EXEMPTIONS AND THE ESTABLISHMENT CLAUSE

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INTRODUCTION

In *Employment Division v. Smith*,[1] the Supreme Court abandoned a strict scrutiny standard of review for most cases under the Free Exercise Clause and announced in its place the rule that neutral, general laws are constitutional, regardless of impact on religious practice. The decision immediately provoked reaction (almost entirely negative) from the legal academy, and undoubtedly helped to reinvigorate sustained scholarly interest in religious exemptions, both judge-made as well as legislative. For the decades that followed *Smith*, the statutory responses to the decision from Congress and state legislatures have continued to invite scholarly response. But in contrast to the fairly uniform scholarly outrage voiced in the immediate aftermath of *Smith*, twenty years of intellectual discourse about the decision has produced a cadre of scholars who question the wisdom, fairness, and constitutionality of court mandated and/or legislative exemptions for religious actors. By the late 1990s, for example, Fred Gedicks concluded that he simply could not support religious exemptions because they violate our core legal commitment to equality.[2] Other scholars took up the equality mantle, some in more nuanced ways than others. Christopher Eisgruber and Lawrence Sager argued for "equal regard," noting that while speech should be privileged, religion—like race—should be protected only from discrimination.[3]

Other scholars, concerned that statutory exemptions inappropriately privilege religion, have focused on the Establishment

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[1] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[2] Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 560-66 (1998).

[3] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1251-52, 1282 (1997); *see also* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

Clause as the preferred tool of challenge.[4] While touching upon equality, Establishment Clause interpretation contains its own powerful set of values not wholly coextensive with equality. Surely, given the language from numerous decisions and "tests" fashioned under the clause, one can piece together a reading of the Establishment Clause that declares exemptions unconstitutional because they advance, endorse, privilege, sponsor, or give special status or financial advantage[5] to a particular faith or to religion generally.[6] Indeed, as Leslie Griffin's casebook notes in constant refrain, "every exemption raises a potential establishment clause violation."[7] Surely, the argument goes, such a reading would impose legal norms uniformly so that governmental commitments cannot be frustrated by a system of exemptions "in which each conscience is a law unto itself."[8] But *should* we read the clause in this way? My answer is no, based in large part on the role that Establishment Clause jurisprudence has played in creating the very conditions of pluralism that justify many legislative exemptions and sometimes necessitate judicially-created ones.

While some examples of *legal* establishments existed in colonial America, a pervasive Protestant cultural and moral establishment was firmly entrenched well into the twentieth century.[9] Catholics provided the first formidable challenge to that establishment in the nineteenth century,[10] but on many moral issues, Catholics and Jews shared the established social mores. It was really the incorporation of the Establishment Clause in the Supreme Court's 1947 decision in *Everson v. Board of Education*, and its sharp emphasis on the wall of separation of church and state, that signaled the beginning of the end of this normative unity.[11] The decision recognized that the clause had to be understood and interpreted in light of an increasingly pluralistic

4 *See infra* note 104; *see also* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006).

5 *See, e.g.*, Marci A. Hamilton, *The Constitutional Limitations on Congress's Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act is Unconstitutional*, 2 ALB. GOV'T L. REV. 366 (2009).

6 *See* City of Boerne v. Flores, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring) ("[T]he Religious Freedom Restoration Act of 1993 (RFRA) . . . violates the [Establishment Clause because] . . . RFRA gives [a religious claimant] a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. . . . [T]he statute has provided [a religious claimant] with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.").

7 LESLIE C. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 177 (2d ed. 2010).

8 Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

9 *See, e.g.*, THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 43, 53-54 (2001).

10 *Id.* at 18, 54-58.

11 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

religious culture.[12] Indeed, decisions interpreting the Establishment Clause (together with other constitutional provisions) over these last sixty years have served as the engine for dismantling the legal supports for this cultural and moral establishment.[13]

Far from producing a secular establishment to replace the religious one, Establishment Clause jurisprudence has promoted instead vast religious pluralism. During the 1960s, when race was the predominant civil rights issue, the clause focused attention on *religious* minorities as well.[14] The decisions over the decades have opened up society to a multiplicity of religious and non-religious practices and norms. The powerful, pluralism-enhancing impacts of disestablishment together with protections for religious freedom are summarized nicely by Justice O'Connor:

> Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "[w]e are a religious people" has proved true. Americans attend their places of worship more often than do citizens of other developed nations, and describe religion as playing an especially important role in their lives.[15]

This constitutional orientation toward pluralism, together with the enormous changes in religious demographics brought about by

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[12] *Id.* at 16 ("New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

[13] *See infra* Part I.

[14] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring) ("[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship . . . no God at all. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."); Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

[15] McCreary Cnty. v. ACLU, 545 U.S. 844, 882 (O'Connor, J., concurring).

immigration, has laid the foundation for the current period of unprecedented, indeed staggering pluralism.[16] As Winnifred Sullivan has observed, "[d]isestablishment is coming to mean less privatized pluralism through the separation of religion(s) from public life and more a permeable and inclusive public accommodation of the religiousness of all Americans."[17]

Along with religious pluralism comes normative pluralism. As the Protestant establishment has disintegrated, expectations for social conformity in certain circumstances have diminished and many issues of personal and public morality have become contested. Rights involving speech, association, and privacy have certainly encouraged these developments, but one contributing factor that is rarely mentioned is the role played by religious exemptions, particularly legislative exemptions from otherwise generally applicable laws. These exemptions are sometimes broadened to encompass non-religious conscience or conduct as well. Religious exemptions allow a degree of normative latitude. Sometimes the exemption protects the dissident minority practice, like the use of drugs in religious ceremonies. Other times the exemption allows forms of discrimination not tolerated in most circumstances. Still other exemptions allow religious groups to retain traditional moral positions that have been rejected by lawmakers. Particularly in connection with shifting moral understandings, exemptions that allow various norms to coexist provide continuity and stability, as well as a framework for ethical discourse in the public square.

Religious exemptions from general laws—whether court-created or legislatively granted—facilitate both religious pluralism and its accompanying normative pluralism. Indeed, Establishment Clause interpretation has served a critical function in advancing normative

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[16] DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION (2001). Note how some of the Supreme Court's encounters with minority faiths are directly related to immigration. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (involving Santeria, which is practiced in Cuba and came to Florida by way of Cuban immigration). Catholic philosopher-theologian John Courtney Murray argued that the norm of America was religious pluralism and not religious unity, and that disestablishment promoted religious liberty for that pluralistic society. *See generally* Angela C. Carmella, *John Courtney Murray, S.J.*, *in* THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS AND HUMAN NATURE 181 (John Witte, Jr. & Frank S. Alexander eds., 2007).

