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# Religious Group Autonomy: Further Reflections about What Is at Stake

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## **Religious Group Autonomy: Further Reflections About What Is At Stake**

Kathleen A. Brady\*

### *Introduction*

Does the First Amendment afford religious organizations special protection when government regulation interferes with their internal activities or affairs? Nearly all scholars would agree that relief is appropriate where government regulation is designed to impede a group's religious mission or otherwise unfairly discriminate against religion,<sup>1</sup> but such cases are rare. The more difficult cases involve neutral, generally applicable laws that are not intended to burden the internal operations of religious groups but, nevertheless, have that effect. Does the First Amendment provide any relief in such situations and, if so, what is the justification for this protection?

In *Employment Division v. Smith*,<sup>2</sup> the Supreme Court held that the First Amendment does not excuse individuals from compliance with neutral, generally applicable laws that burden religious practice.<sup>3</sup> Legislatures may choose to grant relief in such situations, but if they choose not to do so, the First Amendment does not require any special accommodations or exemptions.<sup>4</sup> However, *Smith* did not address protections for religious groups, and, indeed, the Court has never directly addressed the scope of First Amendment protections where neutral government regulation interferes with the internal operations of religious organizations.<sup>5</sup> Scholars who have debated this question have advocated a variety of positions. Some scholars have argued that the rule that *Smith* provides for individuals should also apply to religious groups: where government action is neutral and generally applicable, religious groups are not entitled to special relief even if the action

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<sup>1</sup> The Supreme Court has also held that intentional discrimination against religion is unconstitutional. Such discrimination violates the Free Exercise Clause. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532-33 (1993).

<sup>2</sup> 494 U.S. 872 (1990).

<sup>3</sup> *Id.* at 878-79.

<sup>4</sup> *Id.* at 890.

<sup>5</sup> The Court has addressed claims for tax exemptions, *Jimmy Swaggart Ministries v. Bd. Of Equalization*, 493 U.S. 378 (1990); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), but these cases did not involve direct interference with internal group affairs.

affects areas of group life that are religious in nature.<sup>6</sup> Other scholars have favored limited relief but only where government regulation impinges on religious practices or activity.<sup>7</sup> A less common position favors a broad right of autonomy that extends to all aspects of internal group operations and affairs, those that are clearly religious in nature as well as more mundane matters that appear essentially secular.<sup>8</sup>

Those who have advocated at least some special protections for religious groups when government action interferes with internal group affairs have offered a variety of rationales for relief. Some scholars have drawn upon the Establishment Clause as a basis for restricting government power over religious groups, and they have argued, for instance, that inherently or quintessentially religious matters are outside the competence and jurisdiction of the government.<sup>9</sup> Others have turned to the Free Exercise Clause as a source of religious group rights.<sup>10</sup> Additional justifications for protection include the transcendent authority of religious obligations for believers and their communities,<sup>11</sup> the greater importance of religious convictions and practices for believers than for

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<sup>6</sup> See, e.g., Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1108-10, 1115; see also Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395, 399, 431 (1987) (arguing for a similar view prior to the Court's decision in *Smith*).

<sup>7</sup> See e.g., William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 Ohio St. L.J. 293, 327 (1986) (arguing that protections for religious organizations are only appropriate where government regulation interferes with religious practices or conflicts with matters of church doctrine); see also Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979) (arguing that "the government must refrain from regulating those activities and relationships within a church that can be termed purely spiritual or integral facets of the actual practice of the religion"); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 77, 109 (1998) (arguing that government has no jurisdiction over "inherently religious" aspects of organizational life and governance); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 83-84, 92 (2002) (arguing that group practices "bound up with the sacred" are beyond the competence and jurisdiction of government).

<sup>8</sup> See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373, 1398 (1981).

<sup>9</sup> See Esbeck, *supra* note 7, at 77-81, 109; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1796, 1815; Lupu & Tuttle, *supra* note 7, at 83-84, 92. For further discussion of this position, see Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1668-69.

<sup>10</sup> See Brady, *supra* note 9, at 1672; Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99, 158-59 (1989); Laycock, *supra* note 8, at 1373, 1392.

<sup>11</sup> See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15-16.

government,<sup>12</sup> the conflict and suffering caused by state interference with religious belief and practice,<sup>13</sup> and the benefits that religious group freedom produces for the larger community.<sup>14</sup>

In previous articles, I have advocated a broad right of autonomy for religious groups under the Free Exercise Clause. While I have not rejected the rationales for protection offered by other scholars, my argument has been different. I have argued that such a broad right of autonomy is essential to support the robust freedom for religious belief that the Supreme Court has consistently affirmed under the Free Exercise Clause. While the Supreme Court cut back on protections for individual religious conduct in *Smith*, the Court in that case reaffirmed the right of individuals to “believe and profess whatever religious doctrine one desires,”<sup>15</sup> and the Court envisioned a society with a wide range of different religious views, orthodox as well as unorthodox, popular and unpopular.<sup>16</sup> Individual religious conduct may be restricted by neutral laws of general applicability, but the development and choice of belief will be free.<sup>17</sup> However, aside from stating that the government may not regulate religious belief as such and assuming that the regulation of individual religious conduct will not undermine the individual’s choice of belief, the Court said nothing about the conditions that would be necessary to maintain the type of robust and unrestricted freedom of belief that it contemplated.<sup>18</sup>

My argument has been that autonomous religious groups play an indispensable role in maintaining the freedom and diversity of belief that *Smith* envisioned and that this freedom is, in turn, essential for the development of new and valuable ideas, including for social and political life.<sup>19</sup> The diverse perspectives that religious groups generate and model in their internal community life frequently play a prophetic role in society as they push the norms and values of the larger community forward.<sup>20</sup> Democratic self-government, in particular, depends for its strength on religious and other private groups that are able to

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<sup>12</sup> See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

<sup>13</sup> See *id.* at 317.

<sup>14</sup> See *infra* notes 36-42 and accompanying text.

<sup>15</sup> *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

<sup>16</sup> See Brady, *supra* note 9, at 1674.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 1674-75.

<sup>19</sup> *Id.* at 1674-77, 1703-06.

<sup>20</sup> *Id.* at 1703-06; Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 156-58 (2004).

generate and supply novel and unorthodox ideas that make improvements in the status quo possible.<sup>21</sup>

The link between religious group autonomy and the type of robust freedom and diversity of belief that the *Smith* Court envisions lies in the role that the groups play in shaping and sustaining religious convictions.<sup>22</sup> Religious beliefs are rarely the product of single individuals, nor are religious communities simply aggregations of like-minded individuals who come together to exercise pre-existing beliefs with those who share their views.<sup>23</sup> Rather, religious groups play an essential role in shaping the beliefs that individuals hold as they teach and transmit ideas from one generation to the next, and they are also the vehicles for the formation and development of religious doctrine.<sup>24</sup> Religious doctrine is developed by persons in community as group members work together to interpret, refine and reform inherited beliefs and formulate new ones.<sup>25</sup> Sometimes this process proceeds harmoniously, and other times it is marked by significant disagreement and contention and even schism.<sup>26</sup> Individuals and subgroups may split from the religious community and are sometimes forced out as realignment occurs.<sup>27</sup> The process of change can be messy and painful. However, the formulation and evolution of religious doctrine would be impossible without this conversation, debate, disagreement and sometimes deep conflict.

In order for religious groups to effectively develop and transmit doctrine, they require freedom to implement their ideas in internal group life and affairs.<sup>28</sup> The formation and reformation of religious beliefs is never an abstract affair.<sup>29</sup> Group members seek to live out their beliefs in community, and it is only by putting their ideas into practice within the group that group members are able to fully understand the ramifications of their beliefs and to test and refine these beliefs through experience.<sup>30</sup> The ability to live out ideas in community is also essential for the preservation of group commitments.<sup>31</sup> It would be difficult for

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<sup>21</sup> Brady, *supra* note 9, at 1700-06.

<sup>22</sup> *Id.* at 1675-77.

<sup>23</sup> *Id.* at 1675-76.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1676.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

group members to maintain their convictions without the freedom to put their ideas into practice in their relationships with each other.<sup>32</sup>

While protections for religious groups might in theory be limited to situations where government regulation impinges on beliefs or practices that are religious in nature rather than extended to all aspects of internal group affairs, such an approach is unworkable in practice. In previous articles, I have analyzed a number of cases where courts employing such a narrow approach have misunderstood the organization's beliefs and overlooked significant burdens on religious practice.<sup>33</sup> Such misunderstandings can often be traced to a lack of familiarity with the group's doctrine and sometimes also to the temptation to construe organizational beliefs in a way that is compatible with the desired outcome in the case.<sup>34</sup> Thus, the only reliable way to protect group doctrine and practices from state interference is a broad right of autonomy that covers all aspects of the organization's internal affairs, those which are clearly religious in nature as well as those which may seem less so.<sup>35</sup>

In recent critiques, several scholars have argued that the weakness of my argument is my assumption that the benefits to society from autonomous religious groups are worth the risks. My critics have viewed my argument as one form of a familiar defense of religious group freedom. Religious groups, it is often argued, require special protection from government control because they provide important benefits to the larger community that would be compromised by state interference. The type of social benefit that scholars have identified varies. For example, some have argued that religious groups are important sources of civic virtue essential for democratic self-government and that government interference will impede this function.<sup>36</sup> Scholars also frequently view religious groups as an important buffer or check against overweening state power.<sup>37</sup> For others, religious groups provide individuals with a source of identity and meaning,<sup>38</sup> a context for

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<sup>32</sup> *Id.*

<sup>33</sup> See Brady, *supra* note 9, at 1679-98; Brady, *supra* note 20, at 104-47.

<sup>34</sup> Brady, *supra* note 9, at 1680-89.

<sup>35</sup> *Id.* at 1698.

<sup>36</sup> See Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 121, 123-25, 131-33 (1992).

<sup>37</sup> See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 153 (1996); Esbeck, *supra* note 7, at 67; Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1853 (2001); John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 588 (1990); Lupu & Tuttle, *supra* note 7, at 84, 87.

<sup>38</sup> See Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 959-60 (2004).

personal development,<sup>39</sup> or a source of supportive social bonds.<sup>40</sup> Others observe that the charitable arms of religious organizations perform essential public works,<sup>41</sup> and religious beliefs have also been the source of positive social movements such as abolitionism in the nineteenth century and civil rights in the twentieth century.<sup>42</sup> All of these functions would be undermined by government interference. My argument, my critics believe, is similar. I am essentially claiming that religious groups should receive protection from government control over internal affairs because religious groups are good for us.<sup>43</sup> Religious groups provide important social benefits when they generate and model new ideas for social and political life.

Given this interpretation of my position, a predictable critique follows. Autonomous groups may benefit the larger society in the ways that I suggest, but autonomy has costs as well as benefits, and I have not demonstrated that the benefits associated with a broad right of autonomy outweigh the costs. Indeed, my critics believe that the balance tips in the opposite direction. The type of broad autonomy that I envision will unleash abuses that will outweigh the benefits that I identify. For example, Marci Hamilton emphasizes the “human character” of religious institutions.<sup>44</sup> In her view, the recent clergy sex abuse crisis in the

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<sup>39</sup> See Gedicks, *supra* note 10, at 116; see also NANCY L. ROSENBLUM, *MEMBERSHIP & MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 3, 5 (1998) (discussing voluntary associations more broadly); Yael Tamir, *Revisiting the Civic Sphere*, in *FREEDOM OF ASSOCIATION* 214, 215, 232 (Amy Gutmann ed., 1998) (same).

<sup>40</sup> See Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1072-75 (1983); see also William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75 CHI.-KENT L. REV. 603, 604 (2000) (discussing voluntary associations more generally); Tamir, *supra* note 39, at 215, 232 (same).

<sup>41</sup> See PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 187 (Michael Novak ed., 2d ed. 1996); see also Galston, *supra* note 40, at 604 (arguing that voluntary associations, including religious groups, “offer opportunities for groups of citizens to conduct important public work through collective mechanisms outside the control of government.”); cf. Rodney K. Smith, *The Role of Religion in Progressive Constitutionalism*, 4 WIDENER L. SYMP. J. 51, 84 (1999) (discussing the other-directed nature of many religious acts).

<sup>42</sup> See GARVEY, *supra* note 37, at 153; cf. Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 801-03 (1996) (discussing this positive role of religion); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 647 (same).

<sup>43</sup> See Hamilton, *supra* note 6, at 1173 (“Professor Brady argues that church autonomy is necessary because churches provide important benefits to society.”); Laura S. Underkuffler, *Thoughts on Smith and Religious-Group Autonomy*, 2004 BYU. L. REV. 1773, 1786 (“With the religious strife and oppression that currently engulfs vast parts of the world, the view that religious groups should simply be left alone to do good works seems alarmingly inadequate.”) (commenting on Brady, *supra* note 9).

<sup>44</sup> Hamilton, *supra* note 6, at 1174.

Catholic Church is one illustration of the danger that “religious entities will abuse what power they have,”<sup>45</sup> and history gives plenty of additional examples.<sup>46</sup> According to Hamilton, “it is no longer an open question whether religious institutions should be governed by the laws that govern everyone else, if it ever was; it is a proven necessity.”<sup>47</sup> Laura Underkuffler also believes that I underestimate the social costs associated with broad autonomy for religious groups. While religious groups can generate good ideas and progressive models of social life as I suggest, they can also be the source of bad ideas and destructive ways of life, and it is easy to think of examples.<sup>48</sup> Underkuffler points to groups that “espouse and implement religious hatred, racial hatred, the subordination of women, the persecution of gay men and lesbians, or other beliefs abhorrent to civil society.”<sup>49</sup> In addition, religious groups can harm their own members as well. Religious groups are not always warm, nurturing and supportive places for their members.<sup>50</sup> Cases involving the application of government regulation to religious groups commonly involve “bitter disputes” between the group and dissenting members, and in these conflicts, dissenters experience the group “as a negative, hostile place, in which the religious group attempts to exert, on the individual, oppressive and coercive power.”<sup>51</sup> Underkuffler concludes that “granting religious groups sweeping freedom from civil laws carries with it far more costs than benefits.”<sup>52</sup> Indeed, “[w]ith the religious strife and oppression that currently engulfs vast parts of the world, the view that religious groups should simply be left alone to do good works seems alarmingly inadequate.”<sup>53</sup>

For some scholars, the best approach is to tie protections for religious groups to a balance of social benefits and harms. Where the benefits of freedom from government control outweigh the harms, exemptions from state interference may be appropriate. However, relief is not appropriate where the balance swings the other way. Hamilton adopts such an approach when she leaves room for legislatures to exempt religious institutions from neutral, generally applicable

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<sup>45</sup> *Id.* at 1107.

<sup>46</sup> For example, Hamilton points to the centuries of religious prosecution in Europe that informed the thinking of the founding generation. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 6 (2005); Hamilton, *supra* note 6, at 1149.

<sup>47</sup> Hamilton, *supra* note 6, at 1216.

<sup>48</sup> See Underkuffler, *supra* note 43, at 1784-85.

<sup>49</sup> *Id.* at 1785.

<sup>50</sup> *Id.* at 1783.

<sup>51</sup> *Id.* at 1783; see also Gedicks, *supra* note 10, at 117 (noting that groups are “capable of imposing their own forms of repression on individuals” through “the manner in which they admit, control, and expel members”).

<sup>52</sup> Underkuffler, *supra* note 43, at 1787.

<sup>53</sup> *Id.* at 1786.



laws if the legislature determines that an exemption is consistent with the public good.<sup>54</sup> Hamilton rejects judicially created exemptions. In her view, legislatures are uniquely situated to perform the balancing of social goods and harms that determination of the public good requires,<sup>55</sup> and, thus, they alone should have the “final word on the balance of harms.”<sup>56</sup>

For those who believe that religious group freedom will serve the public interest in most cases, judicial application of the familiar compelling state interest test may be a more appropriate balancing approach.<sup>57</sup> Under such an approach, government interference with religious exercise would generally be prohibited, but where the social harms associated with the group’s practices are significant, the state’s interest in protecting the public would prevail. Prior to the Court’s decision in *Smith*, many courts employed the compelling state interest test to balance burdens on group beliefs and practices with the larger public interest. Outside of the relationship between religious groups and their clergy, however, federal courts rarely found significant burdens on religious exercise and almost always found an overriding state interest.<sup>58</sup>

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<sup>54</sup> See HAMILTON, *supra* note 46, at 8, 275, 298; Hamilton, *supra* note 6, at 1174, 1198, 1214-15.

