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Between Accommodation and Favoritism: The Need for a Political Power Factor in Religious Exemption Adjudication

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BETWEEN ACCOMMODATION AND FAVORITISM: THE NEED FOR A POLITICAL POWER FACTOR IN RELIGIOUS EXEMPTION ADJUDICATION

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This Article enters the current heated debates on religious exemptions with a modest proposal: political power should be central to religious exemption analysis. The Article proposes a factor familiar from equal protection law— the Political Power Factor— to be used in the adjudication of religious exemptions. Drawing on recent Supreme Court cases, the Article explores how and when political power becomes a democratic problem and an Establishment Clause challenge. It argues that extra-accommodation of objectors whose views are backed by political power in political processes may violate the Establishment Clause's mandate against favoritism of particular religions or religion in general. The Political Power Factor is proposed as a tool to adjudicate political power and thereby address the identified Establishment Clause concerns. The Political Power Factor gauges the representation of the religious objector's viewpoints in the given polity's political processes. When a viewpoint is well-represented in political processes, the factor weighs against granting an exemption, and vice versa. While difficult boundaries must be drawn, judges can engage in this line of inquiry without violating long-standing principles of judicial restraint in this area of law.

The time to engage in a careful political power analysis is now. Religious exemptions have been caught in the crossfire of the culture wars, and political discourse on the boundaries of the current religious exemption regime is polarized. Facilitating boundary-drawing for an evolving religious exemption regime is in the interest of both those who fear this regime's rapid expansion and those who are concerned with its long-term stability.

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INTRODUCTION

The current political debate over religious exemptions is contentious and associated with polarizing issues, such as reproductive health care and LGBTQ equality. Often the religious exemption case that evokes controversy has a certain structure: it features religious objectors who seek exemptions on the basis of mainstream beliefs. Two much-discussed Supreme Court cases provide good examples of this type of exemption case: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[1] and *Burwell v. Hobby Lobby, Inc*.[2] In these cases, the objectors sought exemptions on the basis of views familiar from—and strongly voiced in—democratic deliberation: the opposition to same-sex-marriage and certain categories of contraceptives.[3] Moreover, the exemptions requested were perceived by many to be accompanied by harms to particular groups: same-sex couples and women.[4]

The interaction between religious exemptions and discrimination, and the general problem of exemptions resulting in third-party harm to particular social groups, has generated substantial academic commentary.[5] This Article will largely set these heated debates aside and focus instead on a related, yet conceptually distinct, aspect of this type of exemption: the democratic and constitutional concerns that arise from providing accommodations to the subscribers of mainstream views backed by substantial political power. While the general topic of political power in religious exemption cases is not new,[6] some central questions remain underexamined: if, when and why is political power problematic in this area of law, and how should courts adjudicate political power?

Roughly put, the political power concern under scrutiny here is the concern that subscribers of viewpoints that have already had their fair play in the democratic process are receiving a democratically and constitutionally unwarranted privilege. The democratic problem is that members of a polity who are already accommodated in democratic decision-making are receiving extra-accommodation under the laws that

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1 138 S. Ct. 1719, 1723 (2018).

2 134 S. Ct. 2751, 2759 (2014).

3 *Masterpiece Cakeshop*, 138 S. Ct. at 1726; *Hobby Lobby*, 134 S. Ct. at 2759.

4 *See, e.g.*, Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2566–74 (2015).

5 *See, e.g.*, Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 1 (2015); Nejaime & Siegel, *supra* note 4, at 1; JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 1–2 (Oxford U. Press 2017).

6 *See, e.g.*, Nejaime & Siegel, *supra* note 4, at 2520–21.

bind other similarly situated members. The constitutional problem that follows is that such special treatment may favor particular religious views. Such treatment easily violates Establishment Clause mandated neutrality. The political power concern explored here is distinct from the broader and familiar concern that religious exemptions are democratically problematic because they privilege religion over other public interests.[7] The Article assumes that religious exemptions are generally justified and focuses on the problems that nonetheless arise from extra-accommodation of religious views backed by political power.

The Article argues that a thorough Establishment Clause analysis must include political power considerations, and it suggests that courts employ a Political Power Factor when adjudicating religious exemption claims.[8] The concept of courts adjudicating political power is not new—it is an idea familiar from equal protection law and jurisprudence.[9] In contrast to equal protection law and its focus on groups, however, the Political Power Factor as applied in religious exemption adjudication gauges the representation of the objector's viewpoint in political processes and deliberation.[10] The Article conjectures that in failing to employ a Political Power Factor in religious exemption adjudication, courts have been distracted by judiciary principles barring courts from getting too involved in the assessment of religious claims.[11] It argues that perceived obstacles stemming from this judicial "hands-off"[12] religion approach can be overcome when implementing the Political Power Factor. Courts can indeed gauge the relevant forms of political power without getting entangled in the resolution of religious questions and without evaluating the merit of religious claims.

The discussion set forth here is sensitive to the many important yet competing considerations that arise when religion's role in democracy is at stake. The Article does not reject any of the prevalent justifications underlying commitments to broader or narrower religious exemption regimes. It assumes that religion at times warrants special

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[7] *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 86 (Harv. U. Press 2007).

[8] *See infra* Part III.

[9] *See, e.g.*, Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1579–80 (2017); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1528–29 (2015).

[10] The Political Power Factor likely will not eschew indeterminacy problems similar to those encountered in political power analysis in equal protection law. However, this Article argues that the factor likely will provide more transparency and clarity in an area of law that is already characterized by indeterminacy and fuzziness.

[11] *See infra* Section II.B.

[12] *See* Richard W. Garnett, *A Hands-off Approach to Religious Doctrine: What are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837 (2009).

treatment. It also assumes that privileging of religion can be problematic, and any perceived privileging requires careful analysis. It is entirely possible to endorse a Political Power Factor without rejecting any of these viewpoints.

