

THE NEW DISESTABLISHMENTS
*Marc O. DeGirolami**

INTRODUCTION

The individual has the autonomy of choice respecting matters of sex, gender, and procreation. The findings of science as established by the knowledge class, together with the policy preferences of that class in this domain, should be imposed on everyone. These propositions reflect two central creeds of what this Article calls the “new establishment.” They, or statements like them, are the basis for policies across the nation touching many walks of life, from business to education, media, advertising, science, healthcare and medicine, and more.¹

Whether these propositions constitute a “religious” establishment turns out to be an irrelevant distraction. To be sure, some have argued that the new establishment is religious in nature,² but the hypertrophy of the concept of religion in American law has made the legal category “religion” so malleable as to render it useless as an analytical tool.³ And, at any rate, “religious” belief responds to the world in which it is situated. When that world tells dissenting citizens that their beliefs are irrational, antiscientific, and benighted—and that their objections to new establishment creeds are discreditable because

* Cary Fields Professor of Law, St. John’s University Law School. Thanks to Nathan Chapman, Nicole Stelle Garnett, Frederick Gedicks, Paul Horwitz, Mark Movsesian, and Zachary Pohlman for their comments and suggestions. I thank Helen Alvaré for convening a conference on religious liberty at the Liberty and Law Center at Antonin Scalia Law School George Mason University, where this paper was presented.

¹ For discussion, see *infra* Part I.

² See, e.g., James M. Patterson, *Wokeness and the New Religious Establishment*, NATIONAL AFFAIRS (Summer 2021), <https://www.nationalaffairs.com/publications/detail/wokeness-and-the-new-religious-establishment>; JOHN MCWHORTER, *THE ELECT: NEORACISTS POSING AS ANTIRACISTS AND THEIR THREAT TO A PROGRESSIVE AMERICA*, at 7–8 (2021), <https://www.skeptic.com/michael-shermer-show/john-mcwhorter-the-elect-neoracists-posing-as-antiracists-and-their-threat-to-a-progressive-america/> (ebook excerpt); JOHN MCWHORTER, *WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED BLACK AMERICA* 36 (2021); HELEN PLUCK-ROSE & JAMES LINDSAY, *CYNICAL THEORIES: HOW ACTIVIST SCHOLARSHIP MADE EVERYTHING ABOUT RACE, GENDER, AND IDENTITY—AND WHY THIS HARMS EVERYBODY* 12–13 (2020).

³ See Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL’Y 751, 779–82 (2019).

they are “religious”—dissenters may be forgiven for taking the world at its word. If these dissenting views are religious, it is the new establishment that has made them so and, in consequence, entangled itself in religious controversy.⁴

Free exercise exemption has long been thought of as a way to resist the new establishment.⁵ Yet, the dynamics of resistance are ambiguous. Individual exemption, unless connected to a larger strategy, can validate and strengthen the new establishment. Piecemeal carve-outs to the new establishment sometimes can reinforce and sanction its dominance and entrench the supplicant position of the exempted.⁶ Many advocates of religious exemption do not object to this state of affairs. They insist that they have no interest in disrupting the new establishment. They are committed to it, too.⁷

Yet, partisans of the new establishment are not wrong to sense possible danger from expanding rights of free exercise. These rights, if synthesized and organized, could become broader pockets and sub-communities of disestablishment. There is a continuum between free exercise, disestablishment, and establishment. Dissenting positions on American life involving family, education, religion, sex and gender, and other controversial subjects might be stitched together from the somewhat disaggregated set of free exercise exemption micro-victories to constitute challenges to the new establishment. To do that, however, would demand concerted action involving some mechanism other than exemption. It is not plain that advocates of religious exemption are interested in that project, but the project may be coming whether they like it or not. Unlike the new establishmentarians, some prominent free exercise advocates have not adequately appreciated—or do not wish to see—that the real fight is not about an individual exemption here or there, but about the future shape of the American establishment.

In Part I, this Article defines “the establishment” to mean what classical political thinkers have termed a “regime”—the network of rules, structures, and fundamental norms that organize the legal and political order and express its deepest commitments. Every political community is constituted by such a regime, whether it acknowledges it

⁴ For discussion, see *infra* Part II.

⁵ For discussion of the dynamics of resistance in exemption, see Marc O. DeGirolami, *Establishment's Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 747-56 (2022).

⁶ See *id.*

⁷ For discussion of these views, see *infra* Part III.

formally or not. The most successful regimes are those that penetrate deep into the private lives of the citizenry, controlling and shaping their existence in many different domains. But regimes are not static. They change over time. The nation has not always embraced the creedal propositions of the contemporary American regime as part of its establishment. This Article identifies two of these creeds, traces their legal genesis, and attempts to illustrate the depth of their influence on the American public and private life. They, or propositions like them, have a strong claim to represent the major features of the new establishment.

Part II takes up the question of whether these features of the new establishment are components of a “religious establishment” and are, therefore, subject to the constitutional strictures of the Establishment Clause. There is an unfortunate tendency to think about political establishments only in terms of what is constitutionally proscribed by the Establishment Clause, and this reflexive association has obstructed clear-eyed analysis of the scope and influence of the new establishment on American life. In fact, in light of what the Supreme Court has said about the nature of religion over the past century, there is some reason to think that the new establishment could be religious, at least for legal purposes.⁸ As it turns out, however, the question of the new establishment’s religiousness is ultimately irrelevant because the reach of the new establishment is deep enough that it takes definite positions on religious controversies. Partisans of the new establishment often dismiss dissenting views as “religious” and in this way embroil the new establishment in religious disagreement. Indeed, the question of the conceptual boundary lines of religion—of determining what is “in” and “out” legally speaking—is increasingly anachronistic.⁹ It has been rendered so by the new establishment itself. Although litigators must, for strategic and doctrinal reasons, continue to probe the “is it religious?” question, law and religion scholars would do better to stop asking it. It obscures more than it clarifies. Yet because the “is it religious?” question dies hard, as does the desire to distinguish the religious from the secular in constitutional law and elsewhere, this Part addresses it head-on.

⁸ These statements are discussed *infra* Part II.

⁹ See *infra* Part II for examples from recent oral arguments in Supreme Court cases as well as discussion and criticism of those cases.

Part III turns to free exercise exemption, long thought to be one of the primary instruments of resistance to the new establishment. Many proponents of religious exemption, however, do not see it that way. They think of exemption primarily as a concession to weak individuals and groups whose accommodation poses no threat to the new establishment, and they downplay or repudiate those more far-reaching or culturally controversial exemptions that might destabilize the new establishment. In fact, the aggregation of exemption victories in a single domain begins to look like a challenge to the new establishment only if it is conjoined to a larger strategy of resistance. Using the example of school funding policies in current legal controversies, this Article argues that what it calls “new disestablishments” may become possibilities and concludes by considering the continuum between free exercise, disestablishment, and establishment.

It may be necessary to address one preliminary issue to avoid misunderstanding. This Article attempts to map out a set of social and legal phenomena—features of what it calls the new establishment, responses to it, and possible implications of dissenting new disestablishments—without offering an evaluation either of the new establishment or the new disestablishments. That is, this Article tries to point out the structural conditions within which claims of religious free exercise are now situated, but it does not opine on the morality or justice of the general social structure or the dissenting views that it discusses. Like everyone, I have my views about these subjects, but I have tried, as much as possible, not to cheerlead for any position and to remain descriptive, to understand better the social and legal conditions that now attend these fraught conflicts.

I. THE NEW ESTABLISHMENT

A. *Establishments Old and New*

This Article uses “the establishment” to denote what classical political writers have termed “the regime,”¹⁰ what Leo Strauss once

¹⁰ For further development of the idea of the establishment as the regime, see Marc O. DeGirolami, *Establishment's Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 721-22 (2022).

called the “form of life as living together,”¹¹ and what Pierre Manent has described as “the common thing.”¹² The establishment reflects the highest collective projects and ends to which the political community is committed, and which binds it as a political community. Politics demarcate their establishments differently, but it was Aristotle’s view, in his *Politics*, that each polity becomes well-functioning when it exhibits three essential features: an orientation to the common good rather than a partial advantage; the formation of the substance of the citizenry in accordance with the chosen conception of the common good; and the use of laws and other norms, formal and informal, to accustom and acculturate the citizens to the conception of the common good.¹³

Understood in this way, the establishment is the orthodoxy of the political community as manifested in its several public institutions, which, when truly effective, will also influence the character of the citizenry in nonpublic fora. A strong establishment will habituate citizens to accept and embrace it in their private dealings, associations, and lives as well. To say that each political community adopts an establishment is not to say that the nature of that establishment is always clear or fixed. In America, for example, there have been disputes over the character of the establishment, which has been thought by some writers, at least as a historical matter, to be part “providentialist” and part “secular.”¹⁴ In fact, for many years, the American establishment was pervasively influenced by a set of commitments to a nondenominational and diffuse Christianity which, although never formalized as an official religious establishment, nevertheless intimately shaped many facets of public and private life.¹⁵

Although the state never formally recognized or announced the establishment, that did not diminish the establishment’s power as a

¹¹ LEO STRAUSS, *What is Political Philosophy?*, in *AN INTRODUCTION TO POLITICAL PHILOSOPHY: TEN ESSAYS* 30-32 (Alan Udoff et al. eds., Wayne State Univ. Press 2d ed. 1989) (1975).

¹² PIERRE MANENT, *METAMORPHOSES OF THE CITY: ON THE WESTERN DYNAMIC* 64 (Marc LePain trans., Harvard Univ. Press 2013) (2010).

¹³ ARISTOTLE, *Book III*, in *THE POLITICS*, 1275a; 1276b; 1278b; 1279a; 1280a-1280b; 1282a (Carnes Lord trans., Univ. Chicago Press 2d ed. 2013).

¹⁴ See Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 948-49 (2011); cf. IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 3-4 (Wm. B. Eerdmans Publishing Co. 2014).

¹⁵ For extensive discussion, see DeGirolami, *supra* note 5, at 734-44.

unifying set of constitutive assumptions that molded many concrete legal and cultural practices. As Caroline Corbin has put it, the Christian “Sabbath defines the workweek, [its] sacred days define state and national holidays, [its] morality defines the family and determines when life begins, belief in [its] God characterizes patriotism, and invocation of [its] God solemnizes, dignifies, and authenticates.”¹⁶ These and many other features of the old American establishment—school prayer, religious displays, countless state-sponsored references to God, legislative and military chaplaincies, blue laws, tax-exempt status for religious organizations, and so on—have been remarked many times before.¹⁷ And it was not only public institutions that were powerfully influenced by America’s nondenominational, Christian-inflected establishment, but also private groups and associations, religious and otherwise, that relied on it in forming and pursuing their projects in coordination with, and often supported by, the state.¹⁸ Indeed, the nature and scope of ideals like “religious freedom” were made concrete in America and can be fully understood only through the filter of the establishment’s foundational laws and norms reflecting the common affections and binding attachments of the citizen body.