<sup>55</sup> HAMILTON, *supra* note 46, at 297; Hamilton, *supra* note 6, at 1195-96, 1200, 1215.

<sup>56</sup> Hamilton, *supra* note 6, at 1200.

<sup>57</sup> See *Smith*, *supra* note 41, at 61-64.

<sup>58</sup> Cases involving the application of employment discrimination statutes and labor laws are a good illustration. See e.g., *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-98 (4<sup>th</sup> Cir. 1990) (holding that teachers at church-operated school are not ministers and finding that application of Equal Pay Act would place only limited burden on school’s free exercise rights and be justified by a compelling state interest); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368-70 (9<sup>th</sup> Cir. 1986) (holding that employees at religious school are not ministers and that application of Title VII and Equal Pay Act would not substantially impact school’s religious beliefs and practices and would be justified by government’s compelling interest in eliminating employment discrimination); *EEOC v. Mississippi College*, 626 F.2d 477, 485, 488-89 (5<sup>th</sup> Cir. 1980) (holding that faculty members at Christian college are not ministers and that government’s compelling state interest in eradicating discrimination outweighs the minimal impact of Title VII on the college’s free exercise of religion); *Catholic High Sch. Ass’n of the Archdiocese of New York v. Culvert*, 753 F.2d 1161, 1170-71 (2<sup>d</sup> Cir. 1985) (finding that application of the New York State Labor Relations Act to lay teachers at religiously-affiliated high schools places only indirect and incidental burden on schools and burden is justified by compelling state interest in preservation of labor peace and “a sound economic order”); *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1442-43 (9<sup>th</sup> Cir. 1983) (holding that application of National Labor Relations Act to religiously-affiliated hospital will produce only minimal burden on hospital’s religious practice and that government has a compelling interest in promoting labor peace); see also *EEOC v. Pacific Press Publ’g Ass’n*, 676 F.2d 1272, 1279-80 (9<sup>th</sup> Cir. 1982) (finding that application of Title VII’s prohibition against gender discrimination to editorial secretary at religious publishing house only minimally impacts group’s religious belief and practice and that federal interest is high; liability for retaliatory action substantially impacts religious beliefs, but imposition is justified by compelling state interest); cf. *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d

My purpose in this article is to clarify and expand my defense of a broad right of autonomy for religious groups and to answer several new objections that are likely to be made in response to these clarifications. As I discuss below, my critics have not fully understood my argument. I have, indeed, pointed to important social improvements generated by religious organizations, but my argument has not been that freedom for these organizations is appropriate because these social benefits outweigh social harms or, in Hamilton's words, because "the[] well-being [of religious groups] is an adequate proxy for the general public good."<sup>59</sup> Rather, freedom is important because we do not now and, indeed, never will have a complete understanding of what is socially beneficial and what is harmful (at least this side of the eschaton). Our understanding of which ideas and forms of life are truly progressive is always imperfect and in the process of development. Autonomy for religious groups is essential because these groups are an important source of alternative ideas that make development and improvement possible. Freedom for religious groups is not justified because we can show that it produces greater goods than costs. We lack the yardstick to make such a calculation. Rather, freedom for religious groups is essential because our understanding of what is good and what is harmful cannot grow without it. Indeed, I go even further. Freedom for religious groups is necessary because it makes greater understanding of truth, including social and political truth, possible. What is really at stake is this knowledge of truth, and what could be more important?

### I. *Religious Group Autonomy: What is Really at Stake*

My critics' misunderstanding of my argument is not entirely surprising nor is it unwelcome. When I state that religious group autonomy is important because freedom from government interference allows these groups to model new ideas

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940, 947-48 (9<sup>th</sup> Cir. 1999) (applying pre-*Smith* compelling state interest test and holding that Jesuit novice may bring Title VII sexual harassment claim against Jesuit order because claim does not interfere with group's choice of clergy and danger of interference with religious faith or doctrine is low; state's interest in protecting employees against sexual harassment is also of the "highest priority"); *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 721-23 (N.J. 1997) (finding, in case involving teachers at church-operated elementary schools, that state's compelling interest in protecting employees' right to engage in collective bargaining outweighs interference with schools' autonomy); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 866-67 (Minn. 1992) (holding that compelling state interest balancing test under state constitution does not prohibit application of state labor statute to lay teachers at religiously-affiliated high school because application results only in minimal interference outweighed by state's compelling interest in the peace and safety of labor relations and in the protection of employees' right to collectively organize).

<sup>59</sup> Hamilton, *supra* note 6, at 1102 (referring to Brady, *supra* note 9).

for social life that can push the larger community forward, it may, indeed, sound like I am arguing that religious groups deserve protection because they are usually good for us. The examples that I have used have, perhaps, reinforced this interpretation. In an earlier piece on religious organizations and mandatory collective bargaining regimes, I identified the Catholic Church's teaching on labor relations as an important prophetic voice that would be lost if secular labor statutes were applied to religious groups.<sup>60</sup> While secular collective bargaining regimes are based upon an adversarial model that presumes distrust and conflict between labor and management, Catholic social teaching envisions labor relations built upon love, cooperation, and mutual concern and respect.<sup>61</sup> One need not agree with the Church's vision, I have argued, to realize that an important counter-cultural voice would be lost if Church institutions were not free to model this vision in their own employment relationships.<sup>62</sup> Like other scholars, I have also pointed to the contributions that religious organizations and believers made to the fight against slavery and racial discrimination<sup>63</sup> and to the development of American civic culture and political values more generally.<sup>64</sup> However, my purpose has not been to show that religious groups always or usually benefit society or that the social benefits that autonomous groups produce will outweigh the harms. My argument is not that religious groups deserve autonomy because they are usually good for us. Rather, my point has been that we have much learning yet to do regarding what is truly beneficial and what is harmful, and, thus, we must appreciate the importance of keeping open avenues for further growth and change in our understandings. The examples that I have chosen have been meant to illustrate this need for openness, especially in cases when the ideas we encounter seem troubling or harmful. Our initial instincts might be right in many cases, but it is also possible that the ideas we reject today prove to be the valuable ones tomorrow. The mistakes that my critics have made are, however, understandable, and they have convinced me of the need to clarify and expand upon my earlier writing. Much more is encompassed in my arguments may be readily apparent.

#### A. *The Impossibility of Calculating Social Benefit and Harm*

As discussed above, part of what I have been arguing when I emphasize the important role that religious organizations can play in developing and modeling new and progressive visions for social life is that our knowledge of

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<sup>60</sup> Brady, *supra* note 20, at 156, 165.

<sup>61</sup> *Id.* at 106-38, 156.

<sup>62</sup> *Id.* at 158.

<sup>63</sup> Brady, *supra* note 9, at 1705.

<sup>64</sup> *Id.*

social and political good is incomplete. We do not have the standard or benchmark to make definitive determinations regarding the public good or social benefit or harm. The problem is not simply that judges and legislatures lack the tools to make such determinations. The problem goes deeper. Human knowledge is always imperfect and in the process of development. Experience teaches us that even when we are most certain about social or political values, we can be wrong. Slavery and racial discrimination were accepted in Western society for centuries before the successes of the abolitionist and civil rights movements. Persecution for religious heresy was embraced by Christian churches for over a thousand years before path-breaking leaders within the church convinced the larger body that the Gospel demands freedom of conscience. With these and other examples in mind, we should recognize that social progress is only possible where there is robust freedom for unorthodox and often unpopular minority voices. Many of the voices that have contributed to social and political progress in the past have been voices within religious communities that have sought to model and witness new visions for social life, and religious communities can be expected to play a similar role in the future. Of course, nonreligious communities can also play an important educative role as well, and I have advocated strong protections for nonreligious groups under the Free Speech Clause's right of association.<sup>65</sup> However, the religion clauses of the First Amendment remain a special source of protection for religious groups, and they are the focus of this article.

If we do not have any sure standard of social benefit and harm, a further lesson is that we cannot tie the scope of religious group freedom to a balance of social goods and harms as some scholars have proposed. Hamilton argues that exemptions from neutral laws of general applicability are only appropriate when a legislature balancing social costs and benefits determines that such freedoms are consistent with the public good.<sup>66</sup> The problem with this approach is that legislatures lack the ability to make this type of calculation. The public good is something that we are yet discovering and learning more about. The effect of Hamilton's approach is to crab all of our religious and other nongovernmental social institutions into our current, necessarily imperfect understanding of what the public good is. Hamilton's approach cuts off future development and makes the limited perspective of today the measure for tomorrow's possibilities.

Hamilton argues that absolute protection for religious belief is sufficient to enable religious communities to generate and advocate new ideas.<sup>67</sup> Conduct can be regulated in the public interest without impeding this function. However,

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<sup>65</sup> *Id.* at 1706-11; Brady, *supra* note 20, at 163.

<sup>66</sup> See *supra* text accompanying notes 54-56.

<sup>67</sup> See Hamilton, *supra* note 6, at 1163-64.

Hamilton is mistaken. As I discussed above, robust freedom and diversity of belief is not possible unless the groups that generate these beliefs have autonomy over their own internal affairs. Without the freedom to live out new and unorthodox beliefs in internal community life, these groups will have a difficult time generating, communicating and preserving these beliefs.

The familiar balancing approach employed by courts using a compelling state interest test also presupposes a certainty about the public good that we do not have. A compelling state interest analysis protects religious groups when religious beliefs and practices are burdened unless such protections would result in significant social harm. Where a compelling state interest is at stake, the state's interest outweighs the detriment to the religious group. The problem with this approach is that it erroneously presupposes that courts will know what the state's compelling interests are. We can be mistaken about these interests as about the public good more broadly. The effect of using the compelling state interest test is similar to that of Hamilton's approach. It curbs and restricts minority religious groups according to prevailing views about the public good that may, in fact, be mistaken. The danger is that valuable ideas which seem harmful today but are actually improvements will be muzzled.

#### *B. Autonomy and Truth*

My argument goes even further. When I argue that religious group autonomy is essential to preserve the ability of groups to develop and communicate new ideas that push the larger community forward, I have had in mind something more than a vague idea of social progress or improvement. What I have had in mind is greater understanding of truth, including social and political truth.

Full appreciation of this point requires consideration of the nature of religious belief. While scholars often view religion as a strange and puzzling phenomenon that the better educated have outgrown, religion, in fact, has universal foundations. At the root of religious faith is our common human experience of createdness. Though we might like to believe that we make ourselves and our values, we actually experience ourselves as creatures in a world that we have not made and that we can often only barely control. Our existence and the existence of the larger world have been given to us rather than made by us, and we naturally seek their origin and source. Where do we come from, why do we exist and what is the meaning and purpose of our lives? As we ask these questions, we find ourselves in relationship to this source and ground of all that is. This relationship is at once one of intimacy and distance. Our recognition of our

createdness and our desire for greater knowledge of the ground of our being connect us to this greater Reality that underlies and defines all that is. Through head and heart, intuition and deliberation, and even through revelation, our understanding can grow. However, there always remains a gap between ourselves and the Reality that we seek, and our understanding is ever in progress. Different religious traditions conceive of this Reality differently. Each has insights, but none has complete knowledge. For example, while Christians believe that all truth is in Christ, whose supreme sacrifice of love on the Cross makes the invisible God visible and illumines the path for humanity to follow,<sup>68</sup> we are always learning more about the depths and requirements of this love. The Reality that we seek remains transcendent even as it is imminent in the created world and, for many religious believers, further disclosed in revelation.

The understanding that religious individuals and communities seek is of a particular kind. The religious believer is not a detached observer who seeks to understand the Reality that grounds our lives in the way that a scientist would map out the dimensions of the universe or count the numbers of its planets and stars. Rather, the religious believer wants to know how we should live. The believer seeks to live in proper relationship to this ground of our existence, and for the believer, this relationship also has implications for how we should live in relationship with others.<sup>69</sup> Thus, at the core of religious belief are two *oughts*. How *ought* we to live in relationship to the transcendent Reality that gives us life and orders our world, and how *ought* we to live together with each other. Religion is not a purely spiritual matter focused primarily on the extratemporal. It has an important ethical component that reaches deep into our lives, including our social and political lives. Religious values such as the dignity of the person, the sanctity of conscience, mutual cooperation among persons, justice, fairness and mercy are meant not just for the church<sup>70</sup> but the world. To be sure, some religions are less interested in social and political issues than others. For example, Christianity has always drawn a distinction between the institutions and functions of church and state, and for some denominations this distinction is very sharp and the role of the state quite limited. However, no aspect of social life falls completely outside of religion's broader values. The answer to the question of how we ought to live will have implications for all aspects of human relations, from individual conduct, to family and community life, to social and civic matters, and to law and politics.

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<sup>68</sup> See POPE JOHN PAUL II, *DIVES IN MISERICORDIA*, ¶ 2, at 9, ¶ 3, at 13, ¶ 8, at 27-29, ¶ 15, at 47 (Daughters of St. Paul) (1980).

<sup>69</sup> The believer does not seek to know the divine as it exists in itself but as it exists in relationship to us, or, more precisely, the believer realizes that the fact of our createdness and our openness to the creator means that the divine is essentially relational.

<sup>70</sup> When I use the word "church," I am referring to both Christian and nonChristian communities.

When critics and advocates of religious group freedom focus on the social harms or benefits that religious groups generate, they overlook the importance of religion's broader ethical perspective. Before we can draw any conclusions about what is socially beneficial and harmful, we must first address the question of how we ought to live together. We have to begin by examining our fundamental ethical responsibilities to one another as fellow humans and as members of a common social and political community. Indeed, social benefit and harm are empty categories without this broader reference point. Religious groups are foremost among the institutions in society that address these broader ethical issues. As they seek the truth about our social responsibilities, religious groups make it possible for us to speak sensibly about what is really in the public interest and what is not. As they model and witness their answers in their communal life, they alternately challenge and reinforce our intuitions about the public good.

The mistake that so many scholars make is to believe that what is socially beneficial and harmful is obvious. Sometimes it seems to be. For example, who would disagree that social peace and stability, the preservation of life, the advancement of learning, the protection of health, and fairness and equality are all social and political goods. However, what do these goods require? Giving content to these values is much less obvious. For example, what does equality require: equality of opportunity, equality of income and resources, what we deserve, or a basic minimum standard of living for all? We cannot resolve these disagreements and related questions of social benefit and harm without considering the purposes and goals of social and political life and our duties to one another. These are the truths that religion seeks to understand better. The question of social and political truth is prior to the question of social benefit and harm. Certainly, our prevailing ideas about social benefit at the moment will inform our understanding of these truths, and we are unlikely to embrace a conception of truth that is deeply incompatible with our current intuitions. However, we must not equate our current ideas about social benefit with what is truly beneficial. As we grow in our understanding of truth, our ideas of social benefit will also change and develop.

Religious group autonomy is so important because it enables religious organizations to freely seek and grow in their understanding of truth, not only about spiritual matters but also about human relationships more broadly. Religious groups speak to us not only about the divine but also about the social and civic concerns of the larger community, and our collective progress depends upon the range of insights that different traditions provide, including insights that may initially seem unorthodox and incorrect. No one group will have the entire truth, and at no point in time will our understanding be complete. Our knowledge

is always growing and developing, and a broad right of autonomy for religious groups helps to make continued progress possible. As I noted above, nonreligious associations surely contribute much to our understanding of truth in social and political matters, and I have favored strong protections for these groups. However, religious groups are uniquely protected under the First Amendment, and this is my focus here.

Indeed, religious groups do more than speak to us about social and political truth. Religious communities seek to live out their social visions in their internal community life, and it is in this form of witness that the power of new ideas may be most evident. Religious groups not only speak a prophetic word, but they model it in their internal life. For example, in my previous article on religious organizations and mandatory collective bargaining statutes,<sup>71</sup> I observed that the Catholic Church desires its labor relations and other internal relationships to be a “leaven and ... a kind of soul for human society.”<sup>72</sup> The Church wants its example of mutual love and cooperation to be a witness and instrument for the transformation of the larger world.<sup>73</sup> The application of secular labor statutes that presuppose adversarialism and distrust between management and labor rather than cooperation and unity would prevent Church institutions from playing this role.<sup>74</sup> A broad right of autonomy for religious groups is important not only so that these groups can develop and preserve their unique values and social visions, but also so that they can live these visions out and, in this way, effectively communicate them to the larger society. As discussed above, Hamilton argues that protections for religious belief are sufficient to enable religious communities to generate and communicate new and progressive ideas for civic and social life.<sup>75</sup> In her view, it is not necessary for these groups to have freedom over their internal affairs. However, Hamilton ignores the importance of this witness. She does not recognize that when it comes to ideas for social life and human relationships, examples can be more powerful than words alone. Indeed, in some cases, it may be necessary for groups to live their ideas out for them to be fully understood by others. “See how they love one another” and “behold, how good and pleasant it is for brethren to dwell together in unity,” Dorothy Day reminded Catholic Church officials in a bitter labor dispute between the Archdiocese of New York and

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<sup>71</sup> See *supra* notes 60-62 and accompanying text.