I. A CONSTANTLY EVOLVING RELIGIOUS EXEMPTION REGIME

Religious exemptions have a complex relationship with democracy. One difficulty with religious exemptions is the potential for unequal treatment of members of society when certain members are found not to be bound by the democratically enacted laws that bind all others.[13] Another concern is that a system of widespread religious exemptions from democratically enacted laws would be "courting anarchy" and threatening an unstable and unpredictable system of law.[14] At the same time, the United States is founded on a deep commitment to religious liberty and free exercise of religion, commitments that can be relied on in justifying the need to sometimes accommodate its citizens most deeply held beliefs.[15]

In the provision of religious accommodation, it can be difficult to draw the boundary between the protection of religious liberty and the democratically unwarranted privileging of religion. Courts have struggled with this difficult boundary-drawing, and the Supreme Court has shifted in their decisions between broader and narrower understandings of the First Amendment's Free Exercise Clause.[16] In addition to constitutional protection of religious exemptions, statutory religious exemptions are constantly evolving and responding to changing times and shifting interpretations of religious liberty.[17]

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[13] Democratic fairness is a live issue. The issue is at the heart of the debate about the specialness of religion. For an overview of this debate, see, for example, Lawrence Sager & Christopher S. Eisgruber, Opinion, *Religious Exemptions Can Verge on Favoritism*, N.Y. TIMES (May 9, 2012), https://www.nytimes.com/roomfordebate/2012/05/09/should-churches-get-tax-breaks/religious-exemptions-can-verge-on-favoritism.

[14] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990). *Smith* has been superseded by statute. *See infra* Section I.B.

[15] *See, e.g.,* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993) ("The principle that government in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

[16] *See infra* Section I.A.

[17] *See infra* Section I.B.

A. Religious Exemptions and the First Amendment's Religion Clauses

First Amendment protections of Free Exercise at the federal level have been superseded by statute, and these protections are thus currently not as important as they once were.[18] Separating constitutional and legislative protections is nonetheless helpful in understanding the structure of the current religious exemption regime as the different lines of analysis are easily conflated.[19] In interpreting the mandate of the First Amendment's Free Exercise Clause,[20] a minimum/floor protection is well-settled: A law violates the Constitution's Free Exercise Clause when it intentionally targets and discriminates on the basis of religion.[21] Religions and religious observers cannot be singled out for unfavorable treatment under the law.[22] Yet great deference is granted to legislatures' declared purpose of a given law.[23]

From the perspective of the United States Constitution, religious exemptions are—roughly put—Free Exercise claims with Establishment Clause constraints.[24] The Free Exercise Clause prohibits government interference with the individual's meaningful exercise of religion,[25] while the Establishment Clause prohibits government's favoring of particular religions or religion in general.[26] The Supreme Court has

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[18] The statutory exemption scheme will be discussed in the following section.

[19] Even courts sometimes conflate the two. In *Holt v. Hobbs*, the Supreme Court faulted the District Court for "improperly [importing] a strand of reasoning from cases involving prisoners' First Amendment rights" instead of focusing on the analysis required by the governing federal statute. 574 U.S. 352, 361 (2015).

[20] The First Amendment's Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion][.]" U.S. CONST. amend. I.

[21] *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). *See also* Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

[22] *See, e.g.*, *Lukumi Babalu Aye*, 508 U.S. at 542–43 ("[L]aws burdening religious practice must be of general applicability… inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.").

[23] *See* Joseph Liu, *The Smith Decision,* PEW RSCH. F., (Oct. 24, 2007), https://www.pewforum.org/2007/10/24/a-delicate-balance6/.

[24] *See infra* note 32.

[25] The First Amendment's Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion][.]" U.S. CONST. amend. I.

[26] *Id.* ("Congress shall make no law respecting an establishment of religion."); *see, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("When the government acts

acknowledged that tensions exist between the Free Exercise Clause and the Establishment Clause, and it has recognized that often it may not be "possible to promote the former without offending the latter."[27]

While the Establishment Clause mandates "government neutrality between religion and religion, and between religion and nonreligion,"[28] determining the meaning and boundaries of the required neutrality has proved difficult.[29] As Justice O'Connor once noted, "[i]t is difficult to square any notion of 'complete neutrality'. . . with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation."[30] When religious beliefs are singled out for special protection, the government in providing such an exemption is not being neutral in any strict sense of the term. Recent Supreme Court jurisprudence rejects has rejected inflexible interpretations of neutrality and has rather embraced an interpretation of neutrality that is in tune to the unique ways that religious adherents and beliefs are situated.[31] The idea behind this broader understanding of neutrality is that people and institutions may at times be uniquely situated and uniquely disadvantaged in ways that warrants correcting.[32]It is by no means clear when a member of society is situated in a way that warrants correction through exemption. The boundaries between correcting unique burdens and favoring particular religions are fuzzy. Exemptions may run afoul of the Establishment Clause if providing the exemption results in religious imposition on the unwilling, if providing the exemption can be interpreted to result in the

with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (*"*[T]he

'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

27 Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

28 Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

29 *See generally* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013) (discussing the benefits of "religious neutrality").

30 Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring).