As a result of, among many other causes, a long course of systematic dismantling in the twentieth century by the Supreme Court and the efforts of other powerful cultural and political actors of that period,¹⁹ that establishment is now largely, although not completely, defunct. The extent of the Court’s establishment dismantling, in its Establishment Clause jurisprudence but not only there, is suggested in part by the rising number of recent legal cases featuring traditional Christian claimants seeking exemptions from generally applicable laws or bringing other free exercise claims alleging religious discrimination. In virtually every controversial and high-profile free exercise case to have reached the Court over the last decade and more, the

¹⁶ Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1578-79 (2010).

¹⁷ DeGirolami, *supra* note 5, at Part I (collecting sources).

¹⁸ *Id.* at 751-53 (discussing organizations, such as the Little Sisters of the Poor and Catholic Social Services, among many others). For a critical view of this older establishment’s immense influence on the law and life of the American family, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

¹⁹ For discussion about the dismantling process, see DeGirolami, *supra* note 5, at 719. As in many similar matters, the Court both led and followed powerful cultural currents. I do not claim that the Court was the sole or even the prime mover in these developments.

aggrieved parties have been Christians arguing that their traditional Christian views on an assortment of concerns are running up against hostile government regulations, norms, and viewpoints. From the Christian Legal Society in 2010²⁰ to Hosanna-Tabor Evangelical Lutheran Church and School in 2012²¹ to Hobby Lobby Stores in 2014²² to Trinity Lutheran Church in 2017²³ to Jack Phillips in 2018²⁴ to the Little Sisters of the Poor in 2016 and 2020²⁵ to Catholic Social Services,²⁶ Kendra Espinoza,²⁷ and Our Lady of Guadalupe School in 2020,²⁸ to the many religious organizations that litigated against state-imposed COVID-19 occupancy and vaccine requirements,²⁹ and most recently to Coach Joseph Kennedy³⁰ and the Carsons and Nelsons in 2022³¹—to say nothing of the manifold cases in the lower federal courts involving Christian claimants with similar issues that have not been heard by the Supreme Court³²—confrontations between individuals and groups with traditional Christian beliefs and the state's fundamental commitments have exploded in recent years. They have become the primary staple of free exercise law.

²⁰ See *Christian Legal Society v. Martinez*, 561 U.S. 661, 669-75 (2010).

²¹ See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 176-80 (2012).

²² See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 688-93 (2014).

²³ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017-18 (2017).

²⁴ See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723-24 (2018).

²⁵ See *Zubik v. Burwell*, 578 U.S. 403, 405-07 (2016); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375-76 (2020).

²⁶ See *Fulton v. City of Philadelphia*, 140 S. Ct. 1104, 1875-76 (2020).

²⁷ See *Espinoza v. Montana Dep't. of Revenue*, 140 S. Ct. 2246, 2252 (2020) (claim by a parent who wished to use state-based scholarship funds to pay for tuition at a Christian school).

²⁸ See *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055-56 (2020).

²⁹ See Mark L. Movsesian, *Law, Religion, and the COVID-19 Crisis*, 37 EMORY UNIV. J.L. & RELIGION 9, 10, 17 (2022) (discussing how many, though not all, of the groups bringing free exercise challenges to the COVID-19 restrictions were traditional Christian groups).

³⁰ See *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2515 (2022) (coach who wished to offer a solitary Christian prayer at the conclusion of football games at public school at the 50-yard line).

³¹ See *Carson v. Makin*, 142 S. Ct. 1987, 1994-95 (2022) (families that wished to send their children under Maine's tuition program to two different Christian schools).

³² See *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 550 (Wash. 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). See also Warren Richey, *For Those on Front Lines of Religious Liberty Battle, A Very Human Cost*, THE CHRISTIAN SCIENCE MONITOR (July 16, 2016), <https://www.csmonitor.com/layout/set/amphtml/USA/justice/2016/0716/For-those-on-front-lines-of-religious-liberty-battle-a-very-human-cost>.

Although these individuals and groups often have been successful at the Supreme Court, though frequently on narrow grounds, one must wonder just why this category of claimants has become so overwhelmingly common. These individuals and groups, and many others like them, have been litigating with such vigor because they have been consistently losing in the largely sub-constitutional state and federal legal frameworks and the broader political culture. Those legal and political frameworks reflect core elements of a burgeoning new establishment, some of whose fundamental commitments are deeply at odds in one way or another with those of the traditional Christian individuals and groups bringing free exercise claims. What are the commitments of the new establishment that are presenting such persistent problems to the traditional Christian groups now litigating against them?

As with the establishment that preceded it, pinpointing precise positions for the new establishment is difficult because it is, for the present at least, informal and diffuse, constituted by a network of laws and norms that have not been assembled officially and announced as a new establishment in any single place. This Article does not attempt a comprehensive catalogue of the propositions constituting the new establishment, a project that would be in any event premature at this point. Just as the soft Christian establishment of the past was never expressly endorsed as such in a set of specific propositions by the government, so too, the new establishment has not been formally adopted and consequently lacks the explicit precision of a legal code. Moreover, many of the new establishment's fundamental laws and norms do not necessarily come primarily from religion clause doctrine itself, making their identification difficult when they arise in free exercise cases. Yet, the First Amendment does not sit in isolation, unaffected by the development of constitutional and related sub-constitutional doctrines in other areas. Laws and norms other than those concerning "church and state" proper have had a strong influence on the new establishment.

Rather than provide a complete accounting of the new establishment, this Article attempts to identify and describe two particularly salient features of it that have emerged forcefully in the relatively recent free exercise conflicts just mentioned. To count as an establishment creed, one should expect to see a widespread embrace of it across public—legal and political—and powerful or influential private

institutions, coupled with the threat of some form of sanction for failure to adhere to it.

B. *The First Creed*

Taking these criteria as guidelines and focusing on the major controversies that have brought religious claimants to court over the last decade or so, it is possible to say that one central creed of the new establishment is that the individual has autonomy respecting matters of sex, gender, and procreation. This creed has, as part of its genesis, the mid-twentieth century's Fourteenth Amendment substantive due process jurisprudence, which arose at roughly the same moment the Court was also emphasizing the First Amendment's protection of individual autonomy and dignity in its speech and religion clause cases as the core values protected by these rights.³³ The mid-twentieth century emphasis on individual autonomy in the Court's First Amendment decisions was conceptually conjoined to the rise of the substantive due process values of autonomy and sexual equality in some of the Court's most influential and celebrated jurisprudence of the same period. In her study of the emergence of "sex as a civil liberty" in the United States, historian Leigh Ann Wheeler shows that the key to understanding the sexual liberties recognized by the Supreme Court in its Fourteenth Amendment cases was the ACLU's series of "carefully crafted lawsuits" defending an increased scope for sexual expression under the First Amendment.³⁴ The first step was to protect unconventional speech about sex in the 1930s and 1940s, focusing on laws concerning advocacy of birth control, sex education, and nudism, all deploying the venerable "marketplace of ideas" metaphor that had been so influential in the Court's free speech decisions.³⁵

The priority of individual autonomy to the community in matters of sex, gender, and procreation thus developed in a series of constitutional doctrines achieving specific results and promoting particular ways of life. Indeed, the constitutional protection of autonomized sexual practices that developed in the 1960s and resulted in claims of constitutional rights to reproductive freedom, and eventually to sexual

³³ See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971); *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981).

³⁴ LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* 3-5 (Oxford Univ. Press 2013).

³⁵ *Id.* at 61.

equality more broadly, was connected to the enhanced and autonomized protection of sexual expression under the First Amendment. The First Amendment's penumbras were one textual source of the right to privacy, which the Court held forbade regulation of married couples' access to contraception.³⁶ The same right of privacy was later used to prohibit the criminalization of the private possession of obscene material, for the First Amendment, the Court held, protects "the right to satisfy [one's] intellectual and emotional needs" in the home.³⁷ And in still later decades, the mutually reinforcing connection between autonomous conduct and expression persisted and expanded as "ACLU leaders increasingly supported the efforts of homosexual rights activists, along with purveyors and consumers of sexual material, to expand access."³⁸

The Court was in time persuaded that the "sanctity of freedom of speech and sexual privacy" represented "the very core of American constitutionalism,"³⁹ and resistance to such rights, even in the name of First Amendment freedom itself, would become constitutionally dubious. The Court would go on to hold in one of its abortion cases that "few decisions" are "more basic to individual dignity and autonomy" than those concerning procreation.⁴⁰ The complete autonomy to make these and other "intimate and personal choices" is a core component of constitutional freedom blending expression and conduct.⁴¹ Later, the Court would hold that the state confers the "equal dignity" that attends marital status on same-sex couples in accordance with the Court's "evolving understanding of the meaning of equality"⁴² because individuals of the same sex are protected "in their autonomy to make such profound choices" for themselves.⁴³

But it was not only the development of Supreme Court constitutional doctrine that brought about the emergence of this creed of the new establishment. A vast network of sub-constitutional nondiscrimination laws, federal, state, and local, cemented the creed and gave it a far greater range and impact on ordinary public and private life. Title

³⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

³⁷ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

³⁸ *Wheeler*, *supra* note 34, at 153.

³⁹ *Id.* at 224.

⁴⁰ *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

⁴¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

⁴² *United States v. Windsor*, 570 U.S. 744, 769 (2013).

⁴³ *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

VII of the Civil Rights Act of 1964, prohibiting discrimination in all places of employment because of sex, has recently been interpreted by the Supreme Court to prohibit discrimination on the basis of sexual orientation and gender identity.⁴⁴ Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education for any institution that receives federal funds—and the overwhelming majority do.⁴⁵ Federal healthcare statutes and regulations protect against discrimination on the basis of sexual orientation and gender identity in the provision of healthcare.⁴⁶ The “Equality Act,” which enlarges the scope of the Civil Rights Act of 1964 to encompass many more forms of discrimination on the basis of sexual orientation or gender identity, and which expressly denies that the Religious Freedom Restoration Act may be raised as a defense to it, has been passed by the House and awaits consideration by the Senate.⁴⁷ A bare minority of states have comparable or more extensive civil rights statutes, and many more localities have analogous regulations extending the definition of what counts as discrimination to an evolving set of concerns.⁴⁸ Civil rights commissions at all levels of government stand ready to vindicate allegations of discrimination in an ever-expanding and uncertain landscape of what qualifies as proscribed discrimination in this context.⁴⁹

Indeed, part of what makes the first creed of the new establishment so powerful and far-reaching is that the scope of this extensive network of antidiscrimination rules is enlarging in often unforeseeable ways. In New York, for example, the Division of Human Rights protects an individual’s request to be called by whatever pronouns the person chooses and to use whatever facilities the individual wishes

⁴⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

⁴⁵ 20 U.S.C.A. 1681(a) (West).

