1990

Religious Liberty in the Welfare State

Richard A. Epstein

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RICHARD A. EPSTEIN*

I. THE GREAT DIVIDE OF 1937

To what extent can our conception of religious liberty survive or even flourish after the advent of the welfare state? This question, which I hope to address here, is in some sense inescapable. The fully developed welfare state is characterized by a high level of government action in all phases of economic and social life. Necessarily, therefore, some fraction of its constant stream of legislation will pose a challenge, if not a threat, to the autonomy of religious institutions. This stream of legislative action poses special analytical difficulties, moreover, because of the constitutional dualism between preferred freedoms and economic liberties that is the major legacy of the Supreme Court's New Deal decisions.

In this context, I shall examine two aspects of that dualism that are especially relevant to the status of religious freedom: economic liberties and, more briefly, public finance. By conventional wisdom, economic liberties include the right to own and dispose of all forms of property, and to control the disposition of one's labor in the marketplace.[1] Under earlier constitutional regimes, these liberties received a fairly high measure of protection. As a first approximation, the central role of the government was to insure that property was protected against encroachment by trespass or other common law wrongs, and to guarantee that contracts were enforced by the terms on which they were made. Some important exceptions to the general rule were well recognized before the 1937 watershed. The restrictions that the antitrust laws imposed on the freedom of contract were sustained against all constitutional challenge, as they

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1. *See generally* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

should be today.[2] Less justifiably, various restrictions on land use, from zoning to rent control laws, were also accepted, at least on a qualified basis under the earlier conceptions of the police power.[3]

Even if the pre-1937 economic liberties cases did not represent some idealized version of either heaven or hell, two distinct limitations on government power did have substantial bite before they were overrun in the New Deal revolution—limitations with important implications for the place of religious liberty in the United States. First, powerful restrictions were placed on the scope of Congress' commerce power prior to 1937. Commerce meant trade, not agriculture or manufacture, and certainly not every productive activity engaged in by mankind.[4] Some activities were within the scope of the commerce power, but other activities fell unremarkably outside of it as well. Before 1937, regulation of local employment practices was the province of the states, save the regulation of those entities—railroads, for example—engaged in interstate commerce.[5] *Lochner v. New York*[6] was Lochner v. *New York*, not Lochner v. *United States.*

Second, neither Congress nor the state could regulate certain substantive areas. For example, pre-1937 constitutional law had developed a rough and ready distinction in employment cases between "labor" and "health" statutes. The court uniformly held health (including safety) legislation acceptable against employer challenges, even when the legislation functioned explicitly in derogation of freedom of contract.[7] Train coupling statutes, mine regulations, and workers' compensation all fell on the health side of the line.[8] The Court needed only a modest health or safety justification

2. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). For my views, see Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1436 n.156 (1987).

3. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926); Block v. Hirsh, 256 U.S. 135, 155 (1921).

4. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12-13 (1895).

5. Carter v. Carter Coal Co., 298 U.S. 238, 294-97 (1936).

6. 198 U.S. 45 (1905).

7. *See, e.g.*, Second Employers' Liability Cases, 223 U.S. 1, 53 (1912); Southern Ry. Co. v. United States, 222 U.S. 20, 26-27 (1911).

8. New York Cent. R.R. v. White, 243 U.S. 188 (1917) (workers' compensation); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (mine safety).

to sustain a statute that regulated certain kinds of dangerous employment conditions.[9]

In contrast, "labor" statutes were beyond the pale of either Congress or the states to enact. This labor category included two types of regulation critical to understanding the role of religion in the welfare state: collective bargaining statutes and antidiscrimination laws. Collective bargaining statutes were not a justified infringement of the freedom of contract, be they in aid of the employer who demanded a "yellow dog" contract, or in aid of the employee who wanted to stay out of the union orbit.[10] Likewise, if any antidiscrimination laws could have been passed, they would have fallen, I suspect, to the same challenges that doomed the forbidden labor statutes.

Before 1937, the law was something of a hodgepodge because the distinctions it drew did not conform to any consistent theory of the relationship between private ordering and government power.[11] Yet even though every doctrinal nuance was not philosophically coherent, one conclusion was sharply etched in the judicial consciousness: In some matters pertaining to the employment context, the exercise of government power was regarded as an impermissible infringement on economic liberties. The New Deal revolution relegated that theory to history. After 1937, Congress had plenary power in the economic sphere, including labor markets, as individual rights to resist such regulation had eroded. Viewed from a distance, the common law rules of freedom of contract in employment were overrun in two distinct stages. Health risks, which a party could assume at common law, were taken out of the realm of private contract in the first two decades of the twentieth century. Price, wage and bargaining terms followed with far greater fanfare twenty years later.

Redistribution and public financing yield a similar picture on the question of the government's powers to collect and spend tax revenues. Again, one should not suppose that all forms of redistri-

9. The necessary safety justifications were often too modest. *See* Powell v. Pennsylvania, 127 U.S. 678, 685 (1888) (sustaining Pennsylvania statute prohibiting manufacture and sale of margarine to promote the public health and welfare).

10. *See* Coppage v. Kansas, 236 U.S. 1, 26 (1915); Adair v. United States, 208 U.S. 161, 174-75 (1908).

11. *See, e.g.*, Epstein, *The Mistakes of 1937*, 11:2 GEO. MASON U.L. REV. 5 (1988).

bution of wealth were out of bounds before the 1937 revolution. On this issue too, one finds something of the same clouded picture that one found with economic liberties. In fact, progressive taxation was explicitly endorsed before 1937, and cases before 1900 routinely approved use of public funds to provide welfare for the poor and needy.[12] Nonetheless, all forms of redistribution were not viewed with equal favor. The law of special assessments limited the occasions on which one group of individuals could tax another group for the cost of certain local, but public improvements from which the first group derived the lion's share of the gain.[13] In these cases the Court insisted, usually under the due process clause, that such legislation provide some measure of benefit for the persons taxed. Although the calculation of benefit was far from an exact science, prior to 1937 the Court did not adopt an "anything goes" posture to the overall problem of local abuse. By 1937, however, the benefit requirement had eroded until it became clear that the receipt of government protection became a benefit sufficient to justify virtually any redistributive tax.[14] The partial restraints against redistribution previously in place were wholly removed.

I have criticized these 1937 developments elsewhere, and do not want to refight that battle here.[15] Instead, I hope to assess the impact that the 1937 revolution has had on the next generation of cases involving the intersection of religious liberty and government power. My theme is a simple one. The 1937 revolution did not, and could not, completely resolve the question of how to reconcile state power with individual rights for either economic liberties or public finance. Some relatively small but theoretically important areas of tension remain.

Today, the constitutional battleground between state power and the common law conceptions of property and liberty has shifted to new arenas. Ironically, however, the modern dialogue over church

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12. *See, e.g.*, Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890); W. BLUM & H. KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953).

13. *See generally* Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth Century America*, 12 J. LEGAL STUD. 201 (1983).

14. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937).

