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Philip Hamburger
Columbia Law School

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EXCLUSION AND EQUALITY: HOW EXCLUSION FROM THE POLITICAL PROCESS RENDERS RELIGIOUS LIBERTY UNEQUAL

*Philip Hamburger**

ABSTRACT

Exclusion from the political process is a central question in American law. Thus far, however, it has not been recognized how religious Americans are excluded from the political process and what this means for religious equality.

Put simply, both administrative lawmaking and § 501(c)(3) of the Internal Revenue Code substantially exclude religious Americans from the political process that produces laws. As a result, apparently equal laws are apt, in reality, to be unequal for religious Americans. Political exclusion threatens religious equality.

The primary practical conclusion concerns administrative law. It will be seen that this sort of “law” is made through a process that systematically excludes religious Americans and their concerns and that it therefore is apt to be religiously unequal. Courts should recognize this inequality and so should take different approaches to administrative and statutory burdens on religion.

Conceptually, the implications are even broader. The free exercise of religion tends to be understood in terms of a binary choice between equality or exemption. The equality, however, is undermined by the exclusion of religious Americans from the political process. The conceptual framework for understanding religious liberty should therefore be expanded to recognize how exclusion tilts the entire game, giving even facially equal laws an underlying slant.

INTRODUCTION

When individuals or groups are denied full participation in the political process, the resulting laws, even if formally equal, can easily become unequal and oppressive, and this has become a serious danger for religious liberty. Religious Americans are substantially excluded from the political process that produces laws, and this prompts sobering questions about the reality of religious equality. Put simply, political exclusion threatens religious equality.

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The exclusion is two-fold. First, the exclusion arises from the growth of federal administrative power, which leaves Americans, including religious Americans, no opportunity to vote for or against their administrative lawmakers. Second, the exclusion comes from § 501(c)(3) of the Internal Revenue Code.¹ As a result of this section, even when law is made in Congress, religious organizations are restricted in their petitioning and campaigning for or against lawmakers. In two ways, therefore, the law broadly excludes religious Americans and their organizations from the political process that shapes lawmaking. Americans thereby have lost essential mechanisms for persuading their lawmakers to avoid burdening their religious beliefs.

Religious liberty thus comes with an unexpected slant. Courts blithely assume that America offers a flat or even legal landscape—a broad and equitable surface on which all Americans can enjoy rights equally, regardless of their religion. The underlying exclusion, however, tilts the entire game, so that many apparently equal laws actually lean against religion.

This exclusion hollows out the religious equality guaranteed by the Free Exercise Clause. Even where the courts protect this equality, the exclusion is apt to render laws unequal and oppressive.

As a practical matter, the exclusion raises questions as to whether even facially equal laws—laws that do not discriminate on the basis of religion—are always really equal. On account of the systematic character of the administrative exclusion, administrative law is particularly apt to be slanted against religious Americans, and this Article therefore suggests that, at the very least, the courts should distinguish between administrative and statutory burdens on religion.

Conceptually, the exclusion points to the need for a more expansive understanding of religious liberty. The central question about the free exercise of religion is usually framed in binary terms of *exemption* or *equality*—in terms of one variant or another of either a freedom *from* equal laws on account of one's religion or a freedom *under* equal laws regardless of one's religion.² The conceptual problem, however, turns out to be more complicated, for the equality is undermined by exclusion. Therefore, in addition to the constitutional choices between exemption and equality, one must also consider the role of *exclusion*.

1 26 U.S.C. § 501(c)(3) (2012).

2 The literature is enormous. The leading argument for a constitutional right of exemption is Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Among the arguments to the contrary are: Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005) [hereinafter Hamburger, *Religious Freedom*] (arguing contra); Philip Hamburger, *More is Less*, 90 VA. L. REV. 835 (2004) [hereinafter Hamburger, *More is Less*]; Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) [hereinafter Hamburger, *Right of Religious Exemption*].

General and Focused. The exclusion of religious Americans from the political process comes in administrative power and in federal taxation. Put another way, it is both general and focused.

The general exclusion arises from the inability of Americans to vote for or against their administrative lawmakers. For example, the administrators who adopt rules, interpretations, guidance documents, exemptions, and waivers are unelected by Americans. Of course, this broad exclusion of all Americans may not initially seem especially burdensome on religious Americans, but consider the constitutional and administrative context. On the one hand, the Constitution expressly protects religious liberty. On the other hand, administrative lawmaking is designed to be “rational” and “scientific” rather than responsive to political pressures, and this has religious implications. Although administrative lawmaking is not really very rational or scientific, its self-conscious rationalism and scientism leads administrative lawmakers to be relatively indifferent, if not unsympathetic to religious concerns, and the general exclusion of Americans from choosing their administrative lawmakers therefore comes with a distinctively hard edge for many religious Americans. This is not to say that lawmaking should be antagonistic to science or otherwise irrational, let alone that it should be religious, but rather that administrative lawmakers are not typically as sensitive to religious sensibilities as are representative lawmakers—the sort of lawmakers that Americans have a right to expect in a republic. Administrative lawmaking thus excludes religious Americans from the sort of participation in the political process by which they ordinarily could protect themselves from religiously burdensome laws.

A more focused exclusion comes in § 501(c)(3) of the Internal Revenue Code, which bars religious, educational, and charitable organizations from campaigning and from much petitioning of government.³ This exclusion singles out religious organizations, together with other idealistic organizations, for restrictions on their constitutional rights of political speech and of assembling to petition. Business and labor organizations, which represent particular interests and thus (in the government’s view) are not purely idealistic, are not subject to such severe restrictions on their constitutional rights. Section 501(c)(3) thus distinguishes between idealistic and other organizations. And in thereby suppressing the petitioning and political speech of churches, it deprives religious Americans of essential channels for avoiding the religious burdens of statutory and administrative constraints. The cost (it

3 The section excludes business organizations by enumerating [c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual

26 U.S.C. § 501(c)(3). Labor organizations are covered by § 501(c)(5).

will be seen) is apt to be especially high for religious minorities who are theologically orthodox or who otherwise have beliefs that leave them relatively dependent on their churches for political participation.

Both types of exclusion can be illustrated by the regulations underlying the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.* The Department of Health and Human Services (HHS) issued administrative rules under the Affordable Care Act (ACA) requiring employers to provide their employees with health insurance covering contraception.⁴ In response, Hobby Lobby—a closely held business corporation—protested that it had religious objections to providing such insurance.⁵ Religious Americans, including those associated with Hobby Lobby, traditionally might have used the political process to avoid a religiously burdensome requirement of this sort. Under administrative power, however, they cannot vote for their administrative lawmakers; under § 501(c)(3), moreover, they cannot use their religious organizations to campaign or substantially to lobby against such requirements. Religious Americans thereby are significantly excluded from the political process, and they consequently must live under laws that, although equal in form, are not really equal.⁶

4 Pub. L. No. 111-148, 124 Stat. 119 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014) (citing 42 U.S.C. § 300gg-13(a)(4)). The Court held that a closely held business corporation whose owners objected to the contraception mandate imposed by regulations issued under the Affordable Care Act (ACA) are exempted from the regulations by the Religious Freedom Restoration Act. *Id.* at 2785.

5 *Hobby Lobby*, 134 S. Ct. at 2755.

6 Some basic definitions should be noted here.

“Administrative lawmaking” is understood here to mean all administrative edicts that serve a lawmaking function and that are binding on the public. Administrative rules or regulations are the central example of such lawmaking, but the relevant pronouncements also include lawmaking interpretation and guidance and all administrative exemptions, waivers, and adjudications that adjust any such rule, interpretation, or guidance or that otherwise serve to make law.

The word “organization” is used here as a convenient label for any society or association, whether or not incorporated.

When summarizing § 501(c)(3) in concrete terms, this Article speaks of “churches,” “schools,” and “charities,” and it thereby means any such organization “no part of the net earnings of which inures to the benefit of any private shareholder or individual.” 26 U.S.C. § 501(c)(3).

The term “church” is used in this Article to mean any religious association or organization, regardless of its religion or size, and regardless of whether it is a particular congregation or a larger religious association or organization.

“Religious equality” (as already suggested) is used here as a shorthand for a freedom under equal laws, regardless of one’s religion—meaning (as explained in Part II) a freedom from penalty or unequal legal constraint. Of course, freedom under equal laws as presented by this Article is not the only possible concept that could be described as religious equality. For example, even a constitutional right of religious exemption—a right to be free from equal laws on account of one’s religion—could be described as equal in that it is guaranteed equally to all Americans. From this perspective, however, almost any constitutional guarantee of religious liberty, even an overtly discriminatory guarantee, could be described as equal.

Different Paths for Oppression. The problem becomes even more sobering when one places it in the history of religious oppression. Over the centuries, religious oppression has shifted paths.

The route for oppression used to be through unequal legal constraints. In the seventeenth and eighteenth centuries, England and most American colonies unabashedly preserved their power to impose constraints on the basis of religious dissent.⁷ The U.S. Constitution, however, and eventually most state constitutions, barred such discrimination, and these constitutions thereby established freedom under equal laws—meaning that persons could not be constrained on account of their religion.⁸

Religious oppression, however, did not disappear; instead, it took other avenues. Although the laws could not constrain unequally, there remained the question of who would make the laws. Many Protestants increasingly worried about the political participation of Catholics, and repeatedly therefore, from the eighteenth century to the twentieth, many Protestants attempted to prevent Catholics from holding office and even occasionally attempted to prevent them from voting.⁹ When these paths were no longer possible, many Protestants (in the early 1920s) sought compulsory education of future voters in public schools or attempted (for example, in 1928 and 1960) to sway voters with systematic appeals to prejudice.¹⁰

Fortunately, there is now legal equality in suffrage and office holding, and overt appeals to religious prejudice are widely (even if not consistently) viewed as tasteless. But even with legal equality in religious belief, in qualifications for office, and in voting, and even with increasing social equality in rejections of prejudice, there has remained much anxiety about religion. Although this fearfulness has often remained focused on the Catholic Church, most of the anxiety has also extended out to a much broader range of religious and other idealistic organizations, and it has found a new outlet in barriers to political participation: the exclusion of Americans from voting for administrative lawmakers and § 501(c)(3)'s limits on campaigning and petitioning. Barriers to Catholic office holding and voting have thus been replaced with more general restrictions on petitioning and speech and even broader barriers in the removal of lawmaking from the legislature.

On the whole, the law nowadays is religiously equal—in that it does not impose restraints on account of religion and thus allows freedom under equal laws—but it is politically exclusionary. Even while the law declares itself to be equal as to religion, it is unequal in a key point: it deprives Americans, notably religious Americans, of the political participation that would allow them to resist equal but oppressive laws.

7 Hamburger, *More is Less*, *supra* note 2, at 840–42, 850–53; Hamburger, *Right of Religious Exemption*, *supra* note 2, at 918–23. Both articles observe how England, its colonies, and some states protected toleration, meaning a conditional freedom, thus leaving room for penalties on dissenting religion, where the conditions were not met.

8 U.S. CONST. amend. I.

9 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 235, 404–05 (2002).

10 *Id.*

This is a mockery of the law's much vaunted equality. The law guarantees religious Americans legal equality under the Free Exercise Clause. It more generally secures equal protection of the laws under the Fourteenth Amendment. At the same time, however, it excludes Americans, not least religious Americans, from much of the political process, and it thereby leaves them vulnerable to laws that come down hard on their religious beliefs. Even equal laws thus are apt to be unequal.¹¹

Prior Scholarship. Exclusion from the political process is not entirely a new question for religious liberty. But the way in which exclusion from the political process undermines the Constitution's religious liberty has not thus far been recognized.

In his famous footnote in *United States v. Carolene Products Co.*, Justice Stone worried about exclusions from the political process, such as "restrictions upon the right to vote" and "restraints upon the dissemination of information."¹² He also feared that "statutes directed at particular religious . . . minorities" and other "prejudice against discrete and insular minorities" might have the effect of "curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities."¹³

Stone's footnote is an interesting recognition of the political process and some basic threats to it, but it is only a beginning. First, although Stone acknowledged the danger for insular and discrete minorities, he missed the danger for more complexly defined groups. For example, as observed by Bruce Ackerman, judges often should be concerned about "anonymous and diffuse" minorities.¹⁴ Of special interest here, when Stone mentioned attacks on particular religious minorities, he ignored the growing danger of more ecumenical or liberal assaults on churches and idealistic groups in general. Second, and even more basically, he offered only a generic theory about exclusion from the political process. He thereby failed to recognize that restrictions on political participation might alter the character of specific constitutional rights—in this instance, the free exercise of religion. Thus, at least for purposes of this Article, Stone's approach in *Carolene Products* is too narrow in its understanding of excluded minorities and too generic in not focusing on the First Amendment.

This Article therefore takes a very different approach. Rather than rely on Stone's theory in *Carolene Products*, it rests more concretely on the Consti-

11 Similarly, costs under equal laws can be observed in the exclusion of women and blacks from voting. Such exclusion often left these groups at a profound disadvantage. And the exclusion hurt these groups not merely because of discriminatory laws, but perhaps even more frequently because of laws that were nondiscriminatory, or equal, on their face. Not having been made with the direct input of women and blacks, even equal laws were apt to bear down hard on them.

12 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

13 *Id.* at 152 n.4.

14 Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L.R. 713, 724 (1995).

tution's guarantee of free exercise.¹⁵ And rather than confine its analysis to any one "insular and discrete" religious minority, it explores the exclusion of a wider range of religious Americans.

This approach to exclusion under the Free Exercise Clause stands in sharp contrast to the work of Abner Greene. His scholarship focuses on exclusion in the context of the Constitution's religious liberty, but rather than recognize how exclusion from the political process undermines the First Amendment's religious liberty, his scholarship argues that exclusion is the foundation of this freedom. According to Greene, if religious Americans could enact legislation "for the express purpose of advancing the values believed to be commanded by religion," this would result in "the exclusion of nonbelievers from meaningful political debate."¹⁶ The Establishment Clause, he adds, solves this problem by making it "unconstitutional to base law expressly on religious faith."¹⁷ And because this solution in turn "excludes religious believers from full political participation," the Free Exercise Clause "mitigates the effects of that exclusion" by securing religious exemptions from law.¹⁸ Each step of this theory seems dubious, but more to the point here, the theory treats exclusion as the basis for the Constitution's religious liberty, not as a threat to it.¹⁹

In fact, exclusion from the political process is a profound threat to religious liberty. For more than two decades, judges and scholars have tried to figure out whether the Free Exercise Clause guarantees equality or exemption—whether it secures a freedom under equal laws, without regard to one's religion, or a freedom from equal laws precisely on account of one's religion. In addition, however, to the choice between equality and exemption, there is another factor, exclusion. The exclusion of Americans from participation in the political process transforms the Constitution's apparently equal liberty into something that, in reality, is grossly unequal.

Implications for Free Exercise of Religion. The exclusion of Americans from the political process has profound implications for the First Amendment's free exercise of religion. This religious liberty usually is considered on its own, as if it existed in a political vacuum, without any consideration of how it

15 Of course, this Article has implications for Stone's theory in *Carolene Products*, because if the theory is to remain even theoretically persuasive, judges cannot ignore its application to the exclusion of religious Americans. The argument here, however, rests merely on the Constitution's guarantee of free exercise.

16 Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613–14 (1992).

17 *Id.* at 1614.

18 *Id.*; see also ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 149–57 (2012).

19 Greene's argument seems mistaken (a) in assuming that religious participation in legislation would result in "the exclusion of nonbelievers from meaningful political debate," (b) in assuming that the Establishment Clause makes it unconstitutional "to base law expressly on religious faith," and (c) in assuming that that the Free Exercise Clause secures religious exemptions from law. Greene, *supra* note 18, at 1614.

is altered by barriers to political participation. It therefore is time to examine what happens when the First Amendment assures freedom under equal laws, but the government excludes Americans from the process of making law. On account of this exclusion, even religious equality is apt to become oppressive.

The need to understand the implications becomes especially pressing because of the Supreme Court's decision in *Employment Division v. Smith*.²⁰ Justice Scalia's opinion for the majority of the Court concludes that, under the Free Exercise Clause, there typically is no right of religious exemption from general laws.²¹ His opinion, in other words, understands the Free Exercise Clause to provide for equality rather than exemption—for freedom under equal laws, regardless of one's religion, rather than freedom from equal laws on account of one's religion. Even in the best of circumstances, however, equal laws will rub against the religious views of some persons, and Justice Scalia's opinion therefore aptly notes (as will be seen in Part II) that religious liberty rests on a combination of legal and political protection. In courts Americans can claim constitutional equality, and in legislatures they can seek statutory exemptions and other statutory relief. Protection from the burdens of general laws thus comes in the political process.²²

The law, however, significantly excludes Americans and especially religious Americans from this process. It therefore must be asked how the Free Exercise Clause and the doctrine in *Smith* should be applied where the courts are open but the political process is not. In such circumstances, even facially equal laws are not always really equal. Therefore (as will be seen in Part VI) courts should, at the very least, distinguish between statutory and administrative burdens on religious belief.

Argument. This Article most centrally argues that political exclusion has undermined religious equality. To be precise, the freedom under equal laws, regardless of one's religion, loses much of its value in the context of the administrative and the § 501(c)(3) exclusions from the political process. Indeed, because of the exclusions, apparently equal laws are apt to be unequal and oppressive.

The organization follows six main points. First, the argument about exclusion comes with some basic caveats and counter-examples. Second, the Free Exercise Clause (as understood traditionally and in *Smith*) rests on the political logic that religious Americans can protect themselves from oppression under equal laws by engaging in politics. This, however, assumes that religious Americans enjoy full and equal political participation. In fact, third, administrative lawmaking excludes all Americans from political participation, and it excludes religious American with a distinctive edge. Fourth, § 501(c)(3) denies political participation to religious and other idealistic organizations. Fifth, § 501(c)(3)'s exclusion of religious organizations from the political process is part of a broader tendency to impose narrowly special-

20 *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

21 *Id.* at 888–89.

