened scrutiny where (evidently), neither would on its own?

[222] McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1142.

[223] The term free *exercise* of religion suggests something more than merely the protection of religious belief, as *Smith* would have it.

through judicial fiat. This is especially true where, as we have seen, judges do a poor job of protecting unpopular religious minority groups.

Equally sensible and defensible is the critical caveat identified in *Smith*, amplified in *Church of Lukumi Babalu Aye v. Hialeah*, and applied in *Tenafly Eruv Association*, that laws that target religious groups for poorer treatment than others will not be tolerated under the Free Exercise Clause. Cases like *Lukumi* and *Tenafly Eruv Association*, in which there is ample evidence of animosity towards religious communities and laws are crafted or applied in ways that target religious practices, introduce the concern that marginalized religious groups are being locked out of the normal political because of their "otherness." In such cases — which, contrary to the political powerlessness assumption adopted by some leading law and religion scholars, do not represent the norm — strict scrutiny should apply.[224]

In other words, *Smith* and its progeny provide that where religious groups and individuals are capable of receiving a fair hearing in the majoritarian branches by participating in the normal coalition-building and lobbying processes inherent in our political system, that is all they are entitled to, regardless of whether they ultimately achieve their preferred result. But where majority groups target them for exclusion from the polity or for worse treatment than everyone else, then courts and the Constitution are there to protect them.

What is more, *Smith*, together with *Lukumi* and various Establishment Clause cases that prohibit (or at least limit) sect favoritism by the government, *encourage* political coalition building because it gives varied religious groups (and perhaps other groups that seek special accommodations) a common interest. This is quite an achievement, and Paul Horwitz has shown the important values in this equality-promoting consequence of these cases.[225] Indeed, to the degree that *Smith* spurred political engagement among and between religious groups, it is a remarkable example of democracy-forcing on the part of the Court that sparked protection of minorities in the political branches.

In short, the countermajoritarian assumption for judicial engagement is weak because religious groups can and do wield considerable political power. There is little in their institutional design and characteristics to suggest that courts would do a good job of making policy choices about when accommodations are warranted. Courts have done a poor job of

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[224] *See* discussion *supra* Part I.B.1.

[225] Paul Horwitz, *Rethinking the Law, Not Abandoning It: A Comment on "Overlapping Jurisdictions,"* 4 FAULKNER L. REV. 351, 365-66 (2013).

protecting the smallest, most unpopular, and most vulnerable religious minority groups. In fact, there is no evidence at all that since *Smith*, let alone *because of Smith*, there has been a diminished degree of religious freedom in this country. Under these circumstances, the *Smith* approach makes sense.[226]

This framework may or may not be what the framers intended or understood the Free Exercise Clause to mean. The originalist debate will no doubt continue.[227] It may or may not produce optimal public policy. Frankly, the record of both courts *and* majoritarian institutions is at best mixed in this regard.[228] And this reverse Footnote Four vision for limited judicial engagement is by no means universally accepted. But this framework has the virtue of jurisprudential defensibility. And, as Mark Tushnet has noted, legislative accommodations of religion, though imperfect, generally produce an "overall distribution of benefits and burdens [that] is likely to be reasonably fair."[229] Thus, although it does not prove that *Smith* was rightly decided, it does offer a coherent justification for *Smith* that is superior to what the Court itself was able to muster.[230]

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[226] Interestingly, in an excellent Note, Carlton Morse has assessed the relationship between legal process theory and the religion clauses to come to a much greater demand for religious accommodation under the Free Exercise Clause than *Smith* does (or than my own assessment would suggest). *See* Carlton Morse, Note, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 838-42 (2007). Although Morse's contribution is provocative, I suggest that it depends on a parochial view of the social importance of religion and religious institutions that is greatly contested. Further, Morse does not consider the relationship between legal process theory and the interest group analysis that I have offered. This, in turn, makes it difficult to assess the degree to which robust judicial engagement is necessary to protect free exercise values, whatever they may be.

[227] McConnell, *Free Exercise Revisionism*, *supra* note 10, at 1117.

[228] *See supra* Part III.1.

[229] Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1700 (1988).

