ESTABLISHMENT'S POLITICAL PRIORITY TO FREE EXERCISE

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Americans are beset by disagreement about the First Amendment. Progressive scholars are attacking the venerable liberal view that First Amendment rights must not be constricted to secure communal, political benefits. To prioritize free speech rights, they say, reflects an unjust inflation of individual interest over our common political commitments. These disagreements afflict the Religion Clauses as well. Critics claim that religious exemption has become more important than the values of disestablishment that define the polity. Free exercise exemption, they argue, has subordinated establishment.

This Article contests these views. The fundamental rules and norms constituting the political regime—what the Article calls "the establishment"—have now, and have always had, political priority to rights of exemption from it. This basic claim may be narrowed to the issue of church and state, but it is simply a more focused version of the same thing: the establishment's civil religion—the set of transcendent, church-state propositions that support the political regime's legitimacy and authority—has political priority to rights of exemption from it. Narrowed further, the basic claim also reflects the dynamics of Religion Clause doctrine: religious exemption's contemporary ascendance is an epiphenomenal consequence of the civil religion dismantling effected by the Supreme Court's Religion Clause doctrine in the twentieth century and consolidated by the Court in the twenty-first. Though today's most divisive law and religion controversies often take surface-level legal shape as conflicts about free exercise exemption, their deeper source is a long-gestating transformation in the nature of the American political regime's civil religion establishment. Today's free exercise cases are the latest skirmishes in yesterday's disestablishment wars. They reflect disagreements over how best to characterize the work of the dismantlers, as well as efforts toward consolidation of that work to achieve a new civil religion regime. And what they show

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is that in twenty-first century America, just as ever, establishment still takes political priority to free exercise.

INTRODUCTION

Americans are beset by disagreement about the First Amendment. Progressive scholars are attacking the liberal view, famously associated with Ronald Dworkin, that First Amendment rights are "trumps" such that it is wrong to constrict them to secure "overall benefit."[1] Jamal Greene, for example, has argued that rather than "tak[ing] rights seriously," we should be taking them "reasonably," limiting them by the requirements of justice and what binds the political community.[2] Anything more reflects an unjust inflation of individual interest over our common political commitments.[3] Many others have criticized the hypertrophy of free speech and argued for constricting its scope.[4] Rights, the new constrictors say,[5] now have unwarranted political and legal priority to our shared values.

These disagreements afflict the Religion Clauses as well. The hotbed of law-and-religion conflict has moved from establishment to free exercise.[6] All of the latest culture-war controversies are about free exercise,[7] not establishment, including the fights about occupancy

1 RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 31, 34 (2006) [hereinafter DWORKIN, DEMOCRACY]; *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

2 Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 38, 58, 60 (2018).

3 *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 58 (2021).

4 For a very partial list of academic critiques of the hyper-expansion of First Amendment rights, see: MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019); ANTHONY LEAKER, AGAINST FREE SPEECH (2020); BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015); STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? (2016); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Tabatha Abu El-Haj, *"Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917 (2017); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

5 For the new "rights constrictors," see Marc O. DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751, 782–801 (2019).

6 *See, e.g.*, Paul Horwitz, *The Supreme Court 2013 Term—Comment: The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (describing the most heated sites of contestation today as all concerning exemption, not establishment). Objections in principle to religious exemption have also proliferated recently, something that was far less common in an earlier time. *See, e.g.*, Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705 (2014); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015).

7 See *infra* at Part III for a catalog.

restrictions on religious institutions because of the COVID-19 epidemic.[8] Decisions at one time raising Establishment Clause issues are now fought on free exercise terrain.[9] The few establishment cases have generated far less controversy.[10] Rights constrictors argue that religious exemption has become more important than the values of establishment defining the polity.[11] The swelling of free exercise has wrought, some say, the "quiet demise of the . . . separation of church and state."[12]

This Article contests these views. The fundamental rules, norms, and settlements constituting the political regime—what this Article calls "the establishment"—have now, and have always had, political priority to rights of exemption from it.[13] The establishment includes religion as traditionally defined and understood, but it is broader than that. It is the set of foundational laws and values of the political community, including its laws about religion: for example, what counts as "religion," what types of religion are tolerated, and which communal considerations are important enough to override religious interests. Establishment Clause doctrine is only one component of the establishment.[14] "Civil religion," the set of transcendent, church-state propositions that support the political regime's legitimacy and

8 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020); *see also* Mark L. Movsesian, *Law, Religion, and the COVID-19 Crisis*, J.L. & RELIGION FIRSTVIEW, Feb. 2, 2022, at 1.

9 The issue of government funding of religious institutions is the clearest example. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

10 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Town of Greece v. Galloway, 572 U.S. 565 (2014). The ministerial exception cases have been held to implicate both Clauses. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

11 See *infra* at Part III for a representative selection of scholarship making these claims.

12 Nelson Tebbe, Micah Schwartzman & Richard Schragger, *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html? [https://perma.cc/6JXX-DNV9]; *see also* Nelson Tebbe, Micah Schwartzman & Richard Schragger, *Churches Have Been Hypocritical During the Pandemic*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/outlook/2020/05/13/churches-have-been-astonishingly-hypocritical-during-pandemic/ [https://perma.cc/SH7E-RD6D].

13 For further discussion of the meaning of political regime, see Part I.

14 To keep these senses of "establishment" distinct, this Article uses "the establishment" or "the political regime" to designate the broader understanding and "Establishment Clause" to indicate the narrower, purely doctrinal meaning. While they are different, the latter is a part of the former.

authority, is another.[15] Finally, by "political priority," the Article means three things: (1) conceptual priority, meaning dependence on another political settlement; (2) historical priority, meaning temporal precedence; and (3) priority of importance, meaning greater political significance.

The establishment, on this understanding, has political priority to rights of exemption from it. This basic claim may be narrowed to the issue of church and state, but it is simply a more focused version of the same thing: the establishment's civil religion has political priority to rights of exemption from it. Narrowed further, the basic claim also reflects the dynamics of Religion Clause doctrine. Free exercise exemption's contemporary ascendance is an epiphenomenal consequence of the civil religion dismantling effected by the Supreme Court in the twentieth century and consolidated by it in the twenty-first. The Court's Establishment Clause doctrine never has been solely about prohibiting formally recognized, state-operated churches. Its reach has been much broader, controlling, influencing, and altering many features of the American establishment. And it is only because the Court, in its Establishment Clause doctrine, first dismantled the existing civil religion and shaped the direction of a different civil religion—even if incomplete, partially unexpressed, and still evolving—that it could turn to the secondary task of determining the function and scope of free exercise exemption.

Yet it is exactly liberal regimes like the United States, which ostensibly privilege individual rights like religious exemption, that might challenge this Article's thesis. Indeed, the liberal rhetoric of rights such as religious free exercise in America might even suggest that rights of exemption are antecedent politically to the establishment. This is precisely the complaint of today's rights constrictors, who argue that the establishment, in the sense of our common American commitments, has been subordinated to a conception of individual rights run amok.

This Article takes up and rejects that challenge. Drawing from classical political regime theory, the Article argues that the establishment's claim of conceptual political priority to rights of exemption follows from the structural relationship of exemption claims to the fundamental settlements of the American political regime. Classical political regime theory illuminates and corrects the distortions of liberal accounts of the relationship of rights and

15 As with establishment, I use the phrase "church and state" in this Article in its broad sense to mean the formal and informal political relationships of the government to religion. There are narrower and more technical senses of church and state (e.g., the jurisdictional, legal relationship of religious institutions to government powers) but those do not capture the full range of the political reach of church and state needed for a study like this one.

obligations. It clarifies, as liberal theory obscures, the political priority of the establishment to exemptions from it. Rights constrictors are therefore wrong conceptually about the priority of rights of exemption to common political commitments, and classical political regime theory explains why.

They are also wrong sociologically. The last century of American law and religion jurisprudence shows the political predominance of the establishment's civil religion to free exercise exemption from it. But it shows something else, too. Free exercise exemption was one of the Supreme Court's principal tools in dismantling the old, soft Christian civil religion and forging a very different replacement. That is, establishment is politically prior to free exercise exemption in the sense that the Supreme Court's project to change the American civil religion set the political agenda for its doctrines of free exercise exemption.

Part I explains how classical regime theory illustrates, just as liberal theory disguises, that establishment has a powerful conceptual claim of political priority to free exercise as exemption in America. That claim to priority is not confined to modern American constitutional law. Rights constrictors are therefore wrong in principle—wrong conceptually. The liberal rhetoric of the priority of rights of exemption to the commitments of the political regime notwithstanding, free exercise exemption *cannot* be politically prior to the establishment.

Part II contends that sociologically and historically, the case for the establishment's political priority to free exercise is even more straightforward and compelling when the focus is limited to the last century of American legal doctrine. The most important Religion Clause decisions systematically dismantled America's longstanding, soft Christian civil religion. Free exercise often has been described as an afterthought, something reserved for the exotic, the unthreatening, and the politically marginal. Yet if the doctrine is considered relationally—in terms of its overall response to, and effect on, American legal culture rather than in Clause-bound compartments—free exercise exemption during this period is more precisely conceived as one of the Supreme Court's establishment-dismantling instruments.

Rights constrictors contend that the situation today has changed. Free exercise exemption has acquired, in their view, political priority to establishment. And they are not alone. Indeed, progressive-leaning rights constrictors and conservative-leaning critics of the administrative state align in seeing exemption as the principal means to resist the regulatory state's growing incursions on religious freedom. Where rights constrictors condemn this development, critics of the

regulatory state celebrate it. But both believe that religious exemption is a highly effective tool of resistance to the establishment.

In Part III, this Article disagrees with both groups. Though today's most divisive law and religion controversies often take surface-level legal shape as questions about free exercise exemption, their deeper source is a long-gestating transformation in the American establishment's civil religion. Both groups view religion through the lens of liberal theories of individual rights—and religious freedom through the liberal lens of "rights as trumps"—and both make the error of divorcing civil religion from religion. Classical political regime theory again better explains the political relationship between the emerging, new establishment and religious exemption law. Today's free exercise cases are the latest skirmishes in yesterday's establishment wars. They reflect disagreements over how best to characterize the work of the twentieth-century civil religion dismantlers, as well as efforts toward consolidation of that work to achieve a new civil religion. And what they show is that in twenty-first-century America, just as ever, establishment still takes political priority to free exercise. The Article concludes by reflecting briefly on the nature of the new civil religion, and some of the legal and cultural implications that might follow from establishment's political priority.

I. THE ESTABLISHMENT AND EXEMPTION FROM IT

An account of the political relationship between establishment and free exercise, as well as of which has political priority, requires some explanation of (1) what counts as the political, (2) how some features of the political may take priority over others, and finally (3) how the Supreme Court's interpretation of the Establishment and Free Exercise Clauses in relation to each other may reflect these ordinal political dynamics. This Part takes up the first two issues, while the following Parts address the third.

Political institutions are influenced by, and in turn help to form, other anthropological, cultural, and social institutions, assumptions, and ends—the nature of the human person, the existence and constituents of human dignity, the place and role of the individual within the common good, and so on. There are therefore likely to be problems of demarcation in any study of the specifically political quality of establishment and free exercise. Perhaps it is not possible to examine the expressly political relationship of these concepts without getting caught in the nets of these other foundational questions. Perhaps human nature precedes politics, or is at least ineffably bound up in it, rendering a study of this particular relational issue impracticable.

Fortunately, there are reservoirs of learning that can help to define the political so as to isolate it, at least sufficiently for this Article's purposes, from some of these other complex questions. I will use the term "political" in the classical sense of the "regime" or "the establishment," terms I use interchangeably. The regime or the establishment is the "form of life as living together,"[16] the rules, structures, and norms that organize the legal order, express its deepest common commitments, reflect its fundamental constitutive assumptions, and orient the citizenry (by law or otherwise) toward those commitments and assumptions. As Pierre Manent has put it, politics understood as the regime or the establishment presupposes that politics concerns the "common thing," the highest collective projects and ends toward which the rules and norms of the society orient its members just in order to constitute a political society.[17]

The nature of the establishment, and of the best political establishment, is one of the enduring problems of classical political philosophy. In Aristotle's famous scheme, a community becomes an authentic political regime when it exhibits three features: (1) it is founded on some conception of what is just, or for "common advantage," or in the service of the good life for all human beings, rather than for partial or individual advantage;[18] (2) the citizenry is formed or shaped according to that conception;[19] and (3) that formation is accomplished through laws that penetrate deeply into the lives of the citizenry.[20] The scope of the laws consequent on Aristotle's view of the political establishment sweeps broadly, extending to religion, education, family life, social morality and opinion, economics, and whatever else is necessary to mold and accustom

16 LEO STRAUSS, *What is Political Philosophy?*, *in* AN INTRODUCTION TO POLITICAL PHILOSOPHY: TEN ESSAYS BY LEO STRAUSS 3, 30–32 (Hilail Gildin ed., 1975).

