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## Lobbying in the Shadows: Religious Interest Groups in the Legislative Process

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# LOBBYING IN THE SHADOWS: RELIGIOUS INTEREST GROUPS IN THE LEGISLATIVE PROCESS

Zoë Robinson\*

## ABSTRACT

*The advent of the new religious institutionalism has brought the relationship between religion and the state to the fore once again. Yet, for all the talk of the appropriateness of religion–state interactions, scholars have yet to examine how it functions. This Article analyzes the critical, yet usually invisible, role of “religious interest groups”—lobby groups representing religious institutions or individuals—in shaping federal legislation. In recent years, religious interest groups have come to dominate political discourse. Groups such as Priests for Life, Friends Committee on National Legislation, Women’s Christian Temperance Union, and American Jewish Congress have entered the political fray to lobby for legislative change that is reflective of specific religious values. These religious interest groups collectively spend over \$350 million every year attempting to entrench religious values into the law. These groups have become the primary mechanism for religious involvement in federal politics, but, surprisingly, the place and role of these groups has yet to be examined by legal scholars.*

*This Article shows that the key features of religious interest groups reflect significant tensions within the emerging project of religious institutionalism. In developing this claim, this Article identifies two benefits claimed to result from religious involvement in politics—protecting religious liberty and enhancing democratic participation—and demonstrates that in fact these benefits are unlikely to result from religious interest group politicking. Instead, the pursuit*

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\* Associate Professor of Law, DePaul University College of Law. This Article greatly benefited from presentations at Stanford Law School, Emory University School of Law, and The New Religious Institutionalism conference. I am grateful to a number of individuals who offered thoughtful and helpful comments at various stages, including Robin West, Larry Sager, Rick Garnett, Nelson Tebbe, Micah Schwartzman, Richard Schragger, Paul Horwitz, Gregory Magarian, Caroline Corbin, Fred Gedicks, Barry Sullivan, James Nelson, Andrew Koppelman, Jessie Hill, Robin Fretwell Wilson, Jacob Levy, Chris Lund, Chad Flanders, Michael Helfand, John Witte, Jr., Monu Bedi, Robert J. Smith, Deborah Tuerkheimer, Allison Tirres, Daniel Morales, Max Helveston, and Emily Cauble. Thanks to Katherine Garceau and Andrea Wallace for their excellent research assistance. Thanks are also due to the editors at the *Emory Law Journal*, especially Ryan Rummage, Ben Klebanoff, and Jameson Bilsborrow, for their excellent editing and substantive feedback.

*of religiously bound interests as a legislative end results in the religious interest being pursued as an end in and of itself, consequently imposing significant costs on the values of religious liberty and democracy. Ultimately, this Article claims that when considering the place of religion in the political process, it is incumbent on scholars to consider both the institutional design question of how religious participation in politics is operationalized, as well as take into account both the costs and benefits of that involvement.*

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## INTRODUCTION

It has become par for the course among both politicians and commentators that religion does, and should, have a place in the federal legislative process. Legislators, executive officials, and other public figures publically proclaim the need—and their desire—to “work with religious groups” to enact legislation that responds to the needs of religious adherents in the community.<sup>1</sup> Within the scholarly community, research on religious groups—that is, the study of the place and benefits of religious groups in political life—overwhelmingly advocates for inclusion of religious viewpoints.<sup>2</sup> Indeed, the idea that religious groups should have a role in the political process has intuitive value. By including religious groups in politics and in the shaping of

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<sup>1</sup> See, e.g., Liliana Mihut, *Two Faces of American Pluralism: Political and Religious*, J. FOR STUDY RELIGIONS & IDEOLOGIES, Winter 2012, at 39, 53 (“Then, in the 2000s, the Christian Coalition helped George W. Bush to be elected; consequently, one of the first moves of the new President was to create an Office of Faith-Based and Community Initiatives mainly to work with religious groups.”); Laurie Goodstein, *Panel Wants to End Ban on Church Political Work*, N.Y. TIMES, Aug. 15, 2013, at A13, available at <http://www.nytimes.com/2013/08/15/us/panel-wants-to-end-ban-on-church-political-work.html> (discussing Senator Charles E. Grassley’s efforts in convening a commission comprised of fourteen evangelical Christian leaders, recommending the removal of a 1954 ban disallowing churches and other houses of worship from endorsing political candidates through revocation of their tax-exempt status); *Top Bishops Fight Birth Control Deal*, ASSOCIATED PRESS, Feb. 14, 2012, available at <http://www.cbsnews.com/news/top-bishops-fight-birth-control-deal/> (claiming that New York Archbishop, Timothy Dolan, was holding President Barack Obama to his “pledge to work with religious groups” regarding the Affordable Care Act contraception mandate and that “he trusted Obama wasn’t anti-religious”); Peter Wallsten & N.C. Aizenman, *Republicans Vow to Force Repeal of Birth-Control Rule*, WASH. POST, Feb. 9, 2012, at A4, available at [http://www.washingtonpost.com/politics/boehner-vows-congressional-action-to-overturn-obama-administration-rule-on-birth-control/2012/02/08/gIQAIFRczQ\\_story.html](http://www.washingtonpost.com/politics/boehner-vows-congressional-action-to-overturn-obama-administration-rule-on-birth-control/2012/02/08/gIQAIFRczQ_story.html) (claiming that President Barack Obama reiterated his “promise[] to work with religious groups to address their concerns” in regards to the contraception mandate of the Affordable Care Act).

<sup>2</sup> See, e.g., PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 2, 3 (1977); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 145 (2d ed. 1986) (claiming that there is a strong tradition of religious argument from “Adams, Tocqueville, Lincoln, and a host of others who understood religiously based values as the points of reference for public moral discourse”); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 115; David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 883 (1993); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 644–48 (providing a summary of religions historic contributions to the political conversation in the United States); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 233–34 (2001) (summarizing instances of religion’s constructive ethical contributions throughout U.S. history).

federal legislation on the front end,<sup>3</sup> we might be reassured that the religious liberty of Americans is being taken into consideration.<sup>4</sup> Recent Supreme Court decisions in both *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*<sup>5</sup> and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>6</sup> reflect a judicial consensus of the appropriateness and value of religious involvement in public life.<sup>7</sup>

Yet, within the legal community debates about religion–state interactions rarely consider *how* this relationship functions. Despite increasing interest in the role of religious institutions in politics and society more broadly,<sup>8</sup> there is scant study of the structure and operation of *religious interest groups*.<sup>9</sup> This

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<sup>3</sup> See, e.g., Mihut, *supra* note 1, at 46 (noting how interest groups “have stimulated the representation of various categories of people before the government and have facilitated political participation”); see also David Yamane & Elizabeth A. Oldmixon, *Religion in the Legislative Arena: Affiliation, Salience, Advocacy, and Public Policymaking*, 31 LEGIS. STUD. Q. 433, 434 (2006) (“[I]t is reasonable to expect . . . that a religiously informed worldview will act as a filter across policy domains.”).

<sup>4</sup> See, e.g., Maureen O. Manion, *Churches and States: The Politics of Accommodation*, 44 J. CHURCH & ST. 317, 317–18 (2002); Liliana Mihut, *Lobbying—A Political Communication Tool for Churches and Religious Organizations*, J. FOR STUDY RELIGIONS & IDEOLOGIES, Summer 2011, at 64, 74 (detailing the role of religious lobbying groups media campaigns and other advocacy tactics in the debate on abortion in Obama’s healthcare reform); Monica Youn, *Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure*, 81 GEO. WASH. L. REV. 2108, 2112 (2013). On the effect of religion on voting behavior and, consequently, legislator action, see James T. Richardson & Sandie Wightman Fox, *Religious Affiliation as a Predictor of Voting Behavior in Abortion Reform Legislation*, 11 J. FOR SCI. STUDY RELIGION 347 (1972) (finding that religious affiliation of state legislators is a stronger indicator of voting behavior on abortion than constituency, party, or age).

<sup>5</sup> 132 S. Ct. 694 (2012).

<sup>6</sup> 134 S. Ct. 2751 (2014).

<sup>7</sup> See, e.g., Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 114, 118 (2012) (arguing that the decision will leave “religion unregulated and out of control”); Marsha B. Freeman, *What’s Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J.L. & SOC. CHANGE 133, 142 (2013) (arguing that *Hosanna-Tabor* has given religious organizations protection above and beyond that of other employers); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 429 (2013) (characterizing the decision as creating “a constitutional right on steroids”); Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. 181, 181 (2014) (calling the decision a “jurisprudential earthquake” whose “biggest aftershock has yet to be felt”).

<sup>8</sup> See, e.g., Ted G. Jelen, *Religious Priorities and Attitudes Toward Church and State*, 42 REV. RELIGIOUS RES. 87, 88 (2000) (attempting to address the question of how religious priorities relate to political attitudes); Yamane & Oldmixon, *supra* note 3, at 434.

<sup>9</sup> While there is a paucity of references to religious interest groups in the legal literature, there is a growing and robust literature studying religious interest groups in political science and sociology. For particularly robust discussion, see PAUL A. DJUPE & CHRISTOPHER P. GILBERT, *THE POLITICAL INFLUENCE OF CHURCHES* (2009); LUKE EUGENE EBERSOLE, *CHURCH LOBBYING IN THE NATION’S CAPITAL* (1951); ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY* (1988); DANIEL J.B. HOFRENNING, *IN WASHINGTON BUT NOT OF IT: THE PROPHETIC POLITICS OF RELIGIOUS LOBBYISTS* 21 (1995); STEVEN M. TIPTON, *PUBLIC PULPITS: METHODISTS AND MAINLINE CHURCHES IN THE MORAL ARGUMENT OF PUBLIC LIFE* (2007); PAUL J. WEBER & W. LANDIS JONES, *U.S.*

Article begins to fill this gap. It outlines how religious involvement in the political process has been operationalized through the overlooked institutions of “religious interest groups”—associations of either denominational houses of worship or collectives of individuals organized to advance a distinct religious viewpoint.<sup>10</sup> This Article then examines the implications of religious interest groups for the principal justifications of religious participation in the political process: religious liberty and democratic participation.<sup>11</sup> In undertaking an accounting of both benefits *and* costs of religious involvement in politics via religious interest groups, this Article complicates the general support for religious participation in the political process. It turns out that advancement of the religious voice through religious lobbyists imposes both benefits and costs on religious liberty and democracy.<sup>12</sup>

In advancing this claim, this Article is exploring a subject that is largely unrecognized by legal scholars, who have failed to consider the place and role of religious interest groups in the legislative process.<sup>13</sup> This lacuna in the literature is surprising given the longstanding and entrenched role of religious interest groups in the federal legislative process. Indeed, it is impossible to accurately describe the religion–state relationship without an appreciation for religious lobbyists. These groups, ranging from well-known church lobbies like the United States Conference of Catholic Bishops to less-known coalitions and specialist single-issue groups like the Christian Coalition,<sup>14</sup> are now

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RELIGIOUS INTEREST GROUPS: INSTITUTIONAL PROFILES (1994) (providing a comprehensive survey of all religious interest groups in the United States); Daniel J.B. Hofrenning, *Into the Public Square: Explaining the Origins of Religious Interest Groups*, 32 SOC. SCI. J. 35 (1995); Paul J. Weber & T.L. Stanley, *The Power and Performance of Religious Interest Groups*, Q. REV., Summer 1984, at 28.

<sup>10</sup> HOFRENNING, *supra* note 9, at 21; *see also* PEW FORUM ON RELIGION & PUBLIC LIFE, PEW RESEARCH CTR., LOBBYING FOR THE FAITHFUL: RELIGIOUS ADVOCACY GROUPS IN WASHINGTON, D.C. 16 (2012), available at [http://www.pewforum.org/files/2011/11/ReligiousAdvocacy\\_web.pdf](http://www.pewforum.org/files/2011/11/ReligiousAdvocacy_web.pdf) [hereinafter LOBBYING FOR THE FAITHFUL]; WEBER & JONES, *supra* note 9, at vii; Weber & Stanley, *supra* note 9, at 28 (“By religious interest groups we mean groups which are active in national politics and which identify themselves as religious, have a largely religious membership, and/or are active in areas traditionally considered to be of significance to religious groups . . .”).

<sup>11</sup> *See infra* Part II.B (identifying religious liberty and democratic participation as the core justifications for religious argument in politics).

<sup>12</sup> *See infra* Part III.B–C (outlining how religious interest groups impose costs on religious liberty and democratic participation).

<sup>13</sup> *But see* Manion, *supra* note 4 (discussing the politics of religious accommodations); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133 (2011) (discussing the political nature of religious accommodations); Youn, *supra* note 4 (alluding to the organized lobbying of the Church of the Latter-Day Saints in opposing Proposition 8).

<sup>14</sup> *See* LOBBYING FOR THE FAITHFUL, *supra* note 10; Mihut, *supra* note 4, at 74; Fred Van Geest, *Christian Denominational and Special Interest Political Action on Public Policy Issues Related to Sexual*

pivotal players in policy developments and lawmaking.<sup>15</sup> In highlighting religious interest groups' activities and features, this Article attempts to draw religious interest groups out from the shadows of the legislative process and reveal that the specialized nature of religious-interest-group lobbying has effects on the goals of religious liberty and democracy that merit scholarly attention.

Specifically, this Article claims that the facilitation of religious involvement in politics through the medium of religious interest groups imposes serious costs on the principal goals of religious participation in the political process: religious liberty and democratic participation. It is regularly claimed that religious participation in the legislative process is essential to achievement of these two goals.<sup>16</sup> Indeed, a prevailing theme of contemporary law and religion scholarship cites the need for protection of religious liberty from undue burdens as a key driver for religious voices in politics.<sup>17</sup> These same proponents of religious voice in politics also claim that religious involvement in the political process will ensure the broad participation in the democratic process, and that participation in the political process will ensure that substantive democratic outcomes will reflect inputs of the all members of the political community.<sup>18</sup> Yet, by failing to consider how religious participation in the political process is operationalized—through religious interest groups—commentators have failed to recognize the tensions among these goals.<sup>19</sup> It turns out that pursuance of religious interests via religious

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*Orientation*, 69 SOC. RELIGION 335 (2008). For a comprehensive database of the active religious interest groups in the United States, see *Religious Advocacy Sortable Directory*, PEWRESEARCH RELIGION & PUB. LIFE PROJECT, <http://projects.pewforum.org/religious-advocacy-directory/> (last visited Mar. 5, 2015). For historic accounts of American religious interest groups, see generally EBERSOLE, *supra* note 9 (describing religious interest groups in America in 1951); WEBER & JONES, *supra* note 9 (detailing the active religious interest groups as of 1991).

<sup>15</sup> Gregg Ivers, *Religious Organizations as Constitutional Litigants*, 25 POLITY 243, 244 (1992); see also Hofrenning, *Public Square*, *supra* note 9, at 35; Mihut, *supra* note 4, at 71; Van Geest, *supra* note 14, at 336; Yamane & Oldmixon, *supra* note 3, at 434.

<sup>16</sup> See *infra* Part II.B (describing the principal goals of religious democratic participation and religious liberty).

<sup>17</sup> See, e.g., LOUIS FISHER, *RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS* (2002); Louis Fisher, *Statutory Exemptions for Religious Freedom*, 44 J. CHURCH & ST. 291 (2002); Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. REV. 611 (2001).

<sup>18</sup> See, e.g., HERTZKE, *supra* note 9, at 199–200; HOFRENNING, *supra* note 9, at 71; Mihut, *supra* note 1, at 46 (claiming that interest groups “have stimulated the representation of various categories of people before the government and have facilitated political participation”).

<sup>19</sup> See, e.g., Mihut, *supra* note 4, at 71 (“[T]he activities developed by churches and religious organizations in order to influence public policy are sometimes characterized as a violation of the church – state separation . . .”).

interest groups complicates, and ultimately disservices, the goals of religious liberty and democratic participation.

In exploring this complicated question, this Article proceeds in four parts.<sup>20</sup> Part I provides a primer on religious interest groups, taking time to describe the history of religious interest groups in America. It then identifies the salient markers of religious interest groups that define them as unique among interest groups—and both uniquely beneficial and uniquely dangerous for religious liberty and the democratic process. Ultimately, Part I aims to draw religious interest groups out of the shadows of the legislative process and into the public forum where the validity of their continued presence in politics can be examined.

Part II examines the benefits said to result from religious interest group politicking.<sup>21</sup> It first sets out the traditional goals stated for justifying the continued presence of religion in the legislative process—protection of religious liberty and enhancement of democratic participation—before considering the unique prowess of religious interest groups in attaining those goals. Part III considers the flip side to the benefits posed in Part II and articulates the unique and present dangers of religious interest groups in the legislative process.<sup>22</sup> After outlining the traditional concerns for including religion in the legislative process, Part III demonstrates how religious interest groups amplify and enlarge these traditional concerns. It then describes how the success of religious interest groups comes at a cost to both democracy and religious liberty, undermining the values enshrined in the First Amendment.

Part IV concludes by sketching some possible directions for controlling the impact of religious interest groups on religious liberty and democracy, while recognizing the tradeoffs that will inevitably have to be made.<sup>23</sup> It considers

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<sup>20</sup> The structure and framework for this article is drawn from Miriam Seifter's excellent article, *States as Interest Groups in the Legislative Process*, 100 VA. L. REV. 953 (2014). In her article, Professor Seifter examines the idea that states act as interest groups in the administrative process, lobbying federal regulatory agencies for outcomes that benefit the states. Professor Seifter examines the features of state interest groups, as well as the legal framework for state involvement in the administrative process. Professor Seifter posits that there are both benefits (protecting state power) and costs (impact on agency decision making, and the democratic accountability of agencies) to states lobbying in the administrative process. Professor Seifter's approach is groundbreaking, and I decided to build on her framework and present my study of religious interest groups through the same lens. While the structure of the two articles is parallel, this article focuses on the discrete issue of lobbying by religious interest groups—not lobbying by the states.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part IV.



the impact that regulating religious interest groups might have on religious speech, as well as religious liberty, and outlines possible reforms that endeavor to balance the countervailing interests involved.

