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BY

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For my parents, my wife, and my children

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DISSERTATION OVERVIEW

This J.S.D. dissertation presents Law & Religious Market as an alternative critical perspective to examine the normative considerations that are associated with laws/policies affecting religion. The current legal discourse on religious liberty posits the proper role of the law and other state instruments in relation to religious matters as a neutral arbitrator that avoids making normative claims as to the merits or shortcomings of any particular religion. Drawing from sociological research on religions, the foundational premise of Law & Religious Market perspective is the recognition that the impact of law (and other state instruments) on religion extends beyond circumstances where there are conscious and/or explicit support/suppression of particular religions or religion in general. Law continues to exert a far-reaching influence on prevailing religions and religious practices within jurisdictions through shaping the permissible competitive interaction between religions and the consequent effects on the identities and characteristics of the religions that emerge victorious over their religious rivals. Thus, Law & Religious Market perspective argues that legal discourse cannot hide behind a veil of religious neutrality and must confront the conversation regarding what sort of religious competition – and the consequent winner in the religious market – should be fostered by the state.

This dissertation consists of a series of five journal articles. The first three articles highlight the theoretical deficiencies in the prevailing normative prescription of religious free market in the current legal literature addressing the role of the state in religious competition. The final two articles formally present Law & Religious Market perspective and illustrate its contribution via a case study of China.

The first article [Jianlin Chen, *Deconstructing the Religious Free Market*, 3 JOURNAL OF LAW, RELIGION & STATE 1-24 (2014)] begins by deconstructing the religious free market into the

legal components of free exercise, establishment prohibition and definition of religion. The article discusses how given that the desirable normative interpretations of these two clauses differ widely, the nature of the resulting market will inevitably be dependent on one's choice among these hotly contested interpretations. In particular, this analysis highlights two important questions that have been glossed over by previous advocates of the religious free market: namely, who is entitled to "free competition" and whether religion should be privileged or disadvantaged in comparison with secular ideologies/beliefs in a religious free market.

The second article [Jianlin Chen, *Money and Power in Religious Competition: A Critique of the Religious Free Market*, 3(2) OXFORD JOURNAL OF LAW & RELIGION 212-234 (2014)] critically examines the often unarticulated dynamics of monetary and political competition in religious competitions. The religious free market advocates' idealized portrayal of religions "flourish[ing] according to the zeal of its adherents and the appeal of its dogma" overlooks the brutal and harsh realities of competition in the economic and political sphere. Such an omission is unfortunate. The article argues that without articulating the nature and manner of the religious competition that the religious free market is intended to foster, one remains unable to discern the types of laws and policies required/permitted under the religious free market benchmark. The article explores the interplay among economic, political and religious competition and posits that controversial measures, such as financial affirmative action for socio-economically disadvantaged religions and restrictions on the involvement of religion in politics, may actually be conducive to religious competition, especially if one envisages religious competition as a primarily spiritual and theological contest.

The third article [Jianlin Chen, *Bias and Religious Truth-Seeking in Proselytization Restrictions: An Atypical Case Study of Singapore*, 8(1) ASIAN JOURNAL OF COMPARATIVE LAW 21-85 (2013)] draws on the case study of Singapore's restrictions on proselytization to highlight the non-neutrality of the religious free market among different religions. The religious free market expects religions to compete vigorously with one another for religious converts under the view that free competition will facilitate religious truth seeking. However, an emphasis on evangelicalism is not uniformly shared among other religions and the aversion/indifference to establishing objective religious truth is reflected in the theological outlook of certain major religions, such as Buddhism, Taoism and Hinduism. The article questions the unadulterated applicability of the religious free market to these religions, especially in a society in which these religions constitute the majority.

The fourth article [Jianlin Chen, *Law & Religious Market*] presents Law & Religious Market perspective by examining the sociological conception of the religious economic model and the dynamic between laws and religious competition. The article illustrates the informative value of Law & Religious Market perspective by applying it to the controversies surrounding the inclusion of religious content in social service provision by religious charitable organizations and the judicial granting of religious exemptions to generally applicable law. The article further discusses the implications of Law & Religious Market perspective on the broader debate relating to the different church-state models and argues that the central premise of neutrality underpinning the various church-state models should not distract from the factual and normative assessment as to the impact of law on religious competition.

The fifth article [Jianlin Chen, *Law & Religious Market in China: The Case For Gradual Market Liberalization*] applies Law & Religious Market perspective to China to highlight the factual and normative contributions that can be derived from the perspective. Factually, the article lay out the precise nature of religious competition as envisaged by the current legal regime in China beyond the typical mere identification of how religious practices are restricted in China in the current literature. Normatively, the article argues that although the current legal regime is excessively involved in heavy-handed interventions driven by compulsive concerns for political control, the conscious differentiation of religions based on their practical impact on society – not their theological content – is the necessary and appropriate inquiry that should be preserved in any actual reform. In addition, the article argues that even if a religious free market is the normative goal of reform, several of the current restrictions on religious activities are useful for moderating religious competition during the transition from the relatively infant religious market of China.

CHAPTER 1:

DECONSTRUCTING THE RELIGIOUS FREE MARKET

First Published: Jianlin Chen, *Deconstructing the Religious Free Market*, 3 JOURNAL OF LAW,
RELIGION & STATE 1-24 (2014)

I. INTRODUCTION

Commonly associated with the American church-state model,¹ a religious free market aims to foster a socio-legal environment where different religions freely compete with one another for followers without restrictions or distortions by the State.² This is achieved, at least in theory, via the Free Exercise Clause of the First Amendment of the U.S. Constitution that guarantees the freedom to conduct religious activities, and the Establishment Clause prohibits the state from tipping the scale in favor of a particular religion.³ The nature of the relationship between the state and religion under the religious free market is perhaps best captured by the oft-quoted statement from the U.S. Supreme Court case of *Zorach v. Clauson* that government should let “each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.”⁴

Given this attractive image of liberty, free-market competition, religious truth seeking and the purported state neutrality, it is unsurprising that the religious free market is a popular normative

¹ Larry Witham, *Marketplace of the Gods: How Economics Explains Religion* (Oxford University Press 2010) 119; Christopher L. Eisgruber, ‘Secularization, Religiosity, and the United States Constitution’ (2006) 13 *Indiana J Global L Study* 445, 464-468; Paul Harvey, ‘Proselytization’ in Philip Goff & Paul Harvey (eds), *Religion and American Culture* (University of North Carolina Press 2004) 40; Yunfeng Lu, *The Transformation of Yiguan Dao in Taiwan: Adapting to a Changing Religious Economy* (Lexington Books 2008) 7; Victor N. Metallo, ‘Procedamus in pace Serving Justice: RLUIPA Resonates the Teachings of Dignitatis Humanae, and the Third Circuit’s ‘Substantial Burden’ Test Provides a Thorough, Fair Inquiry into a Prisoner’s Religious Exercise’ (2011) 88 *U Detroit Mercy L Rev* 497, 499; Everett Carl Ladd, ‘Secular and Religious America’ in Richard John Neuhaus (ed), *Unsecular America* (William B. Eerdmans Publishing 1986) 18.

² Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005) 92-95; R. Andrew Chesnut, *Competitive Spirits: Latin America’s New Religious Economy* (Oxford University Press 2003) 10-11; Rodney Stark & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (University of California Press 2000) 225. For a discussion of the wide array of possible church-state models, see generally Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 26-40; Ahdar & Leigh (n 2) 67-97.

³ U.S. Constitution amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁴ 343 U.S. 306, 313 (1952) (“We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.”).

benchmark among legal academics in both U.S. and abroad.⁵ Yet the concept of the religious free market remains under-theorized amidst this frequent references to and reliance of the concept in the legal literature. Academics evoking the religious free market have rarely elucidated what exactly the concept entails or articulated the assumptions underpinning it. The consensus is that the religious free market requires the legal guarantee arising from the Establishment and Free Exercise Clauses. However, with opinions of the desirable normative interpretations of these two clauses differing widely,⁶ the nature of the resulting market will inevitably be dependent on one's choice among these hotly contested interpretations.

This Article deconstructs the religious free market into the legal components of free exercise, establishment prohibition and definition of religion. Additionally, this Article discusses how the different interpretations and combinations of these legal components would affect the final religious market. In particular, this analysis highlights two important questions that have been frequently glossed over by advocates of the religious free market: namely, who is entitled to “free competition” and whether religion should be privileged or disadvantaged in comparison with secular ideologies/beliefs in a religious free market.

This Article is organized into five parts. Part II examines the historical evolution, common justifications and critiques of the religious free market as a constitutional principle. Part III sets out the various possible interpretations of the three legal components of the religious free market.

⁵ *Infra* II.B.

⁶ For discussions on First Amendment Religion Clauses jurisprudence, see generally Peter K. Rofes, *The Religion Guarantees: A Reference Guide to the United States Constitution* (Praeger 2005); Geoffrey R. Stone et al., *Constitutional Law* (5th ed., Aspen Publishers, 2005) 1485-1581; James Hitchcock, *The Supreme Court and Religion in American Life: Volume I The Odyssey of The Religion Clauses* (Princeton University Press 2004); Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* (Aspen 2002).

Part IV synthesizes the presiding discussions to illustrate the surprising dynamics among these legal components and highlights the implications on the use of religious free market as a normative guiding principle. Part V concludes.

II. INTELLECTUAL HISTORY OF THE RELIGIOUS FREE MARKET

A. *Historical Origin*

The concept of the religious free market has a long and distinguished pedigree. Government regulations have little or no place in the free market of religion. It is therefore not surprising that the religious free market can be traced back to Adam Smith.⁷ In both “The Wealth of Nations”⁸ and “The Theory of Moral Sentiments,”⁹ Adam Smith applied market principles to religious enterprise. His general disdain toward state monopolies was reflected in his critique of the inefficient European state-sponsored religious monopolies, such as the Church of England or the established Catholic and Lutheran Churches in continental Europe.¹⁰

Adam Smith would ultimately become more well known for his expositions on economics. Nonetheless, his ideas on religious free market gained tractions among the contemporaneous

⁷ Witham (n 1) 14; Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press 2008) 26-31; Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market* (Paramount Market Publishing 2006) 2; Randall Balmer, ‘Fundamentalism, The First Amendment, and the Rise of the Religious Right’ (2010) 18 William & Mary Bill of Rights J 889, 892; Keith N. Hylton et al., ‘Church and State: An Economic Analysis’ (2011) 13(2) American Law and Economics Review 402, 406-407; Robert J. Barro & Rachel M. McCleary, ‘Which Countries Have State Religions’ (2005) Quarterly Journal of Economics, Nov. 2005, 1331, 1331.

⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., Modern Library 1994).

⁹ Adam Smith, *The Theory of Moral Sentiments* (D. D. Raphael & A. L. Macfie eds., Oxford University Press 1979).

¹⁰ *ibid* 185-187; Smith, (n 8) 846-875. For contemporaneous discussion and reference, *see* Hylton et al. (n 7) 406; Kosmin & Keysar (n 7) 2; Michael W. McConnell, ‘Why is Religious Liberty the ‘First Freedom’?’ (2000) 21 Cardozo L Rev 1243, 1255.

intellectuals across the Atlantic. James Madison's views on religious liberty reflected the religious free market.¹¹ Commentators have also frequently argued that the promotion of a religious free market was part of the American Founders' intentions in drafting the Constitution.¹² This is not surprising. While primacy of religion and Christianity were frequently invoked by key members of the Founders,¹³ there was general consensus to avoid the religious establishment of England.¹⁴ Religious free competition under minimal interference by the federal government was a useful tool to resolve the tensions of interests among the various Protestant sects and the strands of deisms in America during the founding era.¹⁵

B. Modern Revival

The religious free market principle did not prevent the de facto establishment of Protestant Christianity in United States.¹⁶ Indeed, established churches at state level continued for several

¹¹ Hylton et al. (n 7) 404-405; Patrick M. Garry, 'The Myth of Separation: America's Historical Experience with Church and State' (2004) 33 Hofstra L Rev 475, 483; McConnell (n 17) 1255; Thomas C. Berg, 'Religion Clause Anti-Theories' (1997) 72 Notre Dame L Rev 693, 703-704.

¹² Kosmin & Keysar (n 7) 3; Patrick M. Garry, *Wrestling with God: The Court's Tortuous Treatment of Religion* (Catholic University of America Press 2006) 96-97; Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 Ala. L. Rev. 1 (1987) 13; McConnell (n 10) 1255; Hylton et al. (n 7) 404-406; Metallo (n 1) 499.

¹³ Reichley, *Faith in Politics* (Brookings Institution Press 2002) 94-99; Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 Hofstra L Rev(2004) 476-477.

¹⁴ Anita Y. Woudenberg, 'Propagating a Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality' (2009) 7 First Amendment L Rev 307, 313; Garry (n 13) 94-95; David Robertson, 'Neutrality Between Religions or Neutrality Between Religion and Non-religion' in Peter W. Edge & Graham Harvey (eds), *Law and Religion in Contemporary Society* 31 (Ashgate 2000) 32.

¹⁵ William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (Yale University Press 2003) 20-21; Robertson (n 14) 34.

¹⁶ William Cobern, 'The Competing Influence of Secularism and Religion on Science Education in a Secular Society' in Ariela Keysar & Barry A. Kosmin (eds), *Secularism & Science in the 21st Century* (ISSSC 2008) 89 & 91; Steven H. Shiffrin, 'The Pluralistic Foundations of the Religion Clauses' (2004) 90 Cornell L Rev 9, 70; Hutchison (n 15) 59-83; Robertson (n 14) 35.

years after passage of the Constitution.¹⁷ Nonetheless, the intellectual seeds were sowed. The revival of the concept in modern times can be traced to the emergence of the religious economic model among the sociological studies of religion in the 1980s. Drawing on the economic assumption of rationality, this new model treats religious adherents as individual rational actors making decisions about the choice of religion and the level of religious participations.¹⁸ Such fusion of sociology and economics helps explain the continued vibrancy of religion in society and promotes better understanding of the successes and failures of faith-based organizations.¹⁹ The model facilitated comparative studies of religions in the different types of socio-legal environment by differentiating between monopolized, regulated and unregulated religious market in accordance with the prevailing law and policies in the polity.²⁰ The model, when fused with the analytical perspective of political science, also helps provide a compelling account about the political origins of religious liberty.²¹

By the late 1980s, this increasingly popular analytical framework prompted renewed attention from legal scholars such as Richard Posner, Michael W. McDonnell, Thomas C. Bergs, and Daniel A. Spiro on the religious free market as a normative constitutional principle – i.e. the law should create a religious free market.²² Since then, many other U.S. legal academics simply

¹⁷ Garry (n 13) 479; Robertson (n 14) 35.

¹⁸ Chesnut (n 2) 7.

¹⁹ Lu (n 1) 7; Chesnut (n 2) 6-8 (discussing the academic history of application of religious economy to Latin America); Stark & Finke (n 2) 27-41 (discussing the religious economy approach in the context of past and prevailing perspectives in the study of religions). See also Hylton et al. (n 7) 407.

²⁰ Gill (n 7) 26-40; Kosmin & Keysar (n 7) 6; Witham (n 1) 115-138; Chesnut (n 2) 8-10.

²¹ For an excellent exposition of the theory, completed with a diverse selection of case studies, both historical and contemporaneous, see Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press 2008).

²² E.g., see Richard A. Posner, 'The Constitution as an Economic Document' (1987) 56 *George Washington L Rev* 4, 18; Michael W. McConnell & Richard A. Posner, 'An Economic Approach to Issues of Religious Freedom' (1989) 56

analyzed the Establishment Clause through the perspective of the religious free market principle²³ or assumed the religious free market as the benchmark in their analysis of the Religion Clauses in general.²⁴ The religious free market has also been adopted by legal scholars abroad in their analysis of foreign jurisdictions. Examples include Russell Sandberg's assessment of the European Court of Human Rights,²⁵ Kyriakos N. Kyriazopoulos's critique of Greek anti-proselytization laws,²⁶ and Li-Ann Thio's advocacy of the concept in the context of Singapore.²⁷

C. *Common Justifications*

Such popularity is perhaps unsurprising, given the several arguments in favor of the religious free market. These arguments are often related but not always consistent with one another, and can be broadly categorized based on whether religious free competition is an end to itself, or as a mean to other normative goals.

U Chicago L Rev 1; Thomas C. Berg, 'What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act' (1994) 39 Villanova L Rev 1, 25; Spiro (n 12) 5-14.

²³ Daniel M. Hinkle, 'Preemptory Challenges Based on Religious Affiliation: Are they Constitutional?' (2005) 9 Buffalo Criminal L Rev 139, 154; Anastasia P. Winslow, 'Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites' (1996) 38 Arizona L Rev 1291, 1335-1336.

²⁴ Douglas Laycock, 'Religious Liberty as Liberty' (1996) 7 J Contemporary Legal Issues 313, 350; Joel S. Jacobs, 'Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test' (1994) 22 Hastings Constitutional LQ 29, 69-70; Richard Delgado, 'Cults and Conversion: The Case for Informed Consent' (1982) 16 Ga. L. Rev. 533, 555-556. See also Metallo (n 1) 525-526; Rosalind I. J. Hackett, 'Religious Pluralism in an Undecidedly Secular World' (2006) 33 Human Rights 21, 22; Richard M. Esenberg, 'You Cannot Lose if You Choose Not to Play: Toward a More Modest Establishment Clause' (2006) 12 Roger Williams U L Rev 1, 65.

²⁵ Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 35, 70.

²⁶ Kyriakos N. Kyriazopoulos, 'Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality' (2004) 20 J L & Religion 149, 149-150.

²⁷ Thio Li-Ann, 'Constitutional 'Soft' Law and Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' [2004] Singapore J Legal Studies 414, 422; Kevin YL Tan & Thio Li-Ann, *Constitutional Law in Malaysia and Singapore* (Butterworths 1997) 876.

In the former category is the justification based on religious liberty.²⁸ Religious liberty is often considered as a core human right²⁹ and as an important, if not the most important, right protected under the U.S. Constitution.³⁰ Religious liberty is safeguarded under the religious free market through the prohibition of state interference with and regulation of religions, whether through support for a particular religion or restrictions of certain religious practices. As an end to itself, the religious liberty argument does not necessarily assume that religion has to be a good thing,³¹ and can be premised on the notion that unhindered religious expression is an integral aspect of individual fulfillment and autonomy.³² Religious free competition is also independently valuable for its prevention of religious oppression through removing the coercive force of the state from the regulation of religion.³³ As argued by Christopher L. Eisgruber and Lawrence G. Sager, the U.S. “Constitution is not to privilege or protect religion per se, but rather to protect all citizens from discrimination born of religious diversity.”³⁴

²⁸ Kosmin & Keysar (n 7) 2.

²⁹ Daniel O. Conkle, ‘Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty’ (2011) 32 Cardozo L Rev 1755, 1763; Thio Li-ann, ‘Courting Religion: The Judge Between Caesar and God in Asian Courts’ [2009] Singapore J Legal Studies 52, 52. See M. Todd Parker, ‘The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR’ (2006) 17 Duke J Comparative & Intl L 91, 91.

³⁰ Garry (n 12) 150; McConnell (n 10).

³¹ Laycock (n 24) 313.

³² Richard M. Esenberg, ‘Must God be Dead or Irrelevant: Drawing a Circle that Lets Me in’ (2009) 18 William. & Mary Bill Rights J 1, 37; Elizabeth Wicks, ‘Religion, Law and Medicine: Legislating on Birth and Death in a Christian State’ (2009) 17 Medical L Rev 410, 411; Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Press 2008) 29-40; Thio (n 27) 417.

³³ Witham (n 1) 194; Kosmin & Keysar (n 7) 4.

³⁴ Christopher L. Eisgruber & Lawrence G. Sager, ‘Does it Matter What Religion is?’ (2009) 84 Notre Dame L Rev 807, 826.

In comparison, the other important line of justification for the religious free market has a more functional orientation that assumes religion is a good thing and focuses on how the religious free market benefits religion. There are two possible manifestations of this approach. First, the promotion of religiosity. Based on observations of the significantly higher religiosity of the American population compared with their European counterparts,³⁵ commentators have frequently identified the separation of the church and state in the U.S. (i.e., the Establishment Clause) as the reason for the U.S. population's religiosity.³⁶ This is echoed in the sociological studies of religions that specifically argues for the religiosity promotion effect of the religious free market,³⁷ including the use of market analogies to explain how overregulation limits religious choices and supply, which, in turn, reduces the consumption of religion.³⁸

Aside from religiosity, the other functional justification focuses on facilitation of religious truth seeking. Resembling the “marketplace of ideas” rationale supporting the freedom of speech that envisages the emergence of objective truth amidst free competition with opposing ideas,³⁹

³⁵ Paul Horwitz, ‘Religion and American Politics: Three Views of the Cathedral’ (2009) 39 U Memphis L Rev 973, 975; Garry (n 12) 123; Reichley (n 13) 1. See Shiffrin (n 16) 48-51; Ladd (n 1) 20-21.

