

A Legal Perspective on Conflicts Involving Religious Communities

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Abstract

Within any given state or society, numerous factors can influence both relations among religious communities and relations between these communities and other institutions or value systems, including scientific communities, schools of economic or legal thought, and various ideological or political movements. Though some of these factors obviously arise from within the beliefs and structures of the religions themselves, many arise from the history, political culture, and legal framework of the state or society in which a given religious community is situated.

This paper discusses the potential role of law and the legal system in influencing these relations and addressing conflicts among these communities and institutions. After explaining in general terms the relevance of a legal perspective to the assessment and resolution of such disagreements, the paper specifically examines characteristics of the constitutional framework and political culture of the United States that appear to prevent or minimize conflicts involving religious communities.

Introduction

This paper, like the forum at which it was presented, takes as its starting point a simple empirical reality, namely, that there are actual, perceived, or potential tensions or conflicts between, on the one hand, certain religious traditions or worldviews and, on the other hand, the methodologies, premises, or claims of other communities, such as the discipline of evolutionary biology, or certain political or ideological commitments, such as civil equality or representative, participatory democracy. From this starting point, it then poses the following question: what is it about the combination of any given religion or religious community and any given political culture or legal-governmental framework that produces a dynamic quite different from that produced by the combination either of a different religious community and the same political culture or of the same religious community and a different political culture?¹

At first blush, this may not seem like a daunting question, and in some instances, especially those involving extreme forms of government or religion, the primary reasons for the relational dynamic may be obvious. But in many scenarios where it does not appear that either the political culture or the religion has characteristics that inherently tend toward frictional relations with the other, one can nevertheless find that the nature of their relations can and does vary across the globe.

In order to address this question—to examine, describe, understand, and perhaps even alleviate these tensions and conflicts—the tools of many disciplines can be employed. This paper, for its part, offers a perspective that is principally *legal* in nature. That is, it provides a perspective reflecting the legal system's institutions, values, objectives, and processes. Specifically, the paper identifies four characteristics of the constitutional framework and political

¹In this paper, the term *political culture* is used broadly, encompassing both the prevailing governmental-legal system and the predominant social attitudes and expectations with regard to legitimate governance and relations between the government and citizens or groups, including religious communities. So defined, it can be synonymous or can overlap with *constitutionalism* as well as the more normative concept of *political community*.

culture of the United States that, on the whole, appear to prevent conflicts involving religious and other communities and even foster healthy relations among these communities, yet generally do so without unduly undermining these communities' respective integrity, purposes, and contributions.

Using a Legal Perspective: Justifications and Limitations

Before engaging in this identification process, it may be helpful to elaborate on the utility and limits of examining the topic selectively from a legal perspective and, in particular, with an emphasis on the legal framework and political culture of the United States.

First, it is important to understand that addressing these conflicts from a legal perspective, though not necessarily one's first inclination and though not without its limitations, is ultimately a rather sensible undertaking. Conflict resolution is, after all, the law's business. At least in the Western tradition, the enterprise of law is concerned at its core with the rational and just ordering of relationships among people and institutions when it is believed that those relationships in the absence of legal formation or intervention would produce an unacceptable level of unfairness, inefficiency, social discord, or harm to persons, property, or other interests that the public deems sufficiently important to protect.

It is true that the legal system at times may respond excessively or ineffectively, may misinterpret the evidence on which its decrees are based, and may measure or weigh competing values and inputs in a manner that can be deemed inappropriate. In some instances, these errors can lead to poorly-crafted legislation or judicial decisions. In other instances, errors of the legal system can themselves cause or exacerbate injustice. But these shortcomings do not make the law any less relevant to the resolution of conflicts; they simply confirm that it is one among many imperfect human institutions.

When compared to approaches based on other disciplines, moreover, one potential advantage of the legal system is its capacity to take account of most if not all available considerations bearing on the causes, nature, and resolution of a given problem. This, of course, is precisely the sort of conglomerative process that frustrates those of specific disciplines that are necessarily more constrained in their methodologies and exacting in their standards. Often, for example, relevant scientific communities express dismay at the final content of public school science curricula, environmental legislation, or constitutional rulings that have emerged as much from non-scientific input and interest group politics as from legitimate science.² Among the law's objectives, however, is not always or not simply the identification of factual truth for its own sake. Law is not itself a science, despite past attempts to deem or to make it so,³ but rather a superstructure of norms and procedures developed and implemented to protect the interests noted earlier and to balance these interests with the need for social order and stability, socioeconomic welfare, public safety and security, and the like.

Correspondingly, the legal system's objectives normally do not include the identification, for its own sake, of *spiritual* truth. Law is not theology, nor is it ethics, though it can share key characteristics with these endeavors and, like the natural and social sciences, can certainly be

²See, e.g., Cornelia Dean, *When Questions of Science Come to a Courtroom, Truth Has Many Faces*, N.Y. TIMES, Dec. 5, 2006, at F3 (discussing a global warming case before the U.S. Supreme Court and the tension between legal and scientific methods of empirical assessment). For an excellent historical overview of the relation between science and the courtroom, see TAL GOLAN, *LAW OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA* (2007).

³See Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999).

assessed from theological and moral perspectives. In turn, one often finds that citizens or moral communities, like scientists in the previous example, are similarly disappointed when their understanding of truth is not adopted wholesale by courts or legislatures, but instead gets commingled with other interests.