[230] Given this defense of *Smith*, it is worth wondering whether the legislature's responding enactment of RFRA was a good idea. After all, the legislature kicked the ball back into the Court's court, so to speak, and if — as I have argued — the Court is not particularly well-suited to make the kinds of policy decisions demanded by the legislature under RFRA, maybe RFRA represents poor legislative policy. It is for this reason, in part, that Chip Lupu has argued that RFRA's generic accommodationism is more problematic than specific accommodations like Congress's response to *Lee*. Ira C. Lupu, *Of Time and the RFRA: A Layer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 183-85 (1995). This argument is not without force, but there are least two reasons to be less troubled by RFRA than by the Court's pre-*Smith* jurisprudence: (1) RFRA at least has clear democratic legitimacy, whereas the Court's pre-*Smith* jurisprudence depended entirely on a contestable interpretation of the Free Exercise Clause; and (2) by de-constitutionalizing the accommodations question, the

*B. Direction for a Persistent Post-*Smith *Line-Drawing Problem*

Ever since *Smith* and *Lukumi* were decided, judges and scholars have struggled with a perplexing problem. It can be difficult to determine whether a decision not to accommodate religious practices and beliefs should be classified as a *Smith*-type case (in which case, they are presumptively valid) or a *Lukumi*-type case.[231] Where is the line between the two?

Lukumi and *Tenafly Eruv Association* were relatively easy cases in this regard, with the laws easily recognized as having been the product of religious bigotry. In *Lukumi*, although the law prohibiting the killing of animals was written in nominally neutral language, it was written in such a way as to apply only to the killing of animals in religious ceremonies.[232] Moreover, the record is clear that it was the product of mistrust of or animus towards adherents of Santería in general, and not simply dislike of their practice of animal sacrifice.[233] In *Tenafly Eruv Association*, although the law was in fact neutral on its face and was originally adopted for neutral reasons, town officials plainly applied the law in a manner intended to target and exclude a religious community.[234] In both cases, then, the records were replete with evidence of anti-religious sentiment.

But not all cases are so cut-and-dried. The line-drawing problem is well-illustrated by the recent turmoil concerning a proposed ban on the circumcision of minors in San Francisco.[235] On the one hand, it is certainly possible to see this proposal as encoding a neutral view that children should not be subjected to medically unnecessary surgical procedures. If this was the motivation behind the proposed ban, then under *Smith*, the Free Exercise Clause had little to offer, no matter how much of a burden such a ban would impose on Jews and

legislature can at least in theory overturn or modify a judicial accommodation of religious practice. That said, I think there is good reason to be skeptical of RFRA's broad reach and vague standards for many of the same reasons stated herein.

231 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993); Emp't Div. v. Smith, 494 U.S. 872, 890 (1990); *see, e.g.*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200-13 (2004) (arguing that *Lukumi* should be applied broadly as an exception to *Smith*); James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. REV. 295, 301 (2013) (arguing for a much narrower construction of *Lukumi* and its progeny).

232 *Lukumi*, 508 U.S. at 534-39.

233 *Id.*

234 Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 156 (3d Cir. 2002).

235 *See* La Ganga, *supra* note 4; *see also* sources cited *supra* note 136.

Muslims. On the other hand, there is a rich history of governments prohibiting circumcision as a tool of religious oppression,[236] and some of the literature produced by proponents of the ban featured blatantly anti-Semitic imagery.[237] It is therefore plausible that at least some proponents of the ban were consciously or unconsciously motivated by anti-religious sentiments. Had the ban been enacted and challenged under the Free Exercise Clause, how should courts have ruled under *Smith*? This question has challenged the courts since *Smith* was decided, and the courts have been less than consistent.[238]

The majoritarian reality of religious liberty suggests a way to approach these cases. The greatest concern with laws that adversely impact religious interests should be whether religious groups are being targeted for exclusion from the polity or the political process. *This*, and not merely whether a law has the ancillary effect of disadvantaging religion, is what justifies judicial involvement most of all. In other words, political exclusion and animosity towards a religious *group*, rather than a rejection of a particular *practice*, is the real concern.

Consider again *Lukumi* and *Tenafly Eruv Association*. The real problem was that the primary goal of the majoritarian institutions in these cases was literally to exclude religious communities from their polity.[239] The majorities' objections were not merely to the practice of animal sacrifice or to eruv construction, but to the religious groups themselves. These sentiments should trigger strict scrutiny because they practically exclude these groups from joining the community or sufficiently isolate them as a discrete and insular minority group that cannot meaningfully participate in communal policymaking.

For similar reasons, recent high-profile efforts in some locales to prevent unpopular religious groups — including Muslims and Scientologists — from building houses of worship should likely also

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[236] *See* Stephen Evans, *German Circumcision Ban: Is It a Parent's Right to Choose?*, BBC (July 12, 2012), http://www.bbc.com/news/magazine-18793842; Ron Kampeas, *US Envoy Warns Circumcision Bans Will Create Jew-Free Europe*, TIMES ISRAEL (July 12, 2014, 1:36 AM), http://www.timesofisrael.com/us-envoy-warns-circumcision-bans-will-create-jew-free-europe/.

