

Three Conceptions of Religious Freedom

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Three strands of thought intertwine in the American legal literature of religious freedom, which can roughly be characterized as individualist, institutionalist and peoplehood. These conceptions correspond roughly to the three historically prominent American religious groups, respectively, Protestant, Catholic and Jewish. The three conceptions, viewed together, provide a pluralist approach to religious freedom which may be stronger than any of the three alone could provide. This has important implications for how courts and agencies should respect the fundamentally different claims which religious groups make upon the concept of freedom.

I. Three Conceptions

A. The Individualist Conception

The first, long-dominant (but perhaps ailing), Protestant-inspired approach, defends the right of individual conscience against governmental infringement.² The phrase "freedom of conscience" is not found in the United States Constitution. The First Amendment's Religion Clauses say only that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³ Others have demonstrated that then-current Protestant

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² On the relationship between Protestantism and the individualist approach, see MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008) 34-58.

³ U.S. Const. amend. I.

notions of freedom of conscience infused these two clauses and their early interpretations.⁴ This can be seen in both the more expansive language of some earlier state constitutions and the debate on the Constitution's Bill of Rights.

Some state charters, beginning with Rhode Island's Charter of 1663,⁵ explicitly equated religious freedom with "liberty of conscience."⁶ Others more fully described this individual basis for religious freedom, such as Virginia's constitution, which announced that the "religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience..."⁷ This language rather reflects an individualistic conception of religious freedom, indebted to John Locke and the Protestant tradition, in which each individual must be given the liberty to choose the manner in which her or she follows the demands of individual conscience.⁸ Locke's concern for personal conscience (not always reflected in his writings on religious freedom) was arguably exceeded by evangelical Protestants who drove the development of free exercise ideology in the republic's early years.⁹

This individualist conception is at work in Supreme Court decisions interpreting the religion clauses from the mid-Twentieth Century onwards. For example, it can be seen in decisions providing religious exemptions from mandatory military service for individuals'

⁴ See, e.g., Michael J. White, *The First Amendment's Religion Clauses: "Freedom of Conscience" Versus Institutional Accommodation*, 47 SAN DIEGO L. REV. 1075, 1076 (Fall 2010).

⁵ R.I. CHARTER of 1663, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1328, 1338 (B. Poore 2d ed. 1878) at 1595, 1596.

⁶ Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1425 (May 1990).

⁷ Va. Const. art. I, § 16.

⁸ White, *supra* note 4 at 1076.

⁹ McConnell, *supra* note 6 at 1442-49.

"whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."¹⁰

Similarly, the protection (or privilege) of "conscientious scruples" provided the basis for the strict judicial scrutiny which the courts for many years imposed even on generally applicable legal rules which substantially burdened the free exercise of religion.¹¹ Perhaps most directly, the Supreme Court has declared that, "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the...inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel[.]"¹²

In recent years, however, the individualist conception has been in decline. This can be seen most clearly in the much criticized case of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, in which the Supreme Court held that a state could deny unemployment benefits to a native American who was terminated for violating a state prohibition on the use peyote during an Indian religious ritual.¹³ As we will see below, however, other approaches to the case may be more powerful than the individual rights approach rejected there.

B. The Institutional Conception

By contrast, a second and older conception, less firmly rooted in American constitutional tradition but arguably ascendant in recent years, is more closely related to traditional Catholic interests and ideology and has supported the prerogatives of religious institutions as against either individuals or the state. The institutionalist approach supports religious freedom, at least

¹⁰ *Welsh v. United States*, 398 U.S. 333, 344 (1970).

¹¹ *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

¹² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

¹³ 494 U.S. 872, 881 (1990).

in significant part, as recognition not of personal spiritual commitments but rather of a proper domain of “church autonomy” protected against the state. Its basic idea is that certain collective or communal institutions hold significant intrinsic social value, or are inextricably connected to both social interaction and individual flourishing, and thus merit protection from governmental encroachment.¹⁴

This concern for institutional prerogatives has been traced back to Pope Gregory VII’s revocation, at the end of the eleventh century, of the then-longstanding prerogative of temporal rulers to select and supervise bishops within their realms.¹⁵ A century later, the first constraint to which King John agreed in the Magna Carta was “that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.”¹⁶ In accepting the “freedom of elections,” King John acknowledged that this right was “thought to be of the greatest necessity and importance to the English church.”¹⁷ In these early confrontations, the idea of religious freedom originated from a preference for papal primacy over the wide range of church affairs. This idea has less to do with individual conscience than with “church autonomy.”¹⁸

Institutional religious freedom, or “Church autonomy” has been described as an “increasingly important site of contestation in the law of the Religion Clauses.”¹⁹ Trumpeting this question of institutional religious freedom as “our day’s most pressing religious freedom

¹⁴ Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 111-112 (Winter 2009).

