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Religions as Sovereigns: Why Religion is "Special"

Elizabeth A. Clark

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Abstract

Commentators increasingly challenge religion’s privileged legal status, arguing that it is not “special” or distinct from other associations or philosophical or conscientious claims. I propose that religion is “special” because it functions metaphorically as a legal sovereign, asserting supreme authority over a realm of human life. Under a religion-as-sovereign theory, religious freedom can be understood as at least partial deference to a religious sovereign in a system of shared or overlapping sovereignty. This Article suggests that federalism, which also involves shared sovereignty, can provide a useful heuristic device for examining religious freedom. Specifically, the Article examines a range of federalism theories and the values of (and concerns about) federalism that they identify and draws strong parallels with a range of theories of religious freedom, highlighting its similar values and potential weaknesses. This comparative endeavor highlights the powerful resonance of sovereignty talk in the religion and law field and suggests that sovereignty is part of the deep structure of our understanding of religious liberty.

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I. Is Religion “Special”?

A key debate underlying many contemporary discussions of religion and law revolves around religious exceptionalism. Is religion “special”?² Should religion or religious beliefs be privileged in law over non-religious associations and over artistic, philosophical, or conscientious beliefs?³ Some of the most heated contemporary debates in the law and religion field turn, at their heart, on assumptions or disagreements about religious exceptionalism. For example, different views of the value, necessity, or uniqueness of religion leads to vastly differing outcomes in conflicts between religion and other civil rights,⁴ arguments over the value or constitutionality of religious exemptions,⁵ and questions of whether religious organizations should be singled out for government cooperation or disengagement. So much of these debates turns on the weight to be given to religious liberty and maintaining religious distinctiveness, values which can have little or much meaning depending on one’s sense of whether religion is truly “different.” At times, religious exceptionalism slides into the question of the definition of religion,⁶ as that definition is ultimately an issue of overlapping normative universes; concerns about the limits of a narrow (or broad) normative field of protection can be expressed in argument or in definitional limits.⁷

While it may seem to some “remarkable”⁸ and anti-textual or anti-historical⁹ to raise the question, it is increasingly being raised, both by scholars¹⁰ and in the popular arena.¹¹ A variety of

² Stephen Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L.REV. 75 (1990); Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L.REV. 1131 (2010); Michael W. McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 CARDOZO L.REV. 1243 (1999-2000); Andrew Koppleman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L.REV. 571 (2006); Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998); William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L.REV. 243 (1993-94); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT.REV. 123; Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 CARDOZO L.REV. 225 (2007-08); MARCI HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L.REV. (forthcoming 2013).

³ See, e.g., Schwartzman, *supra* note __; Gedicks, *supra* note __; Sager and Eisgruber, *supra* note __.

⁴ See, e.g., DOUGLAS LAYCOCK, ET AL., EDS., *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (2008); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

⁵ See, e.g., ISSAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 15 (1996); Stephen Gey, *Why is Religion Special?*, *supra* note __; 182; Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, *supra* note __.

⁶ See, e.g., Lupu, *To Control Faction and Protect Liberty*, *supra* note __ (addressing the uniqueness of religion in the context of definition); Ingber, *Religion or Ideology*, *supra* note __ (same).

⁷ Cole Durham and I have explored at length the issue of overlapping normative conceptions in definition problems. See W. Cole Durham and Elizabeth A. Sewell, *Definition of Religion*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW* (James A. Serritella, ed. 2006),

⁸ See, e.g., *Hosanna-Tabor Lutheran Evangelical Church v. EEOC*, 565 U.S. __ (2012), slip op at 14 (“We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”).

⁹ See, e.g., Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 TEX.L.REV. 963, 963-4 (2008-09) (“Furthermore, in the face of two clauses in the First Amendment explicitly committed to protecting religious liberty, coming in the wake of clear paradigmatic historical instances of religious persecution that the framers wished to alleviate, Chris Eisgruber and Larry Sager argue that it is a misreading of the Constitution to treat religious practice as distinctive for either establishment or free exercise purposes”).

arguments are raised on either side. Defenders of the uniqueness of religion provide textual¹² and a normative arguments, although they differ greatly in which normative arguments they find persuasive.¹³ Some argue for the role of religious views of the value of religious liberty,¹⁴ while others suggest that the case for religious liberty should be religion-neutral.¹⁵ Opponents of religious exceptionalism identify yet other values at play,¹⁶ such as contemporary liberal commitments to equality and autonomy, which undermine the value of religious distinctiveness.¹⁷

In this article, I explore a different approach for defending the uniqueness of religion, one which I argue can provide a deep structural basis for thinking about the exceptionalism of religion and the “disparate and wide-ranging”¹⁸ arguments over the value of religious freedom. I propose that a crucial point in understanding religious exceptionalism comes with the understanding that religious organizations function as sovereigns, or non-state legal orders. Several law and religion scholars have suggested this point in passing.¹⁹ Steven Smith, Perry Dane, and Paul Horowitz have

¹⁰ Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L. Rev 555 (1998); Stephen Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123; Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994).

¹¹ SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR AND THE FUTURE OF REASON*; RICHARD DAWKINS, *THE GOD DELUSION*; CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING*.

¹² Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) (arguing that, as a textual matter, religion is singled out in the U.S. Constitution by negative implication—in contrast to religion, the Constitution has no bars on establishment of official views on or subsidies for philosophical, ethical, or social issues; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEM. LEGAL ISSUES 313 (1996).

¹³ These include: privacy (McConnell, *The Problem of Singling Out Religion*, *supra* note __, 20-21.); the importance of religion to religious believers (Laycock, *Religious Liberty as Liberty*, *supra* note __); religion’s role in civil society and in encouraging civic virtue (McConnell, *The Problem of Singling Out Religion*, *supra* note __, 21-23; Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 Tul. L. Rev. 87 (1992); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law 273-75* (1988); see Paul Horowitz, *Churches as First Amendment Institutions*, *supra* note __); government incompetence to judge religious truth (McConnell, *The Problem of Singling Out Religion*, *supra* note __, 23-28); the comparative unimportance of religion to government (Laycock, *Religious Liberty as Liberty*, *supra* note __, 317-18); the precedence of religious obligations to believers (Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan. L. Rev. 233 (1988-89); Garvey, *Free Exercise and the Values of Religious Liberty*, 18 Conn. L. Rev. 779, 792-97 (1986)); the importance of protecting minorities (Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89, 112 (1990)); the value of religion as a form of “strong evaluation” (Andrew Koppelman, *Is it Fair to Give Religion Special Treatment*, 2006 U. Ill. L. Rev. 571); the power of religious personal commitments and associational bonds (Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. Contemp. Legal Issues 357 (1996)); and the need to minimize social conflict over religion (Laycock, *Religious Liberty as Liberty*, *supra* note __, 321-22; Lupu, *To Control Faction and Protect Liberty*, *supra* note __).

¹⁴ John H. Garvey, *An Anti-Liberal Argument For Religious Freedom*, 7 J. CONTEM. LEGAL ISSUES 275 (1996); JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1997); Smith, *Discourse in the Dusk*, *supra* note __.

¹⁵ Douglas Laycock, *Religious Liberty as Liberty*, *supra* note __.

¹⁶ Sager and Eisgruber, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. (1994) (arguing that states should show equal respect to all of their citizens, and privileging religious beliefs and conscience over deep non-religious convictions would be unfair); Sager and Eisgruber, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (same); *Unthinking Religious Freedom*, 74 Tex. L. Rev. 577 (1996) (same);

¹⁷ Gedicks, *An Unfirm Foundation*, *supra* note __; Sager and Eisgruber, *The Vulnerability of Conscience*, *supra* note __.

¹⁸ Marshall, *Truth and the Religion Clauses*, *supra* note __ at 250.

¹⁹ McConnell, *The Problem of Singling Out Religion*, *supra* note __ at 29-30. See .e.g., *id.* at 30 (“We might draw an analogy to citizens of other nations, or children of other parents. When a citizen of another nation is in our midst, we go

discussed it in somewhat more depth,²⁰ and Cole Durham and I have argued for this as part of a definition of religion based on limited deference.²¹

In this article, however, I not only flesh out the idea of religions as sovereigns, but also discuss objections to it and propose that limited deference to religious organizations can be conceptualized metaphorically as a form of split sovereignty, in many ways similar to federalism. Understanding religious organizations as sovereigns, I argue, not only explains religious uniqueness but, together with the federalism heuristic, provides a framework for identifying additional clusters of values supporting arguments for (and some objections to) broad religious freedom. Conceptions of religious sovereignty can provide a deep structure to debates such as those over religious exemptions or the conflicts of rights. This is so not only because these debates turn on assumptions of religious exceptionalism, but also because division of sovereignty provides a powerful analogy for understanding the interactions of religion and law.

In Section III, I explore the meaning of sovereignty and its historical ties with religion and also address some initial concerns about the applicability of sovereignty to religions. In Section III, I propose the heuristic device of federalism, or shared state sovereignty, to engage the question of the value of shared sovereignty of religion. I employ this heuristic device in Section IV with a range of theories of federalism (from dual sovereignty to post-modernist approaches) to specifically consider the values underlying federalism, finding that the values and theories of federalism parallel in many striking ways the values and theories of religious freedom. The comparatively well-ordered discussions on federalism serve to provide a sometimes foil and oftentimes map to the less-ordered debates on religious freedom. I identify some additional intriguing possibilities of the federalism heuristic that are beyond the scope of this article, but return in conclusion in Section V to the challenges raised to religious exceptionalism, examining these in light of a religion-as-sovereign approach. I conclude that a religion-as-sovereign approach provides not only a significant argument itself as to why religion is “special,” but, together with a federalism heuristic, also identifies a broad range of values (and some concerns) underlying religious freedom. I argue that federalism provides

out of our way to avoid putting him into a position of conflict between our ways and loyalty to his own country, not because we agree with his assessment of the virtues of his own land, but rather, because we recognize the virtue of patriotism even in a person whose patria we do not admire.”); Michael W. Connell, *Why is Religious Liberty the “First Freedom?”* 21 CARDOZO L.REV. 1243, 1256 (1999-2000); Kent Greenawalt, *Fundamental Questions about the Religion Clauses: Reflections on Some Critiques* 47 SAN DIEGO L.REV. 1131, 1146 (2010) (“Although I have written about ‘fairness’ in relation to religion and the state, I do not perceive that as barring a jurisdictional approach, as conceiving some domains within our society, notably including churches and similar institutions of other religions, as largely outside the scope of state authority. Some doctrines I defend are best seen in these terms, and Richard Garnett and Paul Horwitz have presented strong arguments why such a conception should play a larger role than I have accorded it.”). Rick Garnett and Mary Ann Glendon have also advocated a related focus on the institutional aspects of religion. Richard W. Garnett, *Freedom of the Church*, 4 J.Cath. Soc. Thought 59 (2007); Richard W. Garnett, *Do Churches Matter?: Towards and Institutional Understanding of the Religion Clauses*, 53 Vill. L.Rev. 273 (2008); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 Geo. Wash. L.Rev. 672 (1992).

²⁰ Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?* 122 HARV. L.REV. 1869 (2009); Paul Horwitz, *The Philosopher’s Brief*, 25 CONST. COMMENT. 285 (2008); Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. REV. 79 (2009); Perry Dane, *The Public, The Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 Cardozo Stud. L. & Lit. 15 (1996); Perry Dane, *The Varieties of Religious Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE PERSPECTIVE (Gerhard Robbers, ed., 2001); Perry Dane, *The Corporation Sole and the Encounter of Law and Church*, in SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS (Nicholas Jay Deremath ed., 1998); *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L.J. 350 (1980).

²¹ W. Cole Durham and Elizabeth A. Sewell, *Definition of Religion*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW (James A. Serritella, ed. 2006) , 40-45.

such a powerful analogy to religious freedom because religion-as-sovereign forms the deep structure of religion and law in the United States; those seeking to expand as well as those who would restrict religious freedom find themselves enmeshed in arguing questions of authority, jurisdiction, and identity--that is, religious sovereignty.

II. Religions as sovereigns

Legal scholars are increasingly looking at the existence of law beyond that created by the state, and how non-state actors function much like states.²² In doing so, some use the term “sovereignty” to refer to non-state legal orders that function much like states. Perry Dane, Paul Horowitz, and Steven Smith have proposed this in the religious context, and I am indebted to them on this topic.²³ Others have hinted at this concept,²⁴ but I am unaware of any full-scale treatment of the implications of treating religions as legal sovereigns.

The modern Western concept of sovereignty is itself deeply tied to religious concepts and history and has always co-existed with concepts of religious sovereignty. Indeed, it has been suggested that the state is inconceivable without the church.²⁵ The Western idea of state sovereignty (seen as a mystical “body of the King”) was originally derived from religious conceptions of the social organization of the Christian church as a body of Christ.²⁶ Modern Western divisions of sovereign political states are generally dated back to the peace of Westphalia in 1648, which resolved the religion-laden Thirty Year’s War through the principle of *cuius regio, eius religio*, or the religion of the ruler as the religion of the territory.²⁷ Religion, which had been the major impetus for cross-border intervention, was subordinated to the ruler of a state, and the temporal

²² See, e.g., OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* (Barker trans. 1934), OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Maitland trans. 1900), J. FIGGIS, *CHURCHES AND THE MODERN STATE* (1914); H. KRABBE, *THE MODERN IDEA OF THE STATE* (G. Sabine & W. Shepard trans. 1922), H. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS* (1921); H. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* (1917); H. ATHURS, *WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND* (1985); M. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *J. LEGAL PLURALISM* 1(1981); Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 *U. CHI. LREV.* 567 (1983), etc.

²³ See especially Paul Horwitz, *Act III of the Ministerial Exemption*, 106 *NORTHWESTERN L.REV.* 973 (2012); Perry Dane, *Maps of Sovereignty: A Meditation*, 12 *CARDOZO L. REV.* 959 (1991), Steven Smith, *Discourse in the Dusk*, *supra* note __ (using the term “jurisdictional” instead of “sovereign”), and Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 *harv. C.R.-C.L. Rev.* 79 (2009); see also Paul Horwitz, *The Philosopher’s Brief*, 25 *Const. Comment.* 285 (2008); Perry Dane, *The Public, The Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 *Cardozo Stud. L. & Lit.* 15 (1996); Perry Dane, *The Varieties of Religious Autonomy*, in *CHURCH AUTONOMY: A COMPARATIVE PERSPECTIVE* (Gerhard Robbers, ed., 2001); Perry Dane, *The Corporation Sole and the Encounter of Law and Church*, in *SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS* (Nicholas Jay Deremath ed., 1998); *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 *Yale L.J.* 350 (1980).

²⁴ See *supra* note __.

²⁵ JOSEPH STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* (1970), 83.

²⁶ ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957); *Sovereignty*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2010). Medieval Christian notions of the dual natural/individual and mystical/collective natures of Christ were adapted to explain the dual nature of Kings, who were held to have a natural and a political body, which became understood as the state. Kantorowitz at 17-19.

²⁷ See, e.g., Leo Gross, *The Peace of Westphalia 1648-1948*, in A. RUBIN, ED., *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* (1993), 3; *Sovereignty*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2010); J.N. FIGGIS, *FROM GERSON TO GROTIUS 1414-1625* (2nd ed. 1916) at 72.

powers of the Roman Catholic Church were limited.²⁸ In many ways, this tracked Martin Luther's concept that God's authority was divided between two forms of government – “the realm of the spirit,” which related to the soul of the believer and “the realm of the world,” which controlled secular society.²⁹ Later Protestant theorists understood this as “sphere sovereignty,” in which church and state,³⁰ or church, state and society³¹ each had responsibility and sovereignty for distinct spheres of life.

The concept of religions as sovereigns has existed throughout the history of the concept of sovereignty. It is interesting that the ascendancy of state sovereignty is coterminous with the defeat of religion as an independent power. In many ways, the post-Westphalian state has defined itself by its dominance over religion, its greatest challenger. The Western experience of religious freedom was born of this challenge by religions to civil authorities.³² Regions of the world with non-hierarchical religions (that are thus less able to mount a unified challenge to the state) or ones, like Eastern Orthodoxy, where the dominant religions have not traditionally challenged state sovereignty,³³ have a significantly less developed history of religious freedom.³⁴ As I explain further in following paragraphs, however, my arguments for understanding religious freedom as shared sovereignty retain significance in the full range of religious and historical traditions.

The concept of religions as sovereigns, even as a metaphor, may seem less intuitive to modern Western thinkers, however, because of the dominance of the idea of territoriality in sovereignty and the loss of political and territorial power of churches since the Treaty of Westphalia. Thomas Hobbes and Jean Bodin dealt extensively with the concept sovereignty, defining it as the supreme power of a ruler in a territory.³⁵ Most modern conceptions of sovereignty are based in Hobbes and Bodin, although the supreme ruler is largely understood as a constitutional government which exercises supreme authority and maintains legitimacy as an expression of the general will, following Rousseau.³⁶ Contemporary conceptions of sovereignty have become increasingly fluid,

²⁸ See, e.g., *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010).