[237] Natasha Mozgovaya, *Circumcision Ban Comic Book Shows 'Grotesque Anti-Semitic Imagery,' ADL Says*, HAARETZ (June 4, 2011, 3:24 AM), http://www.haaretz.com/jewish-world/circumcision-ban-comic-book-shows-grotesque-anti-semitic-imagery-adl-says-1.365834.

[238] One way to view this case is as presenting a mixed motive. The courts, of course, have a long and not entirely consistent history of dealing with mixed-motive cases to draw from in a variety of discrimination contexts.

[239] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993); *Tenafly Eruv Ass'n*, 309 F.3d at 162.

trigger strict scrutiny, even if such efforts are promoted through facially neutral means (such as neutral-seeming zoning restrictions).[240] The objections in these cases are not to a particular building style or location, but to the religious groups themselves, and they have the effect of preventing these groups from creating communities and participating in the broader social and political life. Such efforts cannot be tolerated.

In contrast, facially neutral laws that only incidentally restrict religious practices are not driven by religious animus but by differences of opinion concerning public policy issues. Laws that prohibit murder are not driven by a desire to harm religious groups that wish to practice human sacrifice but by a widely shared communal belief that the taking of a human life (absent special circumstances) is a moral and ethical evil and harms the interests of society. Similarly, laws that mandate the inclusion of contraception in health insurance plans, equal treatment for gays and lesbians, and the like are not the product of anti-religious sentiment. They have neither the purpose nor the effect of excluding religious groups who disagree from fully participating in the political process and trying to change the law. Rather, they reflect changing cultural attitudes towards equality and sexuality. Consequently, we ought to leave those kinds of laws to majoritarian processes.

Returning to the case of a proposed ban on circumcision, our focus should therefore be on whether those religious groups that practice circumcision are prevented from meaningful political participation and, relatedly, whether their practices are being targeted due to broader animus towards particular religious groups. In San Francisco, there is little reason to believe that this was the case. Practitioners of the religious rite of circumcision were able to make their case in the public sphere — so much so, as it happens, that they ultimately succeeded at the state level in vindicating their interests. And while people who harbored animosity towards religious Jews and Muslims may have been among the supporters of the ban, there is little evidence that the purpose of the proposed ban was to render any religious groups second-class citizens or to keep them out of San

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[240] *See* Anastasia Dawson, *Scientologists Christen Seven-Story Flag Building in Clearwater*, ST. PETERSBURG TRIB. (Nov. 17, 2013), http://tbo.com/pinellas-county/scientologists-christen-7-story-flag-building-in-clearwater-20131117/; Fears, *supra* 213; Fleischer, *supra* note 213; Charlie Frago, *Clearwater Issues Conditions Scientology Must Meet to Hold Its Events*, TAMPA BAY TIMES (Nov. 8, 2012, 5:14 PM), http://www.tampabay.com/news/scientology/clearwater-issues-conditions-scientology-must-meet-to-hold-its-events/2151572; McWhirter, *supra* note 213.

Francisco altogether. Consequently, the proposed ban should not have triggered strict scrutiny.

It makes sense from this analysis that one important factor in separating *Lukumi*-type cases from *Smith*-type cases is just how broadly the restriction applies. As both *Smith* and *Lukumi* note, where a law applies only to a particular religious group's practices (whether on its face or as applied), we should be especially skeptical of it. The reason for this skepticism, according to the public choice account offered earlier, is that such laws may be the product of religious animus or have the effect of excluding or isolating a religious group from the rest of society. "Othering" them, as it were.

Thus, prohibitions on animal sacrifice that do not ban hunting for sport, towns that allow everyone to hang things up on utility poles except religious Jews, and objections to the construction of mosques in neighborhoods that are filled with churches are subject to heightened scrutiny because they suggest a breakdown of the normal political reality.

On the other hand, laws that ban circumcision of minors, that require employers to include contraception in their health plans, and that prohibit discrimination on the basis of sexual orientation do not place the burden of society's decision on a single minority religious group. Rather, these restrictions cut across various religious and non-religious groups, making it more likely for such groups to work together to defeat such laws. For example, libertarians may oppose contraception mandates and anti-discrimination laws alongside religious conservatives. Jews, Muslims, and the millions of Americans who choose to circumcise their sons for reasons unrelated to religious obligation can work together to defeat proposals to prohibit the practice. In other words, laws like this facilitate, rather than undermine, political coalition building. These coalitions may lose in their efforts, but there is no reason to believe that the laws were designed to exclude or isolate religious groups.