³⁶ Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50 William & Mary L Rev 1831, 1909; Steven Goldberg, *Bleached Faith: The Tragic Cost when Religion is Forced into the Public Square* (Stanford University Press 2008) 20; Richard M. Esenberg (n 32) 50; Cobern (n 16) 91; Robert F. Cochran, Jr., ‘Evangelicals, Law, and Abortion’ in Robert F. Cochran, Jr. (ed), *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law* (New York University Press 2008) 100-101. But c.f. Shiffrin (n 16) 52 (“[T]he extent to which repression has enhanced some religions and diminished others may not be fully appreciated in much of the religion clause literature ... Christianity flourishes in Central and South America as well as Africa – religions where dictatorships and support for Christianity have often been intertwined.”).

³⁷ Witham (n 1) 152; Kosmin & Keysar (n 7) 1; Stark & Finke (n 2) 201-202. See also Thomas F. Farr, ‘The Widow’s Torment: International Religious Freedom and American National Security in the 21st Century’ (2009) 57 Drake L Rev 851, 864; Eisgruber (n 1) 464-468.

³⁸ Richard A. Posner, *Economic Analysis of Law* (Aspen, 8th ed., 2011) 948-949; Witham (n 1) 148-152; Chesnut (n 2) 8-10; McConnell & Posner (n 22) 55.

³⁹ Lawrence Rosenthal, ‘First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech’ (2011) 86 Indiana LJ 1, 61-62 & 61 n.288; Steven G. Gey, ‘The First Amendment and the Dissemination

religious truth is similarly more likely to be widely accepted⁴⁰ if religions are allowed to “flourish according to the zeal of its adherents and the appeal of its dogma.”⁴¹ Religious free competition will also produce religious doctrines that best suit the times and circumstances.⁴² Conversely, “informed” religious choice is impeded by restrictions on religious propagation and proselytization.⁴³ It is worth noting that this religious truth-seeking rationale is also commonly featured in arguments for religious liberty.⁴⁴

D. Preliminary Critique

The religious free market is not without controversies. For starter, the proponents of religious free competition are also often guilty of selective applications of the religious free market. One example can be found in nineteenth-century America, in which Christian missionaries advanced the free market of the soul as a justification for disestablishing the Mormon Church.⁴⁵ However, by the turn of the twentieth century, the missionaries had moved away from the free-

of Socially Worthless Untruths’ (2008) 36 Florida State U L Rev 1, 6-9; Hugo M. Mialon & Paul H. Rubin, ‘The Economics of the Bill of Rights’ (2008) 10(1) American L and Economics Rev 1, 6; Stone et al. (n 6) 1054-1056; William P. Marshall, ‘Truth and Religion Clauses’, 43 DePaul L. Rev. 243, 256 (1994).

⁴⁰ Marshall (n 39) 255-256; M. H. Ogilvie, ‘Between Libert  and  galit : Religion and the State in Canada’ in Peter Radan et al. (eds), *Law and Religion: God, the State and the Common Law* (Routledge 2005) 154.

⁴¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

⁴² Kosmin & Keysar (n 7) 4; Kuah-Pearce Khun Eng, *State, Society and Religious Engineering: Towards a Reformist Buddhism in Singapore* (Eastern Universities Press 2003) 164; Hylton et al. (n 7) 407.

⁴³ Thio Li-ann, ‘Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy’ [2010] Singapore J Legal Studies 484, 510; Stephen C. Berkwitz, ‘Religious Conflict and the Politics of Conversion in Sri Lanka’ in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 216.

⁴⁴ Conkle (n 29) 1757-1762; Robert P. George, ‘Natural Law’ (2008) 31 Harvard J L & Public Policy 171, 183-184; Rodney K. Smith & Patrick A. Shea, ‘Religion and the Press: Keeping First Amendment Values in Balance’ [2002] Utah L Rev 177, 200; Marshall (n 39) 255-260; Leonard A. Leo et al., ‘Protecting Religions from “Defamation”: A Threat to Universal Human Rights Standards’ (2011) 34 Harvard J L & Public Policy 769, 782.

⁴⁵ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (University of North Carolina Press 2002) 231-232.

market principle after realizing that no competitive edge had been obtained from disestablishment.⁴⁶ In modern times, organizations such as the World Council of Churches, Pentecostals, Roman Catholics, and the Romanian Orthodox Church denounce intra-Christian proselytization while still encouraging the conversion of non-Christians into Christians.⁴⁷ This reflects the practice of ecumenicity or ecumenical amity among Christian churches which often involve “explicit or implicit agreements not to poach on each other’s territory.”⁴⁸ Paul Freston similarly observed how “some Pentecostal proselytizers appear to want the freedom to ‘win’ and then close down religious freedom.”⁴⁹

To be sure, the hypocrisies and inconsistent behaviors of the purported advocates of the religious free market are not evidence of the shortcomings of the religious free market as a normative ideal. More problematic is the fact that the advocates of the religious free market do not always share the same assumptions about religious liberty or the normative goals which the religious free market are intended to facilitate. The role of government regulations in the religious free market is also ambiguous. For example, the conception of the religious free market has been relied on to argue both for and against restrictions of religious speech. Douglas Laycock utilized the religious truth seeking aspect of the religious free market to argue against restrictions on

⁴⁶ *ibid* 232.

⁴⁷ Grace Y. Kao, ‘The Logic of Anti-proselytization, Revisited’ in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 82-83. See also Peter L. Berger, ‘Pluralism, Protestantization, and the Voluntary Principle’ in Thomas Banchoff (ed), *Democracy and the New Religious Pluralism* (Oxford University Press 2007) 22.

⁴⁸ Berger (n 47) 22.

⁴⁹ Paul Freston, ‘The Changing Face of Christian Proselytizing: New Actors from the Global South Transforming Old Debates’ in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 123.

government funding to private religious speech.⁵⁰ On the other hand, Richard Delgado recommended regulations on the “coercive persuasion” techniques of certain religious cults on the basis that such “recruiting techniques ... bypass the decision-making faculties of would-be adherents” and thus impedes genuine religious competition.⁵¹

While both arguments may be reconciled by their emphasis on the shared purported goals of religious truth seeking, there remains unanswered assumptions. These include the role of material wealth in religious competition. The contribution of material wealth to success has been recognized in other realms of competition for truth, such as legal truth finding (litigation)⁵² and political truth finding (political competition).⁵³ State affirmative action targeting only religions that are economically disadvantaged can arguably reduce the influence of money on a religion’s success. Notwithstanding the clear contravention of the Establishment Clause, such state actions may ironically promote religious free competition especially if religious free competition is envisaged as a primarily spiritual and doctrinal contest that should not be tainted by wealth disparity.⁵⁴

⁵⁰ Laycock (n 24) 350.

⁵¹ Delgado (n 24) 555-556.

⁵² E.g., Issachar Rosen-Zvi, ‘Just Fee Shifting’ (2010) 37 Florida State U L Rev 717, 718-719. For discussions about how money contribute to litigation success, see Albert Yoon, ‘The Importance of Litigant Wealth’ (2010) 59 DePaul L Rev 649; Stanton Wheeler et al. ‘Do the “Haves” Come Out Ahead? Winning and Losing in the State Supreme Courts, 1870-1970’ (1987) 21 L & Society Rev 403.

⁵³ For discussions about the role of money in political speech and political competition, see Timothy K. Kuhner, ‘Citizens United as Neoliberal Jurisprudence: the Resurgence of Economic Theory’ (2011) 18 Virginia J Social Policy & L 395, 414-448; Deborah Hellman, ‘Money Talks But It Isn’t Speech’ (2011) 95 Minnesota L Rev 953; Michael Bailey, ‘The Two Sides of Money in Politics: A Synthesis and Framework’ (2004) 3 Election L J 653.

⁵⁴ For a full treatment about the contribution of material wealth in religious competition and the consequential legal implications, see Jianlin Chen, ‘Money and Power in Religious Competition: A Critique of the Religious Free Market’ (2014) Oxford J of Law and Religion, doi:10.1093/ojlr/rwt069.

Aside from the ambiguity about the nature of “religious free competition” envisaged under the religious free market, the importance of religious truth-seeking is also not universally shared by all religions. Not all religions are predicated on truth claims.⁵⁵ Examples of these religions include Hinduism,⁵⁶ Buddhism,⁵⁷ Taoism⁵⁸ and Native American religions.⁵⁹ While otherwise advocating for religious truth seeking as the guiding principle of the U.S. Religious Clauses, William P. Marshall nevertheless acknowledged that the critique regarding the divergence in the religions’ different purposes “can be deflected but not fully avoided.”⁶⁰ This critique will be particularly salient in jurisdictions where the religious outlook of the majority, unlike arguably in the U.S., are ambivalent to religious truth-seeking.⁶¹

While a full critical inquiry into the normative desirability of the religious free market and the comprehensive analysis of all its various assumptions is beyond the scope of this Article, this Article aims to contribute to the understanding of this otherwise popular concept by demonstrating how the seemingly established legal framework of Establishment and Free Exercise clauses can

⁵⁵ Sarah Claerhout & Jakob De Roover, ‘Conversion of the World: Proselytization in India and the Universalization of Christianity’ in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 65; Marshall (n 39) 265. See generally S. A. Nigosian, *World Religions: A Historical Approach* (Bedford/St. Martin’s 3rd ed. 2000) 414-419 (discussing how the different religions differ in their conceptions of religious path and goals).

⁵⁶ P.N. Bhagwati, Religion and Secularism Under the Indian Constitution, in Robert D. Baird (ed), *Religion and Law in Independent India* (2nd ed, Manohar 2005) 39; Jeff Spinner-Haley, ‘Hinduism, Christianity, and Liberal Religious Toleration’ (2005) 33(1) Political Theory 28, 37.

⁵⁷ Conkle (n 29) 1764-1765.

⁵⁸ See generally Francisca Cho, ‘Leaping into the Boundless: A Daoist Reading of Comparative Religious Ethics’ (1998) 26(1) J of Religious Ethics 139.

⁵⁹ Harvey (n 1) 41-42.

⁶⁰ Marshall (n 39) 266.

⁶¹ For a case study of one such jurisdiction, see Jianlin Chen, ‘Bias and Religious Truth-Seeking in Proselytization Restrictions: An Atypical Case Study of Singapore’ (2013) 8(1) Asian Journal of Comparative Law 1.

yield different and conflicting manifestations of the religious free market. As shall be discussed in the next Part, the tension between these competing conceptions and assumptions are reflected in the hotly contested interpretations of Free Exercise, Establishment and the definition of religion.

III. THE LEGAL COMPONENTS

A. *Free Exercise: The Highs and Lows of Free Exercise Protection*

The guarantee of free exercise is necessary for free competition among religions. If a religion is legally impeded from performing its religious practices or propagating its religious teachings, it will naturally be disadvantaged in the religious marketplace vis-à-vis the other religions that do not face such impediments. Most would agree that it is unconstitutional for legal impediments to target a specific religion or religious practices *qua* religion.⁶² The real controversy concerns a generally applicable law that incidentally impedes religious practices. The majority of the U.S. Supreme Court in *Employment Division, Department of Human Resources v. Smith*⁶³ reduced the level of scrutiny by dispensing with the need for the state to demonstrate a compelling interest in a neutral, generally applicable law that otherwise impedes religiously motivated actions.

⁶² Conkle (n 29) 1755-1756; Kent Greenawalt, *Religion and the Constitution: Volume 1: Free Exercise and Fairness* (Princeton University Press 2006) 36; Russell L. Weaver, 'The Free Exercise Clause of the United States Constitution' in Peter Radan et al. (eds), *Law and Religion: God, the State and the Common Law* (Routledge 2005) 71-73; Rofes (n 6) 167-169. Under what provision should it be unconstitutional is less clear. Justice Scalia in *Employment Division, Department of Human resources v. Smith*, 494 U.S. 872 (1990) indicated that it is unconstitutional under the free exercise clause to ban acts or abstentions solely because of the religious belief that they display. This is confirmed in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) where a city's ban on "ritual slaughter" is invalidated as it is targeted at a particular religious groups amidst animosity towards that group. Nonetheless, it is possible to envisage its unconstitutionality under the equal protection clause, with religion an seemingly uncontroversial candidate as a protected class: Caroline Mala Corbin, 'Nonbelievers and Government Speech' (2012) 97 Iowa L Rev 347, 379 n.230.

⁶³ 494 U.S. 872 (1990).

This decision has been criticized by many academics and the public.⁶⁴ In response, Congress enacted the Religious Freedom Restoration Act, which sought to reinstate the compelling interest test.⁶⁵ The Act was later struck down in *City of Boerne v. Flores* on grounds that the statute exceeds Congress's power.⁶⁶ An empirical study of US court cases from 1981 to 1996 confirmed that Smith had lowered the standard of free exercise protection.⁶⁷

Jurisprudence of the European Convention of Human Rights reflects similar tension in determining whether religious exemptions should be granted from generally applicable law. Under article 9(2), the right to religious practice is subjected to laws necessary for public safety, public order, health and morals, or the rights of others. The European Court of Human Rights adopted a balancing approach in resolving the question.⁶⁸ However, limiting strategies such as religiously motivated-compelled distinctions and core-peripheral distinctions have been employed by the European and domestic courts to defeat claims of religious exemptions and increase the de facto threshold for religious exemptions.⁶⁹

⁶⁴ Conkle (n 29) 1755-1756; Julia K. Stronks, *Law, Religion, and Public Policy: A Commentary on First Amendment Jurisprudence* (Lexington Books 2002) 32; Edwin S. Gaustad, *Proclaim Liberty Throughout All the Land* (Oxford University Press 2003) 130; Kent Greenawalt (n 62) 77-85; John Wybraniec & Roger Finke, 'Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule' in James T. Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* (Kluwer Academic 2004) 536-538.

⁶⁵ Gaustad (n 64) 130-134; Wybraniec & Finke (n 64) 537-538; Bette Novit Evans, 'The Constitutions of Religious Pluralism in the United States' in Alan Wolfe & Ira Katznelson (eds), *Religion and Democracy in the United States: Danger of Opportunity?* (Princeton University Press 2010) 132-133.

⁶⁶ 521 U.S. 507 (1997). See Robert Booth Fowler et al., *Religion and Politics in America: Faith, Culture, and Strategic Choices* (4th ed, Westview Press 2010) 253-255 (discussing the aftermath of RFRA); Zoë Robinson, 'Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion' (2011) 20 William & Mary Bill Rights J 133, 138-143.

⁶⁷ Wybraniec & Finke (n 64) 550.

⁶⁸ Wicks (n 32) 411; Malcolm D. Evans, 'Religion, Law and Human Rights: Locating the Debate' in Peter W. Edge & Graham Harvey (eds), *Law and Religion in Contemporary Society* (Ashgate 2000) 185.

⁶⁹ Ahdar & Leigh (n 2) 160-173.

From the perspective of the religious free market, a high standard of free exercise protection is not always necessary for religious free competition. If the impediments to religions in neutral, generally applicable laws are indeed truly random without influence of insidious religious discrimination, then all religions will be equally subjected to the increased risk of legal impediments under a lower standard of free exercise protection. The disproportionate burden suffered by a religion under a particular law will be evened out over time and over the entire spectrum of laws.

There is a legitimate concern that the burdens of facially neutral, generally applicable laws are usually not random in actual practice. The needs of the religious minority are frequently overlooked by the political majority.⁷⁰ On the flip side, majority and mainline religions are more likely to automatically enjoy legislative exemptions during the legislative process.⁷¹ While members of a political minority are not necessarily incapable of obtaining legal exemptions,⁷² one is entitled to be skeptical of whether this is sufficient on a systematic level in light of the unfortunately common history of religious minorities actively being targeted for legal

⁷⁰ Phillip E. Hammond, 'What's Happening in American Church/State Jurisprudence' in James A. Beckford & James T. Richardson (eds), *Challenging Religion* (Routledge 2003) 136-137; John C. Blakeman, *The Bible in the Park: Religious Expression, Public Forums, and Federal District Courts* (University of Akron Press 2005) 234.

⁷¹ Robinson (n 66) 168-170; Greenawalt (n 62) 81.

⁷² Kathleen M. Sullivan, 'The New Religion and the Constitution' 116 Harvard L Rev 1397, 1411(2003); Robinson (n 69) 165-166; Gregory C. Sisk, 'How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases' 76 U Colorado L Rev 1021, 1024 (2005).

sanctions/impediments.⁷³ In these circumstances, a level playing field for minority religions may require a higher standard of free exercise enforced by the judiciary.⁷⁴

Even if one rules out insidious or subconscious religious discrimination in the lawmaking process, the conclusion that religious free competition is unimpeded by a lower standard of free exercise protection is premised on the assumption that the relevant competitors are religions and do not include secular views. This assumption is not shared by Michael W. McConnell and Richard A. Posner in their economic analysis of religious freedom.⁷⁵ As will be explored further in the following section on the Establishment Clause, the preference or non-preference for religion vis-à-vis secular views is a hotly disputed aspect of the Religion Clauses and has important implications for the religious free market.

B. Establishment: What Sort of Neutrality Do We Really Want?

Guarantee of free exercise anchors religious liberty as a foundational ingredient of religious free competition, but it is the Establishment Clause that distinguishes the religious free market. It is open to dispute whether the prohibition of state support, subsidy or otherwise establishment of religion is necessary to guarantee religious liberty.⁷⁶ The European Commission on Human Rights

⁷³ E.g., Catholics: Cobern (n16) 91; Sisk (n 72) 1039; Mormons: Sarah Barringer Gordon (n 45) 16-166; Hutchison (n 15) 52-54.

⁷⁴ For a discussion about how the interpretation of the Religion Clauses affects the role of political competition in religious competition, see Jianlin Chen, 'Money and Power in Religious Competition: A Critique of the Religious Free Market' (2014) Oxford J of Law and Religion, doi:10.1093/ojlr/rwt069. For an interest groups perspective of how the political dynamics affect the relevant legal doctrines, see Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press 2008) 47-55.

⁷⁵ McConnell & Posner (n 22) 33-35 (their adopted neutrality baseline is neutrality between religious and secular).

⁷⁶ See Rex Ahdar & Ian Leigh, 'Is Establishment Consistent with Religious Freedom?' (2004) 32 McGill L J 635 (arguing that religious freedom does not necessary requires religious equality and that mild Establishment is compatible with religious freedom).

did not hold the establishment of a state religion as a violation of religious freedom.⁷⁷ Some U.S. scholars have also argued that not all state endorsements of the majority's religious traditions diminish religious liberty, especially in the absence of coercion.⁷⁸ However, if a religious free market is the goal, then state's religious establishment (e.g., the subsidies and support provided to a religion by the state) poses a real risk of distorting the supply and consumption of religions.⁷⁹ Establishment can also indirectly frustrate religious competition "by creating a single church (or set of churches) which, as a result of their enormous wealth or their political influence, are uniquely capable of supplying what their members want and so squeeze out other faiths; or, ... by providing all churches with an incentive to serve the state rather than their congregations."⁸⁰

1. Substantive Neutrality

Many academics have criticized the U.S. Establishment Clause's jurisprudence as consisting of unprincipled compromises or worse.⁸¹ From the perspective of the religious free market, the dispute can be seen as reflecting the dispute of which competitors are entitled to free competition. Michael W. McConnell and Richard A. Posner's economic analysis of religious freedom is premised on the notion that religions and non-religions should be placed on equal footing.⁸² This argument essentially represents the "substantive neutrality" principle, in which the

⁷⁷ Sandberg (n 25) 67; Wicks (n 32) 412; Ahdar & Leigh (n 2) 135-138.

⁷⁸ Eisenberg (n 32) 53-59; Woudenberg (n 14) 347-348; Garry (n 12) 128-146; Ahdar & Leigh (n 76) 660-663.

⁷⁹ Gill (n 7) 18-21; Posner (n 38) 949.

⁸⁰ Eisgruber (n 2) 467-468.