17 PIERRE MANENT, METAMORPHOSES OF THE CITY: ON THE WESTERN DYNAMIC 64 (Marc LePain trans., 2013) (2010). How a political regime derives and settles on its common projects is a complex matter. Probably what James Hankins has called a "paideuma"—an "intentional form of elite culture that seeks power within a society with the aim of altering the moral attitudes and behaviors of society's members, especially its leadership class"—has a significant role in formulating and shaping the ends of the political regime. *See* JAMES HANKINS, VIRTUE POLITICS: SOULCRAFT AND STATECRAFT IN RENAISSANCE ITALY 2 (2019) (citing LEO FROBENIUS, PAIDEUMA: UMRISSE EINER KULTUR- UND SEELENLEHRE (1921)). I set these constitutive questions to the side.

18 ARISTOTLE, ARISTOTLE'S POLITICS bk. III, at 1278b15–30 (Carnes Lord trans., Univ. of Chicago Press 2d ed. 2013) (c. 384 B.C.E.) [hereinafter POLITICS]; *id.* at 1279a22–32; *id.* at 1280a34–1280b12.

19 *Id.* at 1275a34, 1276b16.

20 *Id.* at 1282a41.

citizens adequately to the common conception.[21] Later political writers have offered different accounts of political establishments,[22] generally reflecting greater separation between state and society,[23] but these other interventions reinforce that determining the essential character of the establishment is one of the foundational issues of politics[24]—perhaps even the first political problem among equals.

The nature of the relationship between church and state is one of the basic constituents of any establishment, and one of the foundational settlements reached by its laws. It was, in fact, one of the six essential functions of Aristotle's ideal commonwealth—the polity's "superintendence connected with the divine" for the polity's own well-being.[25] No establishment is possible without some public manifestation of political concern with divine or transcendent matters that in turn shapes the basic commitments of the polity. The establishment's formation and maintenance of some church-state settlement, whether one that depends upon a particular political theology—a distinctive perspective on the "question of how God's authority is related to the authority of the state"[26]—or on the repudiation of political theology as antithetical to the regime,[27] is an essential and constitutive choice

21 *Id.* at 1280b29; MARTIN DIAMOND, *Ethics and Politics: The American Way*, *in* AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND 337, 364 (William A. Schambra ed., 1992).

22 *See, e.g.*, POLYBIUS, 3 THE HISTORIES bk. VI, at 293–307 (F.W. Walbank & Christian Habicht eds., W.R. Paton trans., Harvard Univ. Press rev. ed. 2011) (c. 150 B.C.E.) (politeia as "constitution" or regime covering entrenched features of political culture extending to religion, patriotism, civic virtue, funeral orations, etc.).

23 NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 10 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chicago Press paperback ed. 1998) (1517) (dividing types of basic political regime and observing that the most "unhappy" regimes are those that by their "orders [are] altogether off the right road that might lead it to the perfect and true end" of the regime); MONTESQUIEU, THE SPIRIT OF THE LAWS 10–20 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (dividing political regimes into republican, monarchical, and despotic, and describing the settlements foundational to each of these regime types). For Montesquieu, a great many laws controlling civic life—as to education, punishment, the security and defense of the population, war, the freedom of regime subjects, commerce, morality and custom, and so on—followed from the "principle" of the regime type that had been established. *See generally id.*

24 *See generally* STRAUSS, *supra* note 16, at 32.

25 *See* POLITICS, *supra* note 18, bk. VII, at 1328b2–14.

26 NICHOLAS WOLTERSTORFF, THE MIGHTY AND THE ALMIGHTY: AN ESSAY IN POLITICAL THEOLOGY 2 (2012); *see also* MARK LILLA, THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST 3 (2008) ("In most civilizations known to us, in most times and places, when human beings have reflected on political questions they have appealed to God when answering them.").

27 LILLA, *supra* note 26, at 5 ("The ambition of the new philosophy was to develop habits of thinking and talking about politics exclusively in human terms, without appeal to divine revelation or cosmological speculation.").

about the nature of the political community and what its citizens will have in common. Ancient political establishments were "inseparably" also religious communities, either in the sense that the "gods are the gods of the city," or, as in the case of the Jewish experience, that "the people comes to be as a people . . . by the loving and provident design—the Providence—of the one God."[28] Theocracy (rule by religious figures) has been comparatively rare, but what Peter Simpson has helpfully called "theonomic" regimes are far more common—political regimes that institute laws and customs thought to be approved by the gods and which, in turn, consecrate the establishment.[29]

The concept of "civil religion"—a set of super-political and sometimes, but not always, supernatural propositions that transcend the political regime but are bound up with it and are used to support its legitimacy and authority—is an important component of what I am calling the establishment. Civil religion is generally associated today with the work of Robert Bellah,[30] yet it has been emphasized by thinkers as different and distant as Cicero and Rousseau as a foundational feature of any successful establishment.[31] The civil religion of an establishment includes the issue of the official or formally recognized state religion—what is, for example, the narrowest understanding of the province of the U.S. Establishment Clause as prohibiting the equivalent of "the Church of *England* by law established."[32] But civil religion extends well beyond that narrow question into more diffuse social and cultural systems of mutual support between the political regime and its most essential and transcendent commitments.

The establishment therefore encompasses far more than the question of the formally established state church. The establishment

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28 MANENT, *supra* note 17, at 227; *see also* JED W. ATKINS, ROMAN POLITICAL THOUGHT 139 (2018) ("The English terms 'political' and 'religious,' 'sacred' and 'secular,' tend to imply a sharp contrast unknown to the Romans.")

29 PETER L.P. SIMPSON, POLITICAL ILLIBERALISM: A DEFENSE OF FREEDOM 76–77 (Routledge 2018) (2015).

30 ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL (1975).

31 CICERO, ON THE COMMONWEALTH AND ON THE LAWS 135, 156 (James E.G. Zetzel ed., Cambridge Univ. Press 1999) (c. 51 B.C.E.) (arguing that "what is most important in creating a commonwealth" is to attend to the "magistracies" concerning religion); JEAN-JACQUES ROUSSEAU, *On the Social Contract* (1762), *in* THE BASIC POLITICAL WRITINGS 153, 246 (Donald A. Cress ed. & trans., 2d ed. 2011) ("[N]o state has ever been founded without religion serving as its base . . . .").

32 *See* CONSTITUTIONS AND CANONS ECCLESIASTICAL § III (1604), https://www.anglican.net/doctrines/1604-canon-law/ [https://perma.cc/R4Q3-MCAT] (Church of England).

includes all that civil religion encompasses. This capacious sense of establishment is hardly unknown today. Indeed, the Supreme Court and prominent legal scholars consistently use "establishment" to designate a broad range of super-political, foundational commitments of the American political regime.[33] To take one example, many Americans today believe that an expanding and eternal quest for equality as sameness is a fundamental cornerstone of American civil religion, and that this quest should control virtually every feature of American public, and perhaps even private, life. Or to take another, Melissa Murray and Alice Ristroph have discussed, and pointedly critiqued, the traditional nuclear family and heterosexual marriage as fundamental features of the establishment.[34] Or to take a third, many modern political regimes often seek to define themselves by settling on what they take to be a decisive separation of church from state or a division of political from religious authority and influence.[35] Yet even for them, that civil religion settlement is foundational—politically definitional.

That every political establishment adopts a civil religion does not mean that every establishment chooses one official political theology definitively or repudiates all political theology definitively. Civil religions are often fluid and dynamic. Likewise, it can be difficult to identify the precise quality of a regime's civil religion, as well as to trace its evolution. Sometimes, as in the case of the United States, the political regime will settle on an intermediate, unstable, and perhaps even somewhat conflicting or internally inconsistent civil religion. As Steven Smith has put it, American "history ha[s] been characterized by an ongoing competition, sometimes collaborative and sometimes more contentious, between providentialist and secularist conceptions of America. . . . [B]oth the providentialist and secularist conceptions claimed, with some support, to be interpretations of how America was

33 *See, e.g.*, Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252–70 (2010) (arguing that the network of laws regulating marriage reflects a "thick . . . establishment" as well as a "thin . . . establishment" of a particular, traditional religious conception of marriage as foundational to the American regime, and that this conception should be "disestablish[ed]"). For the Court's broad sense of establishment, see *infra* Part II.

34 *Id.*

35 MONTESQUIEU, *supra* note 23, at 38, 321–22 (politics and religion are "things that are naturally separate," and institutions like the Greek city-state were "thus confuse[d]"). Even for Rousseau, the content of the "civil religion" was comparatively thin and totally disconnected from traditional forms of religion. ROUSSEAU, *supra* note 31, at 245–50. One can hear similar sorts of statements even in the mouths of Supreme Court Justices. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring) ("We have believed that . . . a [democratic] government cannot endure when there is fusion between religion and the political regime.").

constituted . . . ."[36] Other scholars have emphasized secularism alone as America's foundational civil religion settlement.[37] Yet even political regimes that have chosen one or another civil religion more conclusively may maintain practices that seem inconsistent with it.[38]

As noted, the scope of the civil religion of the establishment is extensive: it encompasses both first-order questions (e.g., "Is there an officially or formally established religion in regime X?") and far more diffuse second- or third-order issues (e.g., "What are the commitments or values—the ongoing pursuit of equality, for example, or liberty—that transcend the polity's ordinary politics and exist as timeless, constitutive aspirations?"; "What is the relationship between policy, practice, or institution Y promoted by regime X with the transcendent commitments of regime X?"). But whatever its nature, and however broad its scope, some civil religion always defines the political regime. That is as true of the American political regime as any other.[39]

The relationship of individual rights, natural or positive, to political regimes is another profundity of political philosophy.[40] But in this Article, I will narrow the focus to one genre of right: the right to an individual exemption from the general laws constituting the establishment. My focus will be on rights of exemption from the establishment based on individual religious scruple in America, but it may be possible to make some preliminary and more general observations on rights of exemption in relation to the establishment.

Rights of exemption are politically secondary to the establishment in at least three ways.[41] They are secondary conceptually. Their existence depends upon an existing establishment, a regime, and they arise only after the laws and norms constituting that establishment are in place. Rights of exemption, that is, are not one of the laws and norms of the establishment, but instead responsive structurally to

36 Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisio*ns, 38 PEPP. L. REV. 945, 948–49 (2011).

37 *See, e.g.*, IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE, 3–4 (2014).

38 Consider the case of France, which is formally laic, but whose government continues to engage in practices—such as the direct financial support of religious schools—that seem at least in some tension with a thoroughly secular regime. *See* Muriel Fraser, *Church-State Separation in Constitution of 1795 and Law of 1905: Excerpts*, CONCORDAT WATCH, https://www.concordatwatch.eu/kb-1525.834 [https://perma.cc/37LD-HR79] (translating article 2 of 1905's Law Concerning Separation of the Churches and the State).

39 *See* STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 76–110 (2014).

40 *See* ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS bk. V, at 1134b24 (Hugh Tredennick ed., J.A.K. Thomson trans., Penguin Books rev. ed. 1976) (c. 384 B.C.E.) [hereinafter ETHICS] (discussing natural and positive rules of justice).

41 Part II suggests a possible fourth way, which might be related to the categories offered here.

them. The issue of exemption generates controversy because the first-arriving establishment presents some problem that later-arriving rights of exemption are intended to mitigate or overcome.[42] Second, as a result of their secondary conceptual status, rights of exemption are generally also secondary as a historical matter. They tend to come later, temporally, than the establishment.[43] Finally, rights of exemption are also secondary in importance, because their concern is not the "common thing"—the shared affections[44] or loyalties that are foundational to the establishment (however thickly or thinly these are conceived, however inconclusive, unstable, or complex they may be)—but instead apparent departures from the establishment.

In sum, exemptions from the establishment's laws, even where they are ultimately deemed warranted, are secondary decisions to apply the politically prior laws and policies of the establishment selectively and partially. They are thereby arguably in tension with the first feature of Aristotle's regime scheme—that the polity's foundational settlements be for common, not partial, advantage. Exemptions weaken the authority of the establishment. They are micro-negations of the establishment and individual suggestions that its settlements are perhaps not quite as foundational to the polity as had been supposed. Exemptions are, in this way, politically subversive. They are establishment destabilizing.