¹⁵ Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 7 VILL. L. REV. 37, 37 (2002).

¹⁶ J. Holt, *Magna Carta* App. IV, p. 317, cl. 1 (1965). See, generally, Richard W. Garnett, *Religion and Group Rights: Are Churches Just Like the Boy Scouts?*, 22 ST. JOHN’S J.L. COMM. 515, 524 (explaining historical importance of this provision).

¹⁷ *Id.*

¹⁸ Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 La. L. Rev. 1057, 1061-62, 1064 (1987) (describing the idea of “church autonomy,” and contrasting it with the individualist conception of “personal spirituality”).

¹⁹ Horwitz, *supra* note 14 at 79, 81.

challenge," one prominent commentator insisted that "the church-autonomy question ... is on the front line" of religious freedom litigation.²⁰ Another has argued that church autonomy "should be the flagship issue of church and state."²¹

Church autonomy received important recent vindication in the "ministerial exemption" cases, most importantly the 2012 U.S. Supreme Court case of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*²². Under Title VII of the Civil Rights Act of 1964, religious entities are exempted from anti-discrimination lawsuits in cases regarding "the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."²³ This provision does not explicitly exempt churches from challenges involving other protected categories such as race or sex.²⁴ Nevertheless, the Supreme Court in *Hosanna-Tabor* recognized a judicially developed "ministerial exemption," which provides that the First Amendment requires a wider immunity than the statute indicates. *Hosanna-Tabor* shows that the institutionalist approach to religious freedom is gaining ground at a time when the individualist conception is ailing.

C. The Peoplehood Conception

The third conception, equally important to American law if less fully articulated in the constitutional literature, concerns the protections that members of ethno-religious populations (or

²⁰ Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 521 (2006-2007).

²¹ Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1061 (1989).

²² 132 S. Ct. 694 (2012). There is some irony in the fact, observed by Justice Alito, that this term, "minister," is most frequently associated with Protestant clergy. *Id.* at 669 (Alito, J., concurring).

²³ 42 U.S.C. § 2000e-1(a) (2000).

²⁴ See, e.g., *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

peoples) require from discrimination or animus based on group membership. This approach is particularly important for those groups, such as Jews, Sikhs, Native Americans, and (some argue) Muslims, which are culturally framed in terms which combine religious belief with ethnic or ancestral characteristics. This peoplehood approach is broadly distinguished by a focus on three distinct but interrelated qualities: (1) equality or nondiscrimination (rather than liberty *per se*), (2) group rights (rather than individual rights or institutional autonomy), and (3) aspects of religion which overlap with race (rather faith or institutional practice alone). The peoplehood conception is as deeply woven throughout American law as are its individualist and institutionalist analogs, but it has rarely been recognized as such, resulting in sporadic and unpredictable application.

1. Equality or Nondiscrimination

The idea of formal equality has always been pervasive to Religion Clause jurisprudence,²⁵ as well as its philosophical antecedents, just as the idea of freedom underlies the Equal Protection Clause. John Locke stated the matter plainly: “The sum of all we drive at is, that every man enjoy the same rights that are granted to others.”²⁶ Interestingly, the language of equal protection was first articulated in the provisions of early colonial state constitutions addressing religious freedom.²⁷ This concern for equality can be seen throughout the history of Religion Clause jurisprudence, reflected for example in Justice John Harlan’s explicit 1970 observation that Establishment Clause “Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental

²⁵ Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L. Q. 1529, 1530 (2005).

²⁶ JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689, 1990 ed.) (69).