⁸¹ See Koppelman (n 36) 1837; Woudenberg (n 14) 320-321 ("arbitrary and inconsistent"); Garry (n 12) 129 ("decades of inconsistent jurisprudence"); Posner (n 38) 950 ("Some of these efforts are held to violate the Establishment Clause, others not; there is no discernible pattern or crisp legal standard."); Fowler et al. (n 66) 261 ("Taken as a whole, Establishment Clause jurisprudence in the twentieth century amounted to nothing more than a confusing mess to many observers.").

⁸² McConnell & Posner (n 22) 33-35.

“state must often treat religious activities as it treats comparable secular activities to maintain evenhandedness, but it must avoid endorsing any particular religion or religion (or secularism) in general.”⁸³ Calvin Massey observed that this “substantive neutrality” is the position of the current U.S. Supreme Court.⁸⁴

2. Accommodationist

It is also possible to conceive of the religious free market perspective as requiring free competition *only* among religions. This conclusion is reached under the accommodationists’ interpretation of the Establishment Clause. Under their views, the Establishment Clause only requires the state to be neutral among religions.⁸⁵ The government is perfectly entitled to prefer religion in general over non-religion from both the legal and normative perspectives. The legal argument holds that the constitutional structure grants a special status and preference to religion when it specifically provides for the guarantee of religious liberty among the various spheres of human activity.⁸⁶ The normative argument bases the general preference for religion on the unique social values of religion.⁸⁷

⁸³ Esenberg (n 32) 15; Douglas Laycock, ‘Substantive Neutrality Revisited’ (2007) 110 West Virginia L Rev 51, 54-67; Kevin Pybas, ‘Religious Groups in Free Society’ (2009) 86 U Detroit Mercy L Rev 685, 719-720; Robertson, (n 14) 46.

⁸⁴ Calvin Massey, ‘The Political Marketplace of Religion’ (2005) 57 Hastings L J 1, 14-25.

⁸⁵ Garry (n 12) 69; Stronks (n 64) 36; Esenberg (n 32) 14; Fowler et al. (n 66) 237-240.

⁸⁶ Pybas (n 83) 730; Garry (n 12) 86 & 130. See Stronks (n 64) 36 (noting the argument of accommodationists that the Free Exercise Clause mandates a specific duty on the government to accommodate religious belief).

⁸⁷ Esenberg (n 32) 14; Koppelman (n 36) 1844; Garry (n 12) 150-159.

Regardless of the merits of these arguments,⁸⁸ the concern of the religious free market is that the state's preferential treatment for religion in general will turn into the state's preferential treatment of the dominant religion.⁸⁹ Jonathan Gruber and Daniel M. Hungerman conducted an empirical study on Sunday closing laws in the United States and suggested that "repealing the [Sunday closing] laws causes a reduction in religious participation along both the giving and going margins."⁹⁰ However, if the theory is that Sunday closing laws help religions to "enforce the rules of their 'club'" and that repealing these laws hurts those religions,⁹¹ then the converse is true as well. Sunday closing laws favor dominant religions to the detriment of the minority religions with different rest days.⁹²

3. Strict Separationist

Interestingly, the principle of requiring free competition *only* among religions can be supported by the interpretation most opposed by the accommodationists. Under the strict separationist approach, almost all forms of state support for religion are prohibited.⁹³ In an era of expanded government (welfare state), religions may be disadvantaged vis-à-vis secular

⁸⁸ Other constitutional scholars argued that the Religion Clauses protect religious liberty but not religion per se: Eisgruber & Sager (n 34) 826; Lawrence G. Sager, 'The Moral Economy of Religious Freedom' in Peter Cane et al. (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 18.

⁸⁹ Shiffrin (n 16) 70; Robertson (n 14) 35.

⁹⁰ Jonathan Gruber & Daniel M. Hungerman, 'The Church Versus the Mall: What Happens when Religion Faces Increased Secular Competition' [2008] (May) *The Quarterly J of Economics*, 831 852.

⁹¹ *ibid* 838-840.

⁹² Jews whose rest day falls on Saturday failed to get an exemption from the Sunday closing laws in *Braunfeld v. Brown*, 366 U.S. 599 (1961); see Fowler et al. (n 66) 251. Seventh-Day Adventist faced the same situation but was successful in obtaining judicial exemption: *Sherbet v. Verner*, 374 U.S. 398 (1963).

⁹³ Stronks (n 64) 35-36; Fowler et al. (n 66) 235-236. See also Frances Raday, 'Secular Constitutionalism Vindicated', 30 *Caradozo L Rev* 2769 (2009) (arguing that law and policy should not impose religious values).

views/values from a practical perspective.⁹⁴ Similar to the lowering of the standard of free exercise protection discussed in the previous section, competition among religions is not distorted, but government-created incentives to leave the religious market altogether will develop. Accordingly, the strict separationist approach has been criticized for promoting/endorsing a secular ideology.⁹⁵

C. *Definition of Religion: Who is In, Who is Out*

In addition to the Free Exercise Clause and Establishment Clause, a key legal component of the religious free market is the legal definition of religion. Commentators have opined that courts have no real difficulty in determining what religion is.⁹⁶ The existence and involvement of a religion is generally not disputed in most of the Establishment or Free Exercise cases decided by the Supreme Court.⁹⁷ However, the definition of religion has significant implications for the practical applications of the Religion Clauses, which affect the nature of the resulting religious free market. These implications create a vexing problem for both religious liberty and the religious free market: namely, the status of non-believers and secular beliefs.⁹⁸

⁹⁴ James Hitchcock, *The Supreme Court and Religion in American Life: Volume II From "Higher Law" to "Sectarian Scruples"* (Princeton University Press 2004) 141-143; McConnell (n 10) 1261-1262; McConnell & Posner (n 22) 7-8.

⁹⁵ Pybas (n 83) 714; Wicks (n 32) 418; Stronks (n 64) 41; Cobern (n 16) 93-94; Garry (n 13) 500; Reichley (n 13) 158.

⁹⁶ Koppelman (n 36) 1907; Goldberg (n 36) 109; Vickers (n 32) 14.

⁹⁷ Goldberg (n 36) 109; Greenawalt (n 62) 125.

⁹⁸ For two recent discussions on the issue, see Corbin (n 62); Nelson Tebbe, 'Nonbelievers' (2011) 97 Virginia L Rev 1111.

1. Substantive Definition

One approach to defining religion is through substantive or content-based definitions.⁹⁹ Echoing the religions' unique value justification for the accommodationists' approach, this rationale argues that First Amendment protection should be restricted to beliefs with extra-temporal implications.¹⁰⁰ The main criticism of this approach is that it may prejudicially exclude religions and religious practices that are not well understood or that contradict the judges' own perspectives on religion.¹⁰¹ This approach may also lead to the exclusion of non-Western faiths.¹⁰² Julia Stronks, relying on the works of Roy Clouser, explained how uncontroversial religions actually do not fit into the typical widely accepted definition of religions. For example, Shintoism do not fit the criteria "religion as an ethical code"; Buddhism and Hinduism do not fit the criteria "religion must include worship"; Hinduism and Buddhism does not fit the criteria "religion must include a Supreme Being."¹⁰³ Indeed, non-Western religions were not even considered religions in the past.¹⁰⁴ A substantive definition that includes all of the religions in the relevant polity will at least preserve the religious free market for these existing religions under all three establishment

⁹⁹ Tebbe (n 98) 1133-1135; Vickers (n 32) 16-17; Ahdar & Leigh (n 2) 118-122; Stronks, (n 64) 11; Lori G. Beaman, 'Defining Religion: The Promise and the Peril of Legal Interpretation' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (UBC Press 2008) 193-195.

¹⁰⁰ Garry (n 12) 113; Stronks (n 64) 107 (noting but not endorsing the argument).

¹⁰¹ Eisgruber & Sager (n 34) 825; Beaman (n 99) 195; Stronks (n 64) 20. See also Vickers (n 32) 16-17.

¹⁰² Beaman (n 99) 195; Tebbe (n 98) 1135.

¹⁰³ Stronks (n 64) 113.

¹⁰⁴ Hutchison (n 15) 17; Jeremy Webber, 'Understanding the Religion in Freedom of Religion' in Peter Cane et al. (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 43; Eric Michael Mazur, *The Americanization of Religious Minorities* (John Hopkins University Press 1999) 108. In the context of the England, non-Christian religions were historically excluded from the definition of religion: Sandberg (n 25) 42.

approaches. Nevertheless, there could be a possible discriminatory effect against emerging religious movements that bear little resemblance to existing religions.¹⁰⁵

2. Functional Definitions

Another approach uses functional definitions that focus on how the beliefs function in the believers' lives.¹⁰⁶ This approach is reflected by the expansive definition used by the Supreme Court in *United States v. Seeger*.¹⁰⁷ This approach avoids the definitional bias of the substantive approach. The problem with the functional approach is that many otherwise secular perspectives may be deemed religious because they address "fundamental questions" or "ultimate values."¹⁰⁸ There is also the danger that such broad definition may dilute the special legal protection of religion.¹⁰⁹ This approach would render the strict separationist approach towards the Establishment Clause unworkable. If the bulk of secular perspectives are deemed religious, there is almost nothing the state could do without running afoul of the prohibition against state support for "religion."

Conversely, including secularly motivated consciences in the category of religion will transform the accommodationists' preference for religion into the substantive neutrality principle's

¹⁰⁵ C.f. Donald L. Beschle, 'Does a Broad Free Exercise Right Require a Narrow Definition of 'Religion'?' (2012) 39 *Hastings Constitutional L Q* 357, 372.

¹⁰⁶ Ahdar & Leigh (n 2) 115-117; Stronks (n 64) 11; Beaman (n 99) 193. See Tebbe (n 98) 1136-1137 (discussing Kent Greenawalt's analogical approach).

¹⁰⁷ 380 U.S. 163 (1965). The caveat is that the broad construction for the benefit of conscientious objectors is based on interpretation of a statute, not the Constitution: Beschle (n 105) 368; Goldberg (n 36) 109.

¹⁰⁸ Beaman (n 99) 193; Goldberg (n 36) 111-113; Stronks (n 64) 11. See also Greenawalt (n 62) 129-156 (Distinguishing between "single factor approaches" and "multifactor approaches", and advocating a multifactor analogical approach); Tebbe (n 98) 1136-1137 (endorsing Kent Greenawalt's approach).

¹⁰⁹ Ahdar & Leigh (n 2) 112-113.

neutral treatment of religion and secular beliefs. This dynamic is illustrated by Jeremy Webber, who argues that freedom of religion requires the freedom to be premised on the affirmative valuing of religion. However, Webber is prepared to extend the freedom to non-religious conscientious beliefs on the grounds that they are analogous to religion.¹¹⁰ In this aspect, the substantive neutrality approach towards the Establishment Clause is indifferent to the definition of religion because no legal advantages or disadvantages arise from the classification of religion.

IV. THE DIFFERENT RELIGIOUS FREE MARKETS

In summary, although the guarantee of free exercise and the prohibition of establishment are necessary to constitute a religious free market, the different interpretations of the clauses and their various combinations will have different effects on the resulting religious market. The differences revolved around two central issues of who is entitled to “free competition” and whether religion should be privileged in comparison with secular ideologies/beliefs. The following table summarizes how the various combinations of the different legal components affect the final religious market.

¹¹⁰ Webber (n 104).

Table 1: Combinations of Legal Components

Free Exercise	Establishment	Definition (secular beliefs included?)	Resulting Religious Free Market	
			Competitors	Status of Religion
Weak	Strict Separationist	No	Religion only	Disadvantaged
Weak	Strict Separationist	Yes	Unworkable	Unworkable
Weak	Substantive Neutrality	No	Religion & Secular	Neutral
Weak	Substantive Neutrality	Yes	Religion & Secular	Neutral
Weak	Accommodative	No	Religion only	Advantaged
Weak	Accommodative	Yes	Religion & Secular	Neutral
Strong	Strict Separationist	No	Religion	Balanced
Strong	Strict Separationist	Yes	Unworkable	Unworkable
Strong	Substantive Neutrality	No	Religion & Secular	Slightly Advantaged
Strong	Substantive Neutrality	Yes	Religion & Secular	Neutral
Strong	Accommodative	No	Religion Only	Strongly Advantaged
Strong	Accommodative	Yes	Religion & Secular	Neutral

A. The Different Baseline of Competition

From the table, the material divergence of the resulting religious free market becomes apparent. Religions competing freely against one another while being given general preferential treatment over secular beliefs is but one possible conceptualization of the religious free market. A religious market that places religions at a general disadvantage as compared to secular beliefs would qualify as free vis-à-vis religions as well, even it is arguably subversive to the original American Founders' intention.¹¹¹ Such seemingly divergence result arises because the baseline of competition in the religious free market is often not unarticulated. While religious free competition

¹¹¹ Kosmin & Keysar (n 7) 3; Garry (n 12) 96-97; Spiro (n 12) 13; McConnell (n 10) 1255; Hylton et al. (n 7) 404-406; Metallo (n 1) 499.

arguably require maximum freedom afforded to religious practices, tensions inevitably arises when the disadvantages suffered by religions are not intentionally afflicted. Generally applicable laws can hamper religious activities, but granting of religious exemptions involves an notoriously difficult balancing between administrative workability, public interests, and religious liberty.¹¹² Similarly, the real danger of political bias in the granting of purportedly neutral government aids¹¹³ may justify the strict separationists' total exclusion of government aids to religions to ensure a level playing field. However, the reality of an ever increasing government sphere renders this approach detrimental to religions in practice.¹¹⁴

Another observation from the table relates to neutrality – or parity between religions and secular beliefs. Perhaps unsurprisingly, a substantive neutrality approach towards Establishment Clause almost always results in a religious market where secular beliefs and religions are on a level playing field. Defining religions to include secular beliefs will also guarantee that there is no advantage to either religion or secular beliefs in the resulting religious market. Definition of religions is also renders less problematic under the recent international and domestic constitutional documents that tend to be broadly worded to include non-theistic beliefs.¹¹⁵ Nonetheless, there often remains subtle but important distinctions between religion and secular beliefs. For example,

¹¹² For discussions on the controversies surrounding religious exemptions, see Ahdar & Leigh (n 2) 155-189; McConnell, Garvey & Berg (n 6) 200-275.

¹¹³ (n 89-92) and accompanying text.

¹¹⁴ McConnell & Posner (n 22) 7-8; McConnell (n 10) 1261-1262 (“That is why the old paradigm of ‘strict separation’ under the Establishment Clause has had to give way to ideas such as ‘equal access,’ ‘neutral funding,’ and ‘accommodation.’ If it had not, the expansion of government power, combined with the old insistence on ‘strict separation,’ would have been a relentless engine of secularization.”); Hitchcock (n 94) 141-143.

¹¹⁵ Beschle, (n 105) 380-381. See also Sandberg (n 25) 47-49 (discussing the UK’s courts’ application of article 9 of the European Convention on Human Rights).

while Article 9 of the European Convention of Human Rights includes non-religious “thought” and “conscience,” anti-discrimination protection is restricted to religions only.¹¹⁶

B. Who Really is Entitled to Free Competition?

The point on definition is particularly important in the context of the religious free market and religious liberty in general. The entitlement of free competition and liberty hinged on the belief being classified as “religious.” Whether a secular belief is entitled to equal treatment as a religious belief can arguably be conceived as a palatable disagreement between reasonable people. However, history is littered with examples of more discriminatory exclusions. Although Rhode Island was one of the few prerevolutionary colonies that did not have an established church, its social climate was, in reality, not much different from that of its Puritan neighbors, in which Roman Catholics and Jews were denied citizenship.¹¹⁷ Similar patterns occurred in historical England as well. The Act of Toleration that provided relief for most Protestant dissenters continued to exclude Catholics, Jews and atheists from the protection of religious liberty and equality.¹¹⁸ When John Locke advocated for religious liberty and freedom of conscience, Muslims and atheists were not considered to be beneficiaries of such rights.¹¹⁹ In modern times, African traditional religions are excluded from interfaith cooperation between Muslims and Christians in Sierra Leone, even if the traditionalists made up 30% of the total population. One main reason is that Muslim and Christian

¹¹⁶ Ahdar & Leigh (n 2) 110-111.

¹¹⁷ Rofes (n 6) 2-12; Reichley (n 13) 68.

¹¹⁸ Sandberg (n 25) 26-28; Samantha Knights, *Freedom of Religion, Minorities, and the law* (Oxford University Press 2007)3; Andrew Lynch, ‘The Constitutional Significance of the Church of England’ in Peter Radan et al. (eds), *Law and Religion: God, the State and the Common Law* (Routledge 2005) 178-179.

¹¹⁹ Koppelman (n 36) 1859; Knights (n 118) 9; Reichley (n 13) 91.

leaders do not treat traditional religions as “real” religions.¹²⁰ The religious free market can be a dangerously ambiguous concept without clear identification of the appropriate perimeter of the market and the market participants.

C. *Dynamics of Mix and Match*

The table also reveals how the different combinations of the legal interpretations can produce surprising dynamics of the resulting religious market. While one might envisage that the restricted ability to seek religious exemptions from generally applicable law under weak free exercise protection will result in religions as a whole being disadvantaged in the resulting religious market, the opposite can be achieved if the weak free exercise protection is coupled with an accommodative interpretation of the Establishment Clause and a definition of religion that exclude secular beliefs – the latter two combining to provide distinct advantages to religions over secular beliefs. Similarly, strict separationist approach in Establishment Clause is not necessary the anti-thesis of religions as commonly charged by opponents.¹²¹ A balanced approach towards religions and secular beliefs can still be achieved if the strict separationist approach in Establishment Clause is paired with a strong free exercise protection.

D. *Implications*

Hence, it is crucial to appreciate that the devil really is in the details. The complex dynamics between the various legal components can materially alter the resulting religious market. Two

¹²⁰ Prince Sorie Conteh, *Traditionalists, Muslims, and Christians in Africa* (Cambria Press 2009) 2 & 157-164.

¹²¹ E.g., Pybas (n 83) 714; Wicks (n 32) 418; Stronks (n 64) 41; Cobern (n 16) 93-94; Garry (n 13) 500; Reichley (n 13) 158.

takeaways emerge. First, it is paramount to articulate the perimeters of religious free competition that the legal regime is intended to foster before the religious free market can adequately serve as a guiding principle for the law. Reflecting the tension between the functional and “end-in-itself” justifications for the religious free market,¹²² advocates for the religious free market can reasonably differ as to whether secular beliefs are entitled to free competition and whether religions should be privileged as a whole, among other possible variations. Those who are more receptive to the functional justifications will naturally incline towards a legal regime that adopts a strong free exercise protection, an accommodative approach towards Establishment Clause, and a definition of religion that excludes secular belief. This may ultimately be desirable on various normative grounds,¹²³ but the religious free market will not be one of them. This potent combination that reserved the right to free competition only to religions while giving religions a huge preferential treatment over secular beliefs is but one of the many plausible religious free markets. The converse is true for those who adopts a more skeptical view of religion¹²⁴ and/or a more “end-in-itself” justification for the religious free market.

The second takeaway is that the creation of the religious free market requires a holistic assessment of all the various legal components. The contours of the resulting free market is shaped by the combinations and interactions of these various legal components. The emphasis of a

¹²² Supra II.C.

¹²³ A typical argument is premised on the purported unique social values of religions: see Richard (n 32) 14; Koppelman (n 36) 1831, 1844; Garry (n 12) 150-159.

¹²⁴ Such view typically relies on parades of horrors in the name of religions, such as gender discrimination and oppression of other religious minorities, to justify a more restricted role of religions in the public sphere: see Dennis C. Mueller, *Reason, Religion & Democracy* (Cambridge University Press 2009) 386-390; Raday (n 93) 2776-2798; Noah Feldman, ‘From Liberty to Equality: The Transformation of the Establishment Clause’ (2002) 90 Cal. L. Rev. 673, 288-293.

particular clause will not be sufficient to attaining one's desired (and hopefully articulated) version of the religious free market. It is easy to win a battle (e.g., arguing for accommodative interpretation of the Establishment Clause to give preferential treatment to religion in the religious market) and lose the war (e.g., when the playing field with secular belief is leveled back by a definition of religion that includes secular beliefs).

V. CONCLUSION

Projecting an image of liberty, religious truth-seeking and state neutrality, the religious free market is an attractive normative benchmark for law and religion jurisprudence in the United States and abroad. The concept has a long historical pedigree and captures the relatively unique American combination of the establishment prohibition and guarantee of free exercise. However, the frequent reference to and reliance on this concept has masked the controversies within the inherent assumptions that have, unfortunately, often gone unarticulated. This Article dissected the religious free market's legal components, the Establishment Clause, the Free Exercise Clause and the definition of religion. Additionally, this Article demonstrated how the resulting religious market varies greatly depending on one's preferred choice of interpretations. The dynamics among the different combinations of interpretation can also be surprising. Holistic appreciation of the deconstructed legal components of the religious free market is necessary to avoid reducing the concept into a dangerously ambiguous and fluid rhetoric.