<sup>72</sup> Brady, *supra* note 20, at 112 (quoting SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (1965), reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 166, ¶ 40, at 189 (David J. O’Brien & Thomas A. Shannon eds., 1992)).

<sup>73</sup> *Id.* at 112-13.

<sup>74</sup> *Id.* at 106, 138-39.

<sup>75</sup> See *supra* notes 67 and accompanying text.



striking cemetery workers.<sup>76</sup> Dorothy Day realized that the Church's message would be lost without this witness; words alone are not enough.

There is yet more to my defense of religious group autonomy. When I argue that a broad right of autonomy is necessary to protect the ability of religious groups to develop and communicate new visions for social life that can push the larger community forward, I am making a connection between liberty and truth, freedom and social progress. I am assuming that over time, freedom for religious groups will, in fact, advance our understanding of truth by facilitating the development of new and progressive ideas. Of course, the same protections that facilitate the development of good ideas also permit the development of bad ones, and the road of progress will be neither smooth nor straight. Moreover, as new ideas challenge familiar ones, they may also spark conflict and division. At times it may seem as if the promise of freedom is illusory and its costs are too high. My examples in previous articles of the contributions that religious groups have made to our moral and civic culture are designed in part to check our temptation to despair. History gives us many illustrations of religious groups that have promoted ideas that were initially unpopular and divisive and, yet, are now recognized as important advances. Abolitionism and the civil rights movement come to mind again. Freedom is necessary for religious groups to continue to play this role, and while progress is sure to be halting at times and we will take steps backwards as well as forwards, we have good reason to hope and expect continued good fruit. Indeed, what could be more important than greater understanding of truth? In the founding era, James Madison wrote that religion or the "duty which we owe to our Creator" is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."<sup>77</sup> Part of what he meant was that there can be nothing more important than conforming our lives to the most fundamental realities of human existence. How can truth not be worth the cost?

### *C. Confidence, not Certainty*

But, my reader may be thinking, must we not have some limitations on religious group rights? If we can never balance social harms against social benefits, religious groups will be free to cheat and injure outsiders and even to

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<sup>76</sup> Letter from Dorothy Day to Francis Cardinal Spellman, Archbishop of New York (Mar. 4, 1949), *quoted in* David L. Gregory, *Dorothy Day, Workers' Rights and Catholic Authenticity*, 26 *FORDHAM URB. L.J.* 1371, 1379 (1999).

<sup>77</sup> JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), *reprinted in* 8 *THE PAPERS OF JAMES MADISON* 295, 299 (Robert A. Rutland & William M.E. Rachal eds., 1973).

sacrifice or maim willing members. In Underkuffler's words, leaving religious groups completely "alone" is "alarmingly inadequate."<sup>78</sup> Indeed, the results would be intolerable. Of course, I agree that there must be some limitations on religious group freedom, but what I reject is tying these limits to a balance of social benefit and harm or an approach that restricts religious group rights when some threshold of social harm is crossed. Even the use of a heightened threshold in the familiar compelling state interest test is problematic. Balancing approaches such as these presume that we have a greater understanding about the public good than we do, and even state interests that we label compelling may not be so.

The type of restrictions on religious group autonomy that I have advocated are of a different type. Rather than balancing social benefits and costs or restricting especially harmful practices, I favor a narrow set of limitations that would apply in situations where group practices extend beyond essentially internal affairs to involve nonmembers or persons whom the state has a special interest in protecting, where the group has invited government involvement, or where the group restricts the ability of members to freely exit the group. For example, one appropriate area of regulation would be protections for nonmembers where the group deals directly with outsiders. I have argued, for instance, that religious groups can be held liable upon their valid contracts with nonmembers and can be subject to tort liability where there are injuries to outsiders. The government has a legitimate interest in protecting the persons and private rights of nonmembers who deal directly with religious groups.

Protections for insiders may also be appropriate. For example, the group may have invited government involvement. One such instance would be where the organization has expressly or impliedly agreed to civil enforcement of a contract with a member or employee. In most of these cases, secular court enforcement of the contract should be permissible. One exception would be where construction of the contract would entangle the court in religious questions,<sup>79</sup> and courts should also avoid adjudicating contract claims which involve the especially sensitive relationship between the group and its clergy.<sup>80</sup>

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<sup>78</sup> Underkuffler, *supra* note 43, at 1786.

<sup>79</sup> The Supreme Court has repeatedly held that the First Amendment prohibits courts from becoming entangled in religious questions. See *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian E. Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696, 708-10 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>80</sup> Lower courts that have carved out the familiar "ministerial exception" to employment discrimination statutes have repeatedly recognized the especially "sensitive" nature of the relationship between a church and its minister, see *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9<sup>th</sup> Cir. 1981); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d

A religious group also invites limited government involvement in its internal affairs when it accepts government funding. The state has a legitimate interest in ensuring that government funds are used properly for its intended purposes and that beneficiaries of funded programs are protected from coercion, abuse or exploitation. However, government regulation which is designed to go further and reshape the internal practices of funded organizations according to prevailing public values would be inappropriate.<sup>81</sup> Such an effort to mold the internal affairs of religious organizations according to dominant public values would stifle the ability of these groups to develop and witness their own unique and often counter-cultural visions for social life. A third situation where religious groups invite government involvement in their internal affairs arises when the group holds itself out as a provider of professional services such as legal advice or medical care. In such situations, the group can be required to meet generally applicable professional standards.

Protections for insiders would also be appropriate when the ability of group members to freely exit the group is impaired. Membership in religious organizations in a free society must be voluntary, and, thus, the government has a legitimate interest in safeguarding the ability of group members to exit the group should they choose to do so. For this reason, regulations designed to protect the health and safety of members and employees are appropriate where death or serious bodily harm is threatened. It is tempting to justify such restrictions on the ground that preserving human life is a supremely important government interest even when group members value other goals more highly. However, even this balance of social harm and social benefit is not uncontroversial. A number of religious traditions, including Christianity, teach that in some circumstances one must lose one's life to save it,<sup>82</sup> and in Christianity, sacrifice for others is approved and celebrated, even to the point of death.<sup>83</sup> For the Christian, life is not always to be preferred over death, and, indeed, death may be the door to new

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1164, 1169 (4<sup>th</sup> Cir. 1985); *see also* EEOC v. Catholic Univ. of America, 83 F.3d 455, 465 (D.C. Cir. 1996) (quoting *Rayburn*); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 186 (7<sup>th</sup> Cir. 1994) (same), and its "quintessentially religious" character, *Rayburn*, 772 F.2d at 1169 (internal quotation marks omitted) (quoting *Milivojevich*, 426 U.S. 696).

<sup>81</sup> For a discussion of scholarship advocating this position, see *infra* text accompanying notes 177-85.

<sup>82</sup> *Matthew* 10:39 ("He who finds his life will lose it, and he who loses his life for my sake will find it."); *Matthew* 16:25 ("For whoever would save his life will lose it, and whoever loses his life for my sake will find it.").

<sup>83</sup> This is the lesson of Christ's suffering and death on the Cross. *See* Kathleen A. Brady, *Catholic Social Thought and the Public Square: Deconstructing the Demand for Public Accessibility*, 1 J. CATH. SOC. THOUGHT 203, 208-10 (2004).

life.<sup>84</sup> The government's legitimate interest in protecting the ability of group members to voluntarily exit the group is a more appropriate justification for these health and safety regulations. In cases of death and serious bodily harm, the ability of group members to make a subsequent choice to leave the group is difficult or impossible.

This same justification also provides an additional rationale for enforcing contracts between religious groups and their members where the group has agreed to civil enforcement. In such cases, the group member has entered into a relationship with the group with the reasonable expectation that the terms of this relationship will be enforceable in the secular courts. If the civil courts decline to enforce the contract, the ability of group members to enter and exit the group voluntarily upon terms agreed to by both parties will be impaired. Indeed, even if organizational consent to secular adjudication cannot be established, the contract should be civilly enforceable if the language and circumstances of the contract would lead the group member to believe that such adjudication was contemplated. In such a case, the group member has reasonably relied upon this expectation of civil enforcement in making their decision regarding entrance and exit.

While regulations designed to protect the health and safety of group members and employees should generally be limited to situations where death or serious bodily harm is threatened, slightly broader protections are appropriate where children are involved as well as adults whose impaired mental or physical condition makes them vulnerable to exploitation. Because children and vulnerable adults lack the ability to make fully informed and voluntary decisions concerning their dealings with the group, the state has a special interest in protecting their welfare. Thus, the state may intervene to protect children and vulnerable adults from serious psychological harm as well as bodily harm. For this reason, tort liability may be appropriate where clergy persons or employees have engaged in the sexual abuse of minors or sexual misconduct with vulnerable adults. However, in these and other cases involving the protection of child welfare, state intervention must be narrow and limited. For instance, I have argued that religious groups may appropriately be subject to tort liability for reckless supervision of abusive clergy but not for mere negligence.<sup>85</sup> Allowing claims for mere negligence would result in the imposition of secular standards of care on groups that may have their own highly developed practices and procedures for clergy oversight and discipline, and where group leaders have been well-intentioned and have not acted recklessly, the resulting interference with internal group

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<sup>84</sup> *See id.*

<sup>85</sup> *See Brady, supra* note 9, at 1666 & n.212.

governance would be too great.<sup>86</sup> Moreover, while liability for inadequate supervision is appropriate, liability with respect to the hiring and retention of abusing clergy members would infringe too deeply upon the especially sensitive relationship between the group and its clergy.<sup>87</sup>

The protection of child welfare may also justify regulations in the context of church-operated schools, but these regulations must also be limited. States might, for instance, require church-operated schools to demonstrate that their pupils achieve at minimum levels of proficiency on standardized tests. However, direct regulation of curricula and educational programs should be prohibited.

I do not intend these examples of permissible limitations on religious group autonomy to be definitive or exhaustive. There may be other areas where regulation is also appropriate. However, two essential points guide my analysis. First, any restrictions on religious group autonomy must be narrow and limited, and there should be a strong presumption in favor of organizational freedom. Too much is at stake to allow restrictions to multiply without sufficient justification. Thus, for example, protections for children and vulnerable adults must not be defined so broadly that they eliminate or significantly diminish religious group autonomy, and regulations designed to safeguard the ability of group members to freely exit the group must also be construed reasonably so that they do not swallow up group control over internal affairs. Second, restrictions on religious group autonomy should not be the result of a balancing approach even one that would only limit group autonomy in cases of significant social harm. As I have argued above and will discuss further below, such an approach risks restricting group freedom for reasons that are not, in fact, compelling or even persuasive in the long run.

But, my reader may still be thinking, is a compelling state interest analysis or other balancing approach requiring a heightened showing of harm really so problematic. The internal affairs of religious groups can affect the larger society in all sorts of ways, both directly and indirectly, and surely there are some practices that we can agree are truly bad. Underkuffler gives some examples when she points to groups that “espouse and implement” religious and racial hatred, the subordination of women, the persecution of gays and lesbians and “other beliefs abhorrent to civil society.”<sup>88</sup> Indeed, few of these practices would be restricted under my analysis, but they clearly harm outsiders and insiders alike, and we can

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<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 80 and accompanying text for a discussion of the special sensitivity of the church-minister relationship.

<sup>88</sup> Underkuffler, *supra* note 43, at 1785.

agree that the religious conduct at issue makes no positive contribution to social and political truth. In such cases, the use of something like a compelling state interest analysis is not only appropriate but necessary. Courts employing this type of balancing approach do nothing more than recognize that some religious activity is so clearly harmful or deleterious that the state's interest in intervention is overwhelming.

The temptation to restrict religious group autonomy where the group's conduct seems so obviously or unquestionably bad is understandable, but even in these cases we may be mistaken or have more to learn. While it is surely the case that some of the practices that religious groups engage in are destructive and false, we must be careful before we conclude with certainty that we know what these practices are. For example, all of the practices that Underkuffler points to, including religious and racial discrimination, the subordination of women and the persecution of gays and lesbians, were accepted by large segments of society within the past century. Indeed, for many white Southerners, the goals of the abolitionists and civil rights movement were just as abhorrent as racial discrimination is for most Americans today.<sup>89</sup> We too may be wrong about some of the values that we accept without question, and we must be prepared to be surprised. One of the dangers of using a compelling state interest analysis or any other balancing approach that would restrict religious group freedom when group practices endanger important public values is that we may, in fact, be mistaken about the merit of our beliefs. Indeed, practices that seem so clearly harmful or destructive today may actually be seeds of progress. Religious group autonomy is so important because it provides a space for private groups to articulate, preserve and communicate unpopular ideas that may turn out to be tomorrow's truths. As I have stated before, "[w]hile it may be preferable in theory to protect only positive alternatives and new ideas that are helpful rather than harmful, humility requires us to admit that we do not always know where today's errors lie or where tomorrow's advances are hidden."<sup>90</sup>

I am not suggesting that we should doubt the truth of our most cherished beliefs or that the values that most of us agree upon are likely to be wrong. Indeed, there are some principles that I am confident will never change. As a Christian, I believe that Christ reveals the truth about God and humanity: the love that Christ demonstrated for us on the Cross and that he invites us to follow in our own lives is the definitive answer to our questions about the character of God and

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<sup>89</sup> See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 251-52, 257-58 (1998),

<sup>90</sup> Brady, *supra* note 9, at 1703.

the dignity and purpose of human life.<sup>91</sup> Moreover, Christ's example has some clear implications for social and political life. At a minimum, love requires respect for persons and basic human freedoms, protections for life and health, and racial and ethnic equality. However, with confidence should come humility. If we are confident that our beliefs are correct, we should be assured that they can withstand contrary teachings and examples, and if our beliefs cannot do so, we must be prepared to carefully consider whether what we believe is, in fact, true. It is surely better to risk the need to change our views than to embrace error.

Moreover, confidence in a social or political value or principle does not mean that we have learned all there is to know about the requirements and implications of our beliefs. Though I am confident that the truth about God and the moral life is love, I recognize that there is much to learn about what love requires. Indeed, throughout history, the Christian church has been learning more about the demands of love as persuasion has replaced persecution, freedom has replaced slavery, and calls for peace have replaced resorts to violence. The church continues to struggle with what Judge John T. Noonan, Jr. refers to as the "relation of love to power."<sup>92</sup> The distinction between church and state, the persistence of human sin, the call to perfection, the limitations of state power, the demands on state power, and the sanctity of conscience are just some of the considerations that make this relationship particularly difficult to fully understand, and over time, new voices inside and outside the church have continued to bring new insights.

Thus, a second problem with using a compelling state interest test or similar balancing approach is that even when we have correctly identified important public values, we need to leave room for our understanding of these values to grow. While we may be right about our basic principles, we almost certainly have much more to learn about what these principles require in social and political life. We must not assume that our current understanding of important public values will be our final one.

A third danger is that the practices we restrict may contain important insights that can help us to more deeply understand our own beliefs. Not only does our knowledge of our basic commitments develop, but in this process of development, there is much that we can learn from those with whom we disagree. Our Creator has made the pursuit of truth a deeply social endeavor. Not only do we formulate ideas within communities, but communities need the insights of one

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<sup>91</sup> Brady, *supra* note 83, at 208-10.

<sup>92</sup> JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* xii (1976)

another. There are often important elements of truth in beliefs and practices that contain much error.