It does not necessarily follow, of course, that because a legal perspective in general may have value, a perspective specifically drawing upon the legal system of the United States will be of equal utility. The contention here, of course, is that looking to the arrangement in the United States between religious communities—their institutions, members, practices, and underlying beliefs and claims—and the political culture and legal or governmental context in which they are situated *is*, in fact, pragmatically and perhaps philosophically sound.⁴ The soundness of this contention rests on a mix of normative and empirical considerations, several of which comprise the paragraphs that follow.

Most obviously, America is home to a remarkable array of identifiable religious bodies, representing not only the world's major religions but every possible doctrinal and liturgical variation of them.⁵ Within this diverse pool of religions, moreover, are religions or denominations that appear unable to coexist peacefully under other historical or geopolitical conditions. There are, of course, many possible explanations for this diversity or pluralism—*e.g.*, economic opportunity, flight from political persecution, and periodically liberal immigration policies—and some of these are neither especially profound nor meaningfully related to religion. In addition, it is not necessarily the case that unparalleled diversity or pluralism is always or unquestionably a good thing.⁶ Yet qualifications such as these do not diminish the extraordinary reality of American religious pluralism, which is that hundreds if not thousands of religious groups both exist within the same cultural and legal system and live in relative harmony with one another, and the reality of this stable coexistence cannot itself be so readily explained simply by looking at patterns of immigration, economic opportunity, and the like.

Not only is there significant diversity and peaceful coexistence across the American religious landscape, there is a relative robustness of religious adherence and practice by the American citizenry. To be sure, levels of religious identification and practice in the United States are comparatively high for a Western industrialized or post-industrial nation.⁷ This

⁴Importantly, the term *arrangement*, as used in the paper, refers not simply to the relational framework and components that at some point were intentionally established by law, most prominently through the ratification of the First Amendment. It also encompasses those to *de facto* relational features that have arisen and to varying degrees have been culturally ratified, especially by its elites, and that in some cases have been incorporated into revised interpretations of the First Amendment. See Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1003-08 (2009); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

⁵See DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* (2001); WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* (2003); FRANK S. MEAD ET AL., *HANDBOOK OF DENOMINATIONS IN THE UNITED STATES* (12th ed. 2005); J. GORDON MELTON, *ENCYCLOPEDIA OF AMERICAN RELIGIONS* (7th ed. 2002).

⁶See, *e.g.*, AARON WILDAVSKY, *Cultural Pluralism Can Both Strengthen and Weaken Democracy*, in *CULTURE AND SOCIAL THEORY* 195 (Sun-Ki Chai & Brendon Swedlow eds., 1998).

⁷See, *e.g.*, PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE 5* (2004) (“[D]uring the twentieth century in nearly all postindustrialized nations—ranging from Canada and Sweden to France, Britain, and Australia—official church records report that where once the public flocked to Sabbath worship services, the pews are now almost deserted. . . . The United States remains exceptional in this regard”); Harris Interactive, *Religious Views and Beliefs Vary Greatly by Country* (Dec. 20, 2006) (examining survey data regarding the religious beliefs of Americans and Europeans), available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1131>. An overall profile of American religiosity

religious robustness exists, moreover, alongside if not despite the potentially incompatible institutions, ideologies, and products of modernity, including, of course, the ascendancy of the scientific method. As with diversity, the suggestion here is not that high rates of religious identification are by themselves indisputably good or that they genuinely reveal an American citizenry that is engaged day-and-night in an earnest and unfettered pursuit of spiritual truth and fulfillment. What such data do show, however, is that the legal-cultural framework of the United States allows, facilitates, and perhaps even encourages the flourishing of religious adherence and practice and, in turn, that Americans have taken advantage this opportunity to a overwhelming extent.

Another point of note is that the nation's abundant religious communities and adherents have largely respected the political culture and its attendant values and commitments, including participatory and representative democracy, relative functionality of government, and overall regard for the rule of law. This is significant because many religious belief systems harbor the potential to view themselves as superior to other religions, to see their duties as supreme over the demands of the state or the society, or to view the state as an earthly instrument for the implementation of theocratic governance. Yet, despite this potential and more generally the nation's diversity, the United States has never witnessed an actual domestic religious war, though it has certainly seen civil and foreign wars, sometimes of horrific magnitude. This is not to suggest that the wars involving the United States, like all major human endeavors, did not fuel or were not fueled by religious or religion-related motivations and outlooks. The American Civil War, for example, clearly had meaningful religious elements or dimensions for those on both sides of the conflict.⁸ To the extent that these translated into important objectives, however, they generally did not define the war and, instead, combined with other significant themes and objectives, such geopolitical union, states' rights, the institution and economics of slavery, and, for southerners, concerns about the preservation of their social system or way of life.⁹

It is also true that the United States has seen its share of bigotry and violence that, at least on the surface, has often appeared to be motivated primarily by the religion or religious identity of the victims, the perpetrators, or both. At different times in the nation's history, one can see surges, in some instances localized and in others widespread, of animus directed toward Catholics,¹⁰ Jews,¹¹ Mormons,¹² Jehovah's Witnesses,¹³ and others, as well as concerted efforts

is provided in THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

⁸See, e.g., MARK A. NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS* (2006); RELIGION AND THE AMERICAN CIVIL WAR (Randall M. Miller et al. eds., 1998).

