WHEN SEPARATION DOESN'T WORK: THE RELIGION CLAUSE AS AN ANTI-SUBORDINATION PRINCIPLE

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I. INTRODUCTION

The separation of church and state has been one of the hallmarks of liberal First Amendment jurisprudence since at least the mid-20th century. Separation has been understood to stand "as a constitutional principle that promotes democracy and equally protects the religious liberty of all, especially religious outgroups, including Jews."[1] In a democracy, government entanglement with religion would most likely benefit the majority. Moreover, the lessons of history have left many minority faiths understandably concerned about religious oppression, undertaken with government endorsement or support.

In this paper, I use the experience of Jews in America to question whether a strict separationist approach would produce an optimal benefit to the minority religions. Examining this experience may assist in reconstructing a more equitable First Amendment jurisprudence. Historically, Jews have been one of the most persistent and vociferous advocates for the strict separation between church and state.[2] Stephen M. Feldman notes that "in an America that was overwhelmingly Christian . . . Jews knew that any governmental succor for religion would almost certainly translate into support for Protestantism."[3] Insofar as Jewish interests do not always align with those of Protestant Christians, supporting separation of church and state was a clear strategy to avoid religious-based oppression or discrimination. However, imposing a strict separationist system has costs. It hampers free exercise claims by sanctioning nearly any law that is religiously-neutral in intent and generally applicable. And if religious minorities are able to convince the legislature to pass a law accommodating their particular needs, the strict separation paradigm employs the establishment clause to strike down the legislation as religious favoritism.[4] Ideally, the religion clauses should permit legislatures to

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[1] STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 255 (1997).

[2] *Id.* at 201-202; Alan Mittleman, *Jews and Separationism*, 8 J. L. & RELIGION 291, 291-92 (1990).

[3] Feldman, *supra* note 1, at 202.

[4] This leads to one of the foremost ironies of strict separationism—its harms are not dependent on the religious community in question being politically powerless. The amount of power a religious community can bring to bear only changes the particular clause used against them. Free exercise jurisprudence denies the claims of minority faiths which do not have requisite influence in the legislature to pass friendly legislation. And if a minority group does muster enough political power to get an exemption passed, the establishment clause wing of strict separationism will prevent the law from taking effect. Indeed, religious organizations possessing too much political power has been seen as an end result the establishment clause is supposed to guard against. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). Hence, the problems outlined in this article exist regardless of whether minority faiths truly are politically powerless or not.

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accommodate religious difference and encourage courts to step in where legislators are hostile or indifferent towards achieving that end. Only by being cognizant of religious difference and recognizing the distinction between religious beliefs that command majority support and those that do not, will the religion clauses truly equalize the status of different religious traditions in America,

In Part II, I sketch the basic views of the liberal separationist standpoint, in regards to the Establishment Clause, the Free Exercise Clause, and the ideas of special laws, carve-outs, or exemptions for religious accommodation. In general, separationists are skeptical of any action of government that directly touches on religious faith. While government and religion cannot remain entirely separate, the point of separationism is to make church and state interaction incidental and banal, preferably as a part of generally applicable laws that affect religious and non-religious institutions equally. Otherwise, government should remain relatively apathetic to the success or failure of religion and allow it relatively free rein to compete for souls in the private sphere, so long as it does not demand support from the public. Accommodation is on shaky ground in this view because it involves the government directly supporting religious belief.

Part III articulates some theoretical problems with strict separationism. The first is that general principles, such as "strict separation," are usually insufficient to protect minority rights. Majority groups will only accede to the dominance of a principle if they believe their interests can be secured by it—a desire that can be accommodated through the very breadth (and thus ambiguity) of the principle. This same breadth makes it possible—even likely—that distinctions will be drawn in a manner that favors the majority and harms the minority. The reliance of separationists on generally-applicable laws is also problematic. Generally-applicable laws mask but do not eliminate the religious significance of their content. Decisions on what is included and excluded from a rule or regulation often work to the advantage of majority faiths and to the detriment of minorities. Discretionary application of rules offers another opportunity for religious bias to operate. Finally, because these rules tend to operate in congruence with general Christian practice, they effectively establish Christianity as the norm and thus make alternative religious faiths' requests for accommodations into deviations. This helps explain the "Jews lose" rule of free exercise cases: while Christians have sometimes won and sometimes lost Supreme Court free exercise decisions, Jewish claimants have a zero-percent success rate on free exercise cases before the highest court.[5]

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[5] Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 251 (2003). It is not just Jews that lose—

Part IV examines case sets which demonstrate the manner in which strict separation has acted to harm Jewish interests in America. The decisions in these cases, which span a quarter century and cross a wide range of Establishment Clause issues, stand out for their common use of strict separation to reject laws and policies which either sought to alleviate some burden on Jews or protect the community from harm. They are also remarkable in the sheer creativity they demonstrate to insure that Christian or secular interests which might be affected by the precedents established would be insulated from their effects.

Finally, Part V offers a reconceptualization of the religion clauses of the First Amendment in a manner that offers increased protection to minority faiths, including Jews. Arguing for cognizance of minority difference and a specific discursive orientation that emphasizes the experience of religious minorities, this anti-subordination focus stands as a radical counter-testimony to the normative view of a neutral, absolute separationism. It then applies the analysis to the cases analyzed in Part IV, showing how it would lead to a contrary result, or at the very least, point to an alternative methodology for addressing the problem motivating the laws that would pass constitutional muster.

II. THE TENETS OF STRICT SEPARATIONISM

When discussing the jurisprudence dealing with matters of church and state, the use of the term 'separation' is somewhat vague. Indeed, Paul Weber has identified five distinct strains of "separation" in the First Amendment context.[6] Still, 'strict' or 'absolute' separation has a reasonably well-defined pedigree. The defining metaphor of strict separation is Thomas Jefferson's "wall of separation," which made its first legal appearance in *Reynolds v. United States*[7] and then again in *Everson v. Board of Education*.[8] Justice Hugo Black elaborated on that principle as follows:

"Neither a state nor the Federal Government can set up a church.

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with the exception of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 501 U.S. 520 (1993), no non-Christian group has ever won a free exercise case before the Supreme Court. Feldman, *supra* at 251. The Santeria religion at issue in *Hialeah* was itself a "fusion" religion combining elements of Catholicism with traditional West African beliefs. *Hialeah*, 501 U.S. at 524.

6 Paul J. Weber, *Neutrality and First Amendment Interpretation*, *in* EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT 1, 2-5 (Paul J. Weber, ed. 1990).