31 *See e.g. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2031 (2017) ("This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws")

32 *See, e.g.*, Eugene Volokh, *Equal Treatment is Not Establishment*,13 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 341, 345–46 (1999).

favoring of a particular religion, or if the provision of the exemption imposes burdens or harms on third parties.[33]

The interpretation of the Free Exercise Clause as relevant to exemptions was once much broader than it is today. In the 1963 case, *Sherbert v. Verner*, the Supreme Court held that denying unemployment benefits to a Seventh Day Adventist who, for religious reasons, refused to accept employment that required her to work on her Saturday Sabbath violated the First Amendment's Free Exercise Clause.[34] In deciding *Sherbert,* the Court employed what has come to be known as the Sherbert test.[35] The Sherbert test is a balancing test which requires substantial burdens on the free exercise of religion to be justified by a compelling state interest.[36]

In the 1990 case, *Employment Division v. Smith*, the Court took a big step back from this broad understanding of the Free Exercise Clause.[37] In *Smith*, the religious objectors were two Native American drug rehabilitation counselors who were fired from their jobs due to their ingesting peyote at a religious ceremony in their member church.[38] In adjudicating the objectors' exemption claim, the Court limited the scope of the Sherbert test to apply only to laws that already harbor exemption options.[39] The *Smith* Court held that laws could indeed significantly burden religious practices so long as they were "neutral and generally applicable," i.e., so long as they did not target or purposely discriminate against any religion.[40]

The plaintiffs in *Smith* in many ways represented the paradigm case of the religious objector in need of protection.[41] First, the objectors were minorities who could not be considered to have much of a chance affecting the laws that bind them.[42] Second, the objectors were significantly burdened by the law in question which made the intentional

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33 In *Estate of Thornton v. Caldor,* Justice Burger cited Judge Learned Hand in holding that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." 472 U.S. 703, 710 (1985) (quoting Otten v. Balt. & O.R. Co., 205 F.2d 58, 61 (2d. Cir. 1953)). In *Cutter v. Wilkinson*, the Court noted that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries." 544 U.S. 709, 720 (2005).

34 374 U.S. 398 (1963).

35 *See, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith*,* 494 U.S. 872, 883 (1990).

36 *Sherbert*, 374 U.S. at 403, 407.

37 *Smith*, 494 U.S. at 872.

38 *Id.* at 874.

39 *Id.* at 890.

40 *Id.*

41 *Id.* at 920 (Blackmun, J., dissenting).

42 *See* Liu, *supra* note 24.

possession of peyote a crime.[43] The law made it impossible for the counselors to engage in a practice central to their religion without serious repercussions.[44] Finally, the third-party harm involved in granting the exemption (i.e., the third-party harm involved in granting the unemployment benefits) would be rather attenuated.[45] Yet, the Court's majority found that the law burdening the religious objectors was "neutral" and "generally applicable . . ." and that the exemption could be denied on this basis alone.[46] This narrow First Amendment interpretation was immediately controversial[47] and ultimately resulted in legislative intervention.[48]

B. Statutory Protections

The Religious Freedom Restoration Act (RFRA)[49] was implemented in 1993 by the Clinton administration in response to the perceived harshness of *Smith*.[50] The RFRA reinstated—and in some ways expanded—the Sherbert test.[51] RFRA states that the government may only substantially burden the free exercise of religion when acting in furtherance of a compelling government interest and when the government has used the least restrictive means in pursuing that interest.[52] In *City of Boerne v. Flores*, the Supreme Court struck down RFRA as unconstitutional as applied to the states.[53] As a response to *Flores*, a unanimous Congress passed the Religious Land Use and Institutionalized

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43 *Smith,* 494 U.S. at 874 (discussing criminality of peyote).

44 *Id.* at 903 (O'Connor J., concurring).

45 *Id.* at 918 (Blackmun, J., dissenting) (discussing the possibility for the State to grant peyote exemption).

46 *Id.* at 890 (majority opinion).

47 *See* Liu, *supra* note 24.

48 *See State Court and Legislative Responses to the Smith Decision,* PEW RSCH. F., (Oct 24, 2007).

49 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

50 *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities,* 53 SAN DIEGO L. REV. 163, 163–64 (2016).

51 It is arguably even a broader protection than that offered under the *Sherbert* test which does not include the "least restrictive means" language. *See* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION (2017).

52 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012). In full RFRA states that: IN GENERAL. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). EXCEPTION. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. *Id.*

53 521 U.S. 507, 511 (1997).

Persons Act (RLUIP) in which the RFRA/Sherbert test was enacted as applied to local land-use laws, zoning laws and confined institutions.[54] While RFRA following *Flores* only applies to federal law, many states have implemented their own versions of RFRA.[55] The current religious exemption regime is thus comprised of a broad statutory basis for religious exemptions at both state and federal levels, a narrower federal constitutional basis resting on Smith analysis, and various levels of state constitutional protections—the majority of which provide broader protections than those set forth in *Smith*.

When *Smith* was decided, it was perceived by many as being too harsh on religious observers.[56] Both religious organizations and civil rights groups protested the decision.[57] The federal RFRA that was enacted as a response to Smith was passed by a unanimous house and an almost unanimous senate.[58] Today, the RFRA and its state analogs are more controversial, especially when employed in ways perceived to facilitate discrimination against LGBTQ communities.[59] Yet both the federal and state RFRAs have also played an important part in protecting politically vulnerable religious minorities,[60] a protection that is not secured under First Amendment analysis governed by *Smith*.[61] *Smith* analysis focuses on the law's purpose and pays little attention to the burdens placed on religious observers or the opportunities for religious observers to have their beliefs heard by lawmakers in their communities.[62]

II. POLITICAL POWER IN RELIGIOUS EXEMPTION CASES: DEMOCRATIC AND CONSTITUTIONAL CONCERNS

The backlash against the ruling in *Smith* is quite understandable. The protection of vulnerable religious viewpoints and practices harbored in the prior balancing-test was unapologetically eradicated. The problems associated with such eradication was noted in Justice

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54 Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, § 3, 114 Stat. 803, 804 (2000) (codified as amended at 42 U.S.C. 2000cc-1)).

55 *See* Lund, *supra* note 51, at 165.