[17] Winnifred Fallers Sullivan, *Requiem for the Establishment Clause*, 25 CONST. COMMENT. 309, 315 (2009). She continues:

> Religion today in the United States is a fragmented, fissiparous affair, highly resistant to fixed identities and associations, but it is also remarkably resilient. To be American is no longer to be Protestant—but hard-edged atheism is not really acceptable—or even believable. You must be religious, but your religion can be "whatever." Really whatever. Not just Protestant, Catholic, or Jewish.

Id. at 316.

pluralism, as most legislative exemptions are currently understood to comport with the clause. Obviously there are limits to the kinds of normative pluralism any society can tolerate, and the clause sets the outer bounds. But for those who would reinterpret the Establishment Clause to restrict exemptions and the normative pluralism they generate, I would remind them of the long legacy of the jurisprudence that fosters and manages the very pluralism they seek to terminate. Doug Laycock has argued that "whether and when to exempt religious practices from regulation is the most fundamental religious liberty issue in the United States today."[18] The very same question implicates not only religious liberty but normative pluralism as well. Rather than restrict exemptions, I would employ the current exemptions doctrine explicitly to engage the issue of normative pluralism and its limits.

I. RELIGIOUS PLURALISM

The dismantling of the Protestant cultural establishment came first in public schools. Catholics had always argued that the public schools in America were Protestant, despite repeated state court rulings that Bible reading and prayers were "nonsectarian."[19] By mid-to-late twentieth century, the Supreme Court was ready to declare devotional exercises—prayers, Bible reading, and Ten Commandments posters in public school classrooms[20]—unconstitutional. In its place, however, is not the absence of religion. Now moments of silence start the school day in many states;[21] student-initiated prayers and Bible studies and other religious clubs meet during non-instructional time;[22] and religious schedules[23] and some religious practices[24] are accommodated. The

[18] Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 145 (2009).

[19] *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 228 (2002); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

[20] Stone v. Graham, 449 U.S. 39 (1980) (Ten Commandments); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Bible); Engel v. Vitale, 370 U.S. 421 (1962) (prayer). Additionally, moments of silence that are clearly intended for prayer are unconstitutional. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

[21] Eleven states mandate a moment of silence. *See* Lucretia Goddard, *Illinois Joins "Moment of Silence" States*, ETHICS & RELIGIOUS LIBERTY COMMISSION S. BAPTIST CONVENTION (Nov. 12, 2007), http://erlc.com/article/illinois-joins-moment-of-silence-states. Some others have permissive as opposed to mandatory moments of silence. *See States with Moment of Silence or School Prayer Legislation*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=12828 (last visited Apr. 18, 2011).

[22] Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[23] Zorach v. Clauson, 343 U.S. 306 (1952).

[24] Andrea Alexander, *Finding a Place to Pray; Wayne Seeks Way to Accommodate Student*, RECORD, Feb. 19, 2009, at L1, *available at* 2009 WLNR 3457183 (describing various public

Court prohibited clergy from providing religious instruction in a public school classroom—indeed no religious instruction can be in the curriculum.[25] But students can learn *about* religion,[26] and path-breaking work is being done in various states and through the American Academy of Religion to develop curricula for this purpose.[27] The Court prohibits prayers at graduation, but baccalaureate services can be held.[28] No prayers are permitted at school-sponsored sporting events,[29] but the team can pray if the prayers are student-led.[30] And religious groups are free to use public schools during non-school hours if the facilities are generally available for use by community groups.[31] And while the state cannot specifically delegate authority to a religious group to run a public school, a religious group can run a public school as long as its authority is obtained pursuant to a general statute.[32] Finally, in connection with state universities, religious student groups might be required to accept all-comers regardless of beliefs or personal moral conduct,[33] but they cannot be denied facilities and funding available to other groups on non-religious criteria.[34]

In addition to ending the legal supports for "Protestant" public schools, Establishment Clause interpretation halted numerous attempts

school accommodations for finding quiet space for Muslim students' prayers during the school day); Jodi Wilgoren, *A Nation Challenged: Arab Americans, Struggling to Be Both Arab and American*, N.Y. TIMES, Nov. 4, 2001, at B1, *available at* 2001 WLNR 3331017 (describing concentration of Muslims and how public school accommodates girls' gym class and cafeteria food, among other topics).

25 Edwards v. Aquillard, 482 U.S. 578 (1983); McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

26 *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

27 *Guidelines for Teaching About Religion in K-12 Public Schools in the United States*, AM. ACAD. RELIGION (Apr. 2010), http://www.aarweb.org/Publications/Online_Publications/Curriculum_Guidelines/AARK-12CurriculumGuidelines.pdf.

28 Lee v. Weisman, 505 U.S. 577 (1992). But note that "while public schools cannot sponsor prayers at graduation, religious groups may hold baccalaureate services that are filled with prayers and hymns and do so on school property during nonschool hours if the school rents the space on an equal basis to other nongovernmental groups." Melissa Rogers, *Judging Alito*, CHRISTIAN CENTURY, Jan. 10, 2006, at 9, *available at* 2006 WLNR 604067. They can also, of course, hold them in their houses of worship for graduates among their members.

29 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

30 *See, e.g.*, Borden v. Sch. Dist., 523 F.3d 153 (3d Cir. 2008) (holding that coach, as state actor, could not pray with team without violating Establishment Clause; presumably, however, student-initiated and student-led team prayer would be constitutional).

31 Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

32 Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (finding an unconstitutional delegation of government authority along religious lines). For the final outcome showing that the Village was ultimately able to operate a public school, see Nomi Stolzenberg, Board of Education of Kiryas Joel Village School District v. Grumet*: A Religious Group's Quest for Its Own Public School*, *in* LAW & RELIGION: CASES IN CONTEXT 203, 226 (Leslie C. Griffin ed., 2010).

33 Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

34 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981).

to provide government aid to Catholic schools.[35] But rejecting the funding of religious schools was not the last word in the discussion: Vouchers that include a wide variety of public and private options for parents, including religious schools, have been found to be constitutional.[36] There are fewer Catholic schools, but more schools sponsored by other religious groups.[37] Yet another new phenomenon—charter schools—has begun to accommodate all kinds of programs, including those religiously and culturally-based, like Muslim and Hebrew schools.[38] Factor in the phenomenon of home schooling,[39] and we see that the decision not to fund religious education has resulted not in completely secularized education but rather in greater religious pluralism in education.