This approach will not resolve all of the difficult line-drawing problems. Surely some will remain, just as questions of motivation vex courts in all manner of discrimination cases.[241] The law tolerates blurry lines, and it also tolerates both a degree of oversensitivity and

[241] *See* Mark E. Berghausen, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV. 1281, 1289-90 (2011); Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 683 (2010); Adam R. Pulver, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination*, 41 COLUM. J.L. & SOC. PROBS. 365, 381 (2008).

one of overspecificity. That is, no matter what test we adopt to sort *Lukumi*-type cases from *Smith*-type cases, we are certain to miss some cases in which heightened scrutiny should be warranted and to apply heightened scrutiny even when doing so is not warranted. But by recognizing the majoritarian reality and understanding the public choice realities that produce it, we can articulate a useful framework for considering the difficult questions that *Smith* and its progeny have left for us. In other words, by articulating the values encoded in *Smith* and *Lukumi*, we can develop the best possible (albeit imperfect) sorting framework that protects those values.

C. Direction for Contemporary Clashes Between Law and Religious Liberty

The majoritarian reality also has important implications for recent and looming high-profile cases, namely *Hobby Lobby* and the emerging objections of religious groups to anti-discrimination laws that protect people on the basis of sexual orientation.

1. Lowering the Stakes in *Burwell v. Hobby Lobby Stores, Inc.*[242]

The Supreme Court's recent decision in *Hobby Lobby* was perhaps the most anticipated decision of the last term.[243] In *Hobby Lobby*, the owners of a closely held corporation argued that RFRA prohibited the federal government from requiring them to include certain kinds of birth control on their employee health plans.[244] Touching on issues of contraception, abortion, government mandated health care coverage, corporate personhood, administrative agency action, and, of course, religious liberty, *Hobby Lobby* was a culture war lightning rod that pit a familiar coalition of political liberals against a similarly predictable coalition of political conservatives. The political polarization surrounding the case was reflected in the overheated public rhetoric leading up to the Court's decision[245] and nearly matched by the

[242] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[243] *See, e.g.*, Jay Michaelson, *Supreme Court's* Hobby Lobby *Decision Puts Faith in Compromise*, REUTERS (June 30, 2014), http://blogs.reuters.com/great-debate/2014/06/30/supreme-courts-hobby-lobby-decision-puts-faith-in-compromise/ ("Monday the Supreme Court decided its most anticipated case of the year.").

[244] *See Hobby Lobby*, 134 S. Ct. at 2754.

[245] Mark Blumenthal & Ariel Edwards-Levy, *HuffPollster: Reviewing the Polling on* Hobby Lobby, HUFFINGTON POST (June 30, 2014, 5:46 PM EDT), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-polling_n_5545511.html; Ed Kilgore, Hobby Lobby's *Polarizing Effect*, WASH. MONTHLY: POLITICAL ANIMAL BLOG (July 9, 2014, 11:09 AM), http://www.washingtonmonthly.com/political-animal-a/2014_07/hobby_lobbys_polarizing_effect051126.php.

aggressiveness of the majority and dissenting opinions in the Court's 5–4 decision in favor of Hobby Lobby.[246]

Hailed as a major victory for religious freedom by political conservatives,[247] and denounced as judicial overreaching and a blow to women's health by political liberals,[248] an observer might be left with the impression that the stakes in this case were extraordinarily high. And, to be sure, the case does have important implications. For one, it clarifies that at least some kinds of business entities are persons capable of exercising religions within the meaning RFRA, and are therefore entitled to protection.[249] For another, it provides that RFRA imposes a "least restrictive means" test for laws that impose substantial burdens on religious exercise.[250] Further, it implies that a religious plaintiff's assertion that a law's interference with a religious requirement is "substantial" is subject to limited judicial inquiry at most.[251] It also adopts the novel position that RFRA's protections sweep much further than the Court ever interpreted the Constitution to provide, even prior to *Smith*.[252] Finally, it suggests, perhaps, that once the government grants *some* accommodations to a generally applicable law, it must grant similar accommodations to all religious persons who seek them.[253]

However, more circumspect observers have correctly noted that the *Hobby Lobby* decision is in many ways quite narrow. It quite clearly gives the government agency a straightforward way to ensure that all

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[246] *See Hobby Lobby*, 134 S. Ct. at 2787 (noting dissenting opinion by Justice Ginsburg, with Justices Sotomayor, Kagan, and Breyer joining).