Liberal democratic states like the United States, which are said to prize individual rights more than other political regimes—and even to conceive of rights as "trump[s]"[45]—might be thought to challenge these claims. Since at least the nineteenth century, scholars influenced by Benjamin Constant[46] have questioned the relevance of classical

42 Not all exemptions must concern the regime-settling laws. But the issue of exemption becomes more politically controversial when it does involve an accommodation from such a law.

43 This type of secondary status does not follow inexorably from conceptual secondary status and must be verified as a matter of historical fact.

44 *See* POLITICS, *supra* note 18, bk. III, at 1280b28–1281a4; *see also* ETHICS, *supra* note 40, bk. VIII, at 1161a6–26 ("In each of these types of constitution we find a sort of friendship, to the same extent as there is justice.").

45 *See* DWORKIN, DEMOCRACY, *supra* note 1, at 31 (emphasis removed).

46 *See* BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, *in* POLITICAL WRITINGS 308, 320–21 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1819). Constant's thesis has in turn been widely disputed. Quentin Skinner and Philip Pettit, for example, have argued for the relevance of substantive, ancient political ideas (including liberty and equality as conceived in the ancient world) to contemporary liberal democratic republics. *See, e.g.*, 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT ix–xi (1978); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 18 (1997) ("Constant's modern liberty is Berlin's negative liberty, and his ancient liberty—the liberty of belonging to a democratically self-governing community—is the most prominent variety of Berlin's positive conception."). Similarly,

conceptions of the political regime to the modern political situation. What Constant described as "the enjoyment of security in private pleasures,"[47] later abbreviated by Isaiah Berlin as "'negative' freedom,"[48] was claimed to represent the new foundation of modern political communities.

On the issues of conceptual and historical priority, the liberal descendants of Constant might even say that rights of exemption are themselves *part of* the establishment rather than secondary or responsive, let alone subversive, deviations. And as to priority in importance, some might likewise argue that the basic innovation of liberal regimes such as the United States is to make individuals and their rights (including their rights of exemption from the establishment), rather than the community and its common affections, the fundamental basis of political life. Liberal theories of individual rights that prize individual autonomy as the ultimate end of political regimes like the United States may see rights of exemption as regime stabilizing or enhancing.[49] Individual rights, it might be said, including rights of exemption, *are* the "common thing" in the United States and states like it. The polity's collective aims, so the claim goes, are always penultimate and it is individual persons and their rights to exemption from those aims that are politically ultimate. To take a contemporary example, consider the Religious Freedom Restoration Act of 1993 (RFRA)[50] on the axes of conceptual priority and priority of political significance. Are the religious exemptions it requires best conceived as foundationally primary to the American political regime, or instead responsively secondary to the prior arriving establishment?[51] The matter seems contestable.[52]

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there are direct antecedents of what is claimed to be "modern liberty" in the work of ancient thinkers. Having broached these disagreements, this Article largely avoids them hereafter. It does take a view—a positive one—on whether the very concept of a "political regime" is profitable today.

47 CONSTANT, *supra* note 46, at 317.

48 *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 121–22 (1969).

49 *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19–20 (2008) (arguing that the individual right of "equal respect" of the autonomous "conscience" is politically foundational). Doug Laycock's voluntaristic account of religion might similarly prioritize rights of exemption. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 64–68 (2007).

50 Pub. L. No. 103–141, 107 Stat. 1488.

51 *Compare* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995), *with* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015).

52 The Equality Act, which has been passed by the House of Representatives and which enlarges the ambit of the Civil Rights Act of 1964 to encompass sundry forms of discrimination on the basis of sexual orientation and gender identity, explicitly denies that

Turning to religion and the state in America, Thomas Jefferson and James Madison are often enlisted for the proposition that Americans have always believed that natural rights preexist and predetermine America's political, church-state settlements so that, for example, official political support for religion of any kind is anathema—or as Jefferson put it, a "sinful and tyrannical" violation of the "natural rights of mankind."[53] "Both," Jack Rakove insists, "imagined a republic where religion was wholly privatized," and a "society where matters of religion were solely dependent on the complete autonomy of individual citizens."[54] Rakove is of the further view that "these were founding principles of American constitutionalism."[55] Natural rights, on this view, categorically foreclose at least certain sorts of establishments. From his characteristically dour observations about humanity's natural "zeal for different opinions concerning religion,"[56] Madison derives arguments for muting or tamping down the passions that inspire common political affection and resisting the upward gravitational pull of politics toward the grand and the unifying. He instead raises up Americans' individual "multiplicity of interests"—economic, political, religious, and so on—as the common foundation of the American political regime while free-riding upon then-existing cultural supports in the private, non-political sphere to develop higher human virtues in the citizenry.[57] Virtues which, many Founders believed, are in fact necessary in some measure for a politically successful republic.[58]

RFRA may be raised as a defense to it. *See* Equality Act, H.R. 5, 117th Cong. § 2 (2021); *id.* sec. 9, § 1107. If it becomes law, the Equality Act would seem a compelling piece of evidence on the question of the political priority of religious exemption.

53 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* (1779), *in* WRITINGS 346, 346, 348 (Merrill D. Peterson ed., 1984). On the grossly disproportionate pride of place accorded to Jefferson and Madison by contemporary judges and scholars when it comes to the founding generation's church-state views, see DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 112–15 (2010).

54 JACK N. RAKOVE, BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION 99–100 (2020).

55 *Id.* at 100.

56 THE FEDERALIST NO. 10, at 48 (James Madison) (Ian Shapiro ed., 2009).

57 THE FEDERALIST NO. 51, *supra* note 56, at 266 (James Madison). Other founders also made this assumption. *See also* ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 114–92 (1968).

58 *See, e.g.*, George Washington, Farewell Address (1796), *reprinted in* 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 703, 703–22 (David R. Hoth & William M. Ferraro eds., 2019). ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."); *see also* MONTESQUIEU, *supra* note 23, at 22–23 (remarking on the "principle" or conceptual foundation of democratic regimes that "[w]hen that virtue ceases, ambition enters those hearts that can admit it, and avarice enters them all").

For Madison and those of like mind, religion is one such—indeed, perhaps the archetypal—tamped-down political commonality.[59] As far as the communal political projects of civil religion are concerned, religion is simply beyond the "cognizance" or jurisdictional power of the political regime. Religion is left to individual and private associational choice.[60] Government's role is said to be merely one of neutral non-interference. America prioritizes private free exercise—individual and corporate—as the first step in sorting out the proper relationship between politics and religion. There was no "freedom of religion" of the sort enshrined in the First Amendment in the ancient world. It is a modern, and perhaps even a distinctively American, innovation. Individual religious exercise is not secondary on any of the three axes. It is, so this familiar and oft-repeated story goes, primary—the *sine qua non* of the American regime's political theology.

In fact, this classical liberal picture of America as categorically privileging individual natural rights such as religious freedom over the establishment is a distortion.[61] Even Jefferson, in his First Inaugural Address, affirmed the necessity of nurturing "that harmony and affection without which liberty and even life itself are but dreary things" and which establish an indispensable foundation upon which a polity can "unite in common efforts for the common good."[62] To that end, many early Americans "thought that the government ha[d] a duty to promote religion—consistently with the rights of conscience," suggesting at least the concurrence of the establishment and natural religious rights.[63] Indeed, as Daniel Dreisbach has observed, it was "a virtually unchallenged assumption of the age" that

59 *See* THE FEDERALIST NO. 10, *supra* note 56, at 48–49 (James Madison); JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 298–306 (Robert A. Rutland & William M.E. Rachal eds., 1973).

60 MADISON, *supra* note 59, at 299.

61 As Madison himself recognized. *See* Letter from James Madison to Richard Henry Lee (Nov. 14, 1784), *in* 9 THE PAPERS OF JAMES MADISON 430, 430 (Robert A. Rutland & William M.E. Rachal eds., 1975) (describing the more moderate position that "[r]eligious [e]stab[lishmen]ts," rather than religion itself, were not within "the purview of Civil authority"). For evidence that early Americans believed that a prohibition on establishment of religion should leave ample room for government to make many laws concerning and promoting religion, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 102–05 (2002).

62 Thomas Jefferson, *First Inaugural Address*, AVALON PROJECT (Mar. 4, 1801), https://avalon.law.yale.edu/19th_century/jefinau1.asp [https://perma.cc/W3QL-WJRZ].

63 THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM 201 (2017).

American republican government required the support of Christian civil religion.[64]

The duty to promote religion, it should be emphasized, was thought to be a core part of religious liberty as then conceived. It gave the requisite scope and space, and it erected and maintained the institutional "infrastructure," through which American citizens could exercise their religion publicly as they thought required by their religion.[65] It may be that the conjoined features of the American dispensation—an unstable and shifting church-state arrangement, complicated by state-by-state variation in the early republic, combined with a firm commitment to the natural right of religious freedom—eventually made for a comparatively thin civil religion in America. Individual rights of free exercise were integrated and enjoyed their proper (but not a dominant) place within the larger American civil religion. Natural rights might be politically constitutive in the sense of constraining the power of the government to choose certain civil religion settlements, but they do not define America's civil religion.[66] Natural rights were a side-constraint on that settlement: a condition of the establishment that had to be satisfied but that itself did not define its substantive core.

Yet even if the natural right of religious free exercise and the American civil religion are thought to have equal political priority, exemption from the establishment on the basis of religious scruple, as several scholars have shown, was not part of the natural right of religious liberty.[67] The natural right of religious free exercise encompassed a narrow but durable right to believe and worship (within natural limits), but it did not extend to what Phillip Muñoz has called a broader host of "religious interests" in exemption from neutral law.[68]

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64 Daniel L. Dreisbach, *Defining and Testing the Prohibition on Religious Establishments in the Early Republic*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 252, 258 (T. Jeremy Gunn & John Witte, Jr. eds., 2012); *see also* MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 203 (2002) (describing a Christian republicanism according to which "religion could and should contribute to the morality that was necessary for the virtuous citizens, without which such a republic could not survive").

65 *See* Richard W. Garnett, Response, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman*, 39 PEPP. L. REV. 1149, 1158 (2013). See the discussion in Part III for further development of this idea.

66 Thanks to Micah Schwartzman for this way of putting it.

67 *See, e.g.*, Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1604 (2005); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 373–74 (2016).

68 Muñoz, supra note 67, at 373. For analogous arguments as to the nature and limits of the freedom of speech, see Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

True, some have argued that there is historical evidence to suggest that the Free Exercise Clause might be understood to require exemption in some circumstances.[69] And others have claimed that religious exemption is a diffuse but nevertheless pervasive element of American historical and political culture, a logical corollary of the separation of church and state in the old, jurisdictional sense of separated spheres of authority.[70]

Even on this view, however, any commitment to religious exemption depends conceptually on the prior existence of a civil religion governing the place and function of religion within the establishment. Rights of religious exemption never *constitute* the civil religion. They follow from it. That is, the establishment precedes free exercise exemption politically on the conceptual axis, and possibly others. Perhaps religious exemption needs a metaphysics of the "possibility of [the] transcenden[t]" beyond the earthly city that was the legacy of another, older civil religion.[71] Or perhaps it draws some support from liberal assumptions about the nature of autonomous, choosing individuals and what is necessary for their political well-being—yet another civil religion candidate. Or perhaps from some other civil religion conception.

But whatever the source of support for it may be, religious exemption's general advisability as a matter of legislative grace (where reasonable, where not unduly burdensome to the rightful interests of the community, etc.) in some ways confirms its politically secondary status. Lawmakers may make what seem to them prudentially attractive or expedient decisions to grant exemptions where possible, but they would be remiss to grant them in contravention of the establishment, including the part of it concerning civil religion. At a later point, this Article inquires whether the "strict scrutiny" doctrinal test for religious exemption imposed on the Free Exercise Clause by the mid-twentieth-century Supreme Court (and the adoption of statutes like RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[72] thereafter) altered this fundamental political reality.[73] For the moment, however, it is enough to notice that as a matter of the

69 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020). I have argued that some kind of exemption requirement is a possible, though not a necessary, implication of what the Free Exercise Clause under some circumstances may protect. *See* MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 147–66 (2013).

70 STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 301–44 (2018).

71 *Id.* at 339.

72 Pub. L. No. 106–274, 114 Stat. 804.

73 *See infra* Part II. In short: it did not.

political baseline, religious exemption is secondary to the establishment.