²⁹ See, e.g., *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010); MARTIN LUTHER, ON SECULAR AUTHORITY; Smith, *Discourse in the Dusk*, *supra* note __; Garnett, *The Freedom of the Church*, *supra* note __.

³⁰ See Paul Horowitz, *Churches as First Amendment Institutions*, *supra* note __ at 99-105; Siegfried van Duffel, *Sovereignty as a Religious Concept*.

³¹ See Kuyper's theory as detailed in Paul Horowitz, *Churches as First Amendment Institutions*, *supra* note __.

³² Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds and W. Cole Durham, Jr., eds., 1996); JOHN WITTE, GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION (2006), HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

³³ See, e.g., Francis Fukuyama, *Transitions to the Rule of Law*, 21 J. OF DEMOC. 21 (2010), 37-39; Tierney, *Religious Rights in Historical Perspective*, *supra* note __; W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. van der Vyver and John Witte, Jr., eds., 1996). *But see* Richard Burghart, *Hierarchical Models of the Hindu Social System*, 13 MAN (Dec. 1978), 519-36 (arguing that the Brahman, ascetic, and king each presented a competing hierarchical model of Hindu society and that each person claimed the supreme rank according to his own hierarchical model of social relations).

³⁴ See generally RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES (John Witte Jr., and Johan D. van der Vyver, eds., 1996), RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (Johan D. van der Vyver and John Witte, Jr., eds., 1996).

³⁵ THOMAS HOBBS, LEVIATHAN (1651); JEAN BODIN, ON SOVEREIGNTY (ed. Julian H. Franklin, 1992) (originally published as part of THE SIX BOOKS OF THE COMMONWEALTH, 1576). ³⁵ It is interesting, however, that Hobbes and Bodin did see religious limits to political sovereignty—rulers were bound by divine law.

³⁶ See, e.g., JOHN HOFFMAN, SOVEREIGNTY, 43-64.

as transborder movements of ideas, goods, and peoples have increased³⁷ and international-level regulation increases.³⁸ In essence, however, most definitions of sovereignty require that a holder of sovereignty possess supreme authority over a territory.³⁹ Authority is understood to be derived from a source of legitimacy that is mutually acknowledged by the sovereign and its citizens.⁴⁰

Modern understandings of non-state legal orders have led to the identification of some modern NGOs and international organizations⁴¹ or trans-national corporations⁴² as non-state sovereigns. Religions, however, should be considered the archetypal non-state legal sovereigns. Religious belief systems exercise authority over believers, derived from a source of divine or transcendent legitimacy mutually acknowledged by its citizens, or members.⁴³ This is true not only of Western or hierarchical religions—Hindus submit themselves to *dharma*,⁴⁴ Taoists submit to the Tao,⁴⁵ and “Islam” literally means “submission,” understood as submission to the authority of Allah.⁴⁶ The emphasis on religion as an authoritative community rather than just a belief system actually resonates much more clearly with non-Western traditions than with Western Christianity.⁴⁷ Religions also exhibit a commitment to a jurisdiction, distinctiveness from other legal systems, comprehensiveness of legal ordering, history, and territory, physical or metaphorical.⁴⁸ In addition, religious law and canons have formal legal effect in many countries,⁴⁹ which explicitly recognize the jurisdiction of religion over certain aspects of the life of a believer. States give these legal orders respect and some deference. Recognizing sovereignty, especially in cases of overlapping jurisdiction, does not of course mean that a sovereign is all-powerful, but it does mean treating it with the dignity due another sovereign. For a non-state legal order like religion, this may mean that

³⁷ See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999), 12; Virginie Guiraudon, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 *COMP. POL. STUDIES* 2 (March 2000), 163-195.

³⁸ Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law: Sovereignty: Organized Hypocrisy*, 52 *STAN. L. REV.* 959 (2000); Kal Raustiala, *Sovereignty and Multilateralism*, 1 *CHI. J. INT'L L.* 401 (2000).

³⁹ See, e.g., *Sovereignty*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2010);

⁴⁰ See, e.g., *Sovereignty*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2010).

⁴¹ See, e.g., Steve Charnovitz, *Opening the WTO to NonGovernmental Interests*, 24 *FORDHAM INT'L L. J.* (2000) 173, 210-11.

⁴² See, e.g., John Spanier, *Who Are the Non-State Actors?* in WILLIAM C. OLSON, ED., *THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS* 43, 47 (8th ed., 1991); Ved P. Nanda, *The Law of Transnational Business Transactions Database* (updated Sept. 2011), §1A:10 (The Westphalian model of sovereign states interacting only with other states in the international system—the state-centered model—has given way in the post-Westphalian order, to the rise of nonstate actors who play an increasingly influential role in global affairs.”).

⁴³ Note that I am not proposing this as a definition of religion, but as a description of how religions function in the legal sphere. For an exploration of some of sovereignty’s implications in the process of defining religion see W. Cole Durham and Elizabeth A. Sewell, *Definition of Religion*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW* (James A. Serritella, ed. 2006).

⁴⁴ See, e.g., T. G. Vaidyanathan, *Authority and Identity in India*, 118 *DAEDALUS* (Fall, 1989), 154, 156; Richard Burghart, *Hierarchical Models of the Hindu Social System*, 13 *MAN* (Dec. 1978), 519-36.

⁴⁵ See, e.g., JAMES MILLER, *DAOISM: A SHORT INTRODUCTION* (2003).

⁴⁶ See, e.g., Qu’ran, an-Nur (The Light) 24:42 (“And to Allah belongs the sovereignty of the heavens and the earth, and to Allah is the return (of all).”); JOHN L. ESPOSITO, *ISLAM AND POLITICS* (4th ed. 1998); Mehdi Mozaffari and Michel Vale, *Authority in Islam*, 16 *INT’L J. OF POLITICS*, (Winter, 1986/1987).

⁴⁷ Aaron R. Petty, “*Faith, However Defined*”: *Reassessing JFS and the Judicial Conception of “Religion”* (forthcoming 2013)

⁴⁸ Perry Dane, *Maps of Sovereignty: A Meditation*, 12 *CARDOZO L. REV.* 959, 992-998; Horowitz, *Churches as First Amendment Institutions*, *supra* note ___ at 88. Perry Dane fleshes these arguments out in his article *The Maps of Sovereignty*.⁴⁸ He also uses the example of Native American sovereign states to illustrate the point that multiple sovereigns may co-exist on U.S. territory. *Maps of Sovereignty* at 1005.

⁴⁹ See, e.g., Francis Fukuyama, *Transitions to the Rule of Law*, 21 *J. of Democ.* 21 (2010), 42; India, Israel, Spain, etc.

the state would recognize and defer to religious authority in some cases, such as the recognition of institutional autonomy or in exemptions from more generalized laws.⁵⁰ Religious freedom can be conceptualized as recognition by the state of some degree of religious sovereignty.

As early as 1872, the United States Supreme Court has recognized religious sovereignty: “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”⁵¹ The Court later noted that this early opinion “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁵² Even in *Employment Division v. Smith*, decided in 1990, one of the low-water marks of judicial protection of religious freedom, the Court recognized that “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.”⁵³ The 2012 unanimous opinion in *Hosanna-Tabor* rehearsed previous Supreme Court decisions supporting the independent authority of religions on issues of belief, discipline, and organization and further stated that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”⁵⁴ Recognizing the supreme control, or sovereignty, of religion over certain core areas is not a new concept, even in U.S. law, and is bound up with understandings of religious freedom.⁵⁵

I suggest that, in light of an understanding of religions as sovereigns, the U.S. experience with shared sovereignty in federalism becomes a useful heuristic device to identify the values and rationales for protecting religious freedom (which I address in Parts III and IV). A religion-as-sovereign theory also provides significant explanatory power in addressing the question of the distinctiveness of religion (which I discuss in Part V). I argue that a religion-as-sovereign theory highlights the deep structure of religious freedom and underlies even arguments opposing religious freedom.

As an initial matter, my proposal of seeing religion as a sovereign may be met with two objections. First, some argue that sovereignty is a dying concept, one that is becoming increasingly irrelevant in a modern society.⁵⁶ Political and legal theorists⁵⁷ looking at federalism largely marginalize the conception of sovereignty, seeing sovereignty as increasingly meaningless in a modern world with more fluid borders and overlapping restrictions by international organizations.⁵⁸ In a recent Harvard Law Review article, Heather Gerken criticizes conceptions of sovereignty, particularly in discussions of federalism, for emphasizing autonomy over integration, independence

⁵⁰ See generally W. Cole Durham and Elizabeth A. Sewell, *Definition of Religion*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW (James A. Serritella, ed. 2006).

⁵¹ *Watson v. Jones*, 13 Wall. 679, 727 (1872).

⁵² *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).

⁵³ *Employment Division v. Smith*, 494 U.S. 872, 887 (1990).

⁵⁴ *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. ___ (2012), slip op. at 13.

⁵⁵ I use religious sovereignty to include both institutional requirements of religious organizations and the demands that religion places on individuals to practice their beliefs.

⁵⁶ See, e.g., HENDRIK SPRYUT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994).

⁵⁷ See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); Heather K. Gerken, *Foreward: Federalism All the Way Down*, 124 Harv.L.Rev. 4 (2010); SPRYUT, *THE SOVEREIGN STATE*.

⁵⁸ See, e.g., HENDRIK SPRYUT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994).

over interdependence, and exit rights over voice.⁵⁹ I address the specifics of her challenges later,⁶⁰ but even she notes that “Even as scholars regularly announce the death of sovereignty, they remain haunted by its ghost.”⁶¹ I would suggest that looking at religions as sovereigns reveals the renewed salience of the concept. At its base, sovereignty deals with issues of power, loyalty, and legitimate authority. While it is true that American states in the twenty-first century have less power and command far less loyalty than they did at the time of the founding, religions continue to exercise authority and command significant loyalty. For example, even though the percentage of denominationally-affiliated younger Americans has decreased,⁶² the loyalty of those remaining has increased.⁶³ Researchers suggest that the increase of religious options increases the commitment level of believers.⁶⁴ Increased religious commitment is also evident in the global South and in American believers and denominations stemming from it.⁶⁵ Questions of religion in the public square and the role of religious organizations continue to fill public debate.⁶⁶ Paul Horowitz suggests that we live in an “age of contestability,” where “precisely *because* religion is of fading importance to some people, it is of increasing importance to others.”⁶⁷ Sociologists recognize the power religion exercises over its adherents and their loyalty to it, which can lead in extreme cases to religiously-motivated violence.⁶⁸

Recognizing this power and loyalty, however, begs the second objection--whether seeing religions as sovereigns vests too much authority in religion. I will address some more detailed versions of this objection later,⁶⁹ but as an initial matter, the objection seems based on discomfort with the authority that religions claim over their believers and concerns that believers, working with perceived absolute truths, are especially prone to extremism and intolerance.⁷⁰ Recognizing the sovereignty of religion as a legal matter could seem to overly privilege religion or legitimize religious anti-democratic beliefs.⁷¹ As I understand these concerns, they seem to stem in part from a fear that recognizing the sovereignty of religious organizations grants them too much power, a fear, perhaps, that the state would then be powerless to regulate harmful actions of believers or retain its base in liberal democratic theory. Recognizing shared sovereignty, however, does not mean granting religious groups unlimited power. Sovereignty is not unlimited. Even sovereign states are

⁵⁹ Heather K. Gerken, *Foreward: Federalism All the Way Down*, 124 HARV.L.REV. 4 (2010), 12-14.

⁶⁰ See text accompanying *infra* note __.

⁶¹ Heather K. Gerken, *Federalism All the Way Down*, *supra* note __ at 7; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (identifying current problems with the theories, but proposing neo-Federalism account of sovereignty and federalism).

⁶² The Pew Forum on Religion in Public Life, *Religion Among the Millennials* (17 February 2010), available at <http://www.pewforum.org/Age/Religion-Among-the-Millennials.aspx>.

⁶³ Philip Schwadel, *Period and Cohort Effects on Religious Nonaffiliation and Religious Disaffiliation: A Research Note* 49 J. FOR THE SCIENTIFIC STUDY OF RELIG. 311 (2010).

⁶⁴ *Id.*

⁶⁵ See, e.g., PHILIP JENKINS, *THE NEW FACES OF CHRISTIANITY: BELIEVING THE BIBLE IN THE GLOBAL SOUTH* (2006).

⁶⁶ See, e.g., NEUHOUSE, *THE NAKED PUBLIC SQUARE*; JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994).

⁶⁷ PAUL HOROWITZ, *THE AGNOSTIC AGE* (2011), xiv.

⁶⁸ R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED*; MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD*.

⁶⁹ See Sections IV and V and federalism-related concerns about sovereignty's impact on individual civil rights.

⁷⁰ Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 648.

⁷¹ See, e.g., ROBERT AUDI AND NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* (1997); Richard Rorty, *Religion in the Public Square: A Reconsideration*, 31 J. OF RELIG. ETHICS 144 (2003). At an extreme, this becomes the issue of militant democracy, or what is permissible for liberal democracies to do to prevent capture by anti-liberal ideas. See generally ANDRÁS SÁJO, ED., *MILITANT DEMOCRACY* (2004).

bound by compacts, agreements, treaties and participation in international organizations. Western European states, for example, have limited their sovereignty through the formation of the European Union.⁷² Citizens of one state who reside in another one fall under the jurisdiction of both on many issues. Religious organizations as sovereigns are likewise subject to limitations, compromises, and overlapping jurisdictions. Recognizing the sovereignty of religious organizations does not grant them *carte blanche*, but does insist that states treat them with the respect due a legitimate source of authority.⁷³

Some may argue that it is inappropriate for a liberal democracy to share power with or legitimize harmful or anti-democratic religious beliefs by accepting their sovereignty.⁷⁴ I would argue that this objection can be addressed by a fuller understanding of sovereignty. Recognition of sovereignty, both historically and as a matter of politics, does not turn on utilitarian arguments that countries somehow deserve recognition as a sovereign because of the good that they do or the normative value of their system of governance. States recognize other sovereign states as sovereign simply because that is what they are, not because they necessarily want to legitimize their regimes. Recognizing a formidable rival for what it is generally is a much safer course than ignoring it and hoping it will go away quietly. Historically, like states, religion has not had only beneficial effects. Reflecting what has been called the “ambivalence of the sacred,”⁷⁵ the power that religion wields has been used for ill as well as for good. Recognizing a sovereign, however, does not require a moral endorsement of its regime. It is true that some political theorists argue that at an extreme, state abuse of its sovereignty may justifiably permit complete lack of recognition of sovereignty by other states. Recognition that this was one of the theories justifying the U.S.-led invasion of Iraq, however, may suggest some of the problems with the theory.⁷⁶ In a similar way, a state’s refusal to recognize any sovereignty of a religion because of its perceived harm should also be seen at the very least as an extreme measure, fraught with unexpected dangers.

Another initial concern that might arise with the idea of the sovereignty of religion is a fear that the religious sovereign would not, in turn, recognize the sovereignty of the state, either in part or in whole. This is not an unfounded fear. Religious organizations often do make conscientious objections to state laws, and, in a few cases, refuse to recognize civil authority entirely.⁷⁷ It is important to remember, however, that “[f]or a non-state legal order to recognize the state is not to accept all its pretensions. It is not to accept state exclusivism and all that it implies. It does require,

⁷² At times, land or rights to use land or water are shared among states. Think of Antarctica, or shared ocean space, or water rights to international waterways.

⁷³ Cf. Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us about Speaking and Acting for Religious Reasons* in PAUL WEITHMAN, ED., *RELIGION AND CONTEMPORARY LIBERALISM* 162 (1997); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *YALE L.J.* 2475 (1997); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 *WM. & MARY L. REV.* 663, 679, 682 (2001) (“... to construe the nonestablishment norm to forbid legislators to base a political choice on a religiously grounded moral belief unless the belief also has a plausible, independent secular ground would be to unfairly deprive religious faith (relative to secular belief) as a ground of moral judgment Such depriving would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers who, unlike citizens who are not religious believers, would be prevented from having their most important moral beliefs transformed into law (absent a plausible, independent secular grounding for those beliefs).”); Steven D. Smith, *Separation and the ‘Secular’: Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955, 1008-15 (1989).

⁷⁴ See *supra* note ____

⁷⁵ R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED* (2000).

⁷⁶ See *infra* text accompanying note ____.

⁷⁷ Catholics, for example, theoretically at least refuse to recognize laws that are seen as unjust.

however, treating the state as a legitimate source of legal authority.”⁷⁸ And, it is also worth noting that “[t]he striking fact . . . is that most non-state legal orders do recognize the state.”⁷⁹ In those few cases where religious organizations refuse to recognize civil authority or rulings and engage in active, hostile resistance, then the case becomes similar to that of neighbor states engaging in hostilities, with all the unfortunate consequences that can flow from that.⁸⁰

It should be understood that I use the concept of sovereignty of religions as a metaphor⁸¹ or conceptual framework.⁸² I am not arguing a return to the status of religious organizations as significant state sovereigns over physical territory⁸³ as they were before the Peace of Westphalia, but rather using the legal conception of sovereignty to help understand how religions function as a legal matter. Legal attributes of sovereignty distinguish religions from philosophical or moral systems or other associational groups in terms that the law can identify and deal with. While I argue that the basic elements of religion that indicate sovereignty cut across cultures and religious traditions,⁸⁴ I am not claiming that sovereignty is or should be an exclusive definition of what a religion is.⁸⁵

⁷⁸ Dane, *Maps of Sovereignty* *supra* note __ at 999.