22 *Id.* at 890.

ized ends on idealistic organizations in ways that treat them and their members as only fractions of persons with only fractions of rights, and in the case of religious organizations, the effect is to curtail the freedom of individuals to organize in politics in defense of religious freedom. Having shown how religious Americans have lost their means of avoiding oppression under equal laws, this Article, in Part VI, considers whether, as a result of the exclusion, even facially equal laws are sometimes in fact religiously unequal, and on this basis, it suggests possible judicial remedies, including different approaches to administrative and statutory burdens on religion.

I. CAVEATS AND COUNTER-EXAMPLES

The argument here about exclusions comes with caveats and counter-examples. Rather than peripheral, these cautions are at the core of the argument, for they simultaneously demarcate the limits of the claim and suggest its strength.

A. *Caveats and Clarifications*

Some basic caveats can clarify the argument about exclusion.²³

Broad Exclusions and Narrower Effects. When this Article observes that religious Americans, or their organizations, are excluded from the political process, it does not mean that they are the only ones excluded. Administrative power excludes all Americans from voting for their administrative lawmakers, and although § 501(c)(3) mentions religious organizations, it also mentions educational and charitable organizations. These exclusions therefore have a wide range of consequences, not all of which are religious.

From a sociological perspective, the exclusion of Americans from voting for their administrative lawmakers has serious consequences for local, class, and other interests. From a constitutional point of view, § 501(c)(3)'s exclusion of idealistic organizations is a problem not only for religious liberty but also for freedom of speech and the press.²⁴

This Article, however, focuses only on the religious consequences—indeed, only on a narrow range of religious consequences: the implications for the religious liberty enjoyed by Americans under the Free Exercise Clause.²⁵ Whatever their effects in excluding nonreligious Americans from

²³ Note also the definitions in *supra* note 6.

²⁴ As will be discussed below in Parts IV and V, § 501(c)(3) excludes not only religious organizations but also educational and charitable organizations—the result being to tamp down the role of idealistic organizations in American politics, as if their speech were more dangerous and worrisome than that of business organizations and labor unions, let alone political parties. The effects of the exclusion on speech rights, however, is not the subject of this study.

²⁵ This Article only briefly touches on the consequences of § 501(c)(3) for the freedom enjoyed under the Establishment Clause. Tellingly, as will be seen, the section's restrictions arose in the context of theologically liberal anxieties, and these restrictions have undermined the capacity of relatively orthodox religious organizations to resist theo-

the political process, administrative power and § 501(c)(3) severely diminish the ability of religious Americans to protect their interests in the religious equality guaranteed by the Free Exercise Clause.²⁶

Only Partial Exclusion. When this Article says that religious Americans or their organizations are excluded from the political process, it means not that they are entirely excluded, but merely that they are unequally or otherwise significantly excluded. Religious Americans and their organizations still have many avenues for securing their interests in congressional and administrative power. But religious Americans now are much limited in their central, constitutionally established paths for securing their legislative interests—namely, in their right of political speech in campaigns, their right to assemble to petition, and their right to vote for their lawmakers (at least when law is of the administrative kind). They thus are excluded from the political process—not entirely, but very significantly.

Differential Effects. In discussing exclusion, this Article generalizes about Americans and especially about religious Americans, but it should be understood to do so with a caveat. Not all Americans, or even religious Americans, are equally excluded from the political process or suffer equally. And the differential effects accentuate the problem.

All Americans are excluded from voting for their administrative lawmakers, but only religious Americans thereby suffer in their free exercise interests. Even among religious Americans, there are differences, for the costs are apt to be particularly high among the relatively orthodox, whose religious beliefs are particularly apt to depart in salient ways from the centralized rationalism and the scientism (one cannot quite call it rationality and science) that prevails among administrators.

Similarly, § 501(c)(3) has differential effects—even among religious organizations. All religious organizations are excluded from campaigning and substantial petitioning, but religious Americans who are particularly dependent on their own religious institutions when engaging in politics are especially likely to suffer as a result of § 501(c)(3).

Consider, for example, the effects on at least some of the orthodox. Americans with theologically liberal beliefs are not particularly confined to

logically liberal interpretations of the Establishment Clause—not to mention their capacity to influence the laws adopted under those interpretations. *See* Section V.C. Like the implications for speech rights, however, the Establishment Clause implications deserve much more attention than they can receive here.

26 That broad exclusions have narrower effects should not be a surprise. Prior to the mid-nineteenth century, some states excluded unpropertied white men from voting, and although this adversely affected all such men, it also had more focused results. For example, under the exclusions of unpropertied white men, equal laws tended to protect farmers more than mere employees. Only after unpropertied men secured the right to vote did employees gradually secure greater legislative protection. Similarly, in England, only after the passage of the 1832 Reform Bill did Parliament adopt legislation reforming workplaces.

working through their own churches.²⁷ Substantively, they often have beliefs aligned with popular political views; procedurally, they rarely feel obliged to pursue their religious beliefs within their own churches' lines of authority; and for both reasons, they are apt to have other avenues for protecting their beliefs. In contrast, religious Americans with relatively orthodox views often cannot so easily bring their religious beliefs into politics. Procedurally, they tend to feel bound to the religious authority of their churches, and some therefore feel obliged to strive for religious liberty through their churches. Substantively, moreover, their orthodoxy tends to be a mode of setting themselves apart from prevailing views, and it therefore can stand in the way of their forming broad political alliances. On both grounds, there is reason to think that they are more likely than theological liberals to be dependent on their churches for religious engagement in politics. Section 501(c)(3)'s exclusion thus appears to have distinctively severe consequences for at least some religiously orthodox Americans.

Of course, if one associates orthodoxy with majority views or conformity to such views, one will not be apt to worry about the fate of the orthodox. In the contemporary America, however—a very diverse society that has long tended toward theological liberalism—orthodoxy is apt to be the stance of minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views. Put simply, in a theologically liberal society, orthodoxy is unorthodox.

The exclusion, however, is not confined to some of the orthodox, for it more generally affects all who are dependent on their own churches for bringing their religious concerns into the political sphere, including the non-orthodox whose religious beliefs are not easily aligned with popular political opinion. Such persons can be relatively dependent on their own churches for pursuing their religious interests in politics and therefore are more excluded than others.

The exclusion thus comes with theological discrimination—not simply against the religious, but more precisely against the relatively orthodox and others who are dependent on their own churches in politics. Consequently, although the exclusion's effects are not uniform, this is not to say they are insubstantial or that they do not seriously affect religion. On the contrary, precisely because the exclusion tends to be most effective in cutting some minority religious beliefs out the political process, it is particularly worrisome.

Federal Rather than State Exclusion. This Article focuses on the exclusion of religious Americans from the federal political process—on the barriers to their protecting themselves from religiously burdensome lawmaking by Congress or federal administrative agencies. Obviously, religious Americans are similarly excluded from state political processes, and the argument here

27 In light of this Article's use of the word "church" (explained *supra*, note 6), the relatively orthodox Americans discussed here include not only some Christians but also some Jews, some Muslims, and so forth.

could therefore be extended, with some variation, to the states. For simplicity's sake, however, this Article confines itself to exclusion from the federal political process.

Anti-Catholicism Only a Background Explanation. In explaining the exclusion imposed by § 501(c)(3), this Article harks back to the section's cultural origins, including aspects of anti-Catholicism. But the argument is not that anything as narrow as anti-Catholicism produced § 501(c)(3). On the contrary, although anti-Catholicism supplied the model and the vocabulary for the exclusion carried out through § 501(c)(3), the motivating anxiety extended out to a broader theologically liberal fear about a wide range of religious and other idealistic organizations. The anti-Catholicism thus reveals an important historical foundation, but (as will be seen in Part IV) the concerns that animated the adoption of § 501(c)(3)'s restrictions reached much further.

Limited Role of Constitutional Arguments. In making its broad argument about exclusion and equality, this Article does not delve much into the constitutional arguments against administrative power or § 501(c)(3). The constitutional problems with these things are interesting. The focus here, however, is on the larger problem that administrative power and § 501(c)(3) exclude religious Americans from political participation and thereby limit their capacity to protect themselves under equal laws. It is especially important for this to be understood by readers who are unpersuaded by the constitutional objections. One can run from the particular constitutional difficulties, but one cannot hide from the reality of exclusion and its significance for equality.

B. Counter-Examples and Complexity

Throughout this Article, counter-examples will come to mind. And this is to be expected, for although religious Americans and their organizations are excluded from political participation in some ways, they remain able to participate in other ways. The results on the ground are therefore complex. But the existence of counter-examples and complexity does not mean there is no exclusion or that it does not undermine religious equality.

One sort of counter-example can be found in political alliances. Many roughly orthodox Americans (whether more or less Calvinist Christians, Orthodox Jews, or others) ally themselves with the Republican Party, and many more or less theologically liberal Americans (whether liberal Christians, Reform Jews, or others) ally themselves with the Democratic Party.²⁸

28 Of course, such theological labels mean little except in context. For example, many evangelicals are theologically liberal by traditional standards, but could be considered, relatively, to have some sense of orthodoxy when they believe in the inerrancy of scripture. Although many theologically orthodox Jews speak of themselves as Orthodox, some do not, and large numbers of theologically liberal Jews think of themselves as part of the

These broad (and often overstated) alliances, however, touch merely the surface of religious engagement in politics.

As already hinted, the exclusion of religious Americans from the political process has different consequences for different groups. Individuals who do not feel obliged to work through their churches or whose beliefs are sufficiently aligned with popular political views—that is, most theologically liberal individuals and many others—can often rely on nonreligious forces in the society to protect their beliefs from federal law. Less extensively, but still on a broad scale, the religious groups—both liberal and orthodox—that are large enough (at least within the lines of electoral districts) and that are at least roughly aligned with popular political views have the opportunity to form effective alliances with national political parties.

Indeed, precisely because churches are excluded from direct participation in politics, such religious groups have added reasons to seek party alliances. Thus, even at a time when many hope for diminished alliances between religious groups and political parties, the exclusion probably encourages religious groups to seek out parties as conduits for their religious views. It may be doubted whether the resulting pressures for the assimilation of religious and political views are really desirable on either side, but the political parties offer at least some religious groups a forceful, albeit narrow, avenue for political participation.

At the same time, one must worry about the host of other groups that are more dependent on their churches to express their religious beliefs in politics. Whereas the exclusion may push some Americans into the hands of the political parties, it leaves many others relatively dependent on their churches for religious participation in elections and legislation. Consider the fate of Americans whose theological orthodoxy, politically unconventional views, or small numbers leave them outside the ambit of religious alliances with political parties. They cannot expect much from the parties, and when they seek to participate on their own, they find that they are excluded: They cannot vote for their administrative lawmakers, they cannot speak through their churches in legislative campaigns, and they cannot substantially devote themselves in their churches to petitioning. They have the First Amendment freedom of living under equal laws—meaning that on the whole they are not penalized on account of their religion—except that they are excluded from the political process that makes equal laws.

Thus, rather than disprove the exclusion, theological alliances with political parties show the complexity of the situation. Of course, religious Americans and their organizations have sometimes succeeded in protecting themselves through party alliances, but at the same time they have been

Conservative movement, the Reform movement, or simply as unattached—not as theologically liberal. As for Muslims, the word “orthodox” is rarely used. Unsurprisingly, the meaning of the word often becomes increasingly unclear as one moves away from the traditions in which it has familiar usage. Nonetheless, although most Americans do not primarily describe themselves as theologically orthodox or liberal, these labels still are revealing.

severely excluded from the political process, and this has particularly fateful consequences for the religious minorities who are most dependent on their churches for engaging in politics.

A second type of counter-example that cuts against this Article's argument about exclusion can be found in the success of some statutory exemptions. Even before the Supreme Court in *Smith* backed away from a constitutional right of religious exemption, there were occasions when the Court sometimes refused to find such an exemption, but Congress responded by granting a statutory exemption. In *Goldman v. Weinberger*, a Jewish Air Force officer objected to Air Force regulations barring headgear indoors, and after the Court upheld the regulations, Congress offered statutory relief.²⁹ In *Lyng v. Northwest Cemetery*, Native Americans objected to federal plans to build a timber road on federal land sacred to Native Americans, and when the Court upheld the plan, Congress protected the land by statute.³⁰ Most dramatically, shortly after the *Smith* decision, Congress adopted the Religious Freedom Restoration Act.³¹ And when the application of this statute to the states was questioned by the Court, Congress passed the Religious Land Use and Institutionalized Persons Act.³² Thus, at least during the heyday of late twentieth-century evangelical participation in politics, there were instances when religious Americans successfully obtained legislative relief.

Tellingly, however, these were situations in which religious objections to law enjoyed widespread sympathy from both right and left.³³ On many issues, religious Americans and their organizations increasingly cannot mus-

29 *Goldman v. Weinberger*, 475 U.S. 503 (1986); see National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086-87 (1987).

30 *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see Smith River National Recreation Area Act, 16 U.S.C. §§ 460bbb-460bbb-11 (2012); Wilderness Act, 16 U.S.C. §§ 1131-1136.

31 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

32 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5.

33 As put by J. Brent Walker of the Baptist Joint Committee, the Religious Freedom Restoration Act was secured by "a coalition of religious and civil liberties groups" that "spanned the religious and political spectrum from left to right: evangelicals and mainline Protestants, Jews and Muslims, Roman Catholics and Lutherans, Sikhs and Scientologists, and the ACLU and the Traditional Values Coalition." J. Brent Walker, *Remembering the Origins of RFRA*, REPORT FROM THE CAPITAL, Oct. 2013, at 3, available at <http://bjconline.org/wp-content/uploads/2014/06/October-2013-RFTC.pdf>. They "put aside their theological and political disagreements and former weapons of rhetorical warfare to join forces." *Id.*

The provision of the National Defense Authorization Act that provided relief in situations such as *Goldman* was only a small part of large bill, but it was adopted by a voice vote of the whole House of Representatives. National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, 101 Stat. 1019, 1086-1087; see 133 CONG. REC. 11851-53 (May 8, 1987). In getting relief from the decision in *Lyng*, Native Americans had powerful allies

ter such support. Especially when they seek to protect relatively orthodox beliefs, or when they want to adhere to religious duties that are not aligned with popular liberal political views, religious Americans often find themselves alone. In *Goldman v. Weinberger*, where Jewish orthodoxy conflicted with the military's sense of discipline, there was political support for congressional relief, but on the whole, the orthodox beliefs or practices of any group in any religion in contemporary America is apt to set the group apart. Of particular interest here, such beliefs are less likely than theologically liberal beliefs to be the basis of political cooperation in a large, diverse nation. It therefore offers no solace to relatively orthodox or other nonconforming religious Americans to tell them that more liberal religious groups, or those with beliefs more aligned with popular views, have found broad political support.

Put simply, the religious Americans least able to secure allies are at greatest risk from the exclusion. Those who are sailing with prevailing winds, theological and political, do not suffer much from the exclusion. Those who are tacking against prevailing winds, however, have much to fear. It is difficult enough in the political realm to sail against the wind, and it is even worse when the law excludes one from the political process.

II. THE POLITICAL LOGIC OF THE CONSTITUTIONAL RIGHT

Constitutional rights do not stand alone. They need to be examined in context, and for the free exercise of religion, an essential context is access to the political process.

Like all constitutional rights, the free exercise of religion is a limited freedom. At least as understood historically, and in *Smith*, it guarantees freedom under equal laws, without regard to one's religion, not a freedom from equal laws on account of one's religion. And precisely because its equality can bear down hard on persons of nonconforming beliefs, it is crucial that Americans enjoy the political freedom to secure statutory relief.

In other words, persons disappointed with what they can get in court need to be able to turn to Congress and state legislatures; they need to be able campaign, vote, and petition. In broader terms, there is a political logic to the boundaries of the free exercise of religion. Although equal access to the political process is not a measure or condition of the constitutional right, it is an essential part of the logic that justifies the measured character of the right.

among conservationists. 16 U.S.C. §§ 460bbb-460bbb-11; see H.R. REP. NO. 101-707 (1990).

One might think that limits on the speech and petitioning of nonconforming minorities has little cost for religious groups not aligned with popular political views, because even with the freedom of speech and of petitioning, they would be unlikely to succeed in the political sphere. Indeed, they often are not successful. The Constitution, however, guarantees its freedom of speech to all Americans, including minorities, and it thereby gives them at least a fighting chance to persuade others, to find allies, to secure sympathy, and thereby to prevail.

A. *The Generous but Limited Historical Character of Free Exercise*

The political logic of free exercise, as traditionally understood, arises from the generous but limited character of this right. All constitutional rights are generous in some sense and yet limited, and the limit to free exercise is what makes it so important for Americans to have recourse to legislatures. Accordingly, before exploring the political avenue for redress, Part II must observe what cannot be obtained in court.

Obviously, the free exercise of religion has been much debated, and there is no need to pursue it in detail here. Instead, what matters here is simply that this right (as understood traditionally and in *Smith*) is limited in a way that leaves much to the political process. Both the history and the text of the Free Exercise Clause reveal that it protected a freedom from penalty or from discriminatory constraint—that is, a freedom under equal laws—thus allowing Americans to obtain relief from unequal constraints in court, but leaving them to secure exemptions from equal laws in legislatures.³⁴

Generous but Limited. On the one hand, the Free Exercise Clause was a generous grant of liberty. The religious liberty traditionally protected in England was merely toleration, which left room for penalties on account of one's religion. The English had much experience during the seventeenth century with religious opposition to law, and even had fought a civil war partly around this question. They therefore were reluctant to grant more than toleration—as evident in the 1689 Toleration Act.³⁵ Under the policy of toleration, the government offered religious minorities much religious liberty, but only conditionally, so that the government could penalize wayward minorities if they seemed dangerous. Toleration thus preserved the possibility of discriminatory constraints.

This was the standard pursued by many American colonies and, after the Revolution, by many of the states.³⁶ For example, even if the Toleration Act applied in colonial Virginia (and this was disputed in the early 1770s), Baptists needed to get a license before preaching, and where they did not meet this condition, they often were imprisoned.³⁷ In opposition to this mere tol-

34 On account of this traditional understanding of the Free Exercise Clause—as a guarantee of freedom from penalty or discriminatory constraint—this Article focuses on the implications of the exclusion for laws that constrain. The exclusion, however, also has consequences for laws that grant privileges and that therefore more clearly raise Establishment Clause questions. See *infra* note 48.