⁹See generally DAVID M. POTTER, *THE IMPENDING CRISIS 1848-1861* (1976); KENNETH M. STAMPP, *THE CAUSES OF THE CIVIL WAR* (rev. ed. 1965).

¹⁰See EDWIN S. GAUSTAD & LEIGH SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA: THE HEART OF THE AMERICAN STORY FROM COLONIAL TIMES TO TODAY 170-72* (rev. ed. 2004); Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 279-92 (1992); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 417-18 (1986).

¹¹See LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA* (1994).

¹²See EDWIN BROWN FIRMEGE & R. COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900* (2001); SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2001); Christine Talbot, *"Turkey Is in Our Midst": Orientalism and Contagion in Nineteenth Century Anti-Mormonism*, 8 J.L. & FAM. STUD. 363 (2006).

¹³See SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2001).

to suppress the beliefs and practices of various American Indian religions.¹⁴ More recently, the events of September 11, 2001, led to heightened and indiscriminate suspicion of or antipathy toward Muslims, in some cases accompanied by criminal acts against people and property.¹⁵ Nor is it always citizens, acting apart from government, who advance the intolerance, as the nineteenth-century Mormon and American Indian experiences with federal policy illustrate. Nevertheless, these episodes or periods of bigotry are essentially aberrational when one considers the entirety of the nation's history and present-day character, and they directly conflict with both its laws and aspirational principles as embodied in, among other places, the U.S. Constitution as well as the constitutions of the states.

Just as there are potential advantages to using a legal perspective, and in particular looking to the United States, there are also potential disadvantages or limits to such an approach. Most obviously, the question posed at the outset of the paper necessitates an analysis that is much more empirically and conceptually complex than any single discipline, or author, is capable of undertaking. It is an inquiry that ultimately implicates many fields of study and requires the identification, description, and measurement of numerous variables, some of which likely do not lend themselves to uniform conceptualization or easy quantification. In turn, to undertake the inquiry from only one perspective or to address only one aspect of it—if indeed it can even be so divided—invariably circumscribes the force and utility of the resulting analysis. At the very least, one is more likely to make conceptual missteps and impolitic assumptions along the way, though such is often the nature of working with religion as one's object of study.

Among the factors or variables that a more thorough inquiry would address are those of a chiefly conceptual or definitional nature. One may, for instance, get a quite different picture of the interactive dynamic between religious communities and the government or the larger political culture depending on what dynamic one chooses to examine. Religions and governments both have many dimensions and expressions, and their interaction can, as a consequence, be examined along a number of axes. Likewise, the outcome of one's analysis can certainly depend on one's definition or conception of *religion*, and there are clearly many ways, some more helpful than others, in which one can modify and therefore limit the concepts of religion, religious communities, and religious beliefs and commitments.

Then there are the characteristics of the religious communities or belief systems themselves.¹⁶ The strength of a particular religious community's perceived evangelical mandate, for example, or a tendency towards or away from shaping or controlling the legal order, can clearly influence if not dictate relations with other faith traditions, other societal institutions, and

¹⁴See George Dargo, *Religious Toleration and Its Limits in Early America*, 16 N. ILL. U. L. REV. 341, 358-60 (1996); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787-805 (1997); Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 35 (1997).

¹⁵See AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH (2003), at <http://www.adc.org/PDF/hcr02.pdf>; U.S. Department of Justice Civil Rights Division, *Enforcement and Outreach Following the September 11 Terrorist Attacks*, at <http://www.usdoj.gov/crt/legalinfo/discrimupdate.php>.

¹⁶Insofar as one is studying the relational dynamic between religious communities and scientific communities, one would also need to examine the characteristics of scientific communities that themselves may either foster or frustrate healthy relations with religious groups or institutions and their members. Unlike governments within the United States, which are required by the Constitution's First Amendment to remain neutral and non-discriminatory with regard to religion, see *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), scientific communities in and of themselves are not subject to such limitations.

the government. Likewise, dispositional aspects such as the mindset with which certain religious adherents interpret scripture or perceive standards of morality, their understanding of the basis and purposes of government and law, and their views regarding different faith traditions can all potentially predetermine the nature of their relations with other denominations, with the state and the institutions of political culture, and with specialized communities such as medical doctors or evolutionary biologists.¹⁷

Finally, limiting the inquiry only to one legal arrangement, in this case America's, potentially confines the value of the inquiry solely to those countries with legal systems and political cultures that are in relevant respects comparable to that of the United States. This is indeed a legitimate concern. On the one hand, there is no need to take or leave the analysis in its entirety, and it is likely that some aspects of it have broad or even universal application or, at the very least, that there is to be found *something* valuable in the analysis for most if not all nations or political cultures. On the other hand, no two countries are wholly alike and the paper's force and relevance probably do wane as one moves further away—culturally, institutionally, economically, and so on—from the United States. To be sure, one of the principal global lessons of the last century is that integrated systems, whether agricultural or economic or governmental, cannot simply be transplanted from one nation to another with the expectation that the experiences and outcomes of the former nation will essentially be replicated by the latter.¹⁸

Four Influential Aspects of the U.S. Constitutional Arrangement and Political Culture

With these limitations in mind, the objective for this latter part of the paper is to identify characteristics of America's constitutional framework and political culture that can explain the phenomena of unprecedented religious diversity, robust religious affiliation and activity, and relatively peaceful coexistence among religious communities and between religious and other communities. Four such characteristics are identified and discussed. These four are provided, however, with the understanding that they likely do not comprise an exhaustive list and, furthermore, that several if not all of them are interrelated and probably synergistic in their ultimate influence.