⁷⁹ *Id.* at 1000.

⁸⁰ The standoff and open hostilities between the Bureau of Alcohol, Tobacco, and Firearms and the Branch Davidians at Waco in 1993 can be seen in this light.

⁸¹ Cf. Paul Horowitz, *Churches as First Amendment Institutions*, *supra* note __ at 80-81 (recognizing that metaphors are “especially thick in the realm of law and religion,” such as a “wall of separation between Church and State,” and seeking a new metaphor through sphere sovereignty).

⁸² In *Hosanna-Tabor*, there was a split in the circuits on whether ministerial exemption included exemption of religious determinations as a technical matter of jurisdiction (i.e., whether ministerial exemption cases should be dismissed on a 12(b)(6) motion or on summary judgment). The Court determined that the ministerial exemption functions as an affirmative defense and not a jurisdictional bar. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. __ (2012), slip op. at 20 n.4. For purposes of this article, this debate is not central to my argument – my point is seeing jurisdiction and sovereignty as conceptual matters.

Taking religious sovereignty seriously also raises interesting questions of personal and subject matter jurisdiction of religions. Personal jurisdiction is implicitly often raised for example, in the religious employer exemption to Title VII (see *Amos*) or the controversy over the Health and Human Services contraception mandate – i.e., why religious employers are able to “impose” their beliefs on non-religious employees. Understanding religions as sovereigns helps clarify the issue. Just as conceptions of personal jurisdiction in U.S. law have moved from the 19th Century territoriality sovereignty view of *Pennoyer v. Neff*, so too it could be argued that religious organizations should be able to have some authority or jurisdiction over actions and individuals who are non-citizens (or non-believers) who have a significant impact on the sovereign through minimum contacts understood in light of fair play and substantial justice. See *International Shoe*, *Hansen v. Denkla*, *Volkswagen v. Woodson*. Just as minimum contacts can be understood to give a defendant reasonable apprehension and make legal ties foreseeable, so too have courts and legislatures understood that religious organizations may legitimately make claims over non-members in cases of the very close tie of employment. See, e.g., *-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. __ (2012); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

Religions as sovereigns also raise the question of subject matter jurisdiction— clearly courts have held that the truth or falsity of religious belief is outside their competence; just as federal courts recognize their limits through *Erie* or the certification of state questions to state courts. Federal courts have also deferred to religious self-understandings of their own structuring. See *Watson v. Jones*, 13 Wall. 679 (1872); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Just as jurisdiction brings difficult boundary questions in federalism context— e.g., when are state laws and rules procedural and when substantive—so too in the religious context we see difficult boundary questions in examining what is religious, what is an internal affair, or who fits under the “ministerial exemption.”

⁸³ Note, however, that the Roman Catholic Church does retain a sovereign state in the Holy See, which operates from the Vatican City State. This has raised the level of agreements with the Roman Catholic Church to the level of international treaties, but aside from this, has not had a major impact on the Roman Catholic Church’s interactions with states.

⁸⁴ See *supra* note __.

⁸⁵ In our chapter *Definition of Religion*, Cole Durham and I suggest some implications of this kind of sovereignty-based deference on definitions of religion. Sovereignty itself, however, would be both over- and under-inclusive if used as a

Sovereignty, however, is key to understanding how religions function as a legal matter, why religions work differently than other organizations or beliefs in the legal world, and why religious freedom matters. Under a religion-as-sovereign theory, religious beliefs and organizations differ from other types of beliefs and organizations because they assert authority over their members, who accept the legitimacy of the source of the authority.⁸⁶ Respecting religious freedom can then be understood as a question of inter-sovereign respect rather than an exceptional deference to a private entity or believer.

As I argue in Parts III and IV, the United States has extensive experience and theory concerning inter-sovereign respect, particularly in the case of federalism. Theories and experience of federalism abound and prove exceedingly apt in describing the significant values religious freedom protects and identifying concerns about the proper enforcement of religious freedom. Approaching religious freedom through the lens of federalism also reveals some of the deep and difficult issues that it presents. Reconciling the claims of multiple sovereigns has never been simple. I suggest, however, that the struggle to explain and understand these tensions in federalist theories provides a useful heuristic to understand how similar tensions are resolved in the religious freedom context. In Part V, I assert that the striking parallels that federalism and religious freedom exhibit further illuminate the “specialness” of religion and suggest that sovereignty can be understood as the deep structure of law and religion.

III. Shared Sovereignty and the Federalism Heuristic

Thomas Hobbes and Jean Bodin posited that sovereignty entailed a single supreme ruler. In practice, however, sovereignty had already been split in England with parliamentary limits on absolute rule, as the civil war and Glorious Revolution subsequently made clear. The U.S. Constitution provided the first modern written constitutional attempt to share sovereignty, both between branches of government and between states and the federal government. To a contemporary U.S. audience, the concept of shared sovereignty seems straightforward, but in many ways it was a radical move at the time of the founding. Just as Justice Scalia rejected the concept in *Smith* that religion could be a “law unto itself,”⁸⁷ sharing sovereignty among political entities seemed conceptually impossible. If a sovereign is supreme, then how can there be two sovereigns in a single realm?⁸⁸ The distinction modern philosophers make is that a sovereign can be supreme while being non-absolute—absolutism is a question of what questions a sovereign has supreme control over. EU member states, for example, are non-absolute sovereigns: while they exercise absolute authority over most issues, they do not have absolute authority over those issues falling under EU treaties. This question of absolutism arises in the federalism context. Some have

sole definition of religion. Non-state sovereigns need not be religious—these can be seen to include NGOs or the mafia—and it would not be impossible to imagine a religion that asserted no recognized authority over its adherents.

⁸⁶ The fact that some individual members of a tradition may feel little loyalty to their organization or beliefs does not matter. State sovereigns also have members with little loyalty or limited obedience. The point is that the members as a whole accept the source of legitimacy of the religious authority, just as citizens of a state as a whole accept the source of legitimacy of its political authority.

⁸⁷ *Smith*. But see Horowitz, Churches as First Amendment Institutions at 88 (while recognizing of First Amendment institutions can be seen as allowing them to become a law unto themselves, “[i]t is thus important to emphasize one other feature that characterizes most, if not all, First Amendment institutions: these institutions are already significantly self-governing. They operate within a thick web of norms, values, constraints, and professional practices that channel and restrain their actions.”).

⁸⁸ See HOBBS, *supra* note __; BODIN, *supra* note __.

questioned whether federalism is truly a sharing of sovereignty or whether it implies non-sovereignty for states because they are ultimately subordinate to the federal authority.⁸⁹ While there is debate about how much sovereignty was originally left to the states and how much they do or should exercise now, the basic conception of federalism was a shared sovereignty with the ultimate authority being vested in the U.S. constitution, treaties, and federal laws.⁹⁰ States are non-absolute sovereigns that retain supreme authority over some issues.

While the issue of sovereignty has been raised in the religion context,⁹¹ the question of federalism as a model of shared sovereignty with religion has yet to be explored.⁹² Perry Dane, who has addressed the issue of religions as sovereigns, passed over federalism as an appropriate description of the relationship of sovereigns because he felt that it does not fully express the sovereignty of religious groups.⁹³ I would argue that seeing religion as a non-absolute sovereign with supreme authority over internal religious affairs still respects the sovereignty and authority of religions. Shared sovereignty over temporal affairs is simply a fact of life for religions--as a practical matter religions in the United States have been forced to either submit to the supremacy of secular state regulation or disband.⁹⁴ The last significant wholesale resistance to national secular law by a religion resulted in the sending out of a national army, disenfranchisement of believing citizens,⁹⁵ and federal appropriation of most of the religious organization's property⁹⁶— not unlike the results of state resistance to federal authority in the Civil War.

I would argue, however, that accepting the federal (or secular) government as the final decision-maker in points of conflict does not undermine the sovereignty and authority of states (or

⁸⁹ Horowitz, *Churches as First Amendment Institutions*, *supra* note ___ at 96, but state as a sphere of spheres, “natural head” that has responsibility to police boundaries among spheres; id at 106 “sphere sovereignty itself, even if it treats all the sovereign sphere as resting on equal authority, nevertheless permits state intervention in appropriate cases . . . ”

⁹⁰ U.S. CONST’N, Article VI, clause 2.

⁹¹ See *supra* note ___ and accompanying text.

⁹² Ira Lupu and Robert Tuttle have looked at the relationship between state and federal approaches on religion, but this does not deal with the comparison of religions to federal states. Ira C. Lupu and Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006). Paul Horowitz, in a discussion of sphere sovereignty and churches as First Amendment institutions, mentions in passing that First Amendment institutionalism’s “concern with devolving regulation to smaller social units suggests a kinship with federalism scholarship, and with those scholars who have argued for an even greater degree of ‘localism’ in legal discourse.” Horowitz, *Churches as First Amendment Institutions*, *supra* note ___ at 90.

⁹³ Dane, *Maps of Sovereignty*, *supra* note ___ at 961-62 (suggesting that Indian sovereignty does not stem from an American constitutional vision, as does federalism, but recognizing that “[e]ven if Indian sovereignty is partly constructed from the outside, that still does not disqualify it. All claims to sovereignty arise from a union of self-assertion and external perception.”).

⁹⁴ For example, despite Catholic doctrine that unjust laws are not laws, Catholic Charities has shut down adoption services in Massachusetts, Illinois, and Washington, D.C. because they were required to place adoptive children with same-sex couples.

⁹⁵ *Davis v. Beason*, 133 U.S. 333 (1890) (upholding Idaho law requiring oath that one did not agree with religious beliefs of polygamy in order to vote).

⁹⁶ See e.g., *The Late Corporation of the Church of Jesus Christ of Latter-day Saint v. U.S.*, 136 U.S. 1 (1890), modified, 140 U.S. 665 (1891); SARAH BARRINGER-GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2001); cf. Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L.&LIT. 15 (1996) (*Late Corporation* renders the church a creature of the state” and “remains a dark shadow over current law”); Robert Cover, *The Supreme Court, 1982 Term -- Foreward: Nomos and Narrative*, 97 HARV. L.REV. 4, 51-2 (1983) (*Late Corporation* was “officialdom justifying its repression to itself”).

religions).⁹⁷ Losing the competence to decide points of conflict may mean losing absolute authority over the issue of who resolves conflicts, but this does not prevent a religion or state from being a non-absolute supreme ruler in the rest of its own sphere.⁹⁸ It is significant in the issue of religions as sovereigns that the United States Supreme Court has repeatedly held that there are areas where it must defer to religious decisions.⁹⁹

I suggest that federalism provides a very helpful pattern for understanding the values and theories of religious freedom. In my discussions of federalism, however, I do not rely on pre-Civil War federalism or those of any particular political or intellectual tradition. Much of the value of federalism as a heuristic is precisely the richness and diversity of federalism theories themselves. In sections IV and V, I address a wide variety of theories of federalism, which each raise differing and overlapping answers to the question of the values underlying shared sovereignty. I explore how historical experiences and theories of federalism parallel in striking and instructive ways theories of religious freedom. The heuristic device of federalism raises a host of interesting parallels and issues; for purposes of this article, I will focus on what insights federalism brings to the questions of the value of religious freedom. I argue that seeing religions as sovereigns provides not only an array of relevant arguments as to the value of religious freedom, but that the fruitfulness of the approach itself ultimately reinforces my claim that religions indeed function as sovereigns, which is a key reason why religion is “special.”

Federalism, in all its variety, becomes a comparative foil and heuristic device for understanding and analyzing religious freedom. Like all comparative endeavors, the comparison between federalism and religion is not an exact fit, but does reveal interesting and surprising differences and similarities. In this case, it particularly shows the strength and variety of the arguments for religious freedom as well as the sources of concerns. I address the various theories of federalism in turn, and comment on the particular fit of the metaphor with religious freedom in each case.

Using federalism, especially together with sovereignty, may raise many of the same initial objections as sovereignty. In the United States context, federalism is freighted with the powerful and repugnant history of abuse of states’ rights, Jim Crow, and unchecked violations of constitutional rights. Trying to connect religious freedom and federalism might seem to be doing religion a disservice. Although some call for the complete abandonment of federalism,¹⁰⁰ in general, even the justices and scholars who exhibit the most concern about violations of individual rights in the name of federalism still see some values in a federal system and propose some variant thereof.¹⁰¹ I argue that even the arguments of those who propose eliminating sovereignty-based federalism

⁹⁷ See Horowitz, *Churches as First Amendment Institutions*, *supra* note __ at 96, (describing state as a sphere of spheres, “natural head” that has responsibility to police boundaries among spheres; *id* at 106 “sphere sovereignty itself, even if it treats all the sovereign sphere as resting on equal authority, nevertheless permits state intervention in appropriate cases . . .”).

In addition, religions face no competition from the state over their asserted authority over non-temporal affairs. For example, I am not aware of any claim by the U.S. or other nations to jurisdiction over post-temporal consequences of actions.

⁹⁸ This is in contrast with conceptions of subsidiarity or of higher and lower orders of sovereigns. See Horowitz *Churches as First Amendment Institutions*, *supra* note __ at 105-6.

⁹⁹ See notes __-__ and accompanying text.

¹⁰⁰ See, e.g., Martha A. Field, *Garcia v. San Antonio Metropolitan Authority: The Demise of a Misguided Doctrine*, 99 HARV. L.REV. 84 (1985).

¹⁰¹ See section IV.

provide a fertile source for an understanding of the values and concerns that arise in the religious freedom context. As I examine these, I also suggest that concerns about state oppression that arise from the history of federalism in the U.S. are less significant in the religious context because of the low exit costs, multiplicity of choices, and lack of coercive power of religion.¹⁰²

IV. Values of Federalism and Religious Freedom

One of the most striking aspects of comparing theories of federalism and religious freedom is how little consensus there is on the values underlying protection of religious freedom, which stands in stark contrast to how much consensus there is on the values underlying federalism. Religious freedom scholars disagree on much, but agree that they cannot come to consensus on why religious freedom is protected. Doug Laycock notes that “[c]ontemporary scholars have puzzled over why the Constitution would specially protect religious liberty, as distinguished from liberty in other domains.”¹⁰³ Bill Marshall similarly notes that there is “little agreement as to what values underlie the Religion Clauses of the First Amendment.”¹⁰⁴ Mark Tushnet asserts that “[c]onstitutionalists today are committed to developing a law of religion even though they do not understand why they have to do so.”¹⁰⁵ Paul Horowitz questions whether the debate of theories of religious freedom in the United States “exhibits the pointless excitability of a dog chasing its own tail.”¹⁰⁶ Justice Scalia describes First Amendment jurisprudence as “a maze.”¹⁰⁷ To some extent the religion field is polarized by those who accept or are at least willing to leave room for religious valuation as underlying the First Amendment and those seeking to rely on purely secular rationales for explaining its protections.¹⁰⁸ Federalism theorists, on the other hand, are “intimately familiar with [federalism’s] benefits.”¹⁰⁹ “Academic literature richly extols the oft-expressed reasons underlying the American invention of divided government.”¹¹⁰ The U.S. Supreme Court has repeatedly recognized lists of benefits of federalism.¹¹¹ Perhaps a comparison with federalism can better bring to light some of religious freedom’s key underlying values.

A. Whose Federalism?

In this section, I examine the proffered benefits of federalism and assess to what extent these apply in the field of religious freedom. As an initial matter, however, the question should be asked: “Whose federalism?” Various theories of federalism have been advanced since the founding of the U.S. and each theory focuses on slightly different aspects of the traditional list of federalism’s values. The narrative of dual federalism, for example, differs considerably from that of the current neo-federalists. Is federalism about relative competencies in problem solving, restraining

¹⁰² See *infra* text accompanying note ____.

¹⁰³ Douglas Laycock, *Religious Liberty as Liberty*, *supra* note ____.

¹⁰⁴ William P. Marshall, *Truth and the Religion Clauses*, *supra* note _____. See also William P. Marshall, *Religion as Ideas: Religion as Identity*, *supra* note ____ at 385 (1996) (“The one certainty in religion clause jurisprudence is that it is beset by paradox and self-contradiction. The case law is legendary in its confusion and even theories that appear the most straightforward often end up at cross purposes with their own premises.”).

¹⁰⁵ Mark Tushnet, *The Constitution of Religion*, 18 CONN. L.REV. 701, 729 (1986).

¹⁰⁶ PAUL HOROWITZ, *THE AGNOSTIC AGE* (2011), 39.

¹⁰⁷ *Edwards v. Aguillard*, 482, U.S. 578, 636 (1987) (Scalia, J., dissenting).

¹⁰⁸ See HOROWITZ, *THE AGNOSTIC AGE* (2011), chapter 2; Laycock, *Religious Liberty as Liberty*, *supra* note ____ at 313-316.