Nor should we fear the expression and example of ideas that are, in fact, truly bad. While we cannot be certain which ideas meet this description, truly bad ideas surely exist and we are often confident that we know what they are. For example, I am confident that Underkuffler has correctly identified religious and racial hatred as truly immoral and abhorrent beliefs. However, Underkuffler's assumption that we cannot defeat these ideas without suppressing the internal practices of groups that teach them is mistaken. Underkuffler describes my defense of a broad right of autonomy for religious groups as "alarmingly inadequate" in an environment where "religious strife and oppression . . . currently engulfs vast parts of the world."<sup>93</sup> As discussed above, I support limitations on religious group rights when their practices turn to violence and oppression against others. However, I do not favor limitations just because we find their beliefs and practices to be harmful influences on the larger public culture or "abhorrent to civil society."<sup>94</sup> Religious groups must be free to teach their beliefs and live them out in their community life as long as the group's practices do not directly harm others, endanger the lives of members, or threaten members with serious bodily harm. The best way to defeat bad ideas is not to suppress religious group autonomy but to protect this autonomy. The same autonomy that gives protection to bad ideas also supports the development of better ideas that can combat them. The expression and witness of ideas that are true and good are, as Thomas Jefferson recognized long ago, the best antagonists of error.<sup>95</sup> Indeed, while "religious strife and oppression" do, indeed, "engulf[] vast parts of the world,"<sup>96</sup> this is not the case in countries where religious freedom is generally supported by the populace and effectively protected by law. Religious groups that advocate violence and oppression are uncommon in America, and they are likely to remain so. While groups that teach religious and racial hatred do exist, they have become marginalized as commitments to interreligious cooperation and racial equality have become dominant. Though I have argued that the internal affairs of religious organizations should be protected from state interference, it is almost impossible for religious groups to isolate themselves fully from the influence of the larger public culture or from social movements and changes in the community around them. Outside ideas will affect religious groups, and the history of American religion demonstrates that where ideas have

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<sup>93</sup> Underkuffler, *supra* note 43, at 1786.

<sup>94</sup> *Id.* at 1785.

<sup>95</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 77, 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>96</sup> Underkuffler, *supra* note 43, at 1786.



gained wide support in the larger society, they have often become assimilated by the religious groups that initially opposed them. Racial equality and interreligious cooperation are two prominent examples.

Moreover, a broad right of autonomy for religious groups does not mean that the government has no tools to promote the ideas which the majority of Americans believe are especially valuable. The state plays a central role in educating society's young, and it can promote important public values in that setting. In addition, the government can engage in its own speech to advance what its citizens believe are good ideas and to discourage bad ones. Finally, through regulation, the state can ensure that public values are respected in the public and commercial sectors of society, and statutes prohibiting racial and religious discrimination in employment are an example. What the government cannot do, in my view, is attempt to control the internal affairs of religious groups and other private associations engaged in significant expressive activity.<sup>97</sup> These groups must be left alone to develop and promote their own beliefs, including counter-cultural ideas that may turn out to be tomorrow's orthodoxies.

Indeed, restriction of religious group practices that we view as truly bad or abhorrent is not only short-sighted but it is also likely to be counter-productive. Rather than further marginalizing these groups, such intervention is likely to galvanize their members and possibly draw in additional supporters who were previously on the sidelines. Moreover, government intervention is likely to spark conflict between the group and the state with very little accompanying benefits.

#### *D. Religious Group Autonomy and Internal Dissent*

For Underkuffler, however, my analysis still does not fully recognize and account for the harms that groups can cause their own members. Underkuffler notes that many of the cases where religious groups seek exemptions from secular statutes involve situations of conflict within the group.<sup>98</sup> While the group as a whole opposes the application of secular norms, dissenters within the group disagree, and it is these dissenters who seek recourse to the civil laws and civil courts.<sup>99</sup> While I have argued that religious group autonomy is essential to support robust freedom of belief, Underkuffler points out that these dissenters do not experience the group as a supportive place for their beliefs.<sup>100</sup> Rather than

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<sup>97</sup> While my focus in this article is religious groups, I have also advocated broad autonomy for nonreligious associations under the Free Speech Clause. *See* Brady, *supra* note 9, at 1706-11.

<sup>98</sup> Underkuffler, *supra* note 43, at 1783.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

nurturing their faith, the religious group is “experienced as a negative, hostile place, in which the religious group attempts to exert, on the individual, oppressive and coercive power.”<sup>101</sup> Underkuffler questions whether freedom of religious belief is achieved by “granting ... religious group complete, autonomous, and despotic power.”<sup>102</sup> Indeed, Underkuffler’s image of despotic groups that “oppress” and “coerce” dissenting members conjures up pictures of abusive practices, subjugation and other forms of serious mistreatment. Why should we side with the religious group in these or other situations where there is a clash of beliefs between the group and its dissenting members?<sup>103</sup>

Underkuffler is certainly correct that religious groups can be places of conflict and dispute. She is also correct that these groups can be painful places for dissenters. While I have argued that religious group autonomy is essential to maintain robust freedom of belief, I have not argued that religious groups will invariably be supportive of the views of all, or even a majority, of their members. To the contrary, dissension is common in religious groups as group members seek to deepen their understanding of group principles and practices and to apply these beliefs appropriately to concrete situations. Disagreements can arise as group members struggle over unsettled or underdeveloped areas of doctrine or over settled beliefs that are newly challenged by fresh ideas. Disagreements can also arise as group members encounter changing circumstances in their own lives or in the experience of the larger society. Novel ideas from other groups, both religious and nonreligious, can also spark the reexamination of old convictions. In all of these cases, a response is required from the religious community, and community members will frequently have different ideas about what the appropriate response is. The fact that most religious traditions are complex belief systems involving a wide range of ideas and strains of thought means that group members can easily draw from different elements of the tradition to reach different conclusions.

Thus, the beliefs of religious groups are frequently in flux, and debate, disagreement and controversy will often accompany the reexamination and revision of religious doctrine. In some cases, these disputes will be very bitter, and the group may even split with dissenting members either being forced out or choosing to voluntarily withdraw in order to form their own group or to join a preexisting group with more congenial beliefs. For those on the losing side of such controversies, this process can be very painful. However, disputes and controversies, including bitter disagreements, are part and parcel of the process by which religious beliefs are formulated and developed and greater understanding of

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

truth is sought. Religious groups seek knowledge in a world in which truth is always partly hidden. There is a gap between ourselves and the truths we seek, and, thus, progress in understanding will rarely be easy or smooth.

Underkuffler suggests that nonintervention favors the majority of group members (if, in fact, the winners are in the majority) over dissenting members. However, the government does not side with the majority when it recognizes a broad right of religious group autonomy over internal affairs; it simply leaves group members alone to work out their own disputes free from government interference. Religious group autonomy is so important because, without it, state interference will impede and skew the processes by which religious beliefs are formulated, refined and revised. State intervention will tip the balance in group controversies in favor of the ideas and principles that the majority of voters believe to be the most enlightened. The ability of groups to develop and model their own ideas will be obstructed, including unorthodox and unpopular ideas that may bring us closer to the truth. The government surely has a legitimate interest in promoting prevailing values in its own speech and educational functions and in laws governing public and commercial institutions. However, the state must leave a space for religious groups and other private associations to challenge these values and point the way to something even better.

Nor are the interests of dissenting members well served by government intervention. Underkuffler suggests that freedom of belief for individuals is maximized when the religious communities to which individuals belong support their beliefs and is impeded when these communities suppress their beliefs.<sup>104</sup> In Underkuffler's view, a broad right of autonomy that permits religious groups to stifle the beliefs of dissenting members has a cost in terms of individual religious freedom.<sup>105</sup> In one sense, Underkuffler is certainly right. Dissenting members may be free to exit the group, but they are not able to pursue and exercise their beliefs within the setting of their choice. However, in a broader sense, religious group autonomy maximizes the freedom of individual believers. Above all else, religious believers seek a true understanding of their proper relationship to the divine and to one another. They want more than just a setting to pursue unhindered whatever beliefs they happen to embrace at the moment. What they want is the ability to make good choices and to embrace true beliefs, and this requires freedom for religious groups to formulate and develop ideas absent government interference. Religious beliefs are developed by persons in communities, and progress towards true beliefs requires group freedom. Underkuffler is correct that there will be a tension between religious groups and

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<sup>104</sup> See *id* at 1783.

<sup>105</sup> See *id*.

their members, but individuals and groups need one another. The search for truth is at once an individual and social phenomenon. Groups require the contributions of their multiple members, including the different ideas and perspectives that can cause controversy and disagreement as well as less divisive conversation and debate. Individuals, in turn, require communities for the development of sophisticated systems of belief. Moreover, while individual beliefs may depart in significant ways from the groups to which they belong or have belonged, these groups inevitably shape the views that individuals hold. Neither the individual nor the group can do without the other, and neither is well served by government intervention into the processes by which religious beliefs are formed and developed.

Moreover, the experience of dissenting members is rarely as bleak as Underkuffler suggests. For Underkuffler, the dissenter experiences the group as “a negative, hostile place” that “attempts to exert, on the individual, oppressive and coercive power.”<sup>106</sup> However, the power of the group is not nearly as strong as Underkuffler suggests. Dissenters are free to exit the group, and in a pluralistic society such as our own, there are many other groups for dissenters to join. Dissenters can also form a new group if no existing group is congenial. Dissenting members who have been employed by the group may experience financial impediments to withdrawal, but here as well there will be employment opportunities outside the group. Thus, dissenters need only experience the group as oppressive and coercive if they choose to stay and accept the group’s authority. Of course, many do, and, thus, the experience of dissenting group members who choose not to leave the group must not be ignored. Even these experiences, however, need not be as negative as Underkuffler suggests. Some dissenters may choose to stay because they have longstanding ties to the group and they still hold many beliefs in common with other group members. Others may choose to stay because they have not found a more congenial community. Still others may stay because they are committed to working for change within the group. The experience of all these dissenters may be painful, but they all have affirmative reasons for staying that outweigh these negatives. Moreover, state intervention will be a victory for no one. In the short term, the dissenter’s position may be vindicated, but over the long-run the loss of group freedom will interfere with the group’s ability to grow closer to the truth that all members desire. State regulation of group practices may appear to be an improvement today, but it will hamstring the ability of the group to develop ideas freely and to push beyond contemporary public values in the future. State involvement in religious groups is no answer to

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<sup>106</sup> *Id.*

the deficiencies of group doctrine, even very serious and troubling deficiencies. Instead, it only compounds the problem.

Where groups engage in practices that appear abusive or exploitative, the case for intervention may seem stronger. However, in these situations, too, members can protect themselves from harm by exiting the group. As I have argued above, the state has a legitimate interest in safeguarding the ability of group members to voluntarily leave the group should they choose to do so, including through regulations designed to protect members from death or serious bodily harm. Where group members are especially vulnerable to exploitation because of diminished mental or physical capacity, additional protections may be appropriate. However, intervention is not justified just because a majority of voters within the larger community believe that the group's practices are unfair or harmful to group members. It is not the function of government to protect group members from themselves. Indeed, as I have argued above, what may seem like egregious practices to the majority of voters may be viewed quite differently by counter-cultural groups, and the majority might be the ones who are mistaken. Where we have good reason to be confident that our judgments are correct, the government can promote these views through a variety of means that do not interfere with religious group autonomy. Moreover, where values have gained wide support in the larger society, they will likely influence even counter-cultural groups, and groups that make no accommodations to prevailing values are likely to lose membership over time. Furthermore, few groups can be truly despotic and maintain a sizable membership where members can freely exit the group. Truly repressive groups have always understood this and have sought to use government power to retain their influence.

## II. *The Problematics of Truth*

In the previous section of this article, I have defended a broad right of autonomy for religious organizations that extends to all aspects of internal activities and affairs, and I have done so on the ground that such autonomy is necessary to protect the ability of religious groups to freely seek and grow in their understanding of truth, including truth about social, civic and political matters that are also of great concern to the larger community. Without the ability to live out their beliefs in their internal community life, religious groups will have a difficult time generating and preserving their ideas, and their ability to effectively communicate their insights to the larger community will also be curtailed. As a result, new and unorthodox perspectives that can push us all forward may be lost. What is at stake, I have argued, is knowledge of truth, and what can be more important?

For my readers, however, the connection that I draw between religious group autonomy and truth may initially seem more naïve than convincing. Few contemporary scholars seek to justify legal and political principles by a reference to truth, especially truth with a capital “T.” After all, we are not sure we believe in “truth” anymore, and even if truth exists, divisions and conflict regarding its meaning make truth an especially inappropriate basis for legal and political decision making. In this section, I will address three specific objections that are likely to be made to the connection that I draw between religious group autonomy and truth. The first of these objections challenges my assumption that freedom will advance our understanding of truth. In the free speech field, the advancement of truth has long been a familiar justification for freedom of expression, but recently scholars have called attention to the weaknesses of this rationale. These same arguments are also relevant to my defense of religious group freedom. The second objection challenges the appropriateness of using religious or other comprehensive ideas about truth as a basis for law and political life. In a diverse community such as our own, legal and political decision making should draw upon shared democratic values and common methods of reasoning not conflicting conceptions about truth as a whole. The third objection challenges the very existence of the type of truth that I refer to. Religious or other references to a transcendent Reality that grounds our existence are, in this view, foolish nonsense. While I argue that nothing could be more important than truth, for many scholars in our increasingly secular culture, nothing could be less so. In answering these objections, I hope to convince my skeptical reader that the link I draw between religious group autonomy and truth is not only plausible but also compelling. Our reluctance to take the idea of truth seriously in academic conversations has undermined our ability to appreciate the type of argument that I make in this article, but I hope that the discussion below will encourage readers to reconsider this reluctance and give close attention to a perspective that may initially seem strange and even fantastic but upon longer consideration has great force.

#### *A. Freedom and the Advancement of Truth*

Earlier in my article, I acknowledged that my defense of religious group autonomy assumes a connection between freedom and truth, liberty and social progress. I have argued that over time freedom for religious groups will promote greater understanding of truth by enabling these groups to generate, preserve and communicate their ideas without government interference. We need the range of insights that religious groups provide in order for our understanding to progress, and even the most unorthodox and unpopular ideas may contain some, and

sometimes much, truth. In the Free Speech field, proponents of freedom of expression have long drawn a similar link between freedom and truth. One of the oldest and most influential arguments in favor of freedom of speech has been that the free exchange of ideas promotes the discovery of truth. In Justice Holmes's words, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>107</sup> John Milton before him also expected truth to prevail in "a free and open encounter."<sup>108</sup> In Thomas Jefferson's words, "truth is great and will prevail if left to herself," and "she is the proper and sufficient antagonist to error."<sup>109</sup> Where "[r]eason and experiment have been indulged, ... error has fled before them."<sup>110</sup>

However, despite this pedigree, recently scholars have repeatedly challenged the view that unrestricted expression will lead to the advancement of truth.<sup>111</sup> The marketplace of ideas that Holmes spoke of does not necessarily drive out error or properly identify truth. To the contrary, market failures are likely, and the reasons for such failures are numerous. Some problems arise because of human weakness. We all have intellectual and educational limitations that diminish our ability to recognize truth,<sup>112</sup> and even with rigorous education and training, the capacity of the human mind to accurately distinguish truth from falsehood will remain imperfect. Our emotional responses to the ideas that we encounter may also distort our ability to effectively analyze information and arguments.<sup>113</sup> In some cases, speech may be designed to deceive or mislead rather than to advance our understanding, and when this is the case, our natural deficiencies may be exacerbated. For example, where marketing or propaganda is aimed at the emotions or unconscious desires, our ability to distinguish the substance of a message from its form may be diminished.<sup>114</sup> Especially problematic are "[i]rrational appeals to hate and prejudice ..., [which] often

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<sup>107</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>108</sup> JOHN MILTON, *AREOPAGITICA*, reprinted in *AREOPAGITICA AND OF EDUCATION* 1, 50 (George H. Sabine ed., Harlan Davidson, Inc. 1951) (1644).

<sup>109</sup> Jefferson, *supra* note 95, at 77.

<sup>110</sup> THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 160 (William Peden ed., 1982) (1787).

<sup>111</sup> See GARVEY, *supra* note 37, at 66; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5-8; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 2 (1995); Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1246-47 & n.58 [hereinafter Smith, *Believing Persons*]; Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 667-68, 730 (1987) [hereinafter Smith, *Skepticism, Tolerance*].

<sup>112</sup> See Smith, *Skepticism, Tolerance*, *supra* note 111, at 711.

<sup>113</sup> See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 7 (1992); Ingber, *supra* note 111, at 35; Smith, *Skepticism, Tolerance*, *supra* note 111, at 711.