\* \* \*

Before moving to the substance of this Article, it is necessary to make a point about methodology: because this Article begins the project of highlighting the presence and role of religious interest groups in the legislative process, it does not attempt to sort out how the attributes of religious interests groups described in this Article are attributable to interest groups more generally, or at the very least to ideological—although secular—interest groups specifically (e.g., environmental interest groups). It could be that when we compare religious interest groups to secular ideological groups, there is a low level of variance in the gains achieved from the lobbying efforts. While assessing this empirical question is beyond the scope of this Article, it maintains that because of the particular constitutional commitment to religious liberty in the First Amendment,<sup>24</sup> even if there is low—or no—variance between the success of secular ideological lobbyists and religious lobbyists, any gains made by religious interest groups at the expense of general religious liberty, democracy, or both, present specific constitutional concerns that commentators must begin to grapple with.<sup>25</sup>

## I. THE RISE AND ROLE OF RELIGIOUS INTEREST GROUPS IN THE FEDERAL LEGISLATIVE PROCESS

This Part presents a descriptive account of religious interest groups in the United States, providing the necessary foundation for the subsequent analysis of the involvement of religious groups in federal politics in Parts II and III. To this end, section A begins the project of defining religious interest groups by describing the historic advocacy efforts of those groups traditionally identified as religious lobbyists. This sets the scene for section B's examination of the distinctive traits and lobbying practices of religious interest groups. In doing so, section B identifies the salient features of religious interest groups that are

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<sup>24</sup> The Establishment and Free Exercise Clauses are contained within the First Amendment, which reads in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

<sup>25</sup> For an excellent article grappling with the Speech Clause implications of restricting religious speech, see Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379 (arguing that limits on religious speech are consistent with current Speech Clause doctrine).

instrumental to enhancing the values of religious liberty and democracy, yet coincide to undermine these goals.

### A. *A History of Religious Interest Groups in America*

Religious advocacy has, to some degree, always been part of American interest group pluralism. Indeed, at the founding of the Constitution itself, many religious groups worked to ensure that a close relationship between church and state remained, despite the newly minted First Amendment.<sup>26</sup> Religious groups were consistently part of national lobbying campaigns—for example, rallying against Sunday mail delivery or Sunday business hours.<sup>27</sup>

The most prominent early example of religious involvement in issues of politics and social policy was the abolition movement. Religious groups frequently voiced their opposition to slavery in the public square despite government and citizenry rebuke over what was seen as an inappropriate attempt by religious groups to influence legislation.<sup>28</sup> The Quakers were early opponents of slavery, with George Keith telling fellow Quakers in 1693 “[n]ot to buy any Negroes, unless it were on purpose to set them free.”<sup>29</sup>

The Quakers were not the only opponents of slavery. The Methodist Conference of 1800, for example, directed the “Annual Conference to ‘draw up addresses for the gradual emancipation of the slaves, to the legislatures of

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<sup>26</sup> There is robust literature on the history of religious lobbyists in the United States. *See, e.g.*, EBERSOLE, *supra* note 9 (examining the activities of church associations in Washington, D.C.); GAINES M. FOSTER, *MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865–1920* (2002) (discussing the role of religious groups in the fight against slavery); JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* (2004) (discussing the development of formal religious lobby groups in Washington, D.C.); Peter J. Thuesen, *The Logic of Mainline Churchliness: Historical Background Since the Reformation*, in *THE QUIET HAND OF GOD: FAITH-BASED ACTIVISM AND THE PUBLIC ROLE OF MAINLINE PROTESTANTISM* (Robert Wuthnow & John H. Evans eds., 2002); *see also* LOBBYING FOR THE FAITHFUL, *supra* note 10, at 23–27 (providing a brief overview of the history of religious lobbying in America).

<sup>27</sup> *See* Marye Lorelle Thomas, *Faith-Based Organizations and Legislative Advocacy: A Qualitative Inquiry* 26–34 (Apr. 2008) (unpublished Ph.D. dissertation, Virginia Commonwealth University) (on file with the Digital Archive, Virginia Commonwealth University), *available at* [https://digarchive.library.vcu.edu/bitstream/handle/10156/1989/thomasml\\_phd.pdf?sequence=1](https://digarchive.library.vcu.edu/bitstream/handle/10156/1989/thomasml_phd.pdf?sequence=1). Importantly, not all religious groups were involved in national politics. Once the First Amendment was ratified, many religious groups withdrew from public life completely, believing that the primary role of the church was to “encourage faithful relationships between individuals and God” and that the church had no role in politics. *See* HOFRENNING, *supra* note 9, at 35.

<sup>28</sup> EBERSOLE, *supra* note 9, at 3–5; Thuesen, *supra* note 26, at 36.

<sup>29</sup> EBERSOLE, *supra* note 9, at 2 (quoting GEORGE KEITH, *AN EXHORTATION AND CAUTION TO FRIENDS CONCERNING BUYING OR KEEPING OF NEGROES* 2 (New York, William Bradford 1693)).

those states in which no general laws have been passed for that purpose. . . . LET THIS BE CONTINUED FROM YEAR TO YEAR UNTIL THE DESIRED END BE ACCOMPLISHED.”<sup>30</sup> Driven by their belief that the institution of slavery was inherently immoral, as based on their religious faith, groups such as the Quakers believed that living a moral life compelled their involvement on the national political stage. There was, of course, disagreement among religious groups on the issue of slavery, despite the visible and vocal presence of the Quakers and other like-minded groups. The impending Civil War and the issue of slavery drove many denominational schisms among various Baptists, Methodists, and Presbyterians. Those subgroups within each denomination that supported the institution of slavery responded to the opponents of slavery with their own interpretations of sacred texts and claims as to what morality required with respect to slavery.<sup>31</sup>

Despite the prominence of religious groups in the national debate over slavery, religious lobbying in the United States did not become a permanent fixture on the national scene until the late nineteenth century, following the post-Civil War expansion of the federal government.<sup>32</sup> This period represents somewhat of a “moral reconstruction” where religious groups organized specific subgroups to advocate against the evils of alcohol, Sabbath breaking, impurity, and gambling.<sup>33</sup> Many religious groups made a deliberate choice to enter the national political forum and focused their efforts on attempting to influence legislation such that it restricted, and therefore controlled, citizens’ desire to “sin” and their economic means to do so.<sup>34</sup>

The most visible example of the lobbying efforts of religious groups in this period is the temperance movement.<sup>35</sup> The temperance movement represented

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<sup>30</sup> *Id.* at 3 (alterations in original) (quoting H. MATTISON, *THE IMPENDING CRISIS OF 1860*, at 29 (New York, Mason Bros. 1858)).

<sup>31</sup> *See id.*

<sup>32</sup> *See* LOBBYING FOR THE FAITHFUL, *supra* note 10, at 23.

<sup>33</sup> *See* FOSTER, *supra* note 26, at 112; *see also* MORONE, *supra* note 26 (discussing the development of the religious lobby); Gaines M. Foster, *Conservative Social Christianity, the Law, and Personal Morality: Wilbur F. Crafts in Washington*, 71 *CHURCH HIST.* 799, 806 (2002) (discussing the religious lobby efforts against “the ‘Big Four’ evils, intemperance, impurity, Sabbath breaking, and gambling” (quoting WILBUR F. CRAFTS, *PATRIOTIC STUDIES OF A QUARTER CENTURY OF MORAL LEGISLATION* 62 (1910)) (internal quotation marks omitted)).

<sup>34</sup> *See, e.g.*, FOSTER, *supra* note 26, at 112.

<sup>35</sup> *See* John L. Merrill, *The Bible and the American Temperance Movement: Text, Context, and Pretext*, 81 *HARV. THEOLOGICAL REV.* 145 (1988); Ian R. Tyrrell, *Drink and Temperance in the Antebellum South: An Overview and Interpretation*, 48 *J. S. HIST.* 485, 486 (1982); *see also* Mihut, *supra* note 4, at 72 (“The history of religious lobbying started . . . thanks to the activities developed by the Methodist Church to promote ‘the cause of temperance’ and to support the Prohibition as a way to combat alcohol-related problems.”).

an individual morality issue around which religious leaders and citizens could coalesce, prompting the formation of significant religious interest groups, separate from (although maintaining significant formal and financial ties with) the churches themselves on the national scene.<sup>36</sup> Many groups, including the Anti-Saloon League and the Women's Christian Temperance Union, were founded specifically to lobby for a total ban of alcohol in the United States.<sup>37</sup> The fulltime officers of the Women's Christian Temperance Union successfully employed legislator knowledge of the large and growing grassroots membership in the group as leverage to have their concerns and moral reforms brought before Congress and individual legislators.<sup>38</sup> Other examples of the period include lobbying efforts against the Church of Jesus Christ of Latter-day Saints and the practice of polygamy.<sup>39</sup>

The religious lobby slowly grew in the early twentieth century, with the Christian Science Church and the Seventh-Day Adventist Church being among the first religious denominations to establish a permanent advocacy office in Washington, D.C. in 1900 and 1901 respectively.<sup>40</sup> Many of the larger denominations followed suit, and by the second decade of the twentieth century, religious denominations with advocacy offices in Washington included the Methodist Episcopal Church (which became the United Methodist Church in 1968), and the Federal Council of Churches of Christ in America (founded in 1908 and eventually becoming part of the National Council of the Churches of Christ in the USA).<sup>41</sup> In addition to Protestant groups, Catholic organizations also set up shop in Washington. Groups such as Catholic Charities USA, the National Catholic Educational Association, and various

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<sup>36</sup> See EBERSOLE, *supra* note 9, at 9.

<sup>37</sup> *Id.*; see also LOBBYING FOR THE FAITHFUL, *supra* note 10, at 23. For example, the Charter of the Women's Christian Temperance Union specified as follows:

That whereas, the object of just government is to conserve the best interests of the governed: and whereas the liquor traffic is not only a crime against God, but subversive of every interest of society; therefore, in behalf of humanity, we call for such legislation as shall secure this end; and while we will continue to employ all moral agencies as indispensable, we hold prohibition to be essential to the full triumph of this reform.

PETER H. ODEGARD, *PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE* 38 (1928); see also FOSTER, *supra* note 26, at 36 (quoting *ENCYCLOPEDIA OF TEMPERANCE AND PROHIBITION* 651 (New York, Funk & Wagnalls 1891)).

<sup>38</sup> See ODEGARD, *supra* note 37, at 153.

<sup>39</sup> See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 38–39 (2002).

<sup>40</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 23.

<sup>41</sup> *Id.* at 23–24.

groups representing America's Catholic bishops established permanent offices in the nation's capital.<sup>42</sup>

World War II led to an increase in religious lobbying.<sup>43</sup> The advent of the Selective Service Bill of 1940 brought about activism for conscientious objection from churches. For example, members of the pacifist Quaker Church formed the Friends Committee on National Legislation in 1943 to advocate for the protection of conscientious-objector status.<sup>44</sup> Around this time, other Protestant denominations such as the Baptists, Congregationalists, Lutherans, and Presbyterians entered the national lobbying scene.<sup>45</sup> While growth in the religious lobbying market slowed between 1950 and 1970, a number of Jewish advocacy groups formed in the wake of the Holocaust and the creation of the State of Israel.<sup>46</sup> The Civil Rights movement of the 1960s also led to a wave of religious advocacy groups such as the Progressive National Baptist Convention, an African-American Baptist group.<sup>47</sup>

After 1970, the religious lobby scene in Washington changed markedly.<sup>48</sup> Washington experienced a surge in religious groups entering into the overtly political lobbying scene. The Pew Forum on Religion and Public Life notes that the number of religious advocacy groups rose at an accelerating pace with each successive decade.<sup>49</sup> The explosion of organizations included a number of single-issue advocacy groups (e.g., abortion), as well as more groups representing religious schools and colleges, specific denominations, and various religious traditions.<sup>50</sup> The political science literature is replete with theories as to why there was such a large explosion of religious interest groups entering the lobbying scene in the 1970s. Explanations include a general rise in public religious expression,<sup>51</sup> a trend toward the institutionalism of political

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<sup>42</sup> *Id.* at 25.

<sup>43</sup> See LEE E. DIRKS, RELIGION IN ACTION: HOW AMERICA'S FAITHS ARE MEETING NEW CHALLENGES 142-49 (1965); HERTZKE, *supra* note 9, at 29-32.

<sup>44</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 25.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., *id.* at 26.

<sup>47</sup> See, e.g., DIRKS, *supra* note 43, at 142-49.

<sup>48</sup> HERTZKE, *supra* note 9, at 32-36; LOBBYING FOR THE FAITHFUL, *supra* note 10, at 26-27; WEBER & JONES, *supra* note 9, at xxvii.

<sup>49</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 26-27.

<sup>50</sup> *Id.*; see also DAVID S. GUTTERMAN, PROPHETIC POLITICS: CHRISTIAN SOCIAL MOVEMENTS AND AMERICAN DEMOCRACY 1-5 (2005); HOFRENNING, *supra* note 9, at 36-37.

<sup>51</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 26; see also HERTZKE, *supra* note 9, at 32.

activism in America more generally,<sup>52</sup> the continued growth of the federal government in everyday life,<sup>53</sup> as well as the backlash against the Warren Court's expansive interpretation of various individual rights, including a right to an abortion,<sup>54</sup> and the ever increasing restriction of the involvement of religion in government institutions, such as schools.<sup>55</sup>

To quantify the increase in religious interest groups in federal politics, in the 1930s there were 10 religious advocacy groups with registered offices in Washington.<sup>56</sup> By 1970 that number increased to 38, and by 2010 there were 215 registered religious advocacy groups in Washington.<sup>57</sup> In 2010, these groups collectively employed over 1,000 people in the Washington area and spent at least \$350 million on religious advocacy—with the median annual expenditure amounting to almost \$1 million.<sup>58</sup> More than one-third of the groups reported annual expenditures of between \$1 million and \$5 million per year, and around one-in-ten groups spent over \$5 million per year.<sup>59</sup> The United States Conference of Catholic Bishops spent over \$26 million in 2009, the Family Research Council, a conservative Christian interest group, spent over \$14 million, and the National Right to Life Committee spent over \$11 million.<sup>60</sup> According to the Pew Forum on Religion and Public Life, these religious interest groups spend their money on informing constituents, meeting with officials, initiating letter or email campaigns, corresponding with policymakers, issuing news releases, informing the public, signing coalition letters, and writing policy papers.<sup>61</sup> Religious interest groups, then, are an important and entrenched feature of our political system, and it is critical that we begin to study and understand their effect on religious liberty and the democratic process.

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<sup>52</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 26; *see also* RONALD INGLEHART, CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY (1990).

<sup>53</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 26 (noting “the growing reach of the federal government in economic, environmental and social policy”).

<sup>54</sup> *See, e.g.*, MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 243–44 (2001).

<sup>55</sup> *See, e.g.*, ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 258–59 (4th ed. 2010).

<sup>56</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 24.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 13–14, 55.

<sup>59</sup> *Id.* at 14.

<sup>60</sup> *Id.* at 15; PEW FORUM ON RELIGION & PUBLIC LIFE, PEW RESEARCH CTR., LOBBYING FOR THE FAITHFUL: ALL EXPENDITURES DATA 8, 15, 18 (2012), *available at* <http://www.pewforum.org/files/2011/11/all-expenditures.pdf>.

<sup>61</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 18.

## B. *The Salient Features of Religious Interest Groups*

This section elucidates four salient features of religious interest groups that are critical to the arguments advanced in Parts II and III—that religious interest groups thrive as advocates of the values of religious liberty and democracy, yet in the end potentially impede both democracy and religious freedom.<sup>62</sup> The four features are as follows: (1) the nature and mission of a religious interest group; (2) the unique identity and the variable selection of individual and group actors that religious interest groups represent; (3) the distinctive nature of the groups' lobbying; and (4) the relative opacity of religious interest groups to both the public generally, and a subset of their members specifically.<sup>63</sup>

### 1. *Identifying Religious Interest Groups and Their Mission*

First, it is critical to map the contours of what exactly a religious interest group looks like, as well as the institutional mission that delineates the religious interest group from other religious and religiously based organizations.

Importantly, by “religious interest group,” this Article refers to a membership organization that represents some interest that is based on religion and attempts to influence politics.<sup>64</sup> Of course, many religious groups participate in politics directly.<sup>65</sup> However, the group being considered in this Article is not itself a church or denominational organization, for example, the Catholic Church or the Society of Friends. Instead, a religious interest group is a political lobbying group with a formal lobbying presence in Washington, specifically established to lobby for a religiously based policy interest in the legislative process.<sup>66</sup>

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<sup>62</sup> This is a point made by Miriam Seifter in the context of states as interest groups. See Seifter, *supra* note 20, at 957 (arguing that it is critical to examine the costs as well as the benefits of states as interest groups in the administrative process).

<sup>63</sup> On similar salient factors that identify states acting as interest groups that are critical to any assessment of the normative voracity of states as interest groups, see Seifter, *supra* note 20.

<sup>64</sup> HOFRENNING, *supra* note 9, at 21; see also WEBER & JONES, *supra* note 9 (providing a comprehensive survey of all religious interest groups in the United States); Weber & Stanley, *supra* note 9, at 28–29.

<sup>65</sup> See, e.g., Clark E. Cochrane, Jerry D. Perkins & Murray Clark Havens, *Public Policy & the Emergence of Religious Politics*, 19 POLITY 595 (1987) (examining religious politics in the 1970s and 1980s).

<sup>66</sup> HERTZKE, *supra* note 9, at 44; LOBBYING FOR THE FAITHFUL, *supra* note 10, at 16; Robert Zwier, *The Power and Potential of Religious Interest Groups*, 33 J. CHURCH & ST. 271, 271 (1991). Note that some groups prefer to use the term “advocacy” rather than “lobbying” largely because the term “religious lobbying” might raise the specter of the Internal Revenue Service. On the IRS charitable exemption rules, see Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561 (2013) [hereinafter Galle, *Charities*].

Religious interest groups present in two forms, with the distinction being the principal whose interest the group represents in the political sphere.<sup>67</sup> In its first form, the religious interest group is a representative of a specific religious denomination or church.<sup>68</sup> These groups are interest groups that are empowered to represent particular religious traditions, specific congregations, or both. Powerful examples of this form of interest group include Church of Jesus Christ of Latter-day Saints' Office of Public and International Affairs, "whose influence and actions are relevant to the mission of The Church of Jesus Christ of Latter-day Saints,"<sup>69</sup> the Baptist Joint Committee for Religious Liberty, which is comprised of "15 national, state and regional Baptist bodies in the United States and supported by thousands of churches and individuals across the country,"<sup>70</sup> and the Mennonite Central Committee, established by Mennonite denominational bodies to represent their interests in Washington.<sup>71</sup>

In its second form, the religious interest group does not exist as a representative of a church or religious group.<sup>72</sup> Instead, in this second form, the religious interest group represents a collective of individuals whose views are expressly derived from—and depend on—a religious perspective. In this form, the religious interest group is an intermediary between either an institutional religious group and the state, or a collection of individuals whose policy goals are based on religious principles. Examples of this form of interest group include Catholics Against Capital Punishment, established by American Catholics to pursue the abolition of the death penalty in accordance with Catholic teachings,<sup>73</sup> and Concerned Women for America, a group founded by Beverly LaHaye to represent the interests of Christian women in the legislative

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*in Politics*]; Brian Galle, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 103 NW. L. REV. COLLOQUY 370 (2009) [hereinafter Galle, *The LDS Church*].

<sup>67</sup> Interest groups in American politics are often described as political intermediaries between a principal (the voters) and the agent (the legislators). See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

<sup>68</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 16.