¹⁰⁹ Gurken, *supra* note ____, at 6.

¹¹⁰ Barry Friedman, *Valuing Federalism*, 82 MINN. L.REV. 317, 318.

¹¹¹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458-9 (1991).

government power, or about the recognition of minorities? My point in this article is not to assess these competing claims or make any normative arguments about the value of federalism, but simply to draw out the various arguments to see what values federalism can be said to promote. The fact that there is such a sizeable and thoughtful cluster of varying theories of federalism, each emphasizing different strengths (or weaknesses) is one reason that it is such a useful heuristic in examining approaches to religious freedom.

With its sizable list of benefits, federalism points to the richness and usefulness of looking at multiple benefits and rationales of shared sovereignty. If theorists of the First Amendment have been stymied by searching for “the reason” for religious liberty¹¹² or an unwillingness to discuss the possibility of religious truth,¹¹³ perhaps one significant value of the heuristic device of federalism in the religious context is recognizing the possibility of multiple underlying values, tied together by an overriding secular device that serves as a legal bracketing of religious truth claims. Seeing religion as a sovereign is itself clearly a secular legal concept, but one that gives space for truth claims while bracketing them in the secular world. The sovereignty of religion depends upon its authority with its own believers, which as an internal matter often turns on truth claims, so these elements so core to the self-understanding of a religion are at play in the process. Nevertheless, recognizing the sovereignty of religion does not require the secular state to take a position on the validity of internal truth claims of a religion, just as recognizing sovereignty of a foreign state does not require recognition of its governing structure as just or democratic. Instead, the state bases its support of sovereignty, or, I would argue, religious freedom, on the legal functioning of the sovereign. The extensive values of recognizing and sharing sovereignty, as will be evident in the discussion of federalism, are largely based on pragmatic and secular ideals.¹¹⁴

In the following sections, I examine these various values identified in theories of federalism, and provide some thoughts on how these translate or compare to the values underlying religious freedom. I also include contemporary decentralism theories in this account. While these are not strictly speaking federalist theories,¹¹⁵ they represent an extreme emphasis of one set of values of federalism and thus, I argue, correspond well to one group of theories about religious freedom.

B. Dual Federalism and Separate Spheres

1. Dual Federalism and Its Values

Edward S. Corwin, in a notable article in the 1950 *Virginia Law Review*, lamented the passing of dual federalism.¹¹⁶ He defined dual federalism as comprising four postulates:

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutionally promote are few;

¹¹² Laycock, *Religious Liberty as Liberty*, *supra* note __ at 314-16.

¹¹³ HOROWITZ, *THE AGNOSTIC AGE*, *supra* note __, introduction.

¹¹⁴ Note that I do not seek to exclude religious bases for supporting religious freedom. Just as some federalism theories accept the possibility of non-instrumental values of federalism, so too the grounding of religious freedom should be extended to non-instrumental reasons as well as instrumental ones. See section IV.D.2.

¹¹⁵ See, e.g., Edward Rubin, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L.REV.* 903 (1994); Martin Diamond, *On the Relationship of Federalism and Decentralization*, in *COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM* 72-72 (Daniel J. Elazar et al., eds., 1969).

¹¹⁶ Edwin S. Corwin, *The Passing of Dual Federalism*, 36 *VA. L.REV.* 1 1950.

3. Within their respective spheres the two centers of government are ‘sovereign’ and hence ‘equal’;
4. The relation of the two centers with each other is one of tension rather than collaboration.¹¹⁷

In essence, this describes an approach used by the Supreme Court in which it sharply circumscribed and policed the spheres of state and federal responsibility. Although there has been some quibbling about dates,¹¹⁸ the U.S. Supreme Court has been seen to follow a dual federalism approach as early as Justice Taney and up through approximately 1937.¹¹⁹ Dual federalism, with its sharply delineated spheres for states and the federal government,¹²⁰ often focused on states’ rights and the constitutional limits of enumerated powers.¹²¹ Some have suggested that recent federalism cases reflect a dual federalism mentality.¹²²

Dual federalism theory particularly emphasizes a few aspects of federalism. First, it focuses on the distinctive functions of states and the federal government, with particular emphasis (as compared to other approaches) on the importance of state functions. Federalism’s value, from this approach, is to have the states and federal government “each working upon the same persons; and yet working without collision, because their functions are different.”¹²³ Protecting the function of states was seen as of particular value because they were the country’s strongest republican units at the time of the founding. Corwin notes that “[f]ederalism’s first achievement was to enable the American people to secure the benefits of national union without imperiling their republican institutions.”¹²⁴ The Federalism, in the dual federalist model, was needed to protect the “vital cells that [the states] have been heretofore of democratic sentiment, impulse, and action.”¹²⁵

In connection with its role of protecting reservoirs of “democratic sentiment, impulse, and action,” federalism was appreciated for its value in building up state initiatives, energiz[ing] state policies,¹²⁶ and preventing “concentration of excessive power.”¹²⁷ These points are picked up later

¹¹⁷ Corwin, *supra* note __ at 4.

¹¹⁸ See, e.g., Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL.L.REV. 619 (1978) (describing dual federalism as ending with the civil war, followed by a transition period).

¹¹⁹ See, e.g., Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1 (2006-07) 1, 5; WALTER HARTWELL BENNETT, *AMERICAN THEORIES OF FEDERALISM* (1964) at 180-81.

¹²⁰ See, e.g., *Abelman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858) (“[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”).

¹²¹ Corwin, *supra* note __.

¹²² See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo. Wash. L.Rev. 139 (2000-2001) (rejecting the application of dual federalism to recent cases, but arguing for it in the foreign affairs exemption); Andrew I. Gavil, *Introduction: Seminole Tribe and the Creeping Reemergence of “Dual Federalism,”* 23 OHIO N.U. L.REV. 1393 (1997); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 Minn. L.Rev. 849 (1999); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 Vill. L.Rev. 201 (2000).

¹²³ *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

¹²⁴ Corwin, *supra* note __ at 22.

¹²⁵ Corwin, *supra* note __ at 23.

¹²⁶ He suggests that this is contrary to experience, however, citing Justice Cardozo’s decision in *Helvering v. Davis*, 301 U.S.619 (1937), and suggesting that states have been unable to engage in broad scheme for relief and social insurance because they are competing for investors. Corwin, *supra* note ____, at 21.

¹²⁷ *Id.* at 23.

by other federalism theories, reappearing as the value of states as laboratories for experimentation and federalism's value in checking the absolute power of a national government.

Fundamentally, however, dual federalism turned on the fact that, at least initially, states were the primary unit of government. Until modern advances in technology, transportation, and communication, most facets of peoples' lives in times of peace were governed by the states. This is described in *The Federalist Papers*:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state.

The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments, in times of peace and security.¹²⁸

Initially at least, states' rights was not a slogan, but a description of reality. Broader interpretation of Congressional powers was seen as "permit[ing] invasion of the reserved rights of states and thus endanger[ing] the existence of the federal system."¹²⁹ In post-Civil War, modernized America, however, dual federalism theories have long "lost all descriptive force."¹³⁰

2. Sphere Sovereignty Theories and Their Values

Dual federalism in many ways lines up very neatly in the religious freedom arena with traditional understandings of sphere sovereignty, developed by German and Dutch Calvinist philosophers over the last several hundred years. Drawing on the thinking of Calvinist Johannes Althusius (1557-1638), sphere sovereignty has been expressed most articulately in the nineteenth and twentieth-century writings of Abraham Kuyper¹³¹ and Herman Dooyeweerd,¹³² and discussed in the U.S. context by Paul Horwitz.¹³³ Sphere sovereignty "sees a profusion of organically developed institutions and associations, including both church and state, operating within their own authority structures and barred from intruding into one another's realms. Although this appears to be a theory of a limited state, it is also a theory of the limits of religious entities."¹³⁴ State and church are each vested with sovereignty over a sphere of life but are restricted to action within their own spheres. Sphere sovereignty "proclaims church and state to be distinct social structures" which "do not derive their respective competencies from one another, but are in each instance endowed with an internal

¹²⁸ THE FEDERALIST PAPERS, No. 45.

¹²⁹ WALTER HARTWELL BENNETT, AMERICAN THEORIES OF FEDERALISM (1964) at 180-81.

¹³⁰ Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1 (2006-07) 1, 5.

¹³¹ Abraham Kuyper, *Lectures on Calvinism* 96 (photo. reprint 2007) (1931). See generally Horwitz, *First Amendment Institutions*, *supra* note __.

¹³² HERMAN DOOYEWEERD, A NEW CRITIQUE OF THEORETICAL THOUGHT (1969). See generally Gordon J. Spykman, *Sphere Sovereignty in Calvin and Calvinist Tradition*, EXPLORING THE TRADITION OF JOHN CALVIN (David E. Holwerda, ed. 1976) and Johan van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK (Tore Lindholm, et al., eds., 2004), 85, 95-6.

¹³³ Horwitz, *First Amendment Institutions*, *supra* note __.

¹³⁴ Horwitz, *First Amendment Institutions*, *supra* note __ at 84 (describing nineteenth-Century neo-Calvinist Dutch theologian, journalist, and politician Abraham Kuyper's theory).

enclave of domestic powers that emanate from the typical structure of the social entity concerned . . .¹³⁵

At first blush, sphere sovereignty seems to be the obvious fit for a religion-as-sovereign theory. Sphere sovereignty does emphasize the organically sovereign nature of religion and its independence from the state. It is important to note, however, that the religion-as-sovereign theory and federalism heuristic are broader and indeed provide resources for criticisms of sphere sovereignty. Like dual federalism, sphere sovereignty is an initial, almost reflexive approach once one takes legal pluralism seriously. If both states and the federal government are sovereign or if religion and a secular government are sovereign, then they must each have their own realms and governing structures. But just as dual federalism is not the only approach to federalism, so too sphere sovereignty is not the only way to approach religious freedom or religion-as-sovereign.

The federalism heuristic further suggests possible problems with sphere sovereignty. Dual federalism largely faded when faced with the increasingly nationalistic pressures of modern life and the expanding reality of concurrent jurisdiction¹³⁶; so too could arguments be made that a division of spheres in a religious context is overly simplistic and unrealistic in modern life. Religious involvement in education, social service provision, and employment, all areas typically heavily regulated by the state, suggest the complexities of mapping sphere sovereignty onto contemporary life. Recognizing this does not necessarily mean rejection of a religion-as-sovereign approach, but suggests that sphere sovereignty may be only one of several approaches that recognizes and respect religions as sovereigns.

Sphere sovereignty, however, like dual federalism, is useful at the very least as part of an attempt to assess the values underlying religious freedom. Paul Horwitz suggests several values significant to the sphere sovereignty model, which in many ways echo the values of federalism highlighted by dual federalists.¹³⁷ For example, sphere sovereignty recognizes the reality of legal pluralism, which ensures that a unitary state is not “enthroned] . . . as an absolute good.”¹³⁸ “In both its broad outlines and its internal structure and limits,” sphere sovereignty “threads a middle path that avoids both statism and atomistic individualism.”¹³⁹ In connection with this, sphere sovereignty stresses the importance of mediating structures. “It acknowledges that associations serve as a vital means of community in an egalitarian and commercial democratic republic which might otherwise render human life intolerably atomistic.”¹⁴⁰ As with dual federalism, the argument that states (or religion) are necessary as a mediating structure to check the power of a centralized state is also made.

Both dual federalism and sphere sovereignty also recognize that some social ordering predates our modern states. To successfully form a federal constitution required recognizing the preexisting competencies and functions of states; sphere sovereignty emphasizes that secular states must similarly recognize the preexisting claims and functions of religion. Sphere sovereignty “sees associations as an intrinsic part of the ordering of human existence, and honors these associations as

¹³⁵ Johan van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK (Tore Lindholm, et al., eds., 2004), 85, 97.

¹³⁶ See, e.g., Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L.REV. 1563 (1994).

¹³⁷ Horwitz, *First Amendment Institutions*, *supra* note __ at 107.

¹³⁸ Horwitz, *First Amendment Institutions*, *supra* note __ at 107.

¹³⁹ Horwitz, *First Amendment Institutions*, *supra* note __ at 110.

¹⁴⁰ Horwitz, *First Amendment Institutions*, *supra* note __ at 108.

a central and divinely ordered aspect of human life.”¹⁴¹ These arguments are not as frequent under other theories, and have become increasingly contested under late 20th and early 21st century theories that stress individual autonomy and associate mediating structures with hierarchy and oppression. As I argue later,¹⁴² however, these concerns in the federalism arena do not necessarily transfer with full force to religion: in contrast to states, religion has no police power and has lower exit costs.

The parallel with dual federalism also suggests the further, related line of argument that, like states at the founding, religions function as a “vital cell” of “democratic sentiment, impulse, and action.”¹⁴³ In general, aside from the more difficult question of tolerance,¹⁴⁴ empirical studies show that religion has a high correlation with democratic and civic values. For example, religious Americans are more generous in volunteering¹⁴⁵ and giving charitable contributions, both in religious and in secular causes.¹⁴⁶ Studies also show that religious Americans are also up to twice as active civically as secular Americans.¹⁴⁷ After standard statistical controls, studies show that they are more likely to belong to community organizations, energize community problem solving, take part in local civic and political life, and press for local social or political reform.¹⁴⁸ This is true of religious Americans across the political spectrum.¹⁴⁹ Religiosity has also been associated with high levels of self-control, a virtue which has been cited as important to promote the physical, emotional, and financial health of individuals and communities.¹⁵⁰ Among a long list of demographic and ideological characteristics, religion is also the strongest predictor of altruism.¹⁵¹ In many ways, the argument for religion as a cell of democracy may be stronger than that of states, because unlike states, which engage in similar democratic processes to a federal government, religion fosters the exercise of moral and intellectual virtues needed for democratic governance such as “reflective

¹⁴¹ Horwitz, *First Amendment Institutions*, *supra* note __ at 108.

¹⁴² See Part __.

¹⁴³ Horwitz suggests this in part. See *First Amendment Institutions*, *supra* note __ at 113 (religious organizations can be seen as First Amendment institutions, which are “especially important for public discourse” and requiring significant autonomy protections). Cf. PETERBERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999).

¹⁴⁴ Studies show that the more religious are less tolerant of difference and dissent (AMERICAN GRACE at 482 (citing numerous studies)), although it has been suggested that to some extent this is “issue-attitude tolerance” rather than overall political tolerance—religious Americans often hold conservative attitudes on issues like abortion or homosexual marriage, but still support liberal democracy. A. Eisentstein, *Religion and the Politics of Tolerance: How Christianity Builds Democracy* (2008). One political scientist notes “that a secular view of alternative lifestyles is accepted in the public square, while the religious view is rejected there and deemed acceptable solely in the private sphere” so the question of tolerance on these issues only applies to the religious.¹⁴⁴ Marie A. Eisentstein, *Religion and the Politics of Tolerance: How Christianity Builds Democracy* (2008), 14.

Religious American’s discomfort with some aspects of tolerance, however, appears to be a virtue, however, in questions of personal ethics and civic morality: religious Americans are more likely to condemn dishonest behavior, including tax evasion. In fact, religious Americans are more unified in condemning cheating on taxes than they are in condemning homosexuality or premarital sex. AMERICAN GRACE at 459-461.

¹⁴⁵ ROBERT D. PUTNAM AND DAVID E. CAMPBELL, AMERICAN GRACE 445.

¹⁴⁶ AMERICAN GRACE 445, 450. Frequent churchgoers are also more likely to: give money to a homeless person, give excess change back to a shop clerk, donate blood, help someone outside their own household with housework, spend time with someone who is ‘a bit down,’ allow a stranger to cut in front of them, offer a seat to a stranger, and help someone find a job. All of these social goods are correlated with increased religious observance, even when studies control simultaneously for gender, education, income, race, region, homeownership, length of residence, marital and parental status, ideology, and age. *Id.* at 451.

¹⁴⁷ AMERICAN GRACE at 453-54.

¹⁴⁸ AMERICAN GRACE at 454-455.

¹⁴⁹ AMERICAN GRACE. at 458.

¹⁵⁰ DANIEL AKST, *WE HAVE MET THE ENEMY: SELF-CONTROL IN AN AGE OF EXCESS* (2011).

¹⁵¹ AMERICAN GRACE at 463-471.

judgment, sympathetic imagination, self-restraint, the ability to cooperate, and toleration,”¹⁵² which “according to liberalism’s own tenets, fall outside its strict supervision, and that it not only does not always effectively summon but may even discourage or undermine.”¹⁵³

My point here is not to develop this or any one particular argument for religious freedom, but to use the federalism heuristic to assemble a broad array of arguments for (and against) religious freedom. The narratives of dual federalism and sphere sovereignty highlight values such as a legal pluralism that avoids statist and atomistic constructions of society, the respect due a social ordering that pre-dates the state, and the value of religion as a “vital cell” of “democratic sentiment, impulse, and action.” To some extent these also reappear in other theories of federalism.

