Drawing Religious and Political Boundaries: Constitutional Anti-sorting Principles

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There are two key building blocks in Supreme Court precedent for an anti-sorting principle—a principle that would disfavor the alignment of political with religious boundaries. The first is a case about exclusion. Upon learning that a Santeria church was planned for construction within the City of Hialeah, a series of ordinances was adopted. Part of the Santeria faith calls for animal sacrifice, and the practical effect of the ordinances was to outlaw “ritual” animal sacrifice without threatening kosher butchers. The Court unanimously held the ordinances invalid. Going out of its way to teach the locals a lesson, the majority explained that Santeria is a religion for First Amendment purposes even though the City did not argue otherwise. The opinion opened with the observation that local officials “did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation’s essential commitment to religious freedom.” Commentators discuss the Santeria case as a matter of free exercise, and it is surely that. Presumably the same result would obtain if the State of Florida or the Federal Government adopted the same rules for animal sacrifice. But in the spirit of economist Charles Tiebout—who pointed out benefits of political jurisdictions responding to and competing for mobile citizen voters—the Court might have told the newcomers to sort themselves into a more-accepting municipality. Or, recognizing that the City of Hialeah could not have guaranteed Santeria space in any other jurisdiction, the Court might have distinguished a hypothetical statewide program that achieved such a guarantee. But nothing in the Court’s decision is so pro-sorting. It does not suggest that a municipality may expel a disfavored religion from its territory as long as another municipality stays open. To the contrary, the opinion—protecting “the Nation’s essential commitment” to religious liberty—indicates opposition to sect-targeted and government-backed efforts to achieve local homogeneity. For federal constitutional purposes, then, religion looks more like race than wealth: localities may more-or-less explicitly zone for homogeneity in the latter but not the former. The Court would blanch at overt government efforts to restrict migration of African-Americans to select communities even if 99% of residential property within the region remained open. A different result seems unlikely for denominations like Santeria.

Even so, the Hialeah decision is not entirely anti-sorting. In fact it might be read as pro-sorting but anti-subordination. In the spirit of the Supreme Court’s Carolene Products decision rather than Tiebout, the Court might have been protecting the interests of non-mainstream religions to sort themselves however they wish. Perhaps Santeria’s victory means that the local political unpopularity of a migrant’s religion, like her race, is not something she should have to worry about while sorting. But even with a useful concept of “minority religion” within a multitude of faiths, this reading is not quite right. The Court’s concern goes beyond empowering minorities to join a locality that prefers to maintain its religious composition.

The point is made by a second and more controversial case. A year after the Hialeah decision, the New York legislature was rebuked for drawing a new public school district at the request of the Satmar Hasidim. The district’s boundaries would have matched the Satmars’ residential enclave in the Village of Kiryas Joel, and the Court balked at officials consciously aligning political institutions with religious geography. This was true even though both the Satmars and the adjacent community were probably grateful for the partition. The former wanted the new district to provide special education services apart from non-Satmar students, who were a source of discomfort and humiliation for their children.

The ramifications of the case are unclear, however. The decision did not entail invalidation of the Satmars’ village, for example, even though it was religiously homogenous by any standard. Why not? Dicta indicates that the Court’s worry was that state officials purposefully singled out the Satmars for special treatment in creating the school district but not the village. “State action” was needed to get either one, of course. But the State might have been too conscious of sectarian beneficiaries in dealing with the school district, and failed adequately to assure empathy for similarly situated communities. By contrast, the village’s boundaries were generated by a process facially neutral.
with respect to religion. Any group could seek municipal status by that process. If we assume the Satmar village is constitutionally permissible, perhaps the state may facilitate sorting by all groups, as long as it does not purposefully facilitate religious sorting. On the other hand, an anti-subordination principle might re-enter the picture here; it could restrict the benefits of municipal status for religiously monolithic communities to systematic losers in the political process. After all, the Satmars traveled a long way before reaching Kiryas Joel, ultimately seeking village status to escape restrictive zoning ordinances burdening their way of life. The character and dimension of any principles underlying the case are undefined.