15. For example, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) for the long version, and Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985) for a shorter discussion.

and state takes the same substantive form as the earlier debate over state and market. While the turf has changed, the vocabulary used and the principles applied remain unchanged. And the stakes, although smaller, are still substantial for issues of religious liberty always strike a sensitive nerve. The principles of liberty and property that animated the resistance to an unlimited state police power before 1937 have found voice in a new arena after 1937. The concerns with redistribution through taxation have also found expression in the religion cases—for even if most forms of redistribution are tolerated, redistribution from, and especially to, religious organizations has come under increased judicial scrutiny. Yet the pattern of deference found in economic affairs does not carry over to religious affairs, however murky the boundary between the two domains. Once scrutiny becomes stricter, the protection of liberty and the control of redistribution necessarily become central parts of the constitutional enterprise.

The subject of this paper is, then, the fate of religious liberty, a delicate matter in a world in which comprehensive economic regulation is the constitutional norm. I address only a few instructive illustrations here, but the points, I think, can be easily generalized to other cases. Primarily, I concentrate my energies on employment questions, placing to one side a wide number of areas that also cry out for further analysis—education being perhaps the most notable of these.

The remainder of the paper is organized as follows. In part II, I discuss the switch from unanimous consent to majority rule, so typical of collective bargaining statutes in the employment area, as being inconsistent with any tenable notion of religious freedom. Part III examines the scope of religious freedom and concludes that no external or objective test demarcates the domain of religious freedom from the more mundane world of secular affairs. Part IV then shows that justification for religious liberty depends upon the same subjective theories of value that were once used to defend economic liberties more generally. Next, Part V addresses the tension between a broad conception of religious liberty and an equally broad conception of the establishment clause, and shows how this tension is exacerbated by the welfare state. Part VI then explores the judicial response to the tension between collective bargaining and religious liberty as revealed in the important, if in-

conclusive, case of *NLRB v. Catholic Bishop of Chicago.*[16] Part VII then investigates the relationship between religious liberty and the antidiscrimination statutes. Part VIII then examines state efforts to afford additional protection in the workplace to employees with distinctive religious beliefs. A brief conclusion follows in Part IX.

II. From Unanimous Consent to Majority Rule

The 1937 revolution legitimated the institution of collective bargaining in the constitutional context. That scheme of labor relations has two basic features, both of which are troubling to persons who believe in freedom of contract.[17] First, labor negotiations do not require the unanimous consent normally demanded in other complex free market transactions. Collective bargaining replaces unanimous consent with the majority rule of workers within a bargaining unit. By administrative order, the state first chooses the contours of the unit, whose members then decide whether to have union representation. The minority is bound by the choice of the majority; it cannot make direct contracts with the employer, but must be satisfied with the duty of fair representation imposed upon the union that represents it. The employer, for its part, is under a duty to bargain with the union representative. The duty is said to be one of "good faith," with that phrase conveying the clear message that the duty to bargain is not just another name for the duty to agree.[18] When all is said and done, however, there are some limits to the amount of employer intransigence allowed; in the end, the ordinary option of just saying "no" and walking away is not available to the unionized firm.

The system of state limitations on contract necessarily carries with it state-imposed limitations on property. The hallmark of property at common law was the right to exclude others from the use or possession of a thing subject to one's ownership. In essence, the common law set its face against collective use of private prop-

16. 440 U.S. 490 (1979).

17. 29 U.S.C. §§ 151-169 (1982). I have given a more extensive criticism of these statutes in Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983).

18. *See* 29 U.S.C. § 158(d). The vagueness of the good faith phrase is not just a drafting problem. Any other term will have the same difficulties when at-will contracts are abandoned.

erty by government fiat. Joint ownership was created only by unanimous consent. But the advent of the labor statutes meant the end of exclusivity in the domain of property as well.[19] What sense does it make for the law to say that an employer must bargain with workers in good faith, but then to permit the employer to retain the absolute right to exclude them from the workplace? Relinquishment of the autonomy over contract, then, necessarily means relinquishment of absolute control of possession as well. The laws of trespass cannot be used to keep union representatives off the employer's premises during any organization campaign or election. Once a duty to bargain is established, the employer cannot in good faith insist upon a contract that allows him to keep workers out of the workplace altogether. The labor statutes go far beyond the common law rules that relax the owner's claims of exclusive possession only in case of extreme necessity (and without any substantial redistributive consequences).[20]

What happens when collective bargaining is carried over into the area of religious institutions? Initially, one should recognize that imposing a collective governance solution over aspects of religious life is manifestly impermissible. Suppose, for example, that Congress passed a law that said all religious persons within a given territorial region were to be governed by a single religious board, the officers of which were chosen by majority vote of all religious persons in the affected area. The trustees would of course have fiduciary duties toward any minority, and on special application some groups could demand smaller, separate religious units, in much the way that craft unions may seek to organize separately from larger plant unions. Yet that Catholics, Jews and Protestants could be required to work together under such government aegis is inconceivable. Indeed, that different denominations of Jews or Protestants should be required to iron out their differences with their co-religionists is also inconceivable. Freedom of association is implicit in the very idea of the free exercise of religion; it will be vindicated only if unanimous consent is obtained for membership

19. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 493 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

20. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 459-60, 124 N.W. 221, 221-22 (1910).

in a religious organization. Freedom of association involves the right to exclude others without having to justify that decision to anyone.

The intellectual difficulties increase only when religious organizations engage in transactions with their members or, indeed, with the rest of the world. Religious principles and interests reach at least some of these questions, for although doctrine and dogma are essential to religion, they do not define or limit its scope. If freedom of contract is not a constitutional norm generally, then how does it apply to contracts that religious institutions have, both in their religious matters, such as dues and official appointments, and in their inevitable contacts with the rest of the world, including contracts of employment? The dominant question is how to parcel out the turf of the religious institution between two radically disjointed constitutional regimes, one that looks with favor on any government regulation of employment and labor matters, and one that respects the autonomy of religious organizations. The conflict is inescapable so long as religious liberty stands on firmer footing than ordinary economic liberties.

III. The Scope of Religion

One possible way to minimize these boundary problems is to give a narrow conception to what falls within the sphere of religious activities. One rendering of the sphere limits it to the choice of doctrine and religious practices. But that view is utterly inconsistent with the views that religious people take of their own affairs. For them, religion involves a far broader code of conduct. The result is one of those jurisdictional puzzles that has plagued the relations between church and state throughout English history, long before anyone thought of a constitution: Who decides the boundary?[21] If the religious institutions determine the scope of their own practices, very little of consequence will fall outside the religious ambit. But if the state decides the scope of the religious freedom, and hence religious immunity from state regulation, pressures are put in place to make the scope of religious freedom a good deal

21. Indeed, the Assize Utrum, which asks whether certain matters belong to the clergy or the secular courts, raises this point in very powerful fashion. For discussion, see F.W. Maitland, The Forms of Action at Common Law 32-40 (1962).

narrower. In a formal and important sense, the Constitution gives the supreme power to the secular branch; but what it giveth, it can also taketh away, for the Constitution itself contains explicit respect for religious freedom that the state is bound to acknowledge.

The Court has taken the general view that "sincere" religious beliefs are protected from state cross-examination of their soundness.[22] Whether this principle is motivated by a respect for religion, or by a commendable sense of self-preservation, is hard to decide, but the point hardly matters: Each reason is sufficient and both together are overpowering. With this one proposition, the Court has kept itself at a distance from a set of religious controversies that neither it nor anyone else can resolve authoritatively for believers and nonbelievers alike.