7 98 U.S. 145, 164 (1868).

8 330 U.S. 1, 16 (1947).

> Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."[9]

Since then, the Court has significantly expounded upon this doctrine. Fundamental to the separationist instinct is the view, forwarded in *Illinois ex rel. McCollum v. Board of Education*,[10] that "religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[11] Though in modern parlance separationism has been taken to mean a hostility toward religion, its defenders strongly reject this view.[12] "To the contrary, maintaining government neutrality toward religion is at least as important for preserving a sacred, holy concept of religion as it is for preserving a secular state."[13] Justice Black was even more explicit: "The Establishment Clause. . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[14]

As a result, separationists have been particularly wary of government "entanglement" with religion.[15] When religion and government are intertwined, the assumption is that both groups will be harmed. It has been hinted that the idea that religious faith needs governmental support is demeaning. Justice Jackson remarked that "It is possible to hold a faith with enough confidence to believe that what should be rendered to God

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9 *Id.* at 15-16.

10 333 U.S. 203 (1948).

11 *Id.* at 212.

12 *See, e.g.*, Nadine Strossen, *Religion and Politics: A Reply To Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 445 (1997) ("The widespread misconceptions about what the Establishment Clause requires and how the Supreme Court has enforced that clause lead to another dangerous distortion in the debates on this issue: the mistaken view that support for a strict separation between government and religion evinces hostility toward religion.").

13 *Id.*

14 Engel v. Vitale, 370 U.S. 421, 431-32 (1962) (quoting James Madison).

15 *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971), Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

does not need to be decided and collected by Caesar."[16] At the same time, a separationist standpoint protects religious minorities from the prospect of majoritarian domination. Absolute separation between Church and State thus "seeks to promote a vision that all individuals . . . remain free from the unequal burden and sense of isolation that government preferences for organized religion impose on those who are not their beneficiaries."[17]

Finally, separationists are suspicious of governmental accommodations of religious practice, when such accommodations exempt religious actors from generally applicable laws that everyone has to follow.[18] As Justice John Marshall Harlan articulated in his dissent in *Sherbert v. Verner*, one of the first cases to constitutionally require a "carve-out" from a generally applicable regulation to religious objector, demanding accommodation actually requires the state to "*single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[19] The problem with accommodation, from a separationist viewpoint, is that it seems to affirmatively favor religious actors over their secular peers. As Philip Kurland offers, "To permit individuals to be excused from compliance with the law solely on the basis of religious belief is to subject others to punishment for failure to subscribe to those same beliefs."[20] In this manner, strict separation—traditionally seen as an establishment clause doctrine—also makes use of the free exercise clause in its opposition to legislative carve-outs.

Progressives who might normally be counted on to rise to the defense of minority rights have been significantly more hesitant when that might mean giving affirmative support to a religious group. Michael W. McConnell points out that "Religion is an especially vulnerable target" to liberal reformers "because religion represents the wisdom of the ages, which is an obstacle to the transformation of society."[21] And indeed, some of the more radical critics, who are usually quick to disavow legal formalism[22] or the public/private distinction,[23] have turned to precisely

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[16] Zorach v. Clauson, 343 U.S. 306, 324-25 (1952) (Jackson, J., dissenting).

[17] Gregg Ivers, "American Jews and the Equal Treatment Principle," *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 158, 177 (Stephen V. Monsma & J. Christopher Soper, eds., 1998).

[18] *Cf.* Employment Division of Oregon v. Smith, 494 U.S. 872 (1990).

[19] Sherbert v. Verner, 374 U.S. 398, 422 (Harlan, J., dissenting).

[20] Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 7 (1961).

[21] Michael W. McConnell, *"God is Dead and We Have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 187.

[22] Legal formalism is the view that "[a] legal outcome is valid if the system's rules and categories are correctly applied." Rachel Adler, *Engendering Judaism*, in CONTEMPORARY

those tools when the subject is the marginalization of certain religious practices in America.[24] Insofar as religious beliefs might conflict with policy positions that liberals wish to see put into effect, allowing for exemptions could be a barrier to the vision of an egalitarian, open, and equal society. Simply put, free exercise of religion is seen as a threat to certain groups, who view it as facilitating the denial of equal rights for homosexuals, the oppression of women, the promulgation of harmful social policies, or any number of illiberal social practices.[25]

III. THEORETICAL PROBLEMS

Though separationism has its uses, there are deep theoretical problems that cannot be avoided. In general, even generic principles, such as "strict separation," lend themselves to supporting majoritarian desires. This runs counter to the intuitive view of utilizing broad principles, that "once a governing principle is identified, the principle reduces the danger of judicial majoritarianism because the principle rather than judicial discretion generates the adjudicatory result."[26] This fails because "in order to be generally acceptable, a legal principle must be stated at a high enough level of abstraction to permit interest groups with divergent preferences to believe that their objectives can be secured by the principle. This level of abstraction both precludes meaningful constraint and requires an act of discretion to give the principles operative meaning."[27] A Christian-

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JEWISH THEOLOGY: A READER 319, 325 (Elliot N. Dorff & Louis E. Newman, eds. 1999). Legal leftists dislike it, both because it ignores the outcomes of legal decisions, and because they do not believe that the legal system's rules and categories necessarily lead to one set outcome.

23 The public/private distinction holds that the law should be agnostic to certain activities that are primarily private. Issues like family life and religion are often relegated to the "private sphere," where any inequalities are seen as beyond the reach of legal remedies. Feminists, especially, have criticized this formulation as sanctioning oppression that exists in these private sanctums. *See* Catherine A. Mackinnon, *Reflections on Sexual Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

24 McConnell, *supra* note 21, at 188. McConnell points at Mark Tushnet as one of the primary offenders, claiming that "Tushnet is the first to expose and deconstruct the seeming neutrality of the common law of property or contract; but when it comes to supposedly neutral laws that impinge on the practice of religion, Tushnet has resurrected the most formalistic of positions. According to Tushnet, a law that imposes the same secular standards on the religious and the non-religious alike is neutral toward religion." *Id.* (footnote omitted). *See* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited,* 1989 SUP. CT. REV. 373.

25 *See, e.g.*, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 459 (1992) ("[R]eligion perpetuates and reinforces women's subordination, and religious freedom impedes reform."); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003) (citing religious beliefs as a major source of tolerated sex discrimination).