⁴⁶ Exec. Order No. 1421, 86 C.F.R. 13803 (2021). *See also* Doina Chiacu, *Biden Revives LGBT Protections Against Healthcare Discrimination*, REUTERS (May 10, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/biden-administration-protect-gay-trans-gender-against-health-care-discrimination-2021-05-10/>.

⁴⁷ Equality Act, H.R. 5, 117th Cong. §§ 2, 9, 1107 (2021).

⁴⁸ *See* HUMAN RIGHTS CAMPAIGN, STATE EQUALITY INDEX (2021), <https://www.hrc.org/resources/state-equality-index> (reporting that 22 states have civil rights protections in place for discrimination based on sexual orientation and gender identity).

⁴⁹ *See, e.g., Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1724-26. This controversy did not end with the Supreme Court’s opinion. *See also* Megan Verlee, *Denver Court Finds Masterpiece Cakeshop Baker Violated Anti-Discrimination Laws in Refusing to Make Gender Transition Cake*, CPR NEWS (June 17, 2021), <https://www.cpr.org/2021/06/17/masterpiece-cakeshop-trans-gender-discrimination-lawsuit/>.

consistent with their self-identified gender, among other prescriptions, the violation of which incurs a substantial legal penalty.⁵⁰ Other states have enacted similar provisions, and their reach is fluid and changeable, although some are currently debating or contesting them.⁵¹ And still other states have adopted policies that are meant to entrench the first creed in the area of public education, such as new rules prohibiting teachers from revealing a child's gender transition to parents.⁵² The emerging view in states that have adopted these rules seems to be not merely that children are the gender that they choose and claim to be, but that their parents have no right to know. Individual autonomy on these matters takes priority to the family's interests. The result of the combination of the immense reach and power of these antidiscrimination and other adjacent regulations, together with their expanding scope and uncertain range, has been a sporadic but, nevertheless, *de facto* adoption of this creed of the new establishment.

This is not all. As with other highly effective establishments of the past, including the diffuse Christian establishment preceding it, the reach of the new establishment extends well beyond law into the private sphere. The major institutions of the media, advertising, education, business, and healthcare embrace the first creed of the new establishment. Media, advertising, and business concerns, as political scientist Darel Paul has shown, overwhelmingly have adopted the creed as a bedrock commitment.⁵³ Many powerful and wealthy business entities, from Disney to T-Mobile, Budweiser, General Mills, Nike, MasterCard, Verizon, Coca-Cola and tens of thousands of others, have endorsed the position, as Loréal puts it, that "we celebrate individuality and champion self-expression" in the cause of complete autonomy and unfettered individual choice in this area.⁵⁴

⁵⁰ N.Y.S. DIV. OF HUM. RTS., GUIDANCE ON PROTECTIONS FROM GENDER IDENTITY DISCRIMINATION (2020).

⁵¹ See, e.g., Authority of the Behavioral Health Executive Council to Adopt a Rule Prohibiting Certain Discriminatory Conduct by Licensed Social Workers, Op. Tex. Att'y Gen. KP-0372 (2021). See also Parental Rights in Education Act, H.B. 1557, 2022 Sess. (Fla. 2022) (enacted).

⁵² See, e.g., WASH. OFF. SUPERINTENDENT OF PUBLIC INSTRUCTION, PROHIBITING DISCRIMINATION IN WASHINGTON PUBLIC SCHOOLS: GUIDELINES FOR SCHOOL DISTRICTS TO IMPLEMENT CHAPTERS 28A.640 AND 28A.642 RCW AND CHAPTER 392-190 WAC (Feb. 2012).

⁵³ DAREL E. PAUL, FROM TOLERANCE TO EQUALITY: HOW ELITES BROUGHT AMERICA TO SAME-SEX MARRIAGE 38-41 (Baylor Univ. Press, 2018).

⁵⁴ Darel E. Paul, *Under the Rainbow Banner*, FIRST THINGS (June 2020), <https://www.firstthings.com/article/2020/06/under-the-rainbow-banner>.

Corporate America's support for the new establishment creed now firmly extends, as Paul points out, to "transgender normalization to pure conventionality."⁵⁵ The importance of sexual authenticity and self-definition has also become a powerful healthcare marketing tool. Weill Cornell, a major New York healthcare conglomerate, now showcases an advertisement featuring a transgender model with the tagline, "Stay Amazing."⁵⁶ The old seal of New York Hospital, which is a part of Weill Cornell, once showed an image of the Good Samaritan with the inscription, "Go and Do Thou Likewise."⁵⁷ One establishment displaces another. Fortune 500 companies and powerful corporations are not alone. In many parts of the country, it is commonplace to see rainbow and transgender flags and banners prominently displayed in small town storefronts and windows, including the windows of many churches and religious establishments, particularly during Pride Month and its many attendant celebrations. Indeed, many Mainline Protestant churches and other Christian groups have embraced the creed, a testament to the new establishment's power to overturn and replace the old establishment.⁵⁸

Failure to embrace this creed, let alone directly opposing it, can have serious consequences in the business world, as examples from the one-time chief of Mozilla, Brendan Eich, to Chick-fil-A's deposed CEO, Dan Cathy, can attest.⁵⁹ Healthcare groups and associations, as well as universities, have done likewise, punishing individuals within those communities that have criticized or rejected the creed.⁶⁰ The Human Rights Campaign's "Corporate Equality Index" tracks the extent to which business, advertising, and media concerns are committed to "an ethos of LGBTQ inclusion" and support for autonomy in matters of sex and gender, noting not only dramatic increases in the

⁵⁵ Paul, *supra* note 53, at 153.

⁵⁶ @NYPCCommunity, TWITTER (Nov. 3, 2021, 3:16 PM), <https://twitter.com/nypbrooklyn/status/1455977207084601348>. See also "NewYork-Presbyterian Launches 'Stay Amazing' National Brand Marketing," CISION PR NEWswire (Nov. 8, 2021), <https://www.prnewswire.com/news-releases/newyork-presbyterian-launches-stay-amazing-national-brand-marketing-campaign-301418199.html>.

⁵⁷ "Scope: News Briefs," WEILLCORNELLMEDICINE MAGAZINE (Fall 2007), at 6 (Fall 2007), https://news.weill.cornell.edu/sites/default/files/publications/fall_2007.pdf.

⁵⁸ See, e.g., Rucha Modi et al., *How Religion and LGBTQ Rights Intersect in Media Coverage*, CENTER FOR AMERICAN PROGRESS (Dec. 21, 2020), at <https://www.americanprogress.org/article/religion-lgbtq-rights-intersect-media-coverage/>.

⁵⁹ Paul, *supra* note 53, at 15-16.

⁶⁰ See *id.* at 22-25.

past decade but also an increasingly demanding set of criteria to satisfy compliance.⁶¹ State bills purporting to extend exemptions to religious dissenters from complying in a variety of ways with this feature of the new establishment have met fierce political resistance from powerful business interests and media organizations, which have threatened boycotts and exerted other economic and cultural pressure against states considering these laws.⁶²

In education, too, whether higher or lower, state-operated or private, institutions have openly embraced the first creed of the new establishment. Schools have redesigned curricula with the new establishment in mind, the symbolic and expressive embrace of the creed is ubiquitous on campuses and classrooms, and hiring decisions are reached in an open effort to promote it. Take, as one representative example, the University of California, Berkeley's "Rubric for Assessing Candidates' Contributions to Diversity, Equity, and Inclusion"⁶³ detailing the commitment to government-backed policies of diversity—"the reigning social and political ideal of our age"⁶⁴—a faculty applicant must exhibit to be considered for a position. "Advancing diversity, equity, inclusion, and belonging," the Berkeley statement reads, "are responsibilities of all Berkeley faculty through their research, teaching, and/or service," an overarching ideal that is "intrinsic[ally] connected to "all our endeavors."⁶⁵ The allegiance to authenticity, individuality, and self-creation reflected in the commitment to diversity is manifested, among other ways, in the full autonomy to choose in matters of sexuality, gender identity, and procreation.

Dissent from this creed is taken to be disqualifying and even cause for dismissal, although the matter is contested. The issue is not "cancellation," if that term is taken to mean robust and sharp public

⁶¹ See HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX ARCHIVE (2022), <https://www.hrc.org/resources/corporate-equality-index?ga=2.175509291.802616682.1646235139-1257311877.1646235139>.

⁶² Paul, *supra* note 53, at 52-53. See also *id.* at 170 (observing that on the day *Obergefell v. Hodges* was decided, 34 of the Fortune 100 firms immediately issued public relations statements supporting the outcome).

⁶³ *Rubric for Assessing Candidate Contributions to Diversity, Equity, Inclusion, and Belonging*, UNIV. OF CAL., BERKELEY, <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity> (last visited Aug. 15, 2022).

⁶⁴ Paul, *supra* note 53, at 159.

⁶⁵ *Contributions to Diversity, Equity, Inclusion, and Belonging*, UNIV. OF CAL., BERKELEY, <https://ofew.berkeley.edu/recruitment/contributions-diversity> (last visited Aug. 15, 2022).

criticism, but instead punitive action with concrete adverse consequences. In the area of higher education, the example of Professor Kathleen Stock, formerly of the University of Sussex,⁶⁶ is instructive, because Stock is a self-described feminist philosopher who supports transgender rights.⁶⁷ Yet, her positions on transgender self-identification and her opposition to permitting transgender persons unrestricted access to certain spaces and activities formerly reserved for biological women resulted in a campaign by hundreds of other academics—not limited to her own university—and students to have her fired.⁶⁸ She had transgressed the new establishment's first creed, or it may be that she had not kept pace with the evolving character of its demands. After months of conflict during which detractors accused Stock of creating a harmful and unsafe environment at her place of work, she did, in fact, resign but was not formally terminated.⁶⁹

This Article takes no position on the underlying dispute between Professor Stock and her critics. Indeed, it offers no view about the merits or justice of the first creed of the new establishment at all.⁷⁰ Rather, the point is about the degree of creedal commitment that it is necessary to demonstrate, even as a member of an institution of higher learning with what appear to be at least somewhat rivalrous commitments to academic freedom, and about the depth of that creed's reach into private institutional life more broadly. As Christopher Caldwell has argued, the civil rights legal framework has become a model for private institutional and associational engagement—"civil rights as a ruling class cause" in which private forms of litigation-like tactics, pressures, and sanctions are used to settle contested moral questions, rather than civil rights simply as a set of government laws

⁶⁶ The example here is taken from a British university, but the new establishment commitments of the university are largely the same as those in the United States.

⁶⁷ See, e.g., KATHLEEN STOCK, *MATERIAL GIRLS: WHY REALITY MATTERS FOR FEMINISM* (2021).

⁶⁸ See Robin White & Kathleen Stock, *Gender Wars: Two Opposing Perspectives on the Trans and Women's Rights Debates*, PROSPECT MAGAZINE (Dec. 9, 2021), <https://www.prospectmagazine.co.uk/essays/gender-wars-two-opposing-perspectives-on-the-trans-and-womens-rights-debate>.