One limit to the Court’s opposition to religious sorting should be emphasized here. The attention is on religious cleavages that match political boundaries but not all boundaries will be policed. This is a fair inference from race cases. A majority of the Court has been concerned when officials draw legislative districts to match racial demographics. Yet dissenters in those cases—all of whom voted to invalidate the Satmars’ special school district—indicated that religion is a presumptively valid basis on which to draw legislative districts. The majority did not disagree on the religion point, and nobody contended that such districting needed to relieve religious subordination. Why the free pass on legislative districts?

A simple explanation turns on the different functions served by jurisdictional boundaries. In legislative districting, officials mold the membership of a decision-making body drawn from a given citizenry. Those representatives later assemble and make policy. District lines no doubt affect the legislature’s composition, but homogeneity within districts will not necessarily have a serious impact on influence within the assembly. In drawing state and municipal boundaries, however, the citizenry itself is defined. This is important as long as state and local governments retain significant decision-making authority of their own. And homogeneity within such polities is undeniably connected to influence over what is taught in public schools, who enjoys exemptions from regulation, which books show up in public libraries, who runs the local courts, and so on. Religious anti-sorting principles are aimed at the manufacture of such polities.

**Sorting experiments and legal change**

Details aside, the Satmar and Santeria decisions indicate that special government efforts to promote religious homogeneity are sometimes invalid. But can we justify, or at least account for, the precedent? Is there a legitimate constitutional foundation for anti-sorting principles?

Arguments from plain text or original meaning at the founding are unlikely suspects. The First Amendment’s religion clauses were drafted as restraints on “Congress” and, by logical extension, the rest of the federal government. The posture of state and local governments toward religion was an issue for them to resolve. As such, the Federal Constitution of 1791 was at most agnostic about religious sorting. And the explicit promise that Congress would make no law “respecting” an establishment of religion made the document arguably pro-sorting. Whatever else the clause meant when ratified, it indicated restraints on the ability of the federal government to interfere with state religious “establishments.” So a constitutional anti-sorting norm depends on movement since 1791. The importance of the Fourteenth Amendment and subsequent constitutional theory is examined below. However, the argument should begin with government policy predating the Constitution and the dramatic legal change thereafter. This history is sufficiently intriguing that countless scholars have traced and retrailed it. But major developments that are crucial from a sorting perspective are not highlighted in contemporary legal scholarship.

The fact is that our country ran an extended experiment with religious sorting policies at the state and local level. These experiments were intimately associated with official religious “establishments,” and they did not survive. This history is commonly seen as a regrettable episode of intolerant deprivations of religious liberty and equality—a misstep to be forgiven in light of a population so much less diverse than today’s. But that homogeneity was partly the result of purposeful official efforts to sculpt religious demographics in the New World. Religious establishments were part of a dynamic migration system. Less-welcoming atmospheres tend to ward off the less-welcome, while attracting the favored class. A religious-sorting perspective on American history emphasizes these dynamics.

The British colonies provided havens for Protestants, who had strong incentives to sort themselves out of Europe, and for those who thought the Church of England was corrupt. The colonies were sometimes advertised as such. At the same time, these outposts executed the most severe forms of intolerance against other faiths. Certainly part of the story is
about religious liberty simpliciter. Regulation of religious practices, such as rules limiting who could preach or perform legally recognized marriage ceremonies, were obviously impositions on minorities within a given colony. But such regulation and promotion also were mechanisms that encouraged sorting during periods of mass migration. For a time, some colonies even adopted immigration laws to exclude or deport those of the wrong religion. A Virginia policy excluded Catholics and Puritans; Massachusetts Bay Colony banished Quakers and others. In the latter case, Quakers faced the death penalty for returning to Massachusetts, not simply for their heresy. The Colony preferred conformity, to be sure, but the primary tool seems to have been population control rather than conversion.

These formal exclusions were abandoned before separation from the Crown, but efforts to shape the religious population continued. Several early state governments officially preferred sets of religious beliefs and practices. For example, South Carolina’s 1778 Constitution declared Protestantism the State’s established religion. To achieve incorporated status, religious societies would have to agree that Christianity is the “true religion,” the New Testament is “of divine inspiration,” and there is a “future state of rewards and punishments.” Such provisions were liberal compared to colonial policy, but they still made statements about the religious commitment expected of inhabitants.