26 Girardeau A. Spann, *Pure Politics,* 88 MICH. L. REV. 1971, 1989 (1990).

27 *Id.*

dominated polity would not accede to strict separationism unless the principle could be interpreted to allow at least a substantial amount of its objectives to be achieved. The net effect is for ambiguity in the principle to lead to inconsistent results when applied to majorities versus minorities. So, for example, while the belief/conduct distinction[28] is already biased in favor of Christianity over Judaism (the former leans towards emphasizing belief over conduct, the latter tending toward the opposite), Courts can still step in to save Christian conduct from regulation by redefining it as a belief.[29] Because religion and government have to interact at some level, the debate is less about complete or incomplete separation than the degree of the relationship. Especially where the fact of this interaction is submerged under the discourse of separationism, the outcome of this negotiation will likely be significantly slanted in favor of Christianity.

Second, strict separation tends to channel legislative energies towards generally applicable laws, which can still be enforced against religious minorities. Of course, it is true that these laws might theoretically burden majority religious practice too—that's what makes them "generally applicable." Nevertheless, in effect, this is unlikely to be the case. James C. Brent notes that in a majoritarian democracy, "lawmakers are less likely to adopt laws that place burdens on adherents of Christianity, the majority religion."[30] This is not necessarily a result of overt hostility toward minority faiths. Even formally-neutral rules still must include some activities and exclude others; what counts as a violation is itself subject to democratic debate. Lawmakers are simply more likely to notice when majority practice

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[28] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940) (Arguing that "the [First] Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

[29] Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 724-25 (1993) ("[T]he Court's designation of any particular religious interest in each case is arbitrary. It is arbitrary because in reality, religious belief may exist apart from conduct, but religious conduct is never divorced from religious belief.... Thus, the Court has had wide latitude within the paradigm (which asks whether the religious interest is belief or conduct) to identify the religious interest at issue as either belief or conduct. If the Court wants to find that the regulation violates the adherents' rights, it can identify the interest as belief. Conversely, to save the regulation, it can identify the interest as conduct."). *Compare* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972), on the Amish's religious claim against compulsory education ("the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction."), *with* Goldman v. Weinberger, 475 U.S. 503, 508 (1986), on an Orthodox Jew's religious claim against the prohibition of wearing headgear (including a Yarmulke) while on duty ("The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.").

[30] James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 248 (1999).

might be implicated in a law (or be responsive to constituent reports of religious burden or hardship) than if a politically powerless minority sect faces similar problems.[31] Even if made aware of this religious hardship, it may be difficult for a legislator to conceptualize the burden a law places on an uncommon or unfamiliar religious practice and fairly weigh that against the interests the proposed law is meant to achieve.[32] As a result, even legislators with good intentions will still be more likely to enact laws burdening minority religious practices compared to majority religious practices.

The belief that generally applicable laws are neutral towards religion and that any effect they have on religion is incidental is itself based on a majoritarian fantasy. Arguing that the laws in question are neutral towards religion "presupposes that there are decisions that are *not* fraught with religious significance. And perhaps there are—but those decisions will not give rise to free exercise claims. All free exercise claims involve government decisions that are fraught with religious significance, at least from the point of view of the religious minority."[33] Admittedly, laws must still be neutral in intent towards religion.[34] However, this is small consolation when the outcomes will persistently slant themselves against minority faiths. Effectively, the laws separationists assert are religiously neutral (in intent) will only be religiously neutral (in effect) *to the majority*. If it was religiously neutral to *everyone*, there would not be a free exercise claim in the first place.

Establishing a general rule of conduct creates a secular norm, from which any deviation is seen as a request for special privileges or rights. However, both difference and equality are comparative terms. You are different *from* someone,[35] you are equal *to* someone. Both "to" and "from" imply a standard from which the subject is being judged, and equality, in liberal thought, tends to require sameness to the referent.[36] This form of

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31 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1136 n.117 (1990) ("Most legislators are unaware of the problems of minority religions, and many (though not all) minority religions are poorly positioned to defend their own interests.").

32 *See* Brent, *supra* note 30, at 248 ("If, however, Christians do find themselves in court defending the exercise of their religion, the judiciary is likely to be receptive to their claims. Primarily, this is because Christian judges should be more likely to be sympathetic to the plight of fellow Christians. The religious burden may appear more "substantial," or the governmental interests may seem less "compelling" when they burden Christians than when they burden non-Christians.").

33 McConnell, *supra* note 31, at 1134.

34 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 501 U.S. 520 (1993).

35 MARTHA L. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 22 (1990) ("Difference, after all, is a comparative term. It implies a reference: different from whom? I am no more different from you than you are from me.").

36 CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW

equality, in church/state relations, means that Jews will be treated equally insofar as they are treated the same as their secular/Christian peers. This will be inadequate if the First Amendment is assumed to protect in any way the distinctiveness of Jewish identity—the aspects that make them not secular and not Christian.[37]

Though equal treatment in this secular sphere may protect Jews insofar as their practices are not inconsistent with general (Christian) norms, it does not account for Jewish difference from societal norms. McConnell clarifies:

> "[T]his vision of secular equality would force Jews to abandon aspects of their Jewishness. To be sure, it would protect them from laws that explicitly singled out Jews for disabilities, and it would maintain a secular public order in which all citizens could participate on the basis of their shared characteristics. . .But it would not protect the ability of religious minorities to maintain their *differences* from secular society. It would provide no protection for religious practices at odds with the secular interests of the majority."[38]

Contrary to the way law appears to view Judaism, it is not merely a "quirky Protestant sect,"[39] and treating it that way will not provide adequate space by which distinctive Jewish self and communal expression can be actualized. By taking into account the presence of religious pluralism in America, one recognizes that there are differences between faiths, and that the ideal neutrality may in fact illegitimately constrain the life projects of subordinated groups.[40] Defining the First Amendment in such a fashion

22(1987) ("Liberalism defines equality as sameness. It is comparative. To know if you are equal, you have to be equal to somebody who sets the standard you compare yourself with.").

37 *Id.* at 44 ("[T]o require that one be the same as those who set the standard…simply means that…equality is conceptually designed never to be achieved. Those who most need equal treatment will be the least similar…to those whose situation sets the standard against which one's entitlement to be equally treated is measured.").

38 MICHAEL W. MCCONNELL, JOHN H. GARVEY, THOMAS C. BERG., RELIGION AND THE CONSTITUTION 12 (2002).

39 Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 858 (1996).