These reflections about the problem of political priority strongly suggest that as a conceptual matter, establishment takes political priority to free exercise exemption in America. First come the regime's laws and policies concerning the "common thing" that binds the polity—the establishment—including its civil religion. And then come the exceptions, to the extent that the establishment permits them, in the discretion and at the sufferance of those in power. The question of conceptual political priority is ultimately one of control, and it seems perverse—it seems a basic misunderstanding of the nature of politics as the "common thing"—to say that the exceptions to the regime's civil religion control it, rather than being controlled by it. Those who complain about free exercise exemption's political priority to establishment are therefore wrong in principle:[74] exemption *cannot* precede establishment conceptually.

Perhaps today's rights constrictors have something else in mind. Perhaps they are making a historical rather than a conceptual claim. Indeed, a somewhat different way to test the thesis of political priority is inductive, focusing on legal sources and their effect on (and response to) American politics. In American law and religion jurisprudence, the Free Exercise Clause has, for a large part of the twentieth century, sometimes been interpreted to require religious exemptions from neutral and generally applicable law.[75] For the last 30 years, the Supreme Court has adopted a different constitutional rule, but religious exemption has hardly faded from the scene during that time.[76] To the contrary, a complex network of federal and state law has emerged implementing what some scholars have called the "accommodation regime,"[77] itself a suggestion that the American political regime does, in fact, consider religious exemption as bedrock. The question of religious exemption's constitutional status was taken up recently by the Supreme Court, and while the Court did not opine on it definitively, it did indicate that the Constitution may require exemption in more situations than had been previously supposed.[78] The Establishment Clause, too, has been in interpretive flux and

74 *See supra* at notes 54–55 and accompanying text.

75 *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1776.

76 *Id.*

77 Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1193 n.31 (2017); Helfand, *supra* note 75, at 1801; Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 497 (2015).

78 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

confusion over the last eighty years, alternatively inscribing regime settlements of church-state separation, neutrality, noncoercion, and traditionalist or historically-oriented deference.

Which Clause has "come first" politically over the last century of American law-and-religion politics? Which has contributed most to the establishment—to the organizing narrative framework through which American politics has developed and been structured, dictating the terms of the regime to the other? Free Exercise or Establishment?

II. DISMANTLING THE OLD CIVIL RELIGION

This part evaluates the question of political priority historically during the greater part of the twentieth century. What is considered the "modern" meaning of both Clauses emerged in the mid-twentieth century, even if those meanings may be attached after the fact by some scholars to earlier understandings. In evaluating the question of political priority by recourse to legal doctrine, I do not mean to suggest that the Justices were self-consciously acting politically, let alone with an explicit agenda in mind. Instead, I am interested not in underlying judicial motives but in what John Jeffries and James Ryan have called "correspondences" between the doctrine and broader political and cultural developments respecting the specific question of political priority in the twentieth century.[79]

In the twentieth century, those correspondences suggest what could be described as a framework of civil religion regime dismantling. The dismantling was of the political and cultural pride of place occupied by Christianity in American institutions as a crucial basis of the American establishment.[80] The dismantling helped to bring about a shift in the establishment: from the American civil religion of Christianity, to the civil religion of what will come afterward.[81] The Court's Establishment Clause doctrine was one of the primary legal regime-shifting engines in the dismantling process, preceding the Court's Free Exercise Clause exemption doctrine in time and

79 John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281 (2001).

80 Joseph Bottum has defended the thesis of the American Protestant dismantling from a cultural and political perspective, though his focus is on the "death of the Mainline" beginning in the 1970s. JOSEPH BOTTUM, AN ANXIOUS AGE: THE POST-PROTESTANT ETHIC AND THE SPIRIT OF AMERICA 80 (2014). This Article reflects on the Supreme Court's role in that larger phenomenon.

81 For some inconclusive speculation about what the successor civil religion may be, see *infra* Part III.

importance.[82] That is, on both historical and political-importance axes of political priority, establishment was politically prior to free exercise.

Yet exemption was not merely secondary to establishment but disestablishment reinforcing, and in this way, the sociology of American church-state doctrine is consistent with, but adds something distinctive to, the conceptual account of political priority offered in Part I. That account had it that religious exemptions are subversive and establishment destabilizing. And so they were in the twentieth century. Even more, however, the Supreme Court's disassembling of the old civil religion regime created the framework within which free exercise exemption would operate. When it did come, exemption subserved the destabilization of the old civil religion settlement brought on primarily by the Court's Establishment Clause decisions.

In a series of decisions beginning in 1947, the era of Supreme Court dismantling began.[83] One striking fact about the early part of this period is how negligible a part free exercise exemption played in it.[84] From 1947 through 1963, only one case concerning free exercise exemption was decided by the Court.[85] The then-existing, longstanding rule on religious exemption was that it was not required.[86] What few cases there were concerning free exercise did not concern exemption. They instead were about state regulation of religious belief, worship, and speech as such, and even these often presented themselves as Establishment Clause cases.[87] In the single case concerning free exercise exemption involving a Jewish-owned business seeking to disobey a state's Sunday closing laws, the Court rejected the view that the Free Exercise Clause required any exemption, stating that it would be a "radical[] restrict[ion]" on the "operating latitude of the legislature" to expect, "much less require[], that legislators enact no law regulating conduct that may in some way result in an economic

82 Of course, I do not claim that the Supreme Court was the only, let alone the primary, regime-shifter. Other forces had as much or greater influence. But the Court did its work.

83 *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

84 There had been constitutional free exercise exemption cases before the mid-twentieth century, but these, too, had been infrequent.

85 *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

86 *See* Reynolds v. United States, 98 U.S. 145, 166 (1879).

87 *See* Torcaso v. Watkins, 367 U.S. 488, 494–95 (1961) (state constitutional provision requiring a belief in God); Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance targeting religious preaching); Follett v. Town of McCormick, 321 U.S. 573 (1944) (flat tax applied as to religious speech).

disadvantage to some religious sects."[88] Mandatory exemption was simply not part of the early picture.[89]

By contrast, in the generation that followed *Everson*, the Court decided a host of Establishment Clause cases that steadily implemented a strategy of systematic dismantling of the American civil religion regime.[90] After *Everson*'s wall of separation, the Court concluded in a suite of cases that the Establishment Clause prohibited: financial support of parochial schools;[91] state-sponsored religious displays;[92] religious affirmation requirements for public office;[93] regulatory and licensing laws supporting religion;[94] Bible-reading, prayer, and moments of silence in public schools and school events;[95] and public school curricular decisions reflecting traditional religious practices and views.[96] Free exercise exemption was therefore secondary to establishment on the axis of historical priority. It came later. These cases also are an answer to those that might object to this Article's generous use of "the establishment" to encompass the many features of the civil religion regime. The Court itself did not conceive the Establishment Clause to apply narrowly to formally established government churches. To the contrary, it interpreted the scope of the Clause breathtakingly broadly. Its Establishment Clause doctrines

88 *Braunfeld*, 366 U.S. at 605–06.

89 It is possible, with significant doctrinal contortions, to describe *West Virginia State Board of Education v. Barnette* as a case of religious exemption. 319 U.S. 624 (1943). The Court, however, was explicit that it was "not . . . inquir[ing] whether non-conformist beliefs will exempt from the duty to salute." *Id.* at 635. The case was about compelled speech. *Id.* at 634. At any rate, even if there is a vague family resemblance between *Barnette* and the typical religious exemption case, it is still true that mandated religious exemption arose only after the Court's Establishment Clause doctrine got its sea legs.

90 Again, I am not making a claim about motivations but about correspondences and effects.

91 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Flast v. Cohen, 392 U.S. 83 (1968); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977); Aguilar v. Felton, 473 U.S. 402 (1985); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

92 *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (striking down the display of a crèche, but not that of a menorah next to a Christmas tree); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005).

93 Torcaso v. Watkins, 367 U.S. 488 (1961).

94 Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (striking down a Texas statute that exempted religious periodicals from sales tax).

95 Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

96 Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.S. 578 (1987).

impacted an extensive swath of American public life in dismantling the old establishment and shaping the direction of a new one.

As Steven Smith has argued, the transformative effect of the Court's doctrine concerning school prayer is not adequately appreciated but was especially profound. By combining principles of government "neutrality" and "secularity," principles invoked ever since in Supreme Court doctrine as if they were self-explanatory and self-evidently true, the Court in *Abington v. Schempp* imposed a view on the nation that "religion . . . just is an inherently private affair."[97] Not only is that assumption "simply and starkly false"[98] but it also was a direct assault on the existing American civil religion. These decisions, operating on the institution of what Jeffries and Ryan have called "the high church of the Religion of Democracy"[99]—public schools—"erected and reflected . . . a sort of constitutional divide—a divide in both a chronological and a cultural sense. The decisions subtly worked to sever the American self-conception that ensued from the understanding that had prevailed historically."[100] Indeed, virtually every one of the Court's Establishment Clause decisions of this period invalidated practices that supported, in some cases directly and in others indirectly, the American civil religion regime of traditional Christianity, whether Mainline Protestant, Catholic, or more broadly Christian non-denominational. The new "secularism" mandate had profound implications for the systematic privatization of what was once Christianity's public, political influence on the American establishment.

To be sure, the establishment had not formally settled on any particular Christian denomination for its civil religion. It was a more diffuse affair. Nevertheless, the social and cultural influence of the Mainline Churches, a small number of historically enduring and influential Protestant denominations, was substantial. Together with the Catholic Church, these institutions commanded on the order of more than two-thirds of Americans.[101] Cultural and political influence

97 Steven. D. Smith, *Why School Prayer Matters* 3 (San Diego Legal Studies, Paper No. 20-447, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581192.

98 *Id.*; *see also Lee*, 505 U.S. at 645 (Scalia, J., dissenting) ("Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been.").

99 Jeffries & Ryan, *supra* note 79, at 312.

100 Smith, *supra* note 36, at 948.

101 *See* Benton Johnson, *The Denominations: The Changing Map of Religious America*, PUB. PERSP., Mar.–Apr. 1993, at 3, 4, 6; *see also* JAMES D. DAVIDSON & RALPH E. PYLE, RANKING FAITHS: RELIGIOUS STRATIFICATION IN AMERICA 114–17 (2011) (providing data on numbers of adherents across decades).

aligned in public schools,[102] at public events and ceremonies,[103] and in the religious traditions of American political leaders.[104]

The Court's post-*Everson* Religion Clause law reflects regular, repeated, and single-minded interventions that severed the connections of political Christianity and American culture—that is, that destabilized the American civil religion. True, the Court has spoken more generally of "secular[ism]" and "religion."[105] Yet it is telling that the Court has never bothered to define these categories. To the contrary, it has insisted that the category of "religion" has no definite criteria at all—or at least none worth formalizing into law. Perhaps, as in the case of obscenity,[106] the Court simply knows religion when it sees it. Yet what it largely has known, and what it largely has policed in its Establishment Clause doctrine, was not "religion" but Christianity and the influence of America's Christian civil religion on a broad range of institutions of American political life.[107] "Religion" in this period of the Court's dismantling jurisprudence is more precisely taken to mean political Christianity.[108] In the post-*Everson* dispensation, the Court, wielding the Establishment Clause, became a kind of censor ensuring that policies and laws adopted across the

102 *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 62 (2005).

103 *See* JACQUELINE E. WHITT, BRINGING GOD TO MEN: AMERICAN MILITARY CHAPLAINS AND THE VIETNAM WAR 78 (2014) (describing the religious affiliation of military chaplaincies); Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL OF RTS. J. 1171, 1203 (2009) (Before the twenty-first century, "with the exception of the Unitarians and the Universalist, all of the congressional chaplains came from Christian denominations that were established long before the founding of this country.").

104 *See The Religious Affiliations of U.S. Presidents*, PEW RSCH. CTR. (Jan. 15, 2009), https://www.pewforum.org/2009/01/15/the-religious-affiliations-of-us-presidents/ [https://perma.cc/VJW4-7LBK]. With implications, of course, for what Presidents say in their speeches and other public statements.

105 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 616–17 (1971).

106 Jacobellis v. Ohio, 378 U.S. 184, 184 (1964).

107 *See* Marc O. DeGirolami, *The Two Separations*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS FREEDOM 396 (Michael D. Breidenbach & Owen Anderson eds., 2020).