Yet how far does this deference extend? Let us put aside the question of abuse, which might arise with ad hoc religions that have as their major doctrinal message exemption from taxation and military service.[23] Nonetheless, a common tenet of established religions is that their codes of conduct govern church members engaged in ordinary worldly transactions. Religion conceived by its practitioners may form a total and complete code of human conduct that covers ordinary contracts of sale and employment along with religious rituals.

If the imperialist impulse of religious practice places great pressure on any preordained boundary line between state and religion, then the welfare state only exacerbates this conflict. In an earlier age when liberty and contract were both protected, conflicts between the religious and the secular could arise if state rules forbade what religious principles commanded, or commanded what religious rules forbade. The most obvious illustration might be a hypothetical religious rule that required the sacrifice of a human being in order to propitiate the gods. A more chilling and realistic example is the recent, and effective, death threat by the late Ayatollah against Salman Rushdie for the latter's purported defile-

22. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981).

23. See the discussion of the point raised in Freed & Polsby, *Race, Religion, and Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 20-30, which I think overstates the difficulty, especially for the established religions whose practices and beliefs long antedate the New Deal Revolution.

ment of the Islamic faith in his *The Satanic Verses*.[24] In principle, the enforcement of the ordinary criminal law against murder would necessarily require the violation of the free exercise of a religious belief in both scenarios. But the ultimate question is whether the state's prohibition violates the "free exercise of religion" as found in the Constitution.

So it is back to first principles. Freedom in this context is a term that limits as well as empowers. In the religious context, "freedom" does not confer absolute license any more than it does in ordinary business or political disputes. Paradoxically, protection of religious freedom is possible only if courts are wholly indifferent to the internal beliefs of all the religions they protect. Conviction in the rightness of beliefs is critical for those who join one faith or another. However, such conviction is wholly irrelevant in any political order whose first task is to see how people of fundamentally different beliefs can coexist.

Within this framework then, freedom is not total license to do what one wants, wholly without regard for the consequences that one's conduct has upon others. Rather, freedom is the ability to do what one wants within a perimeter of rights, such as property and liberty, without having to *justify* the choices so made to any other individual. But the perimeter of rights is one that must apply across the board. The theory must allow for the compatibility of "like" individual freedoms for all individuals simultaneously, and generally seek that set of mutually consistent rights that maximize, at a best guess, some conception of overall welfare, utility or happiness for the relevant persons. There are enormous complications in deciding how to move from a set of social concerns to a set of individual rights, which I bypass in this context, for all theories agree that a prohibition against force and fraud is consistent with the liberty of the same individuals whose conduct is thereby restrained. Sacrifice of strangers is clearly an application of the former, and we should have to prohibit it if only to ensure the freedom of other individuals to have any religious beliefs or practices of their own.

The use of freedom in religious contexts is no different, I believe, from the use of freedom with respect to speech. There, fraud and

24. S. RUSHDIE, THE SATANIC VERSES (1989).

defamation may be controlled, for while they are undoubtedly forms of speech, they exceed the boundaries of liberty, given the correlative duties that all speakers have to other persons. Moreover, speech encompasses the same conception of freedom, with its normal baggage of correlative duties, that derives from the conceptions of liberty and property that are today rejected in the economic sphere; slander of title is after all a matter of both speech and property. But with the control of force and fraud foremost in mind, there is a way for the state to limit religious actions that does not require an examination of religious principles as such. Rather, the solution undertakes an alternative strategy of importing into religious disputes the basic principles that have been developed elsewhere, with other ends in mind. The virtue in this carryover is that it helps assure us that these traditional conceptions of liberty and freedom are applied to religion without any evident bias for or against religious associations and practices.

The conclusions here are not always to the liking of religious people whose own codes can be as authoritarian as those contrived by secular parties. Thus, in my view, state prohibition of polygamy on religious grounds is as incorrect as state toleration of sacrifice.[25] Polygamy takes place only with the consent of the men and women involved in the marriage, and as such can be regulated by the ordinary office of contract if so desired. The customary marriage vows in most religions speak about "forsaking all others," and that vow should be interpreted both in the religious and civil law to bar polygamy by men and women who take such oaths. But the Mormon oaths were different, and the question is whether offense against the practices and moral sentiments of the multitude can justify the suppression of the religious practices of the few. Judicial decisions that "invent" state interests opposed to polygamy reflect the same authoritarian tradition that holds that the dominant political forces know better what is right for others than others know for themselves. The insistence that these contracts are so repugnant to ordinary sensibilities and could only have been the result of social coercion or duress is wholly incompatible with the idea of freedom; exceptions to the binding power of consent must be proved, and proved clearly. The exception cannot be presumed merely because

25. Reynolds v. United States, 98 U.S. 145, 166 (1878).

polygamists do not do as we would do. Our baseline throughout is that religious liberty ends only where force and fraud begin, not before. That line is not even approached, let alone crossed, in the polygamy cases.

IV. Subjective Preferences and Religious Sincerity

In constitutional discourse, the demarcation between state and church in practice relies upon the same conceptions of property and liberty that once set the line between state and market. The parallel is even closer than might be expected because the line between church and state rests again upon the same subjective conception of value that once constitutionally justified the separation of state from market. Skepticism as to the eternal ends of man rarely motivates religious beliefs. Yet the protection of religious beliefs in an open society rests not on showing the truth of those beliefs, but on the inability of anyone to show which set of beliefs are true or false. Indeed, any effort to ground religious liberty on religious truth means that only one religious creed (the true one, of course) may be protected whereas other inconsistent beliefs forfeit all legal protection. The search for truth thus leads to endless disputations and, worse still, holds out the distinct possibility that no religious activity is protected because none can show why its truths are more eternal than its rivals. All inconsistent religious beliefs can be false even if they cannot be true.

In theory, then, religious liberty can rest only on a religious foundation only in a theocracy. But matters must be different in a democracy with even modest pretensions to pluralism. While membership in religious organizations is rightly conditioned on the acceptance of a complex set of doctrinal beliefs, membership in a political society is open to anyone who is willing to respect the liberty and property of other persons. Churches can excommunicate nonbelievers, but political organizations cannot exile their nonbelievers. Hence the paradox: The political institutions needed to guarantee the protection of religious liberty for all cannot take sides in the disputes that separate various religious peoples. Political institutions must adopt a skeptical—dare one say it, agnostic—stance toward any purported religious truths lest false religious beliefs be denied state protection. Hence the rule that

sincerity is all that is needed to protect religious beliefs from state challenge.[26]

The parallel to subjectivism in economics can now be made explicit. Recall that Thomas Hobbes, groping to his now standard economic theory of private contract in *Leviathan*,[27] stressed that the value that any individual attached to a thing was solely a function of the "appetite" and desire he had for it. Apart from desire, no objective measure of value explained whether an exchange should be regarded as fair. Within this system, the essential role of consent was to ensure that both parties were better off in their own eyes; otherwise, as rational persons, they would not enter into the trade.

The theory of property rights, with its emphasis upon the separate domains of conduct, thus responds to the subjectivity of value. It says, once we know that there is no collective conception of the good, we should choose that arrangement of rights that allows each person the maximum scope to develop his own conception of the good. What arrangement? Answer: personal liberty and property rights, as ordinarily understood. In practice, we can achieve only some incomplete realization of that goal, given the fact of scarcity.