[247] *See* Jennifer Rubin, Hobby Lobby*'s Win for Religious Freedom*, WASH. POST (June 30, 2014), http://www.washingtonpost.com/blogs/right-turn/wp/2014/06/30/hobby-lobbys-win-for-religious-freedom/; Wanda Carruthers, *Karl Rove:* Hobby Lobby *Ruling 'Victory' for Religious Freedom*, NEWSMAX (June 30, 2014, 12:53 PM), http://www.newsmax.com/Newsfront/Karl-Rove-Hobby-Lobby-contraception/2014/06/30/id/580020/.

[248] Interview by Katie Couric, News Anchor, Yahoo! News, with Ruth Bader Ginsburg, Justice, U.S. Supreme Court (July 30, 2014), *available at* http://news.yahoo.com/katie-couric-interviews-ruth-bader-ginsburg-185027624.html; Laura Bassett & Ryan J. Reilly, *Supreme Court Rules in* Hobby Lobby *Case, Dealing Blow to Birth Control Coverage*, HUFFINGTON POST (June 30, 2014, 10:20 AM EDT), http://www.huffingtonpost.com/2014/06/30/supreme-court-hobby-lobby_n_5521444.html.

[249] *Hobby Lobby*, 134 S. Ct. at 2761-75.

[250] *Id.* at 2780-83.

[251] *Id.* at 2777-79.

[252] *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html.

[253] *Hobby Lobby*, 134 S. Ct. at 2783-85.

employees of Hobby Lobby and similar companies are able obtain insurance coverage for the contraceptives in question.[254] It also casts doubt on the viability of the related pending lawsuits by some religiously affiliated nonprofit corporations.[255] And it indicates that there are substantial limitations on the ability of even closely held corporations to win in many other contexts in which they object to generally applicable laws.[256] In other words, the *Hobby Lobby* decision is unlikely to profoundly alter the religious freedom landscape.[257]

But the majoritarian reality of religious freedom lowers the stakes in the case even further. Whatever conclusion the Supreme Court had reached in the case, the battle over religious employers' duty to include coverage for contraception in health care plans they offer to employees would not have ended. Had the Court sided with the defendants rather than with the plaintiffs, interested lobbying groups would likely have continued to attack the mandate, whether legislatively or in the administrative branch. While they would not likely have enjoyed success under the current administration, the issue may well have been raised in political elections. And one suspects that if a Republican candidate were elected President in 2016, the agency would then respond positively to the lobbying efforts of religious conservatives and act to accommodate Hobby Lobby and similar groups. By the same token, the Court's decision leaves ample opportunity for those who favor such contraceptive coverage to achieve their ends in the majoritarian branches.[258]

In other words, because religious groups are *not* hamstrung in the majoritarian branches, the question of Hobby Lobby's duty to, or its right to decline to, provide coverage for contraception is capable of being handled like any policy issue, no different from any other on which powerful competing lobbying groups disagree. The two opposing sides on the issue may care a great deal about it. And one or the other will lose and be profoundly disappointed (unless a mutually satisfactory compromise is struck, which is not out of the question[259]).

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[254] *Id.* at 2780-83.

[255] *Id.* at 2783-85.

[256] *Id.*

[257] *See, e.g.*, Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015) (suggesting that religious exemptions are and should be readily cabined).

[258] *Hobby Lobby*, 134 S. Ct. at 2759-60, 2780-83.

[259] As the Supreme Court suggests in its decision, the government could require insurance companies to provide such coverage at no additional cost to the insured where the employer declines to pay for it. *Id.* at 2780-83. Even if religious employers object to the requirements currently in place to trigger this requirement, as some non-

But there is little reason to treat this as any more consequential than any other political debate, and even less reason to put a thumb on the scale in favor of religious liberty on account of the putative political powerlessness of religious groups.

By refusing in *Smith* to constitutionalize the issue of religious freedom in most cases, and instead leaving it to the political process to resolve disputes, the Supreme Court lowered the stakes of any individual case. The Court has thus sublimated itself to the political process, and crucially, because religious individuals and groups are fully capable of participating in and prevailing in that process, any decision of the Court becomes quite a lot less important.

2. Direction for Looming Disputes Between Religious Conservatives and Gay Rights Advocates

The most significant looming battles concerning religious liberty are sure to be sparked by the growing successes of the gay rights movement.[260] Business owners with religious objections to homosexuality have begun to challenge laws prohibiting discrimination on the basis of sexual orientation that have spread across the country, casting themselves as victims of the gay rights movement.[261]

profits have, the agency might find some manner of triggering the requirement that religious employers could agree to. *See* Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 560 (7th Cir. 2014); Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 1246 (D. Colo. 2013).