35 An Act for exempting their Majestyes Protestant Subjects Dissenting from the Church of England from the Penalties of Certain Lawes, 1689, 1 W & M, c. 18, (Eng.) reprinted in 6 THE STATUTES OF THE REALM 74 (1819).

36 Hamburger, *More is Less*, *supra* note 2, at 840–42, 850–53; Hamburger, *Right of Religious Exemption*, *supra* note 2, at 918–23. Both articles observe how England, its colonies, and some states protected toleration—meaning a conditional freedom—thus leaving room for penalties on dissenting religion, where the conditions were not met.

37 As put by a lawyer who thought the English Toleration Act applied in the colony, “you are entitled to all the Benefit of that Act, provided you comply with the Terms of it.” *An Address to the Anabaptists Imprisoned in Caroline County, August 8, 1771*, THE VIRGINIA

eration, the Virginia Free Exercise Clause, and eventually the Federal Free Exercise Clause provided unconditional guarantees, which sweepingly rejected any penalties or constraints on account of one's religion.

On the other hand, American constitutions did not go so far as to guarantee a general right of exemption from nondiscriminatory laws. In 1775, the Quakers in Pennsylvania sought freedom not only from military service but also from paying an equivalent for this service.³⁸ They therefore argued that they had a general religious liberty or exemption from equal laws.³⁹ The Revolutionaries, however, disagreed. In the 1776 Pennsylvania Constitution, the Revolutionaries offered the Quakers an exemption from military service, but not from paying an equivalent, let alone a general freedom from objectionable laws.⁴⁰ Indeed, the Revolutionaries condemned the Quaker idea of a general right of exemption, protesting that it would be unequal and an escape from duties that all citizens owed the society.⁴¹ Thus, in opposition to the Quaker ideal of exemption, the Revolutionaries argued for the very different ideal of equality.

The Revolutionaries' notion of religious liberty—a freedom under equal laws, regardless of one's religion—was a radical departure from the theory of toleration, and it was the sort of religious liberty that, in one version or another, was increasingly apt to make sense to the religiously diverse population of the extended republic.⁴² Of course, a divergent minority, such as Quakers, hoped for a broader freedom, a freedom even from equal laws. The majority of minorities, however, sought a more moderate freedom—a freedom under equal laws or, put another way, a freedom from penalty. Such a freedom was generous in the context of mere toleration, but was limited as compared to demands for a general right of exemption.⁴³

Text. This moderate position—rejecting penalties but not embracing exemption—was the freedom secured by the Free Exercise Clause. The his-

GAZETTE, Feb. 20, 1772. Similarly, an advocate for the Baptists observed: "The act of toleration gives liberty to all who properly apply for it, and are ready to perform the conditions." A Catholic Christian, *Letter to Mrs. Rind*, THE VIRGINIA GAZETTE, May 12, 1774.

38 Hamburger, *Religious Freedom*, *supra* note 2, at 1612.

39 *Id.* at 1605.

40 *Id.* at 1625.

41 *Id.* at 1615–21.

42 Many Americans endorsed only qualified versions of this ideal of religious liberty—for example, by limiting it to monotheists, Christians, or even merely Protestants. In one version or another, however, the ideal of freedom under law, regardless of one's religion, had broad appeal in America.

43 It is common for scholars to generalize that the "peace churches" sought a constitutional right of exemption, the suggestion being that there was a common front among Quakers, Mennonites, and other sects. The reality, however, was more complicated. The Mennonites, for example, did not fully join the Quakers in 1775, for the Mennonites were of Germanic origin, and many of them were more content than the Quakers to see their fellow Americans resist the English Crown. Indeed, although Mennonites generally would not serve in the military, a significant number were willing to pay an equivalent. Hamburger, *Religious Freedom*, *supra* note 2, at 1621–22.

tory need not be pursued in greater depth here, for the text should be enough to illustrate the point.

The First Amendment guarantees that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” and this is significant.⁴⁴ The First Amendment does not suppose that Congress can make laws that, in some applications, prohibit the free exercise of religion but that otherwise are constitutional. Instead, it more sweepingly assumes that if a law in any way prohibits the free exercise of religion, Congress cannot make it in the first place. There consequently is no room both for Congress to make a law and for the courts to carve out exemptions on the theory that the law prohibits the free exercise of religion. If the law in any way prohibits the free exercise of religion, even if only in a single application, then (according to the First Amendment) there is no authority in Congress to make the law. The text itself thereby clearly precludes any constitutional claim of exemption.

Considered institutionally, the First Amendment imposes a duty on Congress rather than the courts. Congress is the body with the substantive constitutional duty not to make a law that prohibits the free exercise of religion, and the judges, on account of their own duty as judges, must hold unlawful and void any act of Congress that violates that body’s constitutional duty.⁴⁵ Therefore, when courts conclude that a law prohibits the free exercise of religion, they should not uphold the law and carve out exemptions, but rather should hold that Congress lacked the authority to make it. Again, the text clearly shows that the Free Exercise Clause does not grant a constitutional right of exemption.⁴⁶

Smith. Although *Smith* did not rest on this analysis of the history and text, the case largely recognized that the Free Exercise Clause guarantees freedom under equal laws—a freedom from penalty—not a right of exemption. For several decades after World War II, the Supreme Court interpreted the Free Exercise Clause to provide a constitutional right of religious exemption from general laws. Cases such as *Sherbert v. Verner* and *Wisconsin v. Yoder* allowed Americans (at least members of Protestant sects) to escape general laws that burdened their religious beliefs—at least up to the point that a

44 U.S. CONST. amend. I.

45 For the duty of the judges, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 283 (2008).

46 There obviously is much more that could be said about the choice between a freedom under equal laws, regardless of one’s religion, and a freedom from equal laws, on account of one’s religion. For example, as observed elsewhere, the freedom from law had much appeal in the hierarchical context of eighteenth-century Britain, but much less in the diverse and egalitarian context of late eighteenth-century America. Hamburger, *Religious Freedom*, *supra* note 2, at 1630–31. Moreover, although exemption has been described as “accommodation,” there obviously is a need for accommodation in both directions—not only by government but also by religion—and one of the virtues of constitutional guarantees of freedom under equal laws is that they create pressures for both sorts of accommodation.

court found a compelling government interest.⁴⁷ In 1990, however, *Smith* cut short this line of exemption cases and largely, if not systematically, restored the Free Exercise Clause to a freedom under equal laws.⁴⁸

The Free Exercise Clause, from this point of view, provides freedom under equal laws, regardless of one's religion. This is generous against the historical background of penalties—unequal constraints on account of one's religion—but it is less than a right of religious exemption, a freedom from equal laws on account of one's religion. And this limitation is what matters here. Being limited to a freedom from penalty—a freedom under equal laws—the free exercise of religion leaves the question of exemption to the political process.

B. *The Political Logic of the Free Exercise Clause and Smith*

The logic of the Free Exercise Clause rests on assumptions about access to the political process. There are many different understandings of religious liberty, and as has been seen, the free exercise of religion is neither the narrowest nor the broadest. Although in some circumstances the limited character of the right can be worrisome, it is less worrisome when Americans equally have access to the political process and thereby have at least a chance to secure legislative relief where the courts cannot help. Where religious Americans are excluded from the political process, however, the political logic of the Free Exercise Clause breaks down.

The Clause's guarantee of freedom under equal laws, without regard to one's religion, is appealing against the threat of unequal laws. But it offers little reassurance for minorities whose beliefs are in conflict with equal laws, and this is why political recourse is so important. Although the judicial process based on the Free Exercise Clause protects against unequal laws, the representative political process based on freedom of speech is necessary as a supplementary protection against overbearing equal laws.

In interpreting free exercise as a freedom under equal laws, *Smith* recognized the importance of the political context. In particular, the opinion of the Court, written by Justice Scalia, acknowledged that, because the constitutional protection is limited to a freedom under "neutral" or equal laws, Americans often need recourse to the political process to get statutory protection

47 See *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (exempting Amish from a state education requirement beyond the eighth grade); *Sherbert v. Verner*, 374 U.S. 398, 403, 406–07 (1963) (exempting a Seventh Day Adventist from a state eligibility requirement for unemployment that she be willing to work on Saturdays).

48 *Emp't Div. v. Smith*, 494 U.S. 872 (1990). Of course, one may wonder whether the Supreme Court went beyond the freedom-under-equal-laws standard when it recognized a free exercise right of churches to choose their ministers and thus a ministerial exception from antidiscrimination laws. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). The case, however, can be more modestly understood as barring government from dictating a church's choice of its clergy, in violation of the Establishment Clause.

for a broader freedom—a freedom from equal laws.⁴⁹ At the very close of his opinion, Justice Scalia explained:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.⁵⁰

Although the Constitution does not protect a religious freedom from equal laws, statutes may yet do so.

Of course, the case did not say that its denial of judicial redress was predicated on the availability of political relief. Nonetheless, the logic of the freedom under equal laws, and of *Smith*, rests on the coexistence of the two avenues for protecting religious liberty. The courts protect a limited constitutional liberty from *unequal* constraints, and the legislatures can add more expansive statutory rights from *equal* constraints. Precisely because religious exemption is available in the political process, it is not unreasonable for the Free Exercise Clause to protect against only general laws in the judicial process.

This logic, however, breaks down when Americans are systematically barred from political participation. Where administrative regulations are adopted in circumstances that leave Americans unable to elect their administrative lawmakers, and where religious Americans are restricted in their capacity to organize politically through their churches to protect their religious interests, they cannot find much consolation in the political logic of the Free Exercise Clause and *Smith*.

This is not to say that the conception of free exercise evident in the history, in the text, and in *Smith* is wrong. But the equality (or no penalty) conception of free exercise assumes a political avenue for redress that, in fact, has been seriously truncated. Superficially, religious Americans enjoy the Free Exercise Clause's freedom under equal laws, but without the full political participation that would allow them to protect their interests under such laws. The exclusion thus makes the equality look hollow.

III. EXCLUSION THROUGH ADMINISTRATIVE LAWMAKING

One element of the exclusion is administrative. The courts assume that they have protected equal participation in the political process by securing an equal right to vote. At the same time, however, administrative lawmaking largely escapes the political process, thus excluding Americans from the sort of participation they enjoy in the lawmaking process established by the Con-

49 *Smith*, 494 U.S. at 879–81.

50 *Id.* at 890.

stitution. Although this exclusion is general, it cuts with a distinctively sharp edge against religious Americans. The resulting exclusion leaves Americans subject to the religious burdens of administrative lawmaking, but without the political avenue for relief assumed in the First Amendment and *Smith*.

A. *Exclusion*

The administrative exclusion of the people from the lawmaking process is familiar—perhaps so familiar that judges simply take it for granted. For Americans who are excluded, however, the results can be oppressive.

When Congress adopts a statute, the legislators tend to be careful of the needs of their constituents and other Americans. They consult with them; they seek not only their votes but also their money; above all they try to avoid antagonizing them. Americans in turn attempt to impose their will on their legislators. They campaign for or against them. They give money to them or their opponents. They also lobby them, in person and by other means. (The verb “lobby” arises from the ability of the people to meet their legislators in the lobby of the House of Commons, and it thus centrally includes the ability to cajole legislators in person.)⁵¹ Through such mechanisms, Americans actively participate in the political process that ends up with congressional legislation.

In contrast, when an administrative agency engages in binding lawmaking—whether by adopting rules, interpretations, guidance, or even adjudication—the lawmaking usually evades public participation. Americans can vote for or against members of Congress, but not for or against administrators. They can campaign for or against the one sort of lawmaker, but not for or against the other. They can give money for or against congressional campaigns, but there is no equivalent in the administrative sphere. They can petition or otherwise lobby members of Congress, but most Americans have no hope of even identifying most administrative lawmakers, let alone meeting or speaking with them.

Accentuating this exclusion’s cost for religious Americans is the tendency of administrators to idealize bureaucratic rationality and scientific knowledge. It is doubtful whether their rulemaking is merely rational or really very scientific, and it is open to question whether rationality and science are really at odds with religious belief.⁵² But the administrative idealiza-

51 A DICTIONARY OF AMERICANISMS: ON HISTORICAL PRINCIPLES 985 (Mitford M. Mathews ed., 1951).

52 Much of modern science and scientific thought comes out of medieval Christian expectations that the world was created along lines of divine rationality and that it thus is subject to a divinely established natural law. There have since been new understandings of nature, but the expectation that the world can be understood in terms of laws became the foundation of modern scientific inquiry. For a summary of the contrary thesis, that modern empirical science evolved out of medieval voluntarism, and for the failures of this thesis, see Peter Harrison, *Voluntarism and Early Modern Science*, 40 HIST. SCI. 63 (2002).

Especially since the Enlightenment, proponents of human rationality have urged that religion is inherently in conflict with rationality and science. At the same time, many

tion of scientism and centralized rationality usually renders administrative acts—compared with acts of Congress—relatively indifferent and even antagonistic to religion and religious concerns. Of course, this is not to say that religious ideas ought to guide lawmaking; that is a complicated question that goes far beyond the scope of this inquiry. Instead, the point here is simply that congressional lawmaking is open to the concerns of religious Americans in ways that administrative rulemaking is not.

How, then, can religious Americans protect themselves from the burdens of administrative “law”? The Administrative Procedure Act assures them that they will get a month’s “notice” and an opportunity to “comment.”⁵³ But that is all. This participation consists merely of being able to write (not speak) to the rulemakers.⁵⁴ It thus is less than the right to petition; it even is less than the ordinary freedom of speech that Americans enjoy with their neighbors; and it is a far cry from the right of Americans to vote for or against their lawmakers. The result is to leave administrators almost entirely insulated from the public. It therefore is laughable to suggest that notice and comment is a substitute for elections, campaigns, petitioning, lobbying, and other speech. As put by David Baron and Elena Kagan, the notice-and-comment process is “a charade.”⁵⁵

Notice-and-comment rulemaking is even more of a charade than it appears to be, because it does not even apply to much administrative lawmaking. Entire categories of lawmaking—such as the interpretation done through guidance, manuals, letter opinions, briefs, etc.—does not really require notice, let alone comment.⁵⁶ As long as such interpretation appears somewhere, however obscure, and is within the apparent statutory authority of the agency, it is likely to be carried out by the courts. Thus, even if notice and comment could substitute for representation, it would justify only a small part of administrative lawmaking.

Not being able to vote or campaign for or against administrative lawmakers, not being able to petition them, not being able even to know who

others, including many scientists, have more cautiously tended to acknowledge the limits of human rationality and of the scientific method. There thus are multiple visions of rationality and science, and for purposes of this Article, none of them can be taken for granted.

As it happens, many administrators are religious in one way or another. But the more significant their role in shaping regulations, the more probable it is that they are not religious or that they are theologically liberal in their views. Thus, even their religious beliefs probably leave them relatively unsympathetic to the sort of religious beliefs that are most seriously affected by the exclusion.

53 Administrative Procedure Act, 5 U.S.C. §§ 553, 591(2) (2012).

54 *Id.* § 553.

55 David J. Baron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231.

56 Although notice and comment often is necessary for *Chevron* “deference,” it is unnecessary for *Skidmore* “respect.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Another example of lawmaking without notice is that done through waivers, which can be issued without notice to anyone but the recipient of the waiver letter.

most of them are, or what they are doing, Americans cannot participate in the administrative process to protect their religious beliefs. Unlike the political process, this is nearly a closed process.

Americans do not even know when rules are coming down the pipeline, and they therefore have little chance to resist. At best, they are given thirty days' notice to object. Just how much this cuts off opportunities to protect against oppressive general laws is apparent from the ACA. It did not mention the contraception mandate disputed in *Hobby Lobby*; nor did it provide for the unduly narrow exemptions from the mandate; instead, all of this came as a surprise in the regulations introduced under the ACA.⁵⁷ As a result, there was little of the popular political process that could be expected when lawmakers are elected, when they must face reelection, when Americans can campaign for or against them, and when they can continually petition them, warn them, and bargain with them.⁵⁸

And because Americans do not elect administrative lawmakers, they cannot easily press them to legislate in ways that are sensitive to the needs and beliefs of religious minorities. In Congress, legislators propose legislation in response to a wide range of desires and needs felt by a wide range of Americans. In administrative offices, law comes at the behest of the executive, typically more in response to its policy than the varied demands of a diverse people. Indeed, the only legislation considered in the administrative world is that which is acceptable to the executive—that which the executive hopes to impose on the people.

Of course, individuals can submit comments to agencies, and large corporations and well-heeled interest groups have much access to administrators, and on both grounds many scholars therefore emphasize the “democratic” character of administrative lawmaking. Some even suggest that

57 The statute requires “applicable large employer[s]”—that is, employers with 50 or more employers—to offer “minimum essential coverage.” 26 U.S.C. §§ 4980H(a), (c)(2) (2012). The regulations allow the Health Resources and Services Administration to “establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.” 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013). At first, the exemptions were for “religious employers,” essentially churches and religious orders, and then were extended to some religious non-profit organizations. *Id.* § 147.131(a)–(c); see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 161 (2014) (citing U.S. Conference of Catholic Bishops, Office of the Gen. Counsel, Comment Letter Re: Interim Final Rules on Preventative Services I (Aug. 31, 2011), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf>).

58 For the “pushback” against the narrow exemptions, which was a far cry from the regular political process, see MARK HALPERIN & JOHN HEILEMANN, *DOUBLE DOWN: GAME CHANGE 2012*, at 66–70 (2013); Horwitz, *supra* note 57, at 161; Byron Tau & Donovan Slack, *Biden: We ‘Screwed Up’ Contraception Mandate*, POLITICO (Mar. 1, 2012, 4:18 PM), <http://www.politico.com/politico44/2012/03/biden-we-screwed-up-contraception-debate-116128.html>.

all of this amounts to participatory democracy.⁵⁹ It even is claimed that an administrative agency is often a more meaningful site for public participation than Congress.⁶⁰ And perhaps this is true at a high altitude—for the wealthiest of corporations and interest groups—but not on the ground, where most Americans live. For most of them, there is no participation. None at all. Administrative rules come from above, not below, and the suggestions to the contrary about “participatory democracy” are not reassuring. For most Americans, including most religious Americans, the administrative lawmaking process is a closed world, and this has severe and constitutionally significant consequences for religious Americans.