Insistence on separate domains prevents acceptance of individual conceptions of the good that require killing or subjugating persons with different practices or beliefs. Within this system the use of state force is sharply rationed. The state may impose some forced exchanges to raise the taxes, to police the boundaries between persons, and, as becomes relevant later, to overcome the intractable holdout problems that can exist in certain common pool settings. But even when coercion is used, its permissible justifications are only two. The first is to prevent coercion that, if exercised, makes it impossible for others to have or exercise any preferences at all. The second is to secure social arrangements that cannot be brought about by consent, but only when the persons coerced are made better off by the use of government force than they would have been without it. These rules are designed to preserve and advance individual and subjective conceptions of value. Not only do the rules minimize the number of collective decisions

26. *See supra* note 22 and accompanying text.

27. T. HOBBES, LEVIATHAN (E.P. Dutton & Co. ed. 1950).

that have to be made, they also try to make collective decisions in ways that do not prefer one conception of the good life to another, with the caveats on the use of external force noted above.

This conception fits in very nicely with the "wall of separation" between state and religion.[28] Again, the correct strategy is to choose that delineation of rights that minimizes collective determinations of the good, or of truth. By taking this line, the state does not have to decide the merits of religious beliefs, only their sincerity. Using conceptions of liberty and property again minimizes conflicts between state and church, even though there is little constitutional protection against general economic regulation of the rights of disposition of property.

V. The Establishment Complication

Thus far I have shown how the claims of free exercise of religion depend on adopting the very conceptions of liberty and property that ironically have been rejected uniformly in connection with economic liberties today. If, therefore, the free exercise clause is given a faithful rendition, the Constitution speaks with a clear and powerful voice; religious organizations can choose with whom to deal on all matters of concern to them. Another side of the coin, however, makes the overall constitutional analysis more complex than it appears thus far. In addition to the free exercise clause, there is also the establishment clause, providing that Congress shall make no law with respect to the establishment of religion.[29] Historically, the clause had as its most obvious consequence the prohibition of an established church, such as the Church of England. But as with most general pronouncements, it is very difficult to find a principled way to confine the clause to the fact situation that inspired it. Establishment of a state church will usually entitle it to privileges and benefits that are denied to other religious institutions. It is, therefore, fair to ask in this context whether the state could drop the formal title of "established church" and still provide financial or other benefits to one church and its members, yet

28. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (citation omitted) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' ").

29. U.S. Const. amend. I.

deny similar benefits to other religious institutions. The prospect of abuse seems too great for anyone to tolerate happily these transparent evasions. As a result the establishment requirement applies to "partial establishments" much the way the takings clause applies to "partial takings." The bottom line is that the state cannot provide a set of benefits, preferences or privileges for any church that it does not extend on equal terms, and, perhaps, of equal value, to other religions. The prohibition of an established church imports a prohibition against the use of a subsidy or benefit for some religious organizations that is denied to others. An inescapable "equal protection dimension" attaches to the establishment clause, just as it does to forced exchanges under the eminent domain clause, measured as they are by the familiar test of disproportionate impact.[30]

Focusing on the takings analogy in the establishment context also explains why "separation" ought not be regarded as an absolute in church-state relations any more than individual autonomy ought to be regarded as an absolute in economic affairs. Whenever there are transaction cost obstacles, some forced exchanges will work for the benefit of all parties. To take the simplest example, a rule that denies religious persons access to highways that public monies have built has scant justification. The correct view is to subject religious organizations to the same type and level of assessments that are imposed upon nonreligious landowners who benefit from the same improvement. Again no effort has been made to determine why religious institutions wish to have access to public highways. There is only the sense that a rule that makes special assessments proportionate to front footage or market value works to benefit both religious and nonreligious institutions alike, without having to measure the precise gains obtained by either. A strict principle of separation might forbid even these joint ventures.

A more sensible view, however, recognizes that an absolute separationist position pays too high a price in his effort to prevent the redistribution by government action to or from religious organizations. By this logic it is wholly appropriate to provide general funds for transportation or for educational programs that are avail-

30. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960); R. EPSTEIN, *supra* note 15, at 204-10.

able on equal terms to religious and nonreligious students alike, as courts have allowed in some cases,[31] but denied in others.[32] In principle, controlling the dangers of redistribution along religious lines is possible, for example, by confining the aid to those programs from which religious and nonreligious students derive equal benefit. Taking the stronger approach, which excludes religious organizations from the benefit of tax programs, will eliminate redistribution toward religion, but only at the unacceptable cost of promoting redistribution away from religion. To allow the state to impose a tax on religious organizations and purposes and then to spend its proceeds solely for the advancement of secular ends is to risk danger rising unto folly. And once the extreme case is acknowledged, the intermediate cases follow as a matter of course. If X percent of any tax falls upon religious organizations and individuals, X percent of the benefits should devolve on the same groups and individuals so taxed. Only the administrative difficulties of measuring costs should allow rough approximation to substitute for perfect alignment. The possibilities of successful joint projects between church and state require close judicial scrutiny, but they cannot be simply ignored or dismissed out of hand. Separation of church and state should create a presumption no stronger than that of individual autonomy. The insistence that all forced interchanges between state and religion work to mutual benefit carries the best of the eminent domain principles into the area of church and state relations.

Using the takings parallel also explains, I believe, why the religion clauses have not been limited to cases of preferences and privileges among religions, and for good reason. That view, if accepted, carries with it the implication that to have a world of nonreligious people subsidize the world of religious people is constitutionally permissible. This position is inconsistent with the narrow justifications for government coercion set out above,[33] for when the state subsidizes religion, coercion is used neither to restrain force nor to provide benefits otherwise unattainable through voluntary transac-

31. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 398 (1983); *Everson*, 330 U.S. at 17.

32. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 382 (1985) (prohibiting remedial programs on parochial school premises, owing to a fear of entanglement).

33. *See supra* pp. 387-88.

tions by the party taxed. Redistribution presupposes necessarily that some set of needs, values or persons are better than others. It thus puts the state in the business of deciding the worth of preferences and beliefs in ways that are inconsistent with the theory of subjective value still used in the religious arena.

Forcing the nonreligious to subsidize the religious thus injects the possibility of one-way transfers across the deep divide of separate factions or groups—a recipe for political dynamite. Coping with these redistributions in the religious context does not present any special problem for those few of us who think that the takings or due process clause prevents all systematic forms of redistribution. There is no need to press the establishment clause into a service performed elsewhere in the Constitution. The prohibition against general redistributive taxes on regulation conveniently sidesteps the ambiguities of the establishment clause. Indeed, the takings barrier retains considerable bite even when the welfare function is regarded as wholly legitimate. In line with the pre-1937 distinctions, it is possible to make transfers from rich to poor, from young to old, or old to young, on the strength of criteria that have nothing to do with religion. To be sure, some redistribution along religious lines may consequently be necessary, but that may have to be tolerated as an "incidental" effect so long as the motive is not religious but secular—to help the poor, but not to help religions with a disproportionate number of poor members.[34] But transfers between religious groups lie outside any welfare exception, so today's establishment clause prohibition could have been enforced via the takings clause.