A similarly pluralistic trend has occurred in the delivery of social services. Historically, religious groups delivered social services, but as government involvement in the field grew throughout the twentieth century, regulation and funding of privately delivered social services pushed the providers toward secularization (e.g., requiring the removal of religious symbols where services would be delivered). Several religious organizations became significant actors in working closely with government to provide services. But with the advent of Clinton-era Charitable Choice and Bush-era Faith Based Initiatives, many more religious groups have become involved in the delivery of social services. It has become a far more pluralistic endeavor, with secular and religious groups eligible for participation, and some of the requirements of secularization removed.[40]

Consider the military—an institution that thrives on uniformity and unity. Yet it too is becoming more diverse. A court put a stop to supper

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[35] Lemon v. Kurtzman, 403 U.S. 602 (1971). Bus fare reimbursements and textbook loans remain the primary permissible aid to religious schools.

[36] Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Note that several cases were overruled to reach this more pluralistic model. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[37] *Catholic Education's "Mission Confusion,"* AM. MAG. (May 14, 2010), http://www.americamagazine.org/content/signs.cfm?signid=419 (reporting that nationwide, there are 5,654 fewer Catholic schools now than in 1960).

[38] *See* GRIFFIN, *supra* note 7, at 55; Eunice Lee, *Township Sends Money to Charter School: East Brunswick Relents After Threat by the State*, STAR LEDGER, Oct. 5, 2010, at 15, *available at* 2010 WLNR 19768442 (discussing state's first charter Hebrew school); Associated Press, *Controversial Hebrew-Immersion Charter School in Bergen County May Finally Open*, NJ.COM (Nov. 29, 2010, 5:47 PM), http://www.nj.com/news/index.ssf/2010/11/hebrew-immersion_charter_schoo.html.

[39] "Nearly 3 million children" are homeschooled. GRIFFIN, *supra* note 7, at 653-54; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[40] Religious providers "retain independence from government control over their religious practices and beliefs, [are] allowed to keep religious symbols at their facilities, and continue to enjoy their exemption from Title VII anti-discrimination provisions." GRIFFIN, *supra* note 7, at 380. For further discussion, see Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

prayer at Virginia Military Institute,[41] but accommodations exist for those who wear yarmulkes and, more recently, turbans.[42] A cross on federal land cannot serve as a memorial to veterans who have died[43]—but the families of soldiers who have died can choose from among nearly forty different kinds of religious symbols on gravestone markers provided by the Department of Veterans Affairs, representing many different religious traditions—including Wiccan and Atheist.[44]

Another major impact of Establishment Clause interpretation has been to restrict religious symbolism on public property. Despite the constant press of advocacy groups for total secularization, however, this too gives way to pluralism. A crèche or display of the Ten Commandments *inside* a courthouse is prohibited,[45] but they can be placed in any public forum large enough to accommodate them.[46] Indeed, the diversity of the public forum was sealed when the Court found that the Ku Klux Klan could place a cross in the plaza in front of the Ohio state capitol, a traditional public forum.[47] A menorah exclusively and prominently displayed on government property is prohibited—but put it next to a Christmas tree and it becomes a constitutional message of pluralism.[48] In New York City public schools, which educate 1.1 million children, secularism is out and religious pluralism is in: Symbols representing multiple traditions are displayed during religious holidays.[49] And while those symbols are

41 Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019, 1022 (2004) (Scalia, J., dissenting from denial).

42 Congress responded to *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the Supreme Court deferred to the military's ban on yarmulkes, with an exemption to the military dress code. *See* 10 U.S.C. § 774(a)-(b) (2006). Recently, two Sikhs won an accommodation for their turbans, although a general accommodation has not been granted. *See* GRIFFIN, *supra* note 7, at 696.

43 Buono v. Norton, 371 F.3d 543 (9th Cir. 2004), *acknowledged in* Salazar v. Buono, 130 S. Ct. 1803, 1813 (2010).

44 GRIFFIN, *supra* note 7, at 421-22. Note that the conscientious objection to military service, which used to be limited to the historic peace churches, became available to religious and moral objectors alike, even those whose beliefs are formed individually, not in community. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). In *Welsh*, Harlan's concurrence suggested that the constitutional mandate of the Establishment Clause required this broad reading of the conscientious objector statute, now found at 50 U.S.C. app. § 456(j) (2006). 398 U.S. at 344 (Harlan, J., concurring in the result).

45 McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (Ten Commandments); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (crèche). Even the dissent in *McCreary*, authored by Justice Scalia, emphasizes the pluralistic appeal of the Ten Commandments to Christians, Jews, and Muslims.

46 Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 71 (2010) (discussing example of symbols of ten to fifteen religious groups in a public park).

47 Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

48 *Allegheny*, 492 U.S. at 578.

49 Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006), *cert denied*, 549 U.S. 1205 (2007). The symbols are supposed to be secular, in order to promote "understanding and respect for the rights of all individuals regarding their beliefs, values and customs." *Id.* at 6. For holidays with

"supposed" to be secular, most are not because most religious traditions have no secular expression. Perhaps most noteworthy is that although religious symbolism is often restricted on government property that is not public forum property, it is protected on private property by federal law.[50]

The Establishment Clause also sets limits to the control Native Americans can exercise over their sacred lands; they can have access to them, but cannot dictate to the federal government how those lands will be used, in order to prevent a "religious servitude" over "what is, after all, *its* land."[51] At the same time, the older Protestant suppression of tribal forms of worship is gone and federal law actually provides some specific protections for worship and ceremonies,[52] and recognition of indigenous religious and cultural needs—albeit weak—is undertaken through federal agency review processes.

In prisons, mainstream faiths have long had a presence through chaplains, worship services, and other accommodations. The Establishment Clause has ensured that religious groups cannot have exclusive access to prisons in order to proselytize prisoners,[53] but federal law now vigorously protects religious minorities by providing the types of accommodations usually given to mainstream faiths.[54] As described by Winnifred Sullivan, "the model has been one in which prison chaplains schedule an increasingly diverse array of religious services, conventional ones as well as arrangements for sweat lodges and neo-pagan worship of various kinds, services that are planned by prisoners or offered by outside religious groups."[55]

Even in areas where the Court has upheld the older Protestant cultural establishment, as with tax exemptions, Sunday day of rest, and

no secular symbol, however, the religious symbol (menorah, star and crescent) is used; the Christmas tree is used for Christmas. *Id.* at 4.