More important, some colonies and states taxed people for the specific purpose of funding preferred churches or ministers. Virginia famously ran such a system for a time. Massachusetts, Connecticut, and New Hampshire authorized municipalities to select a minister for tax-and-transfer, thereby further decentralizing without rejecting religious establishments. From a sorting perspective, these programs might be superior to immigration laws. The latter must have been difficult to enforce insofar as religious commitments can be sustained without social visibility—a fact that helps explain severe penalties for return after banishment. A tax, in contrast, can be levied on all or many residents and the proceeds then directed to an identifiable religious organization or figure. In other words, officially preferred beneficiaries were probably easier to identify than disfavored religionists. In addition, financing schemes that allowed people to opt out, or to direct their tax contribution to minority religions, can also facilitate sorting. To choose one of these options is to identify oneself as a dissident.

Adherents to minority religions might well prefer to remain anonymous, and so either conform or go elsewhere.

Not all states aimed to be narrowly sectarian enclaves. One could avoid the Congregational influence in New England and the Anglican establishments of some Southern states by settling in Delaware, Pennsylvania, New Jersey, or Rhode Island. They billed themselves as relatively open political societies. The variance in church-state policies offered choices of politico-religious culture. Many people must have made decisions accordingly. Forced to characterize the early American law of religion as anti-liberty or pro-sorting, one could easily favor the latter.

Either way, the formal establishments soon collapsed. Any Anglican establishment was poorly situated to outlive the Revolution. Other schemes failed as well. For instance, South Carolina’s pro-establishment clauses were repealed in 1790. Massachusetts’ system of locally established faiths, which outlasted all the other formal establishments, was abolished in 1833. Buffeted by immigration, additional sources of religious diversity, and competing economic interests, the impulse for religiously closed states softened. Inter-faith animosity was not eliminated, of course. If nothing else, the experience of Catholics in the nineteenth century defeats that claim. And religiously restrictive covenants were used to shape local demographics long after the original establishments were discontinued. Yet the idea of state-orchestrated partition of religious groups seems to have lost legitimacy in relatively short order.

In fact, a sign of the change can be found in a passage of Justice Harlan’s dissent in Plessy v. Ferguson. It put state-mandated religious segregation on a list of shocking hypotheticals that the supporters of racial segregation were challenged to distinguish:

If this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics? This statement might support only a narrow anti-sorting rule, involving legally coerced segregation by religion. But it’s a start.

ANTI-SORTING IN THEORY

Entrenching every perceived resolution of political conflict is no way to do constitutional law, of course. Anti-sorting principles need arguments to distinguish them from other
trends. As a matter of constitutional text, the critical sources are the state-restraining provisions of the Fourteenth Amendment. But because that text is so underspecified, and because its inspiration was chattel slavery, a religion-oriented anti-sorting norm must be reinforced with a broader or different constitutional theory. This is not the place for a fully articulated sorting theory or an end to the “incorporation” debate. Normative and empirical uncertainties strongly caution against a robust anti-sorting principle, anyway. Yet with a little effort, we can see the structure of the argument. And this structure will further the equally challenging task of grinding out concrete versions of the principle.

There are two promising routes to a constitutional anti-sorting principle. Both rely on implications of the Fourteenth Amendment and Reconstruction. The first route is conventional yet synergistic. The concept of “law respecting an establishment of religion” would be borrowed from the First Amendment and converted into a prohibition on state action by one or more clauses in the Fourteenth. The second route does not directly rely on First Amendment concepts. Instead, the Fourteenth Amendment itself underwrites an anti-sorting norm. Either way, the argument is above and beyond the particularities of establishment clause interpretation. These two lines of the argument can then be joined with modern political theory, concern for consequences, and empirical data.