40 *See* Jeff Noonan, *Need Satisfaction and Group Conflict: Beyond a Rights-Based Approach*, 30 SOC. THEORY & PRAC. 175, 179-180 (2004) ("[I]t is just this purported 'neutrality' that has historically been aligned with the interests of the dominant powers. Oppressed groups struggling against their oppressors do not therefore simply demand equality, but the power to determine their own horizons. The core demand of oppressed groups is for the tools they need to reconstruct the conditions of viability for their cultures …. To value neutrality above plurality in cases in which a historically oppressed group is struggling to end its subordinate status is therefore to support conditions that restrict rather than engender different life projects.").

subverts the intent of the protections it establishes.[41]

These aspects of the separationist doctrine reciprocate and reinforce each other to make it highly improbable that the religion clauses will provide meaningful protection to Jews and other religious minorities. The inherent incompleteness of the doctrine, coupled with the unavoidable discretion that Christian-dominated government institutions still possess, contributes to the limited effect of the principle on Christian hegemony. This same discretion, however, can be utilized to reject Jewish claims for accommodations, which will inevitably be characterized as operating outside the generally-applicable secular norm. In this context, it should not surprise us that "[i]n free exercise exemption cases at the Supreme Court level … while members of small Christian sects sometimes win and sometimes lose … non-Christian religious outsiders *never* win."[42] As Samuel J. Levine succinctly puts it, "It is disturbing, but not surprising, that judges who fail to consider the perspectives of disadvantaged groups may also fail to interpret the law in a way that will help combat some of society's institutional biases."[43]

IV. CASES

A study of several specific areas of case law reveal how a separationist doctrine has worked to the detriment of religious minorities. In this section, I will focus on two groups of cases: the interplay of *Braunfeld v. Brown*,[44] *Gallagher v. Crown Kosher Super Market*,[45] and *Estate of Thornton v. Caldor*[46] regarding Sunday closing laws, and the relationship between *Kiryas Joel v. Grumet*[47] and *Rosenberger v. Rectors and Visitors of the University of Virginia*, [48] on governmental grants of secular benefits to religious groups.

[41] *See* McConnell, *supra* note 31, at 1139 ("The ideal of free exercise of religion…is that people of different religious convictions are different and that those differences are precious and must not be disturbed …. The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.").

[42] Feldman, *supra* note 5, at 251 (emphasis added).

[43] Samuel J. Levine, *Towards a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL OF RTS. J. 153, 157 (1996).

[44] 366 U.S. 599 (1961).

[45] 366 U.S. 617 (1961)

[46] 472 U.S. 703 (1985).

[47] 512 US 687 (1994).

[48] 515 U.S. 819 (1995).

A. Sunday Closing Laws

Braunfeld was a Free Exercise clause challenge brought by several Orthodox Jewish plaintiffs protesting against Pennsylvania's Sunday closing law. The claimants had a clothing store which they closed from nightfall Friday to nightfall Saturday, in accordance with the Jewish Sabbath, and argued that forcing them to close on both Sunday and Saturday caused them significant economic loss, placing them in a disadvantageous position against their Christian-owned competitors.[49] The Supreme Court had already upheld Pennsylvania's law against an Establishment Clause challenge,[50] and the *Braunfeld* Court proceeded to reject the Free Exercise claim, as well. The Court was entirely unmoved by the inconvenience the law placed on Orthodox Jews vis-à-vis their Christian counterparts, asserting that the harm to Orthodox Jewish religious belief is minimal because they were still free to participate "in some other commercial activity which does not call for either Saturday or Sunday labor."[51] Aside from the critical question of what occupations exist for which being *required* – by either law or religion – to abstain from work on both Saturday and Sunday is not comparatively disadvantageous against those who only are forced to abstain on Sunday, the Court's response effectively boils down to demanding observant Jews leave the merchant field entirely – or at the very least, being apathetic towards that potential outcome.

The *Braunfeld* Court also heavily relied upon the argument that the state had a compelling interest in creating a single, uniform day of rest, with no exceptions.[52] Two years later, when *Sherbert v. Verner* was decided,[53] the majority opinion distinguished *Braunfeld* on precisely this ground: that while the Pennsylvania law worked "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive . . .. [T]he statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."[54]

The logical conclusion one would draw from this line of analysis is that Sunday Closing Laws could only be enforced against Jews insofar as they were in pursuit of that "strong state interesting in providing *one* uniform day of rest for *all* workers."[55] Alas, this would be an extremely

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49 366 U.S. at 601.
50 Two Guys From Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961).
51 *Braunfeld*, 366 U.S. at 606.
52 *Id.* at 607-608.
53 374 U.S. 398 (1963).
54 *Id.* at 408 (quoting *Braunfeld*, 366 U.S. at 605).
55 *Id.* (emphasis added).

optimistic assumption. In *Gallagher v. Crown Kosher Super Market*, the Court also dealt with a Sunday closing law being enforced against an Orthodox Jewish establishment, this time in Massachusetts.[56] Unlike *Braunfeld*, however, the Massachusetts law could in no way be deemed generally-applicable. Indeed, the Court spent nearly three pages detailing the numerous exemptions that the state had written into its law, including

> "exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers . . .. [T]he Sunday sale of live bait for noncommercial fishing; the sale of meals to be consumed off the premises; the operation and letting of motor vehicles and the sale of items and emergency services necessary thereto; the letting of horses, carriages, boats and bicycles; unpaid work on pleasure boats and about private gardens and grounds if it does not cause unreasonable noise; the running of trains and boats; the printing, sale and delivery of newspapers; the operation of bootblacks before 11 a.m., unless locally prohibited; the wholesale and retail sale of milk, ice and fuel; the wholesale handling and delivery of fish and perishable foodstuffs; the sale at wholesale of dressed poultry; the making of butter and cheese; general interstate truck transportation before 8 a.m. and after 8 p.m. and at all times in cases of emergency; intrastate truck transportation of petroleum products before 6 a.m. and after 10 p.m.; the transportation of livestock and farm items for participation in fairs and sporting events; the sale of fruits and vegetables on the grower's premises; the keeping open of public bathhouses; the digging of clams; the icing and dressing of fish; the sale of works of art at exhibitions; the conducting of private trade expositions between 1 p.m. and 10 p.m."[57]

Similar exceptions were written in for driving ranges, miniature golf course, amusement parks, bowling, and certain professional sports.[58] Despite what the district court had accurately described as an "unbelievable hodgepodge" of wholly arbitrary exemptions,[59] the Supreme Court still upheld the application of the laws against a Jewish establishment as consonant with the Free Exercise clause.