56 *See, e.g.*, Ira C. Lupu et. al., *A Delicate Balance: The Free Exercise Clause and the Supreme Court*, PEW F. RELIGION & PUB. LIFE 12 (Oct. 2007), http://www.pewforum.org/files/2007/10/free-exercise-I.pdf.

57 *Id.*

58 *See* 139 CONG. REC. H8713 (1993), 139 CONG. REC. S14471 (1993), Senate Roll Call Vote No. 331, 103d Cong. (1993) (RFRA was passed with a 97-3 vote in the Senate).

59 *See, e.g.*, Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, WASH. POST, Jun. 25, 2015.

60 *See, e.g.*, Lund, *supra* note 51, at 165–67.

61 *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990).

62 *See id.* at 884–86, 89 n.5.

O'Connor's concurrence.[63] While Justice O'Connor joined the majority in the judgment, she disagreed with the complete abolishment of the Sherbert test, and she wrote separately to criticize the Court's sharp departure from First Amendment jurisprudence. [64] In her concurring opinion, Justice O'Connor emphasized the First Amendment's crucial role in protecting objectors whose views or practices do not have adequate representation in the political process.[65]

> [T]he Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government, and that accommodation of such religions must be left to the political process . . . In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.[66]

In the *Smith* majority analysis, a compelling government interest need not be shown at all for laws to impose burdens on religion.[67] As long as the law is generally applicable—in not targeting religion—it will pass muster.[68] Observers of minority religions that do not have political power stand to lose under such a framework.[69] Such groups lack power in terms of quantitative representation. They do not have the numbers to oust or pressure legislators, and legislators have little political incentive to accommodate beliefs and practices that the majority of their constituency do not approve of. They also lack power in terms of qualitative representation. Unfamiliar religious practices or beliefs are easily overlooked and disregarded in lawmaking.

RFRA and RLUIP blew life into religious liberty by reinstating the kinds of minority protections that were stripped away in *Smith*.[70]

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63 *See id.* at 891–95 (O'Connor, J., concurring).

64 *See id.* at 903–07.

65 *See id.* at 902–03.

66 *Id.*

67 *Smith*, 494 U.S. at 902.

68 *Id.*

69 Justice Scalia, who wrote the majority opinion, acknowledged this consequence. *See id.* at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

70 *See* Lund, *supra* note 51, at 163–64.

However, protection for politically vulnerable minorities endorsed by O'Connor in the quote above is not at all reflected in a RFRA case like *Hobby Lobby*.[71] Unlike objectors like the Native Americans in *Smith* or the Seventh Day Adventist in *Sherbert*, the views in question in *Hobby Lobby* were neither unfamiliar nor disadvantaged in political deliberation.[72] The view at stake concerned contraceptives, in particular the coverage of certain contraceptives in employee insurance plans.[73] The religious objectors in *Hobby Lobby* were evangelical Christians, one of the largest Christian subgroups in the United States[74] and a subgroup that often finds itself at the center of high-stakes political battles.[75] Evangelical Christians have had a strong influence on democratic discourse about contraceptives.[76] Long before the enactment of the Affordable Care Act (ACA), contraceptives as abortifacients was a political issue that was part of political discourse.[77] Evangelical Christians wary of certain contraceptives were able to voice their concerns in this discourse and to influence laws and policies in reproductive health care through democratic processes.[78] The power that this group has in affecting reproductive health care law became even more evident after the *Hobby Lobby* decision.[79] The Trump administration relied heavily on Evangelical Christian advisors.[80] With the help of such advisors, it indeed acted directly on the contraception concern at stake in *Hobby Lobby,* issuing

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[71] Note that *Hobby Lobby* was a statutory exemption case while *Smith* was a constitutional exemption case. This is a significant difference, but not for the purposes of this section.

[72] PEW RSCH. CTR., *America's Changing Religious Landscape* 3 (May 12, 2015), http://www.pewforum.org/ 2015/05/12/americas-changing-religious-landscape.

[73] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 688–91 (2014).

[74] PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 3 (2015), http://www.pewforum.org/ 2015/05/12/americas-changing-religious-landscape.

[75] *See, e.g.*, Elizabeth Dias, *Democrats (Wistfully) Take Aim at a Republican Stronghold: Evangelicals*, N.Y. TIMES (Sept. 14, 2018), https://www.nytimes.com/2018/09/14/us/politics/democrats-progessive-evangelical-election.html.

[76] *See, e.g.*, Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Reshaped Elections*, N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html.

[77] *See, e.g.*, Russell Shorto, *Contra-Contraception,* N.Y. TIMES (MAY 7, 2006), https://www.nytimes.com/2006/05/07/magazine/07contraception.html.

[78] *See* Lerone A. Martin, Assoc. Professor at Washington Univ., Remarks at Evangelicalism and Politics with the American Historian (transcript available at https://www.oah.org/tah/issues/2018/november/evangelicalism-and-politics/).

[79] *See* John Fea, Professor at Messiah Coll., Remarks at Evangelicalism and Politics with the American Historian (transcript available at https://www.oah.org/tah/issues/2018/november/evangelicalism-and-politics/).