<sup>69</sup> *Church of Jesus Christ of Latter-Day Saints Mission Statement*, PEWRESEARCH RELIGION & PUB. LIFE PROJECT, <http://projects.pewforum.org/religious-advocacy/church-of-jesus-christ-of-latter-day-saints-office-of-public-and-international-affairs/> (last visited Mar. 5, 2015).

<sup>70</sup> *About Us*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, <http://bjconline.org/mission-history/> (last visited Mar. 5, 2015).

<sup>71</sup> *Quick Facts About MCC U.S.*, MENNONITE CENT. COMMITTEE, <http://mcc.org/press-center/facts> (last visited Mar. 5, 2015).

<sup>72</sup> HERTZKE, *supra* note 9, at 44; HOFRENNING, *supra* note 9, at 21–22; LOBBYING FOR THE FAITHFUL, *supra* note 10, at 16; ZWIER, *supra* note 66, at 271–72.

<sup>73</sup> *Mission*, CATH. MOBILIZING NETWORK, <http://catholicsmobilizing.org/mission/> (last visited Mar. 5, 2015).



process.<sup>74</sup> The definition also includes groups that are organized to influence public policy based on an expressly nonreligious perspective.<sup>75</sup> Critical examples of these groups include the American Humanist Association, which states that it takes “philosophical issue with beliefs of religious followers,” and that they are organized to ensure that a “wall of separation” remains between church and state,<sup>76</sup> as well as the Americans United for Separation of Church and State, organized to preserve the “constitutional principle of church-state separation as the only way to ensure religious freedom for all Americans.”<sup>77</sup>

In either form, religious interest groups include those groups that do not explicitly refer to themselves as “religious,” instead calling their advocacy agenda “faith based.” The term “faith based” evolved as a consequence of the uneasiness over the presence of explicitly identified religious groups in politics.<sup>78</sup> The shift from “religious” to “faith based” substituted a term that described an organized set of beliefs (religion) to a term that connoted reliance on “trust in truth,” thereby getting around the traditional objection of any overt relationship between religion and the state.<sup>79</sup> The shift by some groups from identifying as religious interest groups to faith-based groups represents both a discomfort with the idea of overt lobbying as a principled issue, as well as the practical concern of church groups to remain in compliance with IRS rules limiting the lobbying activities of not-for-profit organizations.<sup>80</sup>

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<sup>74</sup> *Our History*, CONCERNED WOMEN FOR AM., <http://www.cwfa.org/about/our-history/> (last visited Mar. 5, 2015).

<sup>75</sup> This is the approach of leading political scientists studying religious interest groups. *See, e.g.*, HOFRENNING, *supra* note 9, at 22; Robert Zwier, *The World and Worldview of Religious Lobbyists* (Apr. 4–6, 1988) (unpublished manuscript presented at the meeting of the Midwest Political Science Association, Chicago) (on file with the Emory Law Journal).

<sup>76</sup> *Frequently Asked Questions*, AM. HUMANIST ASS’N, [http://americanhumanist.org/AHA/Frequently\\_Asked\\_Questions](http://americanhumanist.org/AHA/Frequently_Asked_Questions) (last visited Mar. 5, 2015).

<sup>77</sup> *Our Mission*, AMS. UNITED FOR SEPARATION CHURCH & ST., <https://www.au.org/about/our-mission> (last visited Mar. 5, 2015).

<sup>78</sup> *See* sources cited *supra* note 66 (noting that religious lobbying is considered by some to be suspect, and some groups prefer the nomenclature “faith based advocates”); *see also* William Safire, *The Way We Live Now—6-27-99: On Language; Faith-Based*, N.Y. TIMES, June 27, 1999, § 6 (Magazine), at 16 (speculating on the nomenclature evolution from the use of “religious” to “faith-based”); Steven Rathgeb Smith & Michael R. Sosin, *The Varieties of Faith-Related Agencies*, 61 PUB. ADMIN. REV. 651 (2001) (discussing faith-based groups).

<sup>79</sup> Safire, *supra* note 78, at 16; Thomas, *supra* note 27, at 4–7.

<sup>80</sup> Churches and the like are typically registered as tax-exempt organizations under the Internal Revenue Service Code and are thus limited in the amount of lobbying activity that they can undertake. *See* I.R.C. § 501(c)(3) (2012); *see also infra* notes 296–305 and accompanying text (discussing the limits imposed by the Internal Revenue Service on the lobbying activities of exempt groups). In addition, there are potential Establishment Clause issues raised by direct religious group engagement with the state in the manner

Collectively, what religious interest groups share is a common institutional mission. Religious interest groups' advocacy efforts were initiated to create a mechanism for religious groups and individuals to express their religiously based views on public policy—a voice for religion qua religion.<sup>81</sup> Today, religious interest groups continue their focus on facilitating the dissemination of a religious perspective in the legislative process. According to the Pew Forum on Religion and Public Life, to be classified as a national religious interest group, a group would need to either advocate on behalf of a particular denomination or tradition, advocate on behalf of a constituency defined in religious terms, advocate on behalf of a religious institution or group of institutions, promote religious values in public policy, promote an expressly secular or nonreligious perspective on public policy, or encourage policymakers to integrate faith into their work.<sup>82</sup>

For religious interest groups, advocating for public policy from a religious perspective encompasses many activities. Many of the advocacy efforts include lobbying attempts to influence legislators or the public,<sup>83</sup> but it can also include broader activities aimed at Congress and the Executive branch and its related administrative agencies. For example, in 2008, the Family Research Council spent over \$14 million on advocacy efforts,<sup>84</sup> including “mobilizing the grassroots,” “fighting for family tax relief” in Congress, and “combating judicial activism that leads to court rulings that hurt families.”<sup>85</sup> Another example is the American Jewish Committee, which spent over \$13 million on advocacy efforts,<sup>86</sup> including “lobby days, private meetings with members of congress, community mobilization on issues of concern, and meeting with

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described in this Article. On this point, see *infra* Part IV.B (outlining the relevant Establishment Clause doctrine).

<sup>81</sup> See LOBBYING FOR THE FAITHFUL, *supra* note 10, at 16.

<sup>82</sup> See *id.* at 63; see also HOFRENNING, *supra* note 9, at 22; WEBER & JONES, *supra* note 9, at 8–12 (including groups such as the American Civil Liberties Union and the American Ethical Union, which are nominally non-religious but advocate on issues that are of concern to religion).

<sup>83</sup> See Judith E. Kindell & John Francis Reilly, *Lobbying Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1997, at 261 (1996), available at <http://www.irs.gov/pub/irs-tege/eotopic97.pdf>; see also Galle, *Charities in Politics*, *supra* note 66.

<sup>84</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 15.

<sup>85</sup> *FAQs*, FAM. RES. COUNCIL, <http://www.frc.org/faqs> (last visited Mar. 5, 2015) (follow hyperlink associated with the question “What is FRC Action?”).

<sup>86</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 15.

high-ranking officials of local governments.”<sup>87</sup> Combined, religious interest groups spent in excess of \$350 million on similar advocacy efforts in 2008.<sup>88</sup>

Many religious interest groups publicize mission statements, official positions, or long-standing conventions that explicitly specify the groups’ goal of advancing the needs and concerns of particular denominations and individuals, based on the religious principles of the group, groups, or individuals that the interest group represents. The Family Research Council, for example, “champions marriage and the family as the foundation of civilization, the seedbed of virtue,” and aims to “shape public debate” where “God is the author of life, liberty, and the family.”<sup>89</sup> CitizenLink “inspires men and women to live out biblical citizenship that transforms culture,” focusing on “issues involving the sanctity of human life, the preservation of religious liberties and the well-being of the family as the building block of society,” “from a foundation firmly established in a biblical worldview.”<sup>90</sup> Concerned Women for America strives to “protect and promote Biblical values among all citizens . . . thereby reversing the decline in moral values in our nation,” where “women and like-minded men, from all walks of life, [can] come together and restore the family to its traditional purpose.”<sup>91</sup> The mission statement of the National Organization for Marriage specifies that the group is organized “to defend marriage and the faith communities that sustain it.”<sup>92</sup> The Traditional Values Coalition states that its role is to press for legislative change based on “Bible-based traditional values,” including “[p]rotecting traditional marriage and family as the cornerstone of society” and “[s]ecuring the Constitution against the growing threat of Islam and Shariah law” on behalf of “like-minded

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<sup>87</sup> *Public Policy and Advocacy*, AM. JEWISH COMMITTEE, [http://www.ajcwashington.org/site/c.gpLLJOOtHmE/b.877021/k.5C34/Public\\_Policy\\_\\_Advocacy.htm](http://www.ajcwashington.org/site/c.gpLLJOOtHmE/b.877021/k.5C34/Public_Policy__Advocacy.htm) (last visited Mar. 5, 2015).

<sup>88</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 14.

<sup>89</sup> Brief Amicus Curiae of the Family Research Council in Support of Petitioners Addressing the Merits and Supporting Reversal at 1, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 314462; *Marriage and Family*, FAM. RES. COUNCIL, <http://www.frc.org/Marriage-and-Family> (last visited Mar. 5, 2015); *State Family Policy Councils*, FAM. RES. COUNCIL, <http://www.frc.org/state-policy-organizations> (last visited Mar. 5, 2015) (“Family Policy Councils (FPCs) accomplish at the state level what Family Research Council does at the national level—shape public debate and formulate public policy.”).

<sup>90</sup> *About Us*, CITIZENLINK, <http://www.citizenlink.com/about-us/> (last visited Mar. 5, 2015).

<sup>91</sup> *Our Mission*, CONCERNED WOMEN FOR AM., <http://www.cwfa.org/about/vision-mission/> (last visited Mar. 5, 2015).

<sup>92</sup> *Our Work*, NAT’L ORG. FOR MARRIAGE, <https://nationformarriage.org/main/ourwork> (last visited Mar. 5, 2015).

patriots.”<sup>93</sup> These mission statements also highlight the next feature of religious interest groups, unclear identity and representation.

## 2. *Religious Interest Group Identity and Representation*

The second salient feature of religious interest groups that requires some discussion is that although religious interest groups describe themselves as advancing a specific religious view, that claim obscures difficult questions of what precisely the “religious interest” comprises, as well as whom the group represents.<sup>94</sup> These complicated, yet interrelated, questions about religious identity and representation lead to doubts about the plausibility of *a* religious view.

These difficulties are not present, or at least less prevalent, in the context of mainstream secular lobby groups.<sup>95</sup> In the context of secular lobby groups, it is relatively straightforward to identify the interests that secular lobby groups represent—the U.S. Chamber of Commerce and the Business Roundtable for example represent specified businesses in the political sphere.<sup>96</sup> These groups have clearly stated interests and goals, directed by people who agree on the political agenda and whose success is measured by the nature of the benefits accruing to the member organizations.<sup>97</sup>

Identifying both the religious interest and the constituency whom the religious interest group represents is far more challenging because the religious interest group can potentially represent up to three different principals at once, each with variable ideas about the nature of the religious interest that should be advocated for in the political sphere.<sup>98</sup> First, religious interest groups represent

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<sup>93</sup> *About TVC*, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org/content/about> (last visited Mar. 5, 2015).

<sup>94</sup> See HERTZKE, *supra* note 9, at 94–116; KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 26 (2d ed. 1992).

<sup>95</sup> It is, of course, possible to identify various interest groups representing a social issue, for example the environment, where the lobbyist also represents multiple principals. However, this Article maintains that as a general matter, this multiple principal issue is of particular significance for religious interest groups given the inevitable recourse to both a higher power, the hierarchical institutional power responsible for disseminating the religious message, and the membership body of religious adherents.

<sup>96</sup> See *About*, BUS. ROUNDTABLE, <http://businessroundtable.org/about> (last visited Mar. 5, 2015); *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-us-chamber> (last visited Mar. 5, 2015).

<sup>97</sup> See Issacaroff & Ortiz, *supra* note 67.

<sup>98</sup> See HERTZKE, *supra* note 9, at 95; HOFRENNING, *supra* note 9, at 17; see also HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967); REPRESENTATION: ELECTIONS AND BEYOND (Jack H. Nagel & Rogers M. Smith eds., 2013).

a sociocultural group—the individuals who profess belief in the tradition on which the religious interest group relies for its existence and continued relevance.<sup>99</sup> Second, at least in one of their manifestations, religious interest groups potentially represent a specific religious institution or set of institutions.<sup>100</sup> Finally, religious interest groups represent and depend on a specific creed or doctrine from which their underlying moral message derives.<sup>101</sup>

Religious interest groups vary in how they characterize which actors the group represents. While the groups almost universally emphasize their ability to speak to “the religious view,” the groups vary as to how they regard whom they represent. For example, the formal religious interest group for the Episcopal Church, the Office of Government Relations, states that they represent the voice of all Episcopalians.<sup>102</sup> Conversely, the American Baptist National Ministries’ Office of Governmental Relations specifies that they represent American Baptist Churches USA in the United States.<sup>103</sup>

The most complicating dimension of the representational claims is arguably the final dimension: that religious lobbyists not only represent the individuals and institutions that tasked them with a public policy agenda, but they are also called to represent and remain faithful to a theological tradition.<sup>104</sup> This is an additional burden over and above being responsive to member individuals or institutions, and there is an expectation that at all times the religious interest groups will be responsive and faithful to the demands of a religious faith. The problem is, of course, that any understanding of a particular faith-based perspective necessarily differs member to member, and institution to institution.

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<sup>99</sup> See HERTZKE, *supra* note 9, at 95; HOFRENNING, *supra* note 9, at 17.

<sup>100</sup> See, e.g., Rachel Kraus, *Laity, Institution, Theology, or Politics? Protestant, Catholic, and Jewish Washington Offices’ Agenda Setting*, 68 SOC. RELIGION 67 (2007); see also *supra* notes 67–80 and accompanying text (describing the different forms of religious interest groups).

<sup>101</sup> HOFRENNING, *supra* note 9, at 17.

<sup>102</sup> *Episcopal Church, Office of Government Relations Mission Statement*, PEWRESEARCH RELIGION & PUB. LIFE PROJECT, <http://projects.pewforum.org/religious-advocacy/episcopal-church-office-of-government-relations/> (last visited Mar. 5, 2015).

<sup>103</sup> *American Baptist Churches USA, National Ministries’ Office of Governmental Relations Mission Statement*, PEWRESEARCH RELIGION & PUB. LIFE PROJECT, <http://projects.pewforum.org/religious-advocacy/american-baptist-churches-usa-national-ministries-office-of-governmental-relations/> (last visited Mar. 5, 2015).

<sup>104</sup> See HERTZKE, *supra* note 9, at 104–111; HOFRENNING, *supra* note 9, at 17. See generally ALLEN D. HERTZKE, *ECHOES OF DISCONTENT: JESSE JACKSON, PAT ROBERTSON, AND THE RESURGENCE OF POPULISM* (1993) (analyzing Jackson’s and Robertson’s presidential campaigns, which emphasized a need to address national moral and economic crises, and how their parties responded to these campaigns).

### 3. *Opaque Membership and Operations*

Related to the unclear identity and representation of religious interest groups, religious interest groups are often opaque in both their operations and their membership.<sup>105</sup> Although an entrenched part of the political process, by and large religious interest groups are private entities and therefore not subject to the standard mechanisms of making government open to the public. While religious interest groups are directly analogous to formal lobbying groups, possessing the same indicia in terms of formation, interest-based agenda, and action, religious interest groups are generally not subject to the formal disclosure requirements of lobbying groups.

Pursuant to the Lobbying Disclosure Act of 1995<sup>106</sup> (LDA), lobbyists are required to formally register as lobbyists and report communications with the political branches of government, as well as monies spent and received in attempts to influence government behavior.<sup>107</sup> The LDA, however, provides for a number of limited exceptions, including lobbying communications made by “a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return,” as well as “a religious order.”<sup>108</sup> Pursuant to these exceptions, the only instance where a religious interest group that falls within this definition must disclose their lobbying is if it spends a “substantial” amount of money on lobbying, if more than twenty percent of its lobbyists income is from direct lobbying, or if it hires an outside lobbying firm.<sup>109</sup> Because churches and their directly related religious interest groups are tax-exempt, they largely avoid the attention of the

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<sup>105</sup> See LOBBYING FOR THE FAITHFUL, *supra* note 10, at 53, 55.

<sup>106</sup> Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–1614 (2012)).

<sup>107</sup> *Id.* Other significant federal lobbying laws include the Byrd Amendment. See 31 U.S.C. § 1352 (2012) (prohibiting the use of funds appropriated by Congress to lobby for any type of a federal award); see also William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in THE LOBBYING MANUAL 5 (William V. Luneburg et. al. eds., 4th ed. 2009) (describing the history for federal lobbying regulation); Thomas M. Susman & William V. Luneberg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra*, at 23 (describing the history for federal lobbying regulation); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (analyzing the constitutionality of lobbying reform).

<sup>108</sup> 2 U.S.C. § 1602(8)(B)(xviii)(I)–(II); see also Zachary Newkirk, *God’s Lobbyists: The Hidden Realm of Religious Influence*, OPENSECRETS BLOG (July 13, 2011), <https://www.opensecrets.org/news/2011/07/gods-lobbyists.html>.

<sup>109</sup> See I.R.C. § 501(c)(3) (2012); SENATE OFFICE OF PUB. RECORDS & HOUSE LEGISLATIVE RES. CTR., LOBBYING DISCLOSURE ACT GUIDANCE (2014), available at <http://lobbyingdisclosure.house.gov/ldaguidance.pdf>; David C. Vladeck, *Special Considerations for Lobbying by Nonprofit Corporations*, in THE LOBBYING MANUAL, *supra* note 107, at 401; see also *infra* Part IV.C (describing the possibilities for reforming these restrictions).

Internal Revenue Service, and it is extremely rare for the IRS to examine whether the church has spent a “substantial” amount of money on lobbying.<sup>110</sup>

Those religious interest groups that are exempt from the lobbying disclosure requirements are generally not voluntarily forthcoming. Most groups do not publicize a list of members, nor do they disclose the involvement or participation in interest group activities of their members.<sup>111</sup> There are exceptions. For example, the Friends Committee on National Legislation, a nonprofit founded by members of the Society of Friends (i.e., the Quaker church), voluntarily discloses its lobbying expenditures annually. In an email to the website *OpenSecrets Blog*, a representative of the interest group stated that “Quakers value integrity and truth-telling highly, so we willingly disclose our lobbying activities.”<sup>112</sup> Apart from these exceptional groups, most information about the internal operations of religious interest groups, as well as their membership, is garnered from surveys and inside information.<sup>113</sup>

#### 4. *Distinctive Nature of Lobbying*

The fourth important feature of religious interest groups is that they engage in a form of lobbying that is largely distinct from the lobbying of standard interest groups. Standard lobby groups typically advocate for the governmental enactment of either regulation to curb behaviors affecting their members (e.g., unfair competition policy or prohibition of fraudulent advertising), distributive policies to ensure members receive some tangible government aid (e.g., tariffs

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<sup>110</sup> See *supra* notes 107–09 (discussing the Lobbying Disclosure Act); see also *infra* Part IV.B (discussing the interaction between tax exemptions for churches pursuant to the Internal Revenue Service Code and the exemptions under the Lobbying Disclosure Act). The National Association of Evangelicals has implicitly spoken to the exemption for these organizational forms from lobbying requirements. In its publication “For the Health of the Nation,” the group stated in its preamble that:

Evangelical Christians in America face a historic opportunity. We make up fully one quarter of all voters in the most powerful nation in history. Never before has God given American evangelicals such an awesome opportunity to shape public policy . . . The First Amendment’s Establishment Clause is directed only at government and restrains its power. Thus, for example, the clause was never intended to shield individuals from exposure to the religious views of nongovernmental speakers. Exemptions from regulations or tax burdens do not violate the Establishment Clause, for government does not establish religion by leaving it alone.