So, after *Braunfeld* and *Gallagher*, the Supreme Court ruled that states

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[56] 366 U.S. 617 (1961).
[57] *Id.* at 619-620.
[58] *Id.* at 620-21.
[59] *Id.* at 622.

were not obliged to provide religious exemptions to Sunday closing laws because the state had a compelling interest in a universally applicable day of rest. However, the state was not required to actually generally apply this interest to enforce the law against a religious body which rested on a different day. Rather than establishing a uniform day of rest which necessarily would discriminate against observers of either the Saturday or Sunday Sabbath, a Connecticut legislature side-stepped the problem entirely by passing a rather sensitive and sensible law "which prohibited employment of more than six days in any calendar week and guaranteed employees the right not to work on the Sabbath of their religious faith."[60] In fact, the *Braunfeld* court in fact was presented with a very similar proposal and admitted that—while not constitutionally required—it "may well be the wiser solution to the problem."[61]

However, when the case reached the Supreme Court in 1985, the *Lemon* test had firmly entrenched the principle of separation of church and state into the constitutional framework.[62] Applying *Lemon*, the Connecticut Supreme Court found that the statute had "no secular purpose" and struck it down as a violation of the Establishment Clause.[63] The rhetoric of separationism, in this case, stood in fundamental opposition to religious liberty. Upon review, the U.S. Supreme Court affirmed this decision, arguing that the law favored religious employees because it "gives Sabbath observers the valuable right to designate a particular weekly day off."[64] But, as Michael Sandel aptly points out, "Sabbath observers, by definition, do not *select* the day of the week of the rest. They rest on the day their religion requires. The benefit the statute confers is not the right to choose a day of rest, but the right to perform the duty of Sabbath observance on the only day it can be carried out."[65]

Thus, through a dizzying display of constitutional contortions, the Supreme Court refused to invalidate a not generally applicable law as enforced against Orthodox Jews, but found constitutional infirmity in a law designed to accommodate Jewish difference. This sequence of cases highlights the shortcomings in the separationist doctrine. After deciding that Sunday closing laws were constitutional, the rule was thereafter

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60 472 U.S. 703, 706 n.2 (1985)

61 *Braunfeld*, 366 U.S. at 608.

62 Lemon v. Kurtzman, 403 U.S. 602, 612-613 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…finally, the statute must not foster an excessive government entanglement with religion." (internal citations and quotations omitted)).

63 Caldor, Inc. v. Thornton, 191 Conn. 336, 349, 464 A. 2d 785, 793 (1983).

64 *Caldor*, 472 U.S. at 710 n.9.

65 MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 67 (1996).

"coded" as secular rather than religious, thus legitimate to impose upon competing religious faiths.[66] Meanwhile, because closing on Sundays was deemed to be the neutral, secular baseline, alterations from that standpoint to accommodate competing faiths were deemed to be deviations from the secular norm resulting from religious motivations, and thus must be struck down by the Establishment Clause.

B. *Kiryas Joel* and *Rosenberger*

Kiryas Joel discussed the peculiar needs of a Satmar Orthodox Jewish enclave in the village of Kiryas Joel, New York.[67] Due to their strict religious beliefs, the Satmar mostly educated their children in private religious academies. However, a small set of handicapped students entitled to government funded accommodations under state and federal law also lived in this community.[68] At first these students were sent to the local public schools, but this experiment was abandoned after the students experienced "panic, fear, and trauma" from the arrangement.[69] After several failed attempts to find a mutually amenable compromise with the school district, the Satmar convinced the New York state legislature to form a new school district, consisting entirely of the village Kiryas Joel, solely to provide their handicapped children with the benefits they were entitled to under law.[70] An association of New York educators then sued, alleging that the district's creation violated the Establishment Clause of the US constitution.

As with *Caldor*, the problem in *Kiryas* was one of the Supreme Court's own making. Prior to Court decisions in *School Dist. of Grand Rapids* v. *Ball*[71] and *Aguilar* v. *Felton*,[72] the broader school district had simply sent its employees to the Satmar's academies to provide the necessary accommodations. Thus, in his concurring opinion, Justice Kennedy accurately described the dilemma faced by the Satmar as "a

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[66] *See* FELDMAN, *supra* note 1, at 263 ("[W]hen a particular activity is defined or coded as *secular,* the activity supposedly has been removed from the realm of the religious and is therefore legitimated by the principle of separation of church and state. Despite the possibility that a Jew or a member of another minority religion might experience or perceive that very activity as decidedly Christian, the declaration of secularity (by the Supreme Court or some other empowered governmental actor or institution, such as a school board) justifies the activity within the dominant discourse.").

[67] Kiryas Joel v. Grumet, 512 U.S. 687 (1994).

[68] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 ed. and Supp. IV); N. Y. Educ. Law, Art. 89 (McKinney 1981 and Supp. 1994).

[69] *Kiryas Joel*, 512 U.S. at 692.

[70] *Id.* at 693.

[71] 473 U.S. 373 (1985).

[72] 473 U.S. 402 (1985).

predicament into which we put them."[73] Ultimately, however, Kennedy joined a majority opinion holding that the very creation of the Kiryas Joel school district violated the Establishment Clause, lamenting that "One misjudgment is no excuse … for compounding it with another."[74] Although Justice Souter did not dispute that "the Constitution allows the State to accommodate religious needs by alleviating special burdens,"[75] his majority opinion proclaimed that the creation of a special school district "is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance."[76] But the Satmars' claim was not religious at all—the desire to remove one's disabled children from an environment in which they experience "panic, fear, and trauma"[77] is one that would presumably unite secular and sectarian parents alike. Nevertheless, the Court utilized its discretion to classify this case as involving religious interests, and thus one that implicates the Establishment Clause.