[50] *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006) (prohibiting substantial burdens, discrimination, exclusion, and unreasonable restriction in connection with government regulation of religious land use); Fair Housing Act, 42 U.S.C. § 3604 (prohibiting religious discrimination, *inter alia*, in the sale or rental of housing and in the terms and conditions of sale or rental of housing); Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57 (2010); Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485 (2009).

[51] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

[52] Sacramental use of peyote is protected under 42 U.S.C. § 1996; use of eagles for rituals is protected under 16 U.S.C. § 668a (2006). For extension by analogy to other controlled substances, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

[53] Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007) (finding a violation of the Establishment Clause when the Iowa Department of Corrections signed a contract with InnerChange to provide religious programs in prisons, but no other provider was similarly funded).

[54] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[55] Sullivan, *supra* note 17, at 312-13.

legislative prayers, we now see fragmentation and accommodations of pluralism. Tax exemptions may be a vestige of the oldest kind of establishment, but in the American context the Supreme Court has noted that they have resulted in the flourishing of hundreds of religious groups (not to mention numerous charitable and educational organizations).[56] In the Establishment Clause challenge to tax exemptions, Chief Justice Burger noted that churches had not abused tax exemptions by using them to concentrate money or consolidate power; instead, the exemption regime had "operated affirmatively to help guarantee the free exercise of all forms of belief."[57] Precisely because the exemption worked to ensure that government was not involved in the affairs of the beneficiaries, it had led to what Justice Brennan called a "unique[] contribut[ion] [of churches] to the pluralism of American society by their religious activities."[58] In contrast, another vestige of the older Protestant establishment did not survive, as it was viewed as a privilege and not a freedom-enhancing measure: A sales tax exemption for religious books and periodicals was disconnected from alleviating any burden on religious practice under the Establishment Clause.[59]

Only a few years before the widespread repeal of blue laws, the Court in 1961 upheld a uniform day of rest—Sunday—under the Establishment Clause.[60] Indeed, in that same year the Court gave no relief to Jewish storeowners who closed their businesses on Saturdays but could not open on Sundays.[61] But as blue laws have given way to economic pressures, courts now see them primarily as lacking any rational basis,[62] and businesses are free to open and close as they see fit. However, with no uniform day of closing for many businesses, the most prominent issue has become the scheduling of employees who do keep a Sabbath, whether Saturday or Sunday. A state may not empower employees to determine unilaterally their choice of day off from work,[63] but Title VII's requirement that employers reasonably accommodate employees' religious schedules has produced a body of case law replete with challenges by employees of many different religious minority

56 Walz v. Tax Comm'n, 397 U.S 664, 689 (1970) (Brennan, J., concurring).

57 *Id.* at 678 (majority opinion).

58 *Id.* at 689 (Brennan, J., concurring).

59 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Brennan, J., plurality opinion).

60 McGowan v. Maryland, 366 U.S. 420 (1961).

61 Braunfeld v. Brown, 366 U.S. 599 (1961). It is also worth noting that *Sherbert v. Verner*, 374 U.S. 398 (1963), equalized the treatment of Sunday and Saturday worshippers, because a law protecting Sunday worshippers created a need to protect Saturday worshippers from loss of unemployment benefits.

62 People v. Yaffee, 776 N.Y.S.2d 443 (N.Y. Crim. Ct. 2004).

63 Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

faiths arguing for various schedule accommodations.[64] Thus, the move from a uniform day of rest to a system in which employers and employees work out various days of rest acknowledges and protects, to some degree, the existence of religious pluralism in the workforce.

Finally, another area in which no establishment ban was set—legislative prayer—is giving way to pluralism. The Court upheld state legislative prayers delivered by a Presbyterian minister on the grounds that such opening prayers had a long history, dating from the First Congress.[65] Now the idea of inviting clergy from different religious groups has gained some traction.[66] The fact that there has been a Hindu invocation before the United States Senate and various state assemblies suggests that rather than tolerating a secularized version of religion, we are accepting religious pluralism.[67] And when the first Muslim member of Congress took his oath of office on the Qu'ran, and not the Bible, it became clear that even those practices considered primarily ceremonial do in fact carry tremendous religious meaning.[68] So even those practices thought to be of no theological moment—secularized if you will[69]—now move past such notions and into an acknowledgment of religious pluralism.

The cultural disestablishment of the last half century has brought us to a place in which religious pluralism is publicly acknowledged and often protected, and indeed encouraged. The notion that the nation began as a religiously pluralistic society—at least with respect to Protestant sects—has continued in an ever expanding religious diversity. As Doug Laycock has noted, "the history of religious liberty in America is a history of an ever expanding circle of inclusion, both social acceptance and legal protection."[70] The Establishment Clause's analysis under the "endorsement test" has been employed quite explicitly as a way to manage that pluralism, to ensure that no one religious group is viewed as having a privileged claim on citizenship. If

64 Title VII requires employers to accommodate religious needs of employees if it can be done without undue hardship. Trans World Airlines v. Hardison, 432 U.S. 63 (1977); *see also* Vikram David Amar, *State RFRAs and the Workplace*, 32 U.C. DAVIS L. REV. 513 (1999).

65 Marsh v. Chamber, 463 U.S. 783 (1983).

66 Pelphrey v. Cobb Cnty., 547 F.3d 1263 (11th Cir. 2008) (invocations offered on rotating basis); Turner v. City Council, 534 F.3d 352 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 909 (2009) (nondenominational prayer, variety of faiths); Hinrichs v. Speaker of the House, 506 F.3d 584 (7th Cir. 2007) (holding that state taxpayers lacked standing to challenge legislative prayer offered by a variety of clergy and lay persons).

67 GRIFFIN, *supra* note 7, at 403.

68 Keith Ellison, the first Muslim congressman, took his oath of office on the Qu'ran. Mark Leibovich, *Smiles, Backslaps, Even a Civility Meeting: For a Day, at Least, Bipartisanship Reigns*, N.Y. TIMES, Jan. 4, 2007, at A12.

69 *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (O'Connor, J., concurring) (finding "under God" in pledge to be an example of ceremonial deism).

70 Laycock, *supra* note 18, at 174-75 (describing the inclusion of Protestants, then Catholics, then Jews, now Muslims, Hindus and Buddhists, with prediction that nonbelievers will be next).

it was once the case that being American meant being a Protestant, that has been completely undermined by wave after wave of non-Protestant immigration and the dismantling of a Protestant culture.