[80] Noah Weiland, *Evangelicals, Having Backed Trump Find White House "Front Door is Open,*" N.Y. TIMES, (Feb. 7, 2018), https://www.nytimes.com/2018/02/07/us/politics/trump-evangelicals-national-prayer-breakfast.html.

federal regulations to make it easier for employers to seek religious exemptions from the ACA's contraceptive mandate.[81]

The exemption sought in *Masterpiece Cakeshop* was likewise based on beliefs well-represented in democratic politics, namely the opposition to same-sex-marriage.[82] The same-sex marriage debate was a politically hot issue both prior to and following the Supreme Court's ruling in *Obergefell v. Hodges*.[83] The extensive debates in media, academic journals, courts room and legislative debates etc. provided ample opportunity for those who oppose same-sex marriage to make their views and rationales known.[84] The religious objectors in both *Hobby Lobby* and *Masterpiece Cakeshop* could thus be said to seek exemptions on the basis of views backed by significant political power, and the protection provided by RFRA starts to look like privileging and *extra*-accommodation.[85]

A. Exemptions for Politically Powerful Objectors: Establishment Clause Challenges

Privileging certain religions or religious viewpoints through *extra*-accommodation is hard to justify. Meaningful Free Exercise protections may demand that the state remove the burden that a law places on religious observers, however, *privileged* treatment of religious viewpoints backed by political power can raise Establishment Clause concerns. A balancing of Free Exercise and Establishment Clause demands requires an "on the ground" analysis of how the religious observer is situated with respect to the law in question.[86] Political power is a key component of this analysis.[87]

The Establishment Clause prohibits state favoring of any particular religion.[88] A clear yet flexible mandate of state neutrality flows from this prohibition. The flexibility pertains to what the Supreme Court

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[81] *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,537 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

[82] Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1581–82 (2017).

[83] 576 U.S. 644 (2015).

[84] *See infra* note 123 and accompanying text.

[85] Travis Gasper, *A Religious Right to Discriminate: Hobby Lobby and "Religious Freedom" as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 412 (2015).

[86] *See* Leslie, *supra* note 83, at 1595.

[87] *See* Leslie, *supra* note 83, at 1595–96.

[88] *See* U.S. CONST., amend. I., *supra* note 21.

has called "benevolent neutrality,"[89] which allows for religion to be taken into account when providing accommodations to secure meaningful religious liberty.[90] In providing such accommodation, the mandate of neutrality is obeyed if the exemption is correcting for a disadvantage rather than creating a privilege, i.e., when neutrality is interpreted in ways that are in tune to the unique ways that religious adherents and beliefs are situated.[91]

Would an exemption based on views backed by political power lean toward unfair privileging or is the exemption rather correcting a unique disadvantage that the objector faces? The Establishment Clause demands an answer to this important question in religious exemption adjudication. It is hard to argue that objectors like the ones in *Hobby Lobby* or *Masterpiece Cakeshop* were uniquely disadvantaged in ways that warrant correcting. The objectors' viewpoints on same-sex marriage and contraceptives were well-represented in democratic politics.[92] Of course, any member of society on the losing side of a political issue is disadvantaged with regard to the law that reflects the winning side of the underlying disagreement. However, the objectors in these cases do not face a *unique* disadvantage when compared to other members of society who oppose the law in question.[93] By contrast, the Native American counselors in *Smith* subscribed to practices that were likely unfamiliar to the legislators behind the law in question, and they likely did not have any means of making their concerns heard.[94] In this way, the counselors were uniquely situated with respect to the law in question.

Those who believe that religious exemptions should be granted primarily because religious beliefs are special may have their red flags up at this point. From this perspective, one may ask: can religious objectors not be uniquely situated simply by virtue of the religiosity of their beliefs—even if the viewpoints at stake have had a fair representation in the political process? The short answer is yes. The fact that we have religious exemptions at all reflects a societal sensitivity to the

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89 Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994) ("[T]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

90 *See id.* at 705–06 (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987) ("[G]overnment may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.")).

91 *See Grumet*, 512 U.S. at 705.

92 Gasper, *supra* note 86.

93 *See* Weiland, *supra* note 81.

94 Employment Div. v. Smith, 494 U.S. 872, 919–20 (1990) (Blackmun, J., dissenting).

beliefs and practices that arise out of religion broadly defined.[95] This Article does not argue that there is no time or place for accommodation of religious views that are backed by political power. The Political Power factor is merely a factor, it by no means exhausts the inquiry into when an objector is uniquely situated. The more modest proposal is that the Political Power Factor weighs against such claims and provides some clarity to Establishment Clause analysis. Other factors and concerns may weigh in favor of a given exemption.

B. Boundaries in Courts' Adjudication of Religious Claims: The Religious Question Doctrine

The challenges that courts face in adjudicating religious exemption claims go beyond the balancing of competing justifications and understandings of religious liberty. The subject matter itself creates difficulties. Adjudicating religious claims is so fraught with potential problems that courts have adopted an adjudicatory hands-off approach: The Religious Question Doctrine.[96] The Religious Question Doctrine bars courts from resolving religious questions or evaluating the merit of religious claims or practices.[97]

Several rationales underlie the Religious Question Doctrine. First, courts are believed to lack competence in answering religious questions.[98] The general idea behind the competence rationale is that religious questions often turn on metaphysical or spiritual commitments that escape reasoned analysis.[99] Second, when courts adjudicate religious claims, neutrality may be jeopardized.[100] Judges, like other human

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[95] Some commentators argue that this sensitivity should be eradicated—i.e., that religious beliefs should be treated on par with any other ethical or moral concerns. *See, e.g.*, Eisgruber & Sager, *supra* note 13. As previously mentioned, this Article does not take this position.

[96] *See* Garnett, *supra* note 12.

[97] *See* Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions, in* RESEARCH HANDBOOK ON LAW AND RELIGION 262, 263 (Rex Ahdar ed., 2018).

[98] *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); Marsh v. Chambers, 463 U.S. 783, 821 (1983) ("[I]n this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the state to take upon itself the role of ecclesiastical arbiter."). *See also* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 144 (2009).

[99] For a discussion of this rationale and its shortcomings, *see* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 533 (2005).