⁶⁹ Richard Adams, *Sussex Professor Resigns After Transgender Rights Row*, THE GUARDIAN (Oct. 28, 2021), <https://www.theguardian.com/world/2021/oct/28/sussex-professor-kathleen-stock-resigns-after-transgender-rights-row>.

⁷⁰ This agnosticism might itself be thought problematic, but my objective in this paper is to study and describe the terms of current law and religion conflict, not to advocate for any position.

for the equal protection of all members of the citizenry.⁷¹ President Biden himself has declared that “transgender equality is the civil rights issue of our time,” reflecting the depth of the federal government’s commitment to this new establishment creed and its intimate association with the civil rights framework.⁷² Countless private associations agree and have said so in official statements embracing the creed and assembling extensive and expensive programs promoting it. The sometimes rapidly shifting nature of the commitments that must be affirmed to keep faith with the new establishment is a key part of its effective control. Tracking and following the continual cascade of regulatory reconfigurations can be complicated, even for someone generally sympathetic to its substance.

The difficulty is compounded considerably for those with greater reservations, including the Christian Legal Society, Hobby Lobby Stores, Jack Phillips, the Little Sisters of the Poor, Catholic Social Services, and many other prominent free exercise claimants of the last decade and more. It is difficult to devise a single, unifying description of the dissidents to the first creed of the new American establishment. One plausible candidate is what Roger Scruton once called the partisans of the traditional “corporate person.”⁷³ The idea that “human individuals derive their personality,” including, and especially, their commitments concerning human sexuality “in part from corporations”—particularly churches, families, social and civic groups, and other similar institutions whose function is to fix and transmit traditional ways of life—and that, as a result, “corporate personality should be consecrated in our feelings, and acknowledged in our law,”⁷⁴ runs contrary to the first creed of the new establishment.⁷⁵ Those with allegiances to such corporate structures believe that they are “not a

⁷¹ See CHRISTOPHER CALDWELL, *Civil Rights as a Ruling Class Cause*, in *THE AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES* 187-89 (2020).

⁷² Joe Biden (@Joe Biden), TWITTER (Jan. 25, 2020, 12:20 PM), https://twitter.com/JoeBiden/status/1221135646107955200?ref_src=twsrc%25Etfw%257Ctwcamp%255Etweetembed%257Ctwterm%255E1221135646107955200%257Ctwgr%255E%257Ctwcon%255Es1_&ref_url=https%253A%252F%252Fwww.breitbart.com%252Fpolitics%252F2020%252F01%252F26%252Fjoe-biden-transgender-equality-is-the-civil-rights-issue-of-our-time%252F.

⁷³ See Roger Scruton & John Finnis, *Corporate Persons*, 63 *PROC. ARISTOTELIAN SOC’Y SUPP.* 239, 240 (1989) (introducing the conceptual role of a corporation, or “corporate person,” in a market-based civil society).

⁷⁴ *Id.* at 240-41.

⁷⁵ NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 1-2 (2010) (identifying a different corporate family structure in the “blue family”—by contrast with the traditional “red family”—where the blue family,

means but an end: a bond in which you are at rest, as you are at rest beside your hearth. [They are] object[s] of respect and esteem.”⁷⁶ The clash between adherents of the first creed of the new establishment and those who are attached to the ethic propounded by traditional corporate structures like the family or the church on issues of sex, gender, and procreation, is stark. The latter group includes many of the Christian free exercise claimants discussed earlier, which explains their prominence in today’s law and religion conflicts.

C. *The Second Creed*

A second creedal commitment of the new establishment has emerged relatively recently, but with special force during the COVID-19 pandemic: the findings of science, as established by the knowledge class, together with the policy preferences of that class in this domain, must be accepted by all responsible and civically minded persons and imposed generally. By the “knowledge class,” this Article refers, not only to the group that is in the business of making scientific discoveries but also, and more importantly, to the social group or class that has the power to impose political and legal rules in the name of public health and safety derived from an interpretation of those findings. The Centers for Disease Control and Prevention, as well as federal and state executive actors, public health officials, judges tasked with reviewing health and safety orders issued from the government, and countless others empowered to devise and implement policy in response to the COVID-19 pandemic, all form part of the knowledge class for these purposes. The knowledge class is not so much a thing as a set of relationships to dispositions about education and culture, as well as to other classes, characterized generally by an attitude toward what scientific practice and findings suggest to those within the class as sound health policy and responsible civic behavior. That attitude may be summarized as: when it comes to keeping safe and healthy, do what the knowledge class says.

In a period of uncertainty, instability, and massive tragedy of the sort that has characterized the last three years, however, the connection between scientific findings, or “pure science,” as George Wright

in their own telling, depends heavily on norms of individual autonomy and choice in a way that the red family does not).

⁷⁶ Scruton & Finnis, *supra* note 73, at 245.

has termed it,⁷⁷ and the public and private policies implementing what are taken to be the rational conclusions derived from those findings, becomes more rapidly reached and more morally and politically contestable. As Mark Movsesian has shown, this has been the case with respect to the sundry restrictions on occupancy, vaccine mandates, and even masking rules issued in response to COVID-19.⁷⁸ Movsesian observes that the pandemic has exposed “deep divisions . . . about the good faith of elites, the competence and benevolence of government, the credibility of scientific opinion, and many other factors.”⁷⁹

One of the many rifts the pandemic has brought to light involves the division between those who scrupulously adhered and adapted to the knowledge class’s shifting prescriptions concerning COVID-19 and those who were skeptical about them. Within the span of less than two years, knowledge-class actors first actively discouraged and then mandated by law the wearing of masks across a wide cross-section of states and localities.⁸⁰ These actors also mandated that children, who were shown in general to be far less susceptible to the disease than adults, be kept home from school, sometimes for years, and required to wear masks longer than most other groups. Studies detailing the short- and long-term damage done to children are only now beginning to emerge,⁸¹ but rancorous disagreements about the political and moral costs of these decisions and many others, including those related to the economic devastation wrought by lockdown policies which disproportionately affected those outside the knowledge class, are likely to endure and deepen.

⁷⁷ See R. George Wright, *Free Exercise and the Public Interest After Tandon v. Newsom*, 2021 U. ILL. L. REV. 189, 194 (2021).

⁷⁸ Movsesian, *supra* note 29, at 11-12.

⁷⁹ *Id.* at 12.

⁸⁰ See Mia Jankowicz, *Fauci Said U.S. Government Held Off Promoting Face Masks Because It Knew Shortages Were So Bad That Even Doctors Couldn't Get Enough*, BUSINESS INSIDER (June 15, 2020), <https://www.businessinsider.com/fauci-mask-advice-was-because-doctors-shortages-from-the-start-2020-6>.

⁸¹ See, e.g., David Leonhardt, *No Way to Grow Up: For the Past Two Years, Americans Have Accepted More Harm to Children in Exchange for Less Harm to Adults*, N.Y. TIMES (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/briefing/american-children-crisis-pandemic.html> ; Stephanie H. Murray, *Speech Therapy Shows the Difficult Tradeoffs of Wearing Masks*, THE ATLANTIC (Mar. 2, 2022), <https://www.msn.com/en-us/news/us/speech-therapy-shows-the-difficult-tradeoffs-of-wearing-masks/ar-AAUvS7z>; Alex Gutentag, *The COVID Cult Did Lasting Damage To Our Kids*, TABLET MAGAZINE (June 1, 2022), <https://www.tabletmag.com/sections/news/articles/the-covid-cult-did-lasting-damage-to-our-kids> .

More than that, the changeability of the rules and the rapidity with which recommendations and requirements shifted in response to the evolution of the disease, have been measures of one's depth of allegiance to the knowledge class and its policies during the crisis. These variables have hardened the partisanship and mistrust that already existed, but was perhaps not so glaring, on many other contested issues of public health and medicine. When the next public health emergency arrives, assuming COVID-19 is now waning as an emergency, which seems a premature assessment, the same patterns of acrimonious division that emerged in this crisis are likely to resurface. As with the first creed of the new establishment, it is as if the capacity to keep pace with and embrace the changes in what is demanded by the knowledge class are themselves litmus tests either for belonging to that class or being outside it.

As it happens, these divisions were starkly reflected in conflicts involving religion, and particularly in occupancy restrictions imposed on houses of worship in 2020 and 2021. One of the key points of contention, as Movsesian points out, involved the appropriate comparator institutions and activities for houses of worship that would satisfy the "general applicability" requirement of the constitutional test for free exercise violations.⁸² Was the right analogue laundromats, hardware stores, casinos, bowling alleys, stadiums, concert halls, tattoo parlors, liquor stores, supermarkets, or something else? Was the likelihood of speaking, or of singing, or the fact of simple physical proximity with a group of others (and how many others?), determinative, and how close was close enough to be comparably dangerous? Movsesian argues that the justices drew lines and created categories reflecting irremediably blended evaluations of quantitative measurements as to the likelihood of infection within a particular venue with qualitative assessments of the importance of the activity involved in that venue.⁸³ How could it be otherwise when snap judgments on such complex matters were demanded? Yet, surely, the same is just as true of other decision makers within the knowledge class who devised and implemented these rules in the first place, deciding which institutions and

⁸² Movsesian, *supra* note 29, at 9-10 (citing *South Bay United Pentecostal Church v. Newsom* (*South Bay II*), 141 S. Ct. 716, 717-20 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *Calvary Chapel v. Sisolak*, 140 S. Ct. 2603, 2605 (2020); *South Bay United Pentecostal Church v. Newsom* (*South Bay I*), 140 S. Ct. 1613, 1613 (2020); *Tandon v. Newsom*, 992 F.3d 916, 920 (9th Cir. 2021)).

⁸³ *Id.*

services were truly “essential” and which were not,⁸⁴ as well as those private institutions that were forced to make decisions whether to “follow the science” or not.

The Court upheld some rules and struck down others, and its collective degree of deference to scientific opinion, as filtered through the knowledge class, seemed to diminish as the emergency persisted.⁸⁵ Some scholars have noted the politically partisan results in these cases, where outcomes have tended to hew even more closely than usual to judicial politics.⁸⁶ But perhaps the most striking development in the public manifestation of these controversies was the opposition of science and religion in the ideological lines of division. The confrontation of science and religion was a replaying, in intense and bitter microcosm, of the enduring conflict between reason and religion seen at least since the Enlightenment,⁸⁷ in which those within the knowledge class believed that they were defending reason against blind superstition. Some within the knowledge class pitched it as a contest over the sources of truth and the nature of reality as much as a political disagreement. As former Governor Andrew Cuomo put it in April of 2020, prematurely, as it turned out, in announcing what were then new distancing rules based on new scientific findings: “Our behavior has stopped the virus. God did not stop the spread of the virus.”⁸⁸ Or, as Justice Kagan stated in a dissenting opinion in one of the occupancy cases, “judicial edict” motivated by unscientific preferences for religion too often prevailed over “science-based policy.”⁸⁹

Those who challenged the knowledge class’s rules were accused of egotistically and irrationally preferring their religion to science, and often enough, they were portrayed as “anti-science Christians” or dangerous “Christian nationalists” with a long, deeply rooted history of similar irresponsible resistance.⁹⁰ This, despite that no major relig-

⁸⁴ See, e.g., *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

⁸⁵ See *id.* for a close description of these cases.