One year later, the Court ruled on *Rosenberger v. Rectors and Visitors of the University of Virginia*.,[78] This case centered on a university guideline that prohibited funding for religious publications.[79] An evangelical Christian publication sued, arguing that the state was engaging in viewpoint discrimination, and a divided Court agreed—simultaneously holding that the prohibition was neither mandated nor justified by the Establishment Clause.[80] Indeed, the ruling opined that refusing to fund the organizations "risk[ed] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[81]

Kiryas Joel and *Rosenberger* are, in a sense, mirror cases which address very similar questions of law.[82] The difference, of course, is that the Establishment Clause managed to both demand—for Christians—and prohibit—for Jews—equal treatment. In *Kiryas*, the court held that the Establishment Clause forbids the government from granting a secular

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[73] *Kiryas Joel*, 512 U.S. at 731 (Kennedy, J., concurring).
[74] *Id.*
[75] *Id.* at 705.
[76] *Id.* at 706 (footnote omitted).
[77] *See supra* note 69 and surrounding text.
[78] 515 U.S. 819 (1995).
[79] *Id.* at 822-23.
[80] *Id.* at 845-46.
[81] *Id.*
[82] The fact that *Rosenberger* also involved a free speech claim is immaterial. When the 4th Circuit ruled in *Rosenberger*, it found that the University of Virginia had violated free speech rights, but that this was justified by the need to avoid an Establishment Clause violation. Rosenberger v. Rectors and Visitors of the University of Virginia, 18 F.3d 269, 283-287 (1994). The Supreme Court reversed the 4th Circuit's resolution of the Establishment Clause issue, but did not disagree with the appellate court's framing. *See Rosenberger*, 515 U.S. at 837-838. Hence, had the *Rosenberger* court followed the precedent it set in *Kiryas Joel*, it wouldcould have upheld the University's regulation as being consistent with the duty to follow the Establishment Clause.

benefit enjoyed by otherwise similar but non-religious peers to a Jewish group. In *Rosenberger*, it was held that the Establishment Clause does not forbid the government from granting a secular benefit enjoyed by otherwise religious but non-religious peers to a Christian group, *and* that refusing to grant the benefit (thereby treating the Christian organization differently from secular publications) might itself violate the Establishment Clause. This legal distinction held because *Kiryas Joel* was not a general law but rather a request for special privileges for a religious body, and *Rosenberger* was characterized as a religious group asking to be treated the same as secular peers.

But these cases did not have to be framed this way. Whereas the *Rosenberger* case was characterized as a Christian group seeking a benefit generally available to all publications, and *Kiryas Joel* was presented as a religious group receiving a special privilege from the state, it would be equally possible to frame the cases in the reverse. The Christian group in *Rosenberger* could be seen as demanding an exemption to the University's general content regulations, and the village of Kiryas Joel as requesting and receiving the same benefit (an autonomous, secular school district) granted to dozens of other political units across the state. That the Court chose the framing that it did is not a result of the inevitable machinations of objective rules, and the religiously skewed outcome should be viewed with suspicion. Effectively, the principle of "neutrality prohibited New York from creating a public school for the handicapped children of a small and insular Jewish sect, yet neutrality also somehow demanded that Virginia fund a magazine devoted to Christian proselytizing."[83] Once again, separation of Church and State is applied solely to dismantle affirmative protections for a minority faith, while analogous cases involving the majority are recast so that accommodation is not just permitted, but is required.

IV. THE FIRST AMENDMENT AS AN ANTI-SUBORDINATION PRINCIPLE

There is an alternative to the separationist formulation of the First Amendment that is consistent with our desire to protect minority religious traditions. Instead of mandating strict separation in all cases, including those in which that doctrine is interpreted to require state suppression of minority religions under the guise of "neutrality," the First Amendment "should be read to protect minority religious beliefs and practices from being burdened by government and. . .equalize the status of minority religions before the government with that of majority faiths."[84] This is

[83] FELDMAN, *supra* note 1, at 276.
[84] Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 921

freedom of religion as an anti-subordination principle—concerning itself primarily with the status of religious minorities and insuring that they are placed on equal footing with majority faiths.

It is important to note that majority religious traditions should and will receive protection under the First Amendment under this reformulation. First, they will be protected because they are less likely to be threatened in the first place—in a majoritarian democracy, the majority faiths should be able to adequately defend their interests in the electoral arena. Second, though anti-subordination is *primarily* concerned with the differentiated status of minority religious, it also stands in opposition to any attempts to subordinate majority religious practice that do manage to survive the democratic process. However, laws which are in conflict with majority religious practice should be more likely to survive anti-subordination inquiry because the legislature can be presumed to be aware of the effect their laws have on the majority faith (which will likely include the majority of legislators) and presumably would only pass laws conflicting with these beliefs or practices if the interest they were pursuing really was compelling. At the very least, the issue is far more likely to be raised seriously in legislative deliberations compared to the concerns of a small or disliked minority faith. Third, the anti-subordination critique against strict separationism and prevailing First Amendment doctrines is centered around their failure to adequately protect religious minorities. Therefore there is no reason why status quo jurisprudence cannot be retained for adjudicating disputes centered around majority belief and practice, where questions of endorsement or entanglement are likely to loom larger than the prospect of subordination. The different status of majority compared to minority faiths fundamentally means that cases involving the two are likely to involve different sorts of questions. There is no reason why law should be forced to use the same techniques to provide the answers.

Anti-subordination is not a test in the sense of the *Lemon*[85] or "Endorsement" tests,[86] but, like separationism, it is an outlook or a framing point that directs the goals that legislators desire to achieve through the religion clauses . Ruth Colker articulates the view of anti-subordination as believing that "it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole."[87]

(2004).

85 Lemon v. Kurtzman, 403 U.S. 602, 612-613 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…finally, the statute must not foster an excessive government entanglement with religion." (internal citations and quotations omitted)).

86 *See* Lynch v. Donnelly 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

87 Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

This is contrasted with the "anti-differentiation perspective," which holds that "it is inappropriate to treat individuals differently on the basis of a particular normative view [about their group membership]."[88] In other words, if we are committed to treating two groups equally under anti-differentiation, we must treat them precisely the same, while if we are committed to equality as anti-subordination, we must treat them in a manner so as to equalize their status in society, which may require disparate treatment. The principle of anti-differentiation manifests itself in separationism because it condemns disparate treatment between religions, as well as between religion and irreligion. It is thus officially indifferent to the manner which equal treatment might yield unequal effects or results. Anti-subordination sees the harm not necessarily in the particular treatment government metes out to religious or secular actors, but in the resulting effects such treatment has on those groups' equal status in society.

There are several good reasons to adopt the anti-subordination stance. It makes the religion clauses coherent with a general view of how the Constitution should operate to protect minority rights. In this view, if the religion clauses are not working to protect minority rights, they should be seen as not working at all. Moreover, "noticing" the relative position of a given religious practice in relation to dominant social hierarchies is highly relevant to legal decision-making. As Richard Delgado and Jean Stefancic remind us, "Normative discourse … is highly fact-sensitive … adding even one new fact can change intuition radically."[89] Finally, from a pragmatic standpoint, anti-subordination is "simply a more flexible doctrine that permits the courts" and other actors to take religion into account when setting policies that disparately affect different religious faiths, or determining the breadth and scope of such policies.[90]

However, anti-subordination requires us to adopt an even more radical position regarding the notion of a neutral stance. As noted above, the normative perspective on law and legal policy is a Christian voice masquerading as neutrality.[91] Indeed, the very idea of neutrality, in a discursive, God's Eye View sense, is mythological—we all are inextricably tied to particular perspectives and experiences.[92] Therefore, Mari J.