Nonetheless, with the weak prohibitions against all forms of secular redistribution—farmers can rip off city dwellers, and city renters can get rent subsidies paid by farmers—the stress on the establishment clause is made greater by the general New Deal hands-off attitude to redistribution. A precise parallel exists here to the greater pressure placed upon the free exercise clause by the decline in constitutional protection of economic liberties. Today, no nonreligious barriers buffer the religion clauses from a powerful

34. I explore these tensions in Epstein, *The Supreme Court, 1988 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 79-104 (1988).

pounding, so the establishment clause, perhaps against the weight of the historical evidence,[35] takes the broader role of preventing redistribution from nonreligious to religious activities. The redistribution of preference, benefit or favor from nonreligious to religious groups is similarly impossible. Thus, the principle of liberty derived from the free exercise clause is matched by the principle of non-redistribution derived intellectually from the takings clause, which is implemented via the establishment clause.

Within the context of labor relations, however, these two religion clauses are in powerful tension with each other. The free exercise argument advanced for the autonomy of religious groups from, say, the collective bargaining statutes, finds opposition in an establishment clause argument running the other way. Religious institutions are, as the argument for religious liberty concedes, total institutions that express themselves in a wide range of activities, such as care for the elderly and education for people of all ages. Now suppose that we have a rule that requires all nonreligious organizations in these areas to abide by collective bargaining. As these groups are in competition with religious organizations, a fatal preference and imbalance inevitably arises, so the argument goes, if the legal rules permit religious organizations to escape the heavy costs of dealing with labor unions. The point is even more pressing when we note that many religious organizations regard service, including service provided for a price, as an imperative not only for persons of their own religious faith, but for all persons in need. The Catholic schools in Chicago educate a large number of Protestants, many of whom are black. So why doesn't this statutory preference create a clear, albeit partial, establishment of religion that offends the establishment clause of the Constitution?

In my view, this question has no satisfactory answer if the establishment clause is to be taken in isolation from the free exercise clause. The former mandates a prohibition on redistribution that arises whenever differential treatment results. The latter mandates the adoption of a principle of individual liberty that is rejected in ordinary economic affairs. If we start with liberty as the baseline, we cannot require religious organizations to surrender their autonomy over either their work force or activities that they regard as

35. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

essentially religious. If we start with parity between religious and nonreligious organizations, we cannot allow the religious organizations to escape legal constraints thought to be necessary to protect employees of rival firms. The dilemma seems complete. Jurists have protested that the Constitution does not require us to walk the tightrope between the free exercise clause and the establishment clause.[36] But I am far from persuaded that the degree of discretion available here is as great as has been supposed. Again, the takings parallel is instructive. In the domain of taxation, for example, I believe that the level of state discretion is over only the amount of the taxes to be collected, not the form of their collection.[37] Stated otherwise, the state can meet whatever budget target for general revenues it desires, but it must do so within the framework of a flat tax. To use a progressive income tax is to subsidize the poor at the expense of the rich, and to use a regressive tax is to subsidize the rich at the expense of the poor. To use either is to sacrifice overall social gain to the interests of one or the other faction. In each case one has to look at both the taxes that are raised and the uses to which the monies are put in order to obtain an ideal fit between the two. Although redistribution cannot be wholly prevented whenever expenditures on public goods are made, powerful constitutional limitations on the form of the tax can reduce its incidence, and hence the social losses that it generates.

Against this backdrop, it is instructive to analyze the attitude taken toward charitable exemptions for religious purposes. In *Walz v. Tax Commission*,[38] for example, the Court sustained a statute that allowed tax exemptions pursuant to a state constitutional provision authorizing tax exemptions for "religious, educational or charitable purposes" by "any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."[39] Its rationale was in part as follows: "We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of

36. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 912 (1989) (Scalia, J., dissenting).

37. *See* R. EPSTEIN, *supra* note 15, at 295-303.

38. 397 U.S. 664 (1970).

39. *Id.* at 666-67.

property taxation levied on private profit institutions."[40] The Court also stated:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.[41]

Stated this generally, the position has to be wrong. The incidence of taxation can never be understood solely in terms of large aggregate entities like church and state. One must trace the incidence of the taxes down to the individuals who are both burdened and benefited by the taxes in question. When all persons are taxed in proportion to their holdings, we can assume that gains are roughly proportionate to those holdings, given the difficulties of using a perfectly nondiscriminatory tax on income to achieve partisan ends. But once some groups are given an exemption, others must pay more to receive the same benefits as before. The fact that the "government does not transfer part of its revenue to churches"[42] hardly matters. What matters is the possibility that an implicit transfer from nonreligious to religious people will occur, creating a subsidy to the extent that the only items exempt from taxation are religious ones.[43]

This conclusion holds, moreover, even if those individuals so taxed are better off with the tax, notwithstanding the religious organization, than they would have been without any tax and, of course, no religious exemption. Thus, if the world without taxation gives religious groups and nonreligious groups each a value of 100, and a world with taxation gives religious groups a value of 120 and nonreligious groups a value of 110, the skewed distribution of the gain is best understood as an implicit transfer of five units of bene-

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40. *Id.* at 673.

41. *Id.* at 675.

42. *Id.*

43. *See, e.g.*, McConnell & Posner, *An Economic Approach to the Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 8, 12-13 (1989).

fit from nonreligious groups to religious groups, and that transfer is prima facie evidence of the forbidden establishment.

Nonetheless, finding ways to rebut the presumption is often possible. Thus, the same statutes may provide similar charitable exemptions to other types of organization, as was manifestly the case in *Walz*. If these other exemptions did nothing to alter the balance of holdings between religious and nonreligious groups, then in my view the establishment clause objection to the religious exemption from taxation would still stand. But if these other exemptions did provide roughly offsetting benefits to nonreligious organizations, then the showing of a countervailing subsidy effectively counters the establishment clause objection. Although we may be better off with no exemptions than with many, that point is relevant only to a more generalized takings type of challenge conducted under a strict scrutiny standard, an inquiry effectively barred under present law. Those forms of redistribution are wholly irrelevant to the establishment clause issue.

In this view, therefore, religious exemptions not shared by other groups are necessarily suspect under the establishment clause, as the Court held recently in *Texas Monthly, Inc. v. Bullock*,[44] over Justice Scalia's dissent.[45] The converse does not follow, however, in that broad-based exclusions that include other forms of charitable exemptions are not necessarily free from establishment clause challenges. The distributive effect of those other exemptions is what matters, and such an inquiry places extraordinary demands on our feeble tools of measurement. The tightrope that must be walked between the establishment and the free exercise clause leaves very little room to maneuver and seems to condemn any ex-

44. 109 S. Ct. 890 (1989).

45. In my view, Justice Scalia's dissent clearly misinterprets *Walz*. Although many specific statutes provide benefits only to religious organizations, the legislature passed them pursuant to more general programs that gave exemptions, as the New York Constitution required, for all religious, educational and charitable functions. One must look at the whole package, not at the individual statutes in isolation. No larger package of legislation, however, was challenged in *Texas Monthly*. Note too that McConnell and Posner find *Texas Monthly* a difficult case because they are uncertain whether the religious magazines, exempt from the tax, are in direct competition with other magazines subject to the tax. McConnell & Posner, *supra* note 43, at 13. If, however, one focuses on implicit transfers of wealth tied to the provision of public goods, the case for invalidating the exemption is far stronger.

emption directed solely toward religious organizations. This inescapable tension applies in the labor area as well.