In short, administrative power excludes all Americans, but just because it does not narrowly target religious Americans, does not mean it is without interesting religious effects. While administrators pursue lawmaking along lines of scientism and centralized rationality, and while they are unaccountable in elections, religious Americans cannot adequately temper the religious burdens of administrative rules.

Thus, although administrative power excludes the full range of Americans, what matters for the free exercise of religion is that administrative power excludes religious Americans and thereby eviscerates the equality protected by the Free Exercise Clause.

B. *Congressional and Presidential Oversight*

In defense of the exclusion of the people from control over their administrative lawmakers, it often is said that there is congressional and presidential oversight. From this point of view, there is no loss in the political process, because an elected Congress and President have the power to overrule the administrative lawmakers.

Certainly, Congress still has power over agencies. As sardonically put by Walter Gellhorn, “so long as the representative legislature remains supreme—so long as it can modify or repeal rules the executive has made . . . the danger of tyranny is not overwhelming.”⁶¹ The question, however, is not a hard tyranny, but what Alexis de Tocqueville called a soft tyranny, in which

⁵⁹ See, e.g., Jack Carver, *Increasing Participation in E-Rulemaking Through “E-Voting,”* MICH. J. ENVTL. & ADMIN. LAW (Aug. 8, 2012), <http://www.mjeal-online.org/increasing-participation-in-e-rulemaking-through-e-voting/> (regarding “an attempt by the Federal Government to bring a greater degree of participatory democracy to . . . Federal Agency rulemaking”).

The term “democratic” is a misnomer, for the United States is a republic. Indeed, it is a compound republic, which uses a complex system of representation to “refine and enlarge” the views of the public. THE FEDERALIST NO. 10, at 62, (James Madison) (Jacob E. Cooke ed., 1961).

⁶⁰ PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 256 (2000).

⁶¹ WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 15 (1941).

the public is excluded from electing their lawmakers.⁶² Through this exclusion, unelected executive officers can impose rules on the public without fear of the next election, and they thereby are apt to make general rules that bear down hard on some religious minorities.

Exactly how congressional oversight fails to protect against this danger becomes evident when one considers the reversed roles of Congress and the executive. Under the Constitution, Congress makes laws and the President can veto them.⁶³ Now, in contrast, unelected administrators make rules, and the rules remain in effect unless Congress passes a statute barring them. Religiously burdensome “laws” thus can come into existence from unelected and largely anonymous administrators, and congressional action (which responds to political participation) is reduced to a blocking action.

For example, after HHS adopted its regulations imposing the contraception mandate, a senator who was concerned about religious liberty proposed a bill to expand the exemptions. The regulations merely allowed administrators to grant exemptions to religious organizations; in contrast, the bill would have allowed all employers to opt out on religious or moral grounds.⁶⁴ The bill, however, was defeated in the Senate by a vote of fifty-one to forty-eight, and this close margin is revealing. The Senate probably would not have been able to adopt the contraception mandate without an exemption for religious employers, but after unelected administrators imposed the mandate without such an exemption, the question changed. Rather than be about imposing contraception on religious employers, the question now was about denying contraception to their employees, and the Senate therefore lacked the votes to respond.

The reversal of the legislative roles of Congress and the executive thus profoundly reduces the responsiveness of the “law” to religious Americans. Congress is far more sensitive to religious sensibilities than administrators. Accordingly, for purposes of religious liberty, a congressional veto on executive lawmaking is no substitute for the Constitution’s requirement of congressional legislation, subject to an executive veto.

Another version of the oversight justification is that administrators are accountable to higher administrators. According to Jerry Mashaw, “[i]nternal managerial controls can protect private rights and promote fidelity to legislative purposes.”⁶⁵ But this is simply to say that it is turtles all the way up.⁶⁶

62 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 316–19 (Phillips Bradley, ed., Henry Reeve, trans., Vintage Books 1990) (1835).

63 U.S. CONST. art. I, § 7.

64 Matt Negrin, *Senate Blocks Blunt’s Repeal of Contraception Mandate*, ABC NEWS (Mar. 1, 2012, 12:00 PM), <http://abcnews.go.com/blogs/politics/2012/03/contraception-mandate-goes-up-for-a-vote/>.

65 JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 9 (2012).

66 Hegel already argued that administrative officials would not act contrary to public interest—in part because they were accountable to higher officials in the administrative hierarchy. Upon reading this, Karl Marx protested:

To be sure, many administrators are under the supervision of the President, but although the President is elected, he is not a representative body. The election of a hundred senators and hundreds of representatives from fifty states ensures that at least some of the nation's diversity, including some of its religious diversity, will be represented in the debates over the adoption of laws. The election of a single President, in contrast, does not ensure that he will give voice to the nation's diversity in making regulations. Nor does his election ensure that unelected and almost unknown administrators will give voice to the diverse concerns of a diverse people. Whereas minorities can hope to find a voice in Congress through one lawmaker or another, they cannot realistically hope for this from unelected administrators, who are overseen by a President chosen by the nation as whole in a winner-take-all election.

The idea that congressional or presidential oversight will secure the religious interests that Americans ordinarily would protect by electing their lawmakers is especially unrealistic because most administrative lawmakers are not very accountable to their superiors, except for gross departures from duty. Indeed, many administrators make binding regulations in more or less "independent" agencies, with varying degrees of formal independence from political control.

The congressional and presidential oversight arguments are particularly cold comfort for religious Americans who pursue their religious interests through their churches. Most Americans can at least campaign for and against their elected officials, and thereby can participate in shaping the conduct of those who, very, very distantly, oversee their administrative lawmakers. It is very different, however, for religious Americans whose orthodox understanding of religious authority or whose relatively unpopular beliefs render them dependent on their churches for pursuing their religious interests in politics. These Americans must work through their churches to protect their religious freedom, but because of § 501(c)(3), as will be seen in Part IV, churches no longer enjoy their First Amendment right to campaign or to devote themselves to petitioning. Such Americans thus do not even have the assurance of participating equally in choosing those who merely oversee the administrative lawmakers. The administrative exclusion is thus reinforced by § 501(c)(3)'s exclusion, and once again, there are distinctively harsh consequences for religious Americans.

The oversight, in sum, is mostly an illusion, and for Americans who rely on their churches in politics, the oversight is twice as illusory. The oversight does not protect religious Americans from the effects of the administrative

[I]f we ask Hegel what is civil society's protection against the bureaucracy, he answers: . . . The hierarchal organization of the bureaucracy. Control. This, that the adversary is himself bound hand and foot, and if he is like a hammer vis-à-vis those below he is like an anvil in relation to those above. Now, where is the protection against the hierarchy?

KARL MARX, *CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT'* 53 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans. 1970) (emphasis omitted).

exclusion, and when Americans rely on their churches in politics, they cannot even fully participate in the process of choosing those who do the oversight—thus rendering these Americans doubly isolated from administrative lawmakers.

C. Other Justifications for Administrative Power

In addition to oversight, there are a host of other alleged justifications for administrative power. These include congressional delegation, administrative expertise, the necessities of governing a modern industrial economy, and so forth. Such justifications are addressed in detail elsewhere.⁶⁷ The argument here, however, is not about the constitutionality of administrative power, but about the exclusion of Americans from the political process that shapes administrative lawmaking, and the alleged justifications of administrative power, even if persuasive, cannot disguise this reality.

In fact, the justifications for administrative rulemaking tend to acknowledge that Americans are excluded from the rulemaking process.⁶⁸ The delegation of administrative lawmaking is all about shifting lawmaking out of the political process and into the hands of persons insulated from it. The expertise justification claims that some decisions are so technical, they can be made only by expert administrators, not legislators.⁶⁹ The necessity justification contends that lawmaking by administrators is necessary in a modern society because the political process in Congress is too slow and too responsive to political concerns.⁷⁰ Such justifications do not deny the administrative exclusion of the American people, but recognize and excuse it.

It always will be possible to come up with justifications for excluding Americans from the political process. In the early nineteenth century there were plenty of seemingly impregnable justifications for removing voting rights from blacks, women, and unpropertied white males, but there was no doubt about the exclusion, and it eventually came to be recognized as wrong. Similarly, nowadays, there are many apparently solid justifications for removing legislative power from the legislative body elected by Americans, but all the justifications in the world do not alter the reality of the exclusion, which is the basis of this Article. Indeed, the justifications of administrative power tend to acknowledge that it takes lawmaking power out of the hands of elected representatives and thus largely out of the reach of popular participation in the political process.⁷¹

Accordingly, even if the removal of lawmaking from the people's representatives were justifiable, it would not change the reality of exclusion. Regardless of whether or not one likes administrative power, it excludes Americans from voting for their administrative lawmakers. It thus subjects

67 See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402, 419–40 (2014).

68 See *id.*

69 See *id.*

70 See *id.*

71 See *id.*

Americans to binding rules, interpretations, etc.—to “law”—in which they have severely diminished opportunities for participation in the political process that creates the law.

D. *Deliberate*

The exclusion of Americans from political participation in administrative lawmaking is deliberate. Rather than a side effect, the exclusion has always been an essential point of administrative power.

Already in the pre-American administrative systems that flourished on the Continent, one of the goals of having centralized administrative rule was to place lawmaking power beyond the control of importunate interests within society by establishing a form of governance that was, instead, accountable to the State. This perspective eventually found philosophic expression when Hegel described the bureaucracy as a “universal” class, which would serve the State in protecting the public’s “objective” interest, in opposition to the private “subjective” interests of the society—as if the diverse interests of the people had to be made accountable to the State, rather than vice versa.⁷²

Similarly, when late nineteenth-century Americans, mostly progressives, pressed for administrative power in the United States, they sought to establish administrators who would pursue the public interest, without too much accountability to the legislature or thereby to the public. Again, the goal was to secure public ends by insulating administrators from the public and even from their representatives.

Put another way, the goal of administrative power was to escape representative accountability and the underlying political process. Woodrow Wilson, for example, unctuously explained to Americans “the error of trying to do too much by vote.”⁷³ Although administrative power could not elude the broad sweep of public opinion, Wilson and his fellow progressives aimed to limit public opinion—to “make public opinion efficient without suffering it to be meddlesome.”⁷⁴ The key was to confine “public criticism” to “formative policy” and to exclude it from administrative details: “Let administrative study find the best means for giving public criticism this control and for shutting it out from all other interference.”⁷⁵ Frank Goodnow observed that the goal was to escape politics—what he called “party tyranny”—and he therefore sought to prevent the “undue extension of the control of politics over administration.”⁷⁶ Just as judges were independent, so administrators and their

72 GEORG W. F. HEGEL, *PHILOSOPHY OF MIND* 143 (William Wallace trans., 2008) (1894).

73 Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 214 (1887).

74 *Id.* at 215.

75 *Id.*

76 FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 13 (1905).

power were to be “independent.”⁷⁷ Even to this day, it is said that administrators are “largely insulated from politics.”⁷⁸

Tellingly, administrative regulation repeatedly was expanded after each extension of the right to vote. Whenever the right of suffrage was extended—in 1870, 1920, and 1965—it was followed by an expansion of administrative power, thus taking away in lawmaking what had been conceded in voting rights. In each iteration, administrative power evaded different combinations of the American populace, but the repeated theme was to escape popular power.

Again, Wilson was refreshingly candid. Already at the beginnings of federal administrative power, he spelled out the progressive *need* for this mode of governance, writing that “the reformer is bewildered” by the need to persuade “a voting majority of several million heads.”⁷⁹ The difficulty lay in influencing “the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes.”⁸⁰

Of course, he might just as well have said, “Catholics, Germans, and negroes.” The progressive interest in administrative power developed largely in revulsion against the political power exercised by so many Irish Catholics and other religious, ethnic, and racial groups. The educated Americans whose identity and status centered on their “scientific” or rational knowledge were often horrified by the tumultuous politics of the unwashed, their narrowly local and parochial attachments, and their unfortunate religious objections to progressive causes, and from this perspective, many progressives concluded that it was necessary to shift legislative power from elected legislatures to rational administrators—to persons like themselves.⁸¹ It thus is no coincidence that administrative power cuts popular religious feelings out of the lawmaking process; that was part of the larger point.⁸²

Scholars still observe how administrative power “can remove the necessity of building a public consensus in favor of reform.”⁸³ And unsurprisingly, many administrators want to go even further in taking advantage of this. Peter Orszag—a former White House Budget Director—explains “[w]hy we

77 *Id.*

78 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984).

79 Wilson, *supra* note 73, at 208.

80 *Id.* at 209.

81 For aspects of this, see HAMBURGER, *supra* note 67, at 371, 454–55.

82 Of course, progressives embraced apparently conflicting tendencies. On the one hand, they endorsed equal suffrage and even sought popular referenda; on the other, they removed legislative power from legislatures. This is not, however, as puzzling as it may seem, for in identifying with scientific or rational knowledge, they rejected the hierarchies and power of local representative government, and they attacked this simultaneously from below and above—with populism from below and with centralized administrative power from above. Popular power thus was central, but it was not to be trusted with the power reserved for administrators and the “broader knowledge” class. *See id.* at 370–74.

83 DENNIS J. MAHONEY, *POLITICS AND PROGRESS: THE EMERGENCE OF AMERICAN POLITICAL SCIENCE* 136 (2004).

need less democracy.”⁸⁴ Not content with existing administrative power, he argues that “[w]e need to minimize the harm from legislative inertia by relying more on automatic policies and depoliticized commissions for certain policy decisions. In other words, radical as it sounds, we need to counter the gridlock of our political institutions by making them a bit less democratic.”⁸⁵ Of course, “gridlock” here is a euphemism for a failure to persuade elected lawmakers, this being what necessitates becoming “less democratic.”⁸⁶ Similarly, Steve Rattner—former auto czar—writes: “Either Congress needs to get its act together or we should explore alternatives. . . . If our country wants to do a better job of solving its problems, it needs to find a way to let talented government officials operate more like they do in the private sector.”⁸⁷ Perhaps this mode of governance would be more efficient—and perhaps not—but certainly it allows lawmaking to proceed in a way that minimizes the role of elected representatives and thereby also the people.

The free exercise implications are sobering. For statutes, it makes sense to have a constitutional right of freedom under equal laws, regardless of one’s religion, for the people can participate in the political process to choose their lawmakers, and they thereby can do much to protect themselves from the equal laws that grate against their religious beliefs. For administrative power, however, there is no equivalent participation in the process of choosing and removing the lawmakers. Administrative power imposes burdens without the constitutionally authorized opportunities for political participation, and it thereby leaves many religious Americans at risk.

IV. EXCLUSION THROUGH § 501(C)(3)

A second aspect of the exclusion of religious Americans from political participation in lawmaking focuses directly on religious Americans. Whereas most Americans and their organizations at least can campaign for and against legislators, and can devote themselves to petitioning for and against legislation, religious and other idealistic organizations cannot do such things without being taxed under § 501(c)(3).⁸⁸ As a result, religious organizations are substantially excluded from essential aspects of the political process, and this means that law—not only administrative edicts but also statutes—are apt to bear down hard on religious Americans.

A. *Exclusion*

Section 501(c)(3) constrains a range of organizations—most notably, religious, educational, and charitable organizations—from campaigning and

84 *Obama-Style Democracy: Bureaucrats Know Best*, WASH. EXAM’R (Sept. 28, 2011, 7:05 PM), <http://washingtonexaminer.com/obama-style-democracy-bureaucrats-know-best/article/118794> (internal quotation marks omitted).

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

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

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

88 26 U.S.C. § 501(c)(3) (2012).

from devoting themselves substantially to petitioning. It thereby largely excludes the nation's idealistic organizations from participating (that is, from fully and equally participating) in basic types of political participation. Indeed, it singles out religious organizations for this exclusion.

At first glance, § 501(c)(3) is merely one of the parts of § 501 that identify organizations exempt from taxation. As a preliminary matter, subsection (a) provides that “[a]n organization described in subsection (c) . . . shall be exempt from taxation under this subtitle”—thus generally exempting some as yet undefined organizations from the income tax.⁸⁹ Subsection (b) qualifies this exemption by taxing even the exempt organizations for their “unrelated business income.”⁹⁰ Then, subsection (c) specifies the exempt organizations. Of particular importance, subsection (c)(3) exempts corporations and other organizations dedicated to certain purposes, including, most centrally, those “organized and operated exclusively for religious, charitable, . . . or educational purposes.”⁹¹

In exempting these organizations, however, § 501 also subjects them to limitations, and again § 501(c)(3) is especially important. It subjects the nation's primary idealistic organizations—religious, educational, and charitable organizations—to restrictions on both petitioning and campaigning.

First, a religious, educational, or charitable organization is exempt only if it is one “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.”⁹² Second, it is exempt only if it “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁹³ The exemption for churches, schools, and charities thus comes with a severe restriction on petitioning and a complete restriction on campaigning—a restriction that

89 *Id.* § 501(a).

90 *Id.* § 501(b).

91 *Id.* § 501(c)(3). The section in its entirety states:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

92 *Id.*

93 *Id.* The restrictions in § 501(c)(3) are subject to a host of complex interpretations and exceptions, which need not be pursued here.

expressly emphasizes its bar on “publishing” and “distributing” statements.⁹⁴ And this in the United States!

Already at this point it should be apparent that § 501(c)(3) does not simply confine “nonprofits.” This anodyne label may suffice for calculating taxes, but not for evaluating the constitutional questions. More to the point constitutionally, § 501(c)(3) targets *idealistic organizations* for restrictions on their freedom of speech and petitioning. Nonprofits—especially religious, educational, and charitable organizations—are devoted to pursuing ideals, in contrast to profit or other selfish interests. Section 501(c)(3) thus generally targets idealistic organizations, in contrast to business, labor, and other organizations representing types of self-interest.