II. NORMATIVE PLURALISM

The movement from Protestant unity to religious pluralism involves not just recognition of multiple religious groups but of their norms as well. Religious groups bring their moral perspectives, their understanding of right and wrong, and various visions of the good to public life. The alternative ethical systems of varying religious groups contribute to a pluralism of norms, which I will refer to as "normative pluralism."[71] Given the fact that in our constitutional system, governments are limited, even in areas in which they claim broad authority, there is by design room for competing visions of the good—especially those provided by religious traditions. Education of children, for instance, is one of the most significant governmental functions, but it is not an exclusively governmental function: Religious schools informed by the norms of their respective traditions, as well as other private schools, are accredited to perform that function. In perhaps the most radical statement of normative pluralism, when Oregon tried in the 1920s to require public education only for all children, the Supreme Court held—in the face of widespread anti-Catholic attitudes—that "the child is not the creature of the state" and could be prepared for duties in addition to those of citizenship.[72] Of course, the schools were required to meet minimum state standards, but the norms taught were the norms of the Catholic Church.[73] Indeed, we co-exist with normative differences all around us when we protect not only religious schools, but worship and associated religious activities; when we protect a way of life, including gender roles, embedded in religious communities; when we protect religious groups' access to public spaces and resources; and when we protect religious organizations that are involved in economic endeavors and those that provide health care and social services.

Normative pluralism results in part from the basic associational and expressive freedoms available to all, but also derives from the existence of numerous exemptions from otherwise generally applicable

[71] Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007).

[72] Pierce v. Soc'y of the Sisters of the Holy Name of Jesus & Mary, 268 U.S. 510 (1925).

[73] For an example of open hostility toward these schools as places of indoctrination, see the dissenting opinions in *Everson v. Board of Education*, 330 U.S. 1 (1947).

state and federal laws.[74] Whenever an exemption is granted, by a legislature, court or agency, religious norms operate in the "space" created by the law's retreat. It is of course obvious that the alternative ethical systems operating in these spaces should be broadly overlapping with dominant social norms; and if they are not, that they be compatible with the peace and safety of society and the legitimate lawmaking of the state. The converse, of course, is that those public norms that are non-negotiable will be enforced across the board, without exception. So when the federal government granted Native Americans an exemption from prosecution for the sacramental use of peyote, the government recognized that the exemption's impact was to strengthen a community and the positive norms it fosters.[75] In contrast, nineteenth century Mormons lost their bid for an exemption from bigamy laws to engage in religiously-mandated polygamy.[76] The degradation of women within the community, together with the impact on the larger society, was viewed as a monumental moral and political threat to the nation.

Critics of exemptions point to three categories of problematic exemptions. First, exemptions that protect religious behavior wildly at odds with shared public norms; second, exemptions that allow religious institutions to violate anti-discrimination norms; and finally, exemptions that allow religious institutions and individuals holding traditional beliefs to refuse to participate in conduct that is now widely accepted but still morally objectionable under their belief systems. Within these exemption categories, anti-social conduct or traditionalist attitudes are allowed to flourish within families, religious communities, and society, particularly with respect to the subordination of women to male authority. Critics contend that with exemptions there is no accountability to public norms.

I have written at length elsewhere about the general compatibility between exemptions on the one hand, and the administration of law and the peace and safety of society on the other.[77] But surely there are exemptions that never should have been permitted or even contemplated. For instance, while we might consider bodily integrity, and peace and safety within family life, to be some of the highest values of our society and its laws, we still hear of religious exemptions that run shockingly counter to these norms. Exemptions within the child abuse and neglect laws of most states protect faith healing parents who choose prayer over medical treatment when their children are sick.[78] The death

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

[75] *See* Carmella, *supra* note 71, at 427-28.

[76] Reynolds v. United States, 98 U.S. 145 (1878).

[77] *See generally* Carmella, *supra* note 71.

[78] MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 31 n.81 (2005).

of one diabetic child given prayer instead of insulin should be enough to tell us that the abuse and neglect exemptions should be repealed. Consider, too, a most disturbing 2010 domestic abuse decision of a New Jersey trial court, in which the judge accepted a Muslim husband's defense that he could not intend to rape his wife because under his religion he had the right to spousal sexual relations whenever he wanted. Fortunately, the Appellate Division reversed and remanded for a protective order for the woman.[79]

While exemptions from anti-discrimination legislation have come under criticism, there are some important justifications for them. Title VII exempts religious institutions from the prohibitions against religious discrimination, enabling them to employ only co-religionists for their work. Next, courts have exempted religious institutions from *all* anti-discrimination prohibitions in connection with clergy employment decisions. Both of these exemptions are grounded in the necessary separation of religious and governmental functions at the heart of the Establishment Clause, and allow the vast multiplicity of religious groups to maintain their identities. But the notion that certain church employees are left largely unprotected is nonetheless disturbing, particularly where churches have clearly engaged in discrimination, harassment, or retaliation that has absolutely nothing to do with their religion.[80] While some erosion of institutional autonomy may begin to occur, the Supreme Court has come down hard in only one area of anti-discrimination—upholding the revocation of tax-exempt status from a religiously affiliated educational institution that engaged in race discrimination.[81]

In cases dealing with anti-social conduct and discrimination, one can better understand why scholars might want to eliminate the latitude for such conduct and the norms that support it. But to eliminate exemptions from general laws because they advance or privilege religion in intolerable ways assumes, incorrectly, that exemptions are always harmful and never an independent, affirmative good; that the norms of the state are always superior to the norms of any other group and must always be enforced uniformly; and that discourse about norms ends once a law is passed without exemptions. Yet normative pluralism has existed from the earliest days of colonial America and into the life of the new nation, when Quakers were allowed to affirm and not swear an oath and were allowed to conscientiously object to military service,[82]

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[79] S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

[80] *See* Laura Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2078 (2011) (noting that civil rights laws reflect societal values and interests of the highest order).

[81] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[82] MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 92 (2d ed. 2006).

and when Catholic priests did not have to violate the seal of the confessional to help the state convict a criminal.[83] Such accommodation to alternative norms is inevitable to some degree in a system of government that does not assert itself as the exclusive source of norms. Instead, the conversation must be nuanced. Questions concerning the permissibility or mandate of exemptions and the possible normative pluralism they facilitate bring us right to the heart of the norms of American society: We ask whether, on a given topic, pluralism of norms must be allowed or simply tolerated or flatly rejected. When is such latitude a command of freedom or equality? When is it not just tolerable but actually an affirmative good? When does normative pluralism support human dignity? When does it subvert that dignity? Do the alternative norms overlap with the state's goals, or are they antithetical to them? When must there be absolutely no variation in application of a law? These questions are made more complicated by the fact that some norms, particularly norms of personal and public morality, are currently unstable and contested. Ultimately, though, the answers will involve societal decisions concerning notions of identity and citizenship, the nature of government and civil society, and the relationship of normative pluralism to the promotion of human dignity and the common good.