<sup>114</sup> See Ingber, *supra* note 111, at 5, 15, 35.

overwhelm[] thoughtful tolerance and understanding.”<sup>115</sup> Other market failures are the result of the inequality of material resources among participants.<sup>116</sup> Those with greater resources have greater access to more effective means of communication, and, thus, “[t]he marketplace of ideas ... will inevitably be biased in favor of those with the resources to ply their wares.”<sup>117</sup> By contrast, those with few resources will face significant limitations on access.<sup>118</sup> Yet another problem is the effects of socialization on our receptiveness to new ideas. We are likely to be biased in favor of those ideas that are most dominant in society or within our local communities.<sup>119</sup> The government’s role in the educational process also gives it considerable control over thought, and, indeed, education is just one of a number of mechanisms that the state has available to encourage some ideas and discourage others.<sup>120</sup> Perhaps most importantly, anyone can see that the free trade in ideas has not worked as its proponents have expected.<sup>121</sup> Freedom of expression has not, in fact, driven out error as Jefferson predicted,<sup>122</sup> nor has truth vanquished all competing positions.<sup>123</sup> To the contrary, diversity of ideas and conflict among them have increased rather than decreased.<sup>124</sup> In Stanley Ingber’s words, “[t]he marketplace of ideas is more myth than reality.”<sup>125</sup>

Certainly these critics are right that free trade in ideas will not yield quick or complete understanding of truth, and the same cautionary note applies to my defense of religious group autonomy. The weaknesses of human nature are too great to expect speedy progress or perfection. The powers of the human intellect are limited, and our emotions often cloud our judgment. The temptation to oversimplify or cut corners when we are pursuing difficult questions can be great. We will make mistakes, and progress will often occur in fits and starts. No one who has diligently sought the truth would deny these problems.

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<sup>115</sup> SMOLLA, *supra* note 113, at 7.

<sup>116</sup> See SMOLLA, *supra* note 113, at 6; Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119, 134 (1989); Ingber, *supra* note 111, at 5.

<sup>117</sup> SMOLLA, *supra* note 113, at 6.

<sup>118</sup> See SMOLLA, *supra* note 113, at 6; Ingber, *supra* note 111, at 5.

<sup>119</sup> See Greenawalt, *supra* note 116, at 134.

<sup>120</sup> See Ingber, *supra* note 111, at 28, 30.

<sup>121</sup> See SMOLLA, *supra* note 113, at 6 (“The marketplace of ideas rationale is also ostensibly contradicted by our everyday experience.”); Smith, *Skepticism, Tolerance*, *supra* note 111, at 667-68 (“[W]e have lived through too much to believe it.” (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 71 (1975))).

<sup>122</sup> See SMOLLA, *supra* note 113, at 6 (noting that “[t]here are ... many shoddy ideas circulating”); see also GARVEY, *supra* note 37, at 66 (observing that “it is too easy to come up with counterexamples”).

<sup>123</sup> See SMOLLA, *supra* note 113, at 6.

<sup>124</sup> See Ingber, *supra* note 111, at 25.

<sup>125</sup> Ingber, *supra* note 111, at 48.



However, the obstacles that critics point to do not undercut the importance of freedom in the search for truth. The pursuit of truth will rarely be easy even in conditions of freedom, but there is no other route. Knowledge is not possible without understanding, and understanding cannot grow unless individuals and communities are free to ponder, examine, entertain, develop, discover, communicate, discuss and experiment with new and existing ideas. As Thomas Jefferson stated, “God ha[s] created the mind free.”<sup>126</sup> Locke further explained, “such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force”<sup>127</sup>: “only light and evidence ... can work a change in men’s opinions.”<sup>128</sup> Understanding cannot be compelled; it can only be informed—freely.

Indeed, humans have been created to desire knowledge and seek it through understanding. As noted above, we have been made with the capacity to reflect upon our existence, upon the larger world in which we live, and upon the source and ground of all that is, and we cannot help but do so. Our capacity for reflection propels us to further inquiry, examination and discovery. Our goal is the truth about ourselves, the natural world, and our place within it, and this truth only comes by thought and understanding. The tools we have are not limited to reason. Head and heart, deliberation and intuition all play a role as do nature and grace, reason and revelation. Understanding is a multifaceted process, but it always requires freedom to develop.

One of the mistakes that critics make is to expect perfection. In many areas of inquiry, progress will be gradual and complete knowledge will always lie before us. Where the questions addressed are difficult, development requires careful thought and analysis, and the determination to resist any temptation to cut corners, engage in sloppy thinking or take the easy route to what is inescapably complex. We will surely fail often and make mistakes. Indeed, even when we think we have made progress, we may not have. Not every product that emerges from the marketplace of ideas will be true, and new circumstances will often force rethinking of widely accepted opinions. Truth must not only be understood but continuously re-understood in light of new experiences and ideas. Jefferson was, indeed, too optimistic when he expected freedom to drive out all error and truth to quickly emerge the victor.

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<sup>126</sup> Jefferson, *supra* note 95, at 77.

<sup>127</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (Patrick Romanell ed., 2d ed. Bobbs-Merrill 1955) (1689).

<sup>128</sup> *Id.* at 19.

However, contemporary skepticism is also an overreaction. Our understanding is always in the process of development, but that does not mean that we do not make progress. Indeed, if we look back on Western history since Milton published his eloquent defense of freedom of expression,<sup>129</sup> we can see that greater protections for freedom of thought and expression have yielded much fruit. Rapid scientific, social and political developments have all been fueled by these freedoms. Diverse and conflicting ideas remain, but the marketplace has produced many developments that most would agree are positive. In American, calls for civil rights, greater equality for women, and more openness and cooperation among those with different religious views are just some examples. To be sure, there is no guarantee that future developments will be positive or that freedom will, in the long run, lead to increasing knowledge of truth. However, our experience gives us good reason for hope. Ultimately, the claim that freedom will lead to the advancement of truth is an assertion of faith, but it is a reasonable faith and it is our faith as a political community. Holmes called the link between freedom and truth the “theory of our Constitution,”<sup>130</sup> and he also described it as “an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”<sup>131</sup> The obstacles that critics point out do not justify the abandonment of our experiment. To the contrary, the progress that has been made indicates that we have made a most advantageous wager.

Indeed, many of the problems that critics have pointed to are not nearly as deep as they may initially appear. For example, while those with greater material resources will surely have an economic advantage when accessing effective means of communication, a free marketplace ensures that all speakers can participate, and if their ideas are good, the arguments of those with fewer resources may be more compelling. Indeed, there is a limit to the effectiveness of marketing and propaganda even expensive propaganda. When the ideas that are expressed do not fit our experiences or basic beliefs, they will not be persuasive even with sleek packaging. Falsehoods lose their attraction when they bump up against the unbudging facts and realities of our experience. While they may have initial appeal, it is short-term. By contrast, ideas and perspectives that can adequately explain our experiences will have inherent power and appeal. The development of the world’s major religious traditions provides a good illustration. Few of these religions gained their initial following because of the wealth of their founders, nor does their continuing appeal in free countries depend on the riches of their adherents or the packaging of their message. Christianity, in particular,

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<sup>129</sup> MILTON, *supra* note 108.

<sup>130</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>131</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

had especially humble beginnings. Its founder was crucified at the direction of the community's religious leaders, and his message was spread by disciples with limited means, education and social stature. The power of a religious tradition is not in the material resources of its members or the external packaging of its message, but in the force of its ideas. Successful religions answer our questions about the meaning and purpose of life in a way that fits our experiences and speaks both to the desires of our heart and the demands of our intellect. The Christian, for example, believes that Christ's death for us on the Cross best explains the mystery of human life.<sup>132</sup> The Cross is a scandal and paradox today just as at the time of Jesus's death,<sup>133</sup> but it has power and appeal. In the Cross, we encounter a merciful God and are called to follow the example of love.<sup>134</sup> This love attracts us; it answers our questions about the character of God and the purpose of human life, and it gives us joy. In it, the restless heart finds rest.<sup>135</sup> We are surely born in confusion and darkness, and our questions betray our ignorance. Our recognition of our createdness puts us in relationship to the greater Reality that grounds all that is, but there is always a gap between us. However, we have been made to grow in our understanding of our origin and calling, and when the light of the prophet appears, we have eyes to see. Falsehood has limited power against this light even when the light is carried by those of limited means and limited marketing expertise.

The effects of socialization on our receptiveness to new ideas are also not as problematic as critics suggest. It is certainly true that our local communities

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<sup>132</sup> See GAUDIUM ET SPES, *supra* note 72, ¶ 22, at 178 (“The truth is that only in the mystery of the incarnate Word does the mystery of man take on light ... Christ ... by the revelation of the mystery of the Father and his love, fully reveals man to man himself and makes his supreme calling clear.”); *id.* ¶ 22, at 179 (“Through Christ and in Christ, the riddles of sorrow and death grow meaningful.”).

<sup>133</sup> 1 *Corinthians* 1:22-24 (“For Jews demand signs and Greeks seek wisdom, but we preach Christ crucified, a stumbling block (skandalon) to Jews and folly to Gentiles, but to those who are called, both Jews and Greeks, Christ the power of God and the wisdom of God.”).

<sup>134</sup> *Philippians* 2:1-8:

So if there is any encouragement in Christ, any incentive of love, any participation in the Spirit, any affection and sympathy, complete my joy by being of the same mind, having the same love, being in full accord and of one mind. Do nothing from selfishness or conceit, but in`1 humility count others better than yourselves. Let each of you look not only to his own interests, but also to the interests of others. Have this mind among yourselves, which is yours in Christ Jesus, who, though he was in the form of God, did not count equality with God a thing to be grasped, but emptied himself, taking the form of a servant, being born in the likeness of men. And being found in human form he humbled himself and became obedient unto death, even death on a cross.

<sup>135</sup> See SAINT AUGUSTINE, *CONFESSIONS* 3 (Henry Chadwick ed., 1991) (397-400) (observing that “you have made us for yourself and our heart is restless until it rests in you”).

and the larger society play an important role in informing and shaping our beliefs. Indeed, our ability to engage in further reflection and inquiry depends upon this formative role. Sophisticated thought and new ideas and discoveries always rest upon the foundation of what has come before. Socialization is not incompatible with independent thought; to the contrary, it makes it possible. While we surely have some bias in favor of the ideas with which we are most familiar, we also have an inherent tendency to challenge and rethink what we have inherited from others. Our experience in America demonstrates the strength of this tendency in conditions of freedom. Indeed, in America, our willingness to reject what has come before us appears much greater than our reluctance to depart from accepted opinion, and it is this readiness to resist past beliefs and ideas that is, perhaps, the greater obstacle to further progress and development.

Likewise, the power that government has to encourage some ideas and discourage others through education or other means need not be worrisome. A democratic government has a legitimate role in promoting the values and ideals that society considers most important. The health and stability of a community depends on its ability to pass its most significant values on to the next generation. Of course, the community's values could be wrong, and they can almost always be improved or better understood, but as long as government leaves room for individuals and private groups to generate and communicate alternative views, there will be sufficient opportunity for dissenters to advance contrary views. Our experience in America demonstrates that individuals and groups will make use of their freedom to articulate new ideas and press for change, and our rebels and nonconformists have been numerous, active and influential. Indeed, many of our prevailing values are the work of yesterday's dissenters. The work of those instrumental in the civil rights movement provides a good example.

Critics are also mistaken when they view continuing diversity and conflict in the marketplace as a sign of market failure. In most areas of inquiry, advancement will require the contributions of many ideas and perspectives. To be sure, the presence of multiple ideas and perspectives strongly suggests that we have not yet arrived at a full understanding of the truth we seek, but this diversity of perspectives also makes further progress possible. Even when different ideas conflict, they may each contain pieces of the truth. As John Stuart Mill argued, "only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth."<sup>136</sup> Indeed, Mill also recognized that we benefit from contrary perspectives even when our opinions are true. When we

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<sup>136</sup> JOHN STUART MILL, ON LIBERTY 46 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

are forced to explain our position to our opponents, we retain a more “intelligent and living apprehension of a truth.”<sup>137</sup>

Nor is there a better path to truth than freedom. If our minds are weak and our knowledge is incomplete, we cannot count on the government to accurately identify truth and advance it by regulating the expression or development of contrary views. The government can be mistaken just as citizens can, and regulation that restricts the ability of individuals and organizations to develop new and better ideas makes correction and improvement difficult. History has taught us that even when those in power are sure they are right, they could be wrong. It is our weaknesses and limitations in pursuing truth that makes freedom necessary. The obstacles and problems that critics point to strengthen the case for freedom, not undermine it. While freedom may not yield quick or perfect knowledge, few in America believe that they can point to a better system. The proper role of government is not to regulate the marketplace or otherwise restrict the development and expression of ideas. Rather, it is to promote the effectiveness of the marketplace by educating citizens to think clearly and carefully and to resist the temptation to confuse the form or packaging of an idea with its substance. After that, the government must leave individuals and groups alone to develop and communicate their own ideas freely. While we cannot expect quick or easy progress, we can expect progress. Even if we cannot be assured of advancement, our faith is reasonable and what goal could be more important.

### *B. Diversity, Disagreement and Truth*

A second objection to my analysis rejects the important role that I envision for religious organizations in informing and enriching the larger civic and political culture. I have observed that the truth that religion seeks is not purely spiritual. Religion is concerned with how we ought to live, both in relationship to the Reality that grounds our existence and also in relationship to each other, and this fundamental ethical orientation has implications for all aspects of life, including social and political life. Thus, the concerns of religious communities overlap with the social, civic and political concerns of the wider community, and the entire society can benefit from the range of insights that different religious traditions provide. Indeed, I have suggested that the truth that religion seeks about our responsibilities to one another provides an essential foundation for our political values, institutions and structures. As I have argued above, we cannot give content to concepts such as social benefit and harm or the public good without first addressing these fundamental questions about how we ought to live

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<sup>137</sup> *Id.* at 43.

together. Our understanding of the purposes and goals of social life and our responsibilities to one another provides an essential framework for formulating our basic political principles and ideals as well as more specific decisions regarding public policy and legal norms. Religion speaks to these truths, and the ideas that religious groups generate and witness through their internal community life can help deepen our understanding.

However, many contemporary political theorists have been challenging the legitimacy of basing our political institutions and structures on religious ideas and other comprehensive views about “truth as a whole.”<sup>138</sup> Rather than providing an essential foundation for addressing political questions, our fundamental ideas about religion and morality are an especially inappropriate basis for political life. The problem is that we disagree too profoundly about these beliefs, and the exercise of political power is only legitimate when it is based on ideals and principles that we can all reasonably be expected to share.

A leading proponent of this view is John Rawls, and Rawls’s defense of what he calls “political liberalism” has had an enormous impact upon contemporary political theory.<sup>139</sup> While differing with respect to specific issues and often developing Rawls’s views in new directions, many contemporary political and legal scholars have embraced the basic elements of Rawls’s position. In Rawls’s view, we disagree too deeply about our comprehensive religious, philosophical and moral doctrines for these to provide a fair and stable basis for our fundamental political principles,<sup>140</sup> nor can we expect greater agreement in the future.<sup>141</sup> The “natural outcome” of the exercise of human reason under conditions of freedom is pluralism,<sup>142</sup> and profound and irreconcilable conflict among comprehensive views is inevitable.<sup>143</sup> Instead of basing our political institutions on contestable religious beliefs or moral conceptions about human good, we should base our political community upon values and principles that we can all share.<sup>144</sup> While we will not find shared principles in the realm of the “metaphysical,” we can if we limit our focus to the domain of the “political.”<sup>145</sup>

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<sup>138</sup> See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 92-93 (1996); STEPHAN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 166-69 (2000); JOHN RAWLS, *POLITICAL LIBERALISM* 224-25, 243 (1993).

<sup>139</sup> Rawls’s develops his theory of “political liberalism” in RAWLS, *supra* note 138.

<sup>140</sup> See *id.* at 10, 135.

<sup>141</sup> See *id.* at 36, 136.

<sup>142</sup> *Id.* at xxiv; see also *id.* at xvi, 3-4, 36-37; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

<sup>143</sup> See RAWLS, *supra* note 138, at 44, 135; Rawls, *supra* note 142, at 766.

<sup>144</sup> See RAWLS, *supra* note 138, at 38, 137, 139-40, 217.

<sup>145</sup> *Id.* at 10-11, 38, 97, 140.