The idealistic organizations that matter here are religious. In singling out religious organizations for restrictions on their petitioning and political speech, § 501(c)(3) limits the ability of many religious Americans to bring their religious concerns into politics. The section excludes churches from the political process and it thereby also excludes Americans who rely on their churches to protect their religious interests in the political realm.⁹⁵

Of course, notwithstanding § 501(c)(3), many churches and other idealistic organizations do their best to participate in politics. In a 2004 IRS study of one hundred and ten § 501(c)(3) organizations, it became apparent that 68% had engaged in prohibited campaign activities.⁹⁶ Most violations, however, were innocent. For example, many violations were based on misunderstandings of IRS interpretations or were anomalous or were promptly corrected after they were pointed out.⁹⁷ In other words, where the IRS interpretations were clear to the organizations, they usually complied.⁹⁸ The study thus actually confirms the degree to which churches and other idealistic organizations are constrained by § 501(c)(3). To the extent the law is clear, it largely keeps them from campaigning or substantially petitioning. Both in law and in reality, § 501(c)(3) substantially excludes such organizations from central modes of political participation.

B. *Justifications*

Of course, there are considerations that may seem to justify § 501(c)(3)’s restrictions. These considerations are familiar from the constitutional debate over the section, and they cannot excuse the section’s viola-

94 *Id.*

95 *See id.*

96 INTERNAL REVENUE SERV., FINAL REPORT, PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf; see Gina M. Lavarda, *Nonprofits: Are You at Risk of Losing Your Tax-Exempt Status?*, 94 IOWA L. REV. 1473, 1476–77 (2009).

97 INTERNAL REVENUE SERV., *supra* note 96, at 1476–77.

98 *See id.*

tions of the First Amendment.⁹⁹ Yet even if they were persuasive on the constitutional question, they cannot explain away the exclusion.

Merely Conditions on Spending. A standard constitutional justification for § 501(c)(3)'s constraints is that they are merely conditions on spending. The conditions argument, however, does not show the constitutionality of the speech and petitioning restrictions, and more to the point here, it does not justify the exclusion.

99 For some of the scholarship justifying the restrictions in § 501(c)(3), see Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685 (2012) (arguing that § 501(c)(3) is compatible with *Citizens United*); Lavarda, *supra* note 96 (arguing that § 501(c)(3) grants a subsidy consistent with free speech); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003) (arguing that § 501(c)(3) is justified by separation of church and state and that its restrictions on speech are viewpoint neutral); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007) (arguing that § 501(c)(3) grants a subsidy consistent with free speech and free exercise, and that it protects democracy); Sarah Hawkins, Note, *From Branch Ministries to Selma: Why the Internal Revenue Service Should Strictly Enforce the § 501(c)(3) Prohibition against Church Electioneering*, 71 LAW & CONTEMP. PROBS. 185 (2008) (arguing that § 501(c)(3) is required by the separation of church and state and to prevent divisiveness); Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, 57 EMORY L.J. 1605 (2008) (arguing that § 501(c)(3) is consistent with free exercise and is required by the separation of church and state).

For some of the scholarship questioning the lawfulness of § 501(c)(3)'s restrictions, see Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217 (1992) (regarding free speech and vagueness); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990) (regarding free speech and free exercise); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 915–28 (2011) (regarding overbreadth and vagueness); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001) (regarding free exercise); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1 (2003) (regarding motivations of legislators and overbreadth); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001) (regarding free speech and free exercise); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1161–97 (2009) (regarding the violation of the Religious Freedom Restoration Act); Erik W. Stanley, *LBJ, The IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237 (2012) (regarding free speech and free exercise); Zachary Cummings, Note, *Prophetic Speech and the Internal Revenue Code: Analyzing I.R.C. § 501(c)(3) in Light of the Religious Freedom Restoration Act*, 20 REGENT U. L. REV. 151 (2007) (regarding violation of the Religious Freedom Restoration Act); Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999) (regarding free speech).

As will be shown in detail elsewhere, § 501(c)(3)'s limits are grossly unconstitutional.¹⁰⁰ They sweepingly restrict speech and petitioning by religious and other idealistic organizations, regardless of the amount of the supposed subsidy, and even when there is no subsidy. They therefore are grossly disproportionate and nongermane and thus are precisely the sort of conditions that Supreme Court doctrine treats as unconstitutional.¹⁰¹ Accordingly, notwithstanding that the Supreme Court has upheld § 501(c)(3)'s restriction on petitioning, it is difficult to understand how its petitioning and speech restrictions are really constitutional.¹⁰²

Imagine that the government actually offered money to churches and other idealistic organizations on account of their public service, but required in exchange that they silence themselves in campaigns and substantially in petitioning. This clearly would be unconstitutional, but it at least would leave churches free to speak without a direct penalty. Section 501(c)(3), in contrast, is much worse, for it gives churches and other idealistic organizations a choice between silence or paying a tax—indeed, a choice between silence or paying a tax to which they otherwise have never been subject.¹⁰³ It thus is a tax or direct penalty on petitioning and campaign speech by religious and other idealistic organizations.

If this is the offer of a contract, it is at best an extortionate offer—the sort one cannot refuse. Put simply, when the law tells religious and other idealistic organizations, “shut up or pay a tax,” it cannot be constitutional. Section 501(c)(3)'s restrictions on speech and petitioning are forcefully unconstitutional—one of the most sweeping violations of the First Amendment in American history.

The complaint here, however, is not that § 501(c)(3) is unconstitutional, but rather that it excludes. It severely limits petitioning and political speech by churches and thereby also religious individuals. The result predictably is to limit their effectiveness in politics, with sobering consequences for their ability to protect themselves from equal but religiously burdensome laws. Even if (improbably) § 501(c)(3) were constitutional, it hollows out religious equality, leaving in place the formal equality guaranteed by the Free Exercise

100 This argument will be made in a forthcoming book by the author.

101 See *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); see also Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 Nw. U. L. REV. 775, 788–89 (2007) (showing need for tighter fit between purpose and conditions for regulatory conditions, compared to purchases).

Where organizations have little income, the subsidizing effect can be only tiny. And the conditions restrict organizations even where they do not spend any substantial amount of money on their speech. For example, when preachers campaign from their pulpits, when church members urge fellow citizens to vote in accord with religious dictates, or when they petition their representatives in Congress, they usually use no money whatsoever. For such reasons and others, it is difficult to conclude that § 501(c)(3)'s flat restrictions on petitioning and campaigning are germane and proportionate.

102 *Regan v. Taxation With Representation*, 461 U.S. 540, 551 (1983) (upholding § 501(c)(3)'s restriction on petitioning).

103 See 26 U.S.C. § 501(c)(3) (2012).

Clause, but depriving many religious Americans of their political ability to secure their religious interests under equal laws.

This remains true, moreover, even if § 501(c)(3) merely imposes conditions—indeed, even if it imposes entirely constitutional conditions. The government increasingly controls Americans through conditions on its largess. Although Charles Reich may have overstated the due process restrictions on the government’s distribution of benefits, he aptly noted the degree to which the government uses its grants to control Americans.¹⁰⁴ Whereas government traditionally ruled through law, it now governs at least as much through spending. And this is a reminder that, even if § 501(c)(3) merely places conditions on spending, such conditions can be powerful mechanisms for limiting the freedom of Americans—in this instance, by excluding religious organizations, and thereby many religious Americans, from key aspects of the political process.

Alternative Routes for Speech. Of course, idealistic organizations still can campaign and petition through adjunct § 501(c)(4) organizations.¹⁰⁵ But even these organizations apparently are subject to limits on campaigning and petitioning.¹⁰⁶ Thus, to enjoy free speech in politics, a church must form a § 501(c)(4) organization and then this organization then must form a § 527 political action committee, which in turn is finally allowed to speak freely in politics.¹⁰⁷ The result is a series of Russian dolls: The largest is muted, the smaller is slightly less muted, and only the tiniest is allowed freely to squeak out a political message.

Idealistic organizations are thus restricted in their attempts to speak in their own voice. Churches, for example, have a right—a freedom derived from God and protected by the Constitution—to speak as churches.¹⁰⁸ Yet rather than speak in their voice, they are forced to speak like ventriloquists; they must keep their mouths closed and can, at best project a muffled sound through a wooden dummy—a lifeless substitute for a living religious community. Churches therefore cannot speak in the same voice, even in the same

104 Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 756, 787 (1964).

105 26 U.S.C. § 501(c)(4).

106 Section 501(c)(4) organizations are limited in their political speech, for the IRS states that a § 501(c)(4) organization must avoid going so far as to be no longer “primarily engag[ing] in activities that promote social welfare.” Rev. Rul. 81-95, 1981-1 C.B. 332. At least as to campaign speech, the IRS has hinted at the implications, but not with much clarity: “Although the promotion of social welfare within the meaning of section 1.501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations.” *Id.* For discussion of this point, see Houck, *supra* note 99, at 82; Klapach, *supra* note 99, at 510–11, 515.

107 26 C.F.R. § 1.527-6(f), (g) (2014); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (explaining that the political action committee is “free to participate in political campaigns”). See, in contrast, the approach taken in *Citizens United v. FEC*, 558 U.S. 310 (2010). For this structure, see Galston, *supra* note 99, at 905–06.

108 U.S. CONST. amend. I.

body, about both personal morality and political morality. When speaking to God or the people about moral questions, a church can speak in its own voice, but when speaking to the people about elections, or to Congress about legislation, it must speak through a contraption manufactured by the Internal Revenue Service.

In another version of the alternate-route-for-speech justification, it is said that churches and other idealistic organizations can speak through their members. Thus, although a church cannot campaign or substantially petition, it can do so through its members.¹⁰⁹ But this is to view church members as theological automatons, who are subservient to the church's directives. And in depriving a church of its freedom of political engagement, this approach also deprives the members of their freedom to speak in unison and thereby enjoy the strength of a united voice. The voices of individual members are thus no substitute for their united voice through their organization.

A further variant of these justifications is that churches and other idealistic organizations can speak through political parties. Indeed, some religious groups can ally themselves with political parties. But what of the groups that are too small, too orthodox in their attachment to church authority, or too distant from politically popular views? They often cannot work to protect their beliefs through political parties and therefore need to work through their own churches. The alternative avenues for speech thus are no cure for the exclusion of churches from the political process.

Avoiding a Conduit for Tax Deductible Political Contributions. There is a serious danger that § 501(c)(3)'s tax exemption could create a conduit for tax-deductible political contributions. Taxpayers contributing money to § 501(c)(3) organizations can deduct the amount of their contributions from their income, as permitted by Internal Revenue Code § 170(c)(2).¹¹⁰ Section 501(c)(3)'s restrictions have therefore been justified as a necessary barrier to the political use of deductible contributions.¹¹¹

Certainly, there is a risk that tax-exempt churches and other idealistic organizations, as listed in § 501(c)(3), will become conduits for tax-deductible political contributions. But can worries about the abuse of tax deductions really justify shutting churches (and other idealistic organizations) out of central political arenas? The government created the deduction problem and it thus is mere bootstrapping for it to claim that this problem justifies it in barring idealistic organizations from petitioning and core political speech.

Indeed, § 501(c)(3)'s restrictions on exemption are disproportionate and irrelevant to the deduction problem, first, because many churches and other idealistic organizations have assets that were not derived from tax-deductible sources. Many, for example, have assets derived from their own income or from an era before deductions became available, and their use of

109 See, e.g., Tobin, *supra* note 99, at 1351.

110 26 U.S.C. § 170(c)(2).

111 See, e.g., Tobin, *supra* note 99, at 1317.

these assets has nothing to do with the danger from tax deductions. Second, where petitioning or political speech by idealistic organizations is nearly without cost—as when a minister preachers in favor of a candidate—the speech or petitioning does not have much connection to deductible contributions. Third, and most seriously, if the underlying concern is about politically targeted *deductions* by *donors*, it is utterly unnecessary and oppressive to deny *exemption* to *organizations* for exercising their First Amendment rights. This is anything but proportionate or narrowly tailored for blocking tax-deductible political contributions and it thereby can be explained only in terms of other, less constitutional ends.

In fact, there are all sorts of less restrictive means of avoiding the danger of tax deductible campaign contributions. Rather than sweepingly bar § 501(c)(3) organizations from engaging in electoral politics, Congress could simply deny deductibility for donations that end up being used in campaigns or in any substantial petitioning. The mechanics would not be difficult. Basically, such a law would deny deductibility for a donor unless he could show that his donation was not used or would not be used for the restricted end. He could do this by producing an accounting or certification from the recipient organization about how the money was used or about its placement in a restricted fund. And where organizations could not provide such paperwork, donors would not be able to deduct their donations from their income.

This would preclude political use of the subsidy conveyed through deductions. And by focusing on *deductions* for *donors*, it would avoid the unconstitutional speech and petitioning restrictions imposed by threatening the *exemptions* of *organizations*.

The government, however, has not addressed the narrow problem of deductions with a solution that narrowly focuses on deductions. On the contrary, it uses the narrow deduction problem to justify the broad exclusion of churches and other idealistic associations from key political participation. The government thereby grossly overplays its hand. Its broad exclusions cannot be justified by the much narrower concerns about the donor deductions, and thus (once again) the alleged justification is a poor excuse for the exclusion of churches from the political process.

Applied to Professors. Of course, there is no end to the justifications for excluding others from petitioning and political speech, and no attempt will be made here to respond to all of the justifications.¹¹² But one way of thinking about the justifications is to engage in a simple thought experiment: to apply something like § 501(c)(3) to other speakers—for example, professors.

Professors are supposed to be devoted to academic pursuits, and one could easily take a narrow view of academic ends to justify a federally imposed separation of academia and politics. Of course, professors would remain free to espouse political views when not identified as professors. But

112 Nonetheless, one other justification—the separation of church and state—will be discussed. See *infra* Section V.C.

when speaking in their academic role—whether in class, in scholarship, or otherwise under any academic title—they would have to avoid any campaigning or substantial petitioning.

This enforced separation of academia and politics would seem all the more reasonable because almost all professors benefit, directly or indirectly, from substantial federal spending on their students and universities. From this perspective, it would make sense to condition federal aid to students and universities on their professors' not engaging in campaigning or substantial petitioning.

Put another way, if professors were really dedicated to their academic role, they would not engage in political speech and participation. And when they pursued political speech in politics, this would be a sign that they were not really devoted to academic ends. Accordingly, when they thereby stepped outside their specialized academic role, it would be only just for the government to reconsider the eligibility of their institutions and students for government aid.

Of course, the limits on speech and petitioning would easily be defended on the ground that the restrictions would merely affect professors who participated in politics in their own voice. Although they would be precluded from political speech in their classes and scholarship, they still would be able to speak through their students, who are susceptible to professorial influence and thus might campaign or petition in pursuit of the professorial message.

Such is the application of something like § 501(c)(3) to professors. Readers can create their own, even more ludicrous illustrations.

The larger point is that the reasons for suppression are plentiful, but this does not mean they are persuasive. In constitutional debates, they do not disguise the reality of suppression, and in this Article they do not displace the reality of how § 501(c)(3)'s restrictions exclude religious Americans from the political process. Quite apart from the question of whether these restrictions are constitutional, they cut back on political participation by idealistic organizations, and thereby leave religious Americans and their organizations with a diminished capacity to protect themselves from equal but religiously burdensome laws.

C. Deliberate

Like the exclusion of Americans from administrative lawmaking, § 501(c)(3)'s exclusion of churches, schools, and charities from the political process is not an accident. It is a manifestation of widespread anxieties about churches and other idealistic organizations— anxieties that are difficult to distinguish from prejudice.¹¹³

113 It may be protested that the fear of the Catholic Church, or of other religious or more broadly idealistic organizations, is not prejudice, but a justifiable concern about the influence of organizations, particularly those claiming hierarchical authority over their members, or those espousing ideals contrary to American ideals. Undoubtedly, there are

Of course, this is a serious accusation, and it will be elaborated with detailed evidence in a forthcoming book.¹¹⁴ In the meantime, this Article must summarize how § 501(c)(3)'s exclusion was deliberate.

Personal Responses. Section 501(c)(3) acquired its constraints on petitioning and speech when three senators responded to political opposition. In all three instances, there is no reason to think that they were specifically concerned about religious organizations. Instead, they and their fellow members of Congress were responding to a more general source of annoyance: idealistic organizations, both religious and nonreligious, were asserting their ideals in political debates.

Of course, there were earlier hints of the restrictions that the senators introduced into § 501(c)(3). The Treasury Department had interpreted its regulations on educational organizations to limit these bodies from lobbying through political "propaganda."¹¹⁵ But the broader shift toward limiting the speech and petitioning of idealistic organizations came from the three senators.

In 1933, Senator David Reed attempted to pass legislation increasing veterans' benefits, but failed on account of opposition from the National Economy League. Reed therefore led the effort in 1934 to adopt the initial version of what became § 501(c)(3)'s restriction on petitioning.¹¹⁶ He evidently aimed to ensure that nonprofits—at least, that is, the idealistic organi-

grounds for worrying about religious and idealistic organizations, but there is a long history of highly exaggerated and selective fears of this sort.

More generally, even when the fears are justified, it is unclear how they justify using the law to deprive Americans and their organizations of their First Amendment rights. The reasonableness of the fears cannot make the lawlessness reasonable.

114 The evidence here about the historical background of § 501(c)(3) is only part of deeper range of evidence that will be published later in the book discussed *supra* note 100.

115 In 1917, the Code had allowed deductions for contributions to bodies organized exclusively for religious, charitable, scientific, or educational purposes. War Revenue Act of 1917, Pub. L. No. 65-50, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). Eventually, in 1919, the IRS issued regulations defining educational organizations, and at that point it took the view that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute." T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); see Houck, *supra* note 99, at 9. This, however, was merely an attempt to define what was educational, and it was only in 1934 that Congress added an independent limit on lobbying by tax-exempt organizations. Stanley, *supra* note 99, at 242.

Thus, the term "propaganda," which echoed anti-Catholic ideas, was first introduced into federal tax law in 1919, and already shortly afterward was applied to a wide range of organizations, including the decidedly non-Catholic Birth Control League. See *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930). Again, however, the broader application of the propaganda restriction to non-educational organizations, and its establishment of an independent limit, occurred only in 1934.