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88 *Id.* at 1005.

89 *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE, at xv (Richard Delgado & Jean Stefancic, eds., 1995). *But see* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 166 (1989) (Noting that "we think that individuals should be selectively forgetful in their different roles and attend only to considerations that are contextually defined as relevant.").

90 Colker, *supra* note 87, at 1013.

91 *See supra*, text surrounding note 33.

92 This is true for at least two reasons. First of all, human behavior occurs in the context of surrounding institutions which exert considerable influence at every step. It is impossible to even comprehend how normative discourse might proceed without such constraints, and in any event, discussing issues of law and legal interpretation presupposes the existence of them in some form.

Matsuda argues in favor of "[l]ooking to the bottom—adopting the perspective of those who have seen and felt the failure of the liberal promise. . .." as an orienting point for legal and constitutional discourse.[93] In a world where perspectivism is inescapable, the lesson of Critical Race Theory and Feminism is that legal actors must be to affirmatively seek out the distinctive voice of the Other, rather than assume that it will automatically be accounted for in dominant discourse. Jack Balkin expands on this point:

> "If critical race theory and feminism have taught us anything, it is that one cannot begin to understand the situation of others until one also understands one's differences from them and how this difference affects one's ways of seeing the world. If we do not investigate the relationship between our social situation and our perspectives, we may confuse our conception of what is reasonable with Reason itself. If we do not see how our reason is both enabled and limited by our position, we may think our judgments positionless and universal. We may find the perspectives of those differently situated unreasonable, bizarre, and even dangerous, or we may not even recognize the possibility of another way of looking at things."[94]

As Brenda Cossman & Ratna Kapur put it, "the freedom to practise one's religion cannot be defined exclusively from the point of view of the dominant community."[95] Repositioning our perspective to give enhanced

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See Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION MAKING 1, 3(1999). ("It is not possible imagine political behavior—or, for that matter, any purposeful human behavior—proceeding without some overt or tacit reference to the institutional arrangements that give it shape, direction, and meaning.").

Second, normative discourse occurs within a broader context of narrative and experience from which it cannot escape. As Robert Cover argued, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning…. In this normative world, law and narrative are inseparably related…. Every prescription is insistent in its demand to be located in discourse -- to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material realty by our imaginations." Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

93 Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

94 J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1952 (1995).

95 BRENDA COSSMAN & RATNA KAPUR, SECULARISM'S LAST SIGH? HINDUTVA AND THE

weight to voices "from the bottom" offers a way of counteracting this discursive inequity.

Articulating the First Amendment from this framework would yield significantly different results in both the Sunday closing cases and *Kiryas Joel*, as well as other decisions in which the religion clauses have not been construed to adequately protect Jewish religious freedom. By recognizing that difference is a relative term, the anti-subordination principle would reject the "original entitlement" the dominant party claims by virtue of its dominance,[96] by which the subordinated party's difference/deviation is seen as a justification for unequal treatment.[97] Generally speaking, a view from the minority perspective will not condition equality on sameness with the majority, but rather define equality as equal entitlement to pursue their own conception of the good.[98] At the very least, an affirmative effort to include subordinated perspectives into legal discourse would enhance their moral and democratic legitimacy. As Iris Marion Young argues, "Normative judgment is best understood as the product of dialogue under conditions of equality and mutual respect. Ideally, the outcome of such dialogue and judgment is just and legitimate only if all the affected perspectives have a voice."[99] Insofar as some voices are not represented in the status quo, legal actors—both courts and legislators—must proactively work to insure that the voice of the minority—be it Jewish, Muslim, Atheist, or other—is included and fairly considered in the proceedings.

In the Sunday closing cases, for example, a view from the bottom would not naturalize the Christian Sunday Sabbath and thus place the Orthodox Jewish belief as a request for special rights. Due respect for the authenticity of Orthodox Jewish belief would counsel against grouping their claim in with "all other persons who wish to work on Sunday" for the purposes of Free Exercise analysis,[100] and instead describe the case as it really is: Forcing a man to choose "between his business and his religion."[101] It would recognize how Massachusetts' granting Sunday exemptions to everything from mini-golf to clam digging, but not a Kosher Market, feels more like hostility to Judaism than equal consideration and

(MIS)RULE OF LAW 139 (1999).

96 MACKINNON, *supra* note 36, at 37.

97 *See supra* text surrounding notes 35-37.

98 *See supra* note 40.

99 IRIS MARION YOUNG, INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY 59 (1997).

100 Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

101 *Id.* at 611 (Brennan, J., dissenting). Brennan's opinion further buttresses the notion that viewing cases from the perspective of the minority will lead to enhanced protection for minority faiths—for that is precisely how Brennan described his own opinion: "I would approach this case differently, from the point of view of the individuals whose liberty is – concededly – curtailed by these enactments." *Id.* at 610. *See also* Levine, *supra* note 43, at 167-171.

protection.[102] And in the wake of all that history, it would *not* conclude that a law making a genuine, if perhaps pragmatically flawed, effort at accommodating differences between alternative religious faiths constitutes the only type of Sabbath law that presents a real threat to religious liberty.[103]

Kiryas would likewise undergo a major shift under an anti-subordination paradigm. Adopting a perspective from the bottom would, again, act to give the Jewish claimants far more weight in the proceedings then was demonstrated in the majority opinion. It would stridently reject Justice Stevens' concurring opinion, whose separationist instinct manifested itself in outright hostility towards the Satmar faith.[104] It would also rebel against Justice Souter's proclamation that shielding one's children from "panic, fear, and trauma" constitutes a "religiously grounded preference[]."[105] When faced with Justice Souter's proposed remedy for the Satmar, pressuring the legislature to "enact general legislation tightening the mandate to school districts on matters of special education or bilingual

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102 *Supra* notes 56-59 and surrounding text.

103 *Supra* notes 63-65 and surrounding text.

104 *See e.g., Kiryas*, 512 U.S. at 711. Justice Stevens describes the creation of the Kiryas Joel school district as an act which "affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors," and warns that the policy "unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith…. [thus] cement[ing] the attachment of young adherents to a particular faith." This boils down to finding harm in the increased likelihood that the Satmar will remain Satmar, the height of religious intolerance.