I noted above a third category of exemptions: those that allow religious institutions and individuals to refuse to participate in conduct that is now legally acceptable but morally objectionable to them based on their religious beliefs. These exemptions have come in direct response to the dismantling of the Protestant moral establishment and the laws that supported it, and have protected those who wish to maintain those traditional norms. The legalization of abortion and recognition of same-sex marriage (in five states) are obviously among the most polarizing issues of the last half century. The legalization of abortion in 1973 (and increasing acceptance of sterilization) suddenly put the law in tension with the beliefs of many religious groups and individuals.[84] It is not surprising, then, that conscience exemptions were passed by Congress[85] and by forty-six state legislatures to allow hospitals, doctors, and nurses to avoid negative consequences (loss of funding, or demotion or firing) for refusing to perform, or assist in the performance of, abortions and sterilizations.[86] Additional federal

[83] People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813), *in* MCCONNELL ET AL., *supra* note 82, at 103.

[84] Roe v. Wade, 410 U.S. 113 (1973).

[85] 42 U.S.C. § 300a-7(b) (stating that courts may not require hospitals to perform abortions or sterilizations if the procedures are prohibited on the basis of "religious beliefs or moral conviction").

[86] In addition to the abortion clauses, seventeen states allow some refusal of sterilizations. GRIFFIN, *supra* note 7, at 133-35.

measures have been passed to ensure that institutions and persons are protected from any penalty that might result from such refusal.[87] Obviously, such measures protect religiously affiliated hospitals—especially Catholic hospitals—because the Catholic institutions must comply with their Ethical Directives in the delivery of health care.[88]

A similar pattern has emerged with contraception. Traditional prohibitions (which had been supported not only by Protestants but by Catholics as well) were overturned in the 1960s,[89] and the use of birth control is now widespread. But in public schools, where teaching sex education has become the norm, opt-outs allow families to decide on this exposure. And a new moral issue for some pharmacists emerged in the 1990s when controversial morning after drugs (thought to behave like abortifacients rather than contraception) were approved and put on the market. (Some pharmacists now even refuse to fill prescriptions for birth control pills.) Pharmacists who refuse to dispense contraception are now protected from legal action or employment penalties in thirteen states.[90] On a related note, states with gender equity legislation require employers who provide their employees with health insurance coverage to include coverage for contraceptives. These laws contain conscience exemptions for church employers; but the highest courts of New York and California have refused to extend those exemptions to church-affiliated employers like Catholic Charities, which employ non-Catholics.[91]

The issue of same-sex marriage also fits within this larger framework, with tectonic shifts occurring within moral thinking, and

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[87] *Id.*

[88] U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (4th ed. 2001), *available at* http://usccb.org/bishops/directives.shtml.

[89] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating law forbidding sale or distribution of contraceptives to persons under sixteen years of age); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating law prohibiting distribution of contraceptives to unmarried persons on Equal Protection Clause grounds); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating law prohibiting use of contraception by married persons as violating right to privacy under Due Process Clause of the Fourteenth Amendment).

[90] GRIFFIN, *supra* note 7, at 134-35. The American Medical Association has issued rules that attempt to accommodate these moral objections while at the same time ensuring delivery of contraceptives to patients. *See* AM. MED. ASS'N HOUSE OF DELEGATES, RESOLUTION 6: RESERVING PATIENTS' ABILITY TO HAVE LEGALLY VALID PRESCRIPTIONS FILLED (2005), *available at* http://www.ama-assn.org/ama/pub/about-ama/our-history/ama-historical-archives/the-digital-collection-historical-ama-documents.shtml (follow "House of Delegates Proceedings" hyperlink; then follow "Next" hyperlink; then follow "House of Delegates Proceedings, Annual Meeting" hyperlink for year 2005; then select page "0000-0380" from the dropdown menu). But in the context of emergency rooms, exemptions have not been raised. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2805-p (McKinney 2010) (requiring all hospitals to promptly provide emergency contraception to a rape survivor upon request).

[91] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007).

disestablishment coming city by city, state by state, despite the federal Defense of Marriage Act.[92] Five states have recognized same-sex marriage,[93] and a sixth, California, had its recognition overturned by Proposition 8; a federal district court has held Proposition 8 unconstitutional, and the issue is currently before the Ninth Circuit.[94] While thirty-three states have barred the recognition of same-sex marriage, jurisprudential developments in constitutional law indirectly related to the issue of same-sex marriage might erode the bases for these laws. *Bowers v. Hardwick*, the Supreme Court decision in which no privacy or liberty protection was given to homosexual sodomy, was overruled by *Lawrence v. Texas*, which found that the liberty interest in the Due Process Clause of the Fourteenth Amendment "allows homosexual persons the right to make this choice [of sexual expression]."[95] Language from a variety of courts suggests religiously-based moral norms hold little relevance. The *Lawrence* Court, the California federal district court that overturned Proposition 8, and the Iowa Supreme Court considered the moral grounds for opposing same-sex relationships to be incapable of forming the basis for any government interest.[96]

It is unclear where the constitutional jurisprudence will lead, but the obvious issue is whether each city and state that recognizes same-sex marriage will provide religious exemptions or whether the new

[92] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

[93] New Hampshire and Vermont have recognized same-sex marriage by legislative action. N.H. REV. STAT. ANN. § 457:1-a (2010); VT. STAT. ANN. tit. 15, § 8 (2010). The remaining states that recognize same-sex marriage—Connecticut, Iowa, and Massachusetts—have done so via judicial rulings. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[94] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[95] Lawrence v. Texas, 539 U.S. 558, 567 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), thereby decriminalizing private, consensual sodomy); *see also* Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the state constitution that prohibited legislative, judicial, or executive action protecting homosexuals from discrimination violated the Equal Protection Clause because it had no rational relation to a legitimate government purpose, only animosity).