NAT’L ASS’N OF EVANGELICALS, FOR THE HEALTH OF THE NATION: AN EVANGELICAL CALL TO CIVIC RESPONSIBILITY (2004), [http://www.nae.net/images/content/For\\_The\\_Health\\_Of\\_The\\_Nation.pdf](http://www.nae.net/images/content/For_The_Health_Of_The_Nation.pdf).

<sup>111</sup> See HOFRENNING, *supra* note 9, at 149–52.

<sup>112</sup> Newkirk, *supra* note 108.

<sup>113</sup> See, e.g., LOBBYING FOR THE FAITHFUL, *supra* note 10, at 53 (detailing how statistics on religious interest groups are not consistently reported, therefore information was obtained from “websites, questionnaires and interviews”).

and subsidies), redistributive policies (e.g., social security), or constituent policy to control power within the government (e.g., apportionment).<sup>114</sup> The National Federation of Independent Business (NFIB) is a prominent example of a lobby group that pursues at least one of these types of typical policies. For example, the NFIB is well known for its attempts to force regulatory policy in the interests of its members—small businesses. The NFIB has been actively pressuring the federal government to repeal the employer mandate provision in the Patient Protection and Affordable Care Act in order to protect its members from potentially crippling financial obligations.<sup>115</sup> Another example is the environmental group, National Wildlife Federation, which advocates for regulatory change to the end of conservation goals, as well as redistributive policies to fund conservation projects.<sup>116</sup>

By and large, religious interest groups are distinguishable from standard lobbying groups.<sup>117</sup> Political scientists have aptly named religious interest groups “radicalized” lobbyists, a descriptor that captures both the nature of the outcomes sought, as well as the manner in which these outcomes are pursued.<sup>118</sup> The suggestion that religious interest groups are distinct, both in outcomes sought and behavior engaged in to achieve those outcomes, is striking and warrants some unpacking.

As a general matter, religious interest groups seek policy that is based on, and driven by, a particular religious perspective; that is, directly derived from fundamental faith-based values. The radical lobbyist is motivated by a vision

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<sup>114</sup> Theodore J. Lowi, *Foreword: New Dimensions in Policy and Politics*, in *SOCIAL REGULATORY POLICY: MORAL CONTROVERSIES IN AMERICAN POLITICS*, at x, x–xi (Raymond Tatalovich & Byron W. Daynes eds., 1988). For an excellent overview of the mechanics of lobbying, see Richard L. Hall & Richard Anderson, *Issue Advertising and Legislative Advocacy in Health Politics*, in *INTEREST GROUP POLITICS* 221 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012); Burdett A. Loomis, *Learning to Lobby: Groups, Venues, and Information in Eighteenth-Century America*, in *INTEREST GROUP POLITICS*, *supra*, at 37; ANTHONY J. NOWNES, *TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT)* (2006).

<sup>115</sup> *Healthcare Legislative Activity: The Next Steps for Reform*, NFIB (Feb. 6, 2014), <http://www.nfib.com/article/healthcare-legislative-activity-the-next-steps-for-reform-1363/>.

<sup>116</sup> *Advocating for Conservation Policy*, NAT'L WILDLIFE FED'N, <http://www.nwf.org/What-We-Do/Conservation-Policy.aspx> (last visited Mar. 5, 2015).

<sup>117</sup> Of course, religious interest groups can, and do, lobby for the typical policies outlined in this section, for example tax breaks. However, religious interest groups also lobby for fundamental change to generally applicable laws, driven by a religious viewpoint. It is this aspect of religious lobbying that is the core focus of this Article.

<sup>118</sup> *See, e.g.,* HOFRENNING, *supra* note 9, at 55–57; Lowi, *supra* note 114, at xii–xiv.



of the state that is based on a particular version of a religious tradition.<sup>119</sup> Initially, this may not seem concerning. There seems nothing uniquely troubling about advocating for policies directed by a particular faith-based vision of how the law should work. Superficially, this seems to be the epitome of pluralism in politics, where citizens and their advocates have the opportunity—and indeed, the right—to present their views from whatever perspective motivates them. However, once we dig a little deeper, it is possible to see that the image of citizens presenting their religious viewpoint to the collective for consideration is based on idealized assumptions about religion and a thin understanding of religious interest groups as facilitators of religious participation in the political process.

Interest groups are formed to seek outcomes reflective of their members' interests, not to ensure a participatory voice in the political process. Religious interest groups are no different in this regard, and religious interest groups are formed to lobby for the best outcomes for the religious group.<sup>120</sup> While there are many reasons why religious groups are politically active, the core reason is that many churches feel that it is their responsibility to influence politics with their morals and values.<sup>121</sup> For example, the former head of the religious interest group Bread for the World stated that “the Christian faith and moral teaching have implications for politics. Churches should be active in bringing those values to bear in political life.”<sup>122</sup> For many religious institutions and religious individuals, tasking religious interest groups with bringing religious values to the political forum is a way of ensuring that society is just, and that members of society are guided “in distinguishing right from wrong, whether practical in, or out of government.”<sup>123</sup>

This is not a participatory goal. Instead, just as standard interest groups are driven by results in terms of outcomes reflective of the perspectives of their members, so too are religious groups driven by forcing outcomes reflective of

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<sup>119</sup> See W. PHILLIPS SHIVELY, *POWER AND CHOICE: AN INTRODUCTION TO POLITICAL SCIENCE* 97–98 (3d ed. 1993) (discussing the distinction between mainstream incremental lobbying and radical politics); HOFRENNING, *supra* note 9, at 55.

<sup>120</sup> See, e.g., EBERSOLE, *supra* note 9; HERTZKE, *supra* note 9; HOFRENNING, *supra* note 9.

<sup>121</sup> See Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 159 (James E. Wood, Jr. & Derek Davis eds., 1991); Erik J. Ablin, Student Article, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 541, 573 (1999).

<sup>122</sup> Ablin, *supra* note 121, at 573 (quoting Julia McCord, *Election Guide Suit Sparks Debate About Election Guidelines*, *OMAHA WORLD-HERALD*, Aug. 24, 1996, at 63SF) (internal quotation marks omitted).

<sup>123</sup> *Id.* at 574 (quoting Tony Maggio, Editorial, *Churches Help Distinguish Right, Wrong*, *DAILY OKLAHOMAN*, July 26, 1997, at 6) (internal quotation marks omitted).

their members' religious perspective. For example, the Association of Jesuit Colleges and Universities states that it represents the interests of American's twenty-eight Jesuit colleges and universities and that those interests include congressional appropriations, budget, higher education authorization issues, and taxes.<sup>124</sup> Similarly, the United States Conference of Catholic Bishops (USCCB) Office of Governmental Relations (OGR) specifies that it represents the hierarchy of Catholic bishops within the United States and U.S. Virgin Islands. The interests of the USCCB advocated for by the OGR include prohibition of same-sex marriage, prohibition of abortion, Catholic education, and international justice and peace.<sup>125</sup> Once we start to view religious interest groups as driven to an end, rather than being satisfied with participating in the political milieu, the particular concern about religious interest groups specifically—and the reason why political scientists refer to them as “radical” lobbyists—becomes more apparent.

It is precisely because of the moral outcomes that religious interest groups seek that religious interest groups are “radical.” The self-interest that drives religious interest groups is based on a particular vision of the world and the law that is based in religion. Religion, by definition, is an issue of faith.<sup>126</sup> There are a multitude of religious traditions and practices throughout the United States. Indeed, the First Amendment's Religion Clauses were enacted to protect the rights of Americans to freely believe and practice in whatever faith tradition moves them. Ultimately, religious interest groups advocate to entrench one specific religious perspective into law; they are motivated by a vision in which their specific religious values dominate the state.<sup>127</sup> Thus, while religious interest groups look like standard interest groups, working to exert pressure in the classic sense, religious interest groups seek outcomes that are entirely different from classic interest groups. Religious interest groups are not concerned with material spoils (i.e., classic economic rents), but instead religious interest groups seek change in the law based on their own religious understanding.<sup>128</sup> The USCCB is an illuminating example of this. One of the

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<sup>124</sup> *Federal Relations*, ASS'N JESUIT COLLEGES & U., <http://www.ajcunet.edu/federal> (last visited Mar. 5, 2015).

<sup>125</sup> *Government Relations*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/about/government-relations/> (last visited Mar. 5, 2015).

<sup>126</sup> See Gey, *supra* note 25, at 451. See generally Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990) (arguing that religious expression should only be protected to the same extent as all other forms of expression).

<sup>127</sup> See HOFRENNING, *supra* note 9, at 107.

<sup>128</sup> *Id.*; see also Lowi, *supra* note 114, at x–xii.

USCCB's interests is resisting legislative change that would permit same-sex marriage. The USCCB states,

We oppose efforts to make any other personal relationship the equivalent of marriage in law, regulation, or any other public policy. We will oppose measures that seek to redefine or erode the meaning of marriage. The family—based on marriage between a man and a woman—is the first and fundamental unit of society and is a sanctuary for the creation and nurturing of children and it should be defended and strengthened.<sup>129</sup>

These religiously based and religiously driven outcomes sought by religious interest groups drive their behavior in the legislative process.<sup>130</sup> Social scientists have shown that the ideological intensity of religious interest groups is markedly higher than the intensity demonstrated by standard interest groups, including ideologically driven interest groups.<sup>131</sup> The degree of ideological intensity matters because it is determinative in what constitutes an *acceptable policy outcome*. For standard lobbyists, whose ideological intensity is typically lower than the religious lobbyist, acceptable policy outcomes include policies that do not directly reflect their *ideal policy outcome*.<sup>132</sup> Instead, standard interest groups recognize that in order to get as close as possible to their ideal point, coalition with other interest groups and government officials, and consequently compromise on their ideal point, is essential to achieve any result.<sup>133</sup> This means that consensus is possible, and legislators can work with a number of different interest groups on the same policy in an attempt to reduce differences to a point where all interested parties can be satisfied with the outcome. In other words, these standard interest groups are willing to accept smaller, more incremental change to the policy they are seeking to entrench as general law in order to receive a share of the regulatory outcomes.<sup>134</sup>

Unlike standard lobby groups, for the religious interest group an acceptable policy outcome is one that mirrors their ideal policy outcome. As discussed above, the ideal policy outcome for religious interest groups is the entrenchment of their religious perspective on the policy at issue. For religious

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<sup>129</sup> *Government Relations*, *supra* note 125.

<sup>130</sup> HOFRENNING, *supra* note 9, at 106–08.

<sup>131</sup> See Lowi, *supra* note 114, at xi; see also HOFRENNING, *supra* note 9, at 55–57.

<sup>132</sup> See SHIVELY, *supra* note 119, at 97–98 (discussing the distinction between mainstream incremental lobbying and radical lobbying).

<sup>133</sup> See, e.g., Loomis, *supra* note 114; NOWNES, *supra* note 114.

<sup>134</sup> See, e.g., Loomis, *supra* note 114; NOWNES, *supra* note 114.

lobbyists, consensus and compromise on the ultimate outcome is akin to trivialization of the religious perspective that drives their advocacy efforts.<sup>135</sup> In other words, because religious lobbyists tend to be animated by the view that the policy that they are advocating for is fundamentally correct in their religious worldview, any differences with external parties are irreducible. For the religious lobbyist, the only acceptable outcome is a policy that reflects the religiously driven policy being presented.<sup>136</sup> Unlike standard interest groups, then, compromise is impossible—the acceptable outcome is one that reflects the ideal outcome.<sup>137</sup> The Presbyterian Office of Public Witness (representing the Presbyterian Church (U.S.A.) in Washington), for example, states clearly that “[i]ts task is to advocate, and help the church to advocate, the social witness perspectives and policies of the Presbyterian General Assembly.”<sup>138</sup> It further specifies that in order to “remain true to its biblical roots, theological heritage, and contemporary practice,” it “must not fall silent” and instead “must speak faithfully, truthfully, persuasively, humbly, boldly and urgently.”<sup>139</sup> The implication is clear—nothing short of the religious viewpoint proposed by this religious interest group will be acceptable.

Ultimately, then, religious interest groups have different expectations of the legislative process than standard interest groups. What this refusal to accept compromise-based change means is that any legislative success of the religious interest group does not reflect a balance of the views of the represented groups. Instead, when religious interest groups successfully agitate for a particular policy outcome, the process becomes winner takes all.<sup>140</sup> As leading political scientist Daniel Hofrenning notes, “Religious lobbyists seek to fundamentally transform the political and social reality of America. These sweeping goals are rooted in a religious understanding of the achievement of the kingdom of God on earth.”<sup>141</sup>

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As Parts II and III argue, each of these four features of religious interest group participation in the political process contributes to the mixed results for

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<sup>135</sup> See HOFRENNING, *supra* note 9, at 55; *see also* Lowi, *supra* note 114, at x–xii.

<sup>136</sup> HOFRENNING, *supra* note 9, at 52–53.

<sup>137</sup> *Id.*

<sup>138</sup> *About Us*, PRESBYTERIAN MISSION AGENCY, <http://www.presbyterianmission.org/ministries/washington/about-us/> (last visited Mar. 5, 2015).

<sup>139</sup> *Id.*

<sup>140</sup> HOFRENNING, *supra* note 9, at 55.

<sup>141</sup> *Id.* at 107.

the values of religious liberty and democracy. As Part II notes, the groups' commitment to promoting religious goals makes religious interest groups a strong voice for religious liberty and ensures inclusive participation in the democratic process. However, as Part III outlines, these features of religious interest groups ironically obstruct and undermine the goals of religious liberty and democracy.

## II. THE ROLE OF RELIGIOUS INTEREST GROUPS IN PROMOTING RELIGIOUS FREEDOM AND DEMOCRACY

Part I provided the necessary foundational information on the practices and features of religious interest groups. The analysis in Parts II and III will draw on these features of religious interest groups and attempt to demonstrate the implications and effects of religious interest group involvement in the legislative process on the goals of enhancing religious liberty and equal democratic participation and consideration.

Specifically, Part II argues that religious interest groups are generally reliable advocates for the values of religious liberty and democracy. However, in Part III I will outline that despite this consistent advocacy, religious interest groups actually fail to facilitate, and sometimes repress, democratic ideals as well as compromise the religious liberty of both the religious viewpoints that they purport to represent and the polity as a whole by effectively capturing political outcomes.

These diverse—and indeed, contradictory—results reflect deep, latent tensions in the drive for religious liberty in the American polity between the various religious interest groups' goals of protecting their own religious liberty, seeking a diverse and active religious pluralism as a whole, and being active participants in the democratic process. The practice of a religious interest group in advancing the single religious view of the principal it represents—and their lack of accountability and transparency—facilitates representation of a religious viewpoint in the political process. But at the same time, that practice of presenting a single religious position obscures the diversity of religious views, both within a particular faith tradition and between religions generally, undermining a broader religious pluralism, and variously masking internal dissent, policy drift, capture, and disengagement.

### A. *Identifying Benefits: Protecting Religious Freedom and Democracy*

Religious interest groups are beneficial for religious individuals and religious institutions because, like interest groups more generally, they overcome the core problem facing proponents of robust religious participation in the legislative process: that religious individuals and religious institutions are not necessarily consistent advocates of either or both their own religious liberty or participatory rights in the legislative process. Before explaining how religious interest groups have largely overcome this problem, some elucidation of the goals of religious participation in the legislative process is required.

Religious participation in the legislative process—and indeed in politics more generally—is generally justified on one of two grounds: first, that religious participation advances religious liberty, and second, that religious participation serves democratic values.<sup>142</sup> Each of these justifications requires some unpacking.

A core contemporary justification for active religious participation in the legislative process is to advance the value of religious liberty.<sup>143</sup> To serve the value of religious liberty, including the ability of religious citizens to fully practice their religious faith, it is argued that religious participation in the legislative process is essential.<sup>144</sup> The claim is that exclusion of religious citizens from the legislative process would violate First Amendment values of religious freedom.<sup>145</sup> Specifically, the claim is that restricting religion and religious values from political debate violates the right of religious citizens to freely exercise their religion in America, and is tantamount to establishing secularism, in contravention of the Establishment Clause.<sup>146</sup> In this context,

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<sup>142</sup> See ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* 77 (1997); STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* (2000); NEUHAUS, *supra* note 2; McConnell, *supra* note 2.

<sup>143</sup> See, e.g., AUDI & WOLTERSTORFF, *supra* note 142, at 105 (stating that for many religious believers it is not “for them, about *something other* than their social and political existence; it is *also* about their social and political existence”); CARTER, *supra* note 142, at 25–26 (focusing on the salience of religious argument to believers); Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1599 (1987) (“When religious morality is excluded from politics, the religious individual is alienated from public life.”).

<sup>144</sup> See, e.g., Gedicks & Hendrix, *supra* note 143, at 1599.

<sup>145</sup> See, e.g., *id.*; McConnell, *supra* note 2.

<sup>146</sup> CARTER, *supra* note 142, at 3 (“[I]f we build too high the walls that are intended to keep religion out of politics, we will face religious people who will storm the barricades and declare the government no longer legitimate . . . .”); Gedicks & Hendrix, *supra* note 143, at 1600 (“If the religious people who constitute the majority of Americans come to believe, as many already do, that the law making process does not respect their religious beliefs . . . then they themselves will respect neither the process nor the laws that it generates.”);

protecting religious liberty means ensuring the right of religious adherents to participate in the political process. Some additional notes will help to fill out this idea.

For most proponents of a politically active religious life, the idea that they cannot participate in the legislative process publically devalues their faith.<sup>147</sup> Government inevitably makes decisions on moral issues that are salient for many believers, for example abortion, same-sex marriage, wealth redistribution, and the death penalty. At some point, the people will be asked to use their moral judgments to determine their own responses as well as direct the governmental response. Religion frequently plays a role in determining these responses.<sup>148</sup> Some commentators claim that as people debate and engage in difficult moral questions, restricting religious participation is necessarily a restriction on that person's religious liberty to freely act on her religious beliefs.<sup>149</sup> For these commentators, restricting religion in this way unfairly singles out religion for discriminatory treatment. In doing so, the liberty of religious citizens is affected in a way that the liberty of nonreligious citizens is not.<sup>150</sup> While there have been some concerns voiced that religious participation in politics will impose on the liberty of non-adherents, the response is simply that inclusion in political debate is necessary for the liberty of religious adherents, and the liberty of non-adherents is unaffected because mere participation does not dictate policy outcomes.<sup>151</sup> That is, religious arguments

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McConnell, *supra* note 2, at 650 (positing that restrictions on religious political argument "will deepen the anger and hostility that [religious] citizens feel toward the hegemonic and exclusionary practices of the secular power structure").