Admittedly, the Satmar are not the ideal manifestation of a liberal community. But the existence of illiberal aspects in the Satmar community should not be used to deny them the cultural autonomy writ large—only in the particular circumstances. By blurring this distinction, Stevens obliterates political liberalism for the sake of moral liberalism. *See* Chandran Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*, 20 POL. THEORY 674, 680 (1992) ("[A] liberal society is one in which different ways of life can coexist, even if some of those ways of life do not value equality and autonomy…. A liberal society [does not have to be] composed of (more or less) 'liberal' communities…. I see liberalism as offering a solution to the *political* problem of pluralism and social conflict rather than a comprehensive moral ideal.").

I actually believe that both Stevens and Kukathas miss the point. *Contra* Kukathas, we can set baselines of liberal behavior without completely denying the "political" aspect of liberalism. That is, there can be a general norm in favor of allowing communal autonomy, circumscribed by certain hard boundaries that cannot be crossed. However, unlike Stevens, I do not think that the existence of moral illiberalism in a certain community means we should try and suppress it entirely.

Critical race theorists and feminists have historically been able to make this distinction when dealing with problems of intersectionality. The existence of misogyny in the Black community, or racism amongst White women, does not delegitimize either of these groups' quests for liberation. It does mean that progressive theorists must be keenly aware of the potential for sub-minorities who might have colorable claim of oppression against a larger minority group that itself is oppressed. The interaction between these problems is complex, but giving due credence to both issues means not letting either absorb the other.

105 *Id.* at 706.

and bicultural offerings,"[106] it would point out that religious minorities rarely possess that type of raw political power.[107] As Will Maslow points out, Jews' "influence with most legislatures is weak, particularly when there are countervailing religious pressures."[108] It would also note the cruel paradox inherent in this request: a previous redistricting in the New York state legislature split the Hasidic neighborhood of Williamsburg into two districts, "submerging their votes and eliminating Hasidic representatives from the legislature."[109] When this action was challenged before the Supreme Court in *United Jewish Organizations v. Carey*, the Court expressed no interest in the damage done to the Hasidic community's political representation.[110] Reading *Kiryas* and *Carey* together reveals, at best, a hostile indifference towards the Jewish community that further demonstrates the degree to which Jewish interests and experience were marginalized before the Court.[111] The reality of such marginalization is positive proof that abstract principles have not been enough to include Jewish experiences. The incoherencies implicit in *Kiryas*, *Rosenberger*, and *Carey* and the perpetuation of Jewish subordination they guarantee can

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[106] *Id.* at 707

[107] Ironically, the village of Kiryas Joel may be an exception here. Ira C. Lupu argues that the facts in *Kiryas* show that the Satmar community did in fact have such power, because it got the state legislature to pass the law creating the school district in the first place. *See* Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 118-119 (1996) (arguing that "New York's politicians had very good reason to be responsive to the concerns of the Village" because they are a swing vote and have high turnout rates, that the law in question had "all the marks of insider politics," and questioning if "most small religious sects could command [this] kind of legislative clout").

That argument may be well taken in the context of this particular case (where the village was able to get the legislature to pass yet another law in the wake of the Supreme Court ruling that passed constitutional muster). However, it seems unreasonable to expect that all religious communities will possess similar political savvy and influence. Moreover, the ruling in *Kiryas Joel* may have unwittingly helped the Satmar in the legislature by keeping the issue in the spotlight and making it more likely that legislators would see it as an important and pressing issue. Certainly, few religious minorities can count on a high-profile Supreme Court case to give them a similar boost in the public eye.

[108] Will Maslow, *The Legal Defense of Religious Liberty—The Strategy and Tactics of the American Jewish Congress* (1973), *reprinted in* RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 229, 232–33 (Jonathan D. Sarna & David G. Dalin eds., 1997). This also demonstrates the flaws in extending Professor Lupu's analysis too far. *Supra* note 107. The situation in *Kiryas Joel* did not involve "countervailing religious pressures," which will not hold in cases where Jewish and Christian interests are in conflict.

[109] Michael W. McConnell, *The Church-State Game: A Symposium on* Kiryas Joel, FIRST THINGS, Nov. 1994, at 40.

[110] United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

[111] *See* McConnell, *supra* note 109, at 41 ("It is the old story of the double standard…. When the legislature deliberately chops up a district dominated by a religious minority, there is no problem: the Hasidim are just "white." But when it draws boundaries in their favor, the Hasidim become a distinct and dangerous group, and…stern warnings against 'segregation' along religious lines [are issued]….").

only be prevented from controlling the state of religion clause jurisprudence via affirmative inclusion of Jewish voices.

V. CONCLUSION

While this paper subjects the separation of church and state to a harsh critique, the point is not to demand that Church and State be joined at the hip. Indeed, there are many instances where religion and the law should be separated—not the least because such unions often are harbingers of state sponsored oppression toward minority faiths. Rather, I have tried to illustrate the manner in which strict separation as an absolute doctrine is both philosophically impossible, and applied in a manner such as to subordinate Jews and other minority faiths. We would be better served to view religion clause controversies from the perspective of the religious minority, with an affirmative goal of remedying their subordination, and then perhaps weigh those concerns against other values necessary for maintaining a liberal, tolerant, democratic society. In its more progressive incarnations, our judicial system has already begun to move in this direction.[112] However, until judicial actors explicitly recognize the limitations of strict separation and wholly commit themselves to a view of religious liberty centered on the freedom of religious minorities, any reforms will remain halting and spare.

As a general matter, the anti-subordination principle should operate to give us a more progressive and tolerant Church/State jurisprudence. Cass R. Sunstein remarks, "In a system of free expression, exposure to multiple perspectives will offer a fuller picture of the consequences of social acts. This should help make for better law."[113] The view from the bottom is also intrinsically more tolerant of religious pluralism, because it automatically must account for at least two perspectives – the dominant or hegemonic voice, as well as its own – rather than just the voice of the privileged.[114] As a result, an anti-subordination methodology will be more likely to give due deference to the concerns of all relevant parties—majority and minority—in its decision-making process.

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112 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992) ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.").

113 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 243 (1993).

114 *Cf.* W.E.B. DU BOIS, THE SOULS OF BLACK FOLKS 5 (Penguin, 1989) (1903) (explaining the "second-sight" and "double-consciousness" African-Americans receive by virtue of their subordinated state).