108 *See* Robert N. Bellah, *Religion and the Legitimation of the American Republic*, 15 SOCIETY, no. 4, 1978, at 16, *as reprinted in* ROBERT BELLAH, THE ROBERT BELLAH READER 246, 249 (Robert N. Bellah & Steven M. Tipton eds., 2006) ("[T]he American republic, which has neither an established church nor a classic civil religion, is, after all, a Christian republic . . . ."). I am less certain that Bellah was right about America's lack of "a classic civil religion." For descriptions of the predicted, but never quite fulfilled, demise of public, political religion in broader perspective, see JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 40 (1994) ("To say that in the modern world 'religion becomes private' refers also to the very process of institutional differentiation which is constitutive of modernity, namely, to the modern historical process whereby the secular spheres emancipated themselves from ecclesiastical control as well as from religious norms.").

country were not perceived to provide civil support for or approval of Christianity, and in turn that Christianity was not perceived to provide civil support to American political institutions. The Court's object was to dismantle the existing civil religion of the American establishment.[109]

And what of the Free Exercise Clause? Things remained comparatively quiet until 1963, and even for a time thereafter. Free exercise exemption followed in the wake of the Court's Establishment Clause regime subversion and was a largely secondary and minor consideration. Some scholars argue that the Court's post-1963 free exercise doctrine, and especially its new approach to constitutionally compelled religious exemption, compensated for the "special disabilit[ies]" the Court imposed on religion by the establishmentarian dismantling.[110] On this view, the strict scrutiny exemption test of *Sherbert v. Verner* follows "[p]recisely because religion should be excluded from politics" and constitutionalized religious exemptions "are merely the appropriate remedy for the damage" inflicted by the Supreme Court on American civil religion in its Establishment Clause cases.[111]

This view is quite mistaken, however. Exemption strengthened and reinforced the dismantling effected by the Court's Establishment Clause doctrine. Exemption was subversive of the establishment. It is not only, as Andrew Koppelman has suggested, that "the purported tradeoff doesn't really balance, because the majority religions that are constrained by the Establishment Clause are not the same as the minority religions that are protected by the Free Exercise Clause."[112] Rather, all the weights are on one side of the scale. Far from offering the existing American civil religion a compensating or offsetting reward, even if an asymmetrical one, exemption affirmatively valorized a particular understanding of religion's nature and role within the American polity—one directly at odds with the existing civil religion.

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109 Caroline Corbin describes the breadth and cultural pervasiveness of the old establishment that the Court attacked in these decisions: "their Sabbath defines the workweek, their sacred days define state and national holidays, their morality defines the family and determines when life begins, belief in their God characterizes patriotism, and invocation of their God solemnizes, dignifies, and authenticates." Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1578–79 (2010). Quite so.

110 *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1633 (1993).

111 *Id.* at 1613 (emphasis omitted).

112 Andrew Koppelman, Response, *Religion's Specialized Specialness: A Response to Micah Schwartzman,* What If Religion Is Not Special?, 79 U. CHI. L. REV. DIALOGUE 71, 74 n.18 (2013).

Sherbert concerned whether a Seventh Day Adventist was entitled to a religious exemption from a requirement to be available for work on Saturdays as a condition of receiving unemployment benefits.[113] In the background of the case, and explicitly mentioned in the South Carolina Supreme Court's opinion below, is the existence of a general closing day of Sunday,[114] the traditional "uniform day of rest"[115] of the American Christian civil religion, the existence of which had been held not to violate the rights of Sabbatarians just two years earlier.[116] Likewise, in *McGowan v. Maryland*, the Court had acknowledged the Christian roots of the practice but had upheld it against an Establishment Clause challenge: to strike down Sunday closing laws would, the Court thought, "give a constitutional interpretation of hostility to the public welfare."[117] Already in *McGowan*, the Court worked to cut away the civil religion root of Sunday closing laws, and to justify them on the ostensibly neutral ground that the government is entitled to pick *some* day of the week, as if the state had just picked any day at random.[118] *Sherbert* went a good deal further. It disrupted the equilibrium of the establishment by striking a more direct blow against one feature of American civil religion: the generality and political commonality of the Sunday closing day. Whatever else it may have done, *Sherbert* certainly did not shore up the civil religion regime or offer some compensating gift to it. It overcame, in a small but significant way, what was thought to be the irrational obscurantism of this feature of the establishment.[119]

The Court's second major free exercise exemption case involved whether Amish children must be exempted from a compulsory state schooling law.[120] Both *Sherbert* and *Yoder* therefore concerned distinctly minority religions, religions very distant from the Mainline Protestant Christianity of the mid-twentieth century, and the rituals and traditions of civil religion fostered by the Mainline and internalized within the establishment before they were eviscerated by

113 Sherbert v. Verner, 125 S.E.2d 737, 738 (S.C. 1962), *rev'd*, 374 U.S. 398 (1963).

114 *Sherbert*, 125 S.E.2d at 745.

115 Sherbert v. Verner, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

116 *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961)); *see also* McGowan v. Maryland, 366 U.S. 420 (1961).

117 *See McGowan*, 366 U.S. at 445.

118 *See* SOHRAB AHMARI, THE UNBROKEN THREAD: DISCOVERING THE WISDOM OF TRADITION IN AN AGE OF CHAOS 67 (2021) ("[L]et's be honest: These laws are meant to protect *divinely ordained* rest—Sabbath.").

119 See also the story recounted by Stanley Hauerwas and William Willimon that 1963 was a "watershed" date—the year they recall the Fox Theater in South Carolina first opening on a Sunday. STANLEY HAUERWAS & WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY 15–17 (1989).

120 Wisconsin v. Yoder, 406 U.S. 205 (1972).

the Court.[121] Though both sects, as the Court emphasized especially in *Yoder*, had a certain longevity and history in the American experience,[122] exemption victories for them hardly constituted anything like a refortification of American civil religion after the depredations of the Court's mid-century Establishment Clause doctrine. If, as John Inazu has put it, the "intuition underlying *Yoder* is that the Amish are peculiar enough to be given an exemption without significantly undermining the state's interest in public education,"[123] the same is true for any threat from *Yoder* to the Court's interests in its own establishment dismantling.

After *Sherbert* altered the constitutional calculus for exemptions, questions rapidly arose about just what counted as a sufficient religious burden to generate a claim for exemption. One of the Court's most important exemption opinions after *Yoder* provided the answer: virtually anything that an individual claimant might sincerely believe.[124] Once again, the Court's response was decidedly in tension with the existing civil religion. In *Thomas v. Review Board*, the Court held that an individual who objected to building tank turrets on the basis of conscientious scruple was nevertheless entitled to unemployment compensation benefits after termination.[125] In holding that an exemption from these laws was constitutionally compelled, the Court rejected the view that the claimant had to articulate an internally consistent set of beliefs aligned at least in some respects—or perhaps in any respects—with those of other members of the religious community or group in which the claimant alleged membership.[126] An exemption was required, the Court said, even if an individual claimant's beliefs ran directly contrary to the beliefs of the religious group, community, or tradition with which the individual claimed association.[127] Excepting truly "bizarre" deviations[128] (an exception that has rarely, if ever, been invoked to deny a claim of burden), the measure by which religiousness is evaluated is the

121 *See* Lund, *supra* note 103, at 1202, for the "minority" Christian characteristics, demographic and otherwise, of Seventh-Day Adventists.

122 *See, e.g.*, *Yoder*, 406 U.S. at 235; Sherbert v. Verner, 374 U.S. 398, 399 nn.1–2, 410 (1963).

123 John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 514 n.146 (2014); *see also* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 130 (noting *Yoder's* doctrinal lack of force because the Amish "are a numerically insignificant group in relation to almost every aspect of American life").

124 *See* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

125 *Id.*

126 *See Id.* at 715–16.

127 *Id.*

128 *Id.* at 715.

autonomous believer alone. Religion became, after *Thomas*, "a capacious category of personal autonomy or authenticity"[129] that exemption was meant to maximize.

Here, too, one can see that free exercise exemption subserved a vision of religion and its place in the American polity subversive of the establishment's civil religion. Exemption reflected the view that religion is individuated, private, balkanized, idiosyncratic, and virtually incomprehensible to anybody other than to the claimant (and perhaps not even to the claimant). Religion's function is socially splintering rather than unifying. Religion is no longer in a position of mutual support with the state, but instead in a posture of perpetual supplication to the state—a state that now shares none of its fundamental commitments and practices. Religion does not depend upon the shared assumptions, habits, and traditions of any enduring community—the "common thing." It is fragmented politically from the state.

Under the new dispensation, a claimant's views need not conform to any common standard in order to be recognized as religion. Even more, it is exactly those varieties that run contrary to the existing deposit of common religion—whether the common religion of the believing group or of the civil religion of the political community at large—that must now be granted special constitutional solicitude. Mandatory constitutional exemption during this period thus promoted the Establishment Clause dismantling of the establishment. Earlier nonconstitutional decisions expanding the scope of exemptions under military draft statutes, the text of which had insisted on belief "in . . . a Supreme Being," reflected the same dynamic.[130] Their effect, if not their object, was to liquify the existing sociocultural, common, understanding of religion—the central case of which was the establishment's civil religion—requiring the state to exempt virtually any private, individual "conscientious objection," which here meant any deeply felt conviction of whatever kind.

It is commonly known that these examples aside, however, and notwithstanding what appeared to be a generous rule, religious claimants regularly lost under this standard. From 1963 through 1990, requests for religious exemptions from tax laws, Social Security rules,

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129 *See* JOEL HARRISON, POST-LIBERAL RELIGIOUS LIBERTY: FORMING COMMUNITIES OF CHARITY 1 (2020). For a classic work on authenticity of the self as the highest modern ideal, see CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 25–26 (1991) (describing the only source left to connect with as deep within us).

130 United States v. Seeger, 380 U.S. 163, 165–66 (1965) (quoting Universal Military Training and Service Act § 6(j), 50 U.S.C. App. § 456(j) (1958) (repealed 1967)); Welsh v. United States, 398 U.S. 333, 337, 344 (1970) (quoting the same).

and prison and military regulations were routinely denied.[131] As William Marshall has shown, the only claims that were sustained generally concerned the denial of unemployment compensation benefits.[132] The Court's "strict scrutiny" doctrine, at least pre-RFRA, did not in the least suggest that exemption had achieved conceptual political priority or priority of political importance to establishment. Apart from these free exercise exemption losses is the sheer fact of comparative volume: there was simply a great deal less free exercise exemption doctrine than establishment doctrine generated by the Supreme Court during this period. The raw number of cases between 1947 and 1990 shows that the Court decided many more Establishment Clause cases than Free Exercise Clause exemption cases, even if one includes the cases in which free exercise exemption claimants lost.[133] Of course, the political primacy of a legal issue is not measured solely by how frequently the Court discusses and develops it. Nevertheless, from 1947 through 1990, it is notable that the Court was much more

131 United States v. Lee, 455 U.S. 252 (1982); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 343 (1987); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990).

132 William P. Marshall, Smith, Ballard, *and the Religious Inquiry Exception to the Criminal Law*, 44 TEX. TECH. L. REV. 239, 245 (2011).

133 On the order of roughly 2 to 1 (28 to 14). For the Establishment Clause, see Everson v. Bd. of Educ., 330 U.S. 1 (1947); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); McGowan v. Maryland, 366 U.S. 420 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Flast v. Cohen, 392 U.S. 83 (1968); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Epperson v. Arkansas, 393 U.S. 97 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Stone v. Graham, 449 U.S. 39 (1980); Larson v. Valente, 456 U.S. 228 (1982); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Marsh v. Chambers, 463 U.S. 783 (1983); Lynch v. Donnelly, 465 U.S. 668 (1984); Wallace v. Jaffree, 472 U.S. 38 (1985); Estate of Thornton v. Caldor, 472 U.S. 703 (1985); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Edwards v. Aguillard, 482 U.S. 578 (1987); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Bowen v. Kendrick, 487 U.S. 589 (1988); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989). For Free Exercise Clause exemption claims during the same period (counting generously), see Braunfeld v. Brown, 366 U.S. 599 (1961); Sherbert v. Verner, 374 U.S. 398 (1963); Seeger, 380 U.S. 163; *Welsh*, 398 U.S. 333 (not strictly a Free Exercise Clause case, though an exemption case); Gillette v. United States, 401 U.S. 437 (1971) (again, an exemption but not a Free Exercise Clause case); Wisconsin v. Yoder, 406 U.S. 205 (1972); *Thomas*, 450 U.S. 707; *Lee*, 455 U.S. 252; Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *Goldman*, 475 U.S. 503; *Bowen*, 476 U.S. 693; Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989). Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) and Tilton v. Richardson, 403 U.S. 672 (1971) involve both establishment and free exercise exemption claims.

invested in its Establishment Clause doctrine than its free exercise exemption case law.[134] Exemption was a comparative side issue.