[100] *See also* Lupu & Tuttle, *supra* note 99, at 134–35.

beings, are subject to cognitive biases and may be more understanding of claims from familiar majority religions or the religions to which they belong.[101] The Religious Question Doctrine counters the arbitrary outcomes that arise when such cognitive biases shape judicial decision-making, and it functions as a tool to secure the neutrality required by the Establishment Clause.[102] Finally, the primary concern with courts resolving religious questions or assessing the merits of religious claims is their lack of authority in the religious realm.[103] As legal scholar Richard Garnett phrases it: "secular authorities lack the power to answer some questions—religious questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions."[104] According to this rationale, whether courts are capable or not, whether the parties in a given dispute consent or not,[105] it is *improper* for courts to seek to resolve religious questions.[106] Again this rationale has its underpinnings in the Establishment Clause and the concern that resolving religious questions can be perceived as endorsement of certain religions or particular religious viewpoints.[107]

Courts will go far in their adherence to the Religious Question Doctrine."[108] The *Hobby Lobby* case provides a good example of a strikingly broad interpretation of the Religious Question Doctrine.[109] In the wake of *Hobby Lobby*, many commentators were concerned about the almost absolute deference that was given to the objectors in determining the degree of the burden that the law placed on their free exercise of religion.[110] The majority in *Hobby Lobby* deferred to the objectors' own evaluation of the extent to which the contraceptive mandate burdened their religious beliefs, i.e., on whether the objectors were substantially burdened by the law as required by RFRA.[111] In the majority opinion, Justice Alito asserted that it is "not up for us to say that [the objectors']

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[101] *See* MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 50–52, (1990).

[102] *See also* Lupu & Tuttle, *supra* note 99, at 137.

[103] *See* Lupu & Tuttle, *supra* note 99, at 145.

[104] Garnett, *supra* note 12, at 861.

[105] *See* Lupu & Tuttle*, supra* note 99, at 48.

[106] *See* Lupu & Tuttle*, supra* note 99, at 48.

[107] *See* Helfand, *supra* note 98, at 495.

[108] The term "Religious Question Doctrine" is coined by scholars. It is not a term that is used by courts. Scholars also sometimes refer to the doctrine as the "hands-off" approach. *See, e.g.,* Garnett, *supra* note 12; Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine:* An Introduction, 84 NOTRE DAME L. REV. 793 (2009).

[109] *See* Alex J. Luchenister, *A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 65 (2015).

[110] *Id.* at 67–68.

[111] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 726 (2014).

beliefs are mistaken or insubstantial".[112] The majority in *Hobby Lobby* also left unquestioned the objectors' views on the workings of contraceptives, disregarding broadly accepted scientific findings.[113] Further, the sincerity of the objectors was never examined, but rather taken for granted.[114]

In sum, courts are tremendously wary about subjecting religious claims to basically any form of inquiry. Adherence to the Religious Question Doctrine has led courts to refrain from questioning the objector's sincerity, the factual basis of the objector's claims, and the substantiality of the purported burden.[115] This Article will not engage in the academic discussion on whether and when resistance to these various forms of inquiry is warranted. Instead, it argues that whatever other limitations the Religious Question Doctrine may set, it does not bar the inquiry set forth by the Political Power Factor.[116]

III. A POLITICAL POWER FACTOR IN RELIGIOUS EXEMPTION ADJUDICATION

The Political Power Factor is a device that could counter some of the democratic and constitutional concerns associated with religious exemptions. The Political Power Factor evaluates the status of a belief on a scale between unfamiliar/disadvantaged and familiar/well-represented in democratic discourse. Under RFRA analysis, the political power can be rolled into the substantial burden analysis. Recall that the RFRA adopts a strict scrutiny form of analysis, a law can only place a substantial burden on the free exercise of religion if such a burden is justified by a compelling government interest, and the government has used the least restrictive means in pursuing that interest.[117] The Political

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112 *Id.* at 725.

113 *See* Meredith R. Mandell, *When Religious Belief Becomes Scientific Opinion: Burwell v. Hobby Lobby and the Unraveling of Federal Rule 702*, 12 NW. J. L. & SOC. POL'Y. 92, 93 (2016).

114 The Court did discuss whether corporations could have sincere beliefs, and it concluded that a closely held corporation like *Hobby Lobby* could. *See Hobby Lobby,* 573 U.S. at 717. While sincerity technically is a requirement to be met by religious objectors to prevail on their exemption claim, confusion exists on whether it can be adjudicated without trespassing into religious territory.

115 *See supra* Section II.B.

116 *See infra* Section IV.

117 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

IN GENERAL. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). EXCEPTION. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person- (1) is in furtherance of a compelling

Power Factor can play a part in determining substantiality. The idea is that burden analysis need not only be about the ways in which the law affects the lives of the objectors, but also the extent to which the democratic processes underling the law are responsive to the objector as a constituent of the polity in which the law is binding. If the objector did not have a chance of having her voice heard in the deliberation preceding the law's passing, and she likewise will not have a chance of having her voice heard on the subject of concern going forward, she is *loosely put* more burdened by the law than the constituent whose views have had and will have a chance of being heard. For example, as previously noted, the objectors concern with certain contraceptives in *Hobby Lobby*, is recognizable as a political viewpoint that has been part of the democratic discourse for quite some time.[118] It is a position that has played a fairly prominent role in the politics of reproductive health care and that has been backed by significant political power.[119] On the basis of these considerations, the Political Power Factor would weigh against a finding of substantiality.

By contrast, if we employ the Political Power Factor to the facts of *Sherbert v. Verner*,[120] the factor would weigh in favor of finding substantiality. The Seventh Day Adventist who would not work on Saturdays for religious reasons likely did not have a plausible avenue for voicing her concerns in relevant political deliberations. We can assume that the religious belief in question was unfamiliar, and due to the prominence of religious observers who would consider Sunday the day of rest, it may also have been an unpopular belief in her polity. The opportunity for her to voice her concerns in political deliberation was therefore minimal to non-existent. As such, she carries a powerlessness burden that is not carried by the constituent who had or has a fair play in politics. Put in Establishment Clause terms, on the basis of her religious views that lack political power, she is uniquely situated in ways that justify correcting.