[260] In the battles between these two groups it is worth considering their relative degrees of political powerlessness. Should gay rights advocates receive special consideration because of the historical and continued discrimination against gays and lesbians, or have their recent political successes shown them to be capable of participating fully in the political arena? This is an interesting question worthy of further exploration.

[261] *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 58-59 (N.M. 2013) (showing that plaintiff refused to photograph commitment ceremony between two women); Complaint at 2, Odgaard v. Iowa Civil Rights Comm'n, No. CV 046451 (Iowa Dist. Ct. Oct. 7, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf (seeking declaratory judgment that Iowa Civil Rights Commission lacked authority to force plaintiffs to host weddings that violate their religious beliefs); Complaint at 3, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. Apr. 9, 2013), *available at* http://www.adfmedia.org/files/ArlenesFlowersAGcomplaint.pdf (suing flower store for discrimination on the basis of sexual orientation); Jeff Mapes, *Backers of Religious Exemption to Serving Gay Weddings Lose Round in Oregon Ballot Title Fight*, OREGONIAN (Mar. 11, 2014, 4:54 PM), http://www.oregonlive.com/mapes/index.ssf/2014/03/backers_of_religious_exemption_1.html (discussing Oregon individuals and businesses who wanted to refuse commercial services to gay weddings based on religious objections).

The majoritarian reality of religious accommodationism in this country suggests that courts should practice judicial minimalism wherever possible in these cases. They should decline to constitutionalize the rules that govern these disputes, honor the passive virtues, and favor majoritarian resolution over judicial fiat.[262] Where courts must rule on substantive disputes, they should rule narrowly or in a democracy-forcing manner designed to stimulate and intensify political engagement.

The lobbying battle in the majoritarian branches of government between gay rights advocates and religious conservatives on this question is already pitched.[263] It is not yet clear how the dust will settle. Some states will likely carve out narrow religious exceptions;[264] others broader ones;[265] and others none at all.[266] Elections may be won or lost on the issue.[267] Uneasy compromises may emerge. The courts, which often offer only winner-take-all approaches on these issues — which they are not institutionally well-suited toward — should not interfere with this dynamic political process.[268]

If advocates of religious liberty lose their battles for accommodation in the political sphere — or rather, *when* and *where* they lose in the political sphere, because they surely will lose in some instances — it will not be because they are helpless minority groups lacking the ability to participate meaningfully in the political marketplace. Instead, it will be because Americans, through their elected officials, have decided that businesses must not discriminate on the basis of

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[262] *See* McConnell, *Religious Freedom*, *supra* note 149, at 612 (discussing that while in theory the judicial branch would be more protective of minorities, in practice the legislature has done more for protecting minorities).

[263] Jay Michaelson, *Redefining Religious Liberty*, POLITICAL RESEARCH ASSOCS. (May 28, 2013), http://www.politicalresearch.org/2013/05/28/redefining-religious-liberty/ (discussing that a well-funded network of evangelicals are attacking same-sex marriage and anti-discrimination laws on the grounds of violating the religious liberty of others).

[264] *See* Serwer, *supra* note 146.

[265] *Id.* (listing proposed bills in Arizona, Georgia, Maine, Mississippi, and Tennessee that create broad exemptions for religious freedom).

[266] *Id.* (listing proposed bills in South Dakota, Utah, Oklahoma, and Ohio as potentially narrower than bills proposed in other states).

[267] *Id.* (discussing that only fourteen states that have proposed such bill so far).

[268] The point here is consistent with Justice Ginsburg's famous critique of *Roe v. Wade*. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381-82 (1985). There, she suggests that *Roe* went too far in constitutionalizing reproductive liberty because it ultimately prevented any legislative compromise from developing, ultimately to the detriment of the political process. *Id.*

sexual orientation any more than they should discriminate on the basis of race.[269]

My own hope is that courts interfere as little as possible with the organic developments within this conflict, at least for the time being, in order to give space for the political process to generate the kinds of messy compromises that democracies tend to produce. Because both sides of this issue are at this point sophisticated and possess a measure of political power and access, there is little reason to believe that a series of judicial opinions vindicating one side over the other will produce better or more stable results than a prolonged, pitched negotiation among the various stakeholders would. Further, judicial vindication of one side or the other in this area is likely to entrench the current culture wars that currently dominate our politics. It is the majoritarian reality of religious accommodation that potentially allows the courts to step back to permit the political process to negotiate this terrain.