The First and Fourteenth Amendments

The first path depends on certain understandings of both the First and Fourteenth Amendments. The latter explicitly restrains state action in multiple ways that might be relevant: protecting privileges or immunities, guaranteeing liberty with due process, demanding equal protection of the laws; even the grants of national and state citizenship can be relied on. A free-exercise norm, moreover, fits easily within these concepts. There is even Fourteenth Amendment drafting history to that effect. Excluding people or organizations from states or municipalities, such as Hialeah's attempt to prevent Santeria's immigration, is thus relatively easy to prohibit under the Fourteenth Amendment. The result in the Santeria case shielded a sect from a ritual-targeting government prohibition. But for discretionary benefits like a school district for the Satmars, the constitutional problem is harder to see (at least if equal protection norms are satisfied). In some ways the new district promoted religious liberty—perhaps not a system of liberty in which multiple sects thrive and interact, but surely the religious autonomy of the Satmars was served. It is not even clear that the new district would have required substantial additional tax dollars from outsiders who might object. This suggests that more must be done to articulate a non-establishment norm that plausibly can be appropriated by the Fourteenth Amendment. After all, the establishment clause of the First Amendment was a federalism-promoting concession to the states that resists an easy transplant into the Fourteenth.

The best argument on this track is that the American view of religious establishments changed between 1791 and 1868. Perhaps it moved from local option to liberty killer. Even ignoring stare decisis, there is material to support this thesis. However disconnected disestablishment was from the notion of religious liberty at the founding, these ideas were sometimes coupled by the time the Fourteenth Amendment was ratified. In fact, a few state and territorial constitutions even mimicked the federal establishment clause and its “law respecting” language. Thomas Cooley's 1868 treatise summarized state constitutions in just those terms. It is extremely unlikely that these clauses reflected yet another structural decision to decentralize religious questions to municipalities, and they were certainly not cross-jurisdictional protection for other states. A better explanation lies in the shift away from formal establishments among the original states, along with changing political values in the West. Government was by no means disconnected from religion in the 1800s; part of the allure to “church-state connection, moreover, was anti-Catholicism that accompanied new waves of international immigration. But sub-national “establishments” became incompatible with prevailing notions of the proper relationship between government and religion. And we now know that sorting accompanied state and colonial programs regarding religion, we might conclude that government-propelled religious messages are a component of any “establishment” worthy of the name, and we are in any case much closer to placing an anti-sorting norm within the Fourteenth Amendment.

Once the values of deregulated religious liberty and non-establishment are imported, anti-sorting is not only a matter of historical analogy. The principle may be prophylactic, and here there is a connection with anti-proselytism. Monitoring the conduct of officials within local religious enclaves can be difficult. Without effective monitoring, however, these enclaves can disrupt political choices at the state and national levels. Furthermore, sorting will often be imperfect. This was true even under colonial regimes. Religious faith can be relatively invisible if an individual so chooses, while non-religious reasons plainly affect location decisions. Thus a municipality dominated by one sect might still have non-conformists to deal with. Leaving the
law to such imperfectly sorted religious enclaves can therefore threaten social policy. Nor is the threat restricted to sectarian proselytizing and ostracism. There is likewise reason to worry that imperfectly sorted secular enclaves will disregard constitutional guarantees of religious liberty. And the more generous one is with free exercise rights, the more worried one should be about secular dominance within a political community. As such the sectarian vision of Republic, Missouri in the 1990s was not categorically different from the atheistic aspiration of Liberal, Missouri in the 1880s—a Town more than happy to declare its official opinion that “MAN’S SAVIOR MUST BE MAN ALONE.”

Fears persist, moreover, even when sorting is complete. A nightmare scenario is suggested by charges against the Fundamentalist Church of Jesus Christ of Latter Day Saints in Colorado City, Arizona. Members allegedly sorted themselves into relative isolation, minimized access to communications technology, taught theories of racial superiority, subordinated girls to patriarchal domination, banished hundreds of teenage boys to maintain a gender imbalance for polygyny, used government officials to further Church diktats concerning romantic relationships, and diverted tax dollars intended for public schools to Church operations. In fact, “diversion” loses meaning in this context. If critics are correct about Colorado City, local government authority is now an arm of the Church and wielded to achieve religious goals. This fits any plausible definition of religious establishment. Separation of church and state might be a poor slogan for the establishment clause, but church-state integration is certainly not the vision. Anyway, the important argument for anti-sorting principles is that religious homogeneity makes such constitutional violations more likely. And in an interconnected society with a substantial welfare state, “complete exit” of religious groups is more difficult to achieve.

Religious sorting therefore should be most distressing to those who support robust versions of anti-establishment norms. However appealing one might think it to rope off “the government” from religious symbols, religious justifications for public policy, and subsidies benefiting religious institutions, those goals will be harder to obtain if the community is monolithically dedicated to one version of religious faith. All the more so at the local level where the public/private line, often by design, is faintest.