⁸⁶ See, e.g., Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 2, 4, and 5) (on file with author).

⁸⁷ A full accounting of the conflict would be far older. See, e.g., PLATO, *The Laws* 889-92, in COLLECTED DIALOGUES 144--48 (Edith Hamilton & Huntington Cairns, eds., 1961).

⁸⁸ Adrienne Vogt, *New York Governor Says “Phased Reopening” of the State Will Take Months*, CNN (Apr. 14, 2020), https://www.cnn.com/world/live-news/coronavirus-pandemic-intl-04-14-20/h_3bed58b8faba8edcfe5955201319934a.

⁸⁹ *South Bay II*, 141 S. Ct. at 723 (Kagan, J., dissenting).

⁹⁰ John D. Pierce, *Anti-Science Christians Have Long History*, GOOD FAITH MEDIA (Sept. 7, 2021), <https://goodfaithmedia.org/anti-science-christians-have-long-history/>; Elizabeth Dias

ious denomination opposed vaccination, although many did and do support religious exemptions from mandates and many objected to what they perceived as unfairly targeted occupancy restrictions during that phase of the conflict.⁹¹ Yet, as Asma Uddin and Andrew Lewis argued after the decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, “both the court’s ruling and the religious claimants were dismissed as ideologically driven, selfish, anti-science Americans who deny the severity of the pandemic and are a public health risk to their fellow citizens.”⁹²

Indeed, it is worth noting that even the kinds of comparisons thought legally salient during the occupancy restriction fights—How similar to casinos or tattoo parlors are houses of worship? How close do people stand from one another in concert halls and liquor stores, as opposed to in churches? How much spittle is jettisoned in church singing compared to in supermarkets?—were presented as exercises in strictly scientific quantification that masked and repressed the qualitative political and moral judgments underlying them. Yet, as Michael Sandel puts it in *The Tyranny of Merit*:

[A]ttributing political disagreement to a simple refusal to face facts or accept science misunderstands the interplay of facts and opinion in political persuasion. The idea that we should all agree on the facts, as a pre-political baseline, and then proceed to debate our opinions and convictions, is a technocratic conceit.⁹³

Meanwhile, the dissenters were for their own part at times stubborn and irascible—unreasonable, in the sometimes just accusation leveled at them—in denying real dangers and resisting the various iterations

and Ruth Graham, *White Evangelical Resistance Is Obstacle in Vaccination Front*, NY TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/04/05/us/covid-vaccine-evangelicals.html>; Monique Deal Barlow, *Christian Nationalism is a Barrier to Mass Vaccination Against COVID-19*, THE CONVERSATION (Apr. 1, 2021), <https://theconversation.com/christian-nationalism-is-a-barrier-to-mass-vaccination-against-covid-19-158023>.

⁹¹ Mark Kreidler, *No Major Religious Denomination Opposes Vaccination, But Religious Exemptions May Still Complicate Mandates*, CNN (Sept. 9, 2021), <https://www.cnn.com/2021/09/09/health/covid-vaccine-religious-exemptions-khn/index.html>.

⁹² Asma T. Uddin & Andrew Lewis, *When COVID-19 and Religious Freedom Intersect, Partisans Rush to Take Sides*, USA TODAY (Dec. 11, 2020), <https://www.usatoday.com/story/opinion/2020/12/11/partisans-rush-take-sides-when-covid-19-religious-freedom-collide-column/3876908001/>.

⁹³ MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT’S BECOME OF THE COMMON GOOD?* 110 (Penguin Books Publishing 2020).

of mandates. But in a society that is no longer traditionally religious and, indeed, where science is one of the few remaining default authorities accepted by the powerful within the new establishment's knowledge class, it stands to reason that the policies and preferences of that class, as distilled in good faith from scientific data for the promotion of what that class believes is the common good, will be imposed on dissenting voices. So it was in this public health emergency, and so it is likely to be again in future health crises. The new establishment overwhelmingly prizes science and the moral and political preferences of the knowledge class associated with its scientific findings. It will enact and impose laws and policies reflecting those commitments.

II. BUT IS IT RELIGIOUS?

This Article has identified and described what it has called two core creeds of the new establishment—two fundamental orthodoxies of contemporary American law, politics, and culture that have become deeply constitutive of the community. There are obvious connections between these creeds. It is the scientific knowledge class that has, in major part, influenced and stabilized a specific understanding of sex, gender, and procreation.⁹⁴ These are now matters of expert knowledge, such that dissent from that knowledge has become not merely wrong but morally and intellectually contemptible. It is, moreover, no accident that the historical enemy of both creeds of the new establishment was traditional Christianity, the old establishment against which the new establishment is reacting and taking shape. Although these creeds do not exhaust the commitments of the new establishment and have not been officially or formally embraced as such, their influence on public and private life in America is vast and penetrates many of the country's most powerful institutions. This Article has focused on these two specific creeds of the new establishment because they have set the social and legal conditions that have generated most of the principal free exercise challenges of the last decade.

To all of this, a critic generous enough to accept these claims might still respond: so what? Notwithstanding some of the more eloquent and less plausible flourishes in Supreme Court case law,⁹⁵ it is

⁹⁴ For discussion of this relationship, see Paul, *supra* note 53, at 38-41; Paul, *supra* note 54, at <https://www.firstthings.com/article/2020/06/under-the-rainbow-banner>.

⁹⁵ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

true that polities adopt certain fundamental commitments and orthodoxies that bind the political community and reflect the “common thing” or the “shared affections” of the collective. America of the present, like America of the past, has committed itself to many such positions, by law and outside it. In fact, if this Article’s account of establishments as regimes is correct, no nation could do otherwise and there is nothing objectionable about that. Indeed, as Steven Smith has observed, the “prescription of belief” is not only “inevitable” but also a core part of “what the government does”⁹⁶ just to be a government. Under our Constitution, what government cannot do, however, is enact in law a specific sort of establishment: laws respecting an establishment *of religion*. If what I have described as the new establishment is not religious, then there is no difficulty in it. So, is it religious?

The challenge assumes that we have a clear notion of what a religious establishment is, and although there are some clear cases of religious establishments, there is also extensive judicial and scholarly disagreement about what qualifies as a law “respecting an establishment of religion.” To be sure, some—I am in this group—have advanced comparatively narrow accounts of the reach of the Establishment Clause, arguing that specific practices historically believed to fall within its prescription ought to guide its application today.⁹⁷ Others have described a somewhat broader set of historical themes or concerns leading to more general principles animating the Establishment Clause’s scope.⁹⁸ Perhaps if these or similarly delimited views had ever been adopted by the Court, then we could say with greater confidence that the new establishment is definitively not a constitutionally problematic “establishment of religion.”

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

⁹⁶ Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 637 (2003).

⁹⁷ See MARC O. DEGIROLAMI, *Chapter 10*, in THE TRAGEDY OF RELIGIOUS FREEDOM (2013).

⁹⁸ See, e.g., Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107-10 (2003). See also NATHAN CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (forthcoming in Spring 2023); CARL H. ESBECK & JONATHAN J. DEN HARTOG eds., DISESTABLISHMENT AND RELIGIOUS DISSSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776—1833 6-7 (Univ. Missouri Press 2019); VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (Chicago Univ. Press 2022).

As it happens, however, the challenge is inapposite, even perverse, in light of the Supreme Court's own bloated position on both the matter of "religion" and "laws respecting an establishment" of it. Although, in a distant time past, the Supreme Court's account of religion was more concretely theistic,⁹⁹ at least in its statutory doctrine the Court has since moved far away from that position toward malleable functionalist accounts in which nonreligious equivalences are taken to be religious for legal purposes.¹⁰⁰ The Court has more recently spoken of the distinction between "secularism" and "religion,"¹⁰¹ seeming to suggest that a "secular" establishment would be constitutionally permissible. And yet, it has declined ever to define these categories. To say that a secular establishment is not a religious establishment, or that a government must pursue a "secular purpose" and that its policies must not have the primary effect of promoting or inhibiting religion, simply restates the problem in unhelpful ways.¹⁰²

The Court once did indicate in an *en passant* footnote dictum that "secular humanism" was one of a cluster of unconventional religions, such that if the state actually had "established" secular humanism, which it hadn't, that might have violated the Constitution.¹⁰³ In other cases, courts have rejected the view that teaching certain viewpoints and truths that run contrary to traditional religious views, or even teaching them to the exclusion of traditional religious views, constitutes an establishment of secularized religion.¹⁰⁴ And in still other cases, principally those concerning free exercise, the Court has insisted that the category of religion has no definite criteria at all; virtually anything that an individual claimant might sincerely believe can qualify as a religion.¹⁰⁵ Religion need to be neither internally consistent nor aligned in any real respect with the beliefs of other members

⁹⁹ See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890).

¹⁰⁰ See, e.g., *United States v. Seeger*, 380 U.S. 163, 164-66 (1965); *Welsh v. United States*, 398 U.S. 333, 335-36 (1970).

¹⁰¹ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971).

¹⁰² *Id.* at 613-14.

¹⁰³ *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). See also *Edwards v. Aguillard*, 482 U.S. 578, 624 (1987) (Scalia, J., dissenting).

¹⁰⁴ See, e.g., *Edwards*, 482 U.S. at 624 (Scalia, J., dissenting); *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1541 (9th Cir. 1985); *Duro v. Dist. Att'y, Sec. Jud. Dist.*, 712 F.2d 96, 97-98 (4th Cir. 1983) (rejected claim that public school curriculum established religion of "secular humanism").

¹⁰⁵ *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710-15 (1981).

of the community of which the claimant alleges membership.¹⁰⁶ As Joel Harrison has said, religion at the Supreme Court, “has become a capacious category of personal autonomy or authenticity” without any formal criteria.¹⁰⁷ On this understanding, religion sounds like it could comfortably include at least the first creed of the new establishment.

As for “establishment,” this term, too, has been the victim of the Court’s hypertrophic enthusiasms. What the Court has invasively policed in its most celebrated disestablishment cases was not a relatively circumscribed set of practices historically understood and recognized to be “establishments of religion,” but instead the influence of America’s Christian diffuse or soft establishment on a breathtakingly broad range of institutions of American political life.¹⁰⁸ In the period after 1947,¹⁰⁹ the Court, wielding the Establishment Clause, became a censor ensuring that policies, laws, and practices adopted across the country were not perceived to provide civic support for, or approval of, Christianity, and, in turn, that Christianity was not perceived to provide civil support to American political institutions. One may cheer or bemoan the Court’s approach, but one would be hard pressed to claim that the new establishment obviously does not qualify as a “religious establishment,” considering the expansive conceptions of both religion and establishment the Court has consistently adopted across its religion clause jurisprudence.