<sup>147</sup> See, e.g., Gedicks & Hendrix, *supra* note 143, at 1600 ("If the religious people who constitute the majority of Americans come to believe, as many already do, that the law making process does not respect their religious beliefs . . . then they themselves will respect neither the process nor the laws that it generates.").

<sup>148</sup> See, e.g., Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993) (discussing the exclusion of religion from public debate).

<sup>149</sup> See, e.g., CARTER, *supra* note 142, at 25–26 (focusing on the salience of religious argument to believers).

<sup>150</sup> See, e.g., AUDI & WOLTERSTORFF, *supra* note 142, at 72–76 (arguing that liberal calls to exclude religious argument from public political debate violate the fundamental liberal commitment to equal freedom); Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69, 82 (2006) (rejecting as unfair to religious believers the idea of excluding religious arguments because they might alienate nonbelievers); Hollenbach, *supra* note 2, at 897 ("Persons or groups should not face political disability or disenfranchisement simply because their political views are rooted in religious traditions and beliefs."); Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 133–34 (2011); Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAUL L. REV. 1, 18 (1998) (arguing that the morality and ethics of liberal democracy do not require religious believers to forego reliance on religious arguments in making political decisions).

<sup>151</sup> Magarian, *supra* note 150, at 133–34.

simply make “one contribution among others in a debate on how political power is to be used.”<sup>152</sup>

In addition to the protection of religious liberty, most defenses of the right of religious citizens to engage in the political process claim that the democratic process is undermined by the exclusion of religious viewpoints.<sup>153</sup> That is, to safeguard the democratic structures and to ensure politics is appropriately representative, the claim is that religious citizens must retain the ability to engage in the political process.<sup>154</sup> Removing religion from politics actively threatens American democracy. Richard Neuhaus, for example, claims that removing religion from the public domain would result in secularism—a “naked public square” that is far more dangerous to democracy than religion.<sup>155</sup> For Neuhaus and others, taken to its logical limits, the absence of religion from the public square prefigures a totalitarian state.<sup>156</sup>

While I outline in depth the baseline arguments for excluding religion as detrimental to the democratic processes in Part III below,<sup>157</sup> given that so much of the defense of religion’s role in the legislative process is a response to arguments for excluding religion from politics, it is worth briefly noting the core objection here. The basis for the desire to exclude religion from the political processes is that religious participation uniquely burdens non-adherents in political debates.<sup>158</sup> Religiously based arguments are simply inaccessible to non-adherents given that faith, as the word implies, is based on a deep and personal comprehensive understanding of the world. Any debate, then, is stymied by religious arguments, because faith is undebatable.<sup>159</sup> If in a debate over a hypothetical bill to ban the eating of any animal products, a claim is made that “humans should not eat animals because God says that

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<sup>152</sup> Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 841 (1993).

<sup>153</sup> See *supra* note 146.

<sup>154</sup> See NEUHAUS, *supra* note 2, at 27 (arguing that the resulting secularism from a “naked public square” is more dangerous to democracy than religion, and taken to its logical limits, the absence of religion from the public square prefigures a totalitarian state).

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *infra* Part III.B.

<sup>158</sup> See especially KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); JOHN RAWLS, *POLITICAL LIBERALISM* (expanded ed. 2005); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

<sup>159</sup> See GREENAWALT, *supra* note 158; Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16 (1989) (arguing for a principle of “conversational restraint”); Robert Audi, *The Separation of Church and State and the Obligation of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).



ingesting the flesh of another animal is inhumane,” it is impossible to engage with that perspective. If “God said so,” then the debate is over, at least as far as the religious participant is concerned. According to this view, the legislative process is obstructed by religious participants—the process depends on debate and consensus building, and to the extent that religion is a “conversation stopper,” it is in many ways, antidemocratic.<sup>160</sup>

Defenders of religious participation in the political process reject this claim outright. They claim that the idea that religious claims are inaccessible, and therefore undemocratic, smacks of secularism.<sup>161</sup> For these commentators, there is no way to distinguish religious-based advocacy for a particular policy from a nonreligious perspective, at least in terms of accessibility. Both religious and nonreligious arguments for and against legislation suffer from the same infirmities as people who have no understanding of the basis of a person’s claims. For example, in a debate over climate change, a scientist may make a claim that global warming is a scientific fact based on specialized scientific data, a religious person might claim that there is no such thing as global warming because the Bible says that God will protect the earth, and another person might claim that in her hometown, the climate has remained steady for twenty-five years. For each of these perspectives, everyone involved in the debate can listen to or read about the basis for the arguments.<sup>162</sup> Religious arguments, it is claimed, are not uniquely inaccessible. Conversely, the value of including the religious perspective in politics is that it enables all citizens to participate in the democratic process.

These two goals of protecting religious liberty and democracy are typically proposed by commentators as the reasons why religious participation in politics is valuable. The next section considers the unique prowess of religious interest groups in implementing these goals.

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<sup>160</sup> See RICHARD RORTY, *Religion as Conversation-Stopper*, in PHILOSOPHY AND SOCIAL HOPE 168 (1999); see also William P. Marshall, *The Other Side of Religion*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 96, 102 (Stephen M. Feldman ed., 2000).

<sup>161</sup> See, e.g., CARTER, *supra* note 142.

<sup>162</sup> See NEUHAUS, *supra* note 2, at 19 (“Christian truth, if it is true, is public truth. It is accessible to public reason.”); McConnell, *supra* note 2, at 649–51 (characterizing most religious traditions as based on exegesis of sources that nonbelievers can study, such as natural law for Catholics and the Bible for fundamentalist Protestants); Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1639 (1999) (arguing that nonbelievers can access any source of religious knowledge, including claims of divine inspiration); Waldron, *supra* note 152, at 835–36 (discussing comprehensibility of unfamiliar grounds for argument under an Aristotelian conception of public discourse).

## B. *The Success of Religious Interest Groups in Progressing Religious Interests*

As Part I explains, religious interest groups actively focus on the goals of religious liberty and democratic participation of religious individuals and organizations.<sup>163</sup> Religious interest groups have a long-term commitment to advocating for the rights of religious Americans to participate in, and influence, the legislative process, channeling these commitments through various lobbying efforts. It is valuable, then, to elaborate on how religious interest groups are effective in advancing each of these interests.

### 1. *Religious Interest Groups and Democratic Participation*

In the first instance, religious interest groups are critical to ensuring that religious individuals and churches are active participants in the democratic process. Religious interest groups have immediate access to a wide membership base. This is particularly so in the case of the lobbying arms of churches or denominations—such as the Episcopal Church’s Office of Government Relations, representing the Episcopalian Church<sup>164</sup>—or affiliations of churches or denominations—for example the Jewish Federation of North America, representing a number of Jewish federations and independent communities.<sup>165</sup>

Generally speaking, the membership of these churches and other denominational houses of worship is widespread, diverse, and extensive.<sup>166</sup> Surveys put membership in religious institutions at almost 60% of the American population.<sup>167</sup> The presence of a related lobbying group, then, at

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<sup>163</sup> See *supra* Part I.B.

<sup>164</sup> *Episcopal Church, Office of Government Relations Mission Statement, supra* note 102.

<sup>165</sup> *About Us: The Jewish Federations of North America’s Washington Office*, JEWISH FED’NS N. AM., <http://www.jewishfederations.org/washington-office.aspx> (last visited Mar. 5, 2015).

<sup>166</sup> See, e.g., GEORGE GALLUP, JR. & JIM CASTELLI, *THE PEOPLE’S RELIGION: AMERICAN FAITH IN THE 90’S* 16 (1989); HERTZKE, *supra* note 9, at 14; HOFRENNING, *supra* note 9, at 71; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); WILLARD L. SPERRY, *RELIGION IN AMERICA* (1946); David A. Gay & John P. Lynxwiler, *Cohort, Spirituality, and Religiosity: A Cross-Sectional Comparison*, 15 *J. RELIGION & SOC’Y*, no. 1, 2013, at 1, 7–11, available at <https://dspace.creighton.edu/xmlui/bitstream/handle/10504/64325/2013-25.pdf>.

<sup>167</sup> See *Religion*, GALLUP, <http://www.gallup.com/poll/1690/religion.aspx> (last visited Mar. 5, 2015) (noting that in 2014, 59% of respondents indicated they were a “member of a church or synagogue”); see also PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., *U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5–6* (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (noting that only 16.1% of survey respondents indicated that they were unaffiliated with a religion).

least facially makes American politics more democratic by involving ordinary citizens, whose interests on social issues might otherwise go unrepresented, in the political process.<sup>168</sup> That is, individuals who might never have had a voice in the political sphere are, by virtue of their membership in a church or other denomination represented by a religious interest group, captured into a collective and ostensibly given a voice on the political stage.<sup>169</sup> That religious interest groups purport to represent each member of the laity has been demonstrated by social scientists and is apparent from a sampling of statements of the lobby affiliates of the churches. For example, the Episcopal Church affiliate lobby group, the Office of Government Relations, claims to represent all Episcopalian voices in policymaking,<sup>170</sup> and Agudath Israel of America's Office of Government Affairs purports to represent Orthodox Jewish communities and to protect the rights and advance the interests of observant Jews more generally.<sup>171</sup>

More specifically, given that membership in religious institutions is dominated by America's lowest income earners,<sup>172</sup> the politicization of organized religion can enable more citizens outside of the highest income earners to participate in politics. As one political scientist notes, "[I]dentifiable religious societies are important for interest group theory partially because they are by far the largest non-elite group in the nation."<sup>173</sup> As the political representatives of churches, then, religious interest groups have the potential to make lobbyists generally more representative of non-elite and non-monied citizens.

Of course, these high levels of membership do not necessarily equate to high levels of participation or influence. In national politics, where money buys entry and therefore influence, the combined amount that religious interest groups spend on lobbying—\$350 million—is only a very small portion of total

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<sup>168</sup> See Mihut, *supra* note 1, at 46 (claiming that interest groups "have stimulated the representation of various categories of people before the government and have facilitated political participation").

<sup>169</sup> See HOFRENNING, *supra* note 9, at 73–75.

<sup>170</sup> *Episcopal Church, Office of Government Relations Mission Statement*, *supra* note 102.

<sup>171</sup> *Agudath Israel of America, Office of Government Affairs Mission Statement*, PEWRESEARCH RELIGION & PUB. LIFE PROJECT, <http://projects.pewforum.org/religious-advocacy/agudath-israel-of-america-office-of-government-affairs/> (last visited Mar. 5, 2015).

<sup>172</sup> HERTZKE, *supra* note 9, at 12; HOFRENNING, *supra* note 9, at 71; JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 60 (1995).

<sup>173</sup> HERTZKE, *supra* note 9, at 12 (internal quotation marks omitted); *see also* HOFRENNING, *supra* note 9, at 201; Weber & Stanley, *supra* note 9, at 29.

interest group expenditure.<sup>174</sup> In addition, while membership in churches and other denominations is high, because most citizens typically do not join religious institutions for political or policy reasons, individual members are unlikely to actively participate in any political activities of the institution.<sup>175</sup> Instead, most individuals join a religious institution to deepen their faith, meet friends, or provide educational opportunities for their children.<sup>176</sup> Indeed, many individuals are unaware that their church has a religious lobbying group purporting to represent their interests at all, and some in fact have deep objections to political involvement by their church.<sup>177</sup> A recent Pew Research Center poll, for example, notes that more than half of Americans believe that religious institutions should not express views on social and political questions.<sup>178</sup>

Despite this small overall presence in politics in terms of dollars spent, and the low levels of active participation of the members, religious interest groups remain powerful participants in the democratic process—and ensure that religious voices are among the most influential in the legislative process—as a consequence of two related factors.

First, despite the ambivalence of many members of religious institutions to the political functions of the affiliated lobby group, the sheer size of many of the represented churches and denominations is influential in Washington.<sup>179</sup> Even though members might not be actively engaged, the simple fact that religious interest groups represent almost 60% the American population

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<sup>174</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 14 (estimating that the combined religious group expenditure exceeds \$350 million annually). In 2013, approximately \$3.24 billion was spent on lobbying efforts in the United States. See *Lobbying Database*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/index.php> (last visited Mar. 5, 2015).

<sup>175</sup> See, e.g., Katherine E. Stenger, *The Underrepresentation of Liberal Christians: Mobilization Strategies of Religious Interest Groups*, 42 SOC. SCI. J. 391, 392 (“[L]iberal Christians are underrepresented in individual membership-based Christian interest groups.”).

<sup>176</sup> HOFRENNING, *supra* note 9, at 76; see also PUTNAM, *supra* note 166; ROBERT D. PUTNAM & DAVID E. CAMPBELL WITH SHAYLYN ROMNEY GARRETT, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010).

<sup>177</sup> See, e.g., Roy Beck, *National Religious Lobbying*, SOC. CONT. J., Spring 1995, at 160, 162, available at [http://www.thesocialcontract.com/artman2/publish/tsc0503/article\\_430.shtml](http://www.thesocialcontract.com/artman2/publish/tsc0503/article_430.shtml) (“[M]ost members in their local pews have no idea of what lobbying is done on their behalf in Washington.”).

<sup>178</sup> Michael Lipka, *5 Takeaways About Religion and Politics Before the Midterms*, PEW RES. CENTER (Sept. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/09/22/5-takeaways-about-religion-and-politics-before-the-midterms/>.

<sup>179</sup> But see HOFRENNING, *supra* note 9, at 145–46.

provides latent strength to the religious lobbyist.<sup>180</sup> Politicians are rational actors and their behaviors necessarily recognize that responding to religious interest groups that represent large voting blocs will result in a higher chance of reelection.<sup>181</sup> To maximize the opportunity for reelection, a legislator will necessarily attempt to help those groups that will attract the most votes for the legislator.<sup>182</sup> That is, as a consequence of the number of electors that the religious interest groups purportedly represent, government officials, and even other lobbyists, may defer to religious interest groups, ensuring the religious person some form of participation in the legislative process.

Second, the subject matter of religious lobbying necessarily ensures at least some level of participation in the legislative process. Religion has historic salience for the American psyche that holds today.<sup>183</sup> It is difficult to rebuff claims that are based on a principled and moralistic vision of the law, derived from the word of God. Consider the rhetorical power in this statement by the legislative director of Concerned Women for America:

The most basic reason for the existence of Concerned Women for America is to preserve and protect the traditional American family through Judeo-Christian values. We are concerned with those forces which tend to weaken the traditional family. . . . We are looking to preserve the existing laws that we consider to be compatible with our values which are Biblically based and then trying to expose the new trends or movements that come along that would make it difficult for those who want to hold those values and continue to keep them.<sup>184</sup>

This prophetic basis for the goods that the religious lobbyist wishes to exact from the state is powerful. While standard interest groups rely solely on the concerns of their members and institutions for their authority, religious interest groups have the additional authority of a tradition of faith.<sup>185</sup> Religious interest groups, then, present demands that have as their basis a higher power,

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<sup>180</sup> See Paul A. Djupe & Laura R. Olson, *A Meditation on and Meta-analysis of the Public Presence of Religious Interests*, in *RELIGIOUS INTERESTS IN COMMUNITY CONFLICT: BEYOND THE CULTURE WARS* 253, 266 (Paul A. Djupe & Laura R. Olson eds., 2007) (“There is, simply put, an enormous amount of political and social capital stored in individuals and organizations with religious ties.”).

<sup>181</sup> See Robinson, *supra* note 13, at 149.

<sup>182</sup> *Id.*

<sup>183</sup> GUTTERMAN, *supra* note 50, at 2–3; MARTIN E. MARTY WITH JONATHAN MOORE, *POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION’S ROLE IN OUR SHARED LIFE* 43 (2000); PUTNAM & CAMPBELL, *supra* note 176, at 1.

<sup>184</sup> HOFRENNING, *supra* note 9, at 106 (alteration in original) (quoting Interview by Daniel J.B. Hofrenning with Sally White, former Legislative Director, Concerned Women for America (June 1989)).

<sup>185</sup> See *id.*

rooted in faith principles. Combined with the powerful membership base outlined above, the origins of authority for the legislative good sought by the lobbyist almost ensures the religious voice a permanent seat at the proverbial table, entrenching the religious voice in the democratic process.<sup>186</sup>

## 2. *Religious Interest Groups and Religious Liberty*

In addition to the prowess of religious interest groups in increasing democratic participation of religious Americans, religious interest groups increase the substantive religious liberty of those members that they represent.

To begin, religious interest groups are single-mindedly focused on entrenching and protecting the religious liberty of the members that they represent. Acting alone, it is difficult for individuals, or even some smaller churches, to have their voices heard on the national scene. Having overcome collective action problems and the challenges of group formation and membership, religious interest groups can reap the benefits of collectively pursuing shared religiously driven interests.<sup>187</sup> For many commentators, the existence of diverse and vigorous religious interest groups safeguards individual religious liberty.<sup>188</sup> Religious interest groups, then, act as mediating institutions between individuals or churches and the state,<sup>189</sup> serving to protect the liberty interests of an “otherwise powerless individual against the bureaucracy and coercion of the powerful modern state.”<sup>190</sup>

Religious liberty is a subjective ideal; while religious liberty might mean preservation of certain privacy rights for one individual or group, it may mean the right to government funding for another group. Generally, the idea of religious liberty is pursued by religious lobbyists across one of three dimensions. First, religious interest groups advocate for protection of discrete liberty interests for their members. By this I mean that religious lobbyists endeavor to protect the rights of their members to engage in religiously

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<sup>186</sup> See generally Robinson, *supra* note 13.

<sup>187</sup> On the benefits of collective action, see, for example, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, J. ECON. PERSP., Summer 2000, at 137.

<sup>188</sup> Gedicks, *supra* note 2, at 118.

<sup>189</sup> See BERGER & NEUHAUS, *supra* note 2, at 3.