C. Process Federalism and *Smith*: Long Live Political Safeguards

1. Process Federalism and Its Values

Another major theory of federalism has been referred to as “process” federalism or “federalism as empowerment.”¹⁵⁴ This approach, first articulated in Herbert Wechsler’s 1954 article “The Political Safeguards of Federalism,”¹⁵⁵ and refined by Jesse Choper,¹⁵⁶ is reflected in U.S. Supreme Court jurisprudence from 1937 until the 1990s.¹⁵⁷ Process federalism recognizes the value of federalism, but sees this as largely protected by the U.S. political process, separation of powers, and individual rights instead of by judicial enforcement of a division of spheres between the states and federal government. Even though Wechsler saw national action “as exceptional in our polity, an intrusion to be justified by some necessity,”¹⁵⁸ he saw federal intervention against the states as primarily a matter for congressional determination, not judicial review.¹⁵⁹ His argument that “it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism” was based on the impact of the states on the federal government through the apportionment of senators, state control of districting of representatives and voter qualifications, the electoral college, and the Framers’ views.¹⁶⁰ Other commentators have suggested further refinements¹⁶¹—Larry Kramer, for example, argues that political parties provide the modern political safeguards of federalism¹⁶² and Bruce LaPierre argues that Congress’s political accountability provides the needed political safeguards.¹⁶³ Process federalism reached its zenith in

¹⁵² PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999) at xi.

¹⁵³ PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999) at 6.

¹⁵⁴ Erwin Chemerinsky, *The Assumptions of Federalism*, 58 *Stan. L.Rev.* 1763 (2006).

¹⁵⁵ Wechsler, *Political Safeguards*, *supra* note __

¹⁵⁶ JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552 (1977).

¹⁵⁷ See, e.g., Chemerinsky, *The Assumptions of Federalism*, *supra* note __ at 1769 (“From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress’s Commerce Clause authority. Countless criminal and civil laws were enacted under this constitutional power; it was by far the most frequent source of authority for federal legislation.”).

¹⁵⁸ Wechsler, *Political Safeguards*, *supra* note __ at 544.

¹⁵⁹ Wechsler, *Political Safeguards*, *supra* note __ at 559.

¹⁶⁰ Wechsler, *Political Safeguards*, *supra* note __

¹⁶¹ Cf. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *TEX. L.REV.* 1321 (2001) (arguing that separation of powers serves as a safeguard of federalism).

¹⁶² Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Columb. L.Rev.* 215 (2000).

¹⁶³ D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 *WASH.U.L.Q.* 779 (1982); D. Bruce LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 *N.W.U. L.Rev.* 577 (1985).

the 1985 Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁶⁴ in which the Court overruled a 1976 decision, *National League of Cities v. Usery*,¹⁶⁵ in which it held that the Tenth Amendment barred federal regulation of the activities of state and local governments.

Process federalists choose to emphasize slightly different values of federalism than those dual federalists did. Wechsler mentions in passing, for example, the states as “preexisting sources of authority and organs of administration”—“[t]he fact of the continuous existence of the states, with general governmental competence unless excluded by the Constitution or a valid Act of Congress, set the mood of our federalism from the start.”¹⁶⁶ He notes, however that “[i]f I have drawn too much significance from the mere fact of the existence of the states, the error surely will be rectified by pointing also to their crucial role in the selection and composition of the national authority.”¹⁶⁷ He focuses on states as “the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.”¹⁶⁸ Larry Kramer expands on this idea of federalism protecting state interests through state institutions. From his perspective,

The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking. Federalism is a way to capture this advantage, by assuring that federal policymakers leave suitable decisions to be made in the first instance by state politicians in state institutions.¹⁶⁹

He rejects mere decentralization—national representatives “will predictably be less responsive than representatives elected to serve in formally autonomous state or local governments . . .”¹⁷⁰ “Federalism must be understood as a means rather than an end: an institutional strategy formulated to assure a greater degree of decentralization than is ever likely to be seen in a unitary system.”¹⁷¹ A slightly different description of this goal of responsiveness is offered by Erwin Chemerinsky, who identifies the values underlying process federalism as “having multiple levels of government and in multiple actors to deal with social problems.”¹⁷² In sum, process federalists primarily see federalism’s value as delivering better-tailored decision-making, increased responsiveness and an increased number of actors to resolve problems.

2. Smith and the Values of Religious Freedom

In many ways, the process federalism approach parallels the Supreme Court’s Free Exercise regime since *Employment Division v. Smith*, in which the Court rejected judicial exemptions for religious claims.¹⁷³ Just as it did in *Garcia*, the Court overturned precedent in *Smith* to retreat from a judicial role for protections of state/religious sovereignty. In an infamous passage, Justice Scalia, writing for the Court, stated:

¹⁶⁴ 469 U.S. 528 (1985).

¹⁶⁵ 426 U.S. 833 (1976).

¹⁶⁶ Wechsler, *Political Safeguards*, *supra* note ___ at 544.

¹⁶⁷ Wechsler, *Political Safeguards*, *supra* note ___ at 546.

¹⁶⁸ Wechsler, *Political Safeguards*, *supra* note ___ at 546.

¹⁶⁹ Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, *supra* note ___ at 222.

¹⁷⁰ Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, *supra* note ___ at 223.

¹⁷¹ Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, *supra* note ___ at 223.

¹⁷² Chemerinsky, *The Assumptions of Federalism*, *supra* note ___ at 1766-67.

¹⁷³ 494 U.S. 872 (1990),

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁷⁴

It is deeply ironic that opponents of process federalism suggest that the horrifying logical extension of *Garcia* would be something akin to this reasoning in *Smith*, or, as Justice Powell’s *Garcia* dissent puts it, what “[o]ne can hardly imagine this Court saying,” that is, “that because Congress is composed of individuals, individual rights guaranteed by the bill of Rights are amply protected in the political process.”¹⁷⁵

Although *Smith*, like process federalism, is usually seen for what it limits—i.e., judicial enforcement—rather than what it promotes, both do pay some tribute to the values underlying religious freedom or federalism. *Smith* reaffirms the value of a core of religious freedom/religion-as-sovereign when it rejects a judicial role specifically for issues of religious competence:

Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” As we reaffirmed only last Term,”[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.” Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.¹⁷⁶

The Court’s discussion is abbreviated and does not discuss in any depth why “it is not within the judicial ken” to interpret the centrality or validity of beliefs, but the fact that the Court used jurisdictional and sovereign-like terms of reference suggests that the religion-as-sovereign and federalism heuristic are helpful in understanding a broad swath of approaches to religious freedom, including one as narrow as *Smith*. Perhaps *Smith*, like Wechsler, begins its political protections approach with an understanding that religions, like states, had preexisting authority. Bill Marshall defends *Smith*’s core result through arguing, like process federalists, that exemptions are not needed or helpful or traditional in protecting religion.¹⁷⁷ His view is that religion should be treated as a “a product of theistic obligation rather than individual freedom”¹⁷⁸ and that exemptions “undermine[] the constitutional values [they] purport[] to protect, [are] inherently arbitrary, force[] courts to engage in a balancing process that systematically underestimates the state interest, and threaten[] other constitutional values.”¹⁷⁹

¹⁷⁴ 494 U.S. at 890.

¹⁷⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

¹⁷⁶ 494 U.S. at 887.

¹⁷⁷ William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi.L.Rev. 308 (1991).

¹⁷⁸ William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi.L.Rev. 308 (1991), 327.

¹⁷⁹ Marshall, *In Defense of Smith and Free Exercise Revisionism*, *supra* note _ at 310.

An interesting question is to what extent the other process federalism values of better-tailored decision-making, increased responsiveness and increased actors to resolve problems translate into the religion sphere. Religion does not primarily or directly deliver democratic goods in the way states do, but an interesting argument could be made that just as they serve as democratic “cells” by promoting the non-liberal values underlying a liberal democracy,¹⁸⁰ they can be said to promote better-tailored non-governmental social impacts. Certainly empowering religion and religious actors increases the number of actors to resolve social problems. Religions are heavily involved in providing social services such as education, hospitals, and care for the poor, and have done so far longer than the state.¹⁸¹ The idea of the uneven distribution of policy preferences resulting in greater satisfaction through decentralized decision-making could apply with equal force here. Religious beliefs and social-good preferences are, like political beliefs, presumably unevenly distributed. Decentralizing decision-making on the question of religious beliefs and views of social goods by permitting and protecting various religious groups to espouse and carry out their own beliefs and conceptions of the social good should also result in greater overall satisfaction.

Process federalists’ understanding that state interests are protected through state institutions--“the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics”¹⁸²—is also relevant to the world of religious sovereigns. This part of process federalism theory would suggest the importance of protecting citizens’ religious interests through their religious associations, underscoring the value of a group rights approach to religious freedom issues.

D. “Federalism as Limits” and Its Values: The Judiciary to the Rescue

1. “Federalism as Limits” and its Values

Another major approach to federalism has been described as “federalism as limits.”¹⁸³ In many ways, this is a broad tent that includes a variety of modern theories that defend judicial involvement in limiting the federal government’s power. Following the federalism cases in the U.S. Supreme Court from the mid-1990s to the present,¹⁸⁴ these generally draw on themes of dual federalism,¹⁸⁵ but recognize that federal and state governments have concurrent jurisdiction over many issues. Supporters of “federalism as limits” type arguments include Michael McConnell,¹⁸⁶ John Yoo,¹⁸⁷ Steven Calabresi,¹⁸⁸ David Shapiro,¹⁸⁹ and others.¹⁹⁰ They rely on originalism¹⁹¹ and

¹⁸⁰ See the discussion above accompanying notes __ to ____.

¹⁸¹ See, e.g., Wilfred McClay, Honoring Faith in the Public Square, Christianity Today (November 2012) 28-9 (noting that the Catholic Church’s network operates the largest private educational and healthcare systems in the U.S., that the second-largest charity in the nation is the Salvation Army, and similar facts about religious actors).

¹⁸² Wechsler, *Political Safeguards*, *supra* note __ at 546.

¹⁸³ See, e.g., Chereminsky, , *The Assumptions of Federalism*, *supra* note __ at 1767.

¹⁸⁴ *Printz, Lopez, City of Boerne, Seminole Tribe, National Federation of Independent Business v. Sebelius*, No. 11-393 (June 28, 2012).

¹⁸⁵ See, e.g., Chereminsky, *The Assumptions of Federalism*, *supra* note __ at 1769 (seeing “federalism as limits” as describing pre-1936 Supreme Court decisions)

¹⁸⁶ Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. of Chi. L.Rev. 1484 (1987).

¹⁸⁷ John Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L.Rev. 1311 (1997).

¹⁸⁸ Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 Annals Am. Acad. Pol & Soc. Sci. 24 (2001).

¹⁸⁹ DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

the various values that federalism is seen to promote.¹⁹² Although, again, some of these values have been cited by earlier approaches, it is instructive to see the different emphasis and articulation of the values that comes in these versions of federalism. In response to spirited opposition, limits federalists propose more detailed understandings of the values that federalism promotes.

Core among the values limits federalists cite are federalism's increased representativeness, the role of states as "laboratories for experimentation," the value of competition among jurisdictions, the normative value of increased political participation, and the liberty protection role federalism plays. I address each of these in turn. First is the question of increased government responsiveness, relied upon also by process federalists. This is often lumped together with other economic arguments for federalism: that it increases encourages experimentation and increases competition among jurisdictions.¹⁹³ In support of the argument for responsiveness, contemporary limits theorists, relying in part on public choice theory, assert that, because preferences are not uniformly distributed, smaller decision-making units will lead to increased satisfaction overall.¹⁹⁴ Limits federalists recognize that situations involving economies of scale, significant externalities, or compelling arguments from justice may undermine this calculation.¹⁹⁵ Michael McConnell argues that federalism, however, is important to resolve a different externality problem, that of the tragedy of the commons.¹⁹⁶ He cites Nobel laureate James Buchanan as having mathematically demonstrated "that centralized decision making about projects of localized impact will result in excessive spending—excessive meaning more than any of the individual communities involved would freely choose. Each community would be better off if they could agree in advance (as they thought they did in the Constitution) to confine federal attention to issues of predominantly interstate consequence."¹⁹⁷ Limits federalists also argue for the value of innovation and competition that federalism reflects. States, being more numerous than the federal government, are statistically more likely to engage in innovation¹⁹⁸ and will compete for taxpayers and jobs through a race to the top.¹⁹⁹

Those arguing against limits federalism maintain that federalism is not as responsive for minorities that are not concentrated; federalism will not be as representative of the needs and interests of groups of lower social prestige and economic power spread as minorities among many states.²⁰⁰ Critics also argue that the economic values of responsiveness, experimentation, and

¹⁹⁰ See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380-95 (1985).

¹⁹¹ See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. of Chi. L.Rev. 1484 (1987); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 Annals Am. Acad. Pol. & Soc. Sci. 24 (2001), at 26.

¹⁹² See generally Chereminsky, *The Assumptions of Federalism*, *supra* note __ at 1768-9).

¹⁹³ See, e.g., Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *supra* note __ at 27.

¹⁹⁴ See, e.g., McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1493-94; Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 396-97.

¹⁹⁵ See, e.g., McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1494; Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 397-98.

¹⁹⁶ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1496.

¹⁹⁷ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1496 (citing JAMES BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962), 135-40).

¹⁹⁸ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1498.

¹⁹⁹ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1499; Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *supra* note __ at 27.

²⁰⁰ See Choper, *The Scope of National Power vis-à-vis the States*, *supra* note __ at 1619.

competition could be equally achieved through a non-federalist decentralized government.²⁰¹ In response, limits federalists assert that there is still a “prima facie economic case for constitutionally mandated decentralization”²⁰² and that federalism is particularly significant because it entrenches decentralization²⁰³ and because the value of political participation is normative as well as instrumental.²⁰⁴ This argument draws on “the model of participatory government, which goes as far back as Aristotle, [that] views political activity not as instrumental towards achieving a proportionate share in the distribution of available resources, to be used in a variety of private pursuits, but rather as a good in itself, something essentially implicated in the very concept of human freedom,” a good that is shaped in community with others and infuses the lives of its members with a “sense of purpose.”²⁰⁵ To the extent that political involvement in a community is seen as a normative good, this can best be achieved at the state level, where popular referenda and direct citizen participation are more common features.²⁰⁶ From this perspective, one of the important values of federalism is “preserving alternative modes of decisions making.”²⁰⁷ This perspective reflects a more communitarian approach, one that is inspired by “an ideal of a tightly knit community of persons who share each other’s values and concerns and for whom politics does not resolve to a periodical exercise of voting rights but rather stands for the most general expression of their common aspirations.”²⁰⁸

Finally is the conception, also seen earlier in nascent form, that federalism is an important bulwark against tyranny.²⁰⁹ Contemporary thinkers break this down into several aspects – federalism’s protection against tyranny by the majority, tyranny by a minority faction, tyranny by a self-interested central government, and federalism’s help in fostering voluntary compliance with law and public-spiritedness. Federalism protects against tyranny of the majority by diffusing significant powers among the states, limiting the power of a possibly tyrannical centralized government.²¹⁰ Further, individuals can leave states more easily than they can a nation, calculating that oppression by states, as problematic as that is, is less harmful than oppression by a centralized government.²¹¹ Limits federalism also raises the old argument that a large number of people removed from direct participation in politics are more susceptible to political demagoguery and mass manipulation²¹² and the newer argument that the issues in cases most worthy of federalist limits are those, such as *Lopez*, that involve federalizing of crimes and increases in federal power over issues of civil liberty.²¹³ Limits federalists also raise the issue of oppression by the few, relying on political choice theory that suggests that even originally weak organizations have a tendency to grow and ossify into a small number of powerful interests.²¹⁴ These interests capture power and use governmental power to

²⁰¹ See Choper, *The Scope of National Power vis-à-vis the States*, *supra* note __ at 1619.

²⁰² Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *supra* note __ at 28.

²⁰³ Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *supra* note __ at 29.

²⁰⁴ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at

²⁰⁵ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 400.

²⁰⁶ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 402-04.

²⁰⁷ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 404.

²⁰⁸ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 404.

²⁰⁹ See discussion *supra* accompanying notes __-__.

²¹⁰ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1504-05.

²¹¹ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1503.

²¹² Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 382 (citing Plato’s *REPUBLIC*, 564c-566d and SARTORI, *DEMOCRATIC THEORY* (1962)).

²¹³ Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *supra* note __ at 28; Yoo, *The Judicial Safeguards of Federalism*, *supra* note __ at 1397-98..