IV. HIGHLIGHTING THE LIMITS OF THE ARGUMENT

This Part considers the limits of the proposed framework. To briefly review: religious groups have more potency in the majoritarian branches than is often understood as a result of their ability to work together and with others within the political system. As discussed earlier, courts' institutional structure gives them no special expertise on religious liberty questions. They have proven themselves to be no better, and in fact are often worse, at protecting religious liberty than are the majoritarian branches. In combination, these dynamics undermine arguments in favor of special judicial consideration for religious minority groups in the normal course of affairs. But there are situations in which the political system breaks down and that call for heightened judicial scrutiny.

As contentious as these points may be, equally important is what I have *not* argued. First, I have not suggested that the majoritarian branches should decline to offer special accommodations to religious groups and individuals. While I have taken no position on whether

[269] *See, e.g.*, David S. Cohen, *Arizona's Anti-Gay Bill Was Vetoed, but the State — Like Many Others — Still Discriminates Against Gays*, SLATE (Feb. 27, 2014, 2:54 PM), http://www.slate.com/blogs/outward/2014/02/27/arizona_anti_gay_segregation_bill_vetoed_but_arizona_still_discriminates.html (discussing the public outcry against the bill, leading to Governor Jan Brewer vetoing it); *The Civil Rights Movement: The Surge Forward*, AUTHENTIC HISTORY (July 18, 2012), http://www.authentichistory.com/1946-1960/8-civilrights/1954-1960/ (discussing the murder of Emmett Till, the national public outcry expressed when the story was published, and the passage of the Civil Rights Act through the legislature).

special accommodation is "good" or "bad" as a general policy matter, it could be that majoritarian protection of religious liberty is not only fully compatible with a policy of judicial minimalism, it may be a prerequisite. That is, if the majoritarian branches of government begin to show a consistent disdain or antipathy — or possibly even simple but consistent indifference — towards claims of religious conscience, the argument for heightened judicial scrutiny under the Free Exercise Clause should be revisited.[270]

Second, I have not suggested that we should be confident that the majoritarian reality will always generate good public policy on questions of religious liberty. The majoritarian branches may do a poor job of balancing the interests of the public against those of religious groups and individuals. They may at times under-accommodate religious needs (as the military initially did in *Goldman*), and they may at times over-accommodate religious needs (as in the case of vaccination exemptions). This is another way of saying that our political system may sometimes produce poor policy. The Court may have a role in responding to such concerns. But political failures can go in both directions, sometimes giving religious people less freedom than they should have and sometimes giving them too much (at the expense of others). In fact, it seems that as a result of the nature of interest group politics, religious groups are more likely to win more battles than they are to lose, at least when their battles are waged against diffuse majorities or less well-organized and consequently less powerful minority groups.

Thus, if courts are to play a central role in protecting religious people from poor policy choices on this basis, it has to be a two-way street. The Free Exercise Clause alone cannot offer such a two-way street. Heightened scrutiny under the Free Exercise Clause — without a concomitant robust application of the Establishment Clause, which is currently lacking — would create a one-way ratchet. Courts would be asked to give religious people a second opportunity when they lose in the political arena to make their case that religious liberty should be protected. But those who suffer as a result of *too much* majoritarian accommodation of religion would have nowhere to turn.

[270] A case can be made that there have been times in our national history in which the majoritarian branches consistently reflected popular animus towards particular religious groups, and in such circumstances, judicial intervention may well be warranted. Catholics, for example, have a history of oppression in this country, one that is closely linked to xenophobia and battles over class and immigration in the nineteenth century. It is not a given that this accommodationist culture will always prevail in the future.

More generally, we tolerate poor policy decisions that result in harm to individuals, messy compromises, and inconsistent resolutions to problems from the majoritarian branches in virtually all other contexts of governance without demanding heightened judicial review. Extending special judicial protection to religious interests alone in the name of improving public policy — rather than due to some persistent, structural, or systematic breakdown in our political system that results in overwhelming harm to one group — seems unwarranted. In other words, the argument proves too much, because if courts are needed to protect religious people from the poor policy choices of the majority, then we ought to give the courts substantial authority to review all of the *many*, *many* poor policies that emerge from the majoritarian branches. This would work a fundamental reorganization of our government and challenge any commitment to separation of powers and majoritarian self-government.