<sup>190</sup> Gedicks, *supra* note 2, at 115.

motivated actions by entrenching accommodations from generally applicable laws.<sup>191</sup>

A salient example of this kind of liberty-based lobbying can be seen across a number of diverse areas of the law, including the early Quaker lobby and its advocacy for exemptions from conscription laws.<sup>192</sup> With the advent of the Civil War came the first national effort to draft men into national service. The original conscription bill of 1863 did not mention conscientious objectors, but following strong lobbying efforts, an amended bill was proposed that allowed a drafted person to pay an equivalent of \$300 for a substitute.<sup>193</sup> Many Quakers objected to the payment for a substitute and lobbying again resulted in an amendment so that Quakers could serve as noncombatants.<sup>194</sup> A multitude of amendments followed and the conscientious objector provision remains today, albeit in a more modern format.<sup>195</sup> A more modern example of the success of religious interest groups in advocating for discrete accommodations from generally applicable laws is the success of the Jewish lobby in securing an exemption from the Humane Slaughter Act.<sup>196</sup> Not only did Congress amend the bill to include an exemption for ritualistic slaughtering, but it also contained a statement that ritualistic slaughtering is “one of the most humane methods yet devised.”<sup>197</sup> The resulting legislation included a statement that the

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<sup>191</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 1169 (2d ed. 1988); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992). Ira Lupu notes that “accommodation . . . [is] the central motif of religion clause thought.” Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991).

<sup>192</sup> Fisher, *supra* note 17, at 292–93; Robinson, *supra* note 13, at 156.

<sup>193</sup> See Enrollment Act, ch. 75, § 13, 12 Stat. 731, 733 (1863). For the congressional debate over the inclusion of an exemption that would satisfy the Quakers and the Shakers, see CONG. GLOBE, 37TH CONG., 3D SESS. 994 (1863).

<sup>194</sup> Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9. On conscientious objectors in the civil war, see, for example, EDWARD NEEDLES WRIGHT, *CONSCIENTIOUS OBJECTORS IN THE CIVIL WAR* (1931).

<sup>195</sup> See U.S. DEP’T OF DEF., INSTRUCTION NO. 1300.06, *CONSCIENTIOUS OBJECTORS* (2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>; see also Mathew B. Tully, *Ask the Lawyer: Applying for Conscientious Objector Status*, MIL. TIMES (Dec. 22, 2014, 2:14 PM EST), <http://www.militarytimes.com/story/military/benefits/2014/12/22/ask-lawyer-conscientious-objector/20767753/>.

<sup>196</sup> Pub. L. No. 85-765, § 2(b), 72 Stat. 862, 862 (1958). Louis Fisher notes that at the time of the Act’s passage, many companies were following old slaughtering methods of hoisting the animal by a single hind leg, and moving it into a “sticker,” who knifed the jugular vein (which would not kill the animal, only cause it to bleed), and “knockers,” who swung sledge hammers into the animal’s head. FISHER, *supra* note 17, at 308.

<sup>197</sup> 104 CONG. REC. 1654 (1958); see also Robinson, *supra* note 13, at 166.

law was in no way intended to “prohibit, abridge, or in any way hinder the religious freedom of any person or group.”<sup>198</sup>

The second dimension across which religious liberty is pursued by religious interest groups is collective lobbying for the religious liberty of multiple faiths. The best example of this is the collective lobbying efforts of nearly all religious interest groups to urge the passage of the Religious Freedom Restoration Act (RFRA).<sup>199</sup> Following a decision of the Supreme Court that there were no constitutionally mandated exemptions from generally applicable and neutrally expressed laws,<sup>200</sup> religious interest groups as diverse as Americans United, the American Center for Law and Justice, the Christian Legal Society, the American Jewish Congress, and the National Association of Evangelicals joined together to lobby Congress to pass RFRA.<sup>201</sup> The results were astounding, with RFRA passing the House of Representatives without opposition and the Senate with a near unanimous, 97–3 vote.<sup>202</sup> However, this kind of unified pursuit for broad religious liberty is rare.<sup>203</sup>

The third and final dimension across which religious liberty is pursued by lobbyists is the entrenchment of religious ideals into generally applicable law. While the pursuit of societal liberty in the image from a specific religious perspective has strong historic roots, this type of liberty-enforcing lobbying has

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<sup>198</sup> § 6, 72 Stat. at 864.

<sup>199</sup> Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the applicability of the Act to the States and States’ subdivisions); *see also* Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993).

<sup>200</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 882, 884 (1990) (holding that any special accommodation for religious practice is not constitutionally mandated except where a claim that combines a free exercise claim and a claim arising from other constitutional provisions—“hybrid” claims—and claims in contexts that “invite consideration of the particular circumstances”). For commentary on the “exceptions” to the *Smith* doctrine, see especially 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 80–81 (2006) (noting that *Smith* “marks a crucial divide in free exercise law”); Robinson, *supra* note 13, at 139–40.

<sup>201</sup> There was broad unification between Democrats, Republicans, the ACLU, Americans United, American Center for Law and Justice, the Christian Legal Society, the American Jewish Congress, and the National Association of Evangelicals. On this point, see FISHER, *supra* note 17, at 80; MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 150 (2d ed. 2006).

<sup>202</sup> The House Judiciary Committee passed the Act unanimously, and the Act cleared the rest of the House with the rules suspended (which in turn requires a two-thirds majority). Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18, *available at* <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html>; *see* Fisher, *supra* note 17, at 314–15; Robinson, *supra* note 13, at 142.

<sup>203</sup> *See generally* Robinson, *supra* note 13 (discussing this point in the context of a religious organization’s political power).



grown exponentially since the late 1970s and early 1980s.<sup>204</sup> Examples can best illuminate this dimension of lobbying for liberty. We can draw on the history of religious interest groups outlined in Part I for an early illustration.<sup>205</sup> One example is the temperance movement, when churches and groups comprised of religious individuals organized to advocate Congress for the prohibition of alcohol, a law that would be applicable to all Americans. For these lobbyists, “liquor traffic is . . . a crime against God” and “subversive of every interest in society,” and to that end, the lobbyists called for “legislation as shall secure this end” with “prohibition to be essential to the full triumph of this reform.”<sup>206</sup>

A more modern example is the advocacy by religious interest groups for the prohibition, or strong restriction, of abortion. Religious interest groups including Priests for Life, Texas Right to Life, Concerned Women of America for Texas, and Texas Alliance for Life actively pursue the restriction of the availability of abortions in America.<sup>207</sup> The influence that these lobbyists have had on legislators, and consequently generally applicable laws, are visible in numerous jurisdictions across the country. A key example is in Texas, where, on July 18, 2013, Texas Governor Rick Perry signed into law legislation that severely limits access to abortion.<sup>208</sup> One of the bill’s sponsors, Representative Jodie Laubenberg, commented that the bill was a consequence of “the hand of God,”<sup>209</sup> and another sponsor, Senator Glenn Hegar, stated that the “power of

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<sup>204</sup> See *supra* notes 48–61 and accompanying text (discussing the rise of the religious lobby in Washington post-1970).

<sup>205</sup> See *supra* Part I.A (discussing the history of religious interest groups).

<sup>206</sup> ODEGARD, *supra* note 37, at 38 (quoting ENCYCLOPEDIA OF TEMPERANCE AND PROHIBITION, *supra* note 37, at 651); see also FOSTER, *supra* note 26, at 36, 86, 170; LOBBYING FOR THE FAITHFUL, *supra* note 10, at 23.

<sup>207</sup> See, e.g., Steven Ertelt, *Texas Governor Rick Perry Signs Bill Banning Late-Term Abortions*, LIFE NEWS.COM (July 18, 2013, 10:51 AM), <http://www.lifenews.com/2013/07/18/texas-governor-rick-perry-signs-bill-banning-late-term-abortions/> (referencing the Priests for Life involvement in the passage of the bill); Joan E. Greve, *Rick Perry Signs Restrictive Abortion Bill into Law*, ABC NEWS (July 18, 2013, 2:28 PM), <http://abcnews.go.com/blogs/politics/2013/07/rick-perry-signs-restrictive-abortion-bill-into-law/> (referencing the involvement of Texas Right to Life, Texas Alliance for Life, Concerned Women for America of Texas, and 40 Days for Life).

<sup>208</sup> Act of July 18, 2013, 2013 Tex. Gen. Laws 5013. For the official report of the signing statement, see Governor Rick Perry, Remarks at House Bill 2 Signing (July 18, 2013), available at <http://governor.state.tx.us/news/speech/18757/>. See also Christy Hoppe, *Texas Gov. Rick Perry Signs Most Restrictive Abortion Law in Nation*, DALL. MORNING NEWS (July 18, 2013, 12:29 PM), <http://www.dallasnews.com/news/20130718-texas-gov.-rick-perry-signs-most-restrictive-abortion-law-in-nation.ece>; *Rick Perry Signs Texas Abortion Bill into Law*, BBC NEWS (July 18, 2013, 16:13 ET), <http://www.bbc.com/news/world-us-canada-23368980>.

<sup>209</sup> Will Weissert, *Gov. Perry Signs Sweeping Abortion Restrictions*, ASSOCIATED PRESS, July 18, 2013, available at <http://www.usatoday.com/story/news/politics/2013/07/18/perry-signs-abortion-regulations/>

prayer that day was immense.”<sup>210</sup> Governor Perry and other speakers at the signing ceremony praised the churches that supported the bill.<sup>211</sup>

All of these lobbying efforts come with tradeoffs. Part III explains how religious interest groups’ advocacy for religious liberty can suppress the religious liberty of Americans as a whole and potentially affects the democratic rights of all citizens.

### III. ASSESSING COSTS: HOW RELIGIOUS INTEREST GROUPS HARM RELIGIOUS LIBERTY

The analysis in Part II showed that religious interest groups are beneficial for religious individuals and religious institutions in terms of securing the participation of religious persons in the legislative process, as well as the religious liberty of their members. This Part examines the other side of the ledger and claims that despite these benefits, religious interest groups both fail to achieve—and may actually repress—the stated goals of democratic participation and religious liberty. As I stated above, once we consider the costs of religious interest groups alongside the benefits, we can see the deeper tensions in the drive for religious liberty and the participatory rights of religious persons.

In demonstrating these adverse effects, this Part draws on claims of commentators that religion in politics generally results in negative outcomes for both democracy and liberty. To this end, section A outlines the general concerns about the presence of religion in the political process for liberty and democracy, before sections B and C narrow the focus to consider how the pathologies of religious interest groups amplify these general concerns and result in specific costs to both democracy and religious liberty.

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2551347/; see also Bonnie Pritchett, *Abortion Bill Signing Undaunted by Ongoing Protests*, S. BAPTIST TEXAN (July 22, 2013), <http://texanonline.net/archives/4647/>.

<sup>210</sup> David Mildenberg, *Perry Signs Abortion Law as Texas Lawmakers Thank God*, BLOOMBERG (July 18, 2013, 2:23 PM EST), <http://go.bloomberg.com/political-capital/2013-07-18/texas-abortion-law/>.

<sup>211</sup> *Id.* A decision regarding the constitutionality of a hotly contested portion of the law, which requires any clinic performing abortions to meet stringent medical standards, is expected from the United States Court of Appeals for the Fifth Circuit in the coming months. See Carrie Feibel, *Texas Abortion Case May Hinge on Definition of ‘Undue Burden,’* NPR (Jan. 8, 2015, 12:28 PM ET), <http://www.npr.org/blogs/health/2015/01/08/375725066/texas-abortion-case-may-hinge-on-definition-of-undue-burden>.

A. *General Principles: The Danger of Religion and the Need for Constraint*

Religious interest groups present particular immediate dangers for both religious liberty and democratic participation. Explaining how religious interest groups are especially dangerous for these goals requires a brief description of the baseline claim that religion is a dangerous presence in the political process that should be constrained.

Limiting religion in the legislative process—and in politics more generally—is typically justified on one of two grounds: first, that religious participation undermines the liberty and equality of all citizens; and second, that religious participation undermines the democratic process.

Turning first to the claim that religious arguments in the political process harm the liberty and equality of all citizens, the claim is that religious argument provides insufficient justification for government action in a diverse and pluralistic nation.<sup>212</sup> Religious argument in public debate, it is claimed, urges improper grounds for government action. Proper grounds for government action in a liberal democracy exist only when regulatory power is exercised “in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”<sup>213</sup> In a modern secular state, this reasoning necessarily excludes governmental action based on religion. Legislation based on religion is “plausibly seen in some cases as forcing others to observe a religious standard.”<sup>214</sup> Coercion in the form of laws that adhere to one religious perspective, then, denies equality and liberty to non-adherents of that perspective.<sup>215</sup>

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<sup>212</sup> See, e.g., GREENAWALT, *supra* note 158; JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 12, 17 (John Horton & Susan Mendus eds., 1991); RAWLS, *supra* note 158; Audi, *supra* note 148; Audi, *supra* note 159; Rawls, *supra* note 158.

<sup>213</sup> RAWLS, *supra* note 158, at 217; see also THOMAS NAGEL, EQUALITY AND PARTIALITY 155 (1991) (“We must agree to refrain from limiting people’s liberty by state action in the name of values that are deeply inadmissible in a certain way from their point of view.”); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 95, 100 (Seyla Benhabib ed., 1996) (positing a conception of justification reflected in an ideal political procedure, under which reasonable citizens “aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept”); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 742 (1993) (“[R]easons that rely directly on [religious] premises . . . will be rejected by many as unreasonable justifications for political action.”).

<sup>214</sup> AUDI & WOLTERSTORFF, *supra* note 142, at 31.

<sup>215</sup> See Audi, *supra* note 148, at 690; Audi, *supra* note 159, at 260–68.

In addition, commentators who claim that religion must be excluded from politics argue that religion undermines political debate.<sup>216</sup> This claim stresses the dangers inherent within religion. The argument is that while religion has well-known social benefits, there is also a “dark side” of religion, one that is “inherently intolerant and persecutory.”<sup>217</sup> For these commentators, religious argument has a peculiar capacity to inspire and foster intolerance of opposing views.<sup>218</sup> Politics, then, requires religion to be excluded in order to ensure that political debate is not polarized and does not complicate efforts to react consensus.<sup>219</sup> Religion is, as one commentator notes, a “conversation-stopper” that prevents the efforts to “keep a democratic political community going.”<sup>220</sup>

On this view, it is important to place special constraints on religion in the legislative process because absent constraint, intolerant religious believers will treat the legislative process as a battleground, rather than a forum for public debate.<sup>221</sup> In turn, politics will encourage dangerous divisiveness among different religious groups, prompting hate, violence, and persecution.<sup>222</sup> This necessarily results in the undermining of the legislative process and, more broadly, the stability of the liberal state. Commentators that take this position argue that in light of the potential damage to democracy, religion is best removed from politics, in order to “quiet religious fervor.”<sup>223</sup> Only if religion is removed from the legislative process will politics function appropriately.<sup>224</sup>

With these general concerns about the place of religion in politics in mind, the next two sections turn to consider the effect that religious interest groups have on the goals of—and relatedly, the concerns about—religious liberty and democratic participation. These sections argue that the features of religious interest groups—institutional mission, unclear representation, the nature of the

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<sup>216</sup> See AUDI & WOLTERSTORFF, *supra* note 142, at 31 (claiming that a religious perspective that a political opponent is somehow “deficient” can lead to intolerance); GREENAWALT, *supra* note 158, at 24 (discussing concerns of democratic instability as a justification for exclusion of religious perspectives); Marshall, *supra* note 160, at 102.

<sup>217</sup> Marshall, *supra* note 160, at 102.

<sup>218</sup> See *id.*

<sup>219</sup> See Magarian, *supra* note 150, at 129; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–99 (1992) (construing the First Amendment’s Religion Clauses as establishing a secular public moral order in order to sustain a religious truce).

<sup>220</sup> RORTY, *supra* note 160, at 170–71 (claiming that translation of religious argument removes democratically irrelevant rhetoric from political debate).

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> See Marshall, *supra* note 160, at 106.

<sup>224</sup> See RORTY, *supra* note 160; Magarian, *supra* note 150, at 129–30.

lobbying, and the opacity of the groups—combine to amplify the general concerns about the effect of religion in politics. To this end, section B will discuss the accountability limitations of religious interest groups, as well as the potential for the capture of the legislative process by religious interest groups. Section C considers the unique danger that religious interest groups pose for religious liberty.

### *B. Religious Interest Groups and Costs to Democracy*

As noted above, religious interest groups achieve unusual levels of participation in the legislative process through their purported representation of the religious view of a vast portion of Americans.<sup>225</sup> This section argues that the idea of “the religious viewpoint” is misleading, something that is obscured in large part by the opacity of religious lobby groups. This section outlines why it is that religious interest groups are imperfect representatives of the religious American. It also specifies how the representation concern is difficult to overcome as a result of the groups’ limited transparency and therefore accountability to the principal the groups claim to represent, as well as the political process more generally.

There are multiple reasons to think that religious interest groups fail to represent “the religious viewpoint” in the political process. Core among these reasons are four factors that can undercut the democratic gains made by religious interest groups that were discussed in the above section. First, not all religions engage a religious lobbyist to represent them in the legislative process, and among those that do, member engagement is often limited. Second, when lobbyists are engaged, positions are taken on issues despite a lack of intra-religious agreement, or even consensus. Third, the delegation of political representation of a religious viewpoint to lobbyists can result in a drift from the original position of the principal. Fourth, the distinctive nature of religious lobbying creates a risk of religious group capture of the legislative process. Each of these factors will be discussed in turn.

#### *1. Political Disengagement*

In the first instance, the democratic gains of religious interest groups are undercut by the disengagement of the members that the group purports to represent. Recall from Part I the two following features of religious interest

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<sup>225</sup> See *supra* Part II.B.1 (outlining the participatory gains of religious interest groups).

groups: that many religious interest groups do not represent a preponderance of adherents of the represented religion and that it is often difficult to identify which—or how many—members know or consider that the religious interest group represents them.<sup>226</sup> For these reasons, religious lobbyists are unlikely to reflect the consensus of all adherents to the religious perspective being promoted, and often not even a majority.

Even in those instances where individual members are aware of the religious interest group purporting to represent their religious viewpoint in politics, it is unlikely that the religious organization requires any member to engage in policy decisions.<sup>227</sup> The majority of the work religious interest groups do in the political arena involves communications that are driven by senior officials within the primary religious organization or collective that the interest group purports to represent.<sup>228</sup> Examples include letters to officials, regulatory comments, input on proposed laws, and day-to-day communications with members of Congress.<sup>229</sup> The Pew Forum on Religion and Public Life Report specifies that around nine out of ten religious interest groups contact legislators either in person or in writing, using moral and theological arguments in the communications.<sup>230</sup> In addition, around seven out of ten groups author policy papers,<sup>231</sup> more than nine out of ten groups keep their constituents informed,<sup>232</sup> and a growing number hold “lobby days,” where a specific religious interest group or coalition of groups bring members to Washington, D.C. for a conference, providing training to participants and organizing visits to congressional offices.<sup>233</sup> In all of this, the voice of the members is often irrelevant. Elliott Corbett, the former chief lobbyist for the United Methodist Church, exemplifies the views of religious lobbyists asking “What, in the meantime, would have happened to the prophetic voice of the church?” if the church chose to solicit the views of its membership. He explains,<sup>234</sup>

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<sup>226</sup> See *supra* Part I.B.2–3; see also Seifter, *supra* note 20, at 1001–03..