116 78 CONG. REC. 5861 (1934) (statement of Sen. Reed); Houck, *supra* note 99, at 19-20; see also Gaffney, *supra* note 99, at 23.

Reed, incidentally, rejected anti-Catholic political attacks, such as the condemnation of Al Smith by Methodist Episcopal Bishop Adna W. Leonard. *Bishop's Anti-Catholicism Deplored by Protestants—Senator Reed of Pennsylvania and Dr. Butler of Columbia Condemn It*,

zations he disliked—would never again unduly interfere in what he considered congressional business. Thereafter, idealistic organizations would hesitate before substantially devoting themselves to petitioning Congress.

In 1954, Senator Lyndon Johnson similarly responded to opposition.¹¹⁷ He was running in the Texas Democratic primary against a local Catholic, Dudley Dougherty, who “was one of the first Catholics to run for state-wide office in the State of Texas.”¹¹⁸ Johnson’s allies and probably Johnson himself therefore worried about religious opposition. For example, his religious supporters circulated ugly warnings about Catholic opposition, primarily from “the Roman Catholic Mexican vote.”¹¹⁹ More centrally, Johnson faced severe criticism from conservative anticommunist groups, especially the Committee for Constitutional Government, which was a tax-free educational organization.¹²⁰ During the campaign, therefore, in June 1954, Johnson arranged for Representative John McCormack—the Senate Democratic Whip—to ask the Commissioner of the IRS to reconsider this group’s exempt status.¹²¹ The Commissioner, however, concluded that the Committee had not violated the prohibition on lobbying.¹²²

Johnson reacted in the same way as Reed—by seeking to ensure that idealistic organizations would never again interfere, only this time in elections rather than legislation. This was the beginning of § 501(c)(3)’s restriction on campaigning, and ever since, churches, schools, and charities have had to silence themselves in elections or be taxed for exercising their constitutional freedom.

In 1987, a final touch was added to § 501(c)(3). Johnson’s electioneering restriction had focused on campaigning “on behalf of any candidate for public office,” and some conservative tax exempt organizations therefore carefully campaigned against incumbents without campaigning for any particular candidate.¹²³ Although Senator Howard Metzenbaum complained to the IRS without avail, Congressman J.J. Pickle—one of LBJ’s protégés—more successfully held hearings on the subject. The result was to amend

BULL. OF THE CATHOLIC LAYMEN’S ASS’N OF GA., Jan. 22, 1927, at 5, available at <http://scr.stparchive.com/Archive/SCR/SCR01221927p05.php>.

117 James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. OF RELIGIOUS RES. 16, 17 (1998); Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 106–08 (1998); Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740–52 (2001); see also Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR 2002, at 335, 336–37 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopic02.pdf>.

118 O’Daniel, *supra* note 117, at 769.

119 *Id.* at 748 (quoting Letter from Rev. Lewis L. Shoptaw (undated)).

120 *Id.* at 743.

121 *Id.* at 763.

122 *Id.* at 764–65.

123 *Id.* at 740 (quoting 100 CONG. REC. 9604 (1954)).

§ 501(c)(3) so that it restricted idealistic organizations campaigning “on behalf of (or in opposition to) any candidate for public office.”¹²⁴

It would be easy to assume that Reed, Johnson, and Pickle suppressed idealistic organizations merely out of personal resentment.¹²⁵ Their responses, however, probably should be understood in the context of their broader notions about the acceptable parameters of political debate. Indeed, because they obtained the support of their fellow legislators, their proposals need to be recognized as expressions of a widely shared cultural response. It therefore is necessary to dig deeper—to examine the underlying anxieties and prejudices that induced many Americans to embrace § 501(c)(3)’s severe restrictions.

Anti-Catholic Anxieties. Not far beneath the surface of § 501(c)(3) have been widespread concerns about religious and other idealistic organizations. These anxieties initially resulted in attempts to exclude Catholic organizations from the political process, but they soon reached other, mostly communist-influenced organizations, and by the mid-twentieth century such anxieties laid a foundation for excluding a wide range of churches and other idealistic organizations from central aspects of political participation. Anti-Catholic fears, tropes, and code words laid a foundation for more ecumenical liberal anxieties about idealistic organizations.

Fears about Catholic political influence have long been commonplace among American Protestants, and such fears established the language of exclusion that would become part of § 501(c)(3). It is well known how nineteenth-century nativists and other Protestants attempted to limit Catholic political participation in the name of “Americanism.”¹²⁶ Less familiar is that this attack continued well into the twentieth century and that anti-Catholic prejudice thus prepared the way for § 501(c)(3).¹²⁷

An underlying concern was the old theologically liberal fear that the Catholic Church exercised undemocratic ecclesiastical authority over its members and thereby secured their unreasoned attachment to its orthodoxies. On such assumptions, the Church’s authority interfered with the rational and independent mental judgment of individual Catholics.¹²⁸ Indeed, by depriving Catholics of their independent judgment as citizens, the Church acquired undue power in elections and thereby threatened American “democracy.”¹²⁹

124 26 U.S.C. § 501(c)(3) (2012).

125 On personal pique, see, for example, Carroll, *supra* note 99, at 250.

126 For the nineteenth century, see RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860*, at 386–88 (1938); HAMBURGER, *supra* note 9, at 234–38; GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES 166–74* (1943).

127 For the persistence of anti-Catholic prejudice into the twentieth century, see HAMBURGER, *supra* note 9, at 391–478.

128 For such fears, see *id.* at 194–202.

129 *Id.* at 249, 251, 402–05.

Numerous Protestants, including prominent preachers, therefore protested against the danger of Catholic political “influence.” According to Henry Clay Morrison—the widely admired President of Asbury College, who published *Romanism and Ruin* in 1914—the Catholic Church “proposes to dictate the policies, the election of officials, the legislation and administration of the laws of this country.”¹³⁰ Of course, he emphasized that he had nothing against the rights of individual Catholics, but rather was concerned about how the pope and his bishops were using “their political influence where it can be used to best advantage to intimidate, and influence those who make and enforce the laws of the land.”¹³¹

Another of the code words used by anti-Catholic writers was “propaganda.” It has seemed strange that § 501(c)(3) uses this word in its restriction on lobbying or petitioning, but this should be no surprise. Morrison, for example, complained about the Church’s “powerful propaganda,” which it was using “for the conquest of this country,” not least by “establish[ing] a powerful lobby at our national capital.”¹³² Significantly, these sorts of complaints came not merely from narrowly denominational quarters, but from all sorts of theological liberals, including many nativists—as when *The Protestant* (a nativist magazine published in Washington, D.C.) fretted that Catholic newspapers and magazines “constantly ply the public with offensive and defensive propaganda of the Roman hierarchy.”¹³³ Similarly, the Ku Klux Klan worried that “[t]he chief weapon of the enemies of the Klan and of Americanism is propaganda.”¹³⁴

In response to the allegedly antidemocratic authority and propaganda of the Catholic Church, nativists and other theological liberals speculated about how the Church could be induced to silence itself. One such “liberal” was Hiram Evans—the Imperial Wizard of the Ku Klux Klan. In the 1920s, the Klan had become the leading nativist organization in the United States, and

130 H.C. MORRISON, *ROMANISM AND RUIN* 12 (1914).

131 *Id.* at 33–34.

132 *Id.* at 147. For another example, see MYERS, *supra* note 126, at 237.

133 *Join the Great Crusade*, 7 *PROTESTANT* 65, 66 (1927); see also *Senator Heflin’s Great Speech*, 6 *PROTESTANT* 177, 177–79 (1927) (reiterating that newspapers and periodicals constantly put forth propaganda of the Roman hierarchy).

134 *THE KLAN IN ACTION: A MANUAL OF LEADERSHIP FOR OFFICERS OF LOCAL KLANS* 19 (n.d.). This source was distributed to local klans under a cover letter from Imperial Wizard Hiram W. Evans.

Another Klansman who continued to worry about Catholic propaganda was Hugo Black. In 1968, he complained about a New York law:

The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.

Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 251–52 (1968) (Black, J., dissenting) (citation omitted).

thus a prominent purveyor of theologically liberal ideas in opposition to the Catholic Church. Although the Klan had nearly collapsed by 1930, Evans still asserted its positions, repeatedly attacking the Church on “liberal” principles for its threat to “democracy.”¹³⁵ Of particular interest here is his publication in 1930 of a book proposing action against the Church, and although it probably was not a source of § 501(c)(3), it is suggestive as what already was in the air.

Evans suggested that the solution to Catholic power lay in clarifying the legal rights of churches. On the one hand, he wanted to stop Catholic political influence and “propaganda.”¹³⁶ On the other hand, he recognized that Catholics had constitutional rights, and he therefore worried about the claim of Catholics that, as he put it, “their political campaign against American principles” should be “tolerated in the name of religion.”¹³⁷ Taking this question seriously, Evans thought it could be put to rest “by the simple process of definition of rights.”¹³⁸

Thus far, there had not been a clear enough “standard by which the political activities of Catholicism could be measured against American principles.”¹³⁹ Evans therefore closed his 1930 book by urging legislation to clarify for the Church whether it would be “allowed to organize political machinery on a religious basis” and whether it could “use its spiritual authority to coerce voters or members who are in public office.”¹⁴⁰

This is especially sobering in retrospect. In 1930 the head of the KKK argued for limits on how the Church could campaign and lobby, and in 1934 Congress began to impose such restrictions on religious and other idealistic organizations.

Evans recognized he could not simply attack the Catholic Church, and he therefore presented his proposal in anodyne language about churches in general—about “codification of the rights and duties of churches under the principle of the separation of Church and State.”¹⁴¹ He proposed that the law should define “[t]he legal position of all churches in respect to the State, to their members, and to each other, together with their duties toward the State and the precise limits of their right to political activity either directly or through religious power over their followers.”¹⁴² Put crudely, the goal was to “hit political Catholicism.”¹⁴³ Evans, however, understood the need to offer a “political philosophy.”¹⁴⁴ He therefore declared that “we must make

135 HIRIAM W. EVANS, *THE RISING STORM* 75–82, 129–46 (1977).

136 *Id.* at 299, 344 (regarding the “Roman campaign of propaganda, subversion and political aggression”).

137 *Id.* at 335.

138 *Id.*

139 *Id.*

140 *Id.* at 336 (emphasis omitted).

141 *Id.* at 337–38.

142 *Id.* at 338 (emphasis omitted).

143 *Id.* at 342.

144 *Id.* at 337.

Catholics know the American meaning of freedom, equality and Liberalism.”¹⁴⁵ And this is what § 501(c)(3) would soon do.

Of course, not all theologically liberal critics of Catholicism were as explicit as Evans in demanding limits on the speech of churches, and not all were as obviously prejudiced. But in this brief summary of the majoritarian anxieties underlying § 501(c)(3), the Imperial Wizard’s proposal suggests how liberal fears of Catholicism could provoke demands for the exclusion of churches from the political process.

Anti-Catholicism thus provides an initial context for understanding § 501(c)(3). Anti-Catholicism was not, by itself, the cause of this law’s exclusion, but in the context of liberal fears about Catholic political “influence” and “propaganda,” whether in campaigns or legislation, § 501(c)(3) begins to make sense. Among many nativists and, more generally, among a wide range of theological liberals, there seemed a real danger to “democracy” from the political speech of religious organizations—prototypically, Catholic organizations.

Broader Liberal Anxieties. This is not the place to explore the full extent of the prejudices that underlay § 501(c)(3)’s restrictions, but the theologically liberal anti-Catholic anxieties broadened out to become liberal democratic anxieties about the political influence of all churches and other sorts of other idealistic organizations. Even in the ostensible breadth of these liberal anxieties, however, the Catholic Church remained the model of the danger. Many liberals increasingly excused their anti-Catholicism by pairing Catholic and communist organizations as equal threats to American values, especially democracy, but for many, the real source of anxiety remained the Church.

Paul Blanshard illustrates the point. When he campaigned in the 1940s and 1950s against the Church’s influence in America, he understood that he could not expect to prevail by taking aim only at Catholicism. He therefore took the even-handed approach of damning both Catholicism and communism: “Vatican intervention in American life is no more welcome than Kremlin intervention and all true believers in freedom should oppose both types of intervention.”¹⁴⁶ On this assumption, Blanshard repeatedly wrote about these two “alien and undemocratic powers, the Vatican and the Kremlin.”¹⁴⁷

The implication was that Catholicism was antidemocratic and therefore had to be constrained by the American majority. In his 1949 volume *American Freedom and Catholic Power*, Blanshard wrote: “In a democracy, every group

145 *Id.* at 338.

146 *Canon Law Clashes with U.S. Law, Poteat, Blanshard Tell Conference*, CHURCH & STATE NEWS. (Protestants & Other Ams. United for Separation of Church & State, Washington, D.C.), Feb. 1951, at 1, 3.

147 PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 260 (1949) (regarding Hungary in 1949). The first edition alone sold 240,000 copies. PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (2d ed. 1958) (frontispiece). It was a familiar trope. For a slightly later complaint about “these two alien forces,” see DON W. HILLIS, *THE BIG QUESTION? . . . A VATICAN VICTORY IN THE U.S.A.?* 16 (1959).

that affects public policy must be accountable to the entire citizenry. A democracy cannot survive if Iron Curtains are placed around groups, secular or clerical, that intervene in public affairs.”¹⁴⁸ This message was recognized to carry “ominous warnings” for Americans who cared about liberty—but what seemed ominous to Blanshard and many liberals were the threats of discordant political influence from left and right, not the threat to freedom of speech.¹⁴⁹ Thus, far from being beyond the pale, Blanshard’s book won accolades, including praise from John Dewey for its “good judgment and tact.”¹⁵⁰

In 1951, Blanshard spelled out the implications. In terms familiar from foreign policy, his *Communism, Democracy, and Catholic Power* argued for “containment” of both communism and Catholicism.¹⁵¹ They both were “hostile to our freedoms.”¹⁵² Accordingly, “[d]emocracy is inevitably bound by its own self-interest to attempt the limitation of both Vatican and Kremlin power to presently occupied territories because the two systems have been encroaching on the democratic way of life.”¹⁵³ Their encroachments took different forms, and therefore required different responses, but both needed “containment.”¹⁵⁴

As with Evans, so with Blanshard, there is no reason to suspect direct influence on § 501(c)(3). Nonetheless, Blanshard’s writings illustrate the sort of liberal conformism, increasingly advocated in the name of “democracy” both against Catholics and against communists, that underlay § 501(c)(3)’s exclusion. In this sort of context, one can begin to understand why § 501(c)(3)’s exclusion of religious and other idealistic organizations provoked hardly any disapproval.

Just as Part III observed how administrative directives exclude many religious Americans from the lawmaking process, so here Part IV has shown how § 501(c)(3) excludes religious organizations from that process. And like the administrative exclusion, the religious exclusion has been deliberate. It was quite intentional—both politically in Congress and culturally in the liberal response to Catholic and communist organizations. It therefore should be no surprise that religious Americans have difficulty protecting their religious interests through the political process. On the whole, they enjoy a religious liberty under equal laws, but they have deliberately been excluded from equal participation in making and shaping the law.

The result for the First Amendment is a strange religious equality. Most laws impose their constraints equally on Americans without regard to their

148 PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (5th prtq. 1949) (dust jacket).

149 *Id.*

150 *Id.* Blanshard, of course, was not alone. See, e.g., George LaPiana, *A Totalitarian Church in a Democratic State: The American Experiment*, 10 SHANE Q. 59, 59–143 (1949).

151 PAUL BLANSHARD, *COMMUNISM, DEMOCRACY, AND CATHOLIC POWER* 292 (1951).

152 *Id.*

153 *Id.*

154 *Id.*

religious beliefs. Section 501(c)(3), however, singles out churches and other idealistic organizations. Religious Americans therefore do not enjoy an equal freedom to participate in the political process that produces law, and they thereby are deprived of the opportunity to moderate religiously burdensome enactments. Especially for Americans whose religious beliefs are orthodox or otherwise are not aligned with popular political views, there can be profound costs for their alleged religious equality. Exclusion from the political process means that even equal laws are apt to be religiously oppressive.

V. DIVIDING AMERICANS

Section 501(c)(3) creates divisions among organizations. Of particular interest here, it distinguishes idealistic organizations from self-interested organizations—notably, business organizations—and thereby accords them different degrees of speaking, petitioning, and other participation in politics.¹⁵⁵ As a result, the exclusion of religious organizations through § 501(c)(3) reaches further than may be imagined.

By separating idealistic and business organizations in the political sphere, § 501(c)(3) weakens at least religious organizations in their pursuit of their religious ideals. This is part of the broader phenomenon of forced specialization in rights, a government-imposed fractioning of persons and rights, which threatens the liberty of all sorts of Americans—in this instance, the freedom of individuals to organize in politics in defense of religious freedom.

A. *Idealistic Organizations Divided from Business Organizations*

Idealistic organizations—most profoundly, churches—once could find allies in business organizations. Both types of organizations could share religious goals (for example, about education or the moral conduct of business), and they could pursue these ends together in politics. Now, however, the idealistic organizations cannot engage in central modes of political participation, and they therefore have little political strength to offer potential allies in the business world.

Most businesses are not centrally concerned with religious or moral goals, and it therefore has always been difficult enough for idealistic organizations to form alliances with business organizations. But where there were overlapping goals, it was advantageous for the businesses to work with the idealistic organizations, for both types of organization could equally engage in political speech and petitioning, and businesses therefore could amplify their shared messages by joining with the idealistic organizations.

¹⁵⁵ Of course, there are other more-or-less self-interested organizations, such as labor organizations. Both business and labor organizations are idealistic in their own ways. Labor organizations, however, like business organizations, specialize in representing particular economic interests, and they therefore are not treated by the government in the same way as the prototypically idealistic organizations governed by 501(c)(3). See 26 U.S.C. § 501(c)(5) (2012) (regarding labor organizations).