²¹⁴ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 383-84; Yoo, *The Judicial Safeguards of Federalism*, *supra* note __ at 1397-98.

reinforce their own cohesion or prevent competing groups from effectively organizing.²¹⁵ The “existence and vitality of local governments may provide an important counterbalance to the constellation of forces at the national level.”²¹⁶

Finally, limits federalists rely heavily on the idea that federalism prevents oppression by a self-interested, powerful central government.²¹⁷ This draws on public choice theory that suggests that federal legislators will expand federal jurisdiction to be able to regulate more issues and attract broader political support.²¹⁸ In addition, limits theorists suggests that the risk of authoritarianism at the federal level is more dangerous than that at the state level, because a centralized government would be more capable of maintaining a severe and durable oppression.²¹⁹ States’ power and authority, although themselves potentially dangerous to individual rights, are necessary to break a centralized government’s monopoly on coercive power and create a powerful bastion against the possibility of oppression. Rapaczynski suggests that this argument is supported by the German Weimar experience where federal imposition of martial law by the rightist central government on Prussia, the largest German state led within a few months to Goering’s use of Prussian forces to intimidate Nazi political opponents, permitting the rise of Hitler.²²⁰

Limits theorists recognize the challenges to the freedom arguments posed by U.S. history and the struggle for civil rights in the South.²²¹ The states’ rights arguments of dual federalism were used to justify and protect state oppression and denial of civil rights to its citizens of color. Those opposed to limits federalism argue that “history has demonstrated that the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores,” with subsequent pressures toward conformity and narrower tolerance for individual liberties.²²² Others note the problem of high exit costs and the limited practical mobility of an underclass as limiting the effectiveness of liberty through movement among states. McConnell’s response to these arguments is to suggest that while Madison was likely correct in arguing for protection of individual rights through a centralized government (although he does suggest modern public choice theory emphasizing the power of a small, cohesive faction cuts against Madison), the argument proves at most the importance of dual protections of rights through both states and a central government.²²³ He recognizes that some issues are so fundamental to basic justice that they are removed from both state and federal majoritarian control.²²⁴ Federalism, however, remains an important tactical consideration for those seeking greater protections when a national consensus has not emerged. McConnell illustrates this with the value of initial abolitionist state-by-state decisions;²²⁵ many contemporary advocates would see the same liberty value in state-level recognitions of same-sex-marriage rights.

²¹⁵ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 384.

²¹⁶ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 386.

²¹⁷ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1503; Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 384-86; Yoo, *The Judicial Safeguards of Federalism*, *supra* note __ at 1398-99.

²¹⁸ See, e.g., Yoo, *The Judicial Safeguards of Federalism*, *supra* note __ at 1399.

²¹⁹ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 388.

²²⁰ Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note __ at 389 n.119.

²²¹ See, e.g., McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1501-02.

²²² Choper, *The Scope of National Power vis-à-vis the States*, *supra* note __ at 1619.

²²³ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1506.

²²⁴ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1506-07.

²²⁵ McConnell, *Federalism: Evaluating the Founders’ Design*, *supra* note __ at 1506-07.

Limits theorists also argue that federalism promotes liberty through fostering voluntary compliance with law and public-spiritedness.²²⁶ By relying on smaller units of government close to the people, individuals have increased confidence in their rulers and willingness to voluntarily comply with law.²²⁷ This tracks public choice theory that suggests that cooperation sufficient to overcome the prisoner's dilemma or free-rider problems is more likely in a smaller community with greater cohesiveness and increased likelihood of monitoring and stigmatizing anti-social behavior.²²⁸ In a related vein, limits federalists argue that smaller dimensions promote public spiritedness, which encourages citizens to promote the common good over their own interests.²²⁹ This public spiritedness arises both from active engagement in policy formation, which increases individual buy-in to policies and laws, and to the feelings of benevolence or willingness to sacrifice for others, which increase as groups become smaller and closer to the individual and her family.²³⁰

2. Sherbert/Yoder and the Values of "Religious Freedom as Limits"

"Federalism as limits" arguments parallel most closely decisions and theorists supporting the exemption regime before *Smith*, usually known as the *Sherbert/Yoder* compelling state interest test. Under this approach, religious freedom is judicially protected through religious exemptions from neutral, general laws unless the state has a narrowly tailored compelling interest.²³¹ Although this doctrine as a constitutional interpretation of the Free Exercise Clause was struck down by *Smith*, it remains prevailing law in most jurisdictions, either through federal legislation valid as against the federal government²³² or state constitutional law or legislation.²³³

These approaches, however, could draw additional strength (and draw some additional criticism) from parallels with "federalism as limits." For example, arguments on representativeness raise (as mentioned in section IV.C.2) interesting possibilities for arguments of the value of religion in providing increased community responsiveness. Religious organizations, with their considerable reflection of social and value ordering, can make society more responsive to individuals' social and value preferences. Religions run the gamut from highly collective to highly individual, deeply involved in individuals' daily lives or having limited impact on daily living, supporting countercultural or mainstream values (whatever one chooses to identify as countercultural or mainstream). The variety of religions provides for a community that can be much more responsive to individual needs than could a centralized secular government, and increases overall societal satisfaction. Protecting religious freedom could then be seen as a communitarian value, one that enhances the possibilities of strong and viable community-building structures.²³⁴ This argument, however, is, like federalism, subject to counter-arguments of negative externalities or compelling arguments of justice. For example, accommodation of employee work schedules around Sabbath observance may turn on the extent of harm of the externality to co-workers of having to work additional weekend days. Theories of protection of religious freedom could also be subject to the

²²⁶ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1507-10.

²²⁷ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1507-08.

²²⁸ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1507-09.

²²⁹ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1507-10.

²³⁰ McConnell, *Federalism: Evaluating the Founders' Design*, *supra* note __ at 1509-11.

²³¹ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²³² Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4; Religious Land Use and Institutionalized Persons Act, Pub.L. 106-274, codified as 42 U.S.C. § 2000cc et seq.,.

²³³ See chart in BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW (2012).

²³⁴ See TUSHNET, RED, WHITE, AND BLUE, *supra* note __

arguments against federalism that both are not sufficiently representative for non-concentrated minority groups. Sexual minorities, for example, at least in religious groups that do not accept LGBT relationships, could argue that their religious groups are not sufficiently representative of their beliefs.

In a similar way, parallels with federalism could increase the emphasis on the value of religious experimentation and competition. Indeed, religious freedom's argument is even stronger. The number and size of states are essentially fixed, but religious groups regularly grow, fade, blossom, and divide. Religions have low exit costs and generally low startup costs. Protecting religious freedom facilitates the multiplicity of beliefs and the opportunity for new and potentially valuable religious developments. The argument for decentralization as a proxy for representativeness, experimentation, and competition is simply untenable in the religious field. Religious sovereigns govern in ways so different from a secular state that it is impossible to imagine that having religions as extensions of the secular state could produce the creative foment that is perpetually found in the religious world.²³⁵

Parallels between limits federalism and religious freedom have been more fully developed, however, along the lines of the arguments that federalism promotes non-instrumental values and the social good of political involvement in a community. Religious liberty theorists have examined a broad range of potential non-instrumental values that religious freedom protects: the normative value of religion,²³⁶ the normative value of First-Amendment institutions,²³⁷ the possibility that there could be correct religious beliefs,²³⁸ the value of alternative *nomos*,²³⁹ and the value of religious liberty as liberty.²⁴⁰ Communitarians recognize the more closely parallel argument that religion is valuable to help establish social ties.²⁴¹ If a value of federalism is seen as "preserving alternative modes of decision-making,"²⁴² this argument surely applies with even greater force in the argument for religious freedom, given the variety and distinctiveness of religious modes of decision-making.

Religious freedom arguments can also be made that parallel federalism's bulwark-against-tyranny arguments. Religion has traditionally had a prophetic role, one that has been critical of dominant power structures and sees its role as speaking truth to power.²⁴³ While history is replete with religions that have been co-opted by authoritarian regimes or oppressive policies, there are also many examples of religions serving as loci of opposition, such as the Polish Catholic Church under Communist rule, or the religious actors and groups who were at the forefront of the abolitionist movement. Protecting the sphere of action of religious groups supports their authority, which can be used in ways that challenge state policies, such as promoting racial integration of schools,²⁴⁴

²³⁵ See Eileen Barker, *Why the Cults? New Religious Movements and Freedom of Religion or Belief*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK, *supra* note ___ at 571

²³⁶ JOHN GARVEY, WHAT ARE RIGHTS FOR?

²³⁷ Horwitz, *First Amendment Institutions*, *supra* note __.

²³⁸ HORWITZ, POLITICAL AGNOSTICISM.

²³⁹ Cover, *Narrative and Nomos*, *supra* note __.

²⁴⁰ Laycock, *Religious Liberty as Liberty*, *supra* note __.

²⁴¹ See TUSHNET, RED, WHITE, AND BLUE; SANDEL, WALZER, TAYLOR.

²⁴² Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, *supra* note ___ at 404.

²⁴³ See Carl Esbeck, *Regulation of Religious Organizations*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW (James A. Seritella et al., eds., 2006), 349, 388. He contrasts the prophetic model of religion with a priestly model that sees the state as an agent for good. *Id.* at 387-88.

²⁴⁴ Michael McConnell notes that the Catholic Church in some states racially integrated its schools well before the public schools were integrated.

opposing abortion and the death penalty, or celebrating same-sex marriages.²⁴⁵ Religions' prophetic and authoritative voice (at least among their members), similarly positions them to challenge and help counterbalance capture of national politics by minority interest groups. Just as in the federalism context, however, the challenge has been increasingly raised in the religious context that religions, like states, are themselves restrictive of liberty.²⁴⁶ Unlike states, however, religions lack police power and have comparatively low exit costs, suggesting that liberty-limiting concerns may not be as significant in the religion sphere as they are in the federalism context. Further, just as federalism may be tactically helpful in areas where a national consensus on rights has not been achieved, so too religious freedom has been used to claim rights protections not yet covered by federal law.²⁴⁷

The argument can also be made that religious freedom, like federalism, can help prevent oppression by a self-interested powerful government. Just as granting power to states breaks the central government's monopoly on coercive power and places them in a position to effectively resist federal oppression, religious freedom breaks a secular state's monopolistic claims to truth and authority. Protecting the authority and soft power of religion ensures that there are rivals to the self-aggrandizement and mission creep of a secular state. Civil society theorists have extensively discussed the importance of religion and other elements of civil society in this regard.²⁴⁸

Finally, religion has strong parallels with federalism's value of fostering voluntary compliance with law and public-spiritedness. Religion has historically been important to establishing the rule of law²⁴⁹ and current thinking on the rule of law argues that to be effective, rule of law requires a correspondence between the law and social norms.²⁵⁰ Law imposed in contravention of the social norms of a majority will see a decline in voluntary compliance and "if the gap between law and lived values is too large, the rule of law itself will not take hold."²⁵¹ Religions have served an important role in helping establish and promote social norms and provide community buy-in through reflecting the authority of traditional religious-legal institutions.²⁵² Many successful democracies, such as Israel and India still "deviate from modern liberal legal practice by accommodating traditional religiously based rules, precisely in order to get buy-in from the communities involved."²⁵³ Religion not only promotes voluntary compliance with law, but, as empirical studies suggest,²⁵⁴ has a high correlation with other aspects of democracy and civic values.²⁵⁵ For example, religious Americans of all political persuasions are up to twice as civically engaged as secular Americans.²⁵⁶ Peter Berkowitz further argues that liberal democracies depend on

²⁴⁵ See SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (2010) .

²⁴⁶ See, e.g., Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347 (2011-12); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011); Leslie C. Griffin, *Ordained Discrimination: The Cases Against the Ministerial Exception 1* (UNIV. OF HOUSTON PUB. LAW & LEGAL THEORY SERIES 2011-A-9, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936073.

²⁴⁷ See above notes __ and __.

²⁴⁸ See, e.g., RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (1984); ADAM SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1995).

²⁴⁹ Francis Fukuyama, *Transitions to the Rule of Law*, 21 JOURNAL OF DEMOCRACY 1 (January 2012), 35-37.

²⁵⁰ Francis Fukuyama, *Transitions to the Rule of Law*, 21 JOURNAL OF DEMOCRACY 1 (January 2012), 37.

²⁵¹ Francis Fukuyama, *Transitions to the Rule of Law*, 21 JOURNAL OF DEMOCRACY 1 (January 2012), 37.

²⁵² Francis Fukuyama, *Transitions to the Rule of Law*, 21 JOURNAL OF DEMOCRACY 1 (January 2012), 39.

²⁵³ Francis Fukuyama, *Transitions to the Rule of Law*, 21 JOURNAL OF DEMOCRACY 1 (January 2012), 42; see also the case of Spain, GERHARD ROBBERS, *CHURCH AUTONOMY* (Spain chapter).

²⁵⁴ PUTNAM AND CAMPBELL, *AMERICAN GRACE* at 459-461.

²⁵⁵ See discussion in Section IV.B.2; see generally PUTNAM AND CAMPBELL, *AMERICAN GRACE*, 443-492.

²⁵⁶ *AMERICAN GRACE* at 453-54.

the development of non-liberal moral and intellectual virtues such as “reflective judgment, sympathetic imagination, self-restraint, the ability to cooperate, and toleration.”²⁵⁷ Current research and thinking seems to suggest that religion has an even stronger argument than federalism for its ability to fostering voluntary compliance with law and public-spiritedness.

E. Modernists and Post-Modernists

1. Madisonians, Decentralizers, and Neo-Federalists: Federalism’s Values (or Lack Thereof)

Some contemporary thinkers about federalism advocate significantly different proposals for dealing with the issues federalism raises. I address three major groupings of these proposals: advocates of neo-Madisonian “cooperative federalism,” who examine the complex modern interrelations between states and the federal government; decentralizers such as Edward Rubin and Malcolm Feely, who advocate replacing federalism with decentralization; and neo-Federalists such as Akhil Reed Amar and Heather Gerken, who advocate for federalism, but reject the underlying conception of state sovereignty. In many ways, these thinkers are all grappling with what role is appropriate for federalism in contemporary America, given the rise of the welfare state and the destructive legacy of states rights’ theories on civil rights.

Neo-Madisonian cooperative federalists rely heavily on the work of Morton Grodzins, who identified the complexities of separating federal and state interests and actors in the modern regulatory state,²⁵⁸ and argued that the primacy of the federal government in a cooperative structure reflects what Madison perceived federalism to be.²⁵⁹ Morton Grodzins is most noted for his insights on the complex intermingling of federal and state power and the image he invokes of a marble cake.²⁶⁰ He asserts:

The greatest complications arise when attempting to determine the locus of decision-making power. For example, it cannot be assumed that members of the national legislature or of the national executive speak only in the ‘nation’s view’ while state and local offices represent only parochial non-national views. . . . An analogous problem is the way in which special interest groups – date growers or electric train manufacturers, for example – will identify themselves as representing the local or state interest when the burden of their position is one of avoiding national regulation. . . . Even when states and localities are speaking for themselves, it is often not easy to determine whether their views are distinct from the national view. This problem is exacerbated by the universal tendency of all Americans to legitimate their actions in terms of the national interest.²⁶¹

Cooperative federalists see the complexity as “creatively blending” the powers of federal and state governments, “using the federal fisc to harness state and local capacities to national objectives while allowing for a measure of decentralized flexibility in implementation.”²⁶² These theories draw on

²⁵⁷ PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999) at xi.

²⁵⁸ MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (1966).

²⁵⁹ James S. Liebman and Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L.REV. 4 (2004), 837; Charles S. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of the Republican Government*, 36 WM. & M. Q. (3rd ser.) 219 (1979).

²⁶⁰ GRODZINS, *THE AMERICAN SYSTEM*, 60-88.

²⁶¹ GRODZINS, *THE AMERICAN SYSTEM*, 11.

²⁶² Richard B. Stewart, *Federalism and Rights*, 19 GA. L.REV. 917, 957-58 (1985).

Madison's efforts to strengthen federal control over the states, such as his proposed federal power to negate state laws.²⁶³ Centralized governments are also better-placed in this view to remedy discrimination and injustice against minorities.²⁶⁴ Critics of unlimited cooperative federalism argue that such strong centralized power exercised in "cooperative" methods such as conditional grants can also be profoundly destructive of state and local autonomy in restricting state options, conscripting state actors in the service of federal politics, and constraining the fiscal direction of states, thus impairing federalism's values of accountability and representativeness.²⁶⁵

Some take the modern concerns with federalism to their logical extreme and advocate eliminating federalism in favor of decentralization.²⁶⁶ These approaches argue that the most significant values associated with federalism are just those of decentralization, and that the remaining normative arguments for federalism are insufficient.²⁶⁷ A decentralized system where "decisions are made by subsidiary units and the central authority defers to those decisions" is contrasted with a federal system, where "subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority, and leaders of the subordinate units draw their power from sources independent of that central authority."²⁶⁸ In contrast to decentralization, which is seen as an instrumental, managerial strategy, federalism is a recognition of rights, which, although they can be justified by instrumental arguments, reflect a collective willingness of society to subordinate its purposes to those of the rights holders.²⁶⁹

Decentralizers argue that federalism arguments for representativeness, competition, increased choice, and experimentation are really just decentralization arguments.²⁷⁰ Federalism's arguments for the diffusion of government power and protection of communitarian values, however, are seen as unique to federalism. Rubin and Feeley argue that "[w]hile there is an undeniable validity to [the diffusion of power] argument for federalism, it can readily be overstated,²⁷¹ citing the fact that the only power diffusion at issue in federalism cases is administrative power. Rubin and Feeley's see federalism's value in its argument for community, which in turn gives meaning and definition to peoples' lives, and facilitates decision-making within a group's own context and system of relationships and meaning.²⁷² Rubin and Feeley particularly address the concepts of affective communities, where individuals in the group feel a personal or emotional connection to one another, and political communities (also called "dialogic" or "rational" communities) where members of the group engage in a collective decision-making process regarding major questions of

²⁶³ James S. Liebman and Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L.REV. 4 (2004), 837; Charles S. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of the Republican Government*, 36 WM. & M. Q. (3rd ser.) 219 (1979).