<sup>227</sup> See HERTZKE, *supra* note 9, at 14–15; HOFRENNING, *supra* note 9, at 58–60; Bethany Albertson, John Brehm & R. Michael Alvarez, *Ambivalence as Internal Conflict*, in *AMBIVALENCE AND THE STRUCTURE OF POLITICAL OPINION* 15 (Stephen C. Craig & Michael D. Martinez eds., 2005).

<sup>228</sup> See HERTZKE, *supra* note 9, at 14–15; HOFRENNING, *supra* note 9, at 58–60.

<sup>229</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 57.

<sup>230</sup> *Id.*; see also HERTZKE, *supra* note 9, at 44–49.

<sup>231</sup> LOBBYING FOR THE FAITHFUL, *supra* note 10, at 57–58.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 58–59.

<sup>234</sup> J. Elliott Corbett, *Should the Church Lobby?*, *ENGAGE*, Oct. 15, 1970, at 4, 8.

Where deep moral issues are involved, the church cannot afford to wait for most of its members to agree before it exercises leadership. . . . [Church statements] should not be issued after the Gallup poll has made it clear they are safe; they should be proclaimed as a sort of “advance conscience” of the church.<sup>235</sup>

In many ways, the disassociation of religious interest groups from their member base is similar to what happens in mainstream lobby groups—and the standard interest group account predicts that we should expect that members will not in fact be engaged in the lobbyists’ decisions.<sup>236</sup> However, in the context of religious interest groups, the issue is not just that religious interest groups allow for member disengagement. Instead, given that religious interest groups are solicitous of the rights of religious Americans, and indeed reliant on the large member base for political traction as well as political legitimacy, it is important to recognize that religious interest groups are frequently disengaged from their members.

The nature of this disengagement can differ depending on the nature of the member base. For example, members of larger church groups represented by the religious interest groups participate less frequently because the capacity for involvement and input in the political process is low.<sup>237</sup> Conversely, where a religious lobbyist represents smaller religions or groups of individuals, there might be a lack of resources to actively involve members in lobbying efforts.<sup>238</sup> There might also be religious institutions and related lobbyists that, though they have the resources to engage their members, lack any incentive to do so for a variety of reasons.<sup>239</sup>

Ultimately, regardless of the nature of the member base, what is common across all religious interest groups is that it is impossible to know, by looking at a position advanced by a religious interest group, how many citizens considered the issue. This member disengagement undermines the notion that religious interest groups advance a “religious viewpoint.”

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<sup>235</sup> *Id.* at 6, 8. On the strategic choices of religious organizations, see generally FOWLER ET AL., *supra* note 55.

<sup>236</sup> See Hall & Anderson, *supra* note 114; William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512 (1991); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

<sup>237</sup> See HOFRENNING, *supra* note 9, at 149–54.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

## 2. *Intra-Religious Dissent*

Second, even among those religious groups and lobbyists that have consultative or collective decisionmaking processes, statements that a particular religious interest group represents that religion's viewpoint can disguise internal dissent within the religious institution and among the members.<sup>240</sup> This point can be best illustrated with an example. The Leadership Conference of Women Religious is a group established to represent nuns in the United States.<sup>241</sup> The group represents over 80% of America's nuns.<sup>242</sup> The group has refused to publically take a hard line stance on abortion, contraception, and ordination of women contrary to the desires of the Vatican's Congregation for the Doctrine of the Faith.<sup>243</sup> That is, a large portion of American Catholics have refused to support a specific religious perspective. The position of the Leadership Conference of Women is contrary to the views espoused and promoted in the political arena by the leading Catholic lobby group, the USCCB.<sup>244</sup> The USCCB has consistently and continuously lobbied for restrictions, for example, on a woman's access to abortions and availability of funding of contraceptives.<sup>245</sup>

The advancement of a religious viewpoint on issues that have deeply divided members of a particular religious faith masks the variety of religious views on a given issue.<sup>246</sup> Yet, in many instances, there is no way to detect these disagreements on matters of faith. Relatedly, given the opacity under which these groups function, it is impossible to say with confidence how

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<sup>240</sup> PENNY EDGELL BECKER, *CONGREGATIONS IN CONFLICT: CULTURAL MODELS OF LOCAL RELIGIOUS LIFE* (1999); Nancy L. Eiesland, *Irreconcilable Differences: Conflict, Schism, and Religious Restructuring in a United Methodist Church*, in *PENTECOSTAL CURRENTS IN AMERICAN PROTESTANTISM* 168 (Edith L. Blumhofer, Russell P. Spittler & Grant A. Wacker eds., 1999); JAMES L. GUTH ET AL., *THE BULLY PULPIT: THE POLITICS OF PROTESTANT CLERGY* (1997); see also Seifter, *supra* note 20, at 1003–07 (discussing similar themes in a different context).

<sup>241</sup> See *About LCWR*, LCWR, <https://lcwr.org/about> (last visited Mar. 5, 2015); *Membership in LCWR*, LCWR, <https://lcwr.org/about/membership> (last visited Mar. 5, 2015).

<sup>242</sup> See *About LCWR*, *supra* note 241.

<sup>243</sup> See, e.g., Mark I. Pinky, *American Nuns Respond to Vatican Rebuke with Conciliatory Statement*, HUFFINGTON POST (Aug. 20, 2013, 9:03 AM EDT), [http://www.huffingtonpost.com/2013/08/20/catholic-nuns-vatican-rebuke-us\\_n\\_3781683.html](http://www.huffingtonpost.com/2013/08/20/catholic-nuns-vatican-rebuke-us_n_3781683.html).

<sup>244</sup> See CONGREGATIO PRO DOCTRINA FIDEI [VATICAN CONGREGATION FOR THE DOCTRINE OF THE FAITH], *DOCTRINAL ASSESSMENT OF LEADERSHIP CONFERENCE OF WOMEN RELIGIOUS* (2012), available at [http://www.usccb.org/upload/Doctrinal\\_Assessment\\_Leadership\\_Conference\\_Women\\_Religious.pdf](http://www.usccb.org/upload/Doctrinal_Assessment_Leadership_Conference_Women_Religious.pdf).

<sup>245</sup> For an overview of the USCCB's position on abortion and contraceptives, see *Abortion*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/> (last visited Mar. 5, 2015).

<sup>246</sup> See HERTZKE, *supra* note 9, at 14–15; HOFRENNING, *supra* note 9, at 58–60.



common these types of divisions are.<sup>247</sup> However, intuition suggests that at least in midsize to large religious organizations, where factionalism tends to occur, some level of dissent is common.<sup>248</sup> Particularly given the nature of what is being discussed—matters of faith, conscience, and religion—it's difficult to imagine any religious interest group consistently speaking for all members.

### 3. *Policy and Positional Drift*

The third reason that religious interest groups are imperfectly representative of religious viewpoints is that the delegation of the political representation of a religious viewpoint to lobbyists can lead to a drift from the original position of the principal.<sup>249</sup> The religious interest group's staff members are the people who are the voice of the religious principal before Congress and other government officials. The interests of the lobbyist staff and the members may diverge, and the frontline involvement of lobbyists creates the risk of positional drift from the intended interests of the principal, something that is common in any principal–agent relationship.

This problem of drift is particularly likely in the context of religious interest groups. Political scientists have well-documented the extent to which religious lobbyists ignore the views of their members and lobby in an oligarchical manner.<sup>250</sup> As a general matter, groups tend to be oligarchical out of organizational necessity and the psychology of group leaders.<sup>251</sup> This matters because in the context of religious groups in particular, members join for reasons other than political engagement—namely, religious reasons.<sup>252</sup> Most people join church groups, for example, without thinking about the church's related interest group. Indeed, members are often indifferent to the lobbying activities of the church leaders and even the fact that there is an interest group representing the interests of the church in Washington, caring

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<sup>247</sup> See *supra* Part I.B.3 (discussing the opacity of religious interest groups).

<sup>248</sup> See HERTZKE, *supra* note 9, at 14–15; HOFRENNING, *supra* note 9, at 58–60.

<sup>249</sup> On the concept of policy drift, see especially Seifter, *supra* note 20, at 1007–09 (discussing policy drift in the context of state interest groups in the administrative process).

<sup>250</sup> HERTZKE, *supra* note 9, at 14–16; HOFRENNING, *supra* note 9, at 150–52; Charles Kurzman, *Organizational Opportunity and Social Movement Mobilization: A Comparative Analysis of Four Religious Movements*, 3 MOBILIZATION 23, 24–25 (1998). On the concept of oligarchy generally, see JEFFREY A. WINTERS, OLIGARCHY (2011).

<sup>251</sup> WINTERS, *supra* note 250, at 3–5.

<sup>252</sup> HOFRENNING, *supra* note 9, at 60; see also HERTZKE, *supra* note 9, at 14–16.

instead about the provision of the selective incentive—theology and faith.<sup>253</sup> Because the lobbying of religious interest groups is a byproduct, the link between the grassroots religious adherents and the leaders and lobbying staff is severed. The result is an internal oligarchy that functions independent of member decisionmaking.

A salient example evidencing oligarchy in religious interest groups is the antiwar position taken by many religious lobbyists in the early days of the Vietnam War, when the war was popular.<sup>254</sup> Groups such as the National Council of Churches, the Union of American Hebrew Congregations, and the World Council of Churches all provided early antiwar statements and lobbied Congress for American withdrawal from Vietnam. These lobbying efforts were without member support, leading one commentator to conclude that religious interest groups were “generals without armies.”<sup>255</sup>

In addition, the specific nature of religious lobbying tends to lead to religious leaders justifying nondemocratic decisions in theological terms, claiming that their job is to “discern God’s will” and not the interests of members.<sup>256</sup> A critical problem emerges when lobbyists and church leaders guiding the actions of a religious interest group are faced with different interpretations about the will of God. In these circumstances, while occasionally the organizations might resort to member processes to resolve a dispute, typically the views of church leaders are relied upon, even in the face of member disagreement.<sup>257</sup> This drift from the broader religious membership significantly undermines the democratic gains of religious interest groups.

#### 4. *Legislative Capture*

Finally, while interest-group lobbying always creates a risk of capturing the legislative process—that is, having an “outsized influence” on the political

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<sup>253</sup> See Jon A. Shields, *Between Passion and Deliberation: The Christian Right and Democratic Ideals*, 122 POL. SCI. Q. 89, 97, 103 (2007).

<sup>254</sup> HOFRENNING, *supra* note 9, at 152.

<sup>255</sup> JAMES L. ADAMS, *THE GROWING CHURCH LOBBY IN WASHINGTON* 244 (1970).

<sup>256</sup> HOFRENNING, *supra* note 9, at 60 (internal quotation mark omitted); see also FOSTER, *supra* note 26; RICHARD J. GELM, *POLITICS AND RELIGIOUS AUTHORITY: AMERICAN CATHOLICS SINCE THE SECOND VATICAN COUNCIL* (1994); Paul A. Djupe, Laura R. Olson & Christopher P. Gilbert, *Sources of Clergy Support for Denominational Lobbying in Washington*, 47 REV. RELIGIOUS RES. 86 (2005).

<sup>257</sup> HERTZKE, *supra* note 9, at 14–16; HOFRENNING, *supra* note 9, at 61.

process—religious interest groups create particular risks of capture.<sup>258</sup> As described in Part I, the nature of religious lobbying tends to differ from standard mainstream lobbying in that the only acceptable policy outcome is the ideal policy outcome.<sup>259</sup> Recall that under a standard account of interest group politics, interest groups form and generate pressure on the state.<sup>260</sup> In turn, the different interests pressure the state to find a compromise that is acceptable to all groups—an acceptable policy outcome.<sup>261</sup> This conception of interest group politics does little to damage the democratic process—in fact, on the contrary, it can be seen as democracy enforcing, where diverse interests debate important issue in politics and come to a mutual agreement as to the remedy.

The peculiar nature of religious lobbying, where compromise on the ideal policy position is an unacceptable outcome, means that while organized religious interests might work to exert pressure in the classic pluralist sense, their radical expectations change the nature of the legislative process.<sup>262</sup> As such, the legislative process is not a debate where parties sort through their preferences to reach a consensus-based compromise.<sup>263</sup> Rather, religious interest groups tend to proceed on the premise that certain public policies are fundamentally erroneous, and a compromise solution to those errors is unacceptable. Because of this, the legislative process becomes a venue where the strongest, most dominant interest seeks to exert control over the process for the purpose of controlling the outcome.<sup>264</sup>

This refusal to compromise means that the policy process is not a reflection of the balance of community interests. Instead, the process becomes winner-take-all, where the ideas of bargaining and compromise have little, if any, salience.<sup>265</sup> The concern of capture of the legislative process on issues that religious interest groups are involved, then, can be clearly seen when religious interest groups lobby. The inability of religious interest groups to negotiate, debate, and compromise on the outcome *because of* their religious mandate is

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<sup>258</sup> Seifter, *supra* note 20, at 1009–11; *see also* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014) (providing a recent contribution to the scholarly dialogue on capture).

<sup>259</sup> *See supra* Part I.B.4.

<sup>260</sup> *See supra* notes 114–16 and accompanying text.

<sup>261</sup> *See supra* notes 114–16 and accompanying text.

<sup>262</sup> *See* HOFRENNING, *supra* note 9, at 52–53; Lowi, *supra* note 114.

<sup>263</sup> *See* HOFRENNING, *supra* note 9, at 52–53; Lowi, *supra* note 114.

<sup>264</sup> *See* HERTZKE, *supra* note 9, at 74–76. Hertzke cites an interview with Gretchen Eick of the United Church of Christ, where she states “we are concerned about winning, not witnessing.” *Id.* at 75 (emphasis omitted).

<sup>265</sup> *See* HOFRENNING, *supra* note 9, at 117–21.

precisely the concern that animates commentators to push for exclusion of religion in politics as a general matter.<sup>266</sup> The goal of the democratic process is that all citizens be able to discuss an issue in a way that is understandable *and debatable* by all members of the political community.<sup>267</sup> With their prophetic mandate and vision, religious interest groups' fundamental commitment to their desired goal, combined with the powerful force of the large potential voter base, undermines the democratic process.

The problem of capture is compounded by both the opacity of religious interest groups and the subject of the lobbying—religion. While the opacity of religious interest groups stymies any exploration of how religious interest groups function in the political process, the fact that religious lobbyists are representative of the religious voice in the political process necessarily discourages skeptical analysis of the role and function of religious interest groups in the political process. These features of religious interest groups combine to create a situation of deep concern where the legislative process itself is captured by religious interest groups.

### *C. Religious Interest Groups and Costs to Religious Liberty*

In addition to democratic concerns raised by the presence of religious interest groups in politics, there also exists potential for serious harm to religious liberty. While Part II outlined the success of religious interest groups in ensuring the religious liberty of its members to believe and act on their faith,<sup>268</sup> this section claims that any success of religious interest groups' lobbying practices cuts against the religious liberty of the population more generally. This section argues that rather than being an embodiment of religious liberty, the inclusion of religious interest groups in the legislative process results in very serious harm to the religious liberty of all Americans.

Focusing on harm to liberty caused by religious interest groups requires us to rotate the flashlight ever so slightly from the process concerns outlined above (i.e., the role of religion *in* political debate), to recognizing the impact of religion on the outcomes of the debate (i.e., the resulting laws). The regulation resulting from religious persuasion in the legislative process is infrequently recognized by commentators. This is an error. As outlined in Part I, proponents of religious speech in politics are not simply claiming a symbolic role for

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<sup>266</sup> See *supra* Part III.A.

<sup>267</sup> See *supra* Part III.A.

<sup>268</sup> See *supra* Part II.B.

religion, whereby the religious citizen is permitted to have a voice.<sup>269</sup> Religious speech is not passive; it does not merely provide a foil for the secular perspective in political debate. Instead, in speaking from a religious perspective, religious citizens—individuals or groups—seek to influence the political outcomes.

For many religious citizens engaged in the political process, the goal is to ensure religious liberty through accommodations from generally applicable laws. For these citizens, religious liberty is satisfied by freedom from the state. For others, however, religious liberty is only satisfied by ensuring the policies of the state reflect their religious perspective *in* generally applicable law. That is, in arguing for a particular policy, these citizens seek to entrench their religious perspective as law.<sup>270</sup> Recall the example of the Texas law severely restricting access to abortions, overtly acknowledged to be a faith-driven outcome.<sup>271</sup> Those religious interest groups that lobbied for the restrictions on a woman's access to abortion were not simply interested in having a voice in the debate. Their goal, like that of mainstream lobbyists, was to influence the outcome.

In the traditional account of the legislative process, the law can be understood as a system of impartial rules, serving as a framework within which individuals and groups may pursue their own divergent and independently defined conceptions of what constitutes the good life.<sup>272</sup> Under this view, the power of the law is in its hands-off approach to individual determinations of morality and decisionmaking on difficult moral questions. What this simple view of the law's purpose misses, however, is precisely what religious interest groups grasp: that the law is less hands-off in practice than in theory and has a deeply constitutive role that can work to transform the boundaries of the state in the image of a particular religious tradition. In other words, not only do religious speakers want a voice in the political process, in many instances they want to transform the law in their image.

What is wrong with well-mobilized religious interest groups shaping the law and the boundaries of individual choice in our political community? After all, mainstream interest groups arguably do precisely that when they lobby for a legal or regulatory change that impinges on others' daily choices. The answer

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<sup>269</sup> See *supra* Part I.B.4.

<sup>270</sup> See Lowi, *supra* note 114.

<sup>271</sup> See *supra* notes 207–11.

<sup>272</sup> See, e.g., Marshall, *supra* note 160.

lies again in the nature of the advocacy of religious interest groups. Recall the goal of religious interest groups outlined above: religious interest groups seek to change social policy to reflect a particular religious perspective.<sup>273</sup> When we focus on the lobbying outcomes—that is, what happens when the religious lobbying is successful—we can see the burden that radical lobbying places on non-adherents. Transformative law that enshrines a specific religious perspective of the powerful and well-mobilized not only gives power to the religious-group lobbying for the outcome, but importantly it isolates and marginalizes the religious perspectives of the non-adherents by transforming one specific religion into law. This is the essence of a burden on conscience.

Recall from Part II that proponents of religious argument in politics typically claim that excluding religious citizens from the political process would be a violation of the religious citizens' religious liberty, therefore inclusion is critical to religious liberty.<sup>274</sup> Commentators argue that it would be a violation of the very terms of equal citizenship that the democratic polity is designed to guard to exclude religious Americans and, relatedly, religious interest groups.<sup>275</sup> The problem is that allowing these kinds of transformative policies in the name of religious liberty—where the law enshrines a particular religious perspective—necessarily violates the conscience and religious liberty of the whole political community. Unlike religious advocacy for an accommodation from a generally applicable law—for example, exempting slaughterhouses, which operate according to the laws of kashrut, from regulations—the consequence of transformative laws is that we are all bound to adhere to them.<sup>276</sup> Return again to the example of the Texas abortion bill, passed in large part as a result of religious lobbying efforts.<sup>277</sup> The stringent abortion restrictions reflect a particular conservative religious perspective about the origins of life that has its roots in a specific reading of the bible. This religiously driven, religion-based law obliges all Texas citizens to comply with a particular faith-based perspective, whether they adhere to that faith or not.