VI. *Catholic Bishop of Chicago*

The scope of the tension was manifest in *NLRB v. Catholic Bishop of Chicago*,[46] a case in which the question was whether the NLRB could hold union elections for lay teachers who taught at several Catholic parochial schools. The NLRB had taken the position that it would not intervene in those schools whose mission was completely religious, but it could intervene under the labor statutes in those schools that, while associated with religious organizations, nonetheless had a significant secular component to their activities. In other words, Catholic seminaries were outside the Board's jurisdiction, but parochial schools were within it. By a five to four vote, the Supreme Court engaged in a tour de force of statutory "construction" that allowed it to avoid the thorny constitutional issues lurking around the corner. Although the language of the National Labor Relations Act contains a comprehensive definition of who is an employer, complete with eight stated exemptions from coverage, the Court's majority took the position that the statute should not be construed to reach religious schools because the statute showed no explicit textual effort to cover that case.[47] The Court found the constitutional questions so acute and so manifest that it felt Congress should lay down the gauntlet before the Court would attack those issues head on.[48] Justice Brennan's dissent did not tackle the constitutional questions head on, but it forcefully attacked the Court for using dubious stratagems of statutory construction and for refusing to deal with the issues that the case raised.[49]

At least this word, however, can be said for prudence: The status quo ante has proved politically stable even if intellectually unsatisfying. There is, therefore, some practical wisdom in avoiding

46. 440 U.S. 490 (1979).

47. *Id.* at 505-06.

48. *Id.* at 507.

49. *Id.* at 508-18 (Brennan, J., dissenting).

trouble when it is not wanted[50] and in forcing Congress to lay down the gauntlet after the constitutional issues have been *expressly* brought to its attention. But if the bullet must be bitten, how should the issue of principle be decided?

In this context, I believe that the standard modes of American constitutional analysis are not equal to the task. Normally, constitutional analysis requires the individual citizen to demonstrate first some prima facie violation of a constitutional right, and then imposes upon the government the burden of justifying its action by meeting some standard of review. This last task is complicated by the fact that our 1937 legacy requires very different standards of review for religious and economic legislation, the latter clearly being subjected to the low standard of "rational basis" review and the former to a higher standard of review that, in the religion area at least, does not, however, seem to quite reach the lofty level of strict scrutiny.

No matter how the apple is sliced, constitutional analysis requires a good deal of "balancing" the liberty infringed against the justification offered. Unfortunately, the strength of neither interest has a powerful consensus. Thus, with respect to liberty, a threshold question is whether the same level of protection is accorded the internal affairs of a religious organization as is accorded its dealings with outsiders. Even here, however, further distinctions may be required if the "outsiders" are co-religionists or individuals who perform functions that are sensitive to the religious activities. Clear lines are not easy to draw between the unionization of clergy, kitchen help with kosher food, lay and religious teachers, and janitors and clerical staff.

Likewise, the power of the state interest is very uncertain. Initially, enormous disagreements have arisen as to whether labor statutes are merely tolerated under the rational basis test or positively welcomed as a form of union democracy that brings American labor law out of the dark ages of the common law into the gladsome light of modern jurisprudence. The Court, which can stu-

50. The most notorious case in which prudence would have been welcome is Bowers v. Hardwick, 478 U.S. 186 (1986), a case in which the Court addressed a set of thorny issues involving the Georgia sodomy statute when it could (and should) have refused to examine the issue until an actual prosecution under the statute had occurred.

diously avoid examining the merits of the labor statute when the statute's constitutionality alone is at stake, cannot hide behind the rational basis test when the state interests under the labor statutes compete with the religious liberties of the organizations that they regulate. Someone has to decide. How?

Even after the strength of the overall labor statutes is assessed, a question remains as to how strongly the statutes apply to various classifications of workers who might be unionized. One might think that teachers are better able to do without a union than are janitorial staff because the teachers are presumably better educated and relatively well-to-do. Nonetheless, outside the religious context, there is scarcely any distinction between the rights of these various groups of employees under the labor statutes. Beyond the prohibition against the organization of management as such, all workers are treated alike. So again, the competition between labor statutes and religious liberties forces a court to make far more exact gradations of the labor statutes than it does in ordinary economic contexts, but without giving the court the tools to do its job.

When the two interests are placed side by side, the possibilities are legion. One can rate the religious interest as high, and the labor regulation interest as low, or the reverse. One could possibly split the difference and use different standards for various classes of workers. But these are outcomes driven only by the necessity to decide; they are not dictated by the logical or normative power of the decision principle. The inconsistency between the free exercise clause and the establishment clause, given collective bargaining, is a logical inconsistency that cannot be evaded or remedied by "balancing."

The only way to avoid the balancing minuet is to knock out the labor statutes altogether, which, while I would do it,[51] is only an idle pipe dream today. The clauses could then be read in harmony without ad hoc balancing. Religious organizations receive no preference over their secular rivals, as both can hire and fire at will. Religious autonomy is preserved for exactly the same reason. The religious liberty of the free exercise clause and the equal treatment

51. *See* R. EPSTEIN, *supra* note 15, at 280-81.

of the establishment clause are both preserved. They cannot be preserved in so neat a fashion, however, under the welfare state.

VII. The Antidiscrimination Statutes

Although the Court in *NLRB v. Catholic Bishop of Chicago*[52] could finesse its problems with the religion clauses through artful statutory construction, that escape was not available in *Corporation of the Presiding Bishop v. Amos*.[53] That case involved the tension between the religion clauses and the antidiscrimination norm embodied in Title VII of the Civil Rights Act of 1964.[54] In principle, the antidiscrimination norm is as imperial as the collective bargaining norm; no employment relationship is necessarily excluded from its application. Congress tried to defuse the tension between the free exercise clause and Title VII by an express provision, section 702, that allows religious organizations to discriminate in favor of their own members with respect to employment for any "religious corporation, association, educational institution, or society."[55] This statutory maneuver, however, exposed the statute to an establishment clause challenge, which in this instance was brought by a building engineer the Mormons had discharged from working in their school gymnasium because he no longer qualified for a "temple recommend," that is, participation within the Church's religious activities.[56] If the Church had not been a religious organization, its decision to fire would have been a per se violation of Title VII. The exemption, therefore, gave the religious organization a preference over similar nonreligious organizations both within and beyond the charitable field. Prior to 1937, the tension would not have arisen because the Court probably would have struck down the antidiscrimination statutes, like the prohibition on "yellow-dog" contracts, as an impermissible interference with freedom of contract. In the modern environment, however, the conflict cannot be escaped, at least in principle.

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52. 440 U.S. 490 (1979).
53. 483 U.S. 327 (1987).
54. Civil Rights Act of 1964 § 701-718, 42 U.S.C. §§ 2000e-1 to e-17 (1982).
55. *Id.* §702, 42 U.S.C. § 2000e-1.
56. *Amos*, 483 U.S. at 330.