²⁶⁴ Liebman and Garrett, *Madisonian Equal Protection*, *supra* note __ at 849.

²⁶⁵ Richard B. Stewart, *Federalism and Rights*, 19 GA. L.REV. 917, 958-59 (1985).

²⁶⁶ Edward L. Rubin and Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L.REV. 903 (1994); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L.REV. 253 (1993).

²⁶⁷ Edward L. Rubin and Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L.REV. 903 (1994).

²⁶⁸ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 911.

²⁶⁹ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 913.

²⁷⁰ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 914-26.

²⁷¹ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 929.

²⁷² Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 936 (citing epistemologists Richard Rorty and Stanley Fish; political philosophers Michael Walzer, Michael Sandel, Robert Wolff, and Hannah Arendt; political scientist Benjamin Barber, sociologists Philip Selznick and Robert Bellah, and legal writers Cass Sunstein and Frank Michelman).

self-governance.²⁷³ They argue that federalism does not protect or foster affective communities because they involve smaller groups with stronger emotional attachments than states.²⁷⁴ Federalism in the United States, they argue, likewise does not foster political communities because states are artificial administrative units and “the uniqueness has long since given way to the national culture.”²⁷⁵ Decentralizers reject notions of state sovereignty as this “presents too much danger to outsiders and its own members”²⁷⁶; the self-assertion involved in sovereignty is instead properly “associated in our liberal culture with an autonomous individual.”²⁷⁷ Some theorists of decentralization also draw on postmodern subjectivity and work on localism, asserting that the centered subject and collective identities are fluid and suggesting alternate views of de-centered legal subjects that would include cities.²⁷⁸

There are a variety of neo-Federalist theorists—two of the most prominent are Akhil Reed Amar²⁷⁹ and Heather Gerken.²⁸⁰ Like decentralizers, both reject notions of sovereignty, but both argue that federalism can still be meaningfully retained. Heather Gerken argues, drawing on localism, that federalism should be “minority rule without sovereignty” and can be seen in all levels of institutions down to the level of juries, zoning commissions, local school boards, etc.²⁸¹ She argues for the need to orient “federalism-all-the-way-down,” as she defines it, as promoting “voice, not exit, integration, not autonomy, and interdependence, not independence.”²⁸² Federalism-all-the-way down reflects a distinct view of power, the “power of the servant,” which turns on interdependence and integration, akin to a checks and balances model with integrated multiple decision-makers.²⁸³ By orienting federalism around institutions that lack sovereignty, she argues, a nationalist account of federalism can be created that “converts federalism’s signature vices into plausible virtues”—the national majority can still reverse minority oppression if it is willing to expend the political capital and, through local institutions, minorities and outsiders can be brought into the political body and exercise power in ways that feed back into national debates.²⁸⁴

Akhil Reed Amar argues that federalism without state sovereignty is not only possible, but more reflective of the conceptions of the Founders.²⁸⁵ He suggests that sovereignty was understood to be located in the people, rather than the states, tracing this back to the English Glorious revolution of 1688, where legitimacy was seen as flowing up from the people instead of down from God.²⁸⁶ Amar argues that the U.S. constitution vested sovereignty in the people of the United States as a whole, not merely as states or people of various states.²⁸⁷ He rejects the conception of state sovereign immunity for *ultra vires* acts, seeing the Eleventh Amendment as merely a refusal to

²⁷³ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 937.

²⁷⁴ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 941.

²⁷⁵ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 943.

²⁷⁶ Frug, *Decentering Decentralization*, *supra* note __ at 255.

²⁷⁷ Frug, *Decentering Decentralization*, *supra* note __ at 254.

²⁷⁸ Frug, *Decentering Decentralization*, *supra* note __.

²⁷⁹ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987).

²⁸⁰ Heather K. Gerken, *The Supreme Court 2009 Term Foreword: Federalism All the Way Down*, 124 Harv. L.Rev. 4 (2010).

²⁸¹ Gerken, *Federalism All the Way Down*, *supra* note __ at 8.

²⁸² Gerken, *Federalism All the Way Down*, *supra* note __ at 7.

²⁸³ Gerken, *Federalism All the Way Down*, *supra* note __ at 38.

²⁸⁴ Gerken, *Federalism All the Way Down*, *supra* note __ at 46-48.

²⁸⁵ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987).

²⁸⁶ Amar, *Of Sovereignty and Federalism*, *supra* note __ at 1430-31.

²⁸⁷ Amar, *Of Sovereignty and Federalism*, *supra* note __ at 1448-51.

extend independent federal jurisdiction over suits against states by noncitizens of that state.²⁸⁸ Federalism is seen as a “two-edged sword for constitutional justice” where each constitutionally limited government can police the constitutional limits on the other’s powers and remedy the other’s constitutional violations.²⁸⁹

2. Madisonians, Anti-Religious Freedomists, and Neo-Religious Freedomists?

The modern and post-modernist takes on federalism lead to interesting and varied comparisons to religious freedom. Echoes of neo-Madisonians can be heard in theorists who focus on the complex interrelations of religion and the state. Derek Davis, for example, has described the U.S. system as being one with “separation of church and state, integration of religion and politics, and accommodation of civil religion.”²⁹⁰ Others have noted that “the state and religious organizations continue to expand the areas in which they have contact. Thus while officially separated, religious organizations and representatives of government have a level of interaction that is arguably higher than ever.”²⁹¹ Tension also arises with “Christianity as the culturally dominant religion in America and a constitutional order that treats all religions alike.”²⁹² Drawing on neo-Madisonian approaches and theories of civil society, some argue for the value of cooperation between religion and the state. Carl Esbeck describes this as a “priestly” model of a church’s role, in contrast to a prophetic role that challenges the state.²⁹³ The “priestly” model sees the democratic state as an agent for good, which builds on and encourages voluntary impulses. “Avoiding a monolithic, state-monopolized structure to the delivery of service is desirable,” he argues, and religious organizations, through voluntary agencies, can perform this role without excessive regulation or autonomy problems.²⁹⁴ Given the realities of a modern welfare state, religious organizations must look to the government to adequately fund social welfare and education.²⁹⁵ This approach, however, has been criticized by those arguing that seeking state funds distorts religious priorities, that religious activity cannot be easily segregated into temporal and sectarian, that government regulation proves too intrusive, that religions cannot challenge the status quo if they are co-opted with state funds, that religions should not use resources to do what can be done by the state, that state funding draws social services away from religious control, that religion cannot contribute meaningfully without remaining apart from the state, and that the church must be free to focus on its primary mission.²⁹⁶ These parallel some of the concerns about cooperative federalism restricting state options and skewing the federalist values of accountability and representativeness.

²⁸⁸ Amar, *Of Sovereignty and Federalism*, *supra* note __ at 1473-92.

²⁸⁹ Amar, *Of Sovereignty and Federalism*, *supra* note __ at 1493.

²⁹⁰ Derek H. Davis, *Separation, Integration, and Accommodation: Religion and State in America in a Nutshell*, 43 J. Church & State 5 (2001).

²⁹¹ Rhys H. Williams and John P.N. Massaud, *Religious Diversity, Civil Law, and Institutional Isomorphism*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES (James A. Serritella et al., eds. 2006), 111, 114.

²⁹² Derek H. Davis, *Introduction*, THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES (Derek H. Davis, ed., 2010), 5.

²⁹³ See Carl Esbeck, *Regulation of Religious Organizations*, in Religious Organizations in the United States: A Study of Identity, Liberty, and the Law (James A. Serritella et al., eds., 2006), 349, 387-88.

²⁹⁴ Esbeck, *Regulation of Religious Organizations*, *supra* note __ at 388.

²⁹⁵ Esbeck, *Regulation of Religious Organizations*, *supra* note __ at 388.

²⁹⁶ Esbeck, *Regulation of Religious Organizations*, *supra* note __ at 388-89; Paul J. Griffiths, *Religious Allegiance and Political Sovereignty*, in THE SACRED AND THE SOVEREIGN: RELIGION AND INTERNATIONAL POLITICS (John D. Carlson and Erik C. Owens, eds., 2003), 247-55.

Akin to decentralizers' push to eliminate federalism, reductionists argue that religious freedom itself should not be privileged over other forms of speech or expression.²⁹⁷ The only values these theorists see in the First Amendment are "the secular, relativist political values of the Enlightenment which are incompatible with the fundamental nature of religious faith."²⁹⁸ Just as decentralizers try to strip the values of decentralization from federalism, so too do reductionists see their role as winnowing out values relating to religious freedom that are still acceptable in modern life. Like decentralizers, those opposing distinctive protections of religious freedom are concerned about the power inherent in seeing sovereignty in religious organizations and its potential for abuse.²⁹⁹ The parallel with decentralizers suggests that perhaps statist assumptions that religions are mere creations of the state which lack normative value as alternative communities and loci of power may be also at play. Decentralizers criticize federalism's assumption for the need of normative disagreement among subordinate units so that different units can subscribe to different value systems, asserting that disagreements are instrumental and that "the criteria for judgment are shared by or imposed on those within the system."³⁰⁰ Unlike states and federal governments, however, religions and a secular government do subscribe to different value systems. It would seem difficult to suggest that their disagreements are merely instrumental and that they exhibit shared criteria for judgment. It could easily be argued that clash of value systems between the state and religion reveals the inadequacy of a managerial strategy for instrumental disagreements or the conception that fundamental disagreements between the state and religion can be commonly resolved by a centralized decision-maker's fiat.³⁰¹ Reductionist approaches, however, in suggesting that religions are the creations of the state or the sum of religious expression and religious speech, seem to suggest that this could be the case.

What is particularly interesting here are the arguments that decentralizers see as unique to federalism—diffusion of power (discussed above in section IV.D.2) and formation of community. Rubin and Feeley's argument reject communitarian arguments for federalism because of the arbitrary and large nature of states. These arguments seem to cut against the arguments of those opposed to the privileging of religion. Religions, in contrast to states, are affective communities,³⁰² which provide a deep source of identity. Post-modern arguments about the impossibility of a centered self and the fluid nature of group definition are not necessarily problematic in the religious context. In contrast to fixed ideas of a centered-self state, religions, according to some accounts at least,³⁰³ have always defined themselves in fluid and anti-essential terms. Religious engagement with text and with the divine or transcendent, has always involved interpretation and narrative. Post-

²⁹⁷ See Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L.REV. 75 (1990); Frederick Gedicks, "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions" 20 U. ARK. LITTLE ROCK L. J. 555 (1998), 574 ("There no longer exists a plausible explanation of why religious believers—and only believers—are constitutionally entitled to be excused from complying with otherwise legitimate laws that burden practices motivated by moral belief"); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Nondiscrimination Law* 75 FORD. L.REV. 1965 (2007).

²⁹⁸ Gey, *Why is Religion Special*, *supra* note __ at 79.

²⁹⁹ See Fredrick Mark Gedicks, *Ironies of Hosanna-Tabor: Three Speculations* (unpublished paper)

³⁰⁰ Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 912.

³⁰¹ See Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 912 ("It is possible, and indeed quite common, to resolve such normative disagreements [in federalism] by a centralized decision-maker's fiat.").

³⁰² Rubin and Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note __ at 945 ("To be sure, there are affective communities to be found in various parts of the United States: religious groups, Native American tribes, even towns with relatively homogenous populations.").

³⁰³ See, e.g., RADICAL ORTHODOXY (John Milbank, et al., eds. 1999) (offering mainstream Christian post-modern accounts of Christianity).

modern critiques of sovereignty, such as Frug's and Foucault's, suggesting that "no one could trust such an entity to exercise unsupervised power" and that fear of sovereign power "is so common that it is routinely converted into a subjected sovereignty, a sovereignty limited by some other sovereignty,"³⁰⁴ certainly also has its parallels among opponents of broad conceptions of religious liberty.³⁰⁵ From the perspective of religious believers, the sovereignty that limits the sovereignty of religions is often seen as divine or transcendent sovereignty. Some religious thinkers have also emphasized that the sovereignty of religion is one not of this world, "truth, not of empire but of grace and redemption."³⁰⁶ While these approaches and forms of protection may be not be credible to the non-religious, the continued loyalty and willingness of many religious believers to be subject to religious authority suggests that fears of sovereignty may not be universal.

Neo-Federalists' challenges to state sovereignty also provide interesting possibilities for cross-over into the religious freedom arena. Both Gerken's "federalism-all-the-way down" and Amar's sovereignty in the people reflect some current criticisms of religious freedom—that religions may not always address the concerns of individuals within religions. Gerken's approach would perhaps suggest that one should look at individuals as having sovereignty and study how their interactions with religion and with the state provide them voice, interdependence, and integration. The distinctive normative natures of religion and the state as opposed to states and a central government create some problems for cross-over here: individual involvement and voice in religion does not necessarily work upward in as direct a chain from religion to the state as it could from states to a central government. Voice, however, is highly relevant in a religious context. As Paul Horwitz notes, recognizing concerns about how churches use their authority can "lead us to think more clearly about the role of internal and external monitoring by church authorities, the laity, and citizens at large in encouraging churches to wield their power prayerfully, compassionately, and responsibly."³⁰⁷ Gerken's approach also suggests the possibility of interesting work looking into the way that religious individuals interact with religion and the state—questions of dissenters, formation of orthodoxy, and creation of social norms, law and community. From the view of the "power of the servant" she suggests, religious individuals also become part of religion's involvement in the decision- and norm-making societal chain. Individual involvement in religions and sub-religious organizations may form a significant way for minorities to become civically engaged, which would correlate with some of the empirical studies mentioned earlier about the increased civic engagement of religious Americans.³⁰⁸

Gerken's sense of the value of federalism being primarily minority rule has particular salience for religion, as unlike states, religions are discrete and at times insular minorities.³⁰⁹ While she would also probably look at groups below the level of a religion as a whole (perhaps religious orders, volunteer groups, congregations, campus crusades, etc.), it is significant that religious freedom gives religious individuals, religious groups, and religions as a whole voice and involvement in society. Unlike federalism, religious freedom in the U.S. has been understood both at a collective and an individual level and has been instrumental in giving voice and involvement to

³⁰⁴ Frug, *Decentering Decentralization*, *supra* note __ at 255 (citing MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 221 (1977)).

³⁰⁵ See, e.g., MARCI A. HAMILTON, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW (2005).

³⁰⁶ See Fed Dallmayr, *Sacred Nonsovereignty*, in THE SACRED AND THE SOVEREIGN: RELIGION AND INTERNATIONAL POLITICS (John D. Carlson and Erik C. Owens, eds., 2003), 256-264.

³⁰⁷ Horwitz, Act III of the Ministerial Exemption, *supra* note __ at 991.

³⁰⁸ See *supra* notes __ - __.

³⁰⁹ No single U.S. denomination or tradition contains more than 27% of the U.S. population. See, e.g., PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. LANDSCAPE SURVEY, available at <http://religions.pewforum.org/affiliations>.

racial, ethnic, and religious minorities.³¹⁰ It would be interesting to look at the role religious freedom has played in giving otherwise unheard voices to religious minorities such as of Jews, Sikhs, Jehovah's Witnesses, or others and integrating them into the American political and social world.³¹¹

Amar's ideas about sovereignty vesting in the people could also have multiple interesting crossovers. To some extent, this parallels the arguments made that religious organizations should not be exempt from discrimination laws, seeing the sovereign power instead in the individual citizens.³¹² Amar, however, does not argue that federalism should be not protected, merely that states should not be immune from *ultra vires* acts, raising the interesting parallel of whether religious freedom could be protected so long as religions are not acting unconstitutionally. His arguments as a whole, however, may not directly apply, since he relies heavily on the history of the passage of the Constitution to suggest that the Founders understood sovereignty as being vested in the people. Unlike states, however, the question of sovereignty of religion was not raised explicitly. To the extent this question is addressed in the First Amendment, it can be argued that the explicit ban on Congressional jurisdiction left religious sovereignty either with religions or in the states, but an argument like Amar's on federalism in the religion field would be much more tenuous. To make a textual argument asserting complete jurisdiction by American citizens over religion, he would have to depend on the First Amendment (implicitly) granting sovereignty over religions to states, which was then taken up by "we, the people" through the Fourteenth Amendment. It is possible that Amar's ideas of resting sovereign power in the citizens may also suggest conceptions of group religious rights as being collective expressions of the individual rights of citizens rather than group rights *per se*. Amar also focuses on the importance of states as legal protectors of rights vis-à-vis the federal government. While, as discussed above, religions provide important checks on government and protections of individual liberties, religions lack the coercive power of states in a federal system and cannot directly protect constitutional rights against federal violations.