1. Express Constitutional Guarantees

The United States has a written constitution that essentially creates a federal or national government, enumerates limited grants of power to this government, and imposes or recognizes restrictions on the laws and other authoritative actions of all governments—federal, state, and local—to which it applies.¹⁹ Illustrative of such restrictions are those found in the First Amendment, which, among other things, disallows laws “respecting an establishment of

¹⁷See Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1994).

¹⁸Two recent and powerful critiques are WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006), and KATE JENKINS & WILLIAM PLOWDEN, *GOVERNANCE AND NATIONBUILDING: THE FAILURE OF INTERNATIONAL INTERVENTION* (2006).

¹⁹The principal exception is American Indian tribal governments, the core sovereignty of which is not derived from the United States or its citizenry and which, as a result, are subject to few if any constitutional limitations. See *Talton v. Mayes*, 163 U.S. 376, 379-85 (1896). Today, however, tribal governments *are* subject to a statutory set of limitations, known as the Indian Civil Rights Act, that are comparable to many of those imposed by the Constitution on the federal and state governments. See 25 U.S.C. §§ 1301-1303.

religion” (the Establishment Clause), “prohibiting the free exercise” of religion (the Free Exercise Clause), or “abridging the freedom of speech” (the Free Speech Clause).²⁰

Precisely because they are memorialized in print, these constitutional dictates cannot easily be distorted, much less ignored. As the U.S. Supreme Court noted a century ago, “it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.”²¹ True, some provisions are susceptible to multiple reasonable interpretations and, of course, even clear textual limits can be transgressed by corrupt interpreters acting in concert,²² thereby serving in James Madison’s words as nothing more than “parchment barriers.”²³ Dire and unanticipated circumstances, moreover, can sometimes overwhelm even the most well-intentioned political communities, leading them to countenance revisions of constitutional meaning that they would never otherwise perceive as acceptable and that they might later, once the crisis has passed, regret.²⁴

Nevertheless, the “writtenness” of the U.S. Constitution likely plays a key role in the stability of the government and the perceived legitimacy of textually-based governmental decisions, particularly judicial rulings that conclusively define or redefine the Constitution’s meaning. A written constitution visibly reminds government officials of their powers, duties, and limitations, from their oath of office to their potential impeachment.²⁵ Additionally, as long as the written constitution is itself legitimate and its text is heeded, citizens can more easily accept decisions made pursuant to it. This is obviously critical, for unless citizens can accept the validity of a rule of constitutional law as pronounced by a court or embodied in a statute, especially when they are faced with some kind of civil or criminal penalty for failure to comply with the rule, there is constantly a risk that the system will incrementally become unstable.²⁶ This concern may be even more critical in relation to religious citizens, whose loyalty to the state may ultimately be contingent on the extent to which the legal system remains congruent with

²⁰See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). Most of the guarantees of the Bill of Rights, including all those found in the First Amendment, today apply to state and local governments by virtue of the Fourteenth Amendment Due Process Clause, even though they were original applicable only to the federal government. See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

²¹*Muller v. State of Oregon*, 208 U.S. 412, 420 (1908); see also *Boddie v. Connecticut*, 401 U.S. 371, 393 (1971) (Black, J., dissenting) (noting “the certainty and security that lies in a written constitution”).

²²Cf. Andrei Marmor, *Are Constitutions Legitimate?*, 20 CAN. J.L. & JURIS. 69, 78-79 & n.20 (2007).

²³See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON, 1788-1789, at 295, 297 (Robert A. Rutland & Charles F. Hobson eds., 1977) (arguing that a bill of rights would not, by itself, refrain government from violating individual rights because “[r]epeated violations of those parchment barriers have been committed by overbearing majorities in every State”); see also THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961) (“[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”).

²⁴See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (rev. ed. 2004).

²⁵See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the [national] legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”)

²⁶See *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992) (joint opinion) (explaining that the U.S. Supreme Court’s “power lies . . . in its legitimacy,” which “depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation”).

what they perceive to be natural, higher, or divine law.²⁷ As Justice Douglas, quoting G.L. Mehta, once remarked, “[i]t is probably a universal truth that ‘the one thing which authority, whether political, social, religious or economic, tends instinctively to fear is the insistence of conscience.’”²⁸

The writtleness of the Constitution also plays an important if not essential role in the maintenance of the citizenry’s commitments and aspirations, such as the guarantees of religious liberty or equal protection, particularly in light of the nation’s cultural and religious heterogenization over the past two centuries. When a new or foreign religious denomination with an odd or unpopular practice, for example, surfaces in a conventional American community, the Constitution’s fixed commitment to religious freedom (typically enforced through the courts) ultimately protects that denomination from the natural tendency of the community to revise the notion of religious liberty in an ad hoc manner, conveniently enabling the government to restrict practices that the majority finds abhorrent, yet shielding those that it values.²⁹ This is not at all to suggest that countries without written constitutions are also therefore without meaningful religious freedom or equality. Rather, it is to suggest that the maintenance and non-negotiability of these guarantees are likely facilitated by their textual embodiment in a written constitution.