²⁷ Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C.L. REV. 275, 293 (March 2006).

categories to eliminate, as it were, religious gerrymanders."²⁸ In recent years, the egalitarian principle has been increasingly ascendant, to the point that it can be said that religious freedoms have "changed from a substantive liberty, triggered by a burden on religious practice, to a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable."²⁹

This egalitarian concern is most readily grasped where majorities attempt to impose their religion upon minority groups. After all, the Court has announced that "the clearest command of the Establishment Clause" is the rule that one religion cannot be preferred over another.³⁰ In some Establishment Clause cases the Supreme Court has recognized that, in former Justice Sandra Day O'Connor's words, "endorsement sends a message to nonadherents that they are outsiders."³¹ In one older case, *McCollum v. Bd. of Education*,³² Justice Felix Frankfurter observed that (constitutionally impermissible) weekly religious training at public school "sharpens the consciousness of religious differences at least among some of the children committed to its care."³³ The equality principle is equally important, however, where minority groups are precluded from exercising their religions.

It is important to recognize that egalitarian concerns can have either thin or thick formulations. In *Smith*'s thin anti-discrimination formulation, for example, the Court reduced Free Exercise to the rule that state actors may not discriminate among or against religions but that they are not barred from taking actions which have the effect of eradicating religious

²⁸ *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

²⁹ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 156 (2004).

³⁰ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

³¹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

³² 333 U.S. 203, 227-28 (1948) (Frankfurter, J., plurality).

³³ See Susan Gellman and Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 667, note 6.

practices. This anti-discriminatory model is far less protective of individual religious freedom than other approaches have been. On the other hand, thicker formulations of equality can be found in certain federal civil rights laws, which may require accommodations and prohibit disparate impacts. As the ideological core of religious freedom law has shifted from liberty to equality, its protectiveness has in some respects diminished, but its impact may run in the opposite direction if thicker conceptions are embraced.

2. Group Rights

Although religious freedom is typically characterized as an individual right, some commentators have observed that it is necessary to protect groups or peoples from discriminatory treatment.³⁴ This position is supported by three arguments. First, in any factionalized setting, weaker groups are vulnerable to oppression by stronger groups (the “Madisonian argument”). Second, when it comes to religion, it is especially necessary to provide particular protections for weaker religious groups in light of the peculiar history of religious minorities (the “Religious Persecution argument”). Third, group membership provides certain socially valuable benefits, especially in the case of religious or ethno-religious groups, including the sustenance of religious faith, practice, and collective action (the “Group Benefits” argument). These three arguments have provided a basis for securing the freedom of religious groups or, alternatively, the freedom of individuals to associate as active members in religious groups.

³⁴ Cf. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004) (arguing that the Court's main goal in Religion Clause cases should be to protect minority religions). Similar arguments may be found in, e.g., Stephen M. Feldman, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF SEPARATION OF CHURCH AND STATE* (1997); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991). *But see* Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 MERCER L. REV. 595 (Wint. 2008) (arguing to the contrary).

From the beginning, constitutional structures were designed with the intent of protecting minority groups from dominance by the majority. During the congressional debates over the Bill of Rights, James Madison explained that his constitutional proposal was intended to reduce the likelihood not only that a single group "might obtain pre-eminence," but also that "two [might] combine together, and establish a religion to which they would compel others," presumably thereby the minority, "to conform."³⁵ This Madisonian Argument provides a powerful basis for the separation of Church and State and for the federalist structures that support it.

The Religious Persecution Argument has given greater strength to the religion clauses. According to this argument, the historical mistreatment of certain religious minorities, such as Jews and Catholics, provides a compelling justification for the protection which the Religion Clauses afford.³⁶ Generally speaking, the egalitarian justifications for religious freedom are mostly characterized in terms of group rights or interests, despite the traditional emphasis of American constitutional law on the rights of individuals.

Finally, the Group Benefits Argument provides that religious groups merit protection not only for their vulnerability but also for the social benefits that they provide. For example, it has been argued that the "solidarity and insularity of group membership and belief sustain the insistence of many religions on one right God and one right way to homage and salvation--upon one right and insular epistemology. It is the group identity of the faithful that mobilizes pity, distrust, or even hatred for those who are not believers."³⁷

3. Ethno-Religious Populations

³⁵ Berg, *supra* note 34 at 933-34 (*quoting* 1 ANNALS OF CONGRESS 731 (Aug. 15, 1789) (Joseph Gales ed., 1834)).