The argument for a principle disfavoring religious sorting is bolstered by an alternative path. Post-Reconstruction ideals of citizenship and nationalism may support it. Kenneth Karst is a leader here. He forged a theoretical connection between race and religion through the concept of equal citizenship. He did so in service of nationalism—some bare minimum of national identity and civic unity in a multicultural country, which stands against exclusionary or polarizing use of race and religion in politics. Race might be more salient in America, but religion is another tool with which politicians and officials can divide the country. Engineering a desired composition of religion within a political boundary is a literal example of this feared partition. And one can reach these conclusions without specifying the best interpretation of the First Amendment.

Yet insofar as racial sorting implicates fears of perpetual subordination, religious sorting is distinct. Perhaps few believe that race is a normatively defensible category for many purposes and all else equal, instead of a social fact or a tool for organizing disadvantaged groups. But religion is another story. It is far more difficult to demonstrate that society would be better off with the extermination of religion as a category. Furthermore, free-exercise values suggest that the Constitution prefers liberated religiosity. The Reconstruction Amendments, in contrast, are tough to read as promoting racial identity for its own sake or even for instrumental purposes. Anti-sorting would get more mileage out of a theory treating religion as constitutionally valued and religious divisions as indissoluble.
The conventional legal logic begins to stretch thin, but perhaps the nationalizing influence of the Civil War's resolution supports a neo-Madisonian theory of religious faction. Madison's now-hackneyed insight was that the collection of interests into a single political institution could facilitate reasoned compromise or at least prevent factional domination. He applied the theory to religious sects in *The Federalist*. But he did not touch state and local affairs. While Madison promoted federal constitutional guarantees of religious liberty against the states, he could not achieve it in the Bill of Rights. Yet the point is useful for an anti-sorting principle, because it sees religion as politically powerful rather than habitually subordinated. It recommends integrating multiple denominations within political institutions. And it limits the principle to groups dominating political jurisdictions, not simple geographic clumping. Christopher Eisinger pushes similar arguments, singling out organized religion from other interests. Although critical to healthy societal diversity, he contends, religious groups are often cohesive, impervious to ordinary rational argument, and uncompromising because organized on matters of principle. These characteristics might be accentuated when reinforced with a matching political boundary. Those lines can bolster group loyalty, and the use of government machinery may help solve any remaining collective action problems.

Such theories might leave little for a local government to decide, though. Before we take constitutional law to nationalize the primary school curriculum, it is worth recalling the virtues of decentralized democracy. Aside from the hoped-for benefits of Tiebout sorting, some democrats prefer a measure of decentralized government power because it creates locations for citizen participation. The wish is that people develop public-regarding arguments and interests, rather than simply presenting individual preferences for aggregation. In addition, interaction might produce cross-cultural knowledge and cooperation skills, which could themselves qualify as public goods. Other democrats are not interested in or oppose the goal of molding citizen interests through local politics, yet encourage decentralization for other reasons. Even representative forms of local government can be superior to wholly centralization. Local officials might be better informed about local values and conditions, and local residents might be better informed about official conduct. If so, public policy can be more efficiently implemented and officials can be better monitored.

Neither theory for decentralized democracy is seriously assisted by religious homogeneity. This is clearer for participatory democrats. Many of them want citizens to confront and understand differences, not eliminate them by political boundaries or social pressure to conform. Representative democrats also have something to fear from religious sorting, even if preference homogeneity has upsides. One problem is group polarization. Given certain conditions, a group of individuals predisposed toward one position will end up supporting more extreme policies after deliberation than would have been predicted by their pre-deliberation preferences. In addition, too few dissenters can lead to no disagreement being voiced at all. And similar imbalances can generate cascades, as subsequent evaluations are skewed by prior political victories. Sometimes these syndromes might happily produce exciting social experiments. On other occasions the results might be disastrous, without a guarantee that the effects will be wholly localized or that participants will learn much from mistakes. Representative democracy might dampen the risks but this seems less likely at the local level. As political boundaries encompass smaller populations, representatives and constituents begin to mirror a single social group. In this sense, secular enclaves are no different from their religious counterparts.