[96] *Lawrence*, 539 U.S. at 571-72 ("Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: 'Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.' . . . In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." (citation omitted)); *Perry*, 704 F. Supp. 2d at 1001 ("The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples. The evidence fatally undermines any purported state interest in treating couples differently; thus these interests do not provide a rational basis supporting Proposition 8."); *see also Varnum*, 763 N.W.2d at 904-06 (holding that notions of religious morality do not provide a legitimate state interest).

norm will be aggressively enforced across the board.[97] There seems to be a general consensus that no church would be required to solemnize a gay marriage (since the state cannot require a church to perform a religious ceremony), but a church refusing to marry a gay couple might end up losing its ability to solemnize any marriage for civil purposes. It also seems obvious that the state could not require a church to make its house of worship available for a same-sex ceremony, but a church might be required to open its non-worship facilities to such ceremonies under certain circumstances.[98]

Issues that surround the establishment of non-traditional families continue to pose the question of exemptions for those who hold to traditional values. Since family creation for same-sex couples is almost always done through reproductive technologies or by adoption, health care providers and adoption service providers have sought exemptions on grounds of conscience and religious teachings. So far, widespread exemptions have not been the norm: In the area of reproductive technology, a doctor had no free exercise right to refuse to provide fertility procedures to a lesbian woman.[99] And in connection with Catholic Charities' refusal to place children with gay couples, which has occurred in Massachusetts and San Francisco, legislative exemptions were refused and licenses had to be surrendered. Indeed, in San Francisco, the bishop's harsh statement against gay adoption drew reaction by the City Council, which passed a resolution denouncing his "discriminatory and defamatory directive."[100] In an Establishment Clause challenge to that resolution (as a show of government disapproval of religious beliefs), the Ninth Circuit, en banc, upheld the lower court's dismissal of the case, either on the merits based on the finding that the resolution had a primarily secular purpose and effect and created no excessive entanglement, or based on the view that standing requirements were not met.[101]

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[97] For a comprehensive discussion of the many issues involved from both sides of the debate, see generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

[98] Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo, 339 F. App'x 232 (3d Cir. 2009) (upholding district court's abstention while the State of New Jersey investigates under its Law Against Discrimination).

[99] N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 962 (Cal. 2008) ("Do the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, *exempt* a medical clinic's physicians from complying with the California Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation? Our answer is no.").

[100] Catholic League for Religious & Civil Rights v. San Francisco, 567 F.3d 595, 598 (9th Cir. 2009), *aff'd en banc*, 624 F.3d 1043 (9th Cir. 2010) (finding no religious disapproval or religious animosity, only support for non-discrimination, in city resolution criticizing bishop's comments on gay adoption as "discriminatory and defamatory").

[101] *Catholic League*, 624 F.3d at 1043.

The battles surrounding claims for religious exemptions like these will be the location for public discourse on all kinds of issues, particularly those of sex, abortion, and family life, for some time to come. Critical questions must be asked each time exemptions are at issue.[102] What is the impact of the exemption on those who seek it and on others? Is there a value to retaining continuity with traditional ethical systems? Does it provide stability in the face of changes, and if so, is that a societal good? Or does it fracture society into too many different value systems? Or, by allowing the co-existence of norms, do we preserve freedom to pursue multiple visions of the good? Exemptions obviously allow a significant vehicle for dissent and continued influence in public opinion, not simply by speech but also by conduct. At bottom, they appear to be the way religion manifests itself in public life, in the public square. This is why I do not believe the Establishment Clause should be read to shut down the discussion.

III. INTERPRETING THE ESTABLISHMENT CLAUSE

The Establishment Clause, together with other interconnected interpretations, has brought a once-uniform Protestantism crumbling down, and has allowed unprecedented cultural and moral shifts to occur. Should it now be used as an engine to stop the normative pluralism that resulted from that disestablishment? In other words, should it be interpreted to repudiate exemptions?

Many legislative exemptions would be vulnerable if courts pressed for neutrality aggressively and rigidly under the Establishment Clause, taking nothing else into account but the notion that religious conduct is being treated in a "special" way. An exemption that benefits a particular denomination, without similar benefits flowing to other religious groups, could be characterized as a denominational preference rather than a protection for free exercise. Similarly, an exemption that benefits religious conduct or institutions, without similar benefits flowing to secular counterparts, could be understood to prefer religion over non-religion. Even an exemption not crafted to benefit only religious actors but which did so in effect could be viewed as a religious preference. All of these exemptions could be interpreted as violating the endorsement test: One could construct a reasonable observer that views an exemption as state action that makes religion relevant to one's standing in the political community. Indeed, one could argue that with every exemption, religion is advanced, privileged, sponsored, or given special status (or even a financial advantage in some cases).

[102] *See generally* Carmella, *supra* note 71.

Conscience exemptions, the ministerial exemption, exemptions that make it easier for religious people to practice or pass on their faith—most if not all of these would be vulnerable under such an interpretation of the Establishment Clause.[103]

Those who hold such opinions about exemptions on constitutional grounds are "mostly academics or secular activists."[104] The Supreme Court has not been persuaded.[105] Indeed, the *Smith* decision's rejection of judicially-mandated exemptions was inextricably linked to and dependent upon the availability of legislative exemptions. Justice Scalia wrote:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, *so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use*. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that *leaving accommodation to the political process* will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[106]

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[103] *See* Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring) ("On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause."). Justice O'Connor acknowledges that exemptions do advance religion, which does not trouble her; the Court's task, she says, is to decide when an exemption unjustifiably awards assistance. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).

[104] For a list, see Laycock, *supra* note 18, at 148 n.40, 153 nn.49, 51-52. Others take modified positions against exemptions. *See, e.g.*, HAMILTON, *supra* note 78; Eisgruber & Sager, *supra* note 3.

[105] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005); *Corp. of the Presiding Bishop*, 483 U.S. at 327.

[106] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) (emphasis added); *see also* City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring) ("The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of . . . concrete cases. . . . [T]he conclusion we reached in *Smith*: It shall be the people."). For a discussion of *Smith* as a decision more about institutional competence than

For all of its neutrality rhetoric to the contrary, the Court's Establishment Clause jurisprudence has been quite solicitous of legislative religious exemptions that have a nexus to promoting the free exercise of religion.[107] Indeed, "[t]he Supreme Court has repeatedly and unanimously rejected the argument that religious exemptions generally, or in principle, violate the Establishment Clause."[108] This approach is consistent with the pluralism-promoting effects of most Establishment Clause decisions described above in Parts I and II. Legislative exemptions obviously facilitate normative pluralism, and bolster the religious and cultural pluralism of society. The Supreme Court has affirmed and encouraged this phenomenon, within limits.