³⁶ Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282-84 (Fall 1994).

³⁷ *Id.* at 1249.

The peoplehood approach is further predicated upon the existence of non-Christian groups, such as Jews and Sikhs, who face religious violations that are different in character from those which primarily concern Protestants and Catholics because their cultural identities are not based exclusively on their religious beliefs and practices.³⁸ Although the United States courts have generally treated religion and race according to very different doctrinal principles, governmental treatment of racial, religious, and ethno-religious population groups implicate similar concerns.³⁹ Moreover, certain peoples are vulnerable to forms of mistreatment which are difficult to classify as merely religious or merely ethnic. This can be seen, for example, when governmental practices prevent group members from observing certain holidays or donning particular forms of ethno-religious attire.

The Supreme Court has occasionally acknowledged the parallels between race and religion over the years, as in *Board of Education of Kiryas Joel Village School District v. Grumet*, where the Court observed that "government may not segregate people on account of their race ... [as] it may not segregate on the basis of religion."⁴⁰ Some prominent commentators, such as Jesse Choper, have also acknowledged the parallels between race and religion, such as the fact that both "have been the object of public (and private) stereotyping, stigma, subordination and persecution in strikingly similar ways."⁴¹

4. Ramifications

³⁸ See, generally, KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* (2010).

³⁹ Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 120 (Wint. 1997).

⁴⁰ 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

⁴¹ Jesse Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 491-92 (Mar. 1994).

The peoplehood approach challenges jurists to frame certain disputes in terms of ethno-religious group equity. Some disputes take on a different light when courts and agencies recognize the religious freedom sometimes arises from the egalitarian, group-based rights of ethno-religious populations. This can be seen in two kinds of cases: racial claims that appear at first blush to be based on religious difference and religious claims that appear to be based on ethnic, racial or cultural commitments. For an example of the former, consider the successful race discrimination claims have been brought by practitioners of Orthodox Judaism,⁴² including a Hispanic convert.⁴³ For an example of the latter, consider the prison grooming cases that have been brought by ethno-religious groups like Rastafarians. The peoplehood approach to religious freedom provides that the liberty interests of ethno-religious groups should be protected from discrimination to the extent that individual conscience and church autonomy claims are recognized.

If religious group rights cases should ascend further, their genesis may one day be found in one of the more puzzling cases in American constitutional literature. In *Wisconsin v. Yoder*,⁴⁴ the Court held that Wisconsin's compulsory school attendance law violated the Free Exercise Clause of the First Amendment by forcing Amish parents to enroll their children to public school after the eighth grade, despite Amish religious convictions requiring them to remain "aloof from the world."⁴⁵ This sweeping exemption to a generally applicable state statute, which was not enacted to burden the Amish religion, strikes some as an anomaly in American law. The case has been read not only as an application of Free Exercise but also as a parental liberty case. For this reason, Justice Antonin Scalia held *Yoder* out as a "hybrid rights" case, explaining on behalf

⁴² *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995).

⁴³ *Singer v. Denver School District No. 1*, 959 F. Supp. 1325 (D. Colo. 1997).

⁴⁴ 406 U.S. 205 (1972).

⁴⁵ *Id.* at 210.

of the *Smith* Court that the Amish parents' claims were stronger than the usual religious claimants because they were based on more than one constitutional provision.⁴⁶ What is most striking about *Yoder*, however, is the Court's preoccupation with the unique cultural qualities of the Amish people and the extent to which their requested exemption emerges from the distinctive ethno-religious characteristics of this people. In this way, *Yoder* involved hybrid rights in the additional and perhaps more compelling sense that the state was abrogating not only the individual rights of religious parents but also the ability of a discrete and insular people to transmit its values and preserve its culture.