V. Taking Sovereignty Seriously: Sovereignty and "Specialness"

A. The Value and Values of the Federalism Heuristic

Section IV discussed theories of federalism, their parallels in religious freedom theory, and the values in which both are grounded. This use of federalism as a heuristic device illuminates many of the values underlying religious freedom, as well as the values that might cause some to question or limit it. Some of the possible arguments and values favoring a broad understanding of religious freedom include: the recognition of preexisting ordering systems; the value of legal pluralism; the value of mediating institutions that avoid statist or atomistic constructions of society, religion as a cell of democratic sentiment, impulse, and action; better-tailored non-governmental problem-solving; the development of non-liberal values needed in a liberal democracy; increasing the number of actors to resolve social problems; increasing social satisfaction by decentralizing

³¹⁰ See, e.g., JAMES T. CAMPBELL, *SONGS OF ZION: THE AFRICAN METHODIST EPISCOPAL CHURCH IN THE UNITED STATES* (1995); ROBERT GREGG, *SPARKS FROM THE ANVIL OF OPPRESSION: PHILADELPHIA'S AFRICAN METHODISTS AND SOUTHERN MIGRANTS, 1890-9140* (1998); BARRINGER GORDON, *THE SPIRIT OF THE LAW*.

³¹¹ See, e.g., Elizabeth A. Sewell, *Religious Liberty and Religious Minorities in the United States*, in *THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES* (Derek H. Davis, ed., 2010), 249-275; BARRINGER GORDON, *THE SPIRIT OF THE LAW* at ___ (suggesting that religious freedom has played a unifying role in American life as discrete religious groups have joined together in common legal causes).

³¹² See Corbin, *Above the Law?*

decision-making on religious beliefs, social ordering, and other social goods; the value of promoting religious experimentation and competition; protecting non-instrumental values such as communitarianism, the normative value of religion or First Amendment institutions, the possibility of religious truth, and the value of alternative *nomos* and increased liberty; strengthening institutions that can criticize and provide checks on government oppression; preventing authoritarianism by breaking a state's monopolistic claims on truth and authority; helping establish voluntary compliance with law and public-spiritedness; the value of religions in delivering social services; and increasing the civic engagement, voice, and role of minority individuals and groups. The federalism heuristic also brings to light several arguments that could be made against religious freedom: that religions are insufficiently representative of their members; that privileging religions will limit rights of individuals; post-modern critiques of sovereignty and power structures; and assumptions that power must reside in the nation or in the people instead of intermediate groups.

The federalism heuristic raises many other interesting issues which are beyond the scope of this paper, such as what insights theories and experiences of federalism and religious freedom share on the question of the proper enforcement mechanisms. The striking parallels between *Garcia* and *Smith* and judicial enforcement and the religious exemption regime suggest that this would also be a fruitful topic. It would also be interesting to look more closely at the implications that the religious freedom parallel has for federalism, including how federalism was and can continue to be (perhaps outside the U.S.) a system to work out tensions between conflicted loyalties, whether a direct right of action for federalism violations (or federalism violations in a particularly significant area) would be possible or sensible along the model of the Religious Freedom Restoration Act, whether federalism rights should be lodged in smaller units than states, and whether state citizenship could be formulated in a more fluid manner, perhaps with dual citizenship, in a way that would decrease exit costs and increase competition and experimentation. Understanding religion as a sovereign can serve to increase the comparative resources available not only to religion scholars, but also to federalism ones.

Another interesting aspect of religious freedom that the federalism heuristic illuminates is the question of whether religious freedom can be divided into categories of structural protections and individual rights,³¹³ or whether there is an underlying unity of the Free Exercise and Establishment Clauses. This issue arises in the federalism context, where it has been argued that the Framers did not see the distinction between structural protections (such as enumerated powers) and rights (such as the Ninth and Tenth Amendments), and thus outlines of rights should be understood primarily as jurisdictional limits on the federal government.³¹⁴ The religion-as-sovereign approach reinforces claims of an “underlying unity” between the Establishment Clause and the Free Exercise Clause, *i.e.*, that, like federalism, these can be seen as complimentary structural solutions to protecting religious sovereignty and freedom.³¹⁵

B. So Is Religion “Special”? : Sovereignty and Deep Structure

The usefulness of the federalism heuristic in the religious freedom context is manifold. Specifically, for purposes of this article, the heuristic not only identifies numerous overlapping

³¹³ See Fredrick Mark Gedicks, *Ironies of Hosanna-Tabor: Three Speculations* (unpublished paper).

³¹⁴ See Yoo, *The Judicial Safeguards of Federalism*, *supra* note ___ at 1392-3; Akhil Reed Amar, *Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

³¹⁵ See text accompanying note ___.

values at the core of religious freedom, but itself serves to further illustrate how religion is different from other claims of conscience or philosophy or other associational structures. In contrast to claims of philosophical belief, associational structures, or conscience,³¹⁶ concepts of sovereignty and methods of sharing sovereignty lie at the heart of religious freedom. Sovereignty is simply inapposite in describing other associational structures and philosophical or moral claims. Whether or not one accepts the continued viability of sovereignty as a concept, it is the elephant in the federalism room and, I would argue, in the religious freedom one. Heather Gerken's comment in the federalism context rings true in the religious one as well: "Even as scholars have rejected a sovereignty account, they remain haunted by its ghost. They continue to deploy narratives about power, jurisdiction, and identity that mirror those of sovereignty's champions."³¹⁷

For example, Steven Gey, who first explicitly posed the question of whether religion is "special," argued for a strict separationist approach and opposed religious accommodations, arguing that religion is an inappropriate basis for political and constitutional "favoritism."³¹⁸ His arguments, however, are laden with arguments about sovereignty, control and jurisdiction. For example, he summarizes his account of religious accommodations thus: "The essence of the accommodation principle requires that democratic control over certain aspects of public policy be subordinated to a higher force that is beyond human control."³¹⁹ Bill Marshall spends his force opposing "religion as identity," which focuses on the role of religious communities.³²⁰ He sees the Establishment Clause, for example, as "guarding against the state's being captured as a vehicle to promote religious identity,"³²¹ implicitly accepting religion as a rival power structure. Arguments over religious exceptionalism and religious liberty turn on sovereignty because the deep structure of religion and law involves sharing of sovereignty. Understanding religion as a sovereign has been a key part of the structure of Western political and religious history,³²² and continues to inform our approaches to expand or restrict religious liberty. Religious freedom itself in the West was formed through similar successful and less successful attempts to disentangle and juggle the competing demands of church and state sovereigns.³²³

On their face, Sager and Eisgruber, Gedicks, and others who raise equality and individual autonomy concerns seem to avoid questions of authority or jurisdiction. Their appeals to liberal democratic values such as autonomy, equality, however, can easily be understood in a sovereignty context—in essence, they are trying to solve the problem of competing sovereigns by eliminating the power of the religious one. By leveling the charge against religion that it is illiberal and

³¹⁶ Claims of conscience are the closest to making sovereignty-like claims—in essence they claim a conscience as a sovereign of one. Unlike the sovereignty of religion, however, self-given sovereignty lacks historical depth and horizons of meaning and fails to meet the traditional understanding of sovereigns—conscience is not a mutual recognition of legitimate authority involving some form of territoriality or jurisdiction. Cf. CHARLES TAYLOR, *A SECULAR AGE* (2007).

³¹⁷ See Gerken, *Foreword: Federalism All the Way Down*, *supra* note __ at 13.

³¹⁸ Gey, *Is Religion Special?*, *supra* note __ .

³¹⁹ Gey, *Is Religion Special?*, *supra* note __ at 183.

³²⁰ Marshall, *Religion as Ideas: Religion as Identity*.

³²¹ Marshall, *Religion as Ideas: Religion as Identity*, 399.

³²² It would be interesting to explore how religion as a sovereign has been part of the structure of other societies, their histories, and their resulting conceptions of religious freedom (or lack thereof). Certainly the Ottoman Turk millet system suggests religious sovereignty, if a decidedly two-tier one. The French revolution or Kemal Attaturk's anti-clericalism also suggest that they recognized religion as a competing sovereign and sought to eradicate it—perhaps foreshadowing and leading to the contemporary sentiment in both France and Turkey that religious freedom requires an absence of religious symbols in the public sphere.

³²³ See *supra* note __.

undemocratic, they accept the terms of the secular sovereign to define religious sovereigns out of any meaningful authority. This is rather like charging that states are undemocratic because they do not impose uniform law throughout a nation.³²⁴ If they did impose uniform national law, however, they would cease to be states, just as religious communities would lose their character as affective communities if they became liberal democratic political communities.³²⁵

This charge does, however, indirectly raise the interesting question of whether the religion-as-sovereign model reflects an ontological category of religion or merely describes our particularized historical situation. To the extent that religion-as-sovereign reflects part of the ontological nature of religion, attempts to completely eradicate its authority in favor of a secular sovereign are eventually doomed to failure. If this is the case, then religion is an essential element of humanity. On this view, religion and religious communities reflect a deep human need, one that liberal democracies cannot satisfy and should not try to eliminate.

To the extent that religion-as-sovereign does not reflect ontological religious claims and is merely a description of current realities and a particularized historical experience, the proposal of eliminating protections for religion still raises significant issues. Even if religion is seen as merely a power play by reactionary feudal forces that undermine the essence of the liberal democratic project, the descriptive power of the religion-as-sovereign approach suggests that at the very least religious sovereignty is a current description of reality. The problem for those seeking to eliminate or drastically reduce its authority becomes one of transition. While one may reconceptualize an ideal society from a *tabula rosa*, eliminating the protections of sovereignty from religions still requires eliminating the sovereignty of an existing, freely chosen group of private individuals. In many ways, this is an extreme version of the militant democracy problem: can a democracy act in illiberal ways in order to protect its existence? While we might be sympathetic with the democratic elimination of an armed and threatening militia group that proclaimed its sovereignty and declared war on the democracy in question, what of the democratic elimination of the sovereignty of a peaceful, nonthreatening religious group simply because it disagreed with the group's values? I am not sure that this would meet the standards of tolerance and autonomy that a liberal democratic system would seek to impose on religion. To draw on the federalism heuristic, the anti-liberal anti-democratic argument against religious exceptionalism parallels active enforcement of an equivalent of the Republican Guarantee Clause³²⁶ against religions. States, however, entered the constitutional union with republican governments—the Guarantee Clause was merely designed to maintain existing sovereign relationships. Rejecting religious exceptionalism and eliminating protections for religious freedom is the equivalent of forcing states to change their forms of governance hundreds of years after ratification of the constitution. Further, as argued previously,³²⁷ ceasing to respect the jurisdiction of a sovereign based on the sovereign's threats to democracy or violations of human rights is not unknown, but comes with significant risks and costs.

Of course, one need not accept that even illiberal and undemocratic religions are fundamentally incompatible with a secular democratic state. If anything, the federalism heuristic highlights that multiple sovereigns need not have identical goals, be based on similar values, or use the same kinds of governance structures. States, for example, may govern by popular referenda,

³²⁴ Dworkin has raised this concern in his discussion of “checkerboard” justice. See RONALD DWORIN, A LAW'S EMPIRE (1971), 179-186.

³²⁵ See text accompanying note ____.

³²⁶ U.S. CONST'N, art IV, section 4.

³²⁷ See text accompanying notes ____ - ____ and Section II.

elected judges, or other features that would not be permitted in the federal governing structure. Moreover, many of the values identified by federalism depend on differences between federal and state governance—increased social satisfaction through decentralization, responsiveness and representation, states as checks on federal power or factions, the value of experimentation, promoting communitarianism, etc. I would similarly argue that religion’s value and contributions also depend on its differences from a secular state. Permitting the terms of a secular liberal democratic state to significantly define or limit religious authority destroys much of the contributions that religion can provide society.

The deep structure of religion-as-sovereign in religious liberty can not only be seen in arguments that oppose religious exceptionalism, but also ones that support it.³²⁸ Scholars advocating the uniqueness of religion focus on the distinction of realms between private religion and a public state,³²⁹ the comparative unimportance of religion to unbelievers,³³⁰ government incompetence to judge religious truth,³³¹ the precedence of religious claims to believers,³³² the protection of religious minorities,³³³ and the power of personal commitments and associational bonds³³⁴ all of which reflect an implicit understanding of dual sovereigns with distinct jurisdictions and the authority that adherents recognize in religion. Other more instrumental arguments, such as the role of religion in civil society and encouraging civic virtue,³³⁵ as well as religious or communitarian non-instrumental arguments,³³⁶ parallel arguments identified through the federalism heuristic that flow from religion-as-sovereign and shared sovereignty.

Particular note should be made of the argument that religious exceptionalism serves to prevent religious strife.³³⁷ Current empirical research on religious freedom suggests that protections for religious freedom are an immensely practical solution (if one with still unresolved boundary lines) for settling peaceably the contesting loyalties of shared sovereigns. Brian Grim and Roger Finke, for example, have demonstrated empirically how reduced government restrictions on religion are causative of reductions in social conflict and religious violence.³³⁸ They, along with other researchers, have also shown how increased religious freedom is correlated with high levels of other freedoms, multiple measures of well-being, prolonged democracy, and better educational opportunities for women.³³⁹ I would argue that perhaps these correlations exist because inter-sovereign strife is wasteful of resources and a stimulus to extra-sovereign social conflict. Perhaps religious freedom produces its own “peace dividend,” seen in the positive values that the federalism heuristic identifies. In any case, religious freedom can be clearly understood not just as a normative

³²⁸ For a fuller description of these, see Part I.

³²⁹ McConnell, *The Problem of Singling Out Religion*, *supra* note __ at 20-21.

³³⁰ Laycock, *Religious Liberty as Liberty*, *supra* note __ at 317-18.

³³¹ McConnell, *The Problem of Singling Out Religion*, *supra* note __ at 23-28.

³³² Ingber, *Religion or Ideology*, *supra* note __; Garvey, *Free Exercise and the Values of Religious Liberty*, *supra* note __.

³³³ Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres*, *supra* note __ at 112.

³³⁴ Lupu, *To Control Faction and Protect Liberty*, *supra* note __.

³³⁵ McConnell, *The Problem of Singling Out Religion*, *supra* note __ at 21-23; Hall, *Religion and Civic Virtue*, *supra* note __.

³³⁶ TUSHNET, RED, WHITE AND BLUE, *supra* note __ at 273-75.

³³⁷ Laycock, *Religious Liberty as Liberty*, *supra* note __ at 321-221; Lupu, *To Control Faction and Protect Liberty*, *supra* note __.

³³⁸ BRIAN GRIM AND ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2010).

³³⁹ BRIAN GRIM AND ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2010); Hudson Institute Report.

solution—preferable if one values religion *per se*—but as an immensely practical way to address the shared and sometimes conflicting loyalties of overlapping sovereignty.

The fact that conflict arises not only between states that mutually recognize each other's sovereignty, but also between a state and a region with disputed claims for independence (one only needs to think of Kosovo, Chechnya, or East Timor), further suggests that claims of religious freedom are not dependent on a secular state's recognition of religious sovereigns as sovereigns. Similarly, the refusal to recognize the sovereignty of a state, as some theories suggest modern states should do in the face of extreme violations of human rights or threats to others,³⁴⁰ brings its own sets of conflicts (such as Iraq or Afghanistan). Refusing to recognize a sovereign or would-be independent state or religious sovereign is not sufficient to eliminate claims of loyalty and authority, either in the diplomatic or religious spheres. While these approaches may be necessary at the margins or in extreme cases both diplomatic and religious, understanding the deep structure of religious freedom suggests that these approaches bring their own costs.

Understanding the deep structure of religion as religion-as-sovereign explains the core fact that even arguments against religious freedom can be easily understood and analogized as the working out of inter-sovereign conflicts. Sovereignty is so core to our understanding of religion that we seem to be inevitably tied to discussions of authority, loyalty, and jurisdiction in discussions of religious freedom. But recognizing the fact that religious freedom debaters all draw on implicit notions of sovereignty, even those criticizing religion, is itself to recognize that religion is indeed “special” and different from associational structures, philosophical or conscientious beliefs.

In summary, the religion-as-sovereign approach makes a unique set of claims for religious exceptionalism and provides a strong framework for assessing and conceptualizing these claims. Together with the federalism heuristic, it provides significant illumination of the values underlying protections of religious freedom, as well as identifying areas of potential concern. Religion-as-a-sovereign provides a valuable account for the arguments for and against religious exceptionalism. Whether or not one argues for a robust protection of religion, religion-as-a-sovereign suggests that we are still at some level drawing on deep structure of shared sovereignty in the religious liberty debate, even if only to criticize it or attempt to deconstruct it. This suggests that the question of whether religion is “special” is ultimately the wrong question. As a sovereign, it is indeed special. Philosophical, moral, and associational claims do not measure up. Recognizing religion as “special,” however, does not eliminate all discussion on the value or values of religious freedom—sovereignty may set up the framework for a relationship between religion and law and identify salient values, but does not decide all the difficult boundary issues. Arguments have and will continue to rage about the relative merits of religion and whether and how religious freedom should be protected, but these are not at their heart questions of whether religion is “special”; by drawing on deep structural understanding of religion as a sovereign, as they do, they implicitly recognize that it is.

³⁴⁰ See *supra* note ___ and accompanying text.