After the Court again changed its view of free exercise exemption in *Employment Division v. Smith*,[135] however, the country witnessed an explosion of subconstitutional religious exemption laws in the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and an assortment of state statutory and state constitutional analogues. A survey of the cases brought before federal courts as of 1996 under RFRA revealed considerable religious diversity in the claimants seeking exemptions from general law, but a disproportionate number of claims brought by comparatively new and unfamiliar religious sects without deep historical traditions.[136] As Maimon Schwarzschild has put it, "for every one exemption case involving a plausibly Mainline denomination . . . there are surely two or three, or perhaps five or more . . . involving a sect."[137]

Indeed, after RFRA was held invalid as against the states,[138] the coming of RLUIPA and the explicit elevation in the federal law of religious exemption of prison religion was a significant development.[139] When the nation's laws privilege one specific type of religious exemption claim—one that is more likely than in other contexts to reflect a balkanized, individuated, nontraditional, and idiosyncratic understanding of religion—that special legal status inevitably expresses something distinctive about what the polity believes to be religion's true nature and function. Religion, on this understanding, is supported and promoted in exemption laws like RLUIPA as something like the opposite of its manifestation in the establishment of twentieth-century American civil religion. Where the latter was politically foundational, communal, binding, historically enduring, and relatively unified as Christian (even if somewhat diffuse in its nondenominationalism), the former is politically marginal and unthreatening, atomized, privatized, pluralized, and fragmented.

134 Compare the Court's law and religion cases since 1990, where the numbers are more balanced.

135 494 U.S. 872 (1990).

136 John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religious from Majoritarian Rule*, *in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 541–42 (James T. Richardson ed., 2004).

137 Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 197 (2016).

138 City of Boerne v. Flores, 521 U.S. 507 (1997).

139 *See* U.S. COMM'N ON C.R., ENFORCING RELIGIOUS FREEDOM IN PRISON 13–14 (2008) (documenting the outsized proportion of RLUIPA claims by little known sects or even individualized religions). The report also notes that prisoners of minority faiths are the constituency bringing the largest number of religious exemption claims. *Id.* at 102.

Religion as a civic activity was demoted from a position of political strength to one whose foremost national legal expression in RLUIPA was the powerless and suppliant prisoner begging the indulgence of the state.[140] "Religion in prisons and prison religions," Winnifred Fallers Sullivan has written, "are distinctive products of the modern state and its ongoing interest in producing certain kinds of subjects."[141]

This is an opportune moment to emphasize that this Article does not address the desirability of religious exemption. There may be good reasons to support generous policies of exemption (in prison and elsewhere) in a world of significant religious pluralism such as ours, and perhaps even to constitutionalize them, though reasonable minds may differ on that question. Instead, the claim here is that these developments unequivocally show the political priority of the establishment to free exercise exemption in the twentieth century. Obviously, there were many other cultural forces at work than Supreme Court doctrine that contributed to the dismantling of America's civil religion. But law played its role, and it did so principally through the Supreme Court's Establishment Clause cases. Free exercise exemption was secondary in time and in importance in the establishment shift effected by the Court.

Exemption can certainly be understood as a concession to the religiously exotic and unthreatening, as many have observed of cases like *Sherbert*, *Yoder*, and *Thomas*. But when the political dynamics of the Clauses as interpreted by the Court in the twentieth century are considered relationally, free exercise exemption is more, and different, than that. Exemption played a supporting role in promoting the civil religion dismantling undertaken in the name of the Establishment Clause. Here again, today's rights constrictors are mistaken. As a historical matter, the establishment preceded free exercise politically and set the agenda for religious exemption in the twentieth century.

III. RECONSTITUTING THE NEW CIVIL RELIGION

But perhaps things have changed. Rights constrictors certainly believe that religious exemption today has been unjustly privileged, to

140 It should not be surprising that the religious claims generating the greatest bipartisan concord today are those concerning prisoners in RLUIPA cases. *See, e.g.*, Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); Holt v. Hobbs, 574 U.S. 352 (2015) (unanimous).

141 WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 6 (2009).

the detriment of the political community's shared, disestablishmentarian commitments.[142] And it is true that the twenty-first century has witnessed the explosion of free exercise conflict in countless contexts. From disputes about the rights of corporations and nonprofits not to provide contraception insurance coverage to their employees,[143] to religious cakemakers and florists declining to provide services for same-sex weddings,[144] to religious schools seeking the right to be included in religion-neutral government financial grants,[145] to religious foster care agencies claiming the right not to place children with LGBT couples,[146] to broader political battles concerning the existence and scope of state religious exemption statutes,[147] and so on, all of the most acrimonious fights today seem to concern free exercise. As in much of the rest of American life, some of the latest disagreements concern COVID-19 and whether state or locally imposed occupancy restrictions on religious institutions and vaccination requirements on religious objectors infringe on their religious freedom.[148] It may be that this, in the end, is the crux of the rights constrictors' complaint: religious exemption in cases like *Masterpiece Cakeshop* has assumed outsized political importance, one that thwarts the progress that has been made by federal and state civil rights and antidiscrimination laws, and that threatens to reverse the

142 For a selection of arguments that religious exemption has become superinflated, in some cases even trumping the establishment, see Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153 (2015); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2018); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

143 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

144 Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

145 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

146 Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

147 See state RFRA fights in Indiana, Kansas, Arizona, Utah, and other states, as well as Equality Act fights and associated boycotts.

148 *See e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Danville Christian Acad. v. Beshear, 141 S. Ct. 527 (2020); A. v. Hochul, No. 21-CV-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021), *aff'd in part, rev'd in part sub nom.* We the Patriots USA, Inc. v. Hochul, 17 F.4d 266 (2021), *cert. denied sub nom.* A. v. Hochul, 142 S. Ct. 552 (2021) (mem.).

healthy establishment destabilization effected by the Court in the twentieth century.[149]

In this, progressive-leaning rights constrictors share something with conservative- and libertarian-leaning critics of the regulatory state. Indeed, a widely held explanation for the rise of exemption disputes is the growth of the regulatory state. The claim is that as the state has expanded, it has colonized ever greater territory. As much of that territory was formerly occupied by the institutions of civil society, including religious organizations in their great variety, occasions of conflict have increased. So, for example, my colleague, Mark Movsesian, has argued that "[t]he growth of activist administrative agencies figures prominently in controversies like *Masterpiece Cakeshop*. In part, it is simply a matter of volume. The more regulations, and the more subjects covered, the greater the potential for businesses to violate the law."[150] In part also, Movsesian continues, it is the tendency of democratic states toward allegiance to the value of what he has called "equality as sameness" that explains the increasing conflict and the recourse of dissentients to religious exemption.[151] It is the small-o "orthodox" religious, Philip Hamburger writes, who have most to fear from the administrative expansion, because those are the minorities "that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views."[152] Those pressures have special salience, Paul Horwitz has argued, in the area of sexuality and progressive understandings of equality and autonomy,[153] and it is in fact just in that area that one still sees many of the great exemption contests of the present day.[154] Adam White contends that the "federal administrative state," which eliminates the necessary "checks and balances" that would allow religion in America to flourish if regulated locally and through regular legislative

149 See GREENE, *supra* note 3, at 147–52 (citing *Masterpiece Cakeshop* and the thwarting of state civil rights regulations).

150 Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. PUB. POL'Y 711, 738 (2019) (citing Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 375 (1990)); *see also* Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, LAW & LIBERTY: FS. (Jan. 2, 2016), https://lawliberty.org/forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/ [https://perma.cc/N7VE-VF78].

151 *See* Movsesian, *supra* note 150, at 714.

152 Philip Hamburger, *Exclusion and Equality: How Exclusion From the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1929 (2015).

153 *See* Horwitz, *supra* note 6, at 160.

154 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

processes, is the principal culprit for the plight of religious freedom today.[155]

Both rights constrictors and regulatory-state critics, therefore, see in exemption an instrument of resistance to the regulatory state. The former object to this development as granting unjustified privileges to individual religious interest at the expense of the political community. The latter praise it after the fashion of the private, associational recommendations of Tocqueville.[156] It was Tocqueville, after all, who observed that American democracy's impulses toward equality and individualism, with what he claimed were attendant dangers of absolute, despotic, centralized government control of the citizenry, could only be curbed and tamed by cultivating vibrant voluntary associations, the paradigmatic example of which were churches.[157] Religion as manifested in private association can "check, pressure, and restrain the tendencies of centralized government to assume more and more administrative control."[158] Religious exemption, on this view, is a kind of counterbalancing instrument for courts to wield in forging deals between religion and the regulatory state—new compromises between the traditionally religious and progressive government forces.[159]

The regulatory explanation for the rise of free exercise exemption has considerable force, and I myself have argued for a limited version of it.[160] It is probably true that governments that regulate comprehensively are likelier to infringe on religion and religious liberty than governments that do not, though that will depend upon just what religion and religious liberty encompass. Nevertheless, the regulatory explanation is incomplete and beset by several problems. Like earlier "compensatory" accounts of exemption in the twentieth century,[161] it fails to capture something crucial about the political dynamics of religious exemption then and now.

In the first place, there is a practical, temporal difficulty. What has been called "Tocqueville's Nightmare" is more than a century old at least, and as Daniel Ernst has shown, what began as substantial

155 Adam J. White, *The Turn Against Religious Liberty*, COMMENTARY, Jan. 2021, at 32.

156 Movsesian, *supra* note 150, at 739–40.

157 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 180, 485–92 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1840).

158 ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 38 (Univ. Cal. Press 1996) (1985).

159 *See* Mark Movsesian, *The Roberts Court Attempts a Compromise*, FIRST THINGS (July 15, 2020), https://www.firstthings.com/web-exclusives/2020/07/the-roberts-court-attempts-a-compromise [https://perma.cc/3SBD-M7H9].

160 *See* Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105 (2016).

161 *See supra* notes 110–19 and accompanying text.

judicial supervision of administrative and regulatory action rapidly became substantial deference to it.[162] By the 1930s, the "old doctrines" of judicial oversight of administrative rulemaking had "bec[o]me 'ghosts' of their former selves,"[163] and subsequent developments as early as the coming of the Administrative Procedure Act of 1946 reflect the early stages of the great "abnegation" of law to administration.[164] If religious exemption and the rise of the administrative state are connected, that connection does not seem either an immediate or a necessary one. Exemption only became a preferred strategy to resist regulatory control in the last three decades at most. Before that, as discussed above, religious exemption was a politically marginal and largely secondary, supporting phenomenon in the Court's dismantling of the establishment. Exemption's greatly delayed ascendance in American law, coming to dominate the law and religion scene nearly a century after the entrenchment of the regulatory state, requires at least some other causal account. And there does not seem to have been too much conflict between the regulatory state and religion for some time after the former's arrival. What happened in between to render exemption such a popular (or necessary, depending upon one's perspective) strategy today?[165]

And there are other holes in the regulatory account as an explanation for the rise of religious exemption, at least without substantial supplementation. Like the rights constrictors' critique of the rise of exemption, the regulatory account of it suggests that there is a necessary hostility or opposition between a powerful administrative state and religion. It suggests further that with the growth of administrative power comes inevitably the loss of space within which religion can shape, influence, and structure a society. Again, rights constrictors complain about exemption's obstruction of the administrative state, while regulatory critics praise it, but their

162 *See* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 5 (2014). I say "at least" inasmuch as other studies have shown the administrative state in America to be far older. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

163 ERNST, *supra* note 162, at 5 (citing Robert L. Hale, *Does the Ghost of* Smyth v. Ames *Still Walk?*, 55 HARV. L. REV. 1116 (1942); Bernard Schwartz, *Does the Ghost of* Crowell v. Benson *Still Walk?*, 98 U. PA. L. REV. 163 (1949)).

164 *See* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 26–27 (2016).

165 If the claim is instead that particular types of regulation, with particular aims and commitments, caused friction with the American civil religion, and that these arose in the latter half of the twentieth century, then I have less quarrel with it. But it is then not the fact of regulation and the rise of the administrative state itself that is doing the explanatory work.

perspectives align on the dynamics between religion and regulation. Yet as discussed in Part I, many other political regimes in history have had highly centralized and, indeed, by today's lights, invasive networks of laws that penetrate the lives of the citizenry. And these regimes have been graced with vital and flourishing religious traditions that have provided public, organizing frameworks and influences for their respective polities.[166] Indeed, as was argued above, these regimes have deemed the care of religion to be one of the fundamental charges of any self-respecting polity.

Unless one is prepared to say that these earlier regimes were self-deluded or somehow caught in a categorical mistake about religion's essence, and that it is only we today who understand religion's true nature clearly (a position the Supreme Court, at least, has been at pains to deny), government regulation and religion are not inherently at odds. One might even argue that the civil religion of the American establishment before the Court's Establishment Clause dismantling *reflected* such a political regime, as the examples of the Little Sisters of the Poor and Catholic Social Services discussed below, and countless other similar organizations before them, suggest. It was an establishment in which the state's "police power[s]" were employed to promote the "health, safety, and morals" of the polity,[167] and these powers were regularly put to use for the care of American civil religion and to promote religious liberty within the regime's conception of it. Tocqueville's views on private association notwithstanding, to the extent that the mutual antagonism of the administrative state and religion chronicled by these commentators explains the rise of exemption, it is a highly contingent explanation.

166 Some comparatively modern examples of regulated regimes in which religion once played a public, political role may be helpful: France during the period before the 1905 law of church-state separation, *see* note 38, and Spain pre-Franco and pre–Second Republic (before the official church-state separation in the Constitution of 1931), in its so-called "Silver Age," which witnessed the expansion of public works and public regulation. For Spain, and the role of religion in specific, see the discussion in STANLEY G. PAYNE, THE SPANISH CIVIL WAR, 8, 111–18 (2012). The anarcho-syndicalists of the civil war period were antiregulation as well as antireligion. *Id.* at 9. For a description in fiction of the influence of religious traditions in Spain before the Spanish Republican anticlericalism of the 1930s, see JOSÉ MARÍA GIRONELLA, THE CYPRESSES BELIEVE IN GOD (Harriet de Onís trans., Alfred A. Knopf 1955) (1953). My object is not to defend these political regimes (or any others), or to argue that they or their respective religious traditions did not have problems of various kinds. The point is far narrower: regulation and religion are not by their very nature incompatible.

167 Cases using this locution are legion. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (Rehnquist, C.J., plurality opinion). For discussion of these issues, see generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 (1985).

Indeed, the story of exemption's concomitant rise with the regulatory state is not merely an incomplete one. It may mask political causes that have greater explanatory force. It imports a contestable and historically contingent view of the relationship between church and state, in which the two are perpetually at odds in a zero-sum game for political power and influence. On one side are the public, anti-exemption forces of the establishment. On the other are the private, pro-exemption forces of liberty-seeking outsiders. It sees free exercise only from the perspective of the private religious dissenter, ignoring two other important constituencies: (1) the governing power and the ways in which exemption can serve its public ends, and (2) the religious citizen or group whose liberty is fostered by and consonant with the civil religion supported by government regulation. It assumes that free exercise exemption may only stand in opposition to the administrative state rather than in an auxiliary role.

In so doing, those who celebrate religious exemption, much like those who critique it, may obscure deeper causal explanations for exemption's rise: in particular, the changing American establishment and the Court's consolidation of what it had done to the old civil religion in reconstituting a new civil religion. In considering the regulatory explanation for exemption, Thomas Berg helpfully observes that exemption is the ideal strategy to "temper[] regulation without undoing it" and thereby to legitimate the increasing size and scope of administrative control.[168] To help the regulatory pill go down a little easier, since go down it must. This is a descriptive improvement over the inherently oppositional, Tocqueville-inflected accounts of religion and regulation, but it still does not quite hit the mark.

A large part of the problem is that both progressive rights constrictors and conservative regulatory-state critics conceive of religion, and so of religious freedom, as entirely distinct from civil religion. That is, both adopt a liberal view of religion and religious freedom as exclusively private and individual, rather than public and political. Again, classical political regime theory is more perspicacious, and offers a deeper explanatory account of the relevant political dynamics today, than does a liberal theory of individual rights like religious exemption as trumps.[169] Classical regime theory understands civil religion and religion as part of the same political phenomenon, while liberal political theory scrupulously segregates them. True, civil religion and religion may not be one and the same, as public political concern with the divine is not private knowledge of the divine itself.

168 Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 107 (2015).

169 *See supra* notes 45–48 and accompanying text.

True also, the former may well be of minor ultimate importance compared to the latter. Nevertheless, if the object is to offer a political explanation for exemption's ascendancy, then the fortunes of American civil religion deserve pride of place.

This is, in sum, the most fundamental flaw in both the rights constricting and the antiregulatory explanation for religious exemption: by excising civil religion from the category of religion, and by focusing exclusively on the early twentieth-century rise of the administrative state and the early twenty-first-century religious resistance to it, both accounts obscure how exemption may consolidate the Court's gains in dismantling the old civil religion and allow it to reconstitute a new and very different civil religion.

Consider the seemingly interminable (and not yet extinguished)[170] litigation in the *Little Sisters of the Poor* case. The Little Sisters sought an exemption from the so-called "contraceptive mandate" requiring religious nonprofits like them to provide contraceptive insurance coverage for their employees.[171] In the latest iteration of this legal battle, the Little Sisters obtained a bit of relief at the Supreme Court from state challenges to the Trump administration's favorable (for them) administrative rulemaking.[172] What the Biden administration will do is as yet uncertain, though as a candidate, Joe Biden indicated that he intended to rescind their exemption.[173] Should we then say, as both rights constrictors and regulatory critics[174] do (though from opposite perspectives), that this case shows that religious exemption is a powerful instrument of regulatory resistance?

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170 Editorial, *Joe Biden vs. the Nuns*, WALL ST. J. (July 9, 2020), https://www.wsj.com/articles/joe-biden-vs-the-nuns-11594336792 [https://perma.cc/NQ68-A6NH]. And the states, too, may not be finished with the Little Sisters. The state attorneys general of Pennsylvania and New Jersey were the plaintiffs in the latest dispute.

171 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2376 (2020) (discussing Zubik v. Burwell, 578 U.S. 403 (2016) (per curiam)). I recognize that this description is contestable and that there were sundry administrative permutations and re-combinations ("accommodations" as opposed to "exemptions" and so on) in the course of the litigation. I leave these disagreements to the side.

172 *Little Sisters of the Poor*, 140 S. Ct. at 2373.

173 *See* Editorial, *supra* note 170. Xavier Becerra, the Secretary of Health and Human Services, as Attorney General of California sued to stop the former administration from relieving the Little Sisters from compliance with the mandate. Louis Jacobson, *Did HHS nominee Xavier Becerra Sue Nuns?*, POLITIFACT (Feb. 26, 2021), https://www.politifact.com/factchecks/2021/feb/26/xavier-becerra/did-hhs-nominee-xavier-becerra-sue-nuns/ [https://perma.cc/9PEU-3845].

174 *See* Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7, 28 (2017) (observing that "regulatory requirements [have been] significantly pared back in the name of religious free exercise").

It would be highly peculiar—at least, it would require a rather lopsided view of political realities—to describe it in these terms. This case as well as *Hobby Lobby*,[175] both of which were brought by groups within the heartland of the preceding American civil religion regime, would never have arisen at all but for the era of the Supreme Court's Establishment Clause dismantling. Both the Little Sisters of the Poor and Hobby Lobby are organizations that hold to an older view of the public expression of Christianity in their respective public-facing work[176]—one that fits comfortably under the aegis of the American civil religion establishment until the Supreme Court got to work mid-century.

That *was* the religious liberty of these groups. It was the freedom to pursue their public, religious mission in concord with the establishment's civil religion and with its support. But the civil religion sustaining the public-facing and public-acting Christian religiosity of these groups suffered systematic Establishment Clause attack by a Court that insisted on "secularity" as well as "neutrality" in the public domain.[177] The space within which the type of religious liberty fostered by that civil religion could operate was choked off—not because of the growth of the administrative state, but because the establishment and associated government regulation that had made it possible was repudiated. True, the dismantling was officially only of "state action." But its socio-cultural effects were far-reaching and were not contained within formalistic public-private compartments.

It is, in fact, inconceivable that in 1963, the year of *Sherbert* and the birth of contemporary free exercise exemption, a nonprofit organization of Catholic nuns doing public good works for the poor would have faced a decades-long legal struggle against a federal mandate to provide insurance coverage for contraception to its employees.[178] That fight is only imaginable today thanks to the Court's

175 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)

176 *Little Sisters of the Poor*, 140 S. Ct. at 2376–77 (discussing the Little Sisters and the respondents in *Hobby Lobby*).

177 *See* note 97 and accompanying text.

178 I do not mean to suggest that groups like the Little Sisters had altogether smooth sailing before 1963, or that they were not subject to a rich and robust anti-Catholicism in American intellectual culture before the mid-twentieth century. *See generally* HAMBURGER, *supra* note 61; JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 163–213 (2003) (describing Paul Blanshard's *American Freedom and Catholic Power*, in which Blanshard noted that nuns belonged to "an age when women allegedly enjoyed subjection and reveled in self-abasement" (quoting PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 67 (1949))). Blanshard's book was a bestseller and critically acclaimed in 1949 and 1950. Patrick McKinley Brennan, *Are Catholics Unreliable from a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard's* American Freedom and Catholic Power, 56 VILL. L. REV. 199, 199 (2011). The point is about

establishment dismantling (supported by *Sherbert* and its exemptionist progeny), and its slow reconstitution of another establishment and another civil religion. That shift, and not the bare fact of regulation, is the reason that groups like the Little Sisters find themselves in court at all. They are litigating because they are now on the losing end of the new, burgeoning civil religion regime's dispensation. Exemption is the only strategy remaining to them in the face of the strictures of the new establishment and its attendant civil religion. But as with exemption as it emerged in the 1960s and was illustrated in the prototypical RLUIPA case, it is a strategy that confirms and reinforces their supplicant status as outsiders to the new civil religion.

Once again, the point is not to criticize or praise either this development or the responsive legal strategy. From the Little Sisters' perspective, a loser's strategy is better than none at all; and from the government's, there may be reasons to grant an indulgence from the new establishment and its civil religion, and reasons not to. Rather, the argument pursued here is that today, exemption remains secondary in political priority to establishment, just as it was in earlier periods. Exemption only appears as a powerful tool of regulatory resistance, when its real effect is to consolidate the gains made by the Court in dismantling the old civil religion. Where Seventh Day Adventists, the Amish, and other claimants from minor (historically and numerically speaking)[179] or even self-authenticating (as in *Thomas*[180] and *Welsh*[181]) religions once sought religious exemptions from a position of supplication within an establishment of soft Christianity, now a greater number of traditional Christians do within an establishment that has repudiated its Christian past and adopted something else.

Or consider one of the latest free exercise exemption fights in *Fulton v. City of Philadelphia*, decided by the Court for Catholic Social Services (CSS) on exceptionally narrow grounds.[182] "Since 1797," petitioner's brief begins, "the Catholic Church . . . has cared for children in need," a project and a tradition that is today carried on in CSS's provision of foster homes for abused and neglected children.[183]

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regulatory control and compulsion, and on that front, the history of their order in America recounted by the Little Sisters themselves does make the recent federal action difficult to imagine in 1963. *See American Foundations*, LITTLE SISTERS OF THE POOR, http://littlesistersofthepoor.org/american-foundations/ [https://perma.cc/9XAM-GE6P].

179 *See* notes 113–23 and accompanying text.

180 Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

181 Welsh v. United States, 398 U.S. 333 (1970).

182 Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

183 Brief for Petitioners at 3, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 2836494, at *3.

It was the Catholic Church, not the City, that had for centuries taken charge of this charitable activity with explicit reliance on its Christian mission.[184] Even over the last fifty years, which witnessed far greater government regulation in the management of adoption and foster care, the relationship between the City of Philadelphia and CSS was one largely of harmonious partnership.[185] Indeed, the history of that partnership—one between the regulatory state and a public-facing and "exercising" religious institution—belies the claim that religion and regulation are inherently at odds. During that period of accord, CSS's religious liberty flourished precisely *because* it was protected (indeed, cherished and promoted) by the establishment's civil religion. Its religious freedom was the freedom to influence society for the common good through its Christian ministry.

What changed was not the brute fact of increasing government regulation of adoption and foster care, resulting in inevitable conflict with CSS. What changed was the establishment's civil religion, a change manifested as recently as four years ago in Philadelphia's contractual demands of CSS.[186] The long era in which government welcomed the partnership and Christian ministry of service organizations like CSS (as well as religiously operated hospitals, charitable organizations like the Little Sisters of the Poor, religious schools, international religious organizations, and so on) is rapidly waning. These institutions and the part they have played in American political life are part of the older establishment in which Christianity had a formidable public and political presence in virtually every facet of the American polity.

Indeed, it is not only cases like *Little Sisters* and *Fulton* that are inconvenient to the liberal, wholly privatized conception of religion, embraced by rights constrictors and regulatory-state critics alike. Some of the most recent and most heated free exercise controversies—*Espinoza v. Montana Department of Revenue*[187] and *Our Lady of Guadalupe School v. Morrissey-Berru*,[188] for example—concern the same category of public-facing and public-exercising Christian institutions. All of these were at least as important a political presence as the one-time ubiquity of school prayers, Bible reading in public schools, state-sponsored Ten Commandments monuments, and crèches on city hall lawns. The purpose of these institutions and these practices, from the state's perspective, was not to instill a genuine piety or cultivate private

184 *See id.* at 4.

185 *See id.* at 5.

186 Brief for City Respondents at 6, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 4819956, at *6.

187 140 S. Ct. 2246 (2020).

188 140 S. Ct. 2049 (2020).

knowledge of the divine. It was to mark out and recognize the influence of (and, in the case of organizations like CSS and the Little Sisters, to benefit civically from) public Christianity on the American political regime. It was to reflect and reaffirm America's civil religion.[189]

It is just that component of the old establishment that was dismantled by the Court's Establishment Clause decisions, and which a generation later had the effect of deranging an established (in the colloquial as well as the regime sense) Christian organization from pursuing the public, political work that it had undertaken since the founding of the republic. It is, of course, not surprising that CSS sought an exemption from the new establishment, the only remedy that would relieve it from compliance with the City's mandatory nondiscrimination contract clause while permitting it to continue its work without violating its religious principles. And the Supreme Court gave CSS that relief, in a narrow way. But as in the Little Sisters' case, both rights constrictors and regulatory-state critics would be quite mistaking matters to say that *Fulton* therefore vindicates religious exemption as the mighty instrument by which to thwart the regulatory state or to forge new compromises. What exemption in *Fulton* has done is to highlight for CSS, and so many organizations like it, how much they have lost of their former religious liberty. Exemption is, in this way, appeasement.[190] It is an act of placation that ought not to distract from the larger political rout. It is a reminder of the old establishment now gone.

Indeed, the civil religion of the regime has shifted so dramatically that some scholars broadly within the rights-constricting camp now argue that religious exemption in several of these cases violates the Establishment Clause.[191] There are ongoing doctrinal and conceptual disagreements about the so-called "third-party harm" Establishment

189 A point affirmed by Justice Brennan in his extended concurrence in *Schempp*. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (Brennan, J., concurring) (recognizing that public schools, which "Americans regard . . . as a most vital civic institution for the preservation of a democratic system of government," must not impress upon the future citizenry anything of the old civil religion).

190 I use the term in its ordinary, colloquial sense. *Cf.* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 274 (using appeasement in a somewhat different way).

191 *See, e.g.*, Gedicks & Van Tassell, *supra* note 142; Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187, 205–06 & n.81 (Susanna Mancini & Michel Rosenfeld eds., 2018); Schwartzman et al., *supra* note 142.

Clause claim, but those are not my concern here.[192] Rather, what is of interest is how best to understand the third-party harm argument politically and as a matter of civil religion realignment. And on that metric, the argument vindicates the political primacy of establishment to free exercise exemption as well as the regime-destabilizing function of exemption. Religious exemption is no longer needed to promote the dismantling of the old establishment's civil religion. To be sure, as in the cases discussed above, it can still serve that function. But by this point, the twentieth-century Establishment Clause lessons taught by the Supreme Court have been well-learned by federal, state, and local authorities, as cases from *Hobby Lobby* and the *Little Sisters of the Poor* to *Masterpiece Cakeshop*, *Arlene's Flowers*, and *Fulton* show clearly. They have been thoroughly absorbed by the polity.

Rather, from the rights constrictors' point of view, the greater danger now is that further progress will be obstructed, or perhaps even that backsliding or regression will ensue, and that the successor civil religion regime will suffer setbacks. Too many exemptions for too many groups like the traditional Christian ones that now seek them might disrupt the new establishment from gaining its proper footing. While exemption was usefully regime destabilizing for the civil religion that once was, it is threateningly regime destabilizing for the civil religion that is now in the offing. Here, exemption's champions today may with some justice argue that, in fact, exemption does not always subserve and fortify the civil religion regime. Perhaps. But it may be more accurate to say that for rights constrictors, exemption's regime-dismantling function has simply outlived its usefulness at this point. It is no longer needed to perform that role, now that the old civil religion of the old establishment has been toppled.

Be that as it may, this Article's core claim remains undisturbed. For as a political matter, in the third-party harms argument, it is establishment that dictates the terms according to which free exercise exemption operates. Rights constrictors have it wrong yet again. Establishment still takes political priority to free exercise exemption conceptually and as a matter of political importance. Just as it ever has.

192 I have addressed some of these claims elsewhere. *See* DeGirolami, *supra* note 160. For other criticisms, see Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331 (2020); Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KY. L.J. 603 (2018); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019).

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CODA

Two issues that this Article has not broached are the nature of the new civil religion regime (other than describing it as repudiating the soft Christian establishment that preceded it), and the implications of the dynamics between establishment and exemption for law and culture today. This coda briefly and speculatively addresses both questions.

Some scholars have already begun to reflect on what that new civil religion regime is or will be,[193] and those reflections have in turn been contested, but it seems clear that something new is coming.[194] Socio-cultural studies like Tara Isabella Burton's suggest that the rise of contemporary "intuitional religion" has taken its cues from, and itself reinforces, the dismantling of the earlier Christian civil religion.[195] "The kaleidoscopic nature of intuitionalism," Burton writes, "necessarily lends itself to fracture, to ever-smaller, ever-more-fragmented, and ever-more-ideologically-aligned tribes."[196] But Burton is somewhat less sure about what it all means for the civil religion regime to come, hypothesizing a progressive possibility—"social justice culture"—and a libertarian one—the "Rationalists and Transhumanists" of Silicon Valley and big tech—as two likely contenders.[197] These new civil religion possibilities both, in their respective and different ways, "imbue[] the secular sphere with meaning," "reenchant[] a godless world," and "replicate[] the cornerstones of traditional religion—meaning, purpose, community, and ritual—in an internally cohesive way."[198]

This Article takes no strong position on the nature of the successor civil religion regime. But if pressed to offer a view, one in some agreement with Burton, I might venture that whatever the new civil religion is now or will eventually become, it is highly unlikely to be shaped as a legal matter by the Religion Clauses as historically and

193 *See, e.g.*, SMITH, *supra* note 39.

194 Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497 (2019). This article deals primarily with the different question of how to understand the relationship of establishment and free exercise exemption within *any* political regime, and within the American context specifically.

195 TARA ISABELLA BURTON, STRANGE RITES: NEW RELIGIONS FOR A GODLESS WORLD (2020) (documenting the emergence of self-definitional religions of black-pill anarchists, wives of Severus Snape, Jedis, Proud Boys, juice cleansers, World of Warcrafters, neo-witches, wellness industry entrepreneurs, Satanists, new atavists, and a host of others).

196 *Id.* at 166.

197 *Id.* at 167–68.

198 *Id.* at 177–78.

traditionally interpreted. The Religion Clauses, as historically understood, will not have political priority in any sense—conceptual, historical, or as a matter of general political significance—for the new civil religion of the new establishment. The Religion Clauses, after all, do not sit alone and in splendid isolation from the rest of the Constitution.[199] Other developments in constitutional law in the mid-twentieth century, and especially the Court's Fourteenth Amendment Due Process and Equal Protection Clause jurisprudence, as well as the vast network of nondiscrimination laws that are the issue of that doctrine and now pockmark the nation, are far likelier to influence the nature of the new civil religion regime than the Religion Clauses or the First Amendment more generally.

The Establishment Clause dismantling of the soft Christian civil religion discussed earlier may well have been conceptually conjoined to and concurrent with some of the Court's most influential and widely celebrated cases in these other areas. Indeed, a great deal of modern constitutional law that is not conventionally designated "religion clause" law is nevertheless connected with, and perhaps even in some sense a conceptual outgrowth of (though the etiology is complex), the Court's interpretation of the Establishment Clause together with free exercise exemption's assistance.[200] Especially the assumption that government may only act for "secular" reasons and the consequent privatization in America of religion and Christianity in specific. As José Casanova has put it:

> Insofar as freedom of conscience is intrinsically related to 'the right to privacy'—to the modern institutionalization of a private sphere free from governmental intrusion as well as free from ecclesiastical control—and inasmuch as 'the right to privacy' serves as the very foundation of modern liberalism and of modern individualism, then indeed the privatization of religion is essential to modernity.[201]

Casanova might as well have made these observations with the Court's mid-twentieth-century substantive due process doctrine in mind. Just as establishment is politically prior to free exercise exemption, these other parts of constitutional law and the complex and far-reaching grids of related law that have been generated in their wake—this new establishment—may well dictate the political terms of the new civil religion.[202]

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199 *See* WALTER BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 46 (1957).

200 *See, e.g.*, Ristroph & Murray, *supra* note 33 (describing contemporary family law in just these terms).

201 CASANOVA, *supra* note 108, at 40.

202 For elaboration on some of these doctrinal relationships, see Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465 (2016).

As for any concrete implications of establishment's political priority to free exercise, it is certainly possible that there will not be any. Champions of religious liberty will persist in seeking religious accommodations. Rights constrictors will persist in opposing them and bemoaning the hypertrophy of individual rights as against the burgeoning establishment and the new civil religion that they hold dear. Nobody's views of religious exemption and no one's litigation strategy are likely to change. No court is likely to rule differently in these conflicts than it would otherwise.

Still, there are some practical developments that might follow. A first is that those traditionally-minded religious believers—particularly, but not only, traditional Christians—now on the outside of the new civil religion should consider whether to accept that they live within a new establishment that is essentially, and sometimes fiercely, hostile to their way of life. They are no longer in a struggle to determine the basic character of the new American political establishment; they lost that fight. No individual religious exemption from the new regime will change that, and, as discussed earlier, exemptions may only exacerbate and entrench their unwelcome new status.[203] It should be clarifying to contextualize what exemption victories they may win in the future within the larger landscape of their own regime rout.

Another implication of establishment's political priority to free exercise exemption might align with some traditionally-minded religious claims that rather than investing so much in law and politics, traditional believers ought to be creating places of sanctuary and cultural separation for themselves from the new establishment. Rod Dreher, for example, has argued for the formation of alternative communities for the traditionally religious and for abandoning the notion that the fight for Christendom is still ongoing.[204] Others have insisted in a similar vein that the chase after exemption has become so hard-fought that religious communities are beginning to believe that religious freedom is as important as their own substantive religious commitments, or even that there is no difference between them—as if freedom itself were the ultimate religious objective.[205] One consequence of the political priority of establishment to free exercise might be the deflection of some of the energy that the traditionally religious have invested in exemption into other, perhaps more important, realms of religious life.

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203 *See* notes 178–90 and accompanying text.

204 ROD DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION (2017).

205 *See, e.g.*, Yuval Levin, *The Perils of Religious Liberty*, FIRST THINGS (Feb. 2016), https://www.firstthings.com/article/2016/02/the-perils-of-religious-liberty [https://perma.cc/QB2T-48SN].

But perhaps the most intriguing long-term effect of accepting establishment's political priority to free exercise might be the eventual aggregation of religious exemptions into something more than individualized, essentially powerless, and atomized accommodations. Into more organized efforts in which clusters of dissenting communities resist the new establishment by uniting their exemption victories into longer-term programs of subversion of the new civil religion. Many religious exemption advocates may not be prepared to pursue such a strategy, and many are likely uninterested in it, preferring the politics of the emergent establishment and its civil religion. But for others, and in time, we might well see the coming of a new traditionalist disestablishmentarianism.[206]

CONCLUSION

Religious exemption's critics and the growing group of rights constrictors of which they are a part contend that free exercise exemption has assumed greater political importance than the communal values underlying establishment. They are wrong conceptually. The establishment, including its civil religion, always takes political priority to individual rights of religious exemption. They are wrong historically. The Supreme Court's twentieth-century Establishment Clause doctrine, which systematically dismantled the existing civil religion regime, took political priority to its free exercise exemption doctrine and set the political terms for it. And they are wrong today. The recent rise of religious exemption presents no threat to the civil religion dismantling of the last century, or to the new civil religion now aborning to replace it. To the contrary, religious exemption for the groups that seek it today reinforces their status as outsiders and supplicants in the new establishment. Like all civil religions before it, the new American civil religion—whatever its precise shape and commitments—will retain iron political control over the exceptions to it.

206 For further discussion of this possibility, see Marc O. DeGirolami, Traditionalist Disestablishments (forthcoming) (unpublished manuscript) (on file with author).