When making these determinations, courts would use their common knowledge of public political culture. In fact, courts are often in the position of gauging political culture and public sentiment. Examples of such gauging is found in cruel and unusual punishment cases where courts will engage in questions such as whether a given punishment is

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governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

[118] *See supra* note 78.

[119] *Id.*

[120] Sherbert v. Verner, 374 U.S. 398 (1963).

"substantially rejected by contemporary society."[121] Courts are also capable of evaluating the extent of public deliberation surrounding a particular issue. For example, the Court engaged in such an assessment when it found state bans on same-sex marriage to violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment:

> [T]here has been far more deliberation than [the lower court] acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. … Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades.[122]

When engaged in such political power inquiry, judges would not need to dig deep. If too much investigatory work were required, this would be a sign that the concern raised by the objector has not played a visible role in political discourse. Importantly, since the Political Power Factor is just that—a factor—it would not be outcome-determinative. Circumstances unrelated to political power could outweigh the factor. However, the Political Power Factor can function as an additional consideration that courts can engage in to ensure that the exemptions granted are not at odds with the central tenets of democratic governance that underpin the mandates of the Establishment Clause.

IV. CONCERNS EVOKED BY THE INTRODUCTION OF A POLITICAL POWER FACTOR

A. Indeterminacy in the Political Power Factor's Application

It can be hard to determine (without getting into religious questions) whether a religious objector is part of a subgroup that does not have the power of the religious grouping in general. However, this question would never arise in religious exemption adjudication. Religious exemption adjudication focuses on the belief or practice in conflict with

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[121] *See* Furman v. Georgia, 408 U.S. 238, 282 (1972). Thank you to Chris Logel for making this connection.

[122] Obergefell v. Hodges*,* 576 U.S. 644, 676 (2015).

the law in question—not the religious group or individual.[123] It is entirely possible for an objector to be a member of a political group that has little political power, and yet for this objector to seek exemption on the basis of a belief or view that has been backed by political power in democratic deliberation. The view in question could have support by other powerful groups in society. One could imagine that the objectors in *Hobby Lobby* and *Masterpiece Cakeshop* belonged to small evangelical Christian subgroups with unique identities or belief-sets—or that they belonged to completely unfamiliar religious sects. Under such scenarios, the views upon which they based their exemption claims would still be backed by political power. The objection to same-sex marriage and to certain contraceptives would be backed by the political power of other religious and non-religious groups and as such would have had a fair chance of influencing politics.[124] In these cases, it is thus important to note that evangelical Christians have had—and still have—a strong voice in politics on the views in question.[125] Whether or not the objectors actually affiliate themselves with particular evangelical Christian groupings is not important.

Another challenge for the Political Power Factor would, for example, be the case where the religious belief in question falls somewhere in the middle of the scale, i.e., it is not immediately clear whether it is backed by political power or not. In those situations, the Political Power Factor will (obviously) not be of much help in determining the outcome of a burden analysis. However, it is precisely this kind of situation in which the problems associated with political power will be less urgent.

B. Reconciling the Political Power Factor with Competing Justifications for Religious Exemptions

Those who believe that religious exemptions are justified primarily because they protect politically vulnerable minorities have obvious grounds to endorse the Political Power Factor. The factor weighs

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123 For an overview of this feature of religious exemption adjudication, *see* Eugene Volokh, *The Individualistic American Law of Religious Exemptions*, WASH. POST, (Jan. 19, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/19/the-individualistic-american-law-of-religious-exemptions/.

124 *See id.* ("The right to a religious exemption belongs to a particular religious believer because of his religious beliefs, whatever they might be. The right does not belong to a religious group (setting aside certain religious associational rights that are not relevant here), nor does it belong to a person by virtue of his membership in a group").

125 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723-24 (2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014).

in favor of views that are not backed by political power. While the religious views at stake in exemption cases like *Hobby Lobby* and *Masterpiece Cakeshop* reflect concern for "minorities" in the sense that they are based on the views of the losing side of the democratic deliberation that preceded the law from which the exemption is sought, they cannot easily be argued to protect the politically vulnerable.[126] The Political Power Factor would weigh against the objectors claims in these cases because the objectors sought exemptions on the basis of viewpoint already well-represented in democratic deliberation.

Protecting the politically vulnerable is, however, not the only justification for religious exemptions. Another justification arises from the view that religious beliefs are special in a way that sets them apart from other moral or deeply held convictions (or practices). [127] Those who believe religious exemptions are justified primarily on the basis that religion is special may not be too worried about political power. After all, from this perspective it is the nature of the belief that justifies the exemption—not the extent to which the belief is represented in politics.[128] Significant literature exists on the topic of religion's specialness or lack thereof.[129] This Article remains agnostic on the issue of the specialness of religion and how the specialness rationale is weighed against the rationale that familiar or unpopular religious beliefs must be protected. It does assume that the protection of vulnerable minorities is a

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[126] Reva Siegel and Douglas NeJaime have eloquently described some of the tensions and opportunities for manipulation that evolve around the majority–minority status in religious exemptions. *See* Nejaime & Siegel, *supra* note 4, at 2520–21 ("Those seeking to preserve traditional norms governing sex, reproduction, and marriage may speak as a majority endeavoring to defend or enact laws that enforce community-wide customary norms—or, without change in numbers, they may speak as minorities endeavoring to avoid complicity when law departs from those norms.").

[127] BRIAN LEITER, WHY TOLERATE RELIGION? 54–67 (2012*);* CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–77 (2007); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481, 488, 490–92 (2017); Alan E. Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses are Taken Seriously,* 32 CARDOZO L. REV. 1701, 1705 (2011).