By itself, of course, the existence of a written constitution does not preclude the abuse of power or the abridgement of liberty. Given the potential ambiguity of text, for instance, the strength of the foregoing arguments is necessarily contingent on the commitment of the Constitution’s interpreters. In the United States, these interpreters are basically the courts and ultimately the Supreme Court, which is precisely why the composition and structure of the judiciary are discussed later in the paper. The strength of the foregoing arguments is also contingent on the larger political culture that is embraced by the nation’s citizens, who must likewise view the Constitution’s guarantees and restrictions as truly binding and, in Chief Justice Marshall’s words, “unchangeable by ordinary means.”³⁰

2. The Structural Division of Power

A second characteristic of the American constitutional system that tends to prevent or mitigate serious conflict involving religious and other communities is the structural division of sovereign authority. Conventionally viewed, governmental power in the United States is divided between two sets of sovereigns, the national government and the fifty state governments.³¹ Under this

²⁷ See, e.g., Stephen L. Carter, *Introduction to Faith and the Law Symposium*, 27 TEX. TECH. L. REV. 925, 928 (1996) (“Religious people, by training and inclination, are sensitive to the possibility that there is a higher law than the law of the state—that is, the law of God. That Divine Law is superior to secular law is virtually an axiom of theistic religion, religion’s own version of the Supremacy Clause.”).

²⁸ *Gillette v. United States*, 401 U.S. 437, 464 n.2 (1971) (Douglas, J., dissenting) (quoting GAGANVIHARI LALLUBHAI MEHTA, *THE CONSCIENCE OF A NATION OR STUDIES IN GANDHISM* at ii (1933)).

²⁹ This is basically the scenario in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The City Council of Hialeah, Florida, not long after a religious community that practices animal sacrifice announced plans to build a church in the city, enacted several ordinances purportedly intended to protect animal welfare, including a ban on “kill[ing], slaughter[ing] or sacrific[ing] animals for any type of ritual.” The U.S. Supreme Court saw through the city’s pretenses and duly invalidated the ordinances pursuant to the Free Exercise Clause of the First Amendment. See *id.* at 533-47. According to the Court, “the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation’s essential commitment to religious freedom.” *Id.* at 524.

³⁰ *Marbury*, 5 U.S. (1 Cranch) at 177.

³¹ There are actually three, not two, major species of sovereign in the United States, the other being tribal. Except perhaps when speaking from the vantage point of tribal members, however, it may be conceptually difficult to assert

arrangement, often referred to as federalism, the national and state governments in many areas share authority, but in certain areas, the authority belongs exclusively to one or the other.³² Within each government, power is then divided and allocated among multiple separate branches, each with its own functions and jurisdiction.³³ Typically this separation of powers, as it is known, yields three branches—legislative, executive, and judicial—although states are free, at least to some degree, to define the powers of each branch as well as the permissible and impermissible relations among them. Finally, even within branches power may be further subdivided, as in the case of a two-chamber or bicameral legislature.³⁴

This structural division of power in the United States in theory prevents or reduces excessive conflict or factionalism, making less achievable a concentration of power in the national government or in one or more of its branches, preserving to a greater degree the citizenry's liberties, and possibly even lessening the likelihood that disgruntled groups will resort to violence or other unlawful acts. With regard to federalism, for example, the U.S. Supreme Court has explained that “[t]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: [r]ather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”³⁵ Likewise, regarding the separation of powers, the Court has noted that “[t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”³⁶

in an unqualified way that governmental power in the nation is “divided” among the federal, state, and tribal governments. For commentary, see Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

³²See, e.g., U.S. CONST. art. I, § 10 & art. II, § 2, cl. 2 (vesting the power to enter into treaties exclusively with the federal government); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the authority to criminalize gun possession in school zones, though clearly within the police powers of the states, is not within the enumerated power of Congress to regulate interstate commerce).

³³See, e.g., U.S. CONST. arts. I-III (establishing, respectively, the legislative, executive, and judicial branches of the federal government).

³⁴See, e.g., *id.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). Apparently, a state need not have a bicameral legislature. See NEB. CONST. art. III, § 1 (vesting the state’s legislative authority “in a Legislature consisting of one chamber”).

³⁵*New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks and citation omitted). See also PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 329 (2003) (“Federalism and a decentralized party system manage much political conflict by channeling it to the states and localities rather than elevating it to the federal level where it would be magnified by the higher stakes in a single national solution.”); Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were To Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991) (“By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people.”).

³⁶*Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008). See also THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means

These structural divisions of governmental power do not, however, stand alone. Instead, they are accompanied by several guarantees that presuppose a competitive factionalism (discussed in the next section) and allow all constituents of society to attempt to influence government as well as one another, yet effectively prevent or minimize both the commandeering and the corruption of governmental processes. Among these guarantees are those found in the First Amendment: the freedom of the press (which contemplates a role for the media in the process of self-governance), the essentially jurisdictional prohibition on laws respecting an establishment of religion (which keeps religious and government institutions from becoming the agent of one another), and the guarantees of free religious exercise and free speech (which protect the right of religious individuals and institutions to weigh in on matters of public policy and to criticize the government).³⁷

3. A Political Culture That Accepts—Even Exalts—Factionalism and Self-Interest

A third factor, in addition to written constitutionalism and distribution of governmental power, is the acceptance of self-interest and the resulting conflict or factionalism creates, which, as noted, conceptually corresponds to the structural division of power. In order to limit and resolve conflict, the Constitution as well as the larger political culture of the United States basically assume that certain types of conflict are not preventable, and perhaps even valuable, and so it provides an agreed-upon framework in which the conflict can occur. In turn, the success or demise of a certain movement or idea substantially depends not on government control, but instead on its public acceptance or rejection or on its self-delegitimation by failing to abide by the framework's norms.