The Court wriggled out of difficulties in *Amos* by allowing the exemption to stand under the weaker rational basis test, reserving for the moment at least, a stricter scrutiny for distinctions that exist among religious organizations in accordance with their beliefs.[57] Nonetheless, the use of the rational basis standard leaves unanswered the harder question of whether the free exercise clause blocks the application of the antidiscrimination laws to religious organizations if Congress chooses to extend them that far. Indeed, the problem is in a sense at hand right now because the exemption provided in section 702 of Title VII does not extend to discrimination by religious organizations on the ground of race or sex. In principle, therefore, the Catholic Church and the Orthodox Jews are apparently in violation of Title VII because of their refusal to ordain women as priests and rabbis, respectively, unless (as appears probable) they could bring their case under the bona fide occupational qualification exception to Title VII,[58] which has, of course, been narrowly construed.[59] If the Court adheres to a rational basis approach to this free exercise claim, the result must be the mirror image of that reached in *Amos*. The state's judgment prevails, *either way*, because the relative strengths of the interests on both sides of the line make it impossible to articulate any judicial test that places a firm boundary on the extent of state action.

Yet the rational basis test is no more appropriate here than in any other area of constitutional adjudication. The specific protection of religious liberty and the specific prohibition of an establishment of religion have to be respected as firm constitutional injunctions, not as mushy presumptions that changing congressional fad and fancy can easily override. As with the collective bargaining statutes, their logical consistency is preserved only in a world without antidiscrimination laws for private businesses. At that point,

57. *Id.* at 339.

58. Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1).

59. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332-34 (1977) (citing the "virtually uniform view of the federal courts that § 703(e) provide only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Id.* at 333.) The key question is the level of scrutiny. The standard "business necessity" tests of Title VII offer little hope to litigants who want to establish a bona fide occupational qualification exception, but in this context, it seems likely the exception will be held to apply.

religious organizations will have perfect liberty and no advantage over their ordinary secular rivals.

Nonetheless, the prospects for this constitutional revolution are remote at best, even though recent cases suggest that the received interpretation of Title VII no longer represents current law.[60] Again, in the face of explicit contradiction, a balancing test offers the only illusion of escape. Title VII takes the first step along that road when it distinguishes religious organizations from the ordinary commercial businesses that they control and excludes only the former from its operation. Doubtless, the commercial regulation will be accepted because as the element of direct competition between religious and nonreligious organizations increases, the competing free exercise claim ebbs, given that religious organizations themselves often have no religious reason to discriminate against outsiders. As the law moves closer to the religious core, however, the same tensions that manifested themselves in the collective bargaining statutes surface anew.

Beyond the obvious, however, the analysis becomes murkier. As with the labor statutes, the takings and due process challenges to the antidiscrimination laws were hurdled easily under the rational basis test, so that the Court did not have to commit itself to saying just how important Title VII was to the structure of American life. But while the labor statutes have remained in some constitutional nether world, clearly the antidiscrimination laws have not. The Court has held in related contexts that a compelling state interest exists for the elimination of all forms of discrimination from our national life, and it has thus overrun the claims, for example, of private clubs to the right to discriminate against women or, for that matter, men, and it has shown a regrettable willingness to deny charitable deductions to religious organizations that impose restrictions on interracial dating as well.[61] The betting here is that

60. For an example, see the transformation of Griggs v. Duke Power Co., 401 U.S. 424 (1971), in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

61. *See, e.g.*, New York State Club Assoc. v. City of New York, 487 U.S. 1 (1988); Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983). The Court's holdings to such effect concededly predate its rulings in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), and *Wards Cove*, 109 S. Ct. at 2115. Yet even these cases affirm the importance of the antidiscrimination principle even as they limit the scope of 42 U.S.C. § 1981 (governing the

the Court will sustain Title VII in the race, sex and age cases until a case reaching the Court touches on religious personnel or liturgy.

Nonetheless, I do honor the free exercise claim across the board for religious institutions on the ground that the common law baselines offer the only feasible way to understand the scope of organized religious activities.[62] The level of intrusion into religious affairs is just too massive if Title VII, complete with its disparate impact test whose status is now unclear after *Wards Cove Packing Co. v. Atonio*,[63] is applied without regard to the ends that it serves. The Catholic Church, like the Orthodox Jews, has built-in sex classifications that go to the distribution of power throughout its organizations. There is today enormous internal unrest and opposition, and thoughtful critics have condemned the status quo as sexist, archaic and the product of false consciousness, male patriarchy or worse. It is one thing, however, for a religious institution to yield its traditions through internal change in order to keep the consent and the loyalty of the governed. It is quite another for outsiders to impose their own external standards of right and wrong on these bodies. The essence of freedom is the right to decide for oneself what is right and what is wrong. Freedom rests upon the idea that there is no collective conception of the good that all persons must follow. The antidiscrimination norm fares no better on this count than any other principle that challenges freedom of association. When religious organizations use force and deception against outsiders, they interfere with outsiders' rights to conduct their own affairs. In contrast, when a religious organization practices discrimination in its internal affairs for whatever reason, it only opens the avenue for rival churches to gain the support of disaffected members. The problem is self limiting. The basic concern of religious liberty is freedom: The opposition to freedom is tyranny, which is best avoided by keeping the antidiscrimination laws at a safe distance from religious organizations.

The establishment clause claim on the other side is far weaker. It goes to the matter of competitive imbalance. But how much

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right to make and enforce contracts) and disparate impact cases respectively (holding that statistical evidence did not establish a prima facie case of disparate impact).

62. For a more general parallel argument, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 966-77 (1989).

63. 109 S. Ct. at 2115.

weight should we attach to that issue when the world regards competitive equilibria as generally irrelevant in economic affairs? The great assumption of the post-New Deal cases is that competitive principles do not work in labor markets, or so Congress could decide. For that reason, we have created complex cartel structures of labor unions, the minimum wage and other work restrictions in (the irony is in the title) the Fair Labor Standards Act. Because of this regulation, we have Title VII. The use of these statutes creates incredible imbalances and distortions with their attendant welfare losses in ordinary markets. The redeployment of resources toward capital, the relocation of plants and the shifting of labor to offshore markets are all predictable and necessary economic consequences of the current regulatory order. But we ignore them in the belief that centralized control of these matters does not offend the Constitution. This background makes it odd to resurrect as a constitutional touchstone the condition of competitive balance between religious and nonreligious employers. It seems far safer to avoid the endless entanglements and inevitable ad hoc judgments by adopting a simple, but uneasy rule that applies Title VII, for race, sex and age, as well as religion, with full vigor against the commercial businesses owned and controlled by religious organizations. By the same token, application of Title VII should be wholly removed from the core religious side of the organization. No perfect fit between the competing interests is possible, of course, but there is at least a known and stable accommodation, one consistent with the definition and mission that religious organizations hold for themselves. In the days of big government, clear limits are more important than perfect justice.

VIII. Protection of Religious Workers

Given both collective bargaining and Title VII, the question posed for the religion clauses is how far the government can go to deny religious organizations the ordinary protections of contractual freedom. One should not suppose, however, that every exercise of government power works to strip religious organizations and persons of their ordinary common law rights of contract and property. In some cases, statutes seek to give religious workers advantages that ordinary individuals do not hold. Consistent with our basic analysis, the courts should strike down these statutes on establish-

ment clause grounds. As with other liberties, the free exercise of religion is subject to the normal constraint against the use of force on outsiders.