Exemptions that promote the free exercise of religion by lifting a government-created burden on religious practice generally comport with the Establishment Clause.[109] A unanimous Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*[110] upheld the Title VII exemption for religious organizations from the prohibition on religious discrimination in any kind of employment. By not allowing courts to make distinctions between religious and secular jobs, the Court obviously allowed tremendous latitude to churches to set the employment terms even for arguably non-religious positions. Critics say this gives too much economic power to churches, but the Court found that alleviating government interference with employment decisions, to allow churches to decide the religious

about the substance of free exercise, see Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 759-60 (1992).

107 Part of the neutrality concern is that exemptions privilege religion and discriminate against the nonbeliever. As Laycock explains:

> Nonbelievers have many moral commitments, and they hold some of those commitments with religious intensity. But they do not hold many intense moral commitments that are at odds with the dominant morality reflected in government policy. Nonbelievers tend to have a modern sensibility. They do not draw their morality from ancient books written in a radically different culture that lived with radically different technology and had a radically different understanding of the world; they do not obey an omnipotent, omniscient God whose commands may be beyond human understanding. On the whole, nonbelievers take their morality from the same modern milieu that drives democratic decision making and government regulation. It is no accident that military service is the only prominent example where serious claims of nontheistic conscientious objection have been litigated.

Laycock, *supra* note 18, at 170-71.

108 Laycock, *supra* note 18, at 153-54 ("To those who say that any exemption from regulation violates the Establishment Clause, the answer to them is brief. Government does not establish a religion by leaving it alone; government does not benefit religion by first imposing a burden through regulation and then lifting that burden through exemption, and, in most cases, such exemptions do not encourage anyone to engage in a religious practice unless he was already independently motivated to engage in the practice.").

109 Where there has been no lifting of an identifiable burden on free exercise, the exemption is unconstitutional. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (invalidating sales tax exemption for religious books and magazines).

110 483 U.S. 327 (1987).

affiliation of those employees involved in carrying out their missions, is entirely permissible in the non-profit context. Most significantly, the three major opinions within the *Amos* decision are concerned with the pluralism-promoting impacts of the exemption.[111]

In the decades since *Amos*, the Court has further developed the analysis for legislative exemptions, which continues to focus on their impacts. In *Cutter v. Wilkinson*,[112] the Court heard an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act (RLUIPA), which authorizes religious accommodations for prisoners (such as special diet) if no compelling governmental interest warrants their denial. In a unanimous opinion upholding RLUIPA's constitutionality, Justice Ginsburg found three factors (in addition to *Amos*' free exercise nexus) significant to considering when an exemption violates the Establishment Clause. A violation can occur when exemptions place disproportionate burdens on those who do not benefit, allow sectarian discrimination, or thwart other overriding societal interests.[113] This final consideration—that exemptions must be "measured" so as not to frustrate these larger goals—is critical to assessing compliance with the clause; an exemption that benefits religious groups and individuals at the extreme expense of society seems clearly to favor or privilege religion in violation of the clause.[114] Evaluating the social consequence of any exemption under consideration requires us to make normative judgments about the balance between pluralism and uniformity.[115]

Perhaps the most significant role the Establishment Clause plays in setting the outer limits to normative pluralism is its prohibition on the delegation of government authority and government functions to religious organizations. The Court has held that the delegation of veto power to a church in government license-granting,[116] and the delegation of authority to run a public school to a religiously-defined minority group[117] are both violations of the clause. In some other nations, this kind of delegation of civil authority to religious communities exists, particularly with respect to family law and property matters.[118] In

111 The opinion of Justice White and the concurring opinions of Justice Brennan and Justice O'Connor all discuss the pluralism-promoting impacts of the exemption. *Amos*, 483 U.S. at 329 (White, J.); *id.* at 340 (Brennan, J., concurring); *id.* at 346 (O'Connor, J., concurring).

112 544 U.S. 709 (2005).

113 Carmella, *supra* note 71, at 432.

114 *Id.* at 435.

115 *Id.* at 434-35.

116 Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

117 Bd. of Educ. v. Grumet, 512 U.S. 687 (1994).

118 *See generally* Linda C. McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, *in* MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel Nichols ed., forthcoming May 2011), *available at* http://ssrn.com/abstract=1614843.

Israel, for instance, marriage and divorce law has been delegated entirely to religious authorities, allowing the rules and tribunals of each religious group to govern persons within their jurisdictions.[119] Such legal empowerment of religious groups would not be permissible in the United States because of the constitutionally compelled separation of governmental and religious functions.[120]

This kind of "legal pluralism" found in other nations is a delegation of civil authority to religious groups; they are not held accountable for the impacts of their conduct.[121] The system of exemptions in the United States, while a legal pluralism of sorts, is not a delegation of authority.[122] Exemptions usually govern narrow categories; courts, legislatures and agencies can further narrow their applicability to make the religious actors accountable when necessary; and of course exemptions are always subject to repeal. Furthermore, these governmental bodies can deny exemptions that might be socially disruptive or harmful. Thus, exemptions remain the most responsible mechanism for protecting religious pluralism and the normative pluralism that often accompanies it.

CONCLUSION

I have argued that the religious and normative pluralism that have been facilitated by Establishment Clause decisions should continue to be protected by the clause's exemptions jurisprudence. Indeed, it seems that exemptions that permit alternative ethical systems to function—when those do not threaten social order or thwart the common good—define the role of religion in public life. Theologian Ron Thiemann, noting the disintegration of "America's historic civic piety," has lamented that all strategies "fail to provide adequate solutions to our current dilemma" regarding "the question of the proper role of religion and of religiously based moral convictions" in America: Those inadequate strategies have included "appeals to an imagined moral consensus provided by our historic civic piety, . . . attempts to remove

119 Gidi Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855 (2009).

120 It is doubtful whether even a model short of complete autonomy would be constitutional. *See, e.g.*, McClain, *supra* note 118 (manuscript at 4) (discussing Joel Nichols' alternative model of "'semi-autonomous' religious entities and the state acting as the over-arching sovereign that intervenes only when basic minimum guidelines are not met").

121 *Id.* (manuscript at 37) ("A significant body of feminist work identifies problems of gender inequality and discrimination in legal systems that cede jurisdiction to religious tribunals or apply religious and customary family law.").

122 I refer to the exemption model as a narrow form of legal pluralism, but distinguish it from the legal pluralism of autonomous religious jurisdictions within nation-states. *See* Carmella, *supra* note 71, at 413 n.59.

religion altogether from public life, . . . and efforts to divide personal religious commitments from public decision making."[123] The Supreme Court's openness to exemptions, within limits of social accountability, provides a mechanism for religious freedom and normative pluralism that is a different and perhaps better way to envision the role of religion in public life.

[123] RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 1, 36-37 (1996).