A broadly similar approach can be seen in the response of the U.S. Department of Education's Office for Civil Rights (OCR) to claims that Sikh and Jewish students have faced discrimination in federally funded educational programs and activities.⁴⁷ Such discrimination is typically unlawful when based on a student's race, color, or national origin, under Title VI of the Civil Rights Act of 1964,⁴⁸ a statute which does not however prohibit religious discrimination.⁴⁹ When a Sikh father sought OCR's protection, shortly after September 11, 2001, for a son who had been beaten on school grounds on account of his "faith" and called, "Osama," OCR had to reconsider its long-held position that ethno-religious groups (such as Sikhs and Jews) lack Title VI protection.⁵⁰ After much ambivalence and equivocation,⁵¹ OCR has interpreted⁵² that

⁴⁶ *Smith*, 494 U.S. at 881.

⁴⁷ *See, generally*, MARCUS, JEWISH IDENTITY, *supra* note 38.

⁴⁸ 42 U.S.C. § 2000(d) (2000).

⁴⁹ Kenneth L. Marcus, *The Most Important Right We Think We Have But Don't: Freedom from Religious Discrimination in Education*, 7 NEV. L. J. 171 (Fall 2006).

⁵⁰ MARCUS, JEWISH IDENTITY, *supra* note 38 at 26-36. For other examples of post-9/11 discrimination against Sikhs in various contexts, *see* DAWINDER S. SIDHU AND NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009).

⁵¹ Kenneth Lasson, *In an Academic Voice: Antisemitism and Academy Bias*, 3 J. STUD. ANTISEMITISM 2501, 2553-254 (2011); Kenneth L. Marcus, *Jurisprudence of the New Antisemitism*, 44 WAKE FOR. U. L. REV. 371, 389-90 (Summ. 2009).

provision to encompass ethnic and ancestral discrimination against such groups, but not discrimination based narrowly on a student's religious belief.⁵³

It would be tempting, but not fully accurate, to assume that OCR's determination reflects not a third conception of religious freedom but only an interpretation of an entirely different concept, namely ethnic, racial or national origin discrimination. Like the courts and other administrative agencies, OCR carefully parses the protected categories within its jurisdiction, determining whether each individual complaint falls within its jurisdiction relating to, *e.g.*, race, color, national origin, or, when applicable, religion. The artificial construct "race" overlaps so substantially with the equally shifty notion of "national origin" that the two terms now apply, at least since *Shaare Tefilah v. Cobb*,⁵⁴ to largely the same set of attributes.⁵⁵ The bounds between religion and these other concepts is similarly permeable as seen, for example, in racial discrimination cases in which the plaintiff's ancestors do not share the racial characteristics on which the plaintiff's case is predicated, such as racial discrimination cases successfully brought by Orthodox Jewish converts to Judaism. The "religion," "race" and national origin protected in these cases are not completely separate; rather, they are aspects of a broader group membership or peoplehood.

Nevertheless, the courts have not consistently appreciated the extent to which the anti-discrimination rights of persecuted populations deserve special protection under those clauses.⁵⁶

Challenges to religious discrimination are seldom brought under the Equal Protection Clause,

⁵² Russlynn Ali, Assistant U.S. Secretary of Education for Civil Rights, Dear Colleague Letter, Oct. 26, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. See also Kenneth L. Marcus, 15 *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, WM. & MARY B. OF RTS. J. 837 (Feb. 2007).

⁵³ Kenneth L. Marcus, *The New OCR Antisemitism Policy*, 2 J. STUD. ANTISEMITISM 479 (2011).

⁵⁴ 481 U.S. 615 (1987).

⁵⁵ MARCUS, JEWISH IDENTITY, *supra* note 38 at 191-98.

⁵⁶ Meyler, *supra* note 27.

even though that clause may be more effective for addressing unequal treatment.⁵⁷ The drawback is that equal protection jurisprudence has not always been as robustly interpreted as some advocates and scholars would prefer.⁵⁸ It has not been especially productive, for example, in addressing unintentional or systemic discrimination, disparate impacts or failure to accommodate.

II. Alignment and Conflict Among the Three Conceptions

A. Alignment

Claims to religious freedom are on strongest grounds where the three conceptions are aligned and most uncertain where they conflict. Perfect alignment is achieved when a distinct ethno-religious population group is persecuted or burdened by governmental actions which both encroach on institutional prerogatives and restrict individual conscience. This may be seen, for example, in the otherwise surprising result which the Court reached nineteen years ago in *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁵⁹ There the city of Hialeah, Florida, adopted ordinances restricting animal slaughter. The ordinances, if valid and enforceable, would have effectively banned the religion of Santeria, which maintains ritual animal slaughter as a central element of worship. To the surprise of many court watchers, who had expected that Hialeah would prevail under *Employment Division v. Smith*, the Court struck the ordinances on the ground that they impermissibly targeted a particular religion for disfavored treatment.