Further, there is no reason to believe that courts will do a consistently better job at achieving the right balance than the majoritarian branches do. Judges are institutionally well-situated to undertake a *Lukumi*-style analysis, that is, to analyze legislation and other official action to determine whether similar things are being treated similarly or are the product of discriminatory purpose or motive.[271] But they enjoy no similar institutional advantage when it comes to determining optimal levels of religious accommodation or deciding what constitutes a compelling state interest. Thus, although the majoritarian branches and courts may both make poor decisions on such questions, the majoritarian branches enjoy two critical advantages over courts: (a) they can revisit policy choices at will; and (b) they have some majoritarian legitimacy. In the absence of institutional advantages or evidence that the political system is systematically incapable of taking religious claims of conscience seriously, courts should generally defer to those policy decisions, whether or not they are sound.

In any event, even if the interest of "sound public policy" is posited as a sufficient basis upon which to rest a claim for robust judicial

[271] Although Paul Horwitz has argued that equality analysis is not sufficient under the religion clauses, he has shown that it can be quite helpful, as in the case of protecting Muslims from the imposition of anti-Sharia statutes. *See* Horwitz, *supra* note 225, 260-63. There are other examples of such a judicial inquiry. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (striking down a felon disenfranchisement law because of evidence of a discriminatory motive on the part of the legislature that enacted it); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down a facially neutral statute due to prejudicial intent).

review, it is an entirely different argument in favor of judicial review from the one that is the focus of this Article. It does not contradict the analysis of this Article, which questions the specific claim that religious minority groups require special judicial protection because they are impotent in the majoritarian branches. It is simply orthogonal to it, a different argument for judicial engagement that is worth addressing in a different article.

Third, this Article does not argue that religious accommodationism has no constitutional claim under the Free Exercise Clause. As stated at the outset, it may be that the Free Exercise Clause should be understood to confer a right to religious accommodation in some contexts. But it does not necessarily follow that the courts ought to be the ones to define the substance of that right. After all, not every constitutional guarantee is enforced through courts.[272]

Finally, although I have proposed that the focus of the judicial inquiry under the Free Exercise Clause should be similar to that of an inquiry into race discrimination under the Equal Protection Clause, I have not suggested that this is the full extent of the Free Exercise Clause's protections. The Free Exercise Clause may well provide singular substantive guarantees to religious people and institutions, including the absolute right to pray, to select ministers, and perhaps others.[273] That is, although the Equal Protection Clause offers similar equality-based protections to other minority groups, it does not render the Free Exercise Clause unnecessary, for it has a good deal of work to do that the Equal Protection Clause does not perform.[274]

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[272] *Cf.* U.S. CONST. amend. IX (stating that the enumerated rights are not to be construed to deny or disparage other rights); U.S. CONST. amend. X (reserving unenumerated and unspecified powers to the states and the people); Baker v. Carr, 369 U.S. 186 (1962) (discussing the Political Question Doctrine); Luther v. Borden, 48 U.S. 1 (1849) (expressing the Political Question Doctrine); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (reserving the interpretation of the constitutional guarantee to the political branches).

[273] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (recognizing a ministerial exception); Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'").

[274] Laycock has asserted that under the equality view of free exercise,

> [n]othing is left . . . . The free exercise clause just tells you that religion is special for equal-protection purposes, in the same way we know that race is special for equal-protection purposes. So you get a compelling interest standard for discrimination, instead of merely a rational basis standard for discrimination. I guess free exercise is just that. But this interpretation really

CONCLUSION

Our contemporary legal culture is exceptionally accommodating of religious minorities, sometimes for better and sometimes for worse, due to the dynamics of our political system. There is nothing remarkable about their political power that distinguishes them from any other special interest group, other than that they enjoy more of it than a lot of other groups.

Subjecting questions of religious accommodation to majoritarian politics no doubt guarantees that religious groups will sometimes lose. But in my view, this reflects the collective and individual political strength of religious groups rather than their weakness. Groups that are able to vigorously participate in the political process by advocating for their interests alone or through coalition building are far stronger than those that must rely on the courts for special protection. Indeed, minority groups should *aspire* to gain enough cultural cache and lobbying power that they can survive without special judicial protection, even at the cost of losing particular battles.

does just make it an adjunct of the equal protection clause.

Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 903 (1994). But this is obviously mistaken because the Free Exercise Clause *has* been interpreted by courts to offer certain guarantees beyond equal protection. In any event, *even if* the Free Exercise Clause did nothing beyond grant equality to religious groups, it cannot reasonably be viewed as "just . . . an adjunct of the equal protection clause." *Id.* As Laycock knows well, the Free Exercise Clause predates the Equal Protection Clause by nearly a century. *Id.* at 884.