According to Rawls, we share a common democratic culture and values, and we should begin there.<sup>146</sup> Rawls argues that all citizens should draw upon these shared political values and, using common methods of reasoning, develop a “political conception of justice” that other citizens can also be reasonably expected to endorse.<sup>147</sup> Public discussion about fundamental political questions will, ideally, be conducted in terms of a family of such political conceptions as each citizen draws upon the values and principles of their political conception in public advocacy and decision making regarding constitutional essentials and matters of basic justice.<sup>148</sup> Citizens can draw upon their comprehensive moral, philosophical and religious views as well, but only if they also give reasons that others can reasonably accept and if they base their decisions on such reasons.<sup>149</sup> When citizens give such reasons, they engage in what Rawls calls “public reason.”<sup>150</sup> For Rawls, a commitment to public reason is essential for political legitimacy.<sup>151</sup> The exercise of political power is only justified when fundamental political questions are settled in accordance with principles and ideals that all citizens can reasonably be expected to accept based on their common human reason.<sup>152</sup>

For Rawls, one of the great virtues of his approach is that it “bypass[es] religion and philosophy’s profoundest controversies,”<sup>153</sup> and enables citizens to decide political questions based on terms that all can accept as fair.<sup>154</sup> Rawls calls his approach “political liberalism” because, unlike “comprehensive” forms of liberalism, it does not presuppose any particular metaphysical views about human good or truth as a whole.<sup>155</sup> Rawls does not deny the existence of religious, moral or philosophical truth, but he does not take sides on such questions.<sup>156</sup> Rather, he

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<sup>146</sup> See *id.* at 13-14, 43.

<sup>147</sup> *Id.* at 223-27, 43, 66-67, 100-01, 137; Rawls, *supra* note 142, at 773-75. Rawls refers to the conception of justice he proposes as “justice as fairness.” RAWLS, *supra* note 138, at 226. Together, the different political conceptions of justice that citizens articulate constitute a “family” of such conceptions. *Id.* at 43; Rawls, *supra* note 142, at 773-74.

<sup>148</sup> See RAWLS, *supra* note 138, at 223-27; Rawls, *supra* note 142, at 773-76.

<sup>149</sup> See Rawls, *supra* note 142, at 776.

<sup>150</sup> *Id.*

<sup>151</sup> See RAWLS, *supra* note 138, at 217-18; Rawls, *supra* note 142, at 768-69, 770-71.

<sup>152</sup> See RAWLS, *supra* note 138, at 137, 139-40, 217; Rawls, *supra* note 142, at 771. Some of Rawls’s followers extend the requirement of public reason beyond fundamental political questions (or, in Rawls words, “constitutional essentials” and “matters of basic justice,” Rawls, *supra* note 142, at 767). to political discussion and decision making more broadly. See, e.g., GUTMANN & THOMPSON, *supra* note 138, at 85 n.44, 14, 52-53, 55; MACEDO, *supra* note 138, at 169, 172-73.

<sup>153</sup> RAWLS, *supra* note 138, at 152.

<sup>154</sup> See *id.* at 98.

<sup>155</sup> *Id.* at xxvii-xxviii.

<sup>156</sup> See *id.* at xix-xx, 63, 94 150.

rejects the use of truth as a basis for political life<sup>157</sup> and turns instead to strictly political values that we can all share based on our common democratic culture.<sup>158</sup> According to Rawls, “politics in a democratic society can never be guided by what we see as the whole truth” because we will never agree about such truth.<sup>159</sup> To be sure, if the political community is to be stable over time, citizens must be able to explain to themselves how the principles of political justice that they advocate are supported by or at least compatible with their comprehensive views,<sup>160</sup> but these principles must be formulated in terms that are independent of their particular religious, moral or philosophical traditions.<sup>161</sup>

Rawls and his followers do not just limit our decision making regarding fundamental political questions to political principles that we can all share. These political principles also place restrictions on comprehensive views and ways of life as well as the organizations that promote such views. According to Rawls, the “values of the political are very great values.”<sup>162</sup> These values make possible legitimate government based on shared terms,<sup>163</sup> and, thus, where comprehensive belief systems conflict with political values, the political overrides the comprehensive.<sup>164</sup> Likewise, the political virtues that support democratic government and the commitment to public reason are “very great virtues,”<sup>165</sup> and attempts to foster and strengthen these virtues also outweigh objections from individuals and groups espousing minority views.<sup>166</sup> According to Rawls, political values and virtues “set limits to permissible ways of life”<sup>167</sup>; they “inevitably encourage some ways of life and discourage others, or even exclude them altogether.”<sup>168</sup> Likewise, the internal affairs of religious groups and other voluntary associations are not exempt from intervention by the state.<sup>169</sup> Rawls is careful to say that principles of political justice do not apply to internal group affairs directly.<sup>170</sup> The state may not favor particular comprehensive doctrines as

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<sup>157</sup> *See id.* at 94.

<sup>158</sup> *See id.* at 150.

<sup>159</sup> *Id.* at 243; *see also id.* at 42-43 (“A zeal for the whole truth tempts us to a broader and deeper unity that cannot be justified by public reason.”).

<sup>160</sup> *See id.* at 10-11, 12, 134, 140, 168-71.

<sup>161</sup> *See id.* at 9, 144.

<sup>162</sup> *Id.* at 139.

<sup>163</sup> *See id.* at 139-40, 157.

<sup>164</sup> *See id.* at 138-39; 209.

<sup>165</sup> *Id.* at 157; *see also id.* at 199-200.

<sup>166</sup> *See id.* at 199-200.

<sup>167</sup> *Id.* at 209.

<sup>168</sup> *Id.* at 195.

<sup>169</sup> *See Rawls, supra* note 142, at 789.

<sup>170</sup> *See id.*



such.<sup>171</sup> However, democratic political principles do place “essential constraints” on such affairs where internal group practice undermines the ability of the state to protect and preserve these values.<sup>172</sup> To be sure, Rawls does not believe that conflicts between principles of political justice and comprehensive views will occur often.<sup>173</sup> The principles of political justice will always be derived from our shared democratic culture,<sup>174</sup> and, moreover, reasonable people will accept the value of public reason.<sup>175</sup> However, where conflicts do occur, comprehensive views and the groups that disseminate them must yield.<sup>176</sup>

Some of Rawls’s followers would go even further. In their view, state intervention in internal group affairs need not be limited to situations where group practices undermine the values of political justice. The state may also take affirmative steps to shape the beliefs and practices of religious and other civil society institutions according to shared democratic values.<sup>177</sup> Because religious organizations and other voluntary associations play a critical role in transmitting democratic values and virtues, these scholars favor congruence between the values of the political and the values of associational life.<sup>178</sup> Stephen Macedo has argued, for instance, that the private sphere of voluntary associations should be “transform[ed],”<sup>179</sup> “reconstitute[ed],”<sup>180</sup> and “colonize[d],”<sup>181</sup> so that it supports liberal democratic norms. Macedo favors mechanisms of intervention that are “gentle” and “indirect.”<sup>182</sup> For example, he recommends conditioning the receipt of government funds on internal practices that match public values.<sup>183</sup> Others favor the use of more direct regulation though most scholars who support

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<sup>171</sup> See RAWLS, *supra* note 138, at 193.

<sup>172</sup> Rawls, *supra* note 142, at 789; *see also id.* at 791 (stating that “the principles of justice still put essential restrictions on the family and all other associations”).

<sup>173</sup> See RAWLS, *supra* note 138, at 140, 156-57.

<sup>174</sup> *See id.* at 150 (“[W]e turn ... to the fundamental ideas we seem to share through the public political culture.”).

<sup>175</sup> *See id.* at 49-50; Rawls, *supra* note 142, at 770.

<sup>176</sup> See RAWLS, *supra* note 138, at 209.

<sup>177</sup> *See e.g.*, MACEDO, *supra* note 138, at 108, 134-35; Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION, *supra* note 39, at 3, 18.

<sup>178</sup> *See e.g.*, Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 *FORDHAM L. REV.* 1573, 1573-74 (2001); *see also* ROSENBLUM, *supra* note 39, at 40-41 (discussing this view); Tamir, *supra* note 39, at 220-22 (same).

<sup>179</sup> MACEDO, *supra* note 138, at 137, 151.

<sup>180</sup> Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 *CHI.-KENT L. REV.* 417, 440 (2000).

<sup>181</sup> *Id.* at 441.

<sup>182</sup> MACEDO, *supra* note 138, at 137-38; Macedo, *supra* note 180, at 422; *see also* ROSENBLUM, *supra* note 39, at 40-41 (discussing the views of those who favor using government power to shape civil society institutions according to public democratic values).

<sup>183</sup> *See* Macedo, *supra* note 180, at 432, 440-42; Macedo, *supra* note 178, at 1591-93.

congruence between public values and associational life are less comfortable with coercive measures.<sup>184</sup> Regardless of whether the intervention they favor is gentle or more direct, these scholars do not envision the private realm of associational life as a source for new models of social and political life. Rather, the role of civil society institutions is to reflect and support majoritarian democratic values. The insistence upon congruence between civil society institutions and public democratic values has become a “leading proposition in political theory and public policy.”<sup>185</sup>

Rawls’s project to exclude religious and other comprehensive views of truth from the resolution of fundamental political questions is misguided for a number of reasons. First, Rawls ignores the important role that comprehensive belief systems have played in shaping the democratic political values that he embraces. Rawls believes that the divisions that accompany comprehensive views about truth can be avoided if we start with our common democratic culture and, using shared methods of reasoning, work from there to construct principles of political justice that all can reasonably be expected to endorse. In Rawls’s view, only in this way can we arrive at a political system that is both stable and fair. However, Rawls overlooks the extent to which our democratic culture is itself the product of our comprehensive belief systems, including our religious belief systems. The values of political autonomy, equal political and civil liberty, equality of opportunity, economic reciprocity, and freedom of thought and conscience which Rawls finds implicit in our democratic culture<sup>186</sup> all have roots in Western religious thought. For example, the commitment to political autonomy and equality in the founding era was formulated, in significant part, in terms of natural law and natural rights, and the author of this law and these rights was Nature’s God.<sup>187</sup> Freedom of thought and conscience were likewise viewed as natural rights given by the Creator.<sup>188</sup> Subsequent interpretations of what freedom and equality require have also been shaped by America’s religious traditions. For example, the abolitionist and civil rights movements which expanded the categories of persons entitled to political equality were both driven by religious

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<sup>184</sup> See ROSENBLUM, *supra* note 39, at 41.

<sup>185</sup> *Id.* at 10.

<sup>186</sup> See RAWLS, *supra* note 138, at xxiv, 77-78, 139, 224.

<sup>187</sup> See, for example, THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (referring to “the Laws of Nature and of Nature’s God”), and THE FEDERALIST No. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961) (referring to “the transcendent law of nature and of nature’s God”).

<sup>188</sup> See JEFFERSON, *supra* note 110, at 159 (“The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.”); MADISON, *supra* note 77, at 299 (arguing that free exercise is an inalienable right because “what is here a right towards men, is a duty towards the Creator.”).

ideals and actors.<sup>189</sup> The commitment to greater economic equality that emerged in response to the vast disparities of wealth in the Guided Age and grew in strength in the early to mid-twentieth century had roots in the Social Gospel movement and similar religiously inspired commitments to social justice in subsequent decades.<sup>190</sup> As Alexis de Tocqueville remarked in the nineteenth century, religion has been “the first of [America’s] political institutions.”<sup>191</sup> He continued: “The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other.”<sup>192</sup> Politics in America has always been part of our larger deliberations about social truth and human good. There has never been a separate domain of the political distinct from the metaphysical.

Rawls overlooks the religious origins of our democratic traditions because he believes that liberal democracy developed in spite of our comprehensive views not as part of them. Rawls begins his historical account of the development of liberalism with the depiction of medieval Christianity as an “authoritative, salvationist, and expansionist religion” committed to political control and intolerant of different views.<sup>193</sup> When the Reformation splintered Christianity into different factions, Christianity’s authoritarianism turned “inward upon itself.”<sup>194</sup> The result was religious warfare.<sup>195</sup> Liberal ideas such as freedom of thought and conscience and toleration of pluralism arose as an alternative to religious civil war.<sup>196</sup> In Rawls’s words, “[f]or the moderns the good was known in their religion; with their profound divisions, the essential conditions of a viable and just society were not.”<sup>197</sup> For Rawls, it was the promise and experience of peace that gave birth to our liberal democratic institutions not comprehensive ideas about truth.<sup>198</sup>

Surely Rawls is correct that the desire for peace and the experience of it in societies that practiced toleration contributed to the development and appeal of liberal ideals and institutions. However, liberalism was also shaped by

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<sup>189</sup> See NOONAN, *supra* note 89, at 249-52; 256-60.

<sup>190</sup> For a discussion of the Social Gospel movement, see SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 785-804* (1972).

<sup>191</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., Vintage Books 1945) (1835).

<sup>192</sup> *Id.* at 317

<sup>193</sup> RAWLS, *supra* note 138, at xxiii.

<sup>194</sup> *Id.* at xxvi.

<sup>195</sup> See *id.* at xxiii-iv.

<sup>196</sup> See *id.* at xxiv-v.

<sup>197</sup> *Id.* at xxv.

<sup>198</sup> See *id.* at xxv.

developments within Christian thought, and without these religious foundations, liberal ideas would surely have been too weak to prevail. For example, John Milton defended freedom of speech on the grounds that this freedom is essential to greater understanding of truth, including religious truth.<sup>199</sup> Locke argued for religious toleration on the grounds that charity was a mark of the true church,<sup>200</sup> and that God accepts only voluntary belief and worship.<sup>201</sup> In America, James Madison argued that free exercise is an inalienable right because religion, or our “duty towards the Creator,” is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”<sup>202</sup> Thomas Jefferson also defended the rights of conscience as natural rights for which we are “answerable . . . to our God,”<sup>203</sup> and he, like Milton, expressed confidence that true religion, as other forms of truth, will prevail where “[r]eason and free enquiry” are protected.<sup>204</sup> For these men, freedom of speech and conscience were viewed as requirements for greater understanding of comprehensive truth and for meaningful faith and worship. They were not only, or even primarily, mechanisms for avoiding conflict. Indeed, unlike Rawls, Milton and Jefferson expected conflict among comprehensive views to diminish, not increase, in conditions of freedom as understanding of truth increased.<sup>205</sup> When Rawls ignores these origins of our democratic traditions in our comprehensive belief systems, he does bad history and erroneously concludes that it is possible, much less desirable, to limit decision making on fundamental political questions to ideas that are purely political. In fact, such limitations are not possible, and our democratic traditions are already inescapably linked to our comprehensive beliefs.

Not only is it impossible to restrict our fundamental political principles and institutions to purely political values, but it would also be unwise to do so.

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<sup>199</sup> See MILTON, *supra* note 108, at 5, 41-43.

<sup>200</sup> See LOCKE, *supra* note 127, at 13-16; see also MILTON, *supra* note 108, at 45 (“A little generous prudence, a little forbearance of one another, and some grain of charity might win all these diligences to join and unite in one general and brotherly search after truth, could we but forego this prelatical tradition of crowding free consciences and Christian liberties into canons and precepts of men.”).

<sup>201</sup> See LOCKE, *supra* note 127, at 18; see also MILTON, *supra* note 108, at 37 (“A man may be a heretic in the truth; and if he believes things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.”).

<sup>202</sup> MADISON, *supra* note 77, at 299.

<sup>203</sup> JEFFERSON, *supra* note 110, at 159.

<sup>204</sup> *Id.*

<sup>205</sup> See MILTON, *supra* note 108, at 53 (arguing that suppression of dissenting viewpoints “is the chief cause why sects and schisms do so much abound, and true knowledge is kept at distance from us”); Jefferson, *supra* note 95, at 77 (arguing that “truth is great and will prevail if left to herself”).

Just as comprehensive views about truth lie at the foundation of our democratic political traditions, they remain its lifeblood. Our democratic culture has never been static nor should it be. We continue to ask ourselves why our traditional values are important, how they should be interpreted, and whether other related principles should be added to our core commitments. As we do so, we return to the comprehensive ideas that have fed our tradition as well as new belief systems in our increasingly pluralistic society. We ask ourselves fundamental questions about the requirements of human dignity, the nature of our social responsibilities to one another, and what role government should play in implementing these responsibilities. As our religious and moral traditions also continue to evolve, these developments produce further changes in our political ideals. Likewise, new circumstances and experiences require us to rethink and reinterpret our political principles. While not all change has been for the best, much progress has been made. Sometimes the catalysts for change have come from within America's mainstream religious and moral traditions as was the case with the Social Gospel movement within liberal Protestantism at the turn of the century.<sup>206</sup> Other times, prophetic voices from minority groups have been the source of change as was the case with black churches in the civil rights movement. America's religious and moral traditions have been the lifeblood of its political culture, and they have nourished its development and made improvement possible. America has always been a nation with the "soul of a church."<sup>207</sup> We have addressed fundamental political issues through dialogue and debate about what is true and right. We have not always agreed, and sometimes our arguments have been bitter. However, out of disagreement and division has come progress.