This approach was most prominently articulated by James Madison during the period when the Constitution was placed before the original states for ratification. “There are,” he thought, “two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”³⁸ Removing the causes of faction, however, would require either

and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Redish & Cisar, *supra* note 35, at 451.

³⁷See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (invalidating under the Free Speech Clause discrimination against religious speech and holding that the Establishment Clause did not justify such discrimination); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted) (noting that “[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires” and that “[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma”); *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion) (holding essentially that the Free Exercise Clause prohibits imposing disabilities on participants in the political process based on their religious status); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 196 (1992) (noting that religious political activity of all manner “is fully protected by the right of free speech, as well as by the right of free exercise”).

³⁸THE FEDERALIST NO. 10, at 78 (James Madison). Madison defined a faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Id.* He envisioned factionalism based on “different opinions concerning religion, concerning government, . . . an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions,” though he believed that “the most common and durable source of factions has been the various and unequal distribution of property.” *Id.* Today, “commentators are more likely to speak of special interests, vested interests, lobbies, pressure groups, and . . .

“destroying the liberty which is essential to its existence” or “giving to every citizen the same opinions, the same passions, and the same interests.”³⁹ Finding the first method “unwise” and the second “impracticable,” Madison posited, partly as a conclusion and partly as a premise, that “[t]he latent causes of faction are . . . sown in the nature of man,”⁴⁰ such that “the CAUSES of faction cannot be removed” and relief from factionalism “is only to be sought in the means of controlling its EFFECTS.”⁴¹

Madison’s solution was a structural one that relied not on the hope of a wholly virtuous citizenry among which self-serving ambition will naturally be curtailed, but instead on the selection of a suitable form of government through which “[a]mbition must be made to counteract ambition.”⁴² To be sure, Madison’s view was offered principally to explain why the proposed national government was structured as a republic rather than a pure or direct democracy, his thesis being that factionalism of a parochial nature would be less able to impose itself successfully on a sufficiently large republic. According to Madison, “[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”⁴³ With regard to religious factionalism, in particular, he argued that “[a] religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.”⁴⁴

Madison’s proposed form of government obviously prevailed with the Constitution’s ratification, and today one can see not only the representative institutions that he envisioned but also the extent to which his assessment of their operation has been accurate. Importantly, Madisonian-like perspectives on factionalism are also present in other parts of the Constitution, in constitutional interpretation and discourse, and in the larger political culture, which both reflects and informs the Constitution’s meaning. Within the world of free speech, for example, are several valued notions—*e.g.*, the “marketplace of ideas”⁴⁵ and the “favoring [of] more rather

. . . single-issue groups.” Peter H. Schuck, *Against (and For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 553 (1997).

³⁹THE FEDERALIST NO. 10, at 78.

⁴⁰*Id.* at 79.

⁴¹*Id.* at 80.

⁴²THE FEDERALIST NO. 51, at 322.

⁴³THE FEDERALIST NO. 10, at 84.

⁴⁴*Id.* This point is reasserted, in a slightly different form, in THE FEDERALIST NO. 51, at 324 (“In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.”); *see also* John F. Wilson, *Religion, Government, and Power in the New American Nation*, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE PRESENT 79, 86 (Mark A. Noll & Luke E. Harlow eds., 2d ed. 2007) (“[Madison] recognized that religion provided one basis for a factionalism that could destroy a regime. He did not seek to eliminate the causes of faction (religion being one), because in his view the polity stood the best chance of survival if factions (including those based on religion) counterbalanced each other.”).

⁴⁵*See* Consolidated Edison Co. of N.Y., Inc. v. Public Service Comm’n of N.Y., 447 U.S. 530, 538-39 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating’ To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.” (quoting *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972))); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market”).

than less speech”⁴⁶—that clearly adopt a premise more or less consistent with Madison’s approach to factionalism.⁴⁷

Even more broadly, the acceptance or legitimization of factionalism and asserted self-interest can be found in the nation’s economic and legal systems, from free market capitalism to uninhibited litigation, and it is certainly a central motif in popular culture. Public appeals to subvert one’s own interests to those of the common good are, in fact, not especially common, while potentially significant conflict over virtually any economic, educational, environmental, legal, or public policy matter is typically an anticipated event, partly fueled by and eagerly covered by the media.⁴⁸ This acceptance or elevation of self-interest is, of course, partly rooted in classical liberalism, with its joint emphasis on individual freedom or choice and on the limited nature of government, especially the notion that among the government’s primary functions is not the inculcation of virtue by force.⁴⁹ As such, it is present to varying extents in a number of Western political cultures. In the United States, however, a significant portion of this phenomenon is also related to the prevalence of consumerism as a legitimate paradigm for socioeconomic life, if not for life in general.