Some writers have argued that the new establishment, or at least elements of it, is religious in nature. Tara Isabella Burton has suggested that the coming of “intuitional religion” to replace the traditional religions of the past portends a new American civil religion based on either “social justice culture” or the “Rationalist Transhumanism” of Silicon Valley and big tech.¹¹⁰ Each of these new establishment possibilities might, she suggests, “imbue the secular sphere with meaning” and “replicate[] the cornerstones of traditional religion—meaning, purpose, community, and ritual” for American

¹⁰⁶ *Id.* at 714–16.

¹⁰⁷ JOEL HARRISON, *POST-LIBERAL RELIGIOUS LIBERTY: FORMING COMMUNITIES OF CHARITY 1* (Cambridge Univ. Press 2020).

¹⁰⁸ For a catalogue of the Court’s expansive understanding of “establishment” during the twentieth century, see MARC O. DEGIROLAMI, *The Two Separations*, in *THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS FREEDOM* 396 (Cambridge Univ. Press 2020).

¹⁰⁹ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

¹¹⁰ TARA ISABELLA BURTON, *STRANGE RITES: NEW RELIGIONS FOR A GODLESS WORLD* 167–68 (PublicAffairs 2020).

law, politics, and culture. These might, in time, be new American civil religion candidates. Books by John McWhorter, on the one hand, and Helen Pluckrose and James Lindsay, on the other, argue that components of the new establishment—although generally rather different ones than are discussed in this Article—reflect new religions and are therefore objectionable as such.¹¹¹ We need, in the view of books like these, to reaffirm the liberal, nonreligious values of empiricism, rationalism, and skepticism, and reject what they regard as the post-liberal religiosity of the new establishment.

In the end, though, these accounts, a bit like the Supreme Court's own flailing efforts at separating the religious from the secular in its Establishment Clause doctrine, are unconvincing and, in any case, largely irrelevant distractions when it comes to sorting out the legal disagreements we now have. That is because the reach of some creeds of the new establishment runs deep enough to implicate the new establishment in religious controversies. Partisans of the new establishment often dismiss dissenting views as religious and, in this way, embroil it in religious disagreement, helping to create and foster that disagreement. Indeed, religious belief is not a static monolith, fixed in amber and unchanging. It responds to the world in which it is situated. When those who subscribe to new establishment creeds tell dissenters that their views are religious and in consequence illegitimate or discreditable, those dissenters may be forgiven for taking the accusation to heart.

Consider one telling exchange in the oral argument in *Dobbs v. Jackson Women's Health Organization*, in which the Supreme Court ultimately upheld Mississippi's ban, with certain exceptions, on abortion after the first 15 weeks of pregnancy.¹¹² "How is your interest anything but a religious view?" Justice Sotomayor asked advocates for the state. "The issue of when life begins has been hotly debated by philosophers since the beginning of time—it's still debated in religions—" she continued, "so when you say this is the only right that takes away from the state the ability to protect a life, that's a religious

¹¹¹ John McWhorter, *The Elect: Neoracists Posing as Antiracists and Their Threat to a Progressive America*, IT BEARS MENTIONING (Jan. 27, 2021), <https://johnmcwhorter.substack.com/p/the-elect-neoracists-posing-as-antiracists>; HELEN PLUCKROSE & JAMES LINDSAY, *CYNICAL THEORIES: HOW ACTIVIST SCHOLARSHIP MADE EVERYTHING ABOUT RACE, GENDER, AND IDENTITY—AND WHY THIS HARMS EVERYBODY* 17-18 (Pitchstone Publishing 2020).

¹¹² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284-85 (2022).

view, isn't it?"¹¹³ Formally speaking, *Dobbs* does not concern religion. It is not a First Amendment case. Practically, however, it does, inasmuch as Justice Sotomayor was seeking to portray the law as religiously motivated and therefore illegitimate, or possibly even unconstitutional. She was not the first justice to stake out this view in the Court's abortion canon.¹¹⁴ In fact, Justice Sotomayor's dissent in *Dobbs* relied on language in *Roe v. Wade* itself to stake out a similar view of religion, opining that one's "'religious training' and beliefs" might lead one to specific sorts of views about abortion.¹¹⁵

The difficulty with Justice Sotomayor's charge is not that she is wrong about whether the bases for a particular view about life's beginnings are necessarily religious or nonsecular, but that there is no plausible way to distinguish the contrary view, on which current Supreme Court case law was based before *Dobbs*, as necessarily nonreligious or secular. At least, there is no way to do so on the basis of any conceptual distinctions the Court has offered in its religion clause doctrine. Justice Sotomayor might herself have been asked (if the protocols of Supreme Court repartee were different) whether her own views about life's beginnings and the substantive due process freedoms once recognized by the Court in its abortion jurisprudence are religious. How could they not be so described, given the Court's own promiscuously commodious understanding of religion?

Indeed, there is no plausible way to distinguish as necessarily secular the even larger set of views constituting what this Article has identified as part of the first creed of the new establishment—that the individual has autonomy in matters of procreative choice, which the Court has also adopted¹¹⁶—from the state's contrary views about the balance of interests in individual autonomy and human life. These propositions are inextricably bound up in questions of value, human nature, and human purpose and flourishing, and they are deeply fraught with moral and political disagreement. Once the Court informs the losers in controversies like these that their religious views on these matters, qua religious, are discreditable (if not actually a vio-

¹¹³ Transcript of Oral Argument at 29–30, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (No. 19-1392).

¹¹⁴ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 571-72 (1989) (Stevens, J., dissenting) (arguing that without a "secular purpose," a law regulating abortion and declaring that life begins at conception would violate the Establishment Clause).

¹¹⁵ *Dobbs*, 142 S. Ct. at 2320 (Sotomayor, J., dissenting).

¹¹⁶ See *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

lation of the Constitution), it embroils its own prevailing views in the very religious controversies and disagreements that led it to dismiss the losers' position. The reason is that the disagreement between the Court, or its justices, and the state in these cases is not one that pits religion against secularism, but instead concerns the nature of the American establishment, the substance of its creeds, and the terms of cognizable dissent. The national battle over the status of the new establishment has become a national battle over the status of religion, a game with zero sums.

Now that the Court in *Dobbs* has overturned *Planned Parenthood v. Casey* and *Roe v. Wade*, procreative autonomy, one of the features of the first creed of the new establishment, has been destabilized in a way that other elements of the first creed, especially those concerning sexual orientation and gender identity, have not been. Nevertheless, these same disagreements and, perhaps, many others implicating more far-reaching policies and aims of the new establishment,¹¹⁷ will replay themselves at the state level, with powerful private institutions also assuming a central role in enforcing procreative autonomy in a variety of ways.¹¹⁸ Already, the state of Florida is being sued by a religious organization alleging that the denial of access to abortion violates the religious freedom of its members.¹¹⁹ The disagreements, once again, will not be about what is religious and nonreligious, but about who sets the terms of the establishment and what those terms will be on issues of individual autonomy, group authority, and related decisions concerning procreation. The Supreme Court is hardly the only institution in the nation with the authority to say what the law is.

Or consider a different exchange in the oral argument in *Carson v. Makin*, in which the Court later held that a state may not exclude

¹¹⁷ See, e.g., S. 669, 2022 Leg., 444th Sess. (Md. 2022) (a proposed bill that denies "personhood or any rights on the fetus" and decriminalizes death by neglect after the child is born). See also H.R. 22-1279, 73rd Gen. Assemb., Reg. Sess. (Colo. 2022) (recognizes a "fundamental right to abortion" through the whole term of pregnancy).

¹¹⁸ See, e.g., Daniella Genovese, *Nike, Alaska Airlines, Dick's Sporting Goods, and Others Covering Travel Costs for Abortions*, FOX BUS. (June 24, 2022), <https://www.foxbusiness.com/lifestyle/alaska-airlines-dicks-sporting-goods-nike-covering-travel-costs-abortions>; Gerrit de Vynck, *Google Will Delete User Location History for Abortion Clinic Visits*, WASH. POST (July 1, 2022, 5:17 PM), <https://www.washingtonpost.com/technology/2022/07/01/google-abortion/>.

¹¹⁹ See Eliza Fawcett, *Synagogue Sues Florida, Saying Abortion Restrictions Violate Religious Freedom*, N.Y. TIMES (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/florida-abortion-law-judaism.html>.

religious schools from tuition aid programs even when the proceeds go to religious uses.¹²⁰ The state of Maine made determinations about which schools were sufficiently religious to warrant exclusion from its programs, and parents of students who wished to send them to Christian schools sued when those schools were excluded. At oral argument, Justice Alito asked counsel for Maine whether it would exclude “a school affiliated with a religious group . . . [whose] religious beliefs are that all people are created equal and that nobody . . . should be subjected to any form of invidious discrimination and that everybody is worthy of respect and should be treated with dignity. . . .”¹²¹ Counsel for Maine responded: “[T]hat would be very close to a public school,” to which Justice Alito replied, “[T]hen you really are discriminating on the basis of religious belief. What I described is . . . pretty close to Unitarian Universalism”¹²² The exchange is telling inasmuch as what matters is control over the terms of establishment and objection to it rather than the label “religious,” which is simply deployed strategically to implement the establishment and exclude dissenting positions. Either all are religious, or none are, but in either case, neither imposing nor contesting the religious label makes any difference conceptually.¹²³

Something similar occurred in the “contraceptive mandate litigation,” the cluster of cases challenging the federal mandate that companies of a certain size provide cost-free coverage for certain contraceptive products and services. As companies that objected to the contraception mandate were informed that only “religious” objections would afford them a legal basis for challenging these regulations, they developed religious scruples where, in some cases, they had not previously entertained them. A changed awareness of the legal avenues available for dissent stimulated new religious objections, which in turn drove changes in their own policies. Some accused these companies of religious insincerity, cynicism, or conjuring “politicized” free

¹²⁰ *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022).

¹²¹ Transcript of Oral Argument at 63-65, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088).

¹²² *Id.* at 64-65. The point was again lost on Justice Sotomayor in her *Carson* dissent, whose question-begging claims about “dismantl[ing] the wall of separation between church and state” assumed a concept of the religious and the secular that went entirely unexplained and undefended. *Carson*, 142 S. Ct. at 2012 (Sotomayor, J., dissenting).

¹²³ Of course, lawyers will still need to play at the “is it religious?” game to serve their clients, but there is little in the inquiry of interest left for scholars.

exercise claims,¹²⁴ and claimants' religious commitments certainly may have been shaped in response to political considerations and what they were told by the state, and their lawyers were legally required to voice dissent. "Many of the for-profit plaintiffs," complained Gregory Lipper, "had previously provided the very contraceptive coverage which they all of a sudden claimed to oppose."¹²⁵

But why should it be otherwise? Religious belief is not a natural kind, reflecting static, structural features of the natural world.¹²⁶ Religious belief changes in response to the establishment's rules about the nature of legitimate dissent and is always intimately bound up with politics. The notion that religious and political commitments are somehow hermetically isolated from one another assumes a familiar but flawed strict separationist understanding of these domains that was always implausible. Perhaps the claimants were not even aware of their own views until the establishment saw fit to test them and, indeed, to categorize them for the claimants as religious within an overtly political framework. If the new establishment only countenances "religious" objections to its policies, then it takes a stand on religious controversy by setting the terms within which dissent to its policies may be expressed and pursued. The new establishment creates, invites, and foments religious disagreement.

Finally, consider the charge that those who resisted the rapidly descending torrent of COVID-19 mandates were doing so on irrational religious grounds and were often enough Christian, anti-science zealots.¹²⁷ The descriptive language that objectors were handed was "scientific"—to resist the mandates and those recommending and imposing them was "lying" and "anti-science."¹²⁸ Exemptions from the mandates might be permitted, however, if one's reasons were religious, namely, the sort of reason that one might have if one were

¹²⁴ See, e.g., Gregory M. Lipper, *The Contraceptive Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1332 (2016).

¹²⁵ *Id.* at 1336. See also Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (Apr. 1, 2014), <https://motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drugmakers>.

¹²⁶ See Alexander Bird & Emma Tobin, *Natural Kinds*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 28, 2022), <https://plato.stanford.edu/entries/natural-kinds/>.

¹²⁷ See *supra* note 90 and accompanying text.

¹²⁸ See Allie Bice, *Fauci: "I'm Going to be Saving Lives and They're Going to be Lying,"* POLITICO (Nov. 28, 2021), <https://www.politico.com/news/2021/11/28/fauci-lying-covid-research-cruz-523412>.

not civically minded, health-oriented, and patriotic, but instead irrational, selfish, and retrograde. And so many mandate objectors began to see themselves as combatants in a culture war with the knowledge class, using language now labeled “religious” to express their view that what it means to be an American was being rejected.

To ask whether the new establishment is religious or not is, practically speaking, irrelevant. Worse, it is a question that obscures political reality. Indeed, there has been a regrettable tendency to focus on religion’s boundary lines in evaluating the nature and scope of political and cultural establishments, as if the only sort of establishments that were constitutionally concerning were those denominated “Church of the United States of America,” mimicking “the Church of England by law established.”¹²⁹ But that has not been the reality of the disestablishment doctrines of at least the last century and more of American constitutional history, in which the Court has seen fit to regulate far more than any “Church of the United States of America.” Today, the new establishment is so powerful that it inevitably entangles itself in religious controversy, taking positions on religion, assigning religious brands to dissenters, and setting the terms of religious exercise in America. Scholars of law and religion should set aside the “but is it religious?” question. They should stop asking irrelevant questions about what is “in” and what is “out.” They should focus instead on the real dynamics of legal, political, and cultural power, as well as resistance to it.

III. THE NEW DISESTABLISHMENTS

In that vein of inquiry, the primary form of legal resistance to the creeds of the new establishment outlined above generally has been thought to be the free exercise exemption.¹³⁰ This is something that both legal progressives and legal conservatives generally agree on, although their normative perspectives naturally differ, and it is easy to see why.¹³¹ Conceptually, rights of exemption are politically secondary to the establishment; they are not themselves part of the establishment’s foundational laws and norms, but generally oppositional responses to them. First come the basic commitments of the establish-

¹²⁹ See CHURCH OF ENGLAND, CONSTITUTIONS AND CANONS ECCLESIASTICAL, SECTION III (1604) (accessed at www.anglican.net/doctrines/1604-canon-law/).

¹³⁰ See *infra* notes 138, 140.

¹³¹ For discussion of this overlap, see DeGirolami, *supra* note 10.

ment, and then come the exceptions to them.¹³² Therefore, one way to understand rights of exemption is that they destabilize the establishment, inasmuch as they suggest that the orthodoxies set by the establishment are not quite as uniformly orthodox or important as had been supposed.¹³³ Exemptions are little tremors on the establishment's fault lines.

But there is another way to understand free exercise exemption: not as establishment destabilizing but as establishment entrenching. As Thomas Berg has put it, free exercise exemption can "temper regulation, without undoing it"¹³⁴ and in the process help to legitimize the establishment apparatus. In cases like *Wisconsin v. Yoder* and *Thomas v. Review Board of the Indiana Employment Security Division*, constitutional exemptions from the respective state laws at issue were acknowledgments and even validations of the state's position of dominance in the domains of public education and employment.¹³⁵ The exemptions in these cases were, in fact, framed by the Court as concessions to cultural oddities and unthreatening subcommunities or individuals that served to remind the public at large who was in control. Indeed, the rise of official recognition of religious exercise by prisoners in statutes like RLUIPA as deserving special solicitude, and as one of the only sites of nationwide statutory exemption applicable to both the federal and state governments, underscores the establishment-entrenching function of exemption. It is precisely those most balkanized and powerless expressions of religion that are most prominently recognized in the law. Religion's most fundamental expression in American law has become the supplicant prisoner begging the indulgence of the powerful jailer. If "prison religion" is a distinctively modern phenomenon designed, as Winnifred Fallers Sullivan says, to "produc[e] certain kinds of subjects,"¹³⁶ then the elevation of exemption for prisoner religious claims in one of the few truly national statutes protecting religious freedom similarly reflects the American

¹³² Contrast the ways that rights other than exemptions can serve as side-constraints on the establishment's fundamental laws. Exemptions are not side-constraints in the same way.

¹³³ See DeGirolami, *supra* note 5 at 719.

¹³⁴ Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. GEN. DER 103, 107 (2015).

¹³⁵ 406 U.S. 205, 207 (1971); 450 U.S. 707, 709 (1981).

¹³⁶ WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* 6 (Princeton Univ. Press 2009).

establishment's use of exemption to signal and solidify its own position.

Exemption, therefore, is an ambiguous instrument of dissent. It can destabilize, but if it is simply a string of disaggregated exceptions disconnected from a larger strategy of resistance to the establishment, it can also entrench, stabilize, and validate. This dynamic can help to explain the new establishment's turn against exemption in the past decade-plus of religious freedom controversy, and particularly exemptions that are felt to oppose or threaten core creeds of the establishment such as the two described in this Article. As all effective establishments do, the new establishment keenly senses destabilizing dangers represented by forces that use exemption in a concerted effort with other doctrines of free exercise to dissent from its orthodoxies. Partisans of the new establishment perceive the continuum from exemption to disestablishment; the new establishment controls and is reaffirmed in the former, but it is far less in control of, and far more threatened by, the latter.

Some proponents of religious exemption have not sufficiently appreciated this dynamic. Or, if they have appreciated it, they deny or downplay it. In some cases, this may be because these generally pro-exemption advocates are otherwise committed to the new establishment, or features of it, and do not wish to see it destabilized. Andrew Koppelman, for example, has argued that there is an "unnecessary conflict" between LGBTQ rights and religious liberty, and that legislative compromises can be worked out that would both further entrench something like the first creed of the new establishment and provide exemptions for dissenters so long as they "bear the costs" of their dissent by publicly declaring themselves, impose no costs on third parties, and in other ways.¹³⁷ Douglas Laycock has counseled dissenters from the new establishment to acknowledge their subordinate position as the losers in the "revolution" that brought about the new establishment, lest religious free exercise suffer more systemically. Drawing analogies to Catholic resistance to the French Revolution and the resulting strongly laic government in France, Laycock admonishes dissenters against "continued intransigence:" "If you stand in the way of a revolution and lose, there will be conse-

¹³⁷ ANDREW KOPPELMAN, *There Are Many Ways to Compromise, in GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT* 128-45 (Oxford Univ. Press 2020).

quences.”¹³⁸ Christopher Lund suggests that there is an inordinate and unwarranted focus on culture war religious exemption issues, and that religious exemption is statistically much more frequently used for issues, causes, and claims entirely unthreatening and congenial to the new establishment.¹³⁹ It would be better, Lund says, in thinking about religious exemption, to focus on those. “If one wants reasons to be inclined toward the compelling-interest test for free exercise,” he writes, one should avoid focusing on “fractious issues” in cases involving exemptions from new establishment positions since “the bulk of RFRA and state RFRA cases look nothing like *Elane Photography*” and cases like it.¹⁴⁰

But the conflicts between the new establishment and dissenters from it are, in fact, quite necessary. They are coming whether exemption advocates like it or not. They are necessary both because of the fundamental disagreements motivating them and because of the possible threat dissenters pose to the new establishment if their exemption victories can be connected to some larger strategy. Partisans of the new establishment have seen this in a way that some exemptionists have not or have not wanted to see. In part, that is because at least some of these exemptionists may be in fundamental agreement with the new establishment and may want to entrench its orthodoxies.¹⁴¹ Yet, even if this were not so, in the relatively short time since Laycock and Lund wrote, these conflicts have intensified, in large part because the compromises that scholars like Laycock and Koppelman were recommending even just a few years ago were rapidly outrun by the cascade of evolving and deepening demands of the new establishment. No compromise was possible because no firm terms of settlement existed.

Although Laycock’s analogy to the French Revolution is instructive, the lessons he draws may not be the right ones. Revolutions rarely run unidirectionally, and the French Revolution was no exception. True, immediately following the Revolution came a kind of intensification in the Reign of Terror, but there were then ebbs and

¹³⁸ Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869 (2014).

¹³⁹ Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 289, 292 (Schwartzman et al., eds. Oxford Univ. Press 2016).

¹⁴⁰ *Id.* at 292.

¹⁴¹ See Koppelman, *supra* note 137, at 126 (arguing that dissenters from the new establishment “should be ashamed of themselves and repent . . .”).

flows, moments of greater radical vigor and others of reactionary retrenchment. What seems to be stable historical settlements can be rocked and destabilized. *Ancien régimes* may be restored, if in altered form, even if they are, in turn, toppled again. Even the status of Catholicism, the great enemy of the Revolution in Laycock's telling, remained uncertain in France for more than a century after the Revolution. The French establishment continues to accept and even valorize practices that would make an American separationist's blood run cold, such as the direct, state-sponsored financial support of religious institutions, including Catholic schools.¹⁴² As with revolutions, so too with establishments. To say that a polity has adopted an establishment, and even to say that the establishment is powerful and far-reaching, is to say neither that the establishment is fixed nor that its social and cultural grip remains forever uncontested.

What would a strategy of more concerted resistance to the new establishment look like? What would constitute a "new disestablishment?" If this Article is right that a string of disaggregated exemption victories is ineffective, and even possibly counterproductive, in challenging the new establishment, then any new disestablishments would arise from something more than the mere aggregation of exemption mini-victories. These would need to coalesce around, or be conjoined to, some other policy or practice that, even if it did not directly oppose the new establishment, might offer a pocket of insulation or protection from it, creating a space within which dissenting views might find expression within specific communities.

One example of a new disestablishment, which I present merely as a nascent possibility at this point, might involve the recent collection of cases concerning school funding policies. Since *Pierce v. Society of Sisters*,¹⁴³ states may not require children to attend public school if they or their families prefer a state-qualified private or religious school. Nevertheless, religious schools remain at a perpetual financial disadvantage because the Court has held that the Establishment Clause forbids the government from directly funding them,¹⁴⁴ and dissenters from public school programmatic content have few rights of

¹⁴² See Muriel Fraser, *Church-State Separation in Constitution of 1795 and Law of 1905: Excerpts*, CONCORDAT WATCH (last visited Aug. 19, 2022), <https://www.concordatwatch.eu/kb-1525.834>. See generally Mark L. Movesesian et al., *Laïcité in Comparative Perspective*, 49 J. CATHOLIC LEGAL STUD. 1-142 (2010) (discusses France's complicated church-state landscape).

¹⁴³ 268 U.S. 510, 534-35 (1925).

¹⁴⁴ *Lemon*, 403 U.S. at 661 (Douglas, J., concurring).

religious exemption. Barring the school's overt promotion or denigration of religious views, dissenters generally cannot opt-out of content that they or their families object to on religious grounds, content that often enough has directly implicated at least some new establishment creeds.¹⁴⁵ Courts have overwhelmingly held that the state and the school district, not students or families, control the curriculum and educational programming of public schools, and rights of exemption have been rarely recognized.¹⁴⁶ Although some states have adopted statutory exemptions from curricular content, these are inconsistent in scope and administration.¹⁴⁷

The likelihood of success for exemption claims concerning public school curricular choices is thus generally low, and any victory an individual claimant might win would stand largely as a lone exception to the establishment's general control of these issues. But alongside exemption claims stands another related body of free exercise doctrine involving the question of whether states must include religious schools in whatever otherwise neutral or "secular" educational funding schemes they offer. In a series of relatively recent cases, the Supreme Court has been tending toward the conclusion that states must do so. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that states cannot exclude religious schools, qua religious, from otherwise neutral aid programs.¹⁴⁸ In *Espinoza v. Montana Department of Revenue*, the Court then held that the Montana Supreme Court violated the Free Exercise Clause when it invalidated Montana's decision to include religious schools in otherwise neutral tuition aid programs.¹⁴⁹ And, as discussed earlier, in *Carson v. Makin*, the Court most recently held that religious schools are constitutionally entitled to be included in state funding schemes even when the uses to which the monies are being put are programmatically religious.¹⁵⁰ These cases are about state "neutrality" toward "religion," not exemp-

¹⁴⁵ See, e.g., *Parker v. Hurley*, 514 F.3d 87, 94, 107 (1st Cir. 2008); *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1188-90 (9th Cir. 2006); *Leebaert v. Harrington*, 332 F.3d 134, 135, 139, 145 (2d Cir. 2003); *Brown v. Hot, Sexy and Safer Prods. Inc.*, 68 F.3d 525, 529-30, 532, 534-37 (1st Cir. 1995); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1060-61, 1063, 1065, 1069 (6th Cir. 1987).

¹⁴⁶ See, e.g., *Fields*, 447 F.3d at 1190; *Leebaert*, 332 F.3d at 142; *Brown*, 68 F.3d at 533-34.

¹⁴⁷ Of course, government in politically conservative states may be more inclined to give dissenters what they wish, whether as a matter of exemption or otherwise.

¹⁴⁸ 137 S. Ct. 2012, 2017, 2024-2025 (2017).

¹⁴⁹ 140 S. Ct. 2246, 2251, 2254, 2262-63 (2020).

¹⁵⁰ 142 S. Ct. 1987, 1995, 1997-98, 2000-02 (2022).

tion, and the constitutional strategy of the plaintiffs litigating them has to date been successful exactly because the new establishment often deploys the category “religion” non-neutrally, to designate disreputable and benighted dissent.¹⁵¹

The implications of this line of cases extend well beyond these somewhat narrow doctrines, or even any policies that public school districts might contemplate. As Nicole Stelle Garnett has argued, the momentum for school choice programs is growing, and the Court may well nudge it along.¹⁵² A majority of states now have at least one publicly-funded private school choice program and the demand for these alternative educational arrangements might increase in light of the Supreme Court’s recent decisions.¹⁵³ In time, the reach of the free exercise of religion may even encompass what Garnett has elsewhere described as “religious charter schools”—publicly funded schools with express religious commitments.¹⁵⁴ This at a time when, as a recent NPR story puts it, the public school student enrollment “falloff” may be explained in significant part by “an increase in homeschooling [and] a shift to charter schools and private schools.”¹⁵⁵

Some of this decline in public school enrollment might be attributable to transient and temporary unhappiness with policies adopted in response to COVID-19. This Article claims, however, that those policies are themselves emblematic of one of the new establishment creeds and therefore unlikely to disappear. Together with other doctrines such as the ministerial exception, which insulates religious institutions including schools from various new establishment strictures in

¹⁵¹ See *supra* Part II.

¹⁵² Nicole Stelle Garnett, *Correcting Maine’s Error*, CITY JOURNAL (Dec. 7, 2021), <https://www.city-journal.org/supreme-court-to-hear-case-on-religious-schools>. See also Tareena Musaddiq et al., *The Pandemic’s Effect on Demand for Public Schools, Homeschooling, and Private Schools* 9-11 (Nat. Bureau of Econ. Rsch., Working Paper No. 29262, 2021) (noting substantial public school enrollment declines in 2020 and homeschooling and private school increases); Neal McCluskey, *Survey: Private Schools Appear to See Rising Enrollment, This Year and Last*, CATO INST. (Oct. 28, 2021), at <https://www.cato.org/blog/survey-private-schools-appear-see-rising-enrollment-year-last>.

¹⁵³ Garnett, *supra* note 152. See also *School Choice Programs Near You*, AM. FED’N FOR CHILDREN, at <https://www.federationforchildren.org/school-choice-america/interactive-map/>.

¹⁵⁴ Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INST. (Dec. 2020), <https://www.manhattan-institute.org/religious-charter-schools-legally-permissible-constitutionally-required>.

¹⁵⁵ Anya Kamenetz, et al., *Where Are the Students? For A Second Straight Year, School Enrollment is Dropping*, NPR (Dec. 15, 2021), <https://www.npr.org/2021/12/15/1062999168/school-enrollment-drops-for-second-straight-year>.

the hiring and firing of certain personnel, and which has been fortified by the Court since its recognition in 2012,¹⁵⁶ one can begin to see the makings of a new disestablishment coming into view. That is, a combination of free exercise doctrines that might include, but certainly does not prominently feature, religious exemption, has coalesced to create a possible site for the more systematic, organized, and concentrated expression of dissent from certain creeds of the new establishment. At least some of these schools, if not many of them, do not share new establishment creeds. If that collection of forces did, in fact, coalesce—a big if, at this stage, since these developments are new and uncertain—it might represent a new disestablishment, a pocket of resistance to the new establishment that traditionalist families and communities might elect. Of course, one should expect that partisans of the new establishment would jealously seek to police such a development, and that they would use the many instruments at their disposal to combat it. Some of these might involve the strings that come with government funding and consequent pressure on schools that accept money to secularize, while others might be more in the nature of the deep, cultural power discussed earlier.¹⁵⁷

Once again, the point is neither to praise nor condemn these developments but to see them clearly for what they are: evolving contests over the nature and direction of the new establishment and evolving contests over the scope of acceptable disestablishmentarian dissent from it. There is, in fact, a continuum between free exercise, disestablishment, and establishment that might be illustrated in a narrative cycle: the five stages of establishment.¹⁵⁸

In the first stage, the establishment is firm and entrenched. Dissent from it is possible only through limited, individuated, and largely disconnected exemptions with little collective power to threaten the establishment.

¹⁵⁶ See *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066-69 (2020); *Hosanna-Tabor*, 565 U.S. at 188 (2012).

¹⁵⁷ See, e.g., the deep suspicion with which homeschooling, and private schooling more generally, is held by partisans of the new establishment. See Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education and Protection*, 62 ARIZ. L. REV. 1; 8-24; 43-54 (2020); Josh Blackman, *Chemerinsky's Off-The-Wall Constitutional Ideas*, JOSH BLACKMAN BLOG (Jan. 7, 2013), <https://joshblackman.com/blog/2013/01/07/chemerinskys-off-the-wall-constitutional-ideas/>.

¹⁵⁸ I am grateful to Chris Lund for suggesting that I think about these developments in cyclical terms.

In the second stage, the establishment is still the dominant force within the polity, but there is more concentrated and collective internal disagreement about its several creeds. Exemption from it is increasingly paired with other dissenting strategies of free exercise to create subcommunities of disestablishment.

In the third stage, the establishment experiences more genuine fragmentation and instability, and the polity provisionally accepts several different accounts of its fundamental commitments and orthodoxies. What looked at one time like exemptions and free exercise strategies, and what became disestablishments, now have themselves become contenders for new establishment status, although they continue to have rivals.

In the fourth stage, one of the new disestablishments achieves greater cultural and legal strength than the others, as the old establishment is gradually supplanted in law and policy. It is at this relatively late stage that institutions like the Supreme Court involve themselves in dismantling the older establishment to make space for what will come next.

In the fifth stage, the once ascendant disestablishment becomes the new establishment, feels the fullness of its strength, and reaches as deeply as it can into the social structure.

And the cycle begins anew.

CONCLUSION

It is likely that this little story misses a great deal about the complicated relationship between exemption, free exercise, disestablishment, and establishment. But it will be enough if it suggests that scholars of law and religion should turn their focus away from the sorts of questions that were once incessantly asked and regrettably continue to be pressed. Questions such as: What is the line between the religious and the secular? What qualifies as a religion? But is this practice an 'establishment of religion?' How can we describe the views of our community in religiously neutral terms? To be sure, clever advocates will need to continue to use these terms and pursue stratagems that turn them to advantage. But these questions assume and import features of an old American establishment—in which "religion" had a more definite meaning—that is now nearly gone. They have little scholarly purchase any longer. They are questions for a different time and another culture.

Different questions should now be asked. Questions like: What is the arrangement of legal and cultural power within a polity and how does that superstructure frame and control dissent? How do establishments change, and what are the mechanisms of that change? How is the category 'religion' deployed strategically by partisans of the establishment and by disestablishment forces? What can dissenters in any regime reasonably expect from the establishment in the way of tolerance of dissent from the establishment's orthodoxies? Asking this second set of questions, and other questions like these, would orient the field away from the irrelevant concerns of another age and toward the real conflicts that animate our world today.