Drawing on cases decided under both the Religion Clauses and the Equal Protection Clause,

⁵⁷ Gellman & Looper-Friedman, *supra* note 33 at 666 (addressing government religious expression cases).

⁵⁸ Meyler, *supra* note 27 at 279-80.

⁵⁹ 508 U.S. 520, 523 (1993).

Justice Anthony Kennedy explained for a unanimous Court that is unconstitutional “to infringe upon or restrict practices because of their religious motivation.”⁶⁰ The Equal Protection analogy is especially appropriate here, because Hialeah encroached upon central cultural practices of a discrete and insular ethno-religious people.

The same may of course be said of the facts in *Smith*. Justice Scalia argued that Smith did “not present such a hybrid situation” because its free exercise claim was “unconnected with any communicative activity or parental right.”⁶¹ However, the *Smith* case *did* present a hybrid situation in the broader sense that members of the Native American Church, who considered peyote ingestion central to their community, faced violations of individual conscience, institutional practice, and ethno-religious cultural identity. Unfortunately for the Indian plaintiffs in *Smith*, the cultural practices of the Native American Church may have appeared less noble than those of the Quaker plaintiffs in *Yoder*. This was not unpredictable to court-watchers in light of the fact that the Native American Church appeared before the Court primarily as a group interested in the ingestion of unlawful drugs.

B. Conflict

The three conceptions clash on certain issues, such as the question as to whether governmentally funded universities are permitted or required to bar student religious organizations from discriminating against potential members or officers who do not share the organizations’ religious precepts. Under an institutionalist approach, the university must respect a religious student organization’s prerogative to select its own members and officers. Under some individualist approaches, however, this may contradict the individual student’s freedom of

⁶⁰ *Id.* at 2227.

⁶¹ *Smith*, 494 U.S. at 882.

conscience. Even more saliently, under a group-based conception the university must shield ethno-religious groups from discrimination by student organizations.

The Supreme Court partially addressed this issue two years ago in *Christian Legal Society v. Martinez*.⁶² In *Martinez*, the Supreme Court whether a public law school may condition its official recognition of a religious student organization (with consequences for the availability of facilities and funds) on the group's willingness to extend eligibility for membership and office-holding to all students. Justice Ruth Bader Ginsburg wrote for a divided Court that this requirement, imposed at Hastings College of Law, was a “reasonable, viewpoint-neutral condition on access to the student-organization forum” which therefore did not violate Hastings’ Christian Legal Society’s rights to free speech, expressive association, and free exercise of religion.⁶³ Justice Ginsburg emphasized her view that CLS seeks “preferential exemption from Hastings' policy” rather than parity with other groups.⁶⁴

By assuming, for purposes of its decision, that CLS had an “all-comers” policy, rather than an anti-discrimination policy, the Court dodged the harder question as to whether “proscribing discrimination on the basis of religion itself discriminate[s] against religion.”⁶⁵ Justice Alito, writing for the four dissenting Justices, argued that Hastings' nondiscrimination policy violated the First Amendment because it permitted some ideological groups to discriminate against those who do not share their views, but barred religious groups from doing so.⁶⁶

⁶² *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971 (2010).

⁶³ *Id.* at 2978.

⁶⁴ *Id.*

⁶⁵ William P. Marshall, *Smith, Christian Legal Society, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 *CARDOZO L. REV.* 1937 (May 2011).

⁶⁶ See *Martinez*, 130 S.Ct. at 3003-04, 3010-11 (Alito, J., dissenting).

When the evil day comes when the Court must confront the issue that it dodged in *Martinez*, it will decide between institutionalism on the one hand and, on the other, individualism and peoplehood. The presence of two rationales on the latter side might appear to tip the scale in their favor, except that the former side may carry with it the weight of both Catholic sympathy and some forms of conservative opinion, both of which now command a majority on the present Court. From a pluralist perspective, the *Martinez* question is whether the conflict between anti-discrimination law and free exercise can be resolved in a way that equally respects individual, institutional and group rights.