[128] *See e.g.* Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv L Rev 1409, 1498–1500 (1990).

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[129] *See, e.g.,* LEITER, *supra* note 128, AT 54–67; CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–77 (2007); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. (2017); Alan E. Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses are Taken Seriously,* 32 CARDOZO L. REV. 1701, 1705 (2011).

rationale (one amongst many) for allowing religious exemptions.[130] This assumption should not be controversial. Furthermore, it should be clear at this point that any system of accommodation that rests too much on the specialness of religion will rest uneasily with the Establishment Clause.

The abovementioned justifications for religious exemptions are not mutually exclusive and religious exemptions are often granted on grounds that draw on both.[131] While the weight given to various justifications for religious exemption will affect the Political Power Factor, no justification should render it useless. Giving more weight to the specialness of religion merely suggests that from this perspective, the Political Power Factor will likely be less weighty.

C. Applying the Political Power Factor within the Boundaries of the Religious Question Doctrine

This Article conjectures that a reason we may not see courts engage—at least explicitly—in the evaluation of the political power of religious views is the courts' concern with inappropriate trespassing into religious question territory. While the "hands off" religion/Religious Question Doctrine serves important functions, it is also important to ensure that the doctrine not operate beyond the boundaries of its justifications. When the Religious Question Doctrine operates *within* the boundaries of its justifications, it does not bar the inquiry set forth by the Political Power Factor. Courts can make determinations about the democratic status of religious claims without getting entangled in religious subject matter. Courts can, for example, recognize an objection to same-sex marriage as a position that is mainstream within public political culture without involving themselves in religious teachings on the purported sin of such an act. Similarly, courts can recognize the religious requirement of wearing a beard, using peyote, or not working on Saturdays as minority viewpoints vulnerable in ordinary political processes.

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[130] The view that religion should be protected on the basis of religion's specialness alone is not completely divorced from concerns for democracy. However, the democracy concern at stake seems to be of a different nature. One may, for example, argue that religious believers may reasonably believe that their obligations toward a deity precede obligations toward their fellow members of democratic society and providing these citizens with exemptions can ease this tension between divine and democratic obligations and as such be justified in the sense that such accommodation provides stability.

[131] While religious exemption will often be justified by both rationales, the different weighting of these justifications is nonetheless very divisive. For a discussion of these competing justifications *see, e.g.*, William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J. L. & PUB. POL'Y 67–77 (2018).

It is imaginable that a question could arise as to whether the religious viewpoint at stake in the exemption case and the viewpoint familiar from democratic discourse aligns. Even here, the Religious Question Doctrine does not bar inquiry. To adjudicate a religious exemption claim, a court must be able to understand what viewpoint, way of life or practice is being offended by the law in question. Courts can gain such understanding without delving into the theological underpinning of the view or practice and without deciding any religious questions or evaluating the merit of religious claims. When they do so, they engage in second-order questions *about* religion rather than first-order questions *within* religion.[132] It is, for example, easy to see that viewpoints that align with the needs of religious objectors who are opposed to same-sex marriage are already well-represented in democratic discourse.[133] The status of the opposition to same sex marriage in political processes can be evaluated without getting into any religious texts, teachings, or principles.

When determining whether the Political Power Factor offends the Religious Question Doctrine, difficulties and borderline cases would undoubtedly arise. Yet difficult boundary drawing is already inherent in the task of adjudicating religious exemption claims. In a certain sense the Political Power Factor makes explicit considerations that may lurk underneath the surface in religious exemption adjudication. It provides a tool for engaging in explicit and careful Establishment Clause analysis, a tool that should facilitate the difficult boundary-drawing at stake.

V. CONCLUSION

Cases like *Hobby Lobby* and *Masterpiece Cakeshop* are at the heart of a controversy over religious exemptions, and they have spurred heated debates in the courts, academic literature, and in public political culture more generally.[134] To the extent possible, this Article sets aside much debated and important issues related to discrimination and third-party harm and focuses on political power.[135] Without rejecting the need

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[132] For more in depth-discussions of "second-order" questions about religion that courts can unproblematically engage in, *see* Christopher C. Lund, *Rethinking the Religious Question Doctrine*, 41 PEPP. L. REV. 1013, 1016 (2013) (Second-order questions are temporal and empirical questions-sociological questions about the beliefs or structure of a religious group, psychological questions about the religious beliefs and motivations of individual believers, and so on.) *See also* Goldstein, *supra* note 100 at 502–03.

[133] *See supra* note 123 and accompanying text.

[134] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[135] *See supra* Sections I.A., II.A., IV.A., IV.B.

for more radical change, the Article offers a modest proposal that could be implemented within the contours of the current religious exemption regime.[136] The proposed Political Power Factor provides an opportunity to address the democratic and constitutional challenges that arise when objectors seek exemptions on the basis of views already well-represented in democratic deliberation.[137] It is not a flawless principle, but merely a factor, which means that it can adjust to complicated circumstances surrounding religious exemption claims.[138] The Political Power Factor can be used in combination with other factors to reach less controversial and constitutionally suspect outcomes in religious exemption adjudication.[139] The Political Power Factor sets forth a line of inquiry that courts can engage in without offending the Religious Question Doctrine.[140] It thereby provides a tool for careful courts engaged in the difficult boundary-drawing between Free exercise claims and the Establishment Clause challenges.[141] While this Article makes initial gestures at how a Political Power Factor would operate in adjudication, its purpose is to introduce the idea; a more detailed analysis awaits future work.

136 *See supra* Section III.
137 *See supra* Section III.
138 *See supra* Section III.
139 *See supra* Section IV.
140 *See supra* Section IV.
141 *See supra* Section IV.