The role that this cultural emphasis on self-interest plays, in terms of preventing or regulating conflict among religious and other communities, is basically obstructionist and in this sense is nothing more than a variation of Madisonian factionalism. Though heightened self-interest may in the first instance create more factionalism, ultimately it lessens the likelihood that any particular assertion of self-interest, unless widely shared, will prevail in the marketplace of public policy. In general, citizens will favor ideas, technological developments, spending plans, and other items in the marketplace to the extent that they appear not only to be valid but also to be of practical benefit in their own lives. This is why, for example, longstanding legal restrictions on divorce or contraceptives were gradually relaxed, repealed, or declared

⁴⁶Rappa v. New Castle County, 18 F.3d 1043, 1073 n.53 (3d Cir. 1994); *see also* Velez v. Levy, 401 F.3d 75, 97-98 (2d Cir. 2005) (stating that “the basic purposes of the Free Speech clause” are “the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people’s views to those charged with decision making”).

⁴⁷*See* Schuck, *supra* note 38, at 588 (“Madison’s solution has proved brilliantly prescient. It resembles the remedial mantra of the Supreme Court in First Amendment cases—that the cure for error and falsehood is not government restriction of speech, but more speech—which has also served us well.”)

⁴⁸There is some social science research indicating that the extent to which people act in a self-interested manner reflects not simply an innate tendency to do so, but also a cultural norm that suggests that they ought to do so, even if this means refraining from conduct that one otherwise believes to be worthwhile. *See* Rebecca K. Ratner & Dale T. Miller, *The Norm of Self-interest and Its Effects on Social Action*, 81 J. PERSONALITY & SOC. PSYCH. 5 (2001); Dale T. Miller & Rebecca K. Ratner, *The Power of the Myth of Self-Interest*, in CURRENT SOCIETAL ISSUES ABOUT JUSTICE 25 (Leo Montada & Melvin J. Lerner eds., 1996).

⁴⁹In the United States, allusions to the notion of limited government are often narrow domestic references to the theoretical character of the national or federal government when compared to that of the state governments. The federal government, it is said, is one of limited powers defined by the text of the Constitution, which is to say that it possesses only those powers that the people expressly delegated to it, reserving all other powers properly possessed by government to the states. *See* U.S. CONST. amend. X; THE FEDERALIST NO. 45, at 292-93 (James Madison). There is, of course, a much richer conception of limited government that reaches further back into history and is manifested in many nations across the globe, though it, too, is embodied in the U.S. Constitution. Regarding the federal government, *see* U.S. CONST. art. I, § 9, and amends. I-IX; the state governments, *see id.* art. I, § 10, and amend. XIV; and both the federal and the state governments, *see id.* amends. XIII, XV, XIX, and XVI.

unconstitutional⁵⁰ despite objections from many of the nation’s institutionalized religions, some of which eventually or had already acquiesced and modified their own stances on these issues.⁵¹

One of the more substantial contributions that the law or legal system has added to all of this is the constitutionalization of self-interest in the definition, and in some cases the identification, of various rights or liberties. Constitutional rights, after all, are supreme over every form of state law and subconstitutional federal law,⁵² and they also carry with them a unique degree of legitimacy, comprising as they do the fundamental law of the land, grounded in the sovereignty of the people as a whole. Even conduct that is otherwise morally troubling—selling pornography, for instance, or at one time, selling contraceptives—can acquire a veneer of legitimacy merely by its inclusion within the domain of constitutionally protected interests.

4. Elite Constitutional Interpretation

A fourth and final characteristic that can be identified and that merits discussion is the composition and role of the judiciary, specifically the federal judiciary. In the United States, courts possess a general authority to review the constitutional validity of the laws and actions of the federal and state governments and, especially if one has in mind the U.S. Supreme Court, also have the authority to issue definitive interpretations of the Constitution.⁵³ The possession of this authority, known as the power of judicial review, is not entirely uncontroversial, partly because the federal courts have an elite composition that in certain respects is quite unrepresentative of the American population. In turn, it can be alleged that their constitutional interpretations are influenced by a perspective on morality, culture, and indeed the nature of humankind that is necessarily skewed and, further, that they either envision themselves as guardians and pathfinders of an enlightened way or effectively engage in such guardianship without knowing it. Even to those who understand and accept that the federal government is not a pure representative democracy, much less a pure democracy, but rather a mixed government exhibiting both democratic and oligarchical characteristics, the elitism of the Supreme Court and perhaps all of the federal judiciary can still seem problematic once the power of judicial review is taken into account.

Yet it can be argued that it is precisely the Court’s elite guardianship that serves a vital role in maintaining a progressive yet stable trajectory for the nation, including the prevention and mitigation of conflicts involving religious and other meaningful communities. Judges tend to be relatively well-educated, which likely allows them to situate more thoughtfully their decisions in relevant historical and geopolitical context. In addition, the overwhelming majority of federal judges, before holding that status, were practicing lawyers, legal educators, or governmental officials, and their training and experience in these roles probably allows them to foresee more

⁵⁰See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a constitutional right of married persons to obtain and use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right recognized in *Griswold* to unmarried persons).