As a result of § 501(c)(3), however, businesses now have much greater freedom of political participation than idealistic organizations, and therefore, even when business organizations share religious or moral ends with idealistic organizations, they have little to gain by seeking them out as allies. Idealistic businesses often make charitable donations to idealistic organizations, but because of § 501(c)(3), they usually can no longer rely on the latter as equal or useful political allies. Of course, there are prominent exceptions, as when businesses seek out the persuasive power harnessed by educational organizations, but although religious businesses often donate money to religious organizations, they are not apt to view such organizations as political participants and thus useful allies.

Religious organizations thereby often find themselves isolated, cut off from other types of organizations that once might have joined them in religious or moral struggles. The religious organizations therefore are much weakened. They not only have lost most of their freedom in political participation, but they also thereby have lost many of their allies in the business world.

Idealistic organizations cannot even get much business support for their constitutional rights of petitioning and political speech. After more than a half century of separate regulatory schemes for idealistic and business organizations, these bodies have different interests in speech and petitioning, and they are not apt to campaign together for such rights.

For example, there traditionally was only one freedom of speech. This was an equal limit on government, and it thus was the same freedom, regardless of the speaker. As a result, all Americans and all American organizations had a shared interest in preserving the freedom of speech, and although they did not all support it, those who were denied their freedom could count on finding support across different types of individuals and organizations. In other words, the equality of the right, including equal access to it, was a structural mechanism that ensured a shared interest in preserving it.

Nowadays, however, idealistic organizations—especially religious organizations—often stand alone. Having lost their freedom in the political sphere, they also have lost their power in this realm, and they therefore cannot count on the support of their potential business allies.

B. Fractions of Persons and Rights

Section 501(c)(3)'s division among organizations is part of a broader array of divisions of persons, which forces them into specialized roles, or narrow aspects of themselves, with access to rights only along the lines of the government-imposed specialization. Put another way, § 501(c)(3) is part of a tendency to reduce persons to fractions of themselves, with fractions of their rights. The U.S. Constitution, however, leaves no room for fractions of persons and fractions of rights.

Forced Specialization. Nowadays, it often is suggested that associations of one sort or another are not fully persons and thus do not have complete First

Amendment rights. For example, in defense of attempts to constrain the First Amendment rights of business corporations, it is said that they are only partially persons, with only partial constitutional rights.¹⁵⁶ Similarly, in defense of § 501(c)(3)'s violation of First Amendment rights, it is assumed that idealistic organizations, being associations rather than individuals, are only partially persons, with only partial constitutional rights. But it is unclear how this strange reduction of persons and rights to fractions of themselves is different from a violation of their constitutional rights.¹⁵⁷

There is little pretense, at least among lawyers, that corporations are not persons, as one of the most basic reasons for incorporation is to enjoy the legal status of a natural person, with legal rights, including the right to sue and be sued. Indeed, it long was a fundamental legal assumption that persons, whether individuals or corporations, could not be stripped of their rights as persons. The only exception was where, at the outset, an act of naturalization or a charter of incorporation expressly stated a limitation, and even this exception probably did not survive the adoption of the Fourteenth Amendment.¹⁵⁸

156 See, e.g., Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of the Government at 3–11, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013), (Nos. 13-354, 13-356). But see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770–71 (2014) (not adopting such arguments).

157 See 26 U.S.C. § 501(c)(3). The forced specialization is evident in the government's very definition of idealistic organizations as bodies "organized and operated exclusively for religious, charitable, . . . or educational purposes". *Id.* Such a definition pressures Americans to pursue such purposes in organizations narrowly focused only on such on ends. This aspect of the forced specialization, however, need not be pursued here.

158 The standard American approach to corporations was that a corporation enjoyed the same constitutional rights as any other person, without legal limitation, unless the limitation was stated in its charter of incorporation. Of course, a corporation, by its nature, could not take advantage of habeas corpus and other rights that applied only to individuals, or natural persons, but unless an additional limitation was stipulated in its charter of incorporation, it generally seems to have been taken for granted that a state could not impose legal limitations on a corporation's enjoyment of constitutional rights.

The fundamental character of the underlying principle is evident from its application to individual citizens. For example, in 1785, Massachusetts judges concluded, under the Privileges and Immunities Clause of the Articles of Confederation, that a state "Act of naturalization, may admit an alien to certain privileges, and exclude him from others"—meaning that "he may be naturalized under some particular disabilities"—"but if no such proviso is made," and thus "no condition expressly annexed to the privilege granted," then "ex vi termini [by force of the term] a person naturalized, is a free citizen to all intents constructions and purposes whatever." Such persons, "from any class or denomination of Aliens, are by the Confederation, considered as entitled to all the privileges, and immunities of free citizens in the several States; and of course in this commonwealth whenever they shall come to reside within the same." Opinion of Justices of the Supreme Judicial Court on an Article of the Confederation (June 22, 1785) (docketed Oct. 19, 1785), Mass. State Archive, Senate Documents, Rejected Bills, 1785, No. 344, Box 11 (emphasis omitted). Of course, one may reasonably doubt the constitutionality even of initial conditions limiting the constitutional rights of naturalized aliens. But the point here is more modest,

Nonetheless, there increasingly have been suggestions that when individuals work together in associations, they and their organizations enjoy only specialized rights, as determined in accord with the specialized organizational purposes recognized by the government. On this basis, it often is said that individuals in business enjoy the free exercise of religion, but when they join together in a business corporation, they have less of an interest in this right—the assumption being that business corporations have only partial religious interests.¹⁵⁹ Similarly, it is said that religious individuals enjoy the right of assembling to petition and the right of political speech, but that when they join together in religious associations, they lose central aspects of these rights—as if churches had reduced political interests.

This slicing and dicing of persons and rights suggests that business corporations need to put aside their religious commitments and (more centrally here) that idealistic organizations need to avoid engaging in central types of political speech, whether campaigning or substantial petitioning. When such organizations fail to confine themselves in these ways, they are assumed to be going beyond their specialized identities. In the one instance, they are no longer really business corporations, and in the other instance, they are no longer really religious, educational, or charitable organizations.

This specialization is exactly what one would expect when a government seeks to free itself from the ideals of its people. As Tocqueville noted, Americans can find strength in campaigning, persuading, and otherwise shaping public opinion only by associating with others.¹⁶⁰ Most members of Congress, however, do not like being judged by the ideals espoused by Americans, and it therefore is no surprise that Congress has suppressed the speech and petitioning rights of religious and other idealistic organizations.

There commonly are complaints about the selfish character of American business life and the loss of ideals in politics. But should this be a surprise when the government questions the religious potential of business corporations and denies political participation to churches and other idealistic associations?

that where inequalities in constitutional rights are not imposed as initial conditions, they cannot be imposed later.

It may be thought that, at least for corporations, mortmain statutes were an exception. With one exception, however, in Pennsylvania, these sorts of general limitations on corporations do not appear to have been adopted in the early American states. 9 *ENCYCLOPEDIA AMERICANA* 57 (Francis Lieber ed., 1832); *see also* NATHAN DANE, 4 *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 5 (1824) (observing that mortmain statutes had not been adopted in the New England states); JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* AGGREGATE 80 (Boston 1832). Even the Pennsylvania mortmain statute, moreover, merely limited corporate acquisition of land; it did not authorize taking a corporation's previously acquired property. Act (April 1833), PL 167, *in* PURDON'S DIGEST: A DIGEST OF THE LAWS OF PENNSYLVANIA, 320, § 27 (Philadelphia 1853).

159 *See, e.g.*, Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of the Government, *supra* note 156, at 3–11.

160 *See* 2 *TOCQUEVILLE, supra* note 62, at 129–35.

This forced specialization in rights (whether imposed on churches or businesses) is utterly contrary to the Constitution. And of particular interest here, its application in § 501(c)(3) divides American religious organizations associations and individuals in ways that profoundly limit their ability to protect themselves from equal but religiously oppressive laws.

Fractions of Rights. The message for religious organizations is strange. They have constitutional rights in holding property. If they wish, moreover, they can engage in unrelated businesses and pay taxes on the income. But because they are organized and operated “for religious . . . purposes,” they lose central political rights.¹⁶¹ Thus, they have the First Amendment’s freedom of religion, but in exercising this right, they must give up the First Amendment’s freedom of speech. They have a right to assemble to petition God, but in exercising this right, they lose their right to assemble to petition government. They can enjoy only fractions of their rights.

The results are comic. On the one hand, individuals and their associations can speak to and about *God*. On the other hand, individuals and their associations can speak to and about *government*. And ambidextrous *individuals* can devote themselves to *both* types of expression—to both the religious and the political. But woe betide individuals when they *associate to do both*—when they join together to devote themselves to petitioning, or speaking about, both God and Congress! That’s punishable. Then, they have to substantially give up on addressing, or talking about, either God or government, or pay a tax for the privilege of directing their words to or about both.

The very *same* constitutional amendment guarantees free exercise, free speech, and the right to assemble to petition. It says nothing about giving up one right if you exercise too much of the others. Nonetheless, current law requires Americans who associate for religious ends to specialize in the exercise of their rights; it requires them to confine their exercise of religion, speech, and petitioning to religious ends, meaning merely religious, as opposed to political, ends. And if Americans who associate for religious ends fail to specialize in this way, they lose their rights of speech and petitioning—precisely on account of their religion—the result being a violation of all three First Amendment rights.

The result is a constitutional magic trick. You can enjoy all three First Amendment rights—those of speech, petitioning, and religion. But if you mix these rights together in a church . . . drum roll . . . Voila! . . . All three constitutional rights disappear!

Of course, the full extent of this trick—the loss of all three types of First Amendment rights—gets played only on religious Americans who associate together in a church. The trick, moreover, has severe costs only for some—probably only for some with orthodox notions of ecclesiastical authority or with other views not aligned with popular opinion. And they typically are so stunned, they don’t quite know what has happened to them. Many nonreli-

161 26 U.S.C. § 501(c).

gious or theologically liberal Americans, in contrast, find the magic trick admirable and applaud.

Fractions of Persons. All of this treats religious associations, even religious corporations, and the individuals who participate in them, as less than full persons, this being the justification for according them less than full rights. Traditionally, when religious associations were regarded as whole persons, with full constitutional rights, many of them devoted a very substantial part of their energies to petitioning Congress and campaigning for and against legislators—most notably, in the struggle against slavery. Now, however, § 501(c)(3) bars them from engaging in any campaigning and from devoting any substantial part of their activity to petitioning. Put another way, whereas the Constitution once counted slaves as three-fifths of persons for purposes of apportionment, § 501(c)(3) now counts idealistic associations as nonpersons for electioneering speech and as only some fraction of persons for purposes of petitioning.¹⁶²

The point obviously is not that churches, schools, and charities are being treated like slaves; far from it. Rather the point is conceptual: that the Constitution does not allocate rights or recognize persons in fractions, for that would be a way of justifying a denial of rights. All sorts of unfree societies have identified fractions of persons in order to give them only fractions of rights—as when Latin American countries once distinguished quadroons, octoroons, and so forth. Liberal societies, however, as observed by Robert Cottrell, distinguish simply between the free and the unfree, thus precluding any intermediate status.¹⁶³

162 On account of the vagueness of the “no substantial part” test, it is difficult to figure out what percent of the right to petition, and of personhood, § 501(c)(3) leaves to churches, schools, and charities. One case, *Seasongood v. Comm’r*, 227 F.2d 907 (6th Cir. 1955), requires the IRS to allow churches, schools, and charities to devote at least five percent of their activity to petitioning or lobbying.

Incidentally, although the Supreme Court has upheld a severe congressional limit on what veterans can spend to dispute their veteran’s benefits, that concerned only administrative proceedings for benefits, not judicial proceedings on constraints. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985). Here, moreover, the congressional limit bars not what is done in the necessarily constrained circumstances of an adjudication, but what churches and other nonprofit groups can say outside institutions such as courts and Congress.

163 For this point, and the Latin contrast, see ROBERT J. COTTRELL, *THE LONG, LINGERING SHADOW* 54 (2013); Robert J. Cottrell, *The Long Lingered Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76. TUL. L. REV. 11, 15–16 (2001).

Of course, American law traditionally distinguished between persons who owe allegiance, and who thus have the obligation and protection of the law, and those who do not owe allegiance, and so are outside this obligation and protection. Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1826 (2009). This, however, was different from the distinctions discussed by Cottrell.

Thus, although the U.S. Constitution distinguishes persons and citizens, it does not (any longer) deal in portions of them.¹⁶⁴ Of particular significance here, the First Amendment secures rights of speech and religion without distinguishing between individuals and associations. It thus does not allow the government to deny portions of such rights to some associations, let alone on the theory that they are not fully persons.¹⁶⁵

Congress cannot limit any association to a mere portion of its constitutional rights. Nor is there any excuse for this in the theory that, when an association devotes itself to a specialized sphere of life protected by one constitutional right, it no longer is a full person with the full range of constitutional rights beyond its specialized slice of life.¹⁶⁶ For example, when the federal government cuts back on the petitioning and political speech of religious associations, it cannot justify this constitutional violation on the theory that they are specialized persons with only specialized constitutional interests. If the federal government could get away with this excuse, it would be able to eviscerate constitutional rights and abandon one of the Constitution's central liberal principles, that there are no fractions of persons or of constitutional rights.

The stakes are therefore high. Under § 501(c)(3), religious organizations become mere fractions of persons, with only specialized fractions of constitutional rights. Such organizations are thereby prevented from engaging in American society as whole persons, with the full range of human and civic interests—as if a church had less of an interest in political speech than a political association. Under the Constitution, such things are left for God and for individuals and their associations to decide, not government.

C. *Separation of Church and State*

In defense of § 501(c)(3)'s exclusion of churches from the political process, one might protest that the section and its imposition of specialization are in accord with the principle of separation of church and state. Separation of church and state, however, developed as a theologically prejudiced principle, and it still discriminates against religious organizations and the individuals who pursue their religion through such bodies. Rather than justify § 501(c)(3)'s exclusion of churches, separation actually confirms the point here about the imposition of specialization and the resulting reduction

164 See U.S. CONST. art. IV, § 2 (mentioning "citizens"); U.S. CONST. amends. IV, V (mentioning "persons"); U.S. CONST. amend. XIV, § 1 (mentioning both "persons" and "citizens").

165 Incidentally, because the First Amendment secures the right of the people to assemble to petition government, one might think it confines this right to associations, but of course even an individual can be denied the right to assemble with others to petition.

166 For the traditional assumption that individuals and corporations cannot be limited to fractions of their rights on account of their identity, see *supra* note 164 and accompanying text. Of course, advocates of slavery took another point of view, and in any case there have always been some qualifications—for example, those arising from questions of competency.

of religious organizations to fractions of persons with only fractions of constitutional rights.

It is widely assumed that separation of church and state is an areligious or at least theologically neutral principle.¹⁶⁷ But separation of church and state has a long history as a theologically liberal slogan against relatively orthodox religious organizations and their adherents.¹⁶⁸

A hint of this theological bent is evident already from the very words “separation of church and state.” Whereas the Establishment Clause limits Congress and thus only a part of *government*, the principle of separation takes aim at both religion and state—indeed, at a particular type of religion, the *church* or (more generally) a *church*. The principle thereby tends to discriminate against religion. In particular, it tends to distinguish between group religion and individual spirituality in a way that discriminates against religious groups and their organizations—in contrast to individuals and individual spirituality. Precisely by introducing this sort of discrimination into constitutional debate, the phrase has seemed to imply that religious organizations should be excluded from central aspects of political participation.

Separation’s sharp theological edge is further evident from its history. The principle first became part of general American public debate when, during the 1800 election, Thomas Jefferson’s allies used versions of it to delegitimize the right of his Congregationalist critics to campaign against him.¹⁶⁹ Later, beginning in the mid-nineteenth century, nativists employed it to exclude the Catholic Church and its members from political participation and government jobs, and this anti-Catholic usage made the principle widely popular.¹⁷⁰ Since the mid-twentieth century, however, the principle’s more broadly antiecclesiastical implications have again come to the fore, and the principle thus typically seems to reach not only the Catholic Church but also Protestant and other religious groups.¹⁷¹ For example, the principle has been used to justify § 501(c)(3)’s exclusion of religious organizations from political participation.

167 The word “areligious” seems more accurate than “secular.” The latter first acquired currency in England in the 1840s through the efforts of George Jacob Holyoake, who promoted this label precisely because it offered a more positive image than ordinarily was enjoyed by atheists and agnostics. HAMBURGER, *supra* note 9, at 294 & n.20. The word became popular in America beginning in the 1870s as a label for the theologically liberal movement on behalf of a wide range of heterodox groups, including not only atheists but also non-Christian Unitarians, adherents of Comte’s religion of humanity, spiritualists, and many others. *Id.* at 294–95. Especially in this American context, secularists were not so much areligious, or anti-religious, as theologically liberal opponents of religious organizations and supporters of the separation of church and state. *Id.* In short, secularism has often been somewhat religious and even tinged with theological prejudice. *Id.* at 294–95, 491–92.

168 *Id.* at 481.

169 *Id.* at 130–43.

170 *Id.* at 193–251.

171 *Id.* at 476–77.

Notwithstanding the shifts back and forth between a narrow anti-Catholicism and broader theologically liberal animosities, there has been great continuity in how the principle of separation of church and state has been used. All along, from the time of Jefferson to the present, the principle has given forceful expression to liberal fears of ecclesiastical authority and the concomitant liberal demands for limits on the political participation of various religious organizations. The target has sometimes been narrowly the Catholic Church, and has sometimes been more broadly all religious organizations—even all distinct religions. But one way or the other, the principle has persistently discriminated against religious organizations, especially to exclude them from the political process and government benefits.

The apologists for § 501(c)(3) thus are correct in identifying the separation of church and state with the exclusion of religious organizations, but not in assuming that this principle and its exclusionary implications are religious, unprejudiced, or neutral. On the contrary, separation of church and state has long been a theologically liberal excuse for imposing a narrow religious specialization on theological opponents, as when § 501(c)(3) denies them their equal constitutional rights of political speech, of petitioning, and more generally of political participation.

As a result, § 501(c)(3)'s imposition of specialization in the exercise of rights cannot be justified on the spurious constitutional ground of separation of church and state. Instead, it is necessary to recognize the forced specialization for what it is: a means of reducing religious Americans, their religious organizations, and their rights to mere fractions of themselves. And although the results are general, the adverse effects are often especially hard where religious beliefs are relatively orthodox or otherwise are not aligned with popular political opinion. In short, the consequences are most profoundly felt by Americans that worry a theologically liberal majority.