The important role that America's religious and moral traditions have played in supporting and nourishing our basic political values makes Rawls's willingness to restrict comprehensive views and ways of life when they come into conflict with principles of political justice especially dangerous. Restrictions on such beliefs and ways of life stifle future progress and development by cutting off alternative perspectives that may, in fact, turn out to be improvements. Intervention in the internal affairs of groups that teach and model dissenting ideas will have the same effect. To be sure, not all of the ideas that are generated by religious and other voluntary associations are good ideas, and some are certainly bad. However, as I have argued above, we must be careful not to assume that we know with certainty which are which. When Macedo and other scholars go even

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<sup>206</sup> Stirred by the vast inequalities of wealth, labor problems and poverty experienced in America in the Gilded Age, those active in the Social Gospel movement contributed to the reforms of the progressive era. See AHLSTROM, *supra* note 190, at 786-87, 804.

<sup>207</sup> I have borrowed this phrase from Sidney Mead, who borrowed it from G.K. Chesterton. See SIDNEY E. MEAD, *THE NATION WITH THE SOUL OF A CHURCH* 48 (1975).

further than Rawls and envision an affirmative role for the state in shaping civil society institutions according to prevailing democratic values, they are especially short-sighted. These scholars place little or no value on the ability of dissenting groups to generate and witness new and unorthodox ideas for social and political life, and they would turn civil society institutions into little more than instruments for supporting majoritarian political views. Rawls and his followers would do well to remember Milton's admonition: "The light which we have gained was given us, not to be ever staring on, but by it to discover onward things more remote from our knowledge."<sup>208</sup>

Rawls also overestimates the extent of conflict and division among America's comprehensive belief systems and the dangers associated with these conflicts. In Rawls's view, the inevitable result of the exercise of human reason under free institutions is a pluralism of comprehensive views that are "deeply"<sup>209</sup> and "profoundly"<sup>210</sup> divided and, indeed, "irreconcilable."<sup>211</sup> Among these views, there is "no prospect of resolution,"<sup>212</sup> and reasonable citizens in a liberal democracy realize that "they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines."<sup>213</sup> If citizens refer to such competing views in their resolution of core political questions, there will surely be bitterness and instability in the political community.<sup>214</sup>

If Rawls's description of the divisions and conflicts among our comprehensive views were accurate, his desire to rest our political community on purely political values would be understandable. However, neither our history nor current experience supports this bleak picture. Surely, there are deep disagreements among America's religious and moral traditions, but these divisions are not so great that they prevent us from understanding our opponents' positions, engaging in dialogue and debate about our differences and, over time, reaching significant areas of agreement and consensus. For example, despite the deep divisions in contemporary American politics, most people share a basic commitment to human dignity, equality and civil rights, minimum protections for the poor and vulnerable, and religious freedom and pluralism, and they do so based on their comprehensive views about truth and human good not just because

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<sup>208</sup> MILTON, *supra* note 108, at 42.

<sup>209</sup> RAWLS, *supra* note 138, at 44.

<sup>210</sup> *Id.* at 4.

<sup>211</sup> *Id.* at 3; Rawls, *supra* note 142, at 766.

<sup>212</sup> RAWLS, *supra* note 138, at xxviii.

<sup>213</sup> Rawls, *supra* note 142, at 766.

<sup>214</sup> *See id.* at 803.

of a shared democratic culture. Significant disagreement remains about how to interpret and apply many of these concepts, but the values themselves receive broad support. Moreover, where differences continue, they are usually the subject of meaningful, even if often intense, discussion and debate.

Indeed, not infrequently, where disagreement exists today, consensus will emerge tomorrow. Exchange and debate among comprehensive viewpoints, even bitter exchange, can change the way we look at things, and the issues that we agree and disagree about are always in flux. Sometimes the exchange among comprehensive views will result in one viewpoint prevailing over the others, and this can even happen where the winning view began as a novel and unpopular position. For example, prophetic voices from America's religious and moral traditions have often trumpeted positions that they know will be unpopular in light of contemporary values, but their hope is to change minds by transforming the way that we look at things in the future. The reasons that they give in public are not meant to appeal solely or primarily to values or methods of reasoning that are shared widely in civic culture; these reasons are meant, instead, to shake up our culture and to foster new paradigms of thought. Many of America's greatest political developments have emerged from efforts like these. Other times, in an exchange among comprehensive views no one side will prevail, but agreement may be reached on a position that reflects elements from a variety of different viewpoints. Of course, there will be many times when dialogue among comprehensive views will not yield agreement at all, but the interchange can still be mutually enriching. More rarely, mutual understanding and common ground will be elusive, and debates may turn into bitter battles that can only be settled by majority vote. Overall, however, the disagreements and divisions among America's comprehensive belief systems need not be feared. At least when it comes to political questions, these differences have not proved to be as sharp or intractable as Rawls suggests, and frequently they have been the source of important new ideas and advances.

Rawls emphasizes the sources or causes of disagreement among comprehensive views. These "burdens of judgment"<sup>215</sup> include the existence of conflicting and complex evidence, the inherent vagueness of all our moral and political concepts, disagreement about how to weigh relevant considerations, competing normative considerations on both sides of an issue, and our different personal histories and perspectives, which may also lead us to assess the evidence and weigh relevant considerations differently.<sup>216</sup> Surely, these burdens of judgment exist, but they do not preclude the meaningful conversations and

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<sup>215</sup> RAWLS, *supra* note 138, at 55.

<sup>216</sup> *See id.* at 56-57.

significant areas of agreement that we have, in fact, experienced as a political community. Moreover, there are sources and causes of agreement that Rawls does not mention. For example, as humans we share certain common experiences, needs, desires and emotions. We encounter the same unbudging realities of our physical world, and we live in political communities that confront common circumstances, opportunities, limitations and threats. Thus, we share much though we do not share everything. We disagree about much, but we do not disagree about everything.

This more optimistic picture of our capacity to reach mutual understanding, if not agreement, on fundamental moral questions and matters of social and political truth means that we can bring our comprehensive viewpoints into political discussion and decision making without the dangers that Rawls fears. To be sure, we cannot expect the kind of agreement and unity that Rawls desires, nor should we want it. Truth and progress always lie before us, and it is a diversity of perspectives, including disagreements and conflicts, that move us forward.

Indeed, the development of liberalism itself illustrates the importance of including comprehensive views in our political deliberations and decision making as well as the positive role that division and disagreement can play in fostering progress. As discussed above, Western liberal ideas were shaped in significant part by Christian political theology, and it took years of debate, opposition and conflict within Christian communities for these ideas to prevail. Religious ideas lie at the foundation of the democratic culture that Rawls embraces as do conflict and division. The development and success of liberal democracy required both. Rawls portrays Christianity in the medieval and Reformation era as “authoritative, salvationist, and expansionist,”<sup>217</sup> and he often seems suspicious of other comprehensive belief systems as well. For Rawls, comprehensive belief systems seem to have naturally imperialistic tendencies, and unrestricted by the limitations of political liberalism, they would be tempted to use state power to repress other views and enforce allegiance to their own.<sup>218</sup> However, Rawls is wrong. Not all

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<sup>217</sup> *Id.* at xxiii.

<sup>218</sup> Rawls makes numerous comments which suggest that this is a realistic threat. For example, Rawls asks, “how can we affirm our comprehensive doctrine and yet hold that it would not be reasonable to use state power to gain everyone’s allegiance to it?” *Id.* at 139. In response, Rawls points to the importance of strictly political values in ensuring fair, stable and legitimate government, and he argues that it is up to citizens to settle how their comprehensive views are positively related to the values of the political. *See id.* at 139-40. However, for many of America’s religious traditions, including Christianity, Rawls question betrays his ignorance of how their comprehensive beliefs work. It is their comprehensive doctrines that prohibit the use of repression and force and demand freedom. These doctrines do not have naturally imperialistic tendencies;



comprehensive belief systems have authoritarian tendencies, nor is politics founded on consensus always liberal.<sup>219</sup> What matters is the particular comprehensive views involved and the specific political ideas that adherents are advancing. In America, citizens from a wide range of different religious and moral traditions have supported liberal democracy because they have agreed that there is truth in it, not just truth in a strictly political sense, but truth from their comprehensive perspectives. For Americans, liberal democracy is not desirable because its principles are shared or independent of our views of truth as a whole, but *because* we believe that these principles are true. It is our comprehensive belief systems that prohibit the use of force and repression and demand freedom, and there can be no stronger foundation for our liberal commitments. We have also believed that the powers of human reason under free institutions will continue to confirm this truth, and so far we have been more right than wrong. What is needed is not the exclusion of comprehensive ideas from politics, but defenses of liberalism that can speak to and from our comprehensive views.

A better approach to political advocacy and decision making than that offered by Rawls is the one that we, in fact, follow in America. Informed by our religious and moral traditions, we bring our basic moral values and convictions about social and political truth to bear on our political deliberations as we converse, debate and argue with one another about the appropriate resolution of political questions. We ask ourselves what is right and true when we tackle issues such as poverty, inequality, economic development, the environment, education, family and health. While general agreement may emerge from these debates, more often the outcome is a compromise settled by majority vote. Resolution of political questions by majority vote is not a defeat; we do not need the type of unity that Rawls envisions. When we follow a process of decision making that involves the contributions of multiple viewpoints and perspectives, we are able to advance towards the truth that we seek. Moreover, the outcomes of such a process will be richer and more beneficial than the results of an artificial attempt to formulate political principles that all one's fellow citizens can reasonably be expected to endorse. Our political system is and should remain oriented to the truth, and the best way of doing so is to invite broad participation, welcome open discussion of all relevant considerations, including insights from our

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quite the opposite. For additional evidence of Rawls's fears, see *id.* at 63 (referring to the "historical experience" of "centuries of conflict about religious, philosophical, and moral beliefs" where comprehensive doctrines have sought political control).

<sup>219</sup> Recent elections in the Middle East bear this out. See Michael Slackman, *Victory is Seen for Hard-Liner in Iranian Vote*, N.Y. TIMES, June 25, 2005, at A1; Neil MacFarquhar, *Will Politics and Success at the Polls Tame Egypt's Muslim Brotherhood?*, N.Y. TIMES, Dec. 8, 2005, at A18; Steven Erlanger, *Palestinian Landslide: The Election; Hamas Routs Puling Faction, Casting Pall on Peace Process*, N.Y. TIMES, Jan. 27, 2006, at A1.

comprehensive viewpoints, and settle disputes by majoritarian decision making. The burdens of judgment that Rawls identifies are real, and they mean that we will need to include a diversity of perspectives in our deliberations. The possibility of meaningful conversation and debate and at least partial agreement and progress towards greater understanding of social and political truth is also real, and it means that it is not unreasonable to include our comprehensive views among these perspectives. Democratic decision making in a pluralistic environment is the best way to approach truth in a world where truth is neither a matter of profound and intractable disagreement nor easy knowledge and full consensus.

Also essential to a political system oriented to truth are strong protections for minority groups and viewpoints. Protections for dissenting groups permit these organizations to formulate and communicate alternative visions for social and political life that can be a source of improvement and progress in the future. Autonomous religious groups and other voluntary associations can serve as communities of witness, catalysts for change, and sources of renewal in a democratic order. They also play an essential role as spaces for retreat for the losers in democratic political processes, and by doing so, they help to maintain the stability of majoritarian political systems. Thus, orienting our political system to the truth does not mean the tyranny or instability that Rawls fears. To the contrary, it means just the opposite. No single comprehensive belief system can expect to prevail and repress all others in a pluralistic environment such as our own, and the protections for minority viewpoints and groups that are required are much stronger than those Rawls envisions.

Nor is such an approach unfair. Rawls believes that the only fair way to resolve fundamental political questions is to formulate principles and values that all citizens can reasonably be expected to endorse. However, fairness does not require this type of consensus. Rather, a system which gives all citizens equal opportunity to voice their positions and to try to convince others of the merit of these positions and then settles political disputes by majority vote is also fair as long as the losers in the political process are free to implement their views within their own private associations. Fairness and truth need not come at the expense of each other. Majoritarian decision making processes with strong protections for minority viewpoints are both conducive to truth and fair to citizens generally.

Indeed, Americans have always acted as if our basic moral values and views of social and political truth should affect our participation in the political process. We have generally been enthusiastic and optimistic about our abilities to change our social and political structures for the better. When we have been

disheartened, we have retreated into our religious groups and voluntary associations and pursued our principles there. Even when we have thought we were right and lost, we have recognized that our knowledge and understanding are limited and that democratic decision making involving a diversity of voices is better than the victory of a single point of view, even our own. We have also recognized that sometimes the best outcome turns out to be one that we initially opposed. Our understanding of social and political truth develops over time, and we know that we need the contributions of persons and perspectives with which we disagree.

Our system has also been stable over time, and it has yielded many good results and much progress. Of course, it has yielded bad fruit as well, and progress has come in fits and starts. In the end, our commitment to this system is based upon faith in its ability to advance the truth in and through conditions of pluralism. So far, our faith has been justified. Why would we trade it for an approach that gives us only what we and our fellow citizens can already be expected to agree upon rather than the truth that we might be able to better understand tomorrow? We do not need to exclude our comprehensive views from decision making regarding fundamental political questions or politics more generally, and we do not want to. Our unity as a political community does not have to come from a shared political conception of justice or a family of such conceptions. It can come from our agreement on a process that welcomes all citizens and yields outcomes that often reflect a greater understanding of the truth than we can see alone.

### *C. The Sensibleness of Truth-Talk*

A final objection to my defense of religious group autonomy challenges the existence of truth as I understand it in this article. When I argue that religious group autonomy is essential to greater understanding of truth, what I have in mind is truth in an ultimate sense, Truth with a capital “T.” We experience ourselves as creatures in a world we have not made, and as we seek to understand our proper relationship to the transcendent Reality that grounds our existence, we learn about how we ought to live, including how we ought to live together. Social and political truth are connected to these fundamental ethical responsibilities that we have to one another. To postmodern ears, the link that I draw between truth and the transcendent source or ground of our existence is surprisingly, even embarrassingly, naïve. Truth understood in this way does not exist,<sup>220</sup> or, if it does, it is purely a matter of faith that cannot provide any useful guidance for

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<sup>220</sup> See Richard Rorty, *Solidarity or Objectivity?*, in 6 *NANZAN, REVIEW OF AMERICAN STUDIES* 1, 15 (1984).

answering moral, social and political questions.<sup>221</sup> Indeed, to speak of transcendent Reality as a source or standard for human understanding is to talk nonsense.<sup>222</sup> After all, how can we know anything about a transcendent or metaphysical realm “out there” and beyond our ordinary human experience?<sup>223</sup> We have no access to such a world, and we confuse ourselves when we speak of it.<sup>224</sup> It is we who posit the gods.<sup>225</sup> It is we who construct our reality through our social practices.<sup>226</sup> We are embedded in our communities and traditions,<sup>227</sup> and our perspectives are also shaped by our individual histories and personal experiences.<sup>228</sup> We cannot rise above our situatedness to some “universal,”<sup>229</sup> or “ahistorical standpoint,”<sup>230</sup> “transcendent moral order,”<sup>231</sup> or “Moral Law,”<sup>232</sup> that can be a basis for our moral and political judgments. Indeed, when we make moral judgments, we have never really been referring to such a “bizarre metaphysical base.”<sup>233</sup> Our claims have been internal to our social practice,<sup>234</sup> and even if we do assert for them some greater authority, it is not metaphysical in nature.<sup>235</sup> Not all scholars influenced by postmodern ideas deny the existence of

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<sup>221</sup> See JEFFREY STOUT, *DEMOCRACY AND TRADITION* 266-69 (2004).

<sup>222</sup> See Rorty, *supra* note 220, at 4 (arguing that “there is nothing to be said about either truth or rationality apart from descriptions of the familiar procedures of justification which a given society--ours—uses in one or another area of inquiry”); JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* 23-24 (1988) (“You can’t somehow leap out of culture and history altogether and gaze directly into the Moral Law, using it as a standard for judging the justification or truth of moral propositions, any more than you can gaze directly into the mind of God.”).

<sup>223</sup> See STOUT, *supra* note 222, at 23-24; see also *id.* at 72 (“Moral philosophy is not practiced from the vantage point of omniscience, above history. It begins, for any of us, at some particular site, where some moral languages are in use.”).

<sup>224</sup> See *id.* at 22-24.

<sup>225</sup> See Rorty, *supra* note 220, at 9.