CHAPTER 2:

MONEY AND POWER IN RELIGIOUS COMPETITION

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I. INTRODUCTION

A religious free market is a type of church-state model in which the different religions freely compete with one another for followers without restrictions or distortions by the State.¹ Tracing its origin to Adam Smith,² it is commonly associated with the American church-state model.³ Commentators have frequently argued that the promotion of a religious free market was part of the American Founders' intentions in drafting the Constitution.⁴ The Free Exercise Clause of the First Amendment of the U.S. Constitution guarantees the freedom to conduct religious activities, whereas the Establishment Clause prohibits the state from tipping the scale in favor of a particular religion.⁵ The religious free market is perhaps best epitomized by the oft-quoted

¹ Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005) 92-95; R. Andrew Chesnut, *Competitive Spirits: Latin America's New Religious Economy* (Oxford University Press 2003) 10-11; Rodney Stark & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (University of California Press 2000) 225.

² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., Modern Library 1994) 846-875; Adam Smith, *The Theory of Moral Sentiments* (D. D. Raphael & A. L. Macfie eds., Oxford University Press 1979) 185-187. For discussions on the historical origin of the religious free market, see Larry Witham, *Marketplace of the Gods: How Economics Explains Religion* (Oxford University Press 2010) 14; Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market* (Paramount Market Publishing 2006) 2.

³ Witham (n 2) 119; Paul Harvey, 'Proselytization' in Philip Goff & Paul Harvey (eds), *Religion and American Culture* (University of North Carolina Press 2004) 40; Yunfeng Lu, *The Transformation of Yiguan Dao in Taiwan: Adapting to a Changing Religious Economy* (Lexington Books 2008) 7; Victor N. Metallo, 'Procedamus in pace Serving Justice: RLUIPA Resonates the Teachings of Dignitatis Humanae, and the Third Circuit's 'Substantial Burden' Test Provides a Thorough, Fair Inquiry into a Prisoner's Religious Exercise' 88 U. Det. Mercy L. Rev. 497, 499 (2011).

⁴ Kosmin & Keysar (n 2) 3; Patrick M. Garry, *Wrestling with God: The Court's Tortuous Treatment of Religion* (Catholic University of America Press 2006) 96-97; Daniel A. Spiro, 'The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision', 39 Ala. L. Rev. 1, 13 (1987); Michael W. McConnell, 'Why is Religious Liberty the 'First Freedom'?', 21 Cardozo L. Rev. 1243, 1255 (2000); Keith N. Hylton et al., 'Church and State: An Economic Analysis', 13(2) American Law and Economics Review 402, 404-406 (2011); Metallo (n 3, at, 499).

⁵ U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

statement from the U.S. Supreme Court case of *Zorach v. Claiborn*, that government should let “each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.”⁶

The image of liberty, free-market competition, religious truth seeking and the purported state neutrality inherent in the religious free market has rendered the concept an attractive normative benchmark among legal academics. Constitutional scholars such as Daniel A. Spiro⁷ and Thomas C. Berg⁸ specifically advocated the religious free market as a constitutional principle.⁹ Many other U.S. legal academics simply analyzed the Establishment Clause through the perspective of the religious free market principle¹⁰ or assumed the religious free market as the benchmark in their analysis of the Religion Clauses in general.¹¹ Even legal scholars abroad have adopted the religious free market in their analysis of foreign jurisdictions. Examples include Russell Sandberg’s assessment of the European Court of Human Rights,¹² Kyriakos N.

⁶ 343 U.S. 306, 313 (1952).

⁷ Spiro (n 4) 65.

⁸ Thomas C. Berg, ‘What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act’ 39 Vill. L. Rev. 1, 25 (1994).

⁹ See also William P. Marshall, ‘Truth and Religion Clauses’, 43 DePaul L. Rev. 243, 255-260 (1994); Andrew A. Beerworth, ‘Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise’, 26 T. Jefferson L. Rev. 333, 400 (2004).

¹⁰ Daniel M. Hinkle, ‘Preemptory Challenges Based on Religious Affiliation: Are they Constitutional?’, 9 Buff. Crim. L. Rev. 139, 154 (2005); Anastasia P. Winslow, ‘Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites’, 38 Ariz. L. Rev. 1291, 1335-1336 (1996).

¹¹ The religious free market benchmark has been used to argue against restriction of religious speech: Douglas Laycock, ‘Religious Liberty as Liberty’, 7 J. Contemp. Legal Issues 313, 350 (1996); Joel S. Jacobs, ‘Endorsement as “Adoptive Action:” A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test’, 22 Hastings Const. L.Q. 29, 69-70 (1994). The benchmark is also applied to support restriction of religious speech: Richard Delgado, ‘Cults and Conversion: The Case for Informed Consent’, 16 Ga. L. Rev. 533, 555-556 (1982). See also Metallo (n 3) at 525-526; Rosalind I. J. Hackett, ‘Religious Pluralism in an Undecidedly Secular World’, 33-SUM Hum. Rts. 21, 22 (2006); Richard M. Esenberg, ‘You Cannot Lose if You Choose Not to Play: Toward a More Modest Establishment Clause’, 12 Roger Williams U. L. Rev. 1, 65 (2006).

¹² Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) 35 & 70.

Kyriazopoulos's critique of Greek anti-proselytization laws,¹³ and Li-Ann Thio's advocacy of the concept in the context of Singapore.¹⁴

Notwithstanding the frequent references to and reliance on the religious free market, the concept itself remains under-theorized. Academics evoking the religious free market have rarely elucidated what exactly the concept entails or articulated the assumptions underpinning it. In particular, what exactly is the type of "religious competition" that is protected under the religious free market? Should the monetary wealth or political power of a religion be allowed to translate into advantages in religious competition?

This Essay critically examines this often unarticulated dynamics of monetary and political competition in religious competition. The religious free market advocates' idealized portrayal of religions "flourish[ing] according to the zeal of its adherents and the appeal of its dogma" overlooks the brutal and harsh realities of competition in the economic and political sphere. Such an omission is unfortunate. Without articulating the nature and manner of the religious competition that the religious free market is intended to foster, one remains unable to discern the types of laws and policies required/permitted under the religious free market benchmark. This Essay explores the interplay among economic, political and religious competition and posits that controversial measures, such as financial affirmative action for socio-economically disadvantaged religions and restrictions on the involvement of religion in politics, may actually be conducive to religious

¹³ Kyriakos N. Kyriazopoulos, 'Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality', 20 J. Law & Religion 149, 149-150 (2004).

¹⁴ Thio Li-Ann, 'Constitutional 'Soft' Law and Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony', 2004 Sing. J. Legal Stud. (Sing.) 414, 422 (2004).

competition, especially if one envisages religious competition as a primarily spiritual and theological contest.

This Essay is organized into five parts. Part II examines the common justifications of the religious free market and discusses the impact of religious free competition on religions. Part III analyzes the interplay between economic competition and religious competition while noting that affirmative action for socio-economically disadvantaged religions may actually enhance free competition among religions if one primarily conceives religious competition as a spiritual and theological matter. Part IV extends the analysis to political competition and discusses how legal measures restricting political activities of religious organizations is not necessary detrimental to the religious free competition. Part V concludes.

II. JUSTIFICATIONS AND OPERATIONS OF THE RELIGIOUS FREE MARKET

This Part examines the common justifications for the religious free market as a normative constitutional value and discusses the general impact of the religious free market on the religions.

A. *Justifications of the Religious Free Market*

Originally advanced by Adam Smith and adopted by the American Founders,¹⁵ the revival of the concept in modern times can be traced to the emergence of the religious economic model among the sociological studies of religion in the 1980s. This religious economic model fused

¹⁵ (n 2-4).

sociology and economics to explain the continued vibrancy of religion in society.¹⁶ By treating religious adherents as individual actors making decisions about the choice of religion and the level of religious participations, this new model on religion promoted better understanding of the successes and failures of faith-based organizations.¹⁷ The differentiation between monopolized, regulated and unregulated religious market under the model also facilitated comparative studies of religions in the different types of socio-legal environment.¹⁸ By the late 1980s, this increasingly popular analytical framework prompted renewed attention from legal scholars such as Richard Posner, Michael W. McDonnell and Daniel A. Spiro on the religious free market as a normative constitutional principle – i.e. the law should create a religious free market.¹⁹ As noted in the introduction, the religious free market principle has since been widely referred to by both U.S. and non-U.S. legal academics.²⁰

One key justification of the religious free market is that it promotes religious liberty and religious choice.²¹ Religious liberty is often considered an important, if not the most important,

¹⁶ Lu (n 3) 7; Chesnut (n 1) 6-8 (discussing the academic history of application of religious economy to Latin America); Stark & Finke (n 1) 27-41 (discussing the religious economy approach in the context of past and prevailing perspectives in the study of religions). See also Hylton et al. (n 4) 407.

¹⁷ Chesnut (n 1) 7.

¹⁸ Kosmin & Keysar (n 2) 6; Witham (n 2) 115-138; Chesnut (n 1) 8-10.

¹⁹ E.g., see Richard A. Posner, 'The Constitution as an Economic Document', 56 Geo. Wash. L. Rev. 4, 18 (1987); Michael W. McConnell & Richard A. Posner, 'An Economic Approach to Issues of Religious Freedom', 56 U. Chi. L. Rev. 1 (1989); Spiro (n 4) 5-14.

²⁰ See (n 7-14).

²¹ Kosmin & Keysar (n 2) 2.

right protected under the U.S. Constitution.²² It is also regarded as a core human right.²³ The religious free market safeguards religious liberty by prohibiting state interference with and regulation of religions, whether through support for a particular religion or restrictions of certain religious practices. The religious liberty argument does not necessarily assume that religion has to be a good thing.²⁴ Christopher L. Eisgruber and Lawrence G. Sager argued that the U.S. “Constitution is not to privilege or protect religion per se, but rather to protect all citizens from discrimination born of religious diversity.”²⁵ The religious liberty argument is rooted in the notion that religious expression is an integral aspect of individual fulfillment and autonomy.²⁶ Another argument that is not premised on privileging religion states that the religious free market reduces religious suppression by removing the coercive force of the state from the regulation of religion.²⁷

On the hand, the other important line of justification for the religious free market assumes that religion is a good thing and focuses on how the religious free market benefits religion. This argument is expressed in two ways. First, the religious free market promotes religiosity. This argument draws on observations of the significantly higher religiosity of the American population

²² Garry (n 4) 150; McConnell (n 4).

²³ Daniel O. Conkle, ‘Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty’, 32 *Cardozo L. Rev.* 1755, 1763 (2011); M. Todd Parker, ‘The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR’, 17 *Duke J. Comp. & Int’l L.* 91, 91 (2006).

²⁴ Laycock (n 11) 313.

²⁵ Christopher L. Eisgruber & Lawrence G. Sager, ‘Does it Matter What Religion is?’, 84 *Notre Dame L. Rev.* 807, 826 (2009).

²⁶ Richard M. Esenberg, ‘Must God be Dead or Irrelevant: Drawing a Circle that Lets Me in’, 18 *Wm. & Mary Bill Rts. J.* 1, 37 (2009); Elizabeth Wicks, ‘Religion, Law and Medicine: Legislating on Birth and Death in a Christian State’, 17 *Med. L. Rev.* 410, 411 (2009); Thio (n 14) 417.

²⁷ Witham (n 2) 194; Kosmin & Keysar (n 2) 4.

compared with their European counterparts.²⁸ Commentators have frequently identified the separation of the church and state in the U.S. (i.e., the Establishment Clause) as the reason for the U.S. population's religiosity.²⁹ Using market analogies, academics have noted how overregulation limits religious choices and supply, which, in turn, reduces the consumption of religion.³⁰ Sociological studies of religions have also specifically argued that the religious free market promotes religiosity.³¹

The second “good-for-religion” justification is that the religious free market facilitates religious truth seeking. This argument resembles the “marketplace of ideas” rationale supporting the freedom of speech. The “marketplace of ideas” envisages that the best test of the truth of an idea is its acceptance in the context of free competition with opposing ideas.³² In the same vein, by allowing religion to “flourish according to the zeal of its adherents and the appeal of its dogma,” religious truth is more likely to emerge and be accepted.³³ Free competition among religions will

²⁸ Stephen M. Feldman, ‘Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong’, 7 First Amend. L. Rev. 253, 287 (2009); Paul Horwitz, ‘Religion and American Politics: Three Views of the Cathedral’, 39 U. Mem. L. Rev. 973, 975 (2009); Garry (n 4) 123; A. James Reichley, *Faith in Politics* (Brookings Institution Press 2002) 1. See Steven H. Shiffrin, ‘The Pluralistic Foundations of the Religion Clauses’, 90 Cornell L. Rev. 9, 48-51 (2004).

²⁹ Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’, 50 Wm. & Mary L. Rev. 1831, 1909 (2009); Esenberg (n 26) 50; Robert F. Cochran, Jr., ‘Evangelicals, Law, and Abortion’, in Robert F. Cochran, Jr. (ed), *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law* (New York University Press 2008) 100-101.

³⁰ Richard A. Posner, *Economic Analysis of Law* (Aspen, 8th ed., 2011) 948-949; Witham (n 2) 148-152; Chesnut (n 1) 8-10; McConnell & Posner (n 19) 55.

³¹ Witham (n 2) 152; Kosmin & Keysar (n 2) 1; Stark & Finke (n 1) 201-202.

³² Lawrence Rosenthal, ‘First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech’, 86 Ind. L.J. 1, 61-62 (2011); Geoffrey R. Stone et al., *Constitutional Law* (Aspen Publishers, 5th ed., 2005) 1054-1056; Marshall (n 9) 256; David C. Williams & Susan H. Williams, ‘Volitionalism and Religious Liberty’, 76 Cornell L. Rev. 769, 817-818 (1991).

³³ Marshall (n 9) 255-256; M. H. Ogilvie, ‘Between Liberté and Égalité: Religion and the State in Canada’, in Peter Radan et al. (eds), *Law and Religion: God, the State and the Common Law* (Routledge 2005) 154.

produce religious doctrines that best suit the times and circumstances.³⁴ Conversely, Restrictions on religious propagation and proselytization impede “informed” religious choice.³⁵ This religious truth-seeking rationale is also commonly featured in arguments for religious liberty.³⁶

These arguments are not without controversies. In particular, the premise that religions and religious truth-seeking are good things that should be actively promoted by the state can be problematic. Parades of horrors in the name of religions, such as gender discrimination and oppression of other religious minorities, are often being used to justify a more restricted role of religions in the public sphere.³⁷ The importance of religious truth-seeking is also not universally shared by all religions, given that not all religions are predicated on truth claims.³⁸ Examples of these religions include Hinduism,³⁹ Buddhism,⁴⁰ Taoism⁴¹ and Native American religions.⁴² Otherwise advocating the religious truth seeking function of the U.S. Religious Clauses, William

³⁴ Kosmin & Keysar (n 2) 4; Kuah-Pearce Khun Eng, *State, Society and Religious Engineering: Towards a Reformist Buddhism in Singapore* (Eastern Universities Press 2003) 164; Hylton et al. (n 4) 407.

³⁵ Thio Li-ann, ‘Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy’, 2010 *Sing. J. Legal Stud.* 484, 510 (2010); Stephen C. Berkwitz, ‘Religious Conflict and the Politics of Conversion in Sri Lanka’, in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 216.

³⁶ Conkle (n 23) 1757-1762; Marshall (n 9) 255-260; Leonard A. Leo et al., ‘Protecting Religions from “Defamation”: A Threat to Universal Human Rights Standards’, 34 *Harv. J.L. & Pub. Pol’y* 769, 782 (2011).

³⁷ E.g., Frances Raday, ‘Secular Constitutionalism Vindicated’, 30 *Cardozo L. Rev.* 2769, 2776-2798 (2009); Feldman (n 28) 288-293.

³⁸ Sarah Claerhout & Jakob De Roover, ‘Conversion of the World: Proselytization in India and the Universalization of Christianity’, in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 65; Marshall (n 9) 265.

³⁹ Jeff Spinner-Haley, ‘Hinduism, Christianity, and Liberal Religious Toleration’, 33(1) *Political Theory* 28, 37 (2005).

⁴⁰ Conkle (n 23) 1764-1765.

⁴¹ See generally Francisca Cho, ‘Leaping into the Boundless: A Daoist Reading of Comparative Religious Ethics’, 26(1) *The Journal of Religious Ethics* 139 (1998).

⁴² Harvey (n 3) 41-42.

P. Marshall acknowledged that the critique regarding the divergence in the religions' different purposes "can be deflected but not fully avoided."⁴³

Resolving these issues is beyond the scope of this Essay. This Essay does not challenge the religious free market as a normative principle but seeks to elucidate the often unarticulated notion of religious competition. Proceeding on the assumption that the religious free market is desirable, this Essay goes on to examine the dynamics of economic and political competition in religious competition and explore how different conception of religious free competition under the religious free market affects the normative desirability of controversial laws and policies.

But first, what happens if a religion is thrown into the fray of the religious free market?

B. Effect on Religious Competition on Religions

A commercial firm transitioning into a liberalized market environment must either adapt its business practices to meet the new competitive environment or risk being eliminated by market forces.⁴⁴ A religion entering a religious free market must be able to repel conversion attempts by rival religions while attracting new members to its fold. The "market pressure" from the "liberalization" of a religious market has caused previously non-proselytizing religions to proselytize or otherwise react in defence.⁴⁵ Stephen C. Berkwitz described the example of

⁴³ Marshall (n 9) 266.

⁴⁴ For discussions of firms' responses to market liberalization, see generally Seung Ho Park et al., 'Market Liberalization and Firm Performance During China's Economic Transition', 37(1) Journal of International Business Studies 127 (2006); Jen Baggs, 'Firm Survival and Exit in Response to Trade Liberalization', 38(4) The Canadian Journal of Economics 1364 (2005).

⁴⁵ Jean-Francois Mayer, 'Conflicts over Proselytism: An Overview and Comparative Perspective', in Rosalind I.J. Hackett (ed), Proselytization Revisited: Rights Talk, Free Markets and Culture Wars (Equinox 2008) 46-48 (noting examples of India's Hinduism's shuddhi (reconversions) in reactions to Muslims and Christians conversions and organization/restructuring of tribal religious groups in India in reaction to Christian and Hindus proselytization efforts);

nineteenth century Sri Lanka where Buddhism, after initial resistance to participate in the dispute about religious truth as raised and provoked by Christian missionaries, were compelled to engage the missionaries on the missionaries' terms after repeated denunciations and challenges by the missionaries.⁴⁶ In addition, religions have to adapt and rationalize their organizational structures and operational methods to ensure their survival.⁴⁷ This condition frequently leads religions to learn the practices of successful competitors in the religious marketplace.⁴⁸

Another practical consequence of the religious free market is the convergence of religions on the core characteristics that match the prevailing consumers' preferences. In a case study of the religious market in Latin America, R. Andrew Chesnut noted how the three most successful religions (Pentecostals, Catholic Charismatics, and African diasporan groups) shared the "common marquee product of pneumacentrism" and the provision of faith healing.⁴⁹ A similar convergence between religious practices and consumers' preferences is also documented separately in the context of Yiguan Dao (a Chinese religious sect) in Taiwan⁵⁰ and the Taoist temples in Southern China.⁵¹ Larry Witham also observed that in Latin America in the 1960s and 1970s, Catholics

Rachelle M. Scott, 'Promoting World Peace through Inner Peace: The Discourses and Technologies of Dhammakāya Proselytization', in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 235-236 (example of Anagarika Dharmapala' reformist Buddhism in Sri Lanka).

⁴⁶ Berkwitz (n 35) 203-204.

⁴⁷ Peter L. Berger, 'Pluralism, Protestantization, and the Voluntary Principle', in Thomas Banchoff (ed), *Democracy and the New Religious Pluralism* (Oxford University Press 2007) 21-25; Chesnut (n 1) 151.

⁴⁸ Harvey (n 3) 68; Bryan R. Wilson, 'Absolutes and Relatives: Two Problems for New Religious Movements', in James A. Beckford & James T. Richardson (eds), *Challenging Religion* (Routledge 2003) 17.

⁴⁹ Chesnut (n 1) 152-154.

⁵⁰ Yiguan Dao modified its initial theological prohibition of mediation to accommodate the equivalence of mediation practices in light of the increasing popularity of mediation among the Taiwanese society it operates in: Lu (n 3) 102-107.

⁵¹ Graeme Lang et al., 'Temples and the Religious Economy', in Fenggang Yang & Joseph B. Tamney (eds), *State, Market, and Religions in Chinese Societies* (Brill 2005) 178-179.

bishops most vigorously opposed the government in the countries in which the Protestant competition was the highest.⁵² The competitive pressure compelled the Catholic Church to change its position to win back popular support and counter the Protestants' focus on the poor, an area/niche that the Catholic Church had previously neglected.⁵³ The Ciji Merit Society [Tzu Chi Foundation], a successful Taiwan Buddhist charitable movement with a significant global presence in medical aid and disaster relief,⁵⁴ was arguably prompted to act by competition from Christianity.⁵⁵

These changes are arguably not a bad thing, and they resonate with the justification for the religious free market (i.e., competition will produce the religious doctrines and practices that are best suited to the circumstances).⁵⁶ However, if meeting consumer demand is the key to success in the religious free market, then competition may not necessarily produce well-reasoned or sophisticated religions.⁵⁷ Attractive evangelization techniques (akin to successful advertising campaigns by commercial firms) or appealing forms of worship (akin to products/services that provide good consumer "experiences") may also be a driving force in a religion's success in the

⁵² Witham (n 2) 132-134; Chesnut (n 1) 8.

⁵³ Witham (n 2) 133-134.

⁵⁴ Robert P. Weller, 'Within and Beyond the Market: Religions, Moralities, and Philanthropies in Chinese Societies', in Jonathan B. Imber (ed), *Markets, Morals & Religion* (Transaction Publishers 2008) 241. See generally Kai-Ti Chou, *Contemporary Religious Movements in Taiwan: Rhetorics of Persuasion* 77-131 (Edwin Mellen Press 2007) (detailed discussion of the origin, practices and theological foundations of Tzu Chi Buddhist Foundation).

⁵⁵ Weller (n 54) 242; Robert D. Woodberry, 'Pentecostalism and Economic Development', in Jonathan B. Imber (ed), *Markets, Morals & Religion* (Transaction Publishers 2008) 160.

⁵⁶ Kosmin & Keysar (n 2) 4; Kuah-Pearce (n 34) 164; Hylton et al. (n 4) 407.

⁵⁷ Kosmin & Keysar (n 2) 4; R. Laurence Moore, *Selling God: American Religion in the Marketplace of Culture* (Oxford University Press 1994) 10.

religious market.⁵⁸ More worrisome are the situations in which the popular appeal of a religion rests on the more objectionable preferences of the consumers. For example, in the pre-Civil War era, Southern mainstream churches endorsed, or at least tolerated, slavery.⁵⁹ Setting aside the issues of theological error and human fallibility, one could argue that the churches that strenuously opposed slavery were unlikely to attract large congregations in the South.⁶⁰ A more contemporary manifestation of this concern emerges when churches split into different factions over the institution's stance towards homosexuality.⁶¹ The split is arguably driven by a genuine theological dispute, but one could also conceive the split as meeting the members' underlying attitudes towards homosexuality and homosexuals, be it favorable or negative.

This Essay is certainly not suggesting that a regulated religious market will necessarily produce a better outcome, especially if the objectionable preference is prevalent in the population. The key takeaway is simply that religious competition impose pressure on the religions to change their behaviors and practices. The actual manifestation of this pressure is naturally dependent on

⁵⁸ Chesnut (n 1) 14; Lang et al. (n 51) 149; Moore (n 57) 204-237. See also Chou (n 54) 89-92 (discussing the successful marketing techniques and strategies the contributed to the growth of the successful Taiwan Buddhist organization Tzu Chi).

⁵⁹ Reichley (n 28) 181 (e.g., South Carolina Baptists Association, the Old School ecclesiastical faction of the Presbyterian Church); Cochran (n 29) 94.

⁶⁰ Churches split into separate regional churches over disagreement about the issue of slavery: Andrew Koppelman, 'Should Noncommercial Associations Have an Absolute Right to Discriminate?', 67-AUT Law & Contemp. Probs. 27, 50 (2004). The gains of evangelicals in the South were also at least partly attributed to evangelical movement shift from anti-slavery to acquiescence of slavery: Brant T. Lee, 'The Devil in the Details: On Intelligent Design, Racial Conspiracy Theories, and the Theology of Whiteness', 26 Quinnipiac L. Rev. 57, 97-98 (2007). Indeed, Christine Leigh Heyrman's historical account of evangelical growth in the South revealed a conscious adaptation of doctrines and teachings that is sensitive the preferences of the targeted community (including tolerance of slavery): Christine Leigh Heyrman, *Southern Cross: The Beginnings of the Bible Belt* (University of North Carolina Press 1998) 155-160.

⁶¹ Stephanie Simon, 'Episcopal Church Tensions Stirred', Wall St J., Dec. 7, 2009, at A4; Koppelman (n 60) 50; Robert Booth Fowler et al., *Religion and Politics in America: Faith, Culture, and Strategic Choices* (Westview Press 4th ed. 2010) 38-39.

the nature of religious competition that is shaped and facilitated by the laws and policies of the polity. As will be examined in the remainder of this Essay, the “free competition” mandated by the religious free market is sufficiently ambiguous to support a wide range of conceptualization and the corresponding divergences in required laws and policies.

III. ECONOMIC COMPETITION AND RELIGIOUS COMPETITION

Religious competition under the religious free market is often portrayed as a somewhat idealized scenario, in which religions “flourish according to the zeal of its adherents and the appeal of its dogma.” Such a portrayal glosses over the significant contribution of material wealth to a religion’s “flourishing” in the religious market. This Part examines the dynamics of economic competition in religious competition and discusses the compatibility of the religious free market and affirmative actions for socio-economically disadvantaged religions.

A. *Material Wealth and Religious Competitions*

Material wealth frequently helps in religious competition. For instance, material wealth helps attract new followers and retain the existing adherents. Money is crucial in spreading one’s religious message, especially if there are competing messages.⁶² Religious propagation is ultimately a form of speech, and speech is facilitated by money.⁶³ A proselytizing religious organization can also make positive inroads into the targeted community by providing valuable

⁶² Hackett (n 11) 22; Harvey (n 3) 59-60 (noting the substantial financial resources necessary to support the massive overseas missions by American Christians).

⁶³ Deborah Hellman, ‘Money Talks But It Isn’t Speech’, 95 Minn. L. Rev. 953, 955 (2011).

aid and financial assistance.⁶⁴ “Financial growth for wealthy religious organizations means, once building campaigns and staff salaries are taken care of, having more money for charitable activity.”⁶⁵ The controversy of the practice notwithstanding, material wealth enables religious organizations to require participation in their religious activities as a prerequisite for receiving valuable aid.⁶⁶ In particular, education is an attractive aid vehicle that provides a significant competitive advantage to the religions affiliated with the providers of education. In the former British colonies, the linguistic advantage and academic superiority of English-language Christian mission schools rendered them popular even among non-Christians.⁶⁷ The religious influence and pressure in these schools⁶⁸ arguably contributed to the correlation between conversion to Christianity and the attendance of these schools.⁶⁹ The monetary resources from wealthy oil-producing nations in the Arab Gulf have also helped to displace the previously syncretistic type of

⁶⁴ Christopher R. Duncan, ‘Untangling Conversion: Religious Change and Identity Among the Forest Tobelo of Indonesia’, 42(4) *Ethnology* 307, 311-313 (2003) (discussing the evangelical efforts by American-based nondenominational Protestant organization, New Tribes Mission, in Indonesia rural tribes that includes financial assistance and modern medical aid).

⁶⁵ Moore (n 57) 273.

⁶⁶ Harvey (n 3) 44 (describing the “proselytization by material acculturation” by the early Spanish missionaries in Americas whereby material enticement is used to attract younger native men and severing the economic dominance of older elders); Grace Y. Kao, ‘The Logic of Anti-proselytization, Revisited’, in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* 79 (Equinox 2008) 79.

⁶⁷ E.g., Sri Lanka: Berkwitz (n 35) 204; Singapore: Robbie B. H. Goh, ‘Mission Schools in Singapore: Religious Harmony, Social Identities, and the Negotiation of Evangelical Cultures’, in Lai Ah Eng (ed), *Religious Diversity in Singapore* 362, 365-366 (Institute of Southeast Asian studies 2008); Tanzania: Wolfgang Gabbert, ‘Social and Cultural Conditions of Religious Conversion in Colonial Southwest Tanzania 1891-1939’, 40(4) *Ethnology* 291, 299-300 (2001).

⁶⁸ Gabbert (n 67) 300; Jason Tan, ‘The Politics of Religious Knowledge in Singapore Secondary Schools’, in Catherine Cornbleth (ed), *Curriculum Politics, Policy, Practice: Cases in Comparative Context* (State University of New York Press 2000) 80.

⁶⁹ Chee Kiong Tong, *Rationalizing Religion: Religious Conversion, Revivalism, and Competition in Singapore Society* (Koninklijke Brill 2007) 102; Kuah-Pearce (n 34) 268. A survey conducted in Singapore during the 1970s also suggested that education in Christian schools does influence conversion to Christianity: Joseph B. Tamney & Riaz Hassan, *Religious Switching in Singapore: A Study of Religious Mobility* (Select Books 1987) 12-13.

Islam practiced in Sierra Leone that tolerates traditional African religious practices and to promote a more “exclusive” brand of Islam.⁷⁰

On a more basic level, religious organizations usually have to procure the goods and services needed to meet their operational needs from the economic sphere. Economic dominance allows religious organizations to acquire higher-quality goods and services, which provide a competitive advantage in the religious market.⁷¹ Sociological studies have found that certain favorable characteristics of the places of worship (e.g., an accessible location or positive geographical characteristics, such as scenic, cultural or historical value) are important factors in the success of that place of worship.⁷² Wealthier religious organizations can acquire more desirable locations as places of worship, or make necessary infrastructure investment to improve existing places of worship.⁷³ This disparity is aggravated when resources is scarce. If the land allocated for religious use is limited, the wealthier religious organizations are in a more advantageous position to expand and grow, whereas the less wealthy organizations risk elimination.⁷⁴ Media broadcasting may also be dominated by economically privileged religious organizations who are able to extensively purchase airtime or even entire television and radio channels. Such access to these

⁷⁰ Prince Sorie Conteh, *Traditionalists, Muslims, and Christians in Africa* (Cambria Press 2009) 75 & 87-88.

⁷¹ For example, the phenomenal growth of City Harvest Church in Singapore (a megachurch preaching prosperity gospel) can be attributed at least partly to its modern, sophisticated (and expensive) architecture and facilities: Joy Kooi-Chin Tong, ‘Religious Experience of a Young Megachurch Congregation in Singapore’, in Michael Bailey & Guy Redden (eds), *Mediating Faiths: Religion and Socio-Cultural Change in the Twenty-First Century* (Ashgate 2009) 163-164. On a more basic level, “[c]hurches must raise money if they are to exist at all.”: Moore (n 57) 272.

⁷² Lang et al. (n 51) 159-162.

⁷³ Ibid.

⁷⁴ Tong (n 69) 251.

powerful communication mediums is however not available to religious communities that lacks the necessary financial capabilities.⁷⁵

It is true that history contains many instances of religions emerging from materially deprived circumstances but eventually blossoming into successful religions with numerous adherents.⁷⁶ In the terminology of the religious sociologists, new religious movements tend to be exclusive and to experience a high level of tension with society.⁷⁷ Given its nature, religion is the ultimate credence good. Credence goods are items that depend on the credibility of the supplier because the quality cannot be judged before or after the purchase.⁷⁸ Therefore, material deprivation is not necessarily fatal to the growth of a new religion. Through the perceived sacrifice of the religion's leaders and adherents, material deprivation can actually add credibility to the religion's credence good.⁷⁹

However, even if the initial deprivation of material wealth does not impede the survival and initial growth of the religion, the ongoing discussion on the contribution of economic competitiveness to religious competition suggests that the extent to which a religion prospers and spreads is usually associated with its growth in its material wealth.⁸⁰ Material wealth also becomes

⁷⁵ Hackett (n 11) 22.

⁷⁶ Christianity is a possible example: see R. Dean Peterson, *Religion A Concise History of Christianity* (Wadsworth Publishing Company 1993) 38-40.

⁷⁷ Wilson (n 48) 18.

⁷⁸ Witham (n 2) 61-62.

⁷⁹ Ibid 61-65; Stark & Finke (n 1) 106-113. See also Lu (n 3) 60-62 (using example of Yiguan Dao experience in Taiwan).

⁸⁰ See John L. Esposito et al., *World Religions Today* (Oxford University Press 2002) 368-370 & 388 (noting how the success and decline in expansion of pre-modern Buddhism is closely related to the rise and fall of associated mercantile activities).

more crucial in a religious free market, in which a religion must compete actively with other religions for new members and for the retention of existing members. The contribution of material wealth to success has been recognized in other realms of competition for truth, such as legal truth finding (litigation)⁸¹ and political truth finding (political competition).⁸² It is always easy to underestimate the contribution of material wealth to the success of one's own religion (although less so for the success of competing religions).⁸³

B. Hoping for Economically Competitive Religions?

Given the significant contribution of material wealth to religious competitiveness, the question from the religious free market perspective is thus whether the envisaged religious free competition should include economic competition. One possible view is that it should. The material wealth of a religious organization could simply be due to the voluntary donations provided by devout followers who are attracted to the virtues of the organization's professed doctrines and practices. Arguably, there are few normative objections to such an organization succeeding in a religious market. Nonetheless, one still has to be sensitive to the historical or structural factors that

⁸¹ E.g., Issachar Rosen-Zvi, 'Just Fee Shifting', 37 Fla. St. U. L. Rev. 717, 718-719 (2010); Albert Yoon, 'The Importance of Litigant Wealth', 59 DePaul L. Rev. 649 (2010).

⁸² For discussions about the role of money in political speech and political competition, see Timothy K. Kuhner, 'Citizens United as Neoliberal Jurisprudence: the Resurgence of Economic Theory', 18 Va. J. Soc. Pol'y & L. 395, 414-448 (2011); Hellman (n 63); Michael Bailey, 'The Two Sides of Money in Politics: A Synthesis and Framework', 3 Election L.J. 653 (2004).

⁸³ C.f. Shiun-Wey Huang, 'The Politics of Conversion: The Case of an Aboriginal Formosan Village', 91(4/6) *Anthropos* 425, 437-438 (1996) ("When dealing with religion Western writers often seem reluctant to discuss it as a practical or a profit-based phenomenon ... I have tried in this paper to show that, for the Ami of Iwan, at least, conversion is not about a radical and somehow instantaneous change of belief rather it is a strategy employed by people to improve the conditions of their everyday lives.").

are independent of the religious factor but nonetheless impact the religion's socio-economic profile. For example, the socio-economic advantages may be conferred via colonial or imperial rule.⁸⁴

Moreover, the economic competitiveness of a religion is often closely related to its doctrines and practices. The doctrines and practices of certain religions may be incompatible with or non-conducive to the modern capitalist market economy. For example, Islam's prohibition of usury is seemingly out of place in the realities of modern economic activities.⁸⁵ Certain religions may also be hostile against the fundamental premises of modern economic competition, such as property rights in land⁸⁶ or individual ownership of property.⁸⁷ Conversely, the religion may promote capitalism-friendly practices, such as an emphasis on savings and education.⁸⁸ The material wealth of a religious organization also depends on the organization's efficiency in pooling and growing its financial resources.⁸⁹ It is worth noting that religious organizations need not actively strive for economic competitiveness to enjoy its fruits. For example, Martin Luther advocated the expansion of education for a religious reason: to ensure individual access to the

⁸⁴ Tamney & Hassan (n 69) 39; Tong Chee Kiong, 'Religious Trends and Issues in Singapore', in Lai Ah Eng (ed), *Religious Diversity in Singapore* (Institute of Southeast Asian studies 2008) 34-35; Conteh (n 70) 94.

⁸⁵ Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 10-11.

⁸⁶ Many traditional Native American religious beliefs do not treat land as a commodity but rather adopt a custodial approach: Eric Michael Mazur, *The Americanization of Religious Minorities* (John Hopkins University Press 1999) 114-115.

⁸⁷ David Tabb Stewart & James T. Richardson, 'Mundane Materialism: Economic Survival and Theological Evolution Within Jesus Movement Groups', in James T. Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* 491, 491-499 (Kluwer Academic 2004) (example of Shiloh, a Jesus Movement communal group).

⁸⁸ Some religions may encourage savings, emphasize education and promote other "economic-friendly" attitudes: d Woodberry (n 55) 165-167; Luigi Guiso et al., 'Does Culture Affect Economic Outcomes?', 20(2) *The Journal of Economic Perspectives* 23, 38 (2006).

⁸⁹ Regular tithing is arguably an efficient and effective way of collecting and consolidating financial resources: Tong (n 71) 168.

Bible.⁹⁰ However, the resulting improvements in the literacy and economic productivity of the Protestants (especially in comparison with the Catholics)⁹¹ led to greater economic competitiveness, which aided the overall competitiveness of the Protestant religion, especially in circumstances in which military (power) competition was relevant as well.⁹²

One is certainly entitled to find such an outcome normatively desirable. Part of the argument in favor of the religious free market is that free competition among religions produces the religious doctrines that best suit the times and circumstances.⁹³ This argument can be viewed as including economic competition as part of religious competition or as forcing religion to simultaneously compete in two separate spheres: the religious and the economic. Nonetheless, one must be clear about the practical effect of this view: the “flourishing” of a religion is now in accordance with the “the zeal of its adherents,” “the appeal of its dogma” *and* its economic competitiveness.

On the other hand, if one’s vision of the religious free market consists primarily of competition in the spiritual and theological realms, it is unclear as to why the conformity of religious practice to contemporaneous economic circumstances should be a factor influencing a religion’s success in the religious market. Seemingly outdated religious practices that are incompatible with modern (economic) life may arguably be more conducive to the search for

⁹⁰ Sascha O. Becker & Ludger Woessmann, ‘Was Weber Wrong? A Human Capital Theory of Protestant Economic History’, *Quarterly Journal of Economics*, May 2009, 531, at 539-540 (2009).

⁹¹ *Ibid* 581-582.

⁹² *Ibid* 555-556.

⁹³ Kosmin & dKeysar (n 2) 4; Kuah-Pearce (n 34) 164; Hylton et al. (n 4) 407.

spiritual truth.⁹⁴ It is thus worth exploring what role, if any, financial affirmative action for socio-economically disadvantaged religions plays in the religious free market.

C. *Affirmative Action for Socio-economically Disadvantaged Religions*

Affirmative action for socio-economically disadvantaged religions often raises the accusation that those religions are being privileged. However, it is possible to conceive of a version of religious equality that seeks to advance substantial equality through affirmative action in favor of traditionally disadvantaged minority groups.⁹⁵ W. Robert Gray identified four justifications for affirmative action: compensation, social causation, social equality and diversity. He advocated a combination of the diversity and social equality rationales for affirmative action on the grounds that the two approaches focus on individual rights without being insensitive to group dynamics and have forward-looking perspectives that do not merely concentrate on causes from the past.⁹⁶ Other scholars highlighted the limitations of the justifications for affirmative action.⁹⁷

According to the religious free market perspective, this type of targeted financial assistance reduces the contribution of monetary success to religious success and may help otherworldly religions to avoid elimination due only to their lack of material wealth. One example is

⁹⁴ E.g., see David A. Palmer, 'Gift and Market in Chinese Religious Economy', 41(3) Religion 1, 15-16 (2011) (discussing from a sociological perspective the example of a Taoist's otherworldly religious practices that renders him improvised in terms of material wealth and religious market share).

⁹⁵ Vincent D. Rougeau, *Christians in the American Empire: Faith and Citizenship in the New World Order* (Oxford University Press 2008) 101-109; Neera Chandhoke, *Beyond Secularism: The Rights of Religious Minorities* (Oxford University Press 1999) 143-165.

⁹⁶ W. Robert Gray, *The Four Faces of Affirmative Action: Fundamental Answers and Actions* (Greenwood Press 2001) 167-176.

⁹⁷ E.g., see J. Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press 2006) 75-92 (discussing the arguments for and against affirmative action, and noting the underlying competing values and conception of equality and liberty).

Ultraorthodox Judaism in Israel, where the religious requirement of full-time study of religious study (Yeshiva) to the exclusion of economic productive activity is sustained by state's financial subsidies.⁹⁸ Financial assistance may also serve to level the playing field between these groups and the wealthier religions. As noted above, economic dominance may allow certain religious groups to maintain a strangle hold of key resources necessary for a religion survival, such as land or media.⁹⁹

This point is relevant even to those who view economic competition as integral to religious competition. The operation of market, whether religious or economic, often perpetuate initial entitlements and does not ensure fair and just distribution.¹⁰⁰ A religion's wealth may have been accumulated via a prior colonial or legal establishment instead of being "earned" by the religion. There may also be concerns about wealth from foreign sources.¹⁰¹ Similar to the concerns expressed by small, local businesses in the face of globalization and international free trade agreements,¹⁰² support for financially disadvantaged local religions competing with wealthy foreign competitors may be necessary to religious free competition.

⁹⁸ Eli Berman, 'Sect, Subsidy, and Sacrifice: An Economist's View of Ultra-Orthodox Jews', 115(3) *The Quarterly Journal of Economics* 905, 916 (2000). For a discussion on the religious dynamics of the different branches of Judaism in Israel, see generally Ephraim Tabory, *The Influence of Liberal Judaism on Israeli Religious Life*, 5(1) *Israel Studies* 183 (2000).

⁹⁹ (n 71-75) and accompanying text.

¹⁰⁰ Koppelman (n 60) 34 & 43.

¹⁰¹ E.g., Heather J. Sharkey, 'Muslim Apostasy, Christian Conversion, and Religious Freedom in Egypt: A Study of American Missionaries, Western Imperialism, and Human Rights Agendas', in Rosalind I.J. Hackett (ed), *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (Equinox 2008) 156.

¹⁰² C.f. Shima Baradaran-Robison et al., 'Religious Monopolies and the Commodification of Religion', 32 *Pepp L. Rev.* 885, 897-902 (2005) (critical discussion on the analogies between arguments for protection of local industries and religions from international "unfair" competition).

In summary, the religious free market actually welcomes financial assistance to socio-economically disadvantaged religions if this religious competition is primarily conceived of as a spiritual contest or if the financial assistance is used to neutralize the “undeserved” financial advantage of competing religions. One chief concern with this type of financial affirmative action is that the goal of facilitating free competition may be thwarted if the aid is distributed in accordance with the recipient religions’ influence on the political process. The role of political competition in religious competition is the subject of the next Part.

IV. POLITICAL COMPETITION AND RELIGIOUS COMPETITION

This Part examines the dynamics of political competition in religious competition and considers whether the religious free market supports or discourages greater involvement of religion in politics and the public sphere.

A. Does Religious Competition Include Political Competition?

James Madison envisaged that political factions and competition based on religious differences are manageable because of the variety and plurality of sects.¹⁰³ The lack of a Christian denomination that dominates the political sphere in the U.S. arguably confirms Madison’s prediction.¹⁰⁴ However, religious pluralism in the US during the founding era was limited.¹⁰⁵

¹⁰³ Koppelman (n 29) 1880; Shiffrin (n 28) 29; Bette Novit Evans, *The Constitutions of Religious Pluralism in the United States*, in Alan Wolfe & Ira Katznelson (eds), *Religion and Democracy in the United States: Danger of Opportunity?* (Princeton University Press 2010) 122-125 .

¹⁰⁴ Koppelman (n 29) 1838 n.26; Fowler et al. (n 61) 44-45; Mazur (n 86) 130.

¹⁰⁵ William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (Yale University Press 2003) 20-21; Phillip E. Hammond et al., *Religion on Trial: How Supreme Court Trends Threaten the Freedom of Conscience in America* (Altamira Press 2004) 46-50.

Moreover, there are sufficient similarities among the dominant coalitions of the Protestant faction that the Protestants may collaborate to politically exclude and discriminate against non-Protestant minority groups¹⁰⁶ under the banner of non-sectarian neutrality.¹⁰⁷ Immigration and other demographic changes have resulted in a significant increase in and diversification of the religious minorities in the US,¹⁰⁸ and the religious identity of the nation has evolved into a more inclusive and pluralistic notion.¹⁰⁹ For example, Catholics and Jews are now included in the “Judeo-Christian” heritage¹¹⁰ after years of legal discrimination.¹¹¹ However, the religions that do not fall within this broadened notion of the lowest denominator of similarity are still at the mercy of the political process. Examples include the recent state referendums to prohibit state courts from considering Sharia law¹¹² and the local ordinances targeting the religious practices of unpopular or minority religions.¹¹³

Armed with the Establishment Clause and the Free Exercise Clause, the courts play a certain mediating role in the political arena and can thereby provide some protection to the

¹⁰⁶ Feldman (n 28) 304; Stephen J. Stein, ‘Religion/Religions in the United States: Changing Perspectives and Prospects’, 75 Ind. L.J. 37, 48 (2000); Shiffrin (n 28) 70; Hutchison (n 105) 59-83.

¹⁰⁷ Shiffrin (n 28) 41-42; McConnell (n 4) 1264.

¹⁰⁸ Hutchison (n 105) 24-27; Stein (n 106) 41-54; Feldman (n 28) 295.

¹⁰⁹ Edwin S. Gaustad, *Proclaim Liberty Throughout All the Land* (Oxford University Press 2003) 51; Hammond et al. (n 105) 65-67; Mazur (n 86) 142-143.

¹¹⁰ Stein (n 106) 48-49. C.f. Hutchison (n 105) 196-218 (a critical discussion of the concept).

¹¹¹ William N. Eskridge, Jr., ‘Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion’, 57 Fla. L. Rev. 1011, 1051 (2005); Feldman (n 28) 288; Gaustad (n 109) xiv; Reichley (n 28) 175; Shiffrin (n 28) 40.

¹¹² The state constitutional amendments specifically prohibits consideration of “international law or Sharia Law” in state courts: Jess Bravin, ‘Oklahoma Shariah Ban Halted’, Wall St. J., Nov. 9, 2010, at A16 (the Oklahoma measure passed by 70% approval in the state referendum).

¹¹³ For example, the city ordinances banning “ritual slaughter” in *Church of the Lukumi Balabalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) reflected specific animosity to the Santeria religion and its religious practices. The court came to the minority religion rescue in this instance, but the case highlighted the oppressive potentials of the political process against religions that are not part of the “Judeo-Christian” family.

religious groups that lack political power,¹¹⁴ even if the courts may not be free from religious bias themselves.¹¹⁵ The extent to which the religious market includes political competition depends on the combinations of normative interpretations of the Free Exercise and Establishment Clauses. Richard W. Garnett expressed skepticism toward the harm Smith¹¹⁶ posed to religious freedom and argued for the primacy of the political process in securing religious accommodation.¹¹⁷ From the perspective of the religious free market, a lower standard of free exercise protection is not necessarily detrimental to religious competition. If neutral, generally applicable laws impede all religions on a truly random basis, the increased risk of legal impediments does not necessarily distort the competition among religions because all religions are equally at risk of affliction. Although a religion may be disproportionately burdened by a particular law, there is no comparative disadvantage over time and over the entire spectrum of laws.

In practice, however, the burdens of facially neutral, generally applicable laws are usually not random. The political majority is not well known for its sensitivity to the needs of the religious

¹¹⁴ Fowler et al. (n 61) 232-233. C.f. Zoë Robinson, 'Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion', 20 Wm. & Mary Bill Rts. J. 133, 173-175 (2011) (recognizing how religious organizations may wield political power to advance their interests and discuss the effectiveness and limitations of heightened judiciary review as a countermeasure).

¹¹⁵ John Wybraniec and Roger Finke's empirical analysis of all court cases concerning religion between 1981 and 1996 found that minority religions were disproportionately more involved in litigations but had lower success rate: John Wybraniec & Roger Finke, 'Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule', in James T. Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* (Kluwer Academic 2004) 542-545 (68.3% vs 27.6%~46.9%). On the other hand, Gregory C. Sisk's study of 729 published decisions from federal district courts and courts of appeal from 1986-1995 found no difference in success rate after controlling other variables: Gregory C. Sisk, 'How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases', 76 U. Colo. L. Rev. 1021, 1036 (2005).

¹¹⁶ 494 U.S. 872 (1990).

¹¹⁷ Richard W. Garnett, 'The Political (and Other) Safeguards of Religious Freedom', 32 Cardozo L. Rev. 1815, 1820-1823 (2011).

minority.¹¹⁸ Legislative exemptions are more likely to be granted to majority and mainline religions.¹¹⁹ The sociological religious economy model also predicted that sectarian faiths (i.e. religions that are in tension with their socio-cultural environment) will bear the immediate blunt of an increase in regulations and be placed at a competitive disadvantage.¹²⁰ Commenting on the Smith case, Steven H. Shiffrin wryly noted, “If the Protestant majority ingested peyote as part of a communion service in Oregon, the law against peyote ingestion would surely have exempted religious ceremonies.”¹²¹ In the context of United Kingdom, Samantha Knights also observed that the “exemptions to date have been ad hoc rather than systematic and largely confined to major world religions with greater bargaining power vis-à-vis the state.”¹²² In these circumstances, a higher standard of free exercise enforced by the judiciary might be necessary to ensure a level playing field for minority religions.

The members of a religious minority are not necessarily incapable of obtaining executive or legislative exemptions.¹²³ “However discrete or insular minority sects might be one by one, cross-religious alliances are possible, and the political lobbying power of religious interests in the aggregate makes up for any sect’s weakness operating alone.”¹²⁴ Indeed, sometimes “even small

¹¹⁸ John C. Blakeman, *The Bible in the Park: Religious Expression, Public Forums, and Federal District Courts* (University of Akron Press 2005) 234.

¹¹⁹ Robinson (n 114) 168-170; Stewart & Richardson (n 87) 500; Kent Greenawalt, *Religion and the Constitution: Volume 1: Free Exercise and Fairness* (Princeton University Press 2006) 81.

¹²⁰ Wybraniec & Finke (n 115) 539.

¹²¹ Shiffrin (n 28) 32.

¹²² Samantha Knights, *Freedom of Religion, Minorities, and the Law* (Oxford University Press 2007) 24 & 148-149 .

¹²³ Kathleen M. Sullivan, ‘The New Religion and the Constitution’, 116 Harv. L. Rev. 1397, 1411 (2003); Robinson (n 114) 165-166; Sisk (n 115) 1024.

¹²⁴ Sullivan (n 123) 1411.

minority religious fraction may be politically powerful enough in local arenas to secure concessions legislatively.”¹²⁵ Nonetheless, one is entitled to be skeptical of whether these facts can ensure religious free competition, especially given the unpleasant history of religious minorities not only precluded from exemptions but are actively targeted for legal sanctions/impediments.¹²⁶ The example of political support by other religious communities for Native Americans’ sacramental use of peyote after Smith¹²⁷ should also be contrasted with the conspicuous lack of attention to and support for Native Americans’ religious claims over land use, a claim that seemed alien to the other religious communities in the polity.¹²⁸

Similarly, the accommodationists’ interpretation of the Establishment Clause¹²⁹ to allow preferential aid to religions generally favors the religious groups that wield political power. This interpretation of the Establishment Clause still requires aid to be available to all religions. However, the politically dominant religious groups/coalitions can be expected to procure government aid in areas that would produce the greatest benefits for the dominant religious groups/coalitions.¹³⁰ Given the different (material and doctrinal) needs of different religions, one would expect the religious groups with greater political power to receive disproportionate benefits from ostensibly non-preferential aid. One example is the Equal Access Act, which purportedly prohibited all

¹²⁵ Evans (n 103) 129-130 (example of the Satmar Hasidic sect Judaism having the state legislature to carve a district in a way that ensure its population is almost entirely of the religion’s members).

¹²⁶ Sisk (n 115) 1039; Hutchison (n 105) 52-54.

¹²⁷ Sisk (n 115) 1024.

¹²⁸ Mazur (n 86) 112-116; Greenawalt (n 119) 192-193.

¹²⁹ Garry (n 4) 69; Julia K. Stronks, *Law, Religion, and Public Policy: A Commentary on First Amendment Jurisprudence* (Lexington Books 2002) 36; Esenberg (n 26) 14; Fowler et al. (n 61) 237-240.

¹³⁰ Robinson (n 114) 168-172 (using a public choice analysis). See also Berman (n 98) 912 (example of Ultra-Orthodox in Israel).

secondary federally funded public schools that have a “limited open forum” from discriminating against student groups based on their “religious, political, philosophical, or other content of the speech at such meetings.”¹³¹ Notwithstanding the superficially neutral language, the Act was enacted primarily to ensure access to religious student groups¹³² and was primarily utilized by Protestant Christian student clubs in practice.¹³³ Another example is the requirement for school prayer under the No Child Left Behind Act.¹³⁴ While technically available to all religions, the diverse manner and nature of prayers in the different religions renders such prayer activities less meaningful and useful to those religions whose religious worship do not conform to the monotheistic conception of prayer envisaged under law.

On the flip side, politically dominant religious communities would seek to remove non-preferential aid to religion if the beneficiaries disproportionately turned out to be the adherents of other rival religions. One example is the “Peace Policy” instituted under President Ulysses S. Grant to provide funding for religious organizations that would assist in educating and “civilizing” the Native Americans. Most of the initial recipients were Protestant missionaries. However, when Catholics and other non-Protestants ended up with bulk of the funding (apportioned according to school enrolments), oppositions to the programs from the Protestant community ensued.¹³⁵

¹³¹ 20 U.S.C.A. §§ 4071-4074.

¹³² Dena S. Davis, ‘Religious Clubs in the Public Schools: What Happened After Mergens?’, 64 Alb. L. Rev. 225, 226-230 (2000). See generally: S. Rep. No. 98-357 (1984), reprinted in 1984 U.S.C.C.A.N. 2348.

¹³³ A survey of Ohio public schools revealed that the upholding of the constitutionality of the Act by the Supreme Court have not “trigger a tidal wave of religious evangelizing in public school” though “Christian clubs, usually of a Protestant nature, are the sole advocacy offerings in virtually all the schools in which they are present”: Davis (n 132) 238-239. See also: Fowler et al. (n 61) 264-265. In addition, almost all (98.5%) of all litigations relating to religious speech in public schools concerned Christian-based speech: Blakeman (n 118) 96.

¹³⁴ Blakeman (n 118) 240.

¹³⁵ Hammond et al. (n 105) 66.

Religious organizations is also likely to “seek the termination or diminution of aid to one or more of their rival sects based on the incompatibility of the religious tenets of the rival sects with [purported] important secular objectives.”¹³⁶

This problem is inconsequential if one treats political competition as an inevitable or even a normatively desirable aspect of religious competition. This perspective conforms to Justice Antonin Scalia’s jurisprudence (as characterized by Kathleen M. Sullivan), which conceptualizes religious associations as “ordinary interest groups that may participate freely in politics but should expect no particular judicial solicitude from courts interpreting either of the Religion Clauses.”¹³⁷ The willingness to devote the time, effort and expense required to participate in the political process to advance one’s religious interests is arguably correlated with the desirability of that religion.¹³⁸ Given that numerical superiority is an important (though not always decisive) factor in political competitiveness, one might conceive of the competitive advantage of political dominance as a just reward for the religion’s success in attracting and retaining adherents. Of course, here we depart from the idealized scenario of religious competition and enter a world in which religions “flourish according to the zeal of its adherent and the appeal of its dogma” as well as their political power.

¹³⁶ Calvin Massey, ‘The Political Marketplace of Religion’, 57 *Hastings L.J.* 1, 34-35 (2005).

¹³⁷ Sullivan (n 123) 1409-1411 (He identified four different accounts of religious organizations that underpinned the different normative interpretations of the Religion Clauses: quasi-government, private associations, discrete and insular minorities, ordinary interest groups.).

¹³⁸ Garnett (n 117) 1826.

B. Different Religions, Different Politics

One concern with including political competition as a part of religious competition is that success in the political sphere (and its corresponding benefits in the religious sphere) may be due to the political organizational abilities of the religious groups.¹³⁹ According to public choice theory, a mobilized, well-connected minority can exert more political influence than a numerically superior but unorganized or apathetic majority.¹⁴⁰ Highly motivated interest groups are often favored in the legislative process at the expense of fragmented, diverse and possibly unknown interest.¹⁴¹ Although public choice theory has traditionally been applied to economic rent,¹⁴² it is also applicable to scenarios in which non-monetary ideological “rent” is at stake. The National Rifle Association in the U.S. is a classic example of a well-mobilized minority interest group that successfully influences social policies against public opinion. Although the majority of Americans favor stricter gun laws, the group has managed to block and repeal important gun control legislation through strategic financial and electoral contributions.¹⁴³ Religious organizations have

¹³⁹ Fowler et al. (n 61) 119.

¹⁴⁰ Samuel Issacharoff, ‘Democracy and Collective Decision Making’, 6 Int’l J. Const. L. 231, 257-258 (2008); James D. Gwartney & Richard E. Wagner, ‘Public Choice and the Conduct of Representative Government’, in James D. Gwartney & Richard E. Wagner (eds), *Public Choice and Constitutional Economics* (Jai Press 1988) 19; William N. Eskridge, Jr., ‘Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation’, 74 Va. L. Rev. 275, 294-295 (1988).

¹⁴¹ Massey (n 136) 38; Gwartney & Wagner (n 140) 19; Dennis C. Mueller, *Public Choice III* (Cambridge University Press 2003) 475.

¹⁴² Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* (West 2009) 49-67 (discussing economic rents in attorney licensing, steel tariffs, takings, etc); Gwartney & Wagner (n 140) 19.

¹⁴³ See generally Kelly D. Patterson & Matthew M. Singer, ‘Targeting Success: The Enduring Power of the NRA’, in Allan J. Cigler & Burdett A. Loomis (ed), *Interest Group Politics* (7th ed. CQ Press 2007).

also become increasingly prominent political players in the United States in an effort to influence law and policies in accordance with their religious values.¹⁴⁴

Echoing the discussion in Part III, the extent to which political competitiveness varies in accordance with the disparity in the wealth of religious organizations must not be slighted as well. Resources, especially financially resources, are necessary for any political organization.¹⁴⁵ The monetary resources made available to the Native Americans by gambling facilitated significantly greater political presence of both tribal interests and spiritual practices.¹⁴⁶ Affluence of individual religious adherents, perhaps due to economically favorable religious practices or wealth legacy, can also significantly contribute to the religions' political impact.¹⁴⁷ Material wealth affects political power, and both enhance religious competitiveness.

A larger concern about including political competition as an aspect of religious competition is that doing so disadvantages the religions that are privatized in nature or that otherwise frown upon political involvement. For example, given the Anabaptists' aversion toward political involvement in the state,¹⁴⁸ their religious practices are less likely to be granted exemptions if those exemptions solely depend on the political process.¹⁴⁹ Indeed, given that most Amish do not vote

¹⁴⁴ For a discussion of political mobilization by religious organizations in the US, see Fowler et al. (n 61) 119-167.

¹⁴⁵ Fowler et al. (n 61) 130-131.

¹⁴⁶ Ibid 65.

¹⁴⁷ Ibid 70-71.

¹⁴⁸ Jill Norgren & Serena Nanda, *American Cultural Pluralism and Law* (3rd ed. Praeger 2006) 105-106; Fowler et al. (n 61, at 61-62).

¹⁴⁹ They were granted exemption by the courts in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) which requires "[only] those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims of free exercise of religion." This was relaxed in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (J. Scalia). While *Yoder* was distinguished in *Smith* as a case where Free Exercise claim is coupled with other constitutional protection (education of children), other religious practices may not be exempted, both judicially and

as a matter of principle, they have no electoral leverage even on local politicians.¹⁵⁰ Robert L. Kidder and John A. Hostetler described how a group of Amish leaders successfully negotiated for de facto exemptions under Social Security and state regulations on building and education. These exemptions were achieved through politically and legally acute negotiations “without litigation or the use of traditional forms of electoral political pressure” that were nonetheless supported by “a well-developed but generally unpublicized network of relationships [] developed with non-Amish groups who willingly use legal services and political action to help protect them.”¹⁵¹ However, even these mild political negotiations were viewed negatively by the majority of the congregation, and the Amish leaders operated in an environment in which the rest of the community failed to fully understand the actual process.¹⁵²

Argentina’s political and legislative debate over its regulations on religion similarly revealed the differences among the political actions of the minority religions that stood to be most affected by the regulations. The Christian evangelicals were largely successful in mobilizing themselves and lobbying for their claims, whereas the Spiritists were unwilling to mobilize their adherents to support their claims and were therefore largely invisible in the political process.¹⁵³ In

politically under Smith. For example, Amish claim for exemption of Social Security tax was rejected in *United States v. Lee*, 455 U.S. 252 (1982).

¹⁵⁰ Robert L. Kidder & John A. Hostetler, ‘Harmony as Ideology in Amish and Japanese Societies’, 24 *Law & Soc’y Rev.* 895, 913n.9 (1990).

¹⁵¹ *Ibid* 907-918. Jill Norgren and Serena Nanda suggested that the accommodation of Amish, in contrast with the Mormons and Japanese Americans, “rested more upon the similarities between the Amish and the larger society” and see the Amish culture as representing “an ideal model of rural, moral, self-sufficient America.”: Norgren & Nanda (n 148) 116-117.

¹⁵² Kidder & Hostetler (n 150) 916-918.

¹⁵³ Alejandro Frigerio & Hilario Wynarczyk, *Cult Controversies and Government Control of New Religious Movements in Argentina, 1985-2002*, in James T. Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* (Kluwer Academic 2004) 471.

East Asia, “the rapid spread of Christianity in post-war Taiwan provided new impetus for Taiwanese religions to reconsider their relationship with politics.”¹⁵⁴ The Taiwanese Presbyterians’ advocacy for issues such as democratization and the poverty gap in the political and public sphere can be contrasted with the Taiwanese Buddhist organization Tzu Chi’s aversion to involvement in political activities.¹⁵⁵ Robert Booth Fowler et al. also identified each religion’s traditions and theological beliefs as a contributing factor to the religious groups’ political effectiveness while noting the unwillingness of some religious groups, such as the Jehovah’s Witnesses, to become involved in politics.¹⁵⁶

These concerns do not necessarily impede the desirability of including political competition in religious competition. From the religious free market perspective, the question concerns the extent and nature to which political competition should be fostered as part of religious free competition. To answer this question, one must appreciate the disparate impact of the religious free market on the different religions. These impacts vary in accordance with the religions’ political organization skills and theological inclinations toward political involvement.

C. Religious Free Market and the Separation of Politics

Therefore, what is the religious free market’s stance on religious involvement in politics and the public sphere?

¹⁵⁴ Chou (n 54) 67-68.

¹⁵⁵ Ibid. (Although it is worth noting that another Taiwanese Buddhist organization, Fokuangshan, has openly supported a presidential candidate during election. Kai-Ti Chou argued that in Taiwan, religion itself can now decide whether to be involved in politics or not.).

¹⁵⁶ Fowler et al. (n 61) 129-130.

Much has been written about the possible dangers of religiously inspired politics. Because some religious beliefs are absolute or claim to be infallible and absolute,¹⁵⁷ religiously inspired political positions are “not merely strongly held positions; they are convictions, imbued with certitude, excluding doubt.”¹⁵⁸ Religious views are often characterized as irrational given their non-contestable claims of higher authority.¹⁵⁹ Religious memberships are a particularly salient source of group and political identification,¹⁶⁰ and they have the tendency to exclude non-adherents.¹⁶¹ These divisive characteristics are said to impede compromise and accommodation, which are key requirements for a workable democracy in a pluralistic society.¹⁶² In addition, these characteristics create great potential for conflict and discrimination.¹⁶³ The members of religious minorities may consistently lose out in political debates permeated by religious conviction because of their departure from the religious mainstream.¹⁶⁴

Nonetheless, academics have questioned whether the dangers associated with religiously inspired politics are unique to religion. Andrew Koppelman rebutted that “[i]t is not clear why

¹⁵⁷ Matthias Mahlmann, ‘Free Speech and the Rights of Religion’, in András Sajó (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 61; Feldman (n 28) 281; Steven G. Gey, ‘Unity of the Graveyard and the Attack on Constitutional Secularism’, 2004 B.Y.U.L. Rev. 1005, 1023 (2004).

¹⁵⁸ Feldman (n 28) 281; Sullivan (n 123) 1421.

¹⁵⁹ Eric Barendt, ‘Free Speech and Religion: Secular and Religious Perspectives on Truth’, in András Sajó (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 31; Wicks (n 26) 413; Gey (n 157) 1024; June Carbone, ‘Deep Purple: Religious Shades of Family Law’, 110 W. Va. L. Rev. 459, 470 (2007); Blakeman (n 118) 18.

¹⁶⁰ Blakeman (n 118) 87; Feldman (n 28) 285; Carbone (n 159) 495-496; Mahlmann (n 157) 60; Eskridge (n 111) 1050; Koppelman (n 29) 1916.

¹⁶¹ Gey (n 157) 1011; Eisgruber & Sager (n 25) 828-829. Arguments employed may often be based on appeal to divine authority or holy text that is not shared by non-believers: Carbone (n 159) 495.

¹⁶² Feldman (n 28) 282; Blakeman (n 118) 6 & 18; Eskridge (n 111) 1050.

¹⁶³ Eisgruber & Sager (n 25) 829; Feldman (n 28) 304; Eskridge (n 111) 1050.

¹⁶⁴ Feldman (n 28) 282; Stronks (n 129) 145.

division along religious lines is worse than divisions along lines of race, gender, age, ethnicity, or economic class.”¹⁶⁵ Richard W. Garnett noted that “[w]hat’s more, it is not clear that religion has been a ‘*distinctively* divisive force in our society.’ After all, as Judge McConnell has argued, [r]eligious differences ... have never generated the civil discord experienced in political conflicts over such issues as Vietnam War, racial segregation, the Red Scare, unionization, or slavery.”¹⁶⁶ Eric Barendt also questioned the perceived irrationality of the religious position by arguing that “there are no essential differences between the grounds for accepting religious truths (and consequent moral values) and for accepting the moral truth-claims that are made by secular liberals”: both allude to arguments of rationality and cannot be established by empirical means.¹⁶⁷ Some commentators argued that it is undemocratic to exclude religious values and discourse from public/political debate.¹⁶⁸ The purportedly unequal political lobbying capabilities of religious organizations are not in any way unique to religious groups and may include humanist and secular groups as well.¹⁶⁹

Moreover, in reality, religion cannot be confined to the private realm and will inevitably be involved in the public and political spheres.¹⁷⁰ Nevertheless, it is interesting to note that commentators relied on this characteristic as an argument for both a greater involvement of religion

¹⁶⁵ Koppelman (n 29) 1838.

¹⁶⁶ Richard W. Garnett, ‘Religion, Division, and the First Amendment’, 94 Geo. L.J. 1667, 1716 (2006).

¹⁶⁷ Barendt (n 159) 31-32.

¹⁶⁸ Robert F. Cochran, Jr., ‘Introduction’, in Robert F. Cochran, Jr. (ed), *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law* (New York University Press 2008) 3; Patrick M. Garry (n 4) 44-45.

¹⁶⁹ Wicks (n 26) 414.

¹⁷⁰ Horwitz (n 28) 984; Feldman (n 28) 286; Wicks (n 26) 413; Stronks (n 129) 36; Garry (n 4) 44; Carter (n 162) 159-160.

in the public sphere¹⁷¹ and a greater separation between religion and politics.¹⁷² While religious involvement in the political process can never be truly eliminated, there are possible legal measures to limit the influence of religions. The Establishment Clause was originally conceived to restrict the extent and manner in which the majority religious fraction can translate its political dominance into perpetual religious dominance.¹⁷³ There could also be a prohibition against government actions being motivated by religious purposes, as is the first prong of the infamous test in *Lemon v Kurtzman*¹⁷⁴ Another example is section 501(c)(3) of the Internal Revenue Code that bars certain types political campaigning and lobbying activities by tax-exempt religious organizations. These restraints on political activities by religions often attract accusations of restricting religious freedom.¹⁷⁵

From the religious free market perspective, however, the increased separation of religion and politics may actually facilitate free religious competition. As discussed above, the political competitiveness of a religion impacts that religion's success in the religious free market. Nonetheless, a religion's political competitiveness often depends on extraneous factors, such as the political mobilization skills of its members and its theological outlook towards political participation. It is open to debate whether the religious free market is designed to foster these types

¹⁷¹ Horwitz (n 28) 976; Garry (n 4) 44-45.

¹⁷² Feldman (n 28) 286-287. Also c.f. Stronks (n 129) 36 ("the important thing is to figure out how the law should define their legal parameters").

¹⁷³ Eskridge (n 111) 1050.

¹⁷⁴ *Lemon v Kurtzman*, 403 U.S. 602 (1971).

¹⁷⁵ E.g., Anita Y. Woudenberg, 'Propagating a Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality', 7 First Amend. L. Rev. 307 (2009) (criticizing the Lemon test); Jennifer M. Smith, 'Morse Code, Da Vinci Code, Tax Code and ... Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches', 23 J.L. & Pol. 41 (2007) (arguing against application of section 501(c)(3) on religious organizations).

of competitions. On the one hand, the active political participation of religious organizations and citizens is integral to the operation of democracy in a religious pluralistic society.¹⁷⁶ On the other hand, given the oft-alleged “corrupting” influence of politics on religion,¹⁷⁷ the search for spiritual and theological truth may actually be facilitated if political competition is removed from religious competition.

Additionally, the separation of religion from politics lowers the stake of religious competition.¹⁷⁸ The U.S. socio-political environment of increasing religious pluralism and immense potential for religious participation in politics has compelled religious groups to get organized in order to protect their collective interests against encroachment by rival religions.¹⁷⁹ Given the importance of numerical superiority in political influence, any losses in religious competition is magnified by the decrease in political influence. One way of interpreting the anti-immigration movement in U.S. early-twentieth century that targeted Jewish and Catholic immigrations is the concern about the change in political dynamics arising from the increasing proportion of those “inferior” religious communities.¹⁸⁰ Such sentimental and corresponding hostility towards communities comprising of “foreign” religions remains well alive today.¹⁸¹

¹⁷⁶ Cochran (n 168) 3; Garry (n 4) 44-45.

¹⁷⁷ Koppelman (n 29) 1834-1835. See also Cochran (n 29) 100-101 (argue from a religious perspective against government declaring through monuments, symbols, and official designation that the United States is a “Christian nation”).

¹⁷⁸ See Massey (n 136) 38-39 (arguing that that where legislature is given considerable leeway in the accommodation and assistance of religion, “[religious groups] will quickly realize the competitive advantage to be gained by actively and successfully recruiting new adherents”).

¹⁷⁹ Fowler et al. (n 61) 121-122.

¹⁸⁰ Feldman (n 28) 288; Gaustad (n 109) xiv.

¹⁸¹ See L. Scott Smith, ‘From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment’, 45 *Brandeis L.J.* 527, 528 (2007).

Removing political competition from religious competition reduces the rivalry and hostility among competing religious groups by mitigating the danger that a decrease in the number or proportion of adherents will accelerate the religion's marginalization via the political process.

Vigorous political competition among the different religions in a polity may also have the side effects of promoting religious stifles and religiously inspired political extremism. Steven H. Shiffrin warned that “[i]f the state is open for capture by religious groups, the potential for intolerance, ugly confrontation, and violence is multiplied.”¹⁸² Indeed, the reduction of religious strife arising from religions competing to obtain government preferential treatment is one of the purported purpose of the Establishment Clause.¹⁸³ Edward Glaser et al. observed that when a political candidate's audience is particularly defined by religion, the candidate is likely to be more extreme in his religious positions. This religious extremism is due to the incentive to stimulate one's voters turn-out and the informational asymmetry where one's voters are more aware of changes to one's political platform.¹⁸⁴ In the context of India, Ashgar Ali Engineer argued that religious stifles in India is caused by the economic and political competitions among religions that arose after the advent of British rule in the 19th century.¹⁸⁵

In summary, increasing the separation of religion and politics is not necessarily detrimental to the religious free markets. Limiting political mobilization by religion helps reduce the disparate

¹⁸² Shiffrin (n 28) 40.

¹⁸³ Caroline Mala Corbin, ‘Nonbelievers and Government Speech’, 97 Iowa. L. Rev. 347, 375-376 (2012).

¹⁸⁴ Edward L. Glaser et al., ‘Strategic Extremism: Why Republicans and Democrats Divide on Religious Values’, *The Quarterly Journal of Economics*, Nov. 2005, 1283, at 1287 & 1321-1322 (2005).

¹⁸⁵ Ashgar Ali Engineer, ‘Secularism in India’, in Barry A. Kosmin & Ariela Keysar (ed), *Secularism & Security: Contemporary International Perspectives* (Institute for the Study of Secularism in Society and Culture 2007) 151-152.

impact of political competitiveness on religious competitiveness. This is particularly important for religions that are theologically adverse towards religious participation, that are poorly organized in their political activities and/or lacks financial resources. Religious competition that is arguably more “healthy” is also better fostered in an environment where the stakes of religious competition are not magnified by the leverages of political power.

V. CONCLUSION

This Essay’s critical examination of the relationship between religious competition and other socio-economic factors, such as material wealth and political influence, punctures the idealized portrayal that “each [religious group] flourish[es] according to the zeal of its adherents and the appeal of its dogma.” Although they are neither necessary nor sufficient conditions for a religion’s success, the economic and political competitiveness of a religion can significantly contribute to its growth, especially in the face of competition from other religions.

This Essay does not take a position on the way religious competition in the religious free market should be normatively conceived. Rather, this Essay suggests that if one envisages a religious free market designed primarily to preserve spiritual and theological competition among religions, legal measures such as financial affirmative action for socio-economically disadvantaged minority religions and restrictions on religious involvement in politics may facilitate religious free competition. Conversely, if one values religion from a more pragmatic and functional perspective, one’s version of the religious free market would require religions to be successful in economic and political competition as well. In any case, one must be aware that either of these plausible conceptualizations of the religious free market will have disparate effects on different religions. Economically and politically competitive religions will naturally prefer a

religious market that allows any advantages from the economic and political sphere to be legitimately translated into advantages in the religious market. The converse is true as well. In order to avoid the religious free market from being reduced to a dangerously ambiguous and fluid rhetoric, it is essential to appreciate the complex realms of religious competitions and to articulate precisely what type of religious free competition the religious free market intends to promote and protect.

CHAPTER 3:

BIAS AND RELIGIOUS TRUTH-SEEKING IN PROSELYTIZATION RESTRICTIONS

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I. INTRODUCTION

Restrictions on religious propagation, or proselytization, are controversial. In particular, two major objections are frequently raised against such legal restrictions. First, given the religious duty inherent in many missionary religions to evangelize and spread their faith,¹ these restrictions not only curtail the religious liberty of these religious adherents but also impede informed religious choice.² Second, notwithstanding the various purported justifications of social peace underpinning these restrictions,³ the normative desirability of these restrictions is frequently compromised by the fact that these restrictions tend to favor dominant religions and are often one-sided in nature.⁴

Religious propagation is restricted in Singapore. In particular, “offensive” religious propagation is subjected to an array of legal and quasi-legal sanctions.⁵ Worrisome from the perspective of religious liberty and religious free discourse, recent incidents in Singapore revealed that “offense” is given a broad and crude interpretation. Private individuals have been sentenced

¹ Timothy L. Hall, *Toleration and Dogmatism: The Contribution of Baptists to Law*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 77, 85 (Robert F. Cochran, Jr. ed., New York University Press 2008); BARRY A. KOSMIN & ARIELA KEYSAR, RELIGION IN A FREE MARKET 11 (Paramount Market Publishing 2006); Peter Radan, *International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights*, in LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 9, 17 (Peter Radan et al. eds., Routledge 2005); R. ANDREW CHESNUT, COMPETITIVE SPIRITS: LATIN AMERICA’S NEW RELIGIOUS ECONOMY 11 (Oxford University Press 2003).

² Rosalind I.J. Hackett, *Revising Proselytization in the Twenty-first Century*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 1, 3-4 (Rosalind I.J. Hackett ed., Equinox 2008); M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR*, 17 DUKE J. COMP. & INT’L L. 91, 91-92 (2006). See *infra* II.B.

³ Thio Li-ann, *Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy*, 2010 SING. J. LEGAL STUD. 484, 488-493 (2010). See Grace Y. Kao, *The Logic of Anti-proselytization, Revisited*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 76 (Rosalind I.J. Hackett ed., Equinox 2008) (discussing and critiquing the various arguments supporting restrictions on proselytization).

⁴ Examples include Malaysia, Greece and India: see *infra* II.A.

⁵ *Infra* III.B.

to imprisonment for sending evangelical materials to Muslims.⁶ These materials, while censorious toward Islam, fall short of religious hate speech.⁷ Critical commentaries by two Christian pastors on the religious practices of Buddhism and Taoism have also prompted intervention from the Singapore government via the Internal Security Department (“ISD”), a government authority empowered with the dreaded power of detention without trial under the Internal Security Act.⁸ Echoing the two typical objections of proselytization restrictions, prominent local constitutional law scholar Thio Li-ann and other legal academics have criticized the impact of restrictions on the Christian minority in Singapore and the censoring of religious propagation that impedes religious liberty and religious truth-seeking.⁹

Careful examination of the Singapore legal regime, however, reveals two important nuances that challenge the applicability and normative strengths of these objections. First, contrary to the usual narrative, the chastised religion in Singapore is anything but a politically marginalized religious community, whereas protected religions include numerical minority religions that are socially, economically, and politically disadvantaged. Singapore is a pluralistic religious society that includes a diverse spectrum of religious worldviews and has no dominant religion. According to the most recent 2010 census, the religious composition of Singapore includes Buddhism (33.3%),

⁶ Public Prosecutor v. Ong Kian Cheong, 2009 SGDC 163, ¶ 28 & 33 (Sing. D.C.) (hereinafter “Ong Kian Cheong case”); Khushwant Singh, *Jailed for ‘Wounding Feelings’ of Muslims*, STRAITS TIMES (Sing.), Aug. 7, 2010. See *infra* III.C.

⁷ *Infra* IV.A. See generally Zhong Zewei, *Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim’s Perspective*, 27 SING. L. REV. 13 (2009) (discussing the Singapore incidents from the perspective of hate speech).

⁸ Tai-Heng Cheng, *The Central Case Approach to Human Rights: Its Universal Application and the Singapore Example*, 13 PAC. RIM L. & POL’Y J. 257, 270 (2004). For discussion of the Internal Security Act, see *infra* III.B.2.d.

⁹ Thio, *supra* note 3, at 489 & 506-508; Jaclyn Ling-Chien Neo, *Seditious in Singapore! Free Speech and the Offence of Promoting Ill-Will and Hostility Between Different Racial Groups*, 2011 SING. J. LEGAL STUD. 351, 364-366 (2011). See *infra* V.

Christianity (18.3%), Islam (14.7%), Taoism (10.9%), Hinduism (5.1%), and Others (0.7%), with 17.0% reporting no religious affiliation.¹⁰ Although the penalized parties in all recent incidents are Christians, commentators have observed that Christians in Singapore exert “an influence, politically, socially and economically, far greater than the number they represent in the population.”¹¹ In contrast, the “protected” religions of Taoism and Islam are numerical minorities that are significantly underrepresented in various socio-economic indicators.¹²

Second, there is a divergence in attitudes toward proselytization and religious truth-seeking among the major religions in Singapore’s diverse religious landscape. The Buddhist, Taoist, Hindu, and Muslim communities in Singapore do not treat evangelism with the same emphasis and reverence as Christianity.¹³ Religious truth-seeking is also not of particular concern for Buddhists, Taoists, and Hindus in Singapore.¹⁴ While the Singapore restrictions on offensive religious propagation may seemingly reflect a “postmodern” aversion towards religious critiques of other religions,¹⁵ the restrictions are in fact consistent to the religious outlooks of the majority of the population.

¹⁰ SINGAPORE DEPARTMENT OF STATISTICS, CENSUS OF POPULATION 2010 STATISTICAL RELEASE 1: DEMOGRAPHIC CHARACTERISTICS, EDUCATION, LANGUAGE AND RELIGION 13 (2011).

¹¹ Mathew Mathews, *Accommodating Relationship: The Church and State in Singapore*, in CHRISTIANITY AND THE STATE IN ASIA 184, 187 (Julius Bautista & Francis Khek Gee Lim eds., Routledge 2009); Jean DeBernardi, *Asia’s Antioch: Prayer and Proselytism in Singapore*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 252, 257 (Rosalind I.J. Hackett ed., Equinox 2008). *Infra* V.A.

¹² *Infra* V.A.

¹³ *Infra* V.B.

¹⁴ *Infra* V.C.

¹⁵ Thio, *supra* note 3, at 508-509.

This Article utilizes the case study of Singapore to highlight the limitations of the two typical objections toward proselytization restrictions. The controversial issue of proselytization is often framed as a balance between the individual's right to free speech and religious liberty and the state's interest in the preservation of social harmony.¹⁶ Echoing the "marketplace of ideas" justification of free speech,¹⁷ offensive and harmful religious propagation are protected from government sanctions as a means of facilitating the emergence of religious truth through free competition among the different religions.¹⁸ Yet the case of Singapore demonstrates that proselytization restrictions are not always the result of oppression by dominant religious majorities, and may genuinely reflect a different religious assumption. Without the broad acceptance of religious truth seeking as a normative goal, the case for tolerating offensive religious propagation is deprived of an otherwise compelling justification. Moreover, while some local academics have argued that restrictions on religious propagation is counterproductive to social harmony,¹⁹ the actual experience of Singapore indicates that the legal sanctioning of offensive religious propagation provides a legal backdrop that serves as a conducive foundation for inter-religious harmony.²⁰

¹⁶ Neo, *supra* note 9, at 354; Thio, *supra* note 3, at 493.

¹⁷ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 61-62 & 61 n.288 (2011); Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 6-9 (2008); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1054-1056 (Aspen Publishers, 5th ed., 2005); William P. Marshall, *Truth and Religion Clauses*, 43 DEPAUL L. REV. 243, 256 (1994).

¹⁸ Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1757-1762 (2011); Thio, *supra* note 3, at 493; M. H. Ogilvie, *Between Liberté and Égalité: Religion and the State in Canada*, in LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 134, 154 (Peter Radan et al. eds., Routledge 2005); Marshall, *supra* note 17, at 255-256.

¹⁹ Neo, *supra* note 9, at 371-372; Thio, *supra* note 3, at 493.

²⁰ *Infra* V.C.

The religious liberty of adherents of evangelical religions to proselytize and propagate their faith should always be an important consideration against any restrictions on these activities. Nonetheless, this Article argues that one should not give undue weight to the contested assumption of religious truth-seeking and the doubtful benefits of religious integration when critically analyzing proselytization restrictions in the context of a religiously diverse polity. In particular, this Article posits that if a substantial majority of a polity does not share the religious truth-seeking emphasis underpinning the objections of religious truth-seeking, then there may be circumstances in which some limited and even-handed restrictions on religious propagation are sufficiently justified on the grounds of social peace and harmony.

This Article is organized into six parts. Part II outlines the two common objections toward proselytization restrictions. Part III presents the case of Singapore, noting the diverse religious landscape, the wide array of legal tools, and the recent incidents involving offensive religious propagation. Part IV examines the features of the Singapore regime, including the breadth of the restrictions, the implications of the express constitutional right to religious propagation, and the reconciliation between the offenders and the offended with the backdrop of calibrated political management and broad legal sanctions. Part V addresses critiques of the Singapore regime and provides a tentative defense for limited restrictions. Part VI concludes with observations about the search for overlapping consensus in a religiously pluralistic society.

II. OBJECTIONS TO PROSELYTIZATION RESTRICTIONS

Proselytizing is the most controversial component of religious freedom²¹ and is subjected to restrictions in many jurisdictions with various justifications. These justifications typically involve the protection of a religious community, especially in light of allegedly improper religious propagation targeted at vulnerable individuals or foreign imperialistic involvement.²² The preservation of social peace, given the potentially disconcerting effects on religious communities, is another common argument.²³ However, these restrictions are subjected to two major objections. First, the merits of the justifications for proselytization restrictions are undercut by the fact that these restrictions tend to be one-sided in favor of politically dominant religions. Second, these restrictions unduly infringe religious liberty and impede religious truth-finding.

A. *Discriminatory Nature*

The design and enforcement of the restrictions on religious propagation are typically skewed toward protecting only the politically dominant religious communities. For example, the religious liberty clause of Malaysia's Constitution expressly allows the state to control or restrict religious propagation, but this principle only applies to persons professing the religion of Islam.²⁴ This approach has produced laws and court cases that sanction proselytization attempts directed towards the majority Muslim population and effectively curtailed the ability of Muslims to switch

²¹ ANAT SCOLNICOV, *THE RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW* 198 (Routledge 2011); Thio, *supra* note 3, at 484-487; Hackett, *supra* note 2, at 3-4.

²² SCOLNICOV, *supra* note 21, at 198-199; Kao, *supra* note 3.

²³ Thio, *supra* note 3, at 490-493 (noting but not endorsing the argument).

²⁴ Article 11(4), CONSTITUTION (Malaysia) ("State law and in respect of the Federal Territories of Kuala Lumpur and Lubuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.").

to other religions.²⁵ The Greek criminalization of proselytization theoretically provides protection from improper proselytization to members of all religions.²⁶ However, echoing the state establishment of the Greek Orthodox Church, which includes a monopoly of public and private mass media, and religious indoctrination in school,²⁷ the proselytization laws only protect the adherents of the Greek Orthodox religion,²⁸ which constitute nearly 98% of the country's population.²⁹ In the Indian state of Arunachal Pradesh, restrictions are placed on missionary activities by and conversions to “non-indigenous religions” such as Christianity. However, no limitation is placed on Hindu missionary activity. Indeed, reconversion to Hinduism is encouraged by the state.³⁰ A similar pattern of bias occurs in Sri Lanka between the majority Buddhist population and the Christian minority.³¹

In a similar vein, laws on blasphemy (or religious insult) typically only protect certain privileged religions. Prior to abolition in 2008,³² the English common laws on blasphemy

²⁵ See Nurjaanah Abdullah @ Chew Li Hua, *Legislating Faith in Malaysia*, 2007 SING. J. LEGAL STUD. 264 (2007).

²⁶ The criminalized proselytization is defined as “any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of the other person's inexperience, trust, need, low intellect or naivete.”: section 4, Greek Law No. 1363/68 (amended by Law No. 1672/39).

²⁷ *Greece*, in U.S. DEPARTMENT OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (JULY-DECEMBER 2010), available at <http://www.state.gov/documents/organization/171697.pdf> (last visited Feb. 1, 2013); Kyriakos N. Kyriazopoulos, *Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality*, 20 J. LAW & RELIGION 149, 160 (2004).

²⁸ Kyriazopoulos, *supra* note 27, at 154-155.

²⁹ *Greece*, *supra* note 27.

³⁰ Robert W. Neufeldt, *To Convert or Not to Convert: Legal and Political Dimensions of Conversion in Independent India*, in RELIGION AND LAW IN INDEPENDENT INDIA 381, 399 (Robert D. Baird ed., Manohar 2d ed. 2005).

³¹ Stephen C. Berkwitz, *Religious Conflict and the Politics of Conversion in Sri Lanka*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 199, 219 (Rosalind I.J. Hackett ed., Equinox 2008).

³² By the Criminal Justice and Immigration Act 2008: RUSSELL SANDBERG, LAW AND RELIGION 131 (Cambridge University Press 2011).

penalized religious insults, but only if the insults involved Christianity, specifically the doctrines and practices of the Church of England as the form of religion established by law in England.³³ Indeed, the English court “refused to develop the common law to protect Muslim feelings” in the high-profile incident of Salman Rushdie’s *The Satanic Verses*.³⁴ Blasphemy of Islam – and Islam only – is a severe crime in some Muslim-dominant countries, such as Pakistan and Afghanistan.³⁵ Blasphemy laws existed and were employed in the early United States against criticisms of and insults to Christianity, but not other religions.³⁶ The UN resolutions sponsored by countries from the Organization of the Islamic Conference to call for the illegalization of defamation of religions also specifically mentioned only Islam and Muslims.³⁷

This finding is not surprising. Just as commercial firms would be happy to co-opt the state into establishing and maintaining its market monopoly, religious organizations can be expected to secure their own monopolies via state coercion whenever possible.³⁸ Restricting proselytization by rival competing religions helps to reduce the loss of one’s membership and can inhibit the growth

³³ Eric Barendt, *Free Speech and Religion: Secular and Religious Perspectives on Truth*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 23, 37 (András Sajó ed., Eleven International Publishing 2007); Paul Weller, *Equity, Inclusivity and Participation in a Plural Society: Challenging Establishment of the Church of England*, in LAW AND RELIGION IN CONTEMPORARY SOCIETY 53, 61 (Peter W. Edge & Graham Harvey eds., Ashgate 2000). See also SANDBERG, *supra* note 32, at 131-139 (also discussing how the blasphemy law was in fact policed extra-legally notwithstanding the absence of official prosecution).

³⁴ Barendt, *supra* note 33, at 37; Weller, *supra* note 33, at 61.

³⁵ Zahid Hussain, *Islamists Rally in Pakistan*, WALL ST. J., Jan. 10, 2011, at A10; Thomas F. Farr, *The Widow’s Torment: International Religious Freedom and American National Security in the 21st Century*, 57 DRAKE L. REV. 851, 861 (2009).

³⁶ PHILLIP E. HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN THE FREEDOM OF CONSCIENCE IN AMERICA 49 (Altamira Press 2004); JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: VOLUME I THE ODYSSEY OF THE RELIGION CLAUSES 33 (Princeton University Press 2004).

³⁷ Leonard A. Leo et al., *Protecting Religions from “Defamation”: A Threat to Universal Human Rights Standards*, 34 HARV. J.L. & PUB. POL’Y 769, 771 (2011).

³⁸ LARRY WITHAM, MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION 115 (Oxford University Press 2010); RODNEY START & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 199-200 (University of California Press 2000).

of those rival religions. Blasphemy and related laws can also suppress criticisms of one's religion, preserving the façade of legitimacy. American constitutional scholars have argued that such religious captures of the state ultimately do more harm to the religions themselves.³⁹ In particular, the lack of religious competition arising from laws entrenching a religious majority can reduce the religiosity of the protected congregation, leaving them adherents in name only.⁴⁰ Nonetheless, Steven H. Shiffrin observed that state repression of rival religions does not necessarily inhibit protected religions, noting, "Christianity flourishes in Central and South America as well as Africa – religions where dictatorships and support for Christianity have often been intertwined."⁴¹ In any event, the co-opting of state power by politically influential religions to assist one's (and only one's) proselytization efforts⁴² and/or resisting others' proselytization remains common in the U.S. and elsewhere.⁴³ This bias in the design and implementation of the law undercuts the normative strengths of the purported justifications for these restrictions.

³⁹ Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1835 (2009); Robert F. Cochran, Jr., *Evangelicals, Law, and Abortion*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 91, 100-101 (Robert F. Cochran, Jr. ed., New York University Press 2008).

⁴⁰ WITHAM, *supra* note 38, at 148-152; CHESNUT, *supra* note 1, at 8-10; Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 55 (1989).

⁴¹ Koppelman, *supra* note 39, at 1902; Cochran, Jr., *supra* note 39, at 101; Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 43-44 (2004).

⁴² One example is the "Peace Policy" instituted under President Ulysses S. Grant to provide funding for religious organizations that will assist in educating and "civilizing the Indians. Most of the initial recipients were Protestant missionaries. However, when Catholics and other non-Protestants ended up with bulk of the funding (apportioned according to school enrolments), oppositions to the programs from Protestant community ensued: HAMMOND ET AL., *supra* note 36, at 66; HITCHCOCK, *supra* note 36, at 35-36.

⁴³ *Supra* notes 24-37 and accompanying text.

B. *Infringing Religious Liberty and Impeding Religious Truth-seeking*

Religious liberty is a core human right.⁴⁴ Restrictions on proselytization pose particular problems to religious liberty because they restrict religious expression, which is otherwise an integral aspect of individual fulfillment and autonomy.⁴⁵ In addition, evangelism is an integral aspect of many religions, such as Christianity⁴⁶ and Islam.⁴⁷ This emphasis on evangelism is reflected in various types of missionary work and proselytization activities and is recognized as a fundamental aspect of religious freedom.⁴⁸ Restrictions on proselytization impede the religious liberty of the adherents of these religions by restricting their ability to fulfill their religious duty of actively spreading their faith.

Moreover, proselytism is necessary to ensure the freedom to adopt and practice religion.⁴⁹ The unimpeded sharing of faith with others helps individuals choose between religions.⁵⁰ Restrictions on proselytization thus prevent “informed” religious choice.⁵¹ This is not only a limitation on individual freedom of faith but also an obstruction of the process of religious truth-

⁴⁴ Conkle, *supra* note 18, at 1763; Thio Li-ann, *Courting Religion: The Judge Between Caesar and God in Asian Courts*, 2009 SING. J. LEGAL STUD. 52, 52 (2009); Parker, *supra* note 2, at 91.

⁴⁵ Richard M. Esenberg, *Must God be Dead or Irrelevant: Drawing a Circle that Lets Me in*, 18 WM. & MARY BILL RTS. J. 1, 37 (2009); LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 29-40 (Hart Press 2008); Thio Li-Ann, *Constitutional ‘Soft’ Law and Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony*, 2004 SING. J. LEGAL STUD. 414, 417 (2004).

⁴⁶ KOSMIN & KEYSAR, *supra* note 1, at 11; CHESNUT, *supra* note 1, at 11; Radan, *supra* note 1, at 17; Hall, *supra* note 1, at 85. *Cf.*, Berkwitz, *supra* note 31, at 212 (noting distinction between evangelical Christian and mainline Christian churches which have “come to deemphasize the call to convert and instead focus on ministering to the already faithful.”).

⁴⁷ CHESNUT, *supra* note 1, at 11; Radan, *supra* note 1, at 17.

⁴⁸ Hackett, *supra* note 2, at 3-4; Parker, *supra* note 2, at 91-92.

⁴⁹ Radan, *supra* note 1, at 17; Kyriazopoulos, *supra* note 27, at 168-179.

⁵⁰ Thio, *supra* note 45, at 422.

⁵¹ Berkwitz, *supra* note 31, at 216; Thio, *supra* note 3, at 510.

seeking. The importance of facilitating religious truth-seeking is a common justification for religious liberty.⁵² Robert P. George observed that “[t]he natural law argument for religious liberty is founded on the obligation of each person to pursue the truth about religious matters and to live in conformity with his conscientious judgments.”⁵³ Rodney K. Smith and Patrick A. Shea noted that “[r]eligious liberty is also supported by the significant value that we accord to the pursuit of truth. ... There is a special role for religion in the pursuit of truth, a role worthy of protection.”⁵⁴

The religious truth-seeking argument resembles the “marketplace of ideas” rationale supporting freedom of speech. The “marketplace of ideas” envisages that the best test of the truth of an idea is its acceptance in the context of free competition with opposing ideas.⁵⁵ In the same vein, by allowing religion to “flourish according to the zeal of its adherents and the appeal of its dogma,”⁵⁶ religious truth is more likely to emerge and to be accepted.⁵⁷ As noted above, proselytization restrictions prevent free competition for adherents among the different religions in a manner that is often discriminatory to minority religions.⁵⁸ Such restrictions also entrench religious majorities through legal measures designed to prevent individuals from leaving the religious community rather than ensuring their continued adherence based on informed voluntary

⁵² Leo et al., *supra* note 37, at 782; Conkle, *supra* note 18, at 1757-1762; Marshall, *supra* note 17, at 255-260 (advocating the search for truth as a justification of the Religion Clauses).

⁵³ Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 183-184 (2008).

⁵⁴ Rodney K. Smith & Patrick A. Shea, *Religion and the Press: Keeping First Amendment Values in Balance*, 2002 UTAH L. REV. 177, 200 (2002).

⁵⁵ STONE ET AL., *supra* note 17, at 1054-1056; Marshall, *supra* note 17, at 256; Rosenthal, *supra* note 17, at 61-62 & 61 n.288; Gey, *supra* note 17, at 6-9.

⁵⁶ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

⁵⁷ Marshall, *supra* note 17, at 255-256; Ogilvie, *supra* note 18, at 154.

⁵⁸ *Supra* II.A.

choice.⁵⁹ Thus, proselytization restrictions not only infringe the religious liberty of the propagators but also harm the common good of the religious truth-seeking process.

III. RESTRICTIONS ON RELIGIOUS PROPAGATION IN SINGAPORE

Perhaps unsurprisingly, given the international image of Singapore as an illiberal authoritarian state where civil liberties are frequently curtailed,⁶⁰ religious propagation is subjected to restrictions in Singapore. This Part examines Singapore's legal regime on religious propagation, noting the social backdrop of a diverse religious landscape, the myriad arsenal of laws affecting religious speech, and the application of these legal tools on recent incidents involving offensive religious propagation.

A. *Diverse Religious Landscape*

Singapore's religious landscape reflects its British colonial history as an immigrant-populated trading port.⁶¹ As Indian and Arab traders, European colonialists, and Indian and Chinese migrants arrived in Singapore, they brought with them the religious practices of their respective home countries.⁶² This resulted not only in a multi-ethnic society but also one teeming with vibrant religious diversity. According to the recently completed 2010 census, the Chinese constitute the majority (74.1%) of the resident population, with Malays (13.4%) and Indians (9.2%)

⁵⁹ Thio, *supra* note 3, at 492.

⁶⁰ *E.g.*, STEPHAN ORTMANN, *POLITICS AND CHANGE IN SINGAPORE AND HONG KONG: CONTAINING CONTENTION* 73-75 & 126-127 (Routledge 2010); WILLIAM CASE, *POLITICS IN SOUTHEAST ASIA: DEMOCRACY OR LESS* 90-95 (Curzon 2002).

⁶¹ *See generally* JAIME KOH & STEPHANIE HO, *CULTURE AND CUSTOMS OF SINGAPORE AND MALAYSIA* 1-24 (Greenwood Press 2009) (a concise historical account of the region).

⁶² *Id.*, at 27-40; Eugene K. B. Tan, *Keeping God in Place: The Management of Religion in Singapore*, in *RELIGIOUS DIVERSITY IN SINGAPORE* 55, 56 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008).

as the other two significant minority racial communities.⁶³ An aggregation of other ethnic groups, such as Peranakans, Eurasians,⁶⁴ Arabs, Armenians, and Jews, constitute the remaining 3.3%. The religious composition of the population is even more diverse, notwithstanding the failure of the official religious categorization to capture the large internal variations within the following official categories.⁶⁵ Buddhism is the most populous religion, at 33.3%, followed by Christianity (18.3%), Islam (14.7%), Taoism (10.9%), Hinduism (5.1%), and other religions (0.7%), with 17.0% reporting no religious affiliation.⁶⁶

A feature of Singapore's religious landscape is the significant correlation between religion and ethnicity: 97.7% of Buddhists and 99.8% of Taoists are Chinese, whereas 99.0% of Hindus are Indians. Christians and Muslims are more ethnically diverse. Muslims include Malays (83.5%), Indians (12.6%), Others (2.09%), and Chinese (1.8%), whereas Christians include Chinese (83.0%), Others (10.5%), Indians (5.98%), and Malays (0.47%). Almost all Malays are Muslims.⁶⁷ This close correlation between religion and ethnicity renders religious issues particularly

⁶³ SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at viii.

⁶⁴ The ancestry of Peranakans and Eurasians can be traced back to the fifteen-century Malacca Sultanate. Peranakans are descendents of Chinese traders and local Malay women, while Eurasians are the direct offspring of Malacca's Portuguese conquerors who married local women: KOH & HO, *supra* note 61, at 3-4. For census purpose, the ethnicity is as declared by the individuals and does not necessarily reflect the historical ancestry.

⁶⁵ KUAH-PEARCE KHUN ENG, STATE, SOCIETY AND RELIGIOUS ENGINEERING: TOWARDS A REFORMIST BUDDHISM IN SINGAPORE 136 (Eastern Universities Press 2003).

⁶⁶ SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 13.

⁶⁷ *Id.*, at 156.

sensitive.⁶⁸ Singapore experienced incidents of communal violence in the mid-twentieth century that often reflected a volatile combination of religious and racial undertones.⁶⁹

The diversity of Singapore's religious landscape is matched by its fluidity. Religious switching is increasingly common in Singapore. In a 2008 survey, 20% of adults "abandon[ed] the religion they were born into before age 30," compared to 11.5% in 1990.⁷⁰ In 30 years,⁷¹ Buddhism saw its proportion of the population increase from 26.7% in the 1980 census to a high of 42.5% in 2000 before receding to the current 33.3%. Taoism experienced a steady decline from 29.3% in 1980 to a low of 8.5% before bouncing back to 10.9% in 2010.⁷² It is important to note that the distinction between Buddhism, Taoism, and traditional Chinese folk religions is often difficult to

⁶⁸ CHEE KIONG TONG, *RATIONALIZING RELIGION: RELIGIOUS CONVERSION, REVIVALISM, AND COMPETITION IN SINGAPORE SOCIETY* 235 (Koninklijke Brