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Religious Freedom and Civic Responsibility

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I. Introduction

How should we understand the constitutionally mandated relationship between religion and politics in the United States? The Bill of Rights begins by calling upon Congress not to establish religion nor to prohibit its free exercise.[1] Does the religious liberty of citizens carry with it any civic responsibility? When, if ever, should society make exceptions to otherwise legitimate laws on the basis of religious freedom?

I begin to develop an answer to these questions in this essay, but my primary purpose is to explain the problems inherent in two common views of the constitutionally mandated relationship between religion and politics in the United States. One view defends a high and impermeable wall of separation view between religion and politics. Therefore, I call that view the "wall of separation" view. The other view defends the protection of religion from politics, but opposes the protection of politics from religion. I call that view the "one-way protection" view. Both the wall of separation and the one-way protection views have been defended by eminent scholars and also have made it into mainstream civic discourse. Although each view contains an important partial truth that accounts for its attraction, each view fails to recognize the partial truth in the other view. Each view, therefore, is inadequate to the task of offering a morally defensible interpretation of the religion clauses of the Constitution.

I defend a third view, which integrates partial truths of both the wall of separation view and the one-way protection view. I call this view "two-way protection." Two-way protection distinguishes between the separation of church and state, on the one hand, and the separation of religion and politics,

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1. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof.").

on the other. The Establishment Clause separates church and state, but it does not erect a wall of separation between religion and politics more generally. Why not? Religiously based beliefs should not be separated from politics simply because they are religious any more (or less) than secularly based beliefs should be separated from politics simply because they are not religious. Two-way protection, therefore, defends separating church and state, but not separating religiously based beliefs and politics.

II. Two-Way Protection and Two-Way Responsibility

Two-way protection advances a more nuanced, less absolutist interpretation of the Establishment and Free Exercise Clauses than either the wall of separation view or the one-way protection view. Two-way protection offers an interpretation that is closer to actual Supreme Court jurisprudence than either of the other two views. Two-way protection also is more morally defensible in the context of American constitutional democracy.

Two-way protection, I also argue, paves a two-way street for civic responsibility. Democratic politics, two-way protection suggests, should respect the religious views of citizens on the same terms that it respects the secular views of citizens. It also suggests that the right of religious citizens to advance political arguments in terms that are religiously based carries with it a responsibility similar to the responsibility of secular citizens. When religious or secular citizens argue in public for a mutually binding law or policy, we are responsible not simply for speaking to our co-religionists or co-party workers as if we were in church or in a meeting of our favorite voluntary association. We are morally responsible for making arguments that strive for reciprocity. Making these arguments is necessary because mutually binding laws should be mutually justifiable. All citizens are responsible for striving for reciprocity in our public discourse. The terms of a mutual justification within a group that shares a single religious or secular perspective are likely to differ from those within a more morally diverse society. As citizens of a morally diverse society, we all are responsible for seeking terms of mutual justification within our broader society. This moral responsibility must not be legally mandated. A legal mandate would violate the First Amendment guarantees of freedom of speech and religion. Because moral responsibility is not (and should not be) legally mandated, it is all the more important that citizens accept the moral responsibility.

Religious citizens, like secular citizens, therefore have a responsibility for making arguments concerning mutually binding laws and public policies that can be mutually justifiable, not only in some hypothetical world of our dreams, where everyone shares our religion or nonreligion, but also in this world where we differ in our religious beliefs. We are responsible for striving

to make our arguments as mutually acceptable as possible, while still speaking consistently with our own convictions, be they religious or secular.

On the two-way street of two-way protection, all citizens, religious and secular alike, are invited to argue about politics by invoking some of their deepest beliefs. But all citizens also are responsible for making political arguments that at least can be translated into mutually justifiable reasons for mutually binding policies. A classic example is the abolitionists' argument against slavery. William Ellery Channing argued:

> I come now to what is to my own mind the great argument against seizing and using a man as property. He cannot be property in the sight of God and justice, because he is a Rational, Moral, Immortal Being, because created in God's image, and therefore the highest sense his child, because created to unfold godlike faculties, and to govern himself by a Divine Law written on his heart, and republished in God's word.... Did God create such a being to be owned as a tree or a brute?[2]

Surely secularists do not now, and did not then, need to share Channing's religious faith to understand the moral and civic force of his argument.

The civic force of arguments like Channing's depends on a general idea of reciprocity among human beings ("Did God create such a being to be owned as a tree or a brute?"). Mutually binding laws – including the laws that enforced slavery – must stand the test of reciprocity. They must be mutually justifiable to the people who are bound by them. A law that treats "Rational, Moral, Immortal Being[s], created in God's image" as property or an animal to be tamed – "a tree or a brute" – cannot be mutually justified. Black Americans surely are not trees or brutes, and slavery just as surely cannot be justified to them. Black Americans are equal to white Americans, and treatment as a slave cannot be justified to equal persons.

A nonreligious theory of justice easily can translate Channing's religious argument into nonreligious terms. According to John Rawls's theory of justice, for example, all human beings share two capacities: We all share a sense of justice and a sense of the good life that we are capable of rationally revising to be consistent with our sense of justice.[3] The religious and nonreligious ideas apparently overlap, even if something is lost in the translation. Both the religious and nonreligious versions make a reasonable effort to justify mutually binding laws to the people who are to be bound by them. Citizens who speak in Channing's terms or in Rawls's terms both are assuming civic responsibility and are speaking in a way that clearly strives for

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2. *See* THE ANTISLAVERY ARGUMENT 115 (William H. Pease & Jane H. Pease eds., 1965) (citing WILLIAM ELLERY CHANNING, SLAVERY 25-29 (3d ed. 1836)).

3. JOHN RAWLS, A THEORY OF JUSTICE 397, 454-55 (1971).

reciprocity with their fellow human beings.[4] Whether we speak more in Channing's terms or Rawls's, we are trying to justify mutually binding laws and policies to people who do not share our precise and particular religious or secular convictions.

Two-way protection recognizes that citizens who speak in religious terms, in ways that strive to satisfy reciprocity, often do so as well as or better than citizens who speak in nonreligious terms. Martin Luther King's arguments against racial segregation are among the most impressive examples. King repeatedly invoked the "G-word" and Christian religious beliefs, and he did so in a way that anyone committed to furthering the cause of justice in the United States should applaud.[5] King also repeatedly invoked constitutional values, and he did so in a way that helped show religious citizens why they should oppose racial discrimination on both religious and constitutional grounds.[6]

Part of King's civic genius was his ability to be his own translator between religious and civic sources of the same political positions. In the course of the same speech or letter to his fellow citizens, King moved back and forth between religious and constitutional sources of the same political values. "Letter from Birmingham City Jail" is exemplary in this regard. Consider first King's religious argument against segregation statutes:

> A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.[7]

Now consider King's translation of the Christian and Thomist argument into purely civic terms in the very same letter:

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4. I cannot address, and neither do Channing and Rawls, the difficult issue of what constitute fair terms of human association with members of other species.

5. *See* Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217-20 (James M. Washington ed., HarperCollins 1991) [hereinafter A TESTAMENT OF HOPE] (exemplifying King's use of religious references in denouncing racial segregation).

6. *See* Martin Luther King, Jr., The Current Crisis in Race Relations, *in* A TESTAMENT OF HOPE, *supra* note 5, at 89-90 (exemplifiying appeal to constitutional principles in context of publication intended for religious readership).

7. Martin Luther King, Jr., Letter from Birmingham City Jail, *in* A TESTAMENT OF HOPE, *supra* note 5, at 293.

> An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal .... [A] just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal .... An unjust law is a code inflicted on a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote.[8]

Surely King's letter to his fellow citizens would have been less morally compelling, not more, had King limited himself to only the religious discourse, or to only the nonreligious discourse.

There are many more recent examples of religious arguments in politics that strive for reciprocity, although perhaps none quite as extraordinary in their eloquence, effects, and self-translation as those made by King. Among those worth mentioning are the public pastoral letters of the National Conference of Catholic Bishops issued over the past several decades, one of which criticized nuclear proliferation[9] and another that criticized the lack of economic justice for poor people.[10] Religiously inspired pro-life advocates also have addressed the general public in reciprocal terms, arguing against a right to abortion on grounds that human fetuses are human beings with a right to life.[11] Sister Helen Prejean has argued against capital punishment on the basis of her Catholic religious beliefs.[12] Like King, she often translates her religiously based beliefs into ideas that are not tied uniquely to Catholicism, which non-Catholics can readily appreciate when she argues against capital punishment. Her public opposition to capital punishment differs in form from that of the pastoral letters and much anti-abortion (and pro-choice) argument because her expression takes a narrative form. But narrative also can be translated into argument, just as argument can be translated into narrative.

My point in invoking these varied examples is not to suggest that you and I and all other American citizens should agree with these religious arguments in politics, or that everyone should argue in the same style. Although I am not Catholic, I happen to agree with the conclusions of some of these arguments, but not with all of them. The importance of these arguments lies not in

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8. *Id.* at 294.

9. *See generally* CATHOLICS AND NUCLEAR WAR: A COMMENTARY ON THE CHALLENGE OF PEACE (Philip J. Murnion ed., 1983) (providing, in U.S. Catholic Bishops' Pastoral Letter, American Catholic Church's position on nuclear weapons).

10. *See generally* PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (2d Draft, Oct. 7, 1985).

11. *See* John Finnis, *The Rights and Wrongs of Abortion, in* THE RIGHTS AND WRONGS OF ABORTION 22, 22 (Marshall Cohen et al. eds., 1974) (claiming unborn child is person from time of conception).

12. *See* HELEN PREJEAN, C.S.J., DEAD MAN WALKING 123-24, 192-97 (1993).

whether you or I agree with them. Regardless of whether you or I agree with the conclusions of the Catholic bishops, pro-life advocates, or Sister Prejean, we can understand and even appreciate the moral force of the arguments that they make in support of their political positions. We might or might not make the arguments in the same terms. My primary point is that we do not need to make our arguments concerning laws and public policies in the same terms to be mutually comprehensible and reasonable to one another and therefore to be morally responsible democratic citizens. If we support any kind of democracy, we must appreciate the role of arguments in democratic politics with which we do not agree.

A related and equally important point that can be conveyed by these examples is that democratic politics would probably be worse off, not better off, if we all made our arguments on the same terms. Why? We would likely lose sight of the multiple sources of moral learning in a morally complex universe and a morally diverse society like the United States. There is no reason to believe that if we all spoke in the same terms, those terms would be the uniquely and comprehensively correct (or morally enlightening) ones. Among the examples of responsible arguments that I offered above is at least one position – the pro-life position – with which I morally disagree. I offer this example to suggest yet another point about civic responsibility in a morally diverse democracy. We need not even agree with the conclusions of the arguments offered by our fellow citizens – indeed, we may strongly disagree with them – to respect the citizens who offer those arguments and to recognize that they are acting in a civilly responsible way. We can, and should, respect those citizens insofar as they too are striving to offer reciprocal terms for resolving our moral disagreements in politics.

We therefore need to distinguish between two views about the civic responsibility of religious citizens. The first view is that we should welcome into politics those religiously based beliefs with whose conclusions we agree. The second view is that religiously based beliefs should be welcome in politics as long as those beliefs clearly support mutual justification, even if we disagree with their conclusions. The first position is a self-defeating position for a democrat to defend. This position reduces democracy to the undemocratic (and narcissistic) view that democratic politics is respectable only if all the views expressed in it converge with the particular individual's views. The two-way street paved by two-way protection welcomes into politics religiously based beliefs that are opposed to mine, to yours, and to each another. Indeed, two-way protection welcomes religious views that are opposed to those that most secular citizens may hold, and it welcomes nonreligious views that are opposed to those that most religious citizens may hold. Therefore, two-way protection is not a laissez-faire moral perspective. It asks us all – whether we are religious or secular – to take responsibility for trying to offer arguments,

based on our sincere convictions, that strive not to reject the sincere convictions of our fellow citizens. This practice of responsible civic argument is what Dennis Thompson and I in *Democracy and Disagreement* call an "economy of moral disagreement."[13] Two-way protection interprets the two religion clauses in a way that supports an economy of moral disagreement.

Two-way protection, therefore, entails two-way responsibility on the part of both democratic governments and democratic citizens. Democratic governments are responsible, on the one hand, for separating church and state, and on the other hand, for admitting religiously based arguments into politics on the same terms as they admit secularly based arguments. Similarly, religious and secular citizens alike are responsible, on the one hand, for not bringing all their moral convictions to bear on laws, and, on the other hand, for bringing those moral convictions to bear on politics that can be mutually justified to their fellow citizens.

Two-way protection, therefore, does not defend a wall of separation between religiously based beliefs and politics, although it does defend a wall of separation between church and state (for reasons that I will return to below). Calling for a wall of separation between religion and politics is misleading because religion includes religiously based beliefs, such as the belief that all people are created equal in the eyes of God and should be granted equal rights. The strict wall of separation view is mistaken because it denies the legitimacy of bringing any religiously based belief to bear on politics. Neither religiously based beliefs that all people are created equal in the eyes of God, nor nonreligiously based beliefs that all people are ends-in-themselves, or that all individuals should count as one and no one for more than one is justifiable to all members of our constitutional democracy. However, taken together, these widely held beliefs are consistent with reciprocity. Thus, they help support a morally defensible politics among a morally diverse citizenry. A wall of separation of politics and religion extends its reach far too widely by excluding religious beliefs from politics. If this is what a wall of separation entails, the wall is not an aid but an obstacle to the religious freedom and the political freedom of democratic citizens.

III. What's Wrong with One-Way Protection?

In reaction to the fact that an impermeable wall of separation excludes religion from politics, academics in increasing numbers have been calling for the wall of separation to come down. These academics defend a view of the relationship between religion and politics that is diametrically opposed to the wall of separation. In place of the wall, they suggest something more akin to

13. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 84-91 (1996).

a river that flows in one direction, protecting religion from politics but not politics from religion. The Establishment and Free Exercise Clauses, according to the views eloquently articulated by the legal scholars Stephen Carter and Michael McConnell, serve a single important purpose: The clauses protect the free exercise of religion. The two clauses, in Carter's words, "protect religion from the state, not the state from religion."[14] The aim of one-way protection is "to permit maximum freedom to the religious."[15] One-way protection is recommended to replace the wall of separation. In McConnell's vision, a society that practices one-way protection would recognize every religion equally. It would be a society in which "every citizen . . . is in his own country" and in which to the Protestant it is a Protestant country, to the Catholic a Catholic country, to the Jew a Jewish country.[16] Presumably to the agnostic, the United States would be an agnostic country and to the atheist an atheist country. One-way protection extends the politics of recognition to religion. The United States should be Protestant to Protestants, Catholic to Catholics, Jewish to Jews, and secular to secularists. Religious liberty seems to be maximized by one-way protection. How could anybody object? What more could any individual, regardless of his or her beliefs, expect?

Religious and nonreligious citizens alike can and should object to one-way protection. Americans should expect more protection of religious freedom than the wall of separation permits and less protection of religious establishments, such as churches, than the one-way protection view requires. The strongest interpretation of the two religion clauses of the First Amendment calls for two-way protection. The Free Exercise Clause protects religion from the state. The separation of church and state, supported by the Establishment Clause, serves valuable public purposes in addition to protecting the free exercise of religion. This separation protects citizens from the united power of church and state. In so doing, it helps secure space for the pursuit of public purposes that are justifiable to a wide range of religious, nonreligious, and antireligious citizens.

The two religion clauses, taken together, help provide two-way protection of church and state. To some significant extent (two-way protection is, in principle, not absolute), the two religion clauses protect religion from the state and the state from religion. Neither protection can or should be absolute because each protection taken to the extreme would deny the importance of

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14. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 105-06 (1993).

15. *Id.* at 106.

16. Michael McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMODATIONS IN PLURALIST DEMOCRACIES (Nancy L. Rosenblum ed., forthcoming 1999) (draft at 1, on file with *Washington and Lee Law Review*) (citing oral argument of attorney William Sampson in *People v. Phillips* (Court of General Sessions, City of New York 1813) (unreported case)).

the other. Religion includes religiously based beliefs; and religiously based beliefs, per se, should not be excluded from politics. To do so is to devalue a publicly defensible part of religious and political freedom. Two-way protection should focus on the separation of church and state, rather than on the separation of religiously based beliefs and politics. To defend a general right of exemption for churches from otherwise legitimate laws would devalue a publicly defensible part of political freedom, which can regulate churches along with other institutions, as long as the regulations are general and not directed against the religion itself. Zoning ordinances, for example, may regulate churches. Insisting that churches routinely be exempted from legitimate laws would devalue the political freedom of citizens.

Why separate church and state beyond what is necessary to protect religious freedom? Both political and religious freedoms are fundamental. The two freedoms can conflict. A view that resolves all conflicts in one direction, whether the direction be religious or political freedom, before considering the relative importance of what is at stake is far less morally defensible than a view that first considers the relative importance of the conflicting freedoms. Only after considering the relative importance of the conflicting freedoms does it make sense to decide whether it is better to protect the religious freedom or the political freedom at issue. The degree to which such a balancing can and should be fine-tuned remains an open question. For example, perhaps the balancing should not be fine-tuned out of recognition of the fact that courts are not capable of fine-tuning and that churches should not be subject to close scrutiny of their religious practices by the state. The balancing then can proceed by categories that do not place undue burdens on either courts or churches.

Controversies that involve issues of establishment as well as free exercise often are complex and difficult to resolve beyond reasonable disagreement. The nonabsolutist version of two-way protection that I defend certainly does not offer resolutions beyond reasonable disagreement. However, by its very nature, this version takes greater account of the competing values than does either one-way protection or an absolutist version of two-way protection.

One-way protection views the Establishment Clause as serving the cause of maximizing religious freedom and therefore as redundant with free exercise. It defends guarding churches against state interference, but it opposes guarding states against church interference except insofar as necessary to protect religious freedom. The entanglement of church and state permitted by one-way protection, I shall show, threatens the pursuit of public purposes by citizens and also (unintentionally) threatens free exercise for many individuals. It does so by offering state protection to the dominant interpretations of religious doctrines offered by the most powerful members of a religious community. Maximizing religious freedom seems to be an attractive prospect,

especially in a country like the United States where the vast majority of citizens identify themselves as religious. Therefore, I will explain why the prospect of reading the Establishment Clause as redundant with Free Exercise is dangerous to constitutional democracy, and especially dangerous to those citizens who take their religious freedom most seriously.

In the case of *People v. Philips*, decided in 1813 in a New York municipal court, the Attorney William Sampson declared that "Every citizen here is in his own country. To the protestant, it is a protestant country; to the catholic, a catholic country; and the jew, if he pleases, may establish in it his New Jerusalem."[17] Sampson's statement suggests a vision of the way some religious believers may view this country, as a place that they value only insofar as the country reflects their religious beliefs. Although one-way protection supports this viewpoint, religious and secular citizens alike should think twice before they subscribe to it. Why? We need to imagine what democratic politics would look like if it tried to combine the free exercise of religion with what might be called a politics of religious recognition, a politics that does without the two-way protection constraint separating church and state. Our imaginations can be aided by considering the politics of another country that protects religious freedom but does not ban religious establishment. Israel is such a country.

Unlike the United States, Israel is a Jewish country to some of its Jewish citizens. In light of the history of persecution that preceded the creation of the State of Israel, there are some obvious advantages to its being a Jewish state. From the perspective of its non-Jewish citizens, there are some obvious disadvantages of its being a Jewish state. I focus not on the more obvious problem of Israeli politics from the perspective not of its non-Jewish citizens, but instead on the problem of Israeli politics from the perspective of its Jewish citizens. Such a focus may help us recognize a problem of striving to make the United States more of a Christian state from the perspective of its Christian citizens.

Why is there any problem of religious establishment from the perspective of those citizens whose religious identification is being recognized by the state's establishment of religion? When the state speaks in the name of a religion, it speaks in the name of a single, "state establishment" interpretation of the religion. When Israel speaks in the name of Judaism, it speaks in the name of Orthodox Judaism over and against other interpretations of Judaism. Israeli Jews must be married by Orthodox rabbis for their marriages to be respected under the state marriage law as Jewish. If Reform or Conservative Jews in Israel want their marriage recognized as Jewish by the state, an Ortho-

17. WILLIAM SAMPSON, *People v. Philips*, *in* THE CATHOLIC QUESTION IN AMERICA 85 (1813).

dox rabbi must marry them. Otherwise their marriage is not recognized as Jewish by the state. In the United States, the state is committed to not recognizing any church as the official spokesperson for a particular religion. It is therefore the case that a Reform or Conservative Jewish marriage has no greater or lesser status in the eyes of the state than an Orthodox Jewish marriage, which has no greater or lesser status in the eyes of the state than a secular marriage. Nonestablishmentarianism preserves the equal civic status of religious and nonreligious citizens alike. From the perspective of democratic principles, such a system is a very good thing.

There is yet another problem with state recognition of religious establishments. It is a problem from the perspective of the citizens who are members of those recognized establishments. Some Israeli Jews who are Orthodox worry about state establishment of Judaism because they take religious exception to the idea that state officials can be entrusted to determine what counts as the correct practice of Orthodox Judaism. A religious state, for these Orthodox Jews, is suspect because it deforms and thereby devalues their understanding of Orthodox Judaism. As Yeshayahu Leibowitz writes:

> There can be no greater logical and moral incoherence . . . than the appearance on the political scene of a religious bloc of parties demanding "a state in accordance with the Torah," but lacking any concrete program for administering the state in accordance with halakhic [religious] norms. The result is mere clerical politics.[18]

This problem has general applicability to the proposal of state recognition of religious establishments. The more political power that religious leaders assume, the less they can be entrusted as interpreters of religious doctrine. To paraphrase Lord Acton: Power corrupts, and the combination of religious and political power corrupts absolutely. Why? Because one of the most absolute forms of power is the combined power of churches and states.

States, of course, need marriage policies, and no marriage policy can be morally neutral. Why, then, should a state not recognize the kind of marriage a majority of its citizens take to be religiously correct, provided it does not coerce anyone into getting married in the majoritarian way? In the domain of marriage policy, Israel practices one-way protection. It respects the religious freedom of all its citizens. It does not coerce anyone into an Orthodox Jewish or any other marriage. However, Israel does not ban state establishment of religion, and it therefore cannot protect the democratic state from church power. The problem with such one-way protection is not that it directly deprives anyone of religious freedom. The problem is that the state is entangled with religion in a way that is bad for the integrity of both democratic

18. YESHAYAHU LEIBOWITZ, JUDAISM, HUMAN VALUES, AND THE JEWISH STATE 169-70 (Eliezer Goldman ed., 1992).

politics and religion. A state is not the appropriate authority to answer the question of what counts as a Protestant, Catholic, or Jewish marriage.

Why is a state not the appropriate agent for answering the question of what constitutes a Protestant, Catholic, or Jewish marriage? A state that answers this question supports clerical politics in a politically dangerous and religiously degrading domain, the domain of state power. Clerics are encouraged to vie for state power for religious purposes, such as getting their church's interpretation of what counts as a Jewish, or Protestant, or Catholic marriage to be the state's interpretation. Clerical politics is more likely than not to corrupt religion, to corrupt citizens into professing doctrines they do not believe (for the sake of social recognition), and to corrupt religious leaders into claiming more power for themselves than necessary to fulfill truly religious purposes.

The more religious authorities become political authorities (or vice versa), the more likely religion is to be corrupted, and politics to become religiously divided in a way that makes it all but impossible to pursue public purposes that cut across religious divides. The more that churches can wield state power, the more pressure they can place on individuals to conform to religious orthodoxies, and the more corrupt citizens are encouraged to be, simply to gain the goodies that the state-church has to offer. Two-way protection, therefore, does not only protect nonbelievers; it also protects believers from political pressures to conform outwardly to religious orthodoxy.

IV. Two-Way Protection via a Permeable Wall of Separation

Two-way protection supports the separation of church and state at the same time as it welcomes religiously based beliefs into democratic politics on the same terms as it welcomes secularly based beliefs. The terms are that citizens have a responsibility to address each other in a way that we can reasonably be expected to accept, even if we do not share each other's religious or secular perspectives. This aspiration is a democratic one that none of us is likely to achieve fully, but it is an aspiration that the vast majority of American citizens can aim at without compromising our convictions.

Two-way protection opposes a politics of religious recognition by which a state strives to be a religious state to any or all of its citizens. Clergy of all churches should be able to marry couples in a religion and also in the eyes of the civil law. So as not to coerce any citizens into a religious marriage, governmental officials also should be able to marry couples solely in the eyes of the law. A government that practices two-way protection honors both the Establishment and Free Exercise Clauses. It takes no position on what constitutes a true Protestant, Catholic, Jewish, agnostic or atheistic marriage. When a government official, such as a justice of the peace, marries a couple, the

government does not therefore consider the married couple to be agnostics or atheists. Whether the couple is or is not religious is of absolutely no concern to the government.

Does two-way protection, then, support a wall of separation between religion and politics? Two-way protection supports a wall of separation, but not an impermeable wall. The wall is permeable in at least two different senses. First, two-way protection distinguishes between a wall separating church and state, which it supports, and a wall separating religious beliefs and politics, which it opposes. The basic constitutional reasons for separating the institutional power of church and state are consistent with admitting religiously based beliefs into politics on the same terms as any other beliefs. Second, two-way protection allows for exceptions to the rule that religious believers should not be exempt from otherwise legitimate laws just because of their religious beliefs.

Why does the separation of church and state, supported by two-way protection, admit any exemptions for religious believers from otherwise legitimate laws? Sometimes exceptions to legitimate laws for religious beliefs do no damage to the basic purpose of the law and not making an exception would be discriminatory. This answer raises another question, to which two-way protection also provides clues to an answer: When may exceptions to otherwise legitimate laws be made on the basis of religious beliefs? A reasonable answer is that exemptions may be justified in those cases in which the failure to exempt citizens would create a runaway precedent, undermining the basic purpose of the law and entailing invidious discrimination against a group of citizens who hold certain religious beliefs.

Consider the 1990 case of *Employment Division v. Smith*,[19] which led Congress to pass the Religious Freedom Restoration Act.[20] Among the facts of the Smith case were Oregon laws that proscribed the use of a wide range of hallucinatory drugs, including peyote, and laws that denied unemployment compensation to anyone who was fired from a job because of a legal violation. There was no evidence whatsoever that the intent of the laws in question was to discriminate against any religious group. The drug laws and the unemployment laws were what the Court calls "facially neutral" – the laws did not discriminate on their face against any religion – and they also were neutral in intent – they did not reflect the intention to discriminate against any religion.

What, then, could be wrong with the Smith decision, which upheld Oregon's application of the law to members of the Native American Church? The

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19. 494 U.S. 872 (1990).

20. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (finding Oregon's prohibition against ingestion of peyote constitutional and deciding that state's denial of unemployment compensation to person dismissed for use of peyote was constitutional).

law made no exception for the ceremonial use of peyote by religious believers as part of a well-established religious ceremony (although the state did not attempt to enforce the law). The law that was enforced in the Smith case was Oregon's unemployment compensation law, which denied benefits to anyone fired because of a violation of criminal law. The Native American Church has long prescribed peyote for ceremonial use only. In some cases, and Smith may be such a case, not exempting religious believers implicitly entails discrimination.

The United States has a history of exempting members of mainstream religious groups from legal restrictions – such as exempting children from state liquor laws. Oregon itself has exempted religious believers from its liquor laws. The religious believers who need to be exempted from liquor laws for religious purposes are overwhelmingly Christian. In light of this history of making exemptions when mainstream religions are burdened by a law and the exemption will not undermine the main purpose of the law, there is a strong argument for requiring an exemption to the drug law for peyote use for ceremonial purposes only. Making no explicit exception to Oregon's drug law for members of the Native American Church, it reasonably may be claimed, constitutes discrimination against a religious minority. This argument is strengthened in light of the unemployment benefits that may then be denied to members of the minority church who otherwise are law-abiding citizens. It is further strengthened by the fact that permitting peyote use in religious ceremonies would no more undermine the law's primary aim than permitting the use of wine in religious ceremonies would undermine the primary aim of state liquor laws.

The argument in favor of making exemptions to some facially neutral laws for religious believers is, therefore, an argument based on equal protection combined with religious free exercise. The argument can be summarized as follows: Oregon state officials would not have so burdened the practice of a mainstream religion as it burdened the practice of the Native American church by refusing to make an exception to its drug law or unemployment benefits for the sacramental use of peyote. This argument relies on a counterfactual, since there is not an exact parallel between exemption from a drug law and exemption from a drinking law. Nonetheless, the analogy is close enough to call into question the justice of the Smith decision.

Justice Scalia offers the strongest defense of the Court's refusal to require an exemption in the Smith case. He does not deny that exempting members of the Native American church would be fairer than not exempting them. He admits that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[21] He argues, however, for judicial restraint in deference to

21. *Id.* at 890.

democracy and in avoidance of anarchy. He concludes for the Court majority that "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[22] My defense of two-way protection offers an alternative to Scalia's standard while similarly respecting democracy and the rule of law. According to the perspective of two-way protection, the Court should not routinely override legislatures. On this, there is no argument with Scalia's position. However, neither should the Court routinely defer to legislatures when it concludes that a law substantially burdens religious citizens. The Court should judge whether an exemption is constitutionally mandated by asking the following question: Has the legislature exempted members of more mainstream religious groups from functionally equivalent sorts of prohibitions, such as the prohibition on the use of liquor by children in religious ceremonies by mainstream religious groups? This inquiry incorporates concern for the rule of law and religious freedom without exaggerating the risk of anarchy or dangerous precedent when exemptions are made for ceremonial religious practices. The risk of a runaway precedent is slight, and need for a nonmajoritarian institution to protect religious minorities against discrimination is great.

Why, then, should we not settle for protecting church from state, as one-way protection recommends, rather than also protecting states from churches, as two-way protection recommends? Why do I argue for the need for a nonabsolutist version of two-way protection? Democratic politics is more defensible when it is protected from churches competing for state power for three reasons. First, when the stakes of victory are thought to be eternal salvation, the competition too easily escalates into depriving minorities of life or liberty. Second, when churches compete for state power, there are far fewer incentives for citizens to pursue public purposes that cut across religious and antireligious lines. Third, when churches compete for state power, they readily use that power to restrict the religious freedom of their own members, which the state will then be helpless to protect because it has become so entangled with the power of churches.

A democracy that protects politics from religion, as well as religion from politics, therefore serves three purposes. It helps protect the church from state power. It helps protect the state from church power. It therefore also helps protect the freedom of individuals from the united power of both. Such a democracy does not devalue religious views in politics. Religious views may

22. *Id.* Scalia also noted that, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.*

be morally insightful, dangerous, or benign, depending on how responsibly religious citizens speak to their fellow citizens, including those who do not share their religion. Whether or not we are religious, we all should take responsibility for judging all views in politics, whatever their origins, on their public merits. To make constitutional democracy work well, religious and nonreligious citizens alike need to take responsibility for practicing an economy of moral disagreement when we argue about mutually binding laws and public policies.

Two-way protection treats all citizens, regardless of their religion, as civic equals, and it expects all citizens as such to accept civic responsibility for their politics. Two-way protection views churches and states alike as in the service of individuals, and therefore avoids a politics that would treat individuals as if they were in the service of these powerful institutions. By protecting churches against the state, and the state against churches, American constitutional democracy can respect the religious and political liberties of religious and nonreligious citizens alike. In so doing, it recognizes that civic responsibility must accompany religious freedom.