<sup>226</sup> See STOUT, *supra* note 221, at 247-48; STOUT, *supra* note 222, at 72-75, 77; Rorty, *supra* note 220, at 14-15; Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583, 586-87 (1983).

<sup>227</sup> See STOUT, *supra* note 222, at 24; Rorty, *supra* note 220, at 4,7; Rorty, *supra* note 226, at 586-89.

<sup>228</sup> See Ingber, *supra* note 111, at 15, 25-26.

<sup>229</sup> Rorty, *supra* note 220, at 12.

<sup>230</sup> *Id.* at 11.

<sup>231</sup> Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 825 (1993) (describing relativism of modern philosophy).

<sup>232</sup> STOUT, *supra* note 222, at 23-24.

<sup>233</sup> RONALD DWORKIN, *LAW’S EMPIRE* 81 (1986); see also STOUT, *supra* note 221, at 255-56 (stating that “[t]ruth-talk is not an implicitly metaphysical affair”); Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 97-99, 103, 105, 108 (1996); STOUT, *supra* note 221, at 255-56 (stating that “[t]ruth-talk is not an implicitly metaphysical affair”).

<sup>234</sup> See Rorty, *supra* note 220, at 11-12; Rorty, *supra* note 226, at 586-87.

<sup>235</sup> See Dworkin, *supra* note 233, at 127-28.

truth altogether. For some, it is still possible to speak of moral, social and political truth and even to say that some practices are better than others as long as we do so without any metaphysical baggage.<sup>236</sup> It is when we start speaking of truth as something connected to the transcendent or metaphysical that we cease to make sense.<sup>237</sup> Thus, when I seek to defend religious group autonomy as something necessary for greater understanding of this type of truth, I rest it on a very weak foundation. Indeed, the senselessness of my argument does more to undermine the case for freedom than to support it.

There are a number of problems with this postmodern critique. First, the critique rests upon a caricature of my position. Of course, if “Truth” is “out there,” wholly beyond human experience and outside of our world and our particular communities and traditions, it is a nonsensical idea. So too is the notion of a transcendent moral order or “Moral Law” that we can simply refer to as a measuring stick for making moral judgments. We do not have access to a realm of values that wholly transcends our own, and we do not have the “God’s-eye point of view”<sup>238</sup> that would provide us with an easy blueprint for making moral choices. Postmodernists are certainly right that we cannot wholly “leap out of culture and history”<sup>239</sup> to some sort of ahistorical transcultural vantage point.

However, this is not what I have had in mind when I have spoken of truth. When I refer to the source and origin of human existence, the transcendent Reality that grounds all that is, I have not meant something beyond our experience and “out there” in some metaphysical world outside of our own. To the contrary, the Reality I speak of is an inescapable aspect of our experience here and now. While postmodernists argue that we construct our own world through our social practices, this is plainly not so. As I have observed above, we find ourselves instead to be creatures in a world that we have not made and often can only barely control. We perceive an order to the world that we have not fashioned. We bump up against unbudging realities that we cannot change, including fundamental aspects of human nature that are shared across communities and nations. We have been created, for instance, with the capacity to reason and make moral judgments, with the resources of intuition and deliberation, with head and heart. We also share common human needs and desires, including the desire for knowledge about the source and ground of our existence. We ask common questions about how we came to be, who has created us, what is the meaning and purpose of human life

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<sup>236</sup> See STOUT, *supra* note 221, at 252-56; STOUT, *supra* note 222, at 77; Dworkin, *supra* note 233, at 127-28.

<sup>237</sup> See Dworkin, *supra* note 233, at 127-28, 108.

<sup>238</sup> Rorty, *supra* note 220, at 8.

<sup>239</sup> STOUT, *supra* note 222, at 23.

and our particular lives, and how we ought to live. As we ask these questions, we find ourselves inescapably in relationship to the Reality that grounds all that is. There is, indeed, nothing more Real than this Reality that confronts us on our finiteness and dependence and calls and beckons through our desire for knowledge. The fact that we can reflect upon our existence and seek its meaning and purpose means that we have been created with an openness to this Reality. This Reality is both transcendent and immanent. The “out there” is also “in here,” in our world as its origin, guide and goal.

When the postmodernist denies the existence of transcendent Reality or “Truth” in an ultimate sense, he blinds himself to the most basic and inescapable aspect of human existence. He makes himself creator when he is only creature. He tries to fashion his own order for the world instead of seeking the order that already exists. He will not succeed. The questions about the origin and purpose of human life persist even if the postmodernist tries to ignore or suppress them. They will be answered, but if they are not answered thoughtfully with the full resources of the human mind and heart and the riches of our great religious and philosophical traditions, they will be answered poorly. The contemporary American who dabbles in New Age philosophy is a warning and example of the foolishness that can result.

Of course, there is a gap between ourselves and the Reality that we seek. We have no God’s-eye point of view and no easy blueprint for moral action. We also find ourselves embedded in our traditions and communities, and our perspectives are surely shaped by our personal histories and experiences. However, we are not trapped in these traditions or within our idiosyncratic personal backgrounds. We begin with these, but we are not stuck there. Reality is embedded in our world and also in our personal histories, communities and social practices. Working from these, we can grow in understanding. Indeed, our unique backgrounds and communal traditions are important resources for this process. Within and among communities and sometimes in opposition to them, we reflect upon the evidence of the divine in creation. We draw upon the light of nature and human nature, the unbudging realities we encounter in both, and through intellect and emotions, intuition and deliberation, our knowledge grows. Individuals and communities each play a role, and the different perspectives they provide advance our understanding. We need each other; we must learn together. As long as the gap between ourselves and the Reality we seek persists, there will be disagreement and conflict among individuals and communities and within them, but these divisions and the diversity of insights that accompany them are part of the way that we close the gap.

Thus, while we have been made to seek the ground of our existence and to grow in understanding, we do not have immediate access to a God's-eye point of view. Our knowledge increases over time and requires the contributions of many individuals and traditions and much careful reflection and thought. It also requires freedom. Without freedom for individuals and communities to develop and communicate new ideas and challenge old ones, our knowledge cannot grow and error will persist. The link between humanity and the Creator is the human mind and heart. We approach this Reality through investigation, inquiry, reflection and thought. We grow closer through understanding, and understanding must be free. It cannot be compelled, and for progress to be made, it must have wide berth for study and consideration. We have been created, but we have been created for a free relationship with our Creator.

Thus, the postmodernist description of our social practices is also wrong. These practices are metaphysically freighted. They emerge and evolve as part of our collective efforts to discover the truth about the meaning and purpose of human life and how we should live together. When we make moral judgments, we are making claims about truth in an ultimate sense, and we reach our conclusions in part by engaging other communities making similar claims. The appropriate metaphor for describing our social practices is not construction or "making",<sup>240</sup> as postmodernists argue but, rather, discovery.

Of course, the skeptic may observe that there is no guarantee that our human understanding is connected to the Reality it seeks. I am assuming that our ability to reflect upon our existence and its meaning and source means that there is a link between our reflections and our goal. I am assuming some kind of connaturality between our human understanding and the truth so that when we pursue our object we can actually approach it. To use a metaphor from the Judeo-Christian tradition, I am assuming that we are made in the image of the Creator, that our understanding reflects a higher Understanding, that our mind bears some resemblance to the divine Mind, that our heart mirrors in some way the Heart of the Creator. However, perhaps there is no connection between Creator and creature. Perhaps the light of nature and human nature provide no information about the Reality that grounds all of nature. Perhaps, as Hume suggested almost 250 years ago, the universe is the product of a giant seed or egg, not some sort of purposeful design.<sup>241</sup> Perhaps, there is nothing behind creation as postmodernists suggest. How do we know for sure? We cannot say with any certainty that our

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<sup>240</sup> Rorty, *supra* note 220, at 10 (arguing that the appropriate metaphor is "making" rather than "finding").

<sup>241</sup> See DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* 44-45 (Richard H. Popkin ed., Hackett Publ'g Co. 1980) (1777).

apparent openness to source and ground of our existence is, in fact, a real openness, that there is a fit between this Reality and the human mind and heart.

Of course, the skeptic is right that we have no such certainty or guarantee of such a fit. It is possible that all of our reflections get us nowhere, that the apparent evidence of the divine in creation tells us nothing. The link that I draw between human thought and the object of our reflections does rest on faith. However, it is a reasonable faith. How likely is it that there is no connection between human understanding and the Reality it seeks, or that our desire for knowledge and the tools of reason and intellect, intuition and emotion were created for futility? To view the relationship between creature and Creator in this way is to see creation as a big joke. We have been made to seek the Creator, but we can get nowhere. Our capacity to reflect upon our existence and its meaning and source are not an openness to the Creator, but a dead end. How likely is this skeptical position? Both hope and doubt rest on faith, but hope is the more reasonable position. Indeed, the skeptic's argument only has force for those who desire certainty for their beliefs. Hume's skepticism shook religious believers in Enlightenment Europe because it attacked a popular form of natural theology that had been widely embraced with such confidence.<sup>242</sup> We need not quake at the arguments of contemporary skeptics unless we have the same pretensions. When skeptics today believe that their arguments have dealt a devastating blow to those who believe that truth exists and is accessible, they demonstrate that it is they, not the metaphysicians and the religionists, who insist on certainty. Skepticism is an overreaction to a misplaced insistence on certainty. The skeptic assumes that because we have no certainty about the truth we seek that we should act as if knowledge is not possible at all.

As noted above, some contemporary scholars influenced by postmodernism do not deny the existence of truth altogether but only truth understood in an ultimate sense.<sup>243</sup> Some of these scholars believe that it is possible to make moral claims that are not wholly constructed and that are true not just for ourselves and our traditions but more broadly for communities in general.<sup>244</sup> What these scholars reject is any attempt to connect these truth claims to a transcendent or metaphysical basis. However, this position is also unreasonable. Where does our capacity for moral judgment come from? What grounds our idea of moral obligation and what is the source of authority for the

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<sup>242</sup> See AHLSTROM, *supra* note 190, at 354 (noting that "churchmen all over the world trembled when they faced what they regarded as the 'skeptical' implications of David Hume ..., particularly his critique of natural theology, the age's great stock in trade").

<sup>243</sup> See *supra* note 236-37 and accompanying text.

<sup>244</sup> See e.g., Dworkin, *supra* note 233, at 92.



criteria we use in determining these obligations? How can we distinguish what is really right from what is really wrong unless there is an order to the world, and how can there be an order without an orderer? Indeed, even if all our truth claims are human constructions and it makes no sense to speak of truth apart from the particular human communities and social practices within which such claims are made, how have we come to have such creative capacities? How is it that we have the ability to construct our reality in this way? The postmodernist keeps her eye earth-bound. She seeks no foundation for our capacity for moral judgment apart from its being a fact of human experience.<sup>245</sup> She seeks no grounding for our moral judgments apart from the criteria that seem persuasive to us here and now either as members of particular communities or as members of human communities more generally.<sup>246</sup> She says we must draw on our social practices and traditions in moral decision making while overlooking the fact that these practices reach beyond themselves to make more ultimate claims.<sup>247</sup> The postmodernist is determined to stick her head in the ground, to focus on the purely human and the created, but not the Creator.

However, to restrict one's vision in this way makes no sense. Truth with a small "t" would not exist without a foundation in Truth with a capital "T." To the extent that we are the creators of our reality, we receive this power from a greater source. Rather than ignore this greater Reality and attempt to make moral, social and political judgments on our own, we should seek to live in harmony with it and to conform ourselves to the norms and purposes for our created kind. We are not without evidence of how to do so. The light of nature and human nature provide much guidance, and we can learn much from the insights of other individuals and communities engaged in a similar quest. Religious group autonomy is essential because it protects the ability of religious groups to seek this truth and communicate their insights through their communal life.

For many religious traditions, the light of revelation supplements the evidence of the divine in the created world. Through revelation, the divine enters the world more directly and provides an additional source of knowledge. For example, for the Christian, God is present in the person of Christ, and the love demonstrated by Christ on the Cross manifests the character of God and provides an example for us to imitate. Many contemporary academics are deeply skeptical about claims of revelation. They view revelation as something that believers accept on blind faith and that is inaccessible to nonbelievers. However, this is a

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<sup>245</sup> See *id.* at 118, 128.

<sup>246</sup> See STOUT, *supra* note 221, at 269; Rorty, *supra* note 220, at 11-12; Dworkin, *supra* note 233, at 118, 119-20.

<sup>247</sup> See STOUT, *supra* note 221, at 255-56; STOUT, *supra* note 222, at 71-73.

misunderstanding. For the believer, the content of revelation is no more disconnected from ordinary human experience than other forms of knowledge about the Creator. The truth of revelation is confirmed by its power to provide satisfactory answers to our questions about the meaning and purpose of human life and how we ought to live. For example, the Christian believes because the revelation of God's love on the Cross and the call to model this love in our own lives provides a compelling explanation of our experiences, satisfies the desires of the human heart and the demands of the intellect, attracts us by its beauty, and is witnessed in changed lives and communities.<sup>248</sup> Revelation, just like other forms of knowledge, is embraced through understanding in freedom.

For Christians in particular, the revelation of God's love on the Cross provides an additional reason for believing that our efforts to grow in understanding of truth will be successful. Creation is an act of love,<sup>249</sup> and God does not abandon fallen humanity. If we seek, we shall find.<sup>250</sup> God has created us for a free relationship with himself and his redemption works through this freedom, and, thus, progress may be slow and occur in fits and starts. However, we have good reason to hope that our efforts will not be in vain.

### *Conclusion*

For some readers, a defense of religious group autonomy that is linked to truth may yet be troubling. I have argued that religious groups must be allowed to seek truth freely and to communicate their insights to the broader society through their internal affairs and communal life. Religious groups are concerned with how we ought to live, including how we ought to live together in our social and political relations, and the range of ideas that different religious groups provide can advance our collective understanding. However, it is precisely this interest in truth that may trouble my reader. Groups that seek to discover and advance the truth, particularly groups that are concerned with truth for the larger social order, are dangerous. When a group believes that it has the truth, it will seek to impose this truth on others and to suppress all contrary viewpoints. The desire of religious groups to advance truth is not something to be fostered unreservedly, but, rather, it is something that must be carefully monitored and, when necessary, controlled.

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<sup>248</sup> See Brady, *supra* note 83, at 222-25.

<sup>249</sup> See John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998).

<sup>250</sup> *Matthew 7:7* ("Ask, and it will be given you; seek, and you will find; knock, and it will be opened to you. For every one who asks receives, and he who seeks finds, and to him who knocks it will be opened.")

While my reader's fears are understandable, they are largely unjustified. It is a belief in and dedication to truth that is the stronger foundation for liberty. As long as we recognize that our understanding of the truth is always partial and in the process of development, a devotion to truth will demand protections for the diversity of viewpoints that different individuals and groups can offer. Even when we are confident that we have discovered the truth about a matter, we must permit others to embrace this truth freely and voluntarily. Truth is meant to be understood, and no one can understand for us. Our understanding can be informed, but it cannot be compelled. Each person has a desire for and capacity to seek truth, and, thus, each person was made for a free relationship to the divine. This is a fact of human nature and experience. From Milton to Locke to Jefferson and Madison, religious believers have been foremost among those who have understood and defended this insight. In the founding era and beyond, we have been indebted to religious groups for safeguarding the freedoms that rest upon this insight, and as we have protected these freedoms in our laws, new generations of believers and new religious traditions have recognized this truth about human nature and human dignity.

By contrast, if we deny that truth exists or that its discovery is of preeminent importance, we may be tempted to cling tightly to those ideas which are familiar or comfortable with little confidence that these beliefs can be sustained without state power to support them. As Stephen Macedo has written about our contemporary democratic values, "[t]alk of diversity and difference too often proceeds without taking adequate account of the degree of moral convergence it takes to sustain a constitutional order that is liberal ... [and] democratic."<sup>251</sup> In Macedo's view, "[p]rofound forms of sameness and convergence should not only be prayed for but planned for without embarrassment."<sup>252</sup> While truth always lies before us and demands an openness to change and development, a dedication to the familiar and the orthodox necessitates measures that block change and preserve conformity.

Finally, the reader should remember that in a political community that protects freedom, including religious group freedom, there will inevitably be a diversity of viewpoints and ideas circulating. As long as decisions are made democratically, no one viewpoint can dominate. Where freedoms are strongly protected, tyranny and repression need not be feared.

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<sup>251</sup> MACEDO, *supra* note 138, at 1-2.

<sup>252</sup> *Id.* at 2.