One recent case that illustrates these issues is *Estate of Thornton v. Caldor, Inc.*[64] In this case the issue involved the constitutionality of a statute that allowed workers to both keep their jobs and not work on their chosen Sabbath, regardless of the employer's preferences. The statute was passed after the Connecticut Sunday closing laws, themselves of dubious constitutionality,[65] had been repealed. The motivation behind the statute was inseparable from the prior state of affairs. When the Sunday closing laws were in effect, no employer could tell an employee he had to work against his will on Sunday. Employees would have lost this protection with the repeal of the Sunday closing laws save for the new Connecticut statute that restored the status quo ante on this narrow point. In conformity with sound establishment clause thinking, the state also extended the same benefit to individuals with different Sabbaths.

At first blush, the statute seems to support the free exercise of religion, at least if the only question is whether religious observance is advanced because of the statute's protection. Nonetheless, the Court, by an eight to one vote, struck down the statute on the grounds that it violated the establishment clause because it advanced religious organizations over other organizations.[66] I believe that this decision was sound, given the account of religious liberty delineated above. In *Thornton*, the religious individual wanted to have an exemption from the ordinary principles of freedom of contract that, in the world before 1937, governed economic affairs at a constitutional level. In that context, what is sought is an explicit subsidy for religion to be funded by individuals who have no particular religious beliefs. The inescapable effect of the rules is to place religious individuals at a systematic competitive advantage over their nonreligious rivals.

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64. 472 U.S. 703 (1985).

65. The Court sustained the constitutionality of the laws in Braunfeld v. Brown, 366 U.S. 599 (1961).

66. *Thornton*, 472 U.S. at 710-11.

If, however, the conception of religious liberty is derived from the earlier conception of economic liberty, then the state in *Thornton* has gone beyond its powers. There is no risk of force or fraud to be controlled. *Thornton* is not a case like *Sherbert v. Verner*,[67] in which the question was whether the state may deny religious persons, unwilling to work on the Sabbath, the right to receive state unemployment benefits. In *Sherbert*, the state may have forced the worker to choose between her religious beliefs and unemployment benefits, but in *Thornton* the state has not forced the individual to choose at all between his religion and his occupation. Instead, the *employer* has "forced" that choice upon the worker, in the ordinary exercise of his private right to contract. The question remains a matter of straight private evaluation, leaving the worker to decide whether his religious needs tug stronger at his heartstrings than his economic needs tug at his pocketbook. In practice, one expects that workers and employers will reach some form of accommodation on issues of this sort; good employees are hard to find. But one cannot speak about the issue categorically, independent of the facts in particular cases. If the employer runs an outlet store that does most of its business on Sundays, as was the case in *Thornton*, the absence of its manager on a busy shopping day may be critical to its operations. We should expect this accommodation to fail and the worker to look elsewhere for a job that gives Sundays off. In my judgment, a very dangerous precedent is set by saying that the power of the religious claim is so strong that it trumps the employer's economic claim whenever it is placed in opposition to it.

My colleague, Michael McConnell, has suggested that *Thornton* was wrongly decided because the only cost imposed upon the employer was economic—a cost against which the employer could protect itself in the legislature if the cost got too high.[68] After all, he argues, to uphold the employer's economic interest in this context is odd when the Court uniformly upholds so many regulations more onerous on employers.

Although I follow Professor McConnell on most points, I must part company with him here. The number of dollars, or the burden

67. 374 U.S. 398 (1963).

68. *See* McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 57-58.

of the legislation, has little to do with the principle involved, which is the elimination of both religious penalty and religious subsidy. Behind those two injunctions lies the fundamental proposition that values are subjective and manifested in trade. In my view, there is no violation of the free exercise clause if the employer is allowed not to hire a worker for any reason, including his religious practices. What the worker wants in this context is a subsidy; what the free exercise clause protects is freedom. Just as no viable free exercise claim forces someone to hire you against his will, nothing counterbalances the establishment clause argument that the state has subsidized religious practices. This conclusion would be, I take it, well nigh inescapable if the state offered to pay a small sum out of public funds to the employer to defray the additional costs it had to bear to keep the religious worker on its payroll. The mandated benefit under the Connecticut statute has the unhappy economic feature of imposing a hidden and selective tax on certain employers when the state does not pay the tab itself. But this second vice of the Connecticut statute hardly cancels out the first. If a public subsidy of religious workers is not acceptable under the establishment clause, then a public mandate of a private subsidy is unacceptable as well.

This entire problem, moreover, would not have arisen if freedom of contract had remained a powerful constitutional principle in economic affairs. But once freedom is displaced in economic relations, interference with business contracts can be limited only on religious grounds. Unlike the collective bargaining cases and the antidiscrimination cases, *Thornton* is one situation in which we do not have to wander through an endless forest balancing interests. Striking down the statute offends no claim for religious freedom, and it avoids any possible conflict with the establishment clause. Thornton's personal problem arose because he was caught in the transition between the older regime of the Sunday closing laws and the new regime of open markets. Once the new regime is on the books, however, the marketplace can best allow matters, and jobs, to sort themselves out without requiring the hand of state intervention to preserve some small vestige of an untenable status quo ante.

IX. CONCLUSION

I want to close here with a general set of observations drawn from these cases. We have examined a system in which all tensions have arisen because of the rejection of property and contract ideas in employment markets generally. If we are really prepared to think about system-wide issues as a matter of first principle, then we should begin with a reevaluation of the modern view that affords little constitutional protection to economic liberties. By repealing the collective bargaining and antidiscrimination statutes generally, we can escape most of the conceptual conflicts that arise. At that point, we can return to the common law baseline and easily insist that religious organizations honor their contracts just as they respect the laws of trespass and murder. These common law rules are good for all seasons, and for all comers. Their regulatory substitutes are not. The fatal vice of such substitutes is that they abandon the strategy of defining separate zones of authority in which all persons can move at will, and substitute in their place complex regimes of joint ownership and collective control in which all has to be done "for cause" by balancing government and individual interests. We can all do well without such uncertainty.

Concededly, we live in an imperfect world, and we must ask, therefore, how we can preserve religious liberty and prevent the establishment of religion when the government is given plenary power to tax and regulate for all sorts of redistributive ends. In practice, devising a set of rules that permits redistribution along economic or class lines, but prohibits it along religious ones, is very difficult. Indeed, if matters had to be resolved at a constitutional level only, my best guess is that it would be only a matter of time before a mass of dubious legal stratagems slowly frittered away the interests in religious liberties. *United States v. Lee*,[69] *Grand Rapids v. Ball*[70] and *Bob Jones University v. United States*[71] are all clear straws in that direction. But one critical difference between religion and property remains. Religious claims still exert a strong hold on Congress, which has often refused to act in ways that compromise religious liberty even when it has the apparent

69. 455 U.S. 252 (1982).
70. 473 U.S. 373 (1985).
71. 461 U.S. 574 (1983).

power to so behave; this much we have learned from *Catholic Bishop*. Religious liberties in the welfare state have a better position than might have been the case if the only protections available were judicial ones. But as matters stand, the success of religious liberty in this country rests as much on political accommodation as it does on constitutional theory. Let us hope that our modest portion of good fortune can be preserved.