Lastly, social trends might make an anti-sorting norm attractive to many integrationists and nationalists. The country includes undeniably deep cultural divisions and religion plays a part. Few can believe that the United States will fit strong versions of the secularization thesis anytime soon, while empirical work suggests:

- co-religionists are clumped regionally and sometimes locally—at the county level, perhaps to a degree now similar to segregation scores for African Americans;
- foreign immigration trends may be contributing to religious separation, as newcomers sometimes bring shared religious commitments to geographically distinct communities;
- fundamentalist denominations are gaining proportionally to other sects; yet the percentage of the population unaffiliated with any religious institution is substantial, if not growing.

Religious segregation scores are worth pausing over. The calculations of Professors Paul W. Rhode and Koleman S. Strumpf suggest that, between 1890 and 1990, the nation became equally segregated at the county level with respect to religions, African Americans, and the foreign born—with
the first score falling slightly, the second falling substantially, and the third recently increasing. A single nationwide number for "religion" is not obviously comparable with that for other social categories. The spatial distribution of many small sects must be aggregated to get a single segregation score, a handful of larger sects predominate in respective regions of the country, and our normative commitments are likely distinct in the religion context. But segregation indices are not the only relevant data point. With year 2000 county-level numbers, we can see that a single denominational family exceeds 50% of claimed adherents in a large number of counties. Although the percentage of residents who are claimed varies significantly across counties, the numbers may understated geographic unevenness in terms of anti-sorting concerns. A county that is relatively "diverse" as a whole might be divided at a more local level. Cook County, Illinois, to take a fairly extreme example, includes over 100 cities, villages, and towns, not to mention dozens more special purpose districts for education, parks, libraries, and so on. Strong anti-sorters might care about each of these divisions.

Some of these trends are untroubling or even thrilling. Anti-sorting is not anti-diversity; indeed it could be quite the opposite. The principle is concerned with how social divisions are institutionalized. When multiple social cleavages are piled upon each other, and then reinforced by coinciding political boundaries, there is cause to fear an overly fractionated country operating more as a confederation of monolithic associations than a nation of people sharing any fundamental commitment.

Likewise, it should be clear that anti-sorting principles are not anti-religion in a strong sense. Dispersing fellow believers is not the objective; the worry is alignment of religious and political borders. A denomination's geographic concentration is not problematic under the theory unless, for example, it falls within and dominates a single political jurisdiction. Furthermore, religious clumping within a political jurisdiction is not facially problematic if the jurisdiction as a whole is religiously diverse. The theory is concerned with monolithic local democracies, not neighborhoods lacking governmental authority. Second, the principle does not entail opposition to religion in politics. One can object to the coincidence of government institutions and uniform beliefs about religion without fearing the effects of religiosity on politics. In fact, anti-sorting is compatible with support for religious argument within democratic institutions. Yet it does imply qualms about organized religious factions, which ought to be accounted for by institutional choice and design.

A preference for mixing cannot achieve universal support, of course. Religious separatists dedicated to avoiding communities of sin, secularists convinced that religion is an infectious fraud, and still others will not be satisfied. Anti-sorting principles cannot be any more neutral than, say, basic commitments to liberal democracy. But unmitigated tolerance seems inconceivable for a functioning nation, and anti-sorting is consistent with a liberal goal of relative inclusion.

At the same time, humility is in order. We do not know all that we reasonably might about the system of religious sorting in America. In addition, strong anti-sorting rules are understandably controversial. Nobody should want an even distribution of every identifiable denomination and secular philosophy across every political jurisdiction. A defensible measure of "religious diversity," moreover, is not readily available. Nor will the work done on race smoothly carryover into the religion context, where the historical, sociological, and normative differences fall somewhere between significant and massive. Tempered measures are in order, especially with respect to constitutional law enforced by courts. For now the judicial focus ought to be on religious homogeneity within political jurisdictions, official action that consciously and effectively promotes or entrenches such sorting, and the sorting risks that accompany other doctrinal choices. Doing this much would be relatively unambitious yet meaningful. Whatever are the appropriate doctrinal implications, an anti-sorting perspective focuses on questions that matter. It pinpoints live social phenomena in a modern, dynamic, and religiously diverse nation. This should be a welcome addition to our continuing search for the proper relationship between religion and political institutions.