⁵¹See David M. Wagner, *The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right To Divorce Have Been Greatly Exaggerated*, 12 REGENT U.L. REV. 53, 62 n.49 (1999-2000) (noting that “moral opposition to contraception was a position held in common by most Protestant churches, as well as by the Catholic Church, well into the 1930s, when views started to shift, in part as a result of the change in the Anglican view announced at the Lambeth Conference of 1933”).

⁵²See U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

⁵³See *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803).

clearly the institutional effects of their decisions and to appreciate to a greater degree the value of order and stability.⁵⁴ Judges also appear to be more secular than the general population in terms of their affiliations and outlooks, which to some extent is not surprising given that their profession or occupation basically requires a heightened commitment to empirical, rationalist modes of knowledge and discourse.⁵⁵ Among other things, this secularist dimension of judges may allow them to be more neutral or detached with regard to conflicts involving religious communities, though it may also cause them to discount some of the concerns that prompt such conflicts in the first instance.⁵⁶

Some have contended that Supreme Court, in part for these reasons, has gone too far in its desire to stem religion-related conflict or alienation, and that many of its Establishment Clause rulings over the past 60 or so years have amounted to or have led to an unwarranted, even dangerous exclusion of religion from public life. Concerns such as these, of course, only confirm that the Court plays a unique role in the prevention and management of religion-related conflict, even if that role has not always been optimally fulfilled. Likewise, whatever one's views toward the Court's Establishment Clause rulings, it is interesting to note that two of its more controversial and unstable Establishment Clause doctrines—a prohibition on governmental endorsement of religion⁵⁷ and a prohibition on religion-related government decisions that foster divisiveness⁵⁸—directly relate to the issues of alienation and conflict associated with religion, indicating not only that the Court is indeed consciously involved in the process of preventing and limiting conflict involving religion or religious communities, but also that it has yet to determine precisely the nature and extent of that involvement.

⁵⁴See STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 105, 114 (1998); J. Thomas Sullivan, *Requiem for RFRA: A Philosophical and Political Response*, 20 U. ARK. LITTLE ROCK L.J. 795, 798 (1998). Judges also must have some degree of political involvement or savvy. Federal judgeships, for example, require nomination by the U.S. President and confirmation by the U.S. Senate, see U.S. CONST. art. II, § 2, cl. 2, and one does not normally encounter the first stage and then pass through the second without at some point meaningfully engaging the world of politics.

⁵⁵See Stephen L. Carter, *Introduction to Faith and the Law Symposium*, 27 TEX. TECH L. REV. 925, 929 (1996); George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 54-58; Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 593 (1998); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126 (1992); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 498-500 (1999); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1221 n.188 (1994).

⁵⁶See CARTER, *supra* note 54, at 104-05; Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 141; Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 5 (1996).

⁵⁷See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 149 (explaining that the endorsement test was left "in a precarious state" following a pair of 2005 Supreme Court rulings and that, "[a]lthough the Court is essentially unanimous on some kind of anti-proselytism principle, several Justices oppose the non-endorsement concept as too stringent, while the test's adherents disagree on its precise content" (footnote omitted)).

⁵⁸*Compare* Mitchell v. Helms, 530 U.S. 793, 825 (2000) (plurality opinion) (discounting if not altogether abandoning a divisiveness inquiry), *and* Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002) (restating the Mitchell opinion's rejection of the divisiveness inquiry), *with* McCreary County v. ACLU of Ky., 545 U.S. 844, 861, 863, 876, 881 (2005) (mentioning divisiveness four times and suggesting that it is an analytical consideration).

Conclusion

This paper has attempted to demonstrate the relevance of the law and its institutions in relation to conflicts involving religious and other communities. In particular, it has attempted to identify components or aspects of the constitutional system and political culture of the United States that appear to prevent or resolve such conflicts. At the same time, the paper has endeavored to be cognizant of its limitations both in terms of its potential relevance and in terms of certain methodological deficiencies.

One thing that readers may have noticed and perhaps thought conspicuously odd is that the paper has devoted relatively little space to the Constitution's provisions that directly concern religion—the Establishment and Free Exercise Clauses of the First Amendment and the Religious Test Clause of article VI⁵⁹—while devoting quite a bit of space to the identification of structural, institutional, and cultural aspects of the American constitutional arrangement. What these allocations reflect is the reality that textual commitments such as those in the First Amendment, while important, are but one of many elements that can lead to the prevention, reduction, and resolution of conflicts involving religious communities and the other institutions or communities of a society or state. Of these elements, in fact, textual commitments like those of the First Amendment are potentially some of the easiest to establish—even oppressive regimes can issue sweet-sounding charters of rights⁶⁰—but they are potentially also the most difficult to fulfill in the absence of other elements or circumstances such as those described in the paper. In short, it is this reality that has directed the focus of the paper, and it is also this reality that poses the greatest challenge to nations and citizens seeking to limit conflict among communities and to do so without, to quote Madison once more, “destroying the liberty which is essential to its existence.”

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⁵⁹U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

⁶⁰*See, e.g.*, PEOPLE'S REPUBLIC OF CHINA CONST. art. 36 (“Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. . . .”), at http://english.gov.cn/2005-08/05/content_20813.htm; U.S.S.R. CONST. of 1936, art. 124 (“In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of antireligious propaganda is recognized for all citizens.”), at <http://www.departments.bucknell.edu/russian/const/36cons04.html#chap10>.

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