III. A Pluralist Reconciliation: Bringing Three Conceptions into Dialogue

The differences in these three conceptions parallel differences among the American religious groups to which they have primarily been applied, respectively Protestants, Catholics and Jews. More broadly, they also reflect the differing conceptions of religion that emerge from each tradition. That is to say, religious disagreements among Protestants, Catholics and Jews reflect not only different approaches to the same phenomenon, “religion,” but rather different conceptions of what “religion” is, with correspondingly different approaches to the phenomenon so described. In other words, they do not merely supply different answers to the same question. Rather, they supply different questions as well as different answers. This has always been a challenge for inter-religious dialogue. It is no less a challenge for legal discourse concerning the freedom of “religion.” The three conceptions described here are not three approaches to a fixed concept, “religion,” but rather three approaches based on three different but overlapping concepts.

When these three approaches are delineated in this way, the most salient ramification is that equivalent regard must, as a matter of equal protection, be given to each of these three conceptions. Even the thinnest egalitarian principles might disapprove a court which, for example, gives greater latitude to Protestant-based concerns rooted in individual conscience than to Catholic-based concerns for “church autonomy,” or vice versa, or which fails to attend equally to individual and group-based concerns. This observation may place new light on judicial decisions which, for example, burden minority religions by deferring to military uniform rules⁶⁷ or prison grooming regulations.⁶⁸

This pluralist conception – which aims to accommodate all three approaches – need not amount to mere leveling. Little is gained, for example, by a jurisprudential tendency which suppresses the aspirations of personal conscience, *à la Smith*, while nodding to the claims of church autonomy, as in *Martinez* – in the expectation that this will bring the historical pendulum back to the center – if the exercise of both individual and institutional prerogatives is not sufficiently robust to justify the claim that equal religious *freedom*, rather than equal religious *regulation*, has been achieved.

Those who defend a bias in favor of one or the other of these conceptions may respond that equal regard for the three conceptions is unnecessary, because the relationship between each approach and its corresponding religious tradition is quite loose. Martha Nussbaum, for example, has conceded that basing religious freedom on the claims of individual conscience is tantamount to basing it on a peculiarly Protestant set of ideas. She nevertheless argues that this bias is acceptable, because this individualism can also be squared with a host of other traditions,

⁶⁷ *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

⁶⁸ *See, e.g., Booth v. Maryland*, 207 F. Supp. 2d 394 (D. Md. 2002) (rejecting discrimination claims by Rastafarian prison guard punished for wearing modified dreadlocks).

from Greek and Roman Stoicism to certain strands within contemporary Catholicism.⁶⁹ This argument is however unsatisfactory, because it proves too much. A dominant religion, such as American Protestantism, will inevitably have both historical antecedents and inter-religious influence. Nussbaum's argument would effectively permit establishment of any Protestant dogma which can claim both. The principle of neutrality cannot admit an exception for sectarian dogmas or practices which are embraced by multiple sects, or the exception will swallow the rule. Few encroachments on the Establishment Clause could not be defended on this logic.

V. CONCLUSION

The persistence of three distinct, overlapping, but sometimes divergent conceptions of religious freedom should not be surprising in a nation that has been home to three very different primary religious traditions. The tendency of most jurists has been to argue for one or another of these conceptions, or perhaps of some hybrid of two of them, in various formulations of differing robustness. Of the three conceptions, the individualist approach has been so dominant, at least during some periods, that some jurists have assumed it to be the sole form that religious freedom might take. In recent years, the venerable institutional approach has made steady headway, but its proponents have not necessarily acknowledged that there might be other approaches that would stand together with these two, Christian-inspired conceptions. The peoplehood approach should be recognized as a third, equally compelling conception, with similarly deep roots in American constitutional culture, even if it has not been as clearly identified as the other two. To understand these three conceptions, and the distinct but powerful moral demands which each

⁶⁹ NUSSBAUM, *supra* note 2 at 58.

provides, is to acknowledge that a robust, equitable approach to religious freedom must respond to all of their demands. This implies a pluralist religious freedom, which is equally responsive to the demands of individual conscience, institutional autonomy, and the equality of all peoples.