To divide and conquer is an ancient strategy, and by dividing idealistic organizations—most notably churches—into fractions of persons with only fractions of constitutional rights, § 501(c)(3) severely limits the ability of at least some Americans to resist equal but religiously burdensome laws. For such persons, exclusion from the political process has seriously undermined what is celebrated as religious equality.

VI. JUDICIAL REMEDIES

Finally, what are the possible judicial remedies? The constitutional problem arises from the combination of equality and exclusion—on the one hand, freedom under equal laws, regardless of one's religion, and on the other hand, exclusion from the political process that produces law—and this dual character of the problem complicates any strong conclusions about a judicial remedy. Nonetheless, where the exclusion is clear and consistent, there is reason to question the equality of the resulting law, and on this basis one can discern some potential judicial responses, most clearly against administrative lawmaking that burdens religion.

A. *Statutory Burdens on Religion*

The initial question concerns statutes. Under the First Amendment and current caselaw (as noted in Part II), where a statute does not discriminate on the basis of religion, it is considered “neutral” or equal, and thus even where it burdens religion, it ordinarily is upheld. But what if § 501(c)(3)’s exclusions from the political process render the statute’s equality illusory? In such circumstances, under the First Amendment’s Free Exercise Clause, perhaps the judges should hesitate to uphold the statute.¹⁷²

Section 501(c)(3) goes far in excluding churches from politics, and the danger of inequality is therefore serious. The exclusionary effect of § 501(c)(3), however, is not consistent. In some instances, it excludes at least some religious Americans from the political process leading up to congressional enactments, but in other instances it does not, and it therefore often will be very difficult for the judges to be confident as to when § 501(c)(3) has had an exclusionary effect.

The implications for statutes are therefore mixed. Where § 501(c)(3) has excluded religious Americans from participating in the political process leading up to the enactment of a statute, the statute may not really be neutral or equal, and therefore, under *Smith*, the judges have reason to question whether it is compatible with the First Amendment’s Free Exercise Clause. The judges, however, cannot simply assume that § 501(c)(3) has had an exclusionary effect on religious Americans, and it therefore is unclear how the judges ordinarily could be confident that religious Americans were really excluded from the process that produced any particular statute or that the statute is really unequal. The exclusion under § 501(c)(3) thus does not necessarily point to a remedy against statutes.

At least, however, judges should be honest about the exclusion and its threat to equality under statutes. The courts are largely responsible for the inequality, for they have acquiesced in the imposition of § 501(c)(3)’s unconstitutional restrictions on speech, petitioning, and religion. In other words, they have legitimized the exclusion from the political process, and they thereby have helped to render equal statutes oppressive. The courts therefore should at least be candid about the problem. Even if they cannot remedy it, they should acknowledge it.

B. *Administrative Burdens on Religion*

A second question focuses on administrative acts, and here redress is much clearer. At least for the administrative exclusion, there is a clear path toward a remedy.

Binding administrative “law” (whether in the form of regulations, interpretations, guidance documents, exemptions, waivers, or adjudications) comes from unelected persons, and in this way Americans are systematically excluded from voting for their administrative lawmakers. And because of the

172 U.S. Const. amend 1.

scientific and rational ambitions of administrative power, this exclusion is apt to be especially hard on Americans with religious beliefs, or at least on those with religious beliefs that depart from administrative scientism and centralized rationality. The administrative exclusion, moreover, including its harsh effect on religious Americans, is accentuated by § 501(c)(3), which limits the ability of religious Americans to persuade Congress and the President—the bodies that supposedly oversee administrative power. For all these reasons, even when administrative “law” appears religiously equal, the administrative exclusion of Americans from the lawmaking process means that, in reality, such law is apt to be unequal for many religious Americans.

This exclusion from administrative lawmaking is therefore in tension with the Free Exercise Clause. When the Supreme Court in *Smith* laid out the fundamental principle that neutral or equal laws are compatible with the Clause, it buttressed this conclusion by noting that religious Americans can participate in the political process that produces the laws.¹⁷³ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court added that even if a law is facially neutral or equal, there are circumstances in which it cannot really be considered religiously neutral or equal.¹⁷⁴ From this perspective, when administrative lawmaking excludes religious Americans from participation in the process that produces administrative law (whether rules, interpretations, etc.), it calls into doubt whether these “laws,” even if superficially equal, are really equal or neutral, as required by the Free Exercise Clause.

Unlike the inequality in the making of statutes, this inequality in administrative lawmaking clearly and consistently points to a judicial remedy. In contrast to statutes, administrative lawmaking is predictably affected by the exclusion, for administrative power always excludes Americans from voting from their administrative lawmakers. Administrative edicts, moreover, are not statutes, and thus are not themselves law, but rather are merely executive acts, and they therefore must meet higher standards than statutes—as specified in the Administrative Procedure Act’s arbitrary and capricious standard and in the limits on judicial deference.¹⁷⁵ Judges thus must respond differently to statutes and to administrative acts. Even where they must sustain statutes under the Constitution, they often (under statutes and judicial doctrine) must refuse to sustain administrative lawmaking.

Significantly, administrative lawmaking is not what the First Amendment addresses when it declares that “Congress shall make no law.”¹⁷⁶ Laws made by Congress are those made by the people’s elected legislators, and the First Amendment was adopted on the assumption that Americans would be bound only by such rules as were adopted by Congress, not by administrative edicts.

173 *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

174 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

175 See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012); see also *United States v. Mead Corp.*, 533 U.S. 218 (2001) (recognizing and limiting respect for agency interpretation); *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984) (recognizing and limiting deference to agency interpretation).

176 U.S. CONST. amend. I.

The First Amendment itself thus suggests that the courts should recognize the threat from administrative lawmaking.

In fact, there are hints that the courts, in carrying out *Smith*, already are quietly heading in this direction. Many of the recent conflicts between law and religious belief have arisen not from the supreme law of the land, but from mere administrative lawmaking—whether done through rules, interpretations, guidance documents, exemptions, waivers, or adjudications—and the courts in such cases have tended to be unusually solicitous of the religious claims. Although such cases often are based on concerns about “individualized exemptions,” they more generally reveal concerns about “neutrality” or equality in administrative lawmaking. Hence, the courts’ different treatment of statutory and administrative exemptions. Where statutes allow nonreligious exemptions, courts do not ordinarily assume that there is any inequality, but where administrative rules, etc. allow nonreligious exemptions, or where administrative adjudications amount to individualized decisions about exemptions, the courts are apt to find the administrative edicts unequal and unlawful.¹⁷⁷ Evidently, administrative lawmaking is different from statutory

177 The contrasting treatment of statutes or ordinances on the one hand, and administrative rules on the other, can be illustrated by at least some cases.

On the one hand, there are cases upholding statutes and ordinances. See *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692 (9th Cir. 1999) *vacated for lack of ripeness*, 220 F.3d 1134 (9th Cir. 2000) (upholding a statute barring housing discrimination on basis of marital status, which exempted real property for singles or couples only, and upholding a city ordinance barring such discrimination, which exempted landlords sharing space with renters, neither of which granted religious exemptions); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996) (holding that state statute barring housing discrimination against unmarried cohabitants did not impose a substantial burden in violation of the Religious Freedom Restoration Act); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) (holding that state statute and local ordinance barring housing discrimination against unmarried cohabitants did not impose a substantial burden in violation of the Religious Freedom Restoration Act).

On the other hand, there are cases providing relief (a) against administrative rules that offer only nonreligious or very narrow religious exemptions and (b) against administrative acts that amount to individualized decisions about exemptions. See *Fraternal Order of Police Newark Lodge 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding unconstitutional an internal police order barring police officers from having beards that granted medical exemptions, but not religious exemptions); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding unconstitutional a state university’s decision denying a religious exemption from its housing policy where the university granted exemptions for nonreligious reasons); see also *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 537 (holding an ordinance unconstitutional because it “requires an evaluation of the particular justification for the killing,” and this “represents a system of ‘individualized governmental assessment of the reasons for the relevant conduct’” (citation omitted)). Somewhat similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court allowed an exemption from the Controlled Substances Act where the statute contained a provision authorizing the Attorney General to “waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.” *Id.* at 432 (citation omitted). This provision and especially the grant of an exemption under it were indicia that cut against the claimed government interest.

lawmaking, and the heightened sensitivity about equality in administrative cases suggests the underlying significance of exclusion.

The importance of the administrative exclusion as the basis for the heightened sensitivity has not thus far become explicit in the cases. It should, however, be brought to the surface, as it offers valuable clarification.

At the very least, the exclusion is helpful in understanding administrative exemption cases. For example, where a statute bars policemen from wearing beards, the legislature should be able to grant a medical exemption, without also giving a religious exemption, and this statutory medical exemption should not provoke the courts to grant a religious exemption on the ground that the existing exemption is unequal.¹⁷⁸ But when an administrative “lawmaker” grants so limited an exemption, the danger of inequality deserves and usually gets judicial attention, for the administrative lawmaker is unelected, he is apt to be indifferent to religious concerns about freedom, and the exclusion of religious Americans even goes so far as to bar many of them from participating in the political process that oversees the administrator’s decisions.¹⁷⁹

The exclusion and the consequent inequality in administrative lawmaking, however, is not confined to unequal administrative exemptions; it also is a problem with all administrative lawmaking, including general administrative rules, interpretations, and guidance documents. Administrative lawmaking excludes Americans from electing their administrative lawmakers, and it is made from a perspective that deliberately and systematically excludes many religious concerns that would arise in congressional lawmaking. Americans thus are subject to general administrative edicts that are facially equal but in reality very unequal. Accordingly, where administrative lawmaking of any sort bears down hard on religious belief, the judges should recognize that this cannot be dismissed as an accident. On the contrary, it is exactly what one would expect where Americans are excluded from electing their administrative lawmakers, where administrative lawmaking is designed to be indifferent or even antagonistic to much religious belief, and where recourse to Congress is minimal because religious organizations are excluded from campaigning and substantial petitioning.

In sum, even facially equal administrative lawmaking is apt to be unequal for at least some religious Americans, and judges therefore should not assume that facially equal administrative lawmaking is really equal. In terms of precedent, they should recognize that the political participation logic that

In fact, some of the most notable pre-*Smith* Supreme Court exemption cases—*Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987)—involved administrative adjudications about unemployment benefits under a vague statutory standard of “good cause,” these being the source of what Justice Scalia has called a “system of individual exemptions.” *Smith*, 494 U.S. at 884 (1990) (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J., joined by Powell, J., and Rehnquist, J.)).

178 Cf. *Thomas*, 165 F.3d at 717.

179 Cf. *Fraternal Order of Police Lodge No. 12*, 170 F.3d at 360.

underlies *Smith* does not apply to administrative lawmaking. Indeed, in applying *Smith*, they should be suspicious of the purported equality of administrative rules, interpretations, etc. when they conflict with religious belief.

Exactly how the courts should temper the administrative oppression may vary from case to case. Depending on the circumstances, where administrative lawmaking impinges on religious beliefs, a court may conclude that such lawmaking violates the Free Exercise Clause, that it violates the Equal Protection Clause, that it is arbitrary and capricious under the Administrative Procedure Act, that it does not qualify for *Chevron* deference or *Mead* respect, that it violates a statute such as the Religious Freedom Restoration Act, or at least that the enforcement of the administrative lawmaking should not have the benefit of equitable or other discretionary remedies.

Of course, the courts will not always be able to offer relief from the administrative oppression created by the exclusion. As with statutes, however, so with administrative lawmaking, the courts always should be honest about the danger of the exclusion from the political process and the costs for the liberty enjoyed under apparently equal laws. And even where the courts would enforce statutory burdens on religion, they should hesitate before enforcing equivalent administrative burdens on religion.

C. *Constitutional Questions*

In the end, the courts cannot evade the underlying constitutional questions about administrative power and about § 501(c)(3). Those questions cannot be examined here, but nor can they be ignored, for it is not enough to address the implications for religious liberty in a piecemeal manner. More basically, the courts need to protect Americans in their political participation.

Thus far, however, the courts have legitimized the exclusions from the political process. The courts have acquiesced in the establishment of the administrative state in which Americans cannot vote for or against their administrative lawmakers. The courts also have accepted § 501(c)(3), thereby cutting religious organizations out of much of the political process. In both ways, the courts have participated in excluding Americans, including religious Americans, from the political process that gives rise to legislation, and the courts therefore need to reconsider what they have done.

On account of the exclusion from the political process, there is no justice in enforcing religiously burdensome administrative regulations. Nor is there justice enforcing religiously burdensome statutes where the affected Americans have been excluded from political participation by § 501(c)(3). The courts, therefore, most fundamentally need to reevaluate their acquiescence in each element of the exclusion.

CONCLUSION

Exclusion from the political process is a central question in American law. Thus far, however, it has not been recognized how religious Americans

are excluded from the political process and what this means for religious equality.

Both administrative lawmaking and § 501(c)(3) of the Internal Revenue Code substantially exclude religious Americans from the political process that produces laws. As a result, apparently equal laws are apt, in reality, to be unequal for religious Americans. Political exclusion threatens religious equality.

The exclusion imposed by § 501(c)(3) is often justified as a sort of specialization, in which Americans are told that, when they join together in the exercise of their First Amendment rights, they have only fractions of their rights, as if they were only fractions of themselves. The U.S. Constitution, however, leaves no room for fractions of persons and fractions of rights.

The exclusion and its consequences for religious liberty therefore cannot be ignored. On the contrary, the exclusion must be integrated into accounts of religious liberty.

The primary practical conclusion concerns administrative power. Although courts already respond to some of the inequalities in administrative burdens on religion, they should more directly and systematically recognize how, on account of the exclusion, even apparently equal administrative law is apt to be unequal.

Conceptually, the implications are even broader. The free exercise of religion tends to be understood in terms of a binary choice between equality or exemption, but the equality is undermined by the exclusion of religious Americans from the political process. The conceptual framework for understanding religious liberty should therefore be expanded to recognize how exclusion tilts the entire game, giving even facially equal laws an underlying slant.

Less Equal than Others. American are told that they enjoy *religious equality*, *equal voting rights*, *equal protection of the laws*, and the advantages of *democracy* and *political participation*. But at the same time they are excluded from participating in administrative lawmaking, and churches are excluded from campaigning and from any substantial efforts in petitioning. This makes a mockery of the right to vote. It also makes a mockery of the religious liberty enjoyed under equal laws. The laws are equal and nondiscriminatory, except that Americans and many of their organizations are excluded, even on religious grounds, from participating in the political process that produces the laws.

In its free exercise cases, the Supreme Court tells religious Americans that the Constitution gives them liberty under equal laws, and that for exemptions and other relief from general laws, they must go to Congress. But in its administrative cases the Court tells Americans that they must submit to rules made outside the political process, and in its tax cases it tells churches that they cannot fully or equally participate in the political process. The Court thus ratifies both elements of the exclusion without even pausing

to consider what this means for the free exercise freedom to live under equal laws.

In *Animal Farm*, the barnyard animals write a constitution on the barn wall, ending with the commandment that, "All animals are equal."¹⁸⁰ Eventually, however, the pigs get up on their hind legs and presume themselves to be better than the other animals. Shortly afterward, the rest of the animals awake one morning to find that the constitution has surreptitiously been amended. It now states, "All animals are equal. But some animals are more equal than others."¹⁸¹ In our society, there also has been a surreptitious amendment, and it makes an equivalent point: some Americans are less equal than others.

Cultural Shift or Oppression? It often is said that there has been a cultural shift away from religion—or at least away from organized religion—and it may be thought that this justifies the exclusion of religious organizations from politics and the denial of religious exemptions. Yet, whatever the real character of the cultural shift, it itself is partly a product of the suppression of religious voices in the political process. When Americans have their hands tied, and their churches are gagged, in the choosing and petitioning of their lawmakers, the resulting laws inevitably will shape the culture against religious beliefs. It therefore is merely circular to suggest that the ensuing cultural shift justifies these laws.

In any case, it is utterly oppressive for popular views to justify the suppression of Americans and their churches in the political process. Americans have a right to vote for their lawmakers, regardless of any contrary popular opinion. They and their religious organizations, moreover, have a right to speak their minds, and to assemble to petition government, regardless of any contrary popular opinion. If cultural shifts justify denying basic constitutional rights, then no Americans (except those that continually conform) can be safe.

And this points to the most troubling problem: the underlying project of depriving cultural and political opponents of their constitutional rights. Administrative power was established as a means of withdrawing lawmaking power from elected legislatures and thereby depriving the American people of their right to elect their lawmakers. Similarly, the restrictions in § 501(c)(3) were established as a means of preventing churches and other idealistic organizations from campaigning and petitioning. The exclusions from the political process, in other words, have been instruments for denying theological and political opponents their political freedom.

It therefore should be no surprise that the consequences have been severe, and of particular interest here are the consequences for the free exercise of religion. This right, at least traditionally, is the freedom to live under

180 GEORGE ORWELL, *ANIMAL FARM* 21 (1946).

181 *Id.* at 112.

equal laws, regardless of one's religion. The exclusion of religious Americans from the political process, however, alters this equality, rendering it hollow.

The Unequal Republic. The United States was established as a republic, in which the people were governed by their elected legislature and were free to speak in campaigns and to petition their government. Unfortunately, most blacks were enslaved, and even after they obtained constitutional equality—equal protection of the law and equal suffrage—they were not always allowed to vote. This was formal equality combined with electoral exclusion, and the results were predictably grim.

Now, there are equal rights in voting, but underlying types of exclusion. The people finally are equally secured in suffrage, but their legislature does not make all of their laws, and their churches (and other idealistic organizations) are substantially silenced. The consequences are exactly what one would expect when a boxer ties the hands of his opponent behind his back, and the umpire declares, "Let the equality begin!"

All of this is ugly, and there needs to be an accounting. Whether the Supreme Court can repair the damage it and others have done is doubtful. But it should make the effort, if only to moderate the blame it justly deserves for having acquiesced in the oppression.