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<sup>273</sup> See Part I.B.4 (describing the distinctive lobbying style of religious interest groups).

<sup>274</sup> See Part II.A (stating the goals of including religious views in politics).

<sup>275</sup> McConnell, *supra* note 2, at 656; see also Jonah Perlin, Note, *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate About Religion's Place in Legal and Political Discourse*, 100 GEO. L.J. 331, 340 (2011).

<sup>276</sup> Although the focus of this Article is on lobbying that results in entrenchment of religious views in generally applicable laws, there might also be concern that lobbying for accommodations from generally applicable laws raises similar, although potentially less intense, concerns.

<sup>277</sup> See *supra* notes 207–11.

Thus, while the religious liberty of the specific citizen whose religious liberty has been entrenched in the general law has been respected, the conscience of those citizens that do not share the worldview of the well-funded and politically mobilized religious group has been violated. The often radical and transformative politics of religious interest groups results in a captured state that, over time, becomes far from liberal, and instead is the very essence of illiberality.

#### IV. LOOKING FORWARD: BALANCING THE COSTS AND BENEFITS OF RELIGIOUS INTEREST GROUPS IN FEDERAL POLITICS

As the previous Parts have attempted to demonstrate, once we attend to the grassroots question of *how* religious voices participate in the political process—through the medium of religious interest groups—the picture of unmitigated benefits for religious liberty and the democratic process becomes complicated. Accounting for religious interest groups, we can see that these goals are, ironically, compromised due to the nature of the groups and their manner of functioning. This means that some balancing is necessary, and some tradeoffs may have to be made: if the best way of advancing religious liberty and democratic participation in fact disserves religious liberty and democratic participation, we must calibrate the role of religious interest groups in the legislative process.

In order to more precisely identify the interests that must be balanced when working toward the goal of ensuring religious liberty and democracy, it is beneficial to recall the prowess of religious interest groups in advancing the goals of religious liberty and democracy outlined in Part II.<sup>278</sup> Recall that religious interest groups institutionalize long-term commitments to advocate for religious liberty and democratic participation.<sup>279</sup> Religious interest groups offer a focus on the religious interest (however defined in the terms of any given faith), advancing that interest in the legislative process for the benefit of the wide and often underrepresented member base. But these benefits come at a cost: representation of a single religious view, defined by high-ranking church members, can limit the information conveyed about the religious perspective.<sup>280</sup> And the insulation of religious lobbyists from the religious

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<sup>278</sup> See *supra* Part II (discussing the prowess of religious interest groups in advancing the goals of religious liberty and democracy).

<sup>279</sup> See *supra* Part II.B.

<sup>280</sup> See *supra* Part III.B (discussing the costs of religious interest groups on democratic participation).

adherents, as well as the general population, makes them opaque and unaccountable in the political process.<sup>281</sup>

Yet, reforming the legislative process to account for the particular concerns of religious interest groups could potentially impede the religious liberty and democratic gains that religious interest groups have achieved. Consider what would happen if reforms focused on protecting the religious liberty of the non-adherents to the religious lobbyists' agenda. A potent reform might attempt to exclude religious interest groups from the legislative process as a general matter, justifying it on the ground that the free exercise of a non-adherent's religion will always be violated by the presence of legislation motivated by religious lobbying efforts. While this type of reform would protect the non-adherents, it would potentially undermine the religious freedom of the represented faith, and unfairly single out religion for restrictions in the political process.<sup>282</sup>

With these tradeoffs in view, this Part proceeds to outline some possible reforms that take account of the competing interests. As stated above, this Article has proceeded on the assumption that the goals of religious liberty and democratic participation have value.

The challenge therefore becomes finding a balance between the costs and benefits of religious interest groups' participation in the political process for the goals of religious liberty and democratic participation—one that increases transparency about, and accountability of, the groups' advocacy platforms and behaviors, yet militates against burdens on the religious liberty of non-adherents, without disturbing the groups' liberty and democratic gains. What follows is a brief outline of possible directions for reform, all of which require subsequent development and balancing against constitutional considerations.

#### A. *Religious Interest Groups and Their Members*

The first possible locus for reform is the religious interest groups themselves, or the religious traditions that they represent. With that said, it is unlikely that either the religious institutions or their representative religious

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<sup>281</sup> See *supra* Part I.B.3.

<sup>282</sup> See, e.g., Nina J. Crimm & Laurence H. Winer, *Tax Law Bans on Political Campaign Speech by Houses of Worship: Inappropriate Government Censorship and Intrusion on Religion*, 2 J.L. RELIGION & ST. 101, 106 (2013). See generally NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS (2011) (examining the role of religion in electoral politics).



interest groups will be the primary driver behind reforms, as neither have any incentive to deviate from the status quo.<sup>283</sup>

Yet, as the existence and role of religious interest groups are more readily apparent—and the sometimes deleterious effects of religious lobbyists on the goals of religious liberty and democratic participation become known—it is plausible to think that the groups and their principals might advance changes on their own accord. At a minimum, religious interest groups can disclose their lobbying efforts, as well as the specific policies being lobbied for, to their broader membership. This would go some way toward alleviating the accountability concerns outlined in Part III above.<sup>284</sup> Religious interest groups could also go further, and voluntarily disseminate their membership and funding information, along with their lobbying platforms and strategies, to the general public via their websites.

This kind of voluntary disclosure is not unprecedented. Recall the voluntary disclosure of lobbying spending and reporting of advocacy efforts by the Friends Committee on National Legislation above in Part I.<sup>285</sup> This reporting also benefits the public at large and legislators by informing them of the actions being taken in the name of any given religious institution or issues group. In addition, this kind of voluntary reporting has the benefit of informing the grassroots members of the actions that are being taken in their names, possibly increasing member engagement and thereby increasing the representativeness of the interest group, decreasing drift, and limiting the potential of oligarchical lobbying.

### *B. Judicial Reform*

There is a possibility that courts could play a role in mitigating any deleterious effects on religious liberty and democratic participation of religious interest groups via the Establishment Clause.<sup>286</sup> That is, any individual or group that feels aggrieved by legislation that is underscored by religious doctrine could bring a claim that the legislation violated the Establishment Clause. Thinking about the consequences of religious-interest-group lobbying that are of most concern—where the religious interest group entrenches a

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<sup>283</sup> See *supra* Part I.B (discussing the features and structure of religious interest groups).

<sup>284</sup> See *supra* Part III.

<sup>285</sup> See Seifter, *supra* note 20, at 1022 (discussing voluntary disclosures in the states-as-lobbyists context); *supra* note 112 and accompanying text.

<sup>286</sup> See U.S. CONST. amend. I.

faith-based doctrine in the generally applicable law—there is at least a plausible claim that the Establishment Clause will be responsive to this claim. However, in light of the Court’s trajectory in Establishment Clause cases and the narrow reading of the relevant constitutional standard, arguably the Court is unlikely to employ the Establishment Clause to respond to claims of religious entrenchment in general law.<sup>287</sup>

Under the Court’s current doctrine, litigants bringing a claim pursuant to the Establishment Clause must claim either that the government is favoring one religious sect over another,<sup>288</sup> or that the government is benefiting one religion by, for example, requiring or permitting prayer in public schools or permitting religious symbols in the public square.<sup>289</sup> In the case of entrenchment of religious faith in generally applicable law, there is at least a colorable claim that the government is benefiting one religion over another. As the Court held in the leading case of *Larson v. Valente*, “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>290</sup> Equally, there is a facial claim that these kinds of laws benefit one religion, with its intangible, and often tangible, support for the faith in question.

The problem, however, is that under either of these causes of action, the Court will engage in a form of balancing analysis, and its jurisprudence suggests that the balancing will favor the government. For instance, if the law is held to prefer one religion over another, strict scrutiny will apply.<sup>291</sup> In the Religion Clause context, strict scrutiny has been referred to as “strict in theory but feeble in fact,”<sup>292</sup> with the Court frequently finding that the claimant’s religion was not burdened, or that the government had demonstrated a

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<sup>287</sup> *But see* Gey, *supra* note 25 (arguing that limits on religious speech are consistent with current Speech Clause doctrine).

<sup>288</sup> *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982).

<sup>289</sup> *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (affirming that a statute encouraging mediation or voluntary prayer in school was unconstitutional); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 127 (1982) (affirming that a statute that vests in churches the authority to veto liquor licenses within 500 feet of the church was unconstitutional).

<sup>290</sup> *Larson*, 456 U.S. at 244.

<sup>291</sup> *Id.* at 246.

<sup>292</sup> Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (“While in other constitutional areas the compelling state interest test is fairly characterized as ‘strict in theory and fatal in fact,’ in the religion cases the test is strict in theory but feeble in fact.” (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)) (internal quotation marks partially omitted)).

compelling (secular) interest for the law.<sup>293</sup> Equally, under the Court's preferential treatment jurisprudence, where the Court has applied various tests to assess the validity of the law,<sup>294</sup> cutting against a judicial remedy is the fact that the Court has tended to find that a facial secular motive is sufficient to save the constitutionality of a law that might favor one particular religion.<sup>295</sup> Relying on the judiciary as a deliberate choice for controlling religious interest group behavior, then, is inadvisable.

### C. *Political Reform*

The political branches of government are most likely to be the driver of any reform given the likely incapacity of the courts—and the likely unwillingness of the religious interest groups—to address the countervailing burdens imposed by religious lobbying. Given that exclusion of religious interest groups from the legislative process is both normatively and politically unpalatable, I suggest here that there are two plausible options for politically driven institutional constraints on religious lobbyists.

First, there is the possibility of more stringent policing of the limits on lobbying permitted for organizations exempt under the Lobbying Disclosure Act.<sup>296</sup> Recall from Part I that pursuant to the LDA, churches and related auxiliaries, associations of churches and their auxiliaries, or religious orders that are exempt under the Internal Revenue Code § 501(c)(3) from filing a federal income tax return are exempt from the disclosure requirements of the

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<sup>293</sup> See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (finding that there was no burden on the Native American's religion); *United States v. Lee*, 455 U.S. 252 (1982) (holding that the government had demonstrated a compelling interest for the law burdening the Amish complainant's religion).

<sup>294</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (outlining that the government must not “endorse” religion, as assessed from the perspective of an objective observer); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive governmental entanglement with religion.’” (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968))). On Establishment Clause standards, see 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008); DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* (2003).

<sup>295</sup> See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.”).

<sup>296</sup> 2 U.S.C. §§ 1601–1614 (2012); see Timothy W. Jenkins & A.L. (Lorry) Spitzer, *Internal Revenue Code Limitations on Lobbying by Tax-Exempt Organizations*, in *THE LOBBYING MANUAL*, *supra* note 107, at 393.

LDA.<sup>297</sup> Pursuant to § 501(c)(3), these exempt religious institutions are limited in the amount of lobbying that they can do without jeopardizing their tax-exempt status.<sup>298</sup> Specifically, religious institutions will only maintain their exempt status if “no substantial part of the activities [of the religious institution include] carrying on propaganda, or otherwise attempting, to influence legislation.”<sup>299</sup> Any institutions found to have engaged in prohibited lobbying efforts will lose their tax-exempt status and, relatedly, their exempt status under the LDA.<sup>300</sup> One possibility for political reform, then, is heightened policing of the lobbying efforts of religious institutions by the IRS.

This political reform is plausible, but has a number of potential flaws. First, there are restraints on the IRS’s auditing of churches, the auspices of which the related lobbying affiliates fall under for IRS purposes. Specifically, the Church Audit Procedures Act, located in § 7611 of the Internal Revenue Code, stipulates that only “an appropriate high-level Treasury official” can initiate an investigation into a church’s tax compliance.<sup>301</sup> A high-level tax official is defined as “the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region.”<sup>302</sup> Investigating churches, then, poses significant administrative burdens on one government agency.

In addition, even if investigations are launched there still remains a discrete problem that makes this reform suboptimal. Specifically for interest groups representing religious denominations, many groups will not run afoul of the Internal Revenue Code requirement that lobbying activities not comprise a “substantial” portion of the denomination’s activities, even when they engage in what appears to be significant lobbying efforts.<sup>303</sup> While neither the Court

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<sup>297</sup> See *supra* notes 107–09 and accompanying text (outlining the exemption under the LDA for religious organizations).

<sup>298</sup> I.R.C. § 501(c)(3) (2012); see also Siri Mielke Buller, *Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136 (2007).

<sup>299</sup> I.R.C. § 501(c)(3). Alternatively, § 501(h) includes a safe harbor provision, whereby an exempt organization can opt out of the substantial amount test, and instead use an expenditure test to allow the institution to make lobbying expenditures within a dollar or formula limit. *Id.* § 501(h).

<sup>300</sup> *Id.* § 501(c)(3); Vladeck, *supra* note 109.

<sup>301</sup> I.R.C. § 7611(a)(2) (defining the process for an IRA audit of churches and related organizations).

<sup>302</sup> *Id.* § 7611(h)(7); see also Press Release, Secular Coalition for Am., Atheists Say IRS Not Doing Enough to Hold Churches Accountable, (May 17, 2013), available at <http://secular.org/news/atheists-say-irs-not-doing-enough-hold-churches-accountable>.

<sup>303</sup> Galle, *Charities in Politics*, *supra* note 66, at 1619–21; Galle, *The LDS Church*, *supra* note 66, at 371–73.

nor Congress has defined what constitutes “substantial” lobbying for any organization, most tax lawyers assume that it refers to a portion of the organization’s resources.<sup>304</sup> The problem with this measure is that it fails to capture the larger groups. Take, for example, the Mormon Church’s multimillion dollar lobbying efforts in support of Proposition 8: observers suggested that even the estimated \$10 million in expenditures on lobbying was a small fraction of the Church’s annual revenues and therefore were not “substantial.”<sup>305</sup> In other words, even if the IRS heightens their policing efforts of the activities of religious institutions, the current regulations simply do not reach so far as to capture all of the parties that we might be concerned about.

Second, there is the possibility of legislative amendment of the current controls on lobbying disclosure requirements, specifically removing exemptions for religious organizations from the Lobbying Disclosure Act. Doing so would ensure greater transparency of religious interest groups and accountability of those groups to both members and the public at large. To be sure, the LDA is not a particularly robust tool for ensuring the accountability of interest groups.<sup>306</sup> Scholars have consistently argued that the LDA requirements fail to capture important information of significant relevance to public knowledge of the power of private interests in the political process.<sup>307</sup> However, in the interests of neutrality and in light of general unwillingness to single out religious interest groups for special exclusion from the legislative process, removing the exemption would at least bring religious interest group disclosures in line with all other lobbyists.

The most significant obstacle to the implementation of this reform is, ironically, precisely the reason the reform is necessary in the first place: the power of religious interest groups. As rational actors, legislators are necessarily disincentivized from enacting these reforms.<sup>308</sup> Legislators are

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<sup>304</sup> *Supra* note 303.

<sup>305</sup> Janet I. Tu, *Mormon Church’s Role in Prop. 8 Fight Debated*, SEATTLE TIMES, Nov. 14, 2008, at A12, available at [http://seattletimes.com/html/localnews/2008389449\\_churchpolitics14m.html](http://seattletimes.com/html/localnews/2008389449_churchpolitics14m.html).

<sup>306</sup> See Hasen, *supra* note 107, at 202; Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 520 (2007).

<sup>307</sup> See, e.g., Lloyd Hitoshi Mayer, *Politics and the Public’s Right to Know*, 13 ELECTION L.J. 138, 150 (2014) (stating that private-private political interactions are not covered by the LDA); Youn, *supra* note 4, at 2110–11 (discussing the value of public knowledge of disclosures of individual contributions to political campaigns).

<sup>308</sup> See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Dennis C. Mueller, *Public Choice in Perspective*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 1 (Dennis C. Mueller ed., 1997). How effective legislators’ actions can be predicted and incentivized is a subject of significant debate. Compare Edward L. Rubin, *Law and the Methodology of Law*,

benefit maximizers, interested predominantly in their own political survival (i.e., reelection).<sup>309</sup> Legislative actions, then, are the result of a subtle and complex process through which the gains derived from any legislative action (votes gained) are weighed against the costs of the action (votes lost).<sup>310</sup> When we focus on religious interest groups, the possibility of reforming the LDA to exclude religious interest groups seems tenuous. As noted in Part I, religious interest groups have a strong presence and influence in Washington, in large part because of the large member base that they can potentially call on to respond to legislator action or inaction contrary to their beliefs on an issue.<sup>311</sup> At least facially, it seems a challenging proposition to expect the legislature to be responsive in the face of likely religious interest group opposition. Future work should, however, continue to explore the role of the political branches of government in constraining religious interest groups' behavior.

### CONCLUSION

While the advent of the new religious institutionalism has pushed questions over the role of the appropriate relationship between religion and the state to the foreground, commentators have thus far failed to address how the religion–state relationship functions. This Article has sought to expose the overlooked question of institutional design in the religion–state relationship. By illuminating and analyzing the role of the prime instigator of religious involvement in political life—religious interest groups—this Article reveals that religious involvement in the political process is more complex than previously thought. Religious interest groups are a structural presence in the federal legislative process, and understanding their function and impact is critical to any complete account of the role of religion in politics and public life.

What this Article reveals is that while religious involvement in politics is generally claimed to support core constitutional goals of democratic participation and religious liberty, the features of these groups result in far more complicated outcomes for these underlying values. While contemporary popular and scholarly discourse generally praises the involvement of religion

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1997 WIS. L. REV. 521 (arguing that predictive tools in social science can be useful in legal analysis and predicting the decisions of public actors), with Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167 (1988) (arguing that it is difficult, if not impossible, to quantitatively predict public persons behavior).

<sup>309</sup> FARBER & FRICKEY, *supra* note 308; Robinson, *supra* note 13, at 150–51.

<sup>310</sup> Robinson, *supra* note 13, at 150–51.

<sup>311</sup> See *supra* Part I.B.2.

in the legislative process as serving the goals of religious liberty and democratic participation, once we bring religious interest groups into view we can see that the presence of religion in the legislative process can sometimes compromise religious liberty and democracy. This Article argues that these mixed results mean that rather than according unmitigated praise to religion in public life, it is essential to rethink the role of religious interest groups in politics in order to appropriately balance the competing outcomes for religious liberty and democracy. By outlining some possible directions for reform that attempt to account for these mixed results, this Article seeks to start a new conversation about the institutional design of religious participation in the legislative process. Ultimately, this Article concludes that, going forward, discussions of religious involvement in political life should attempt to balance both what is gained and lost through the entrenched presence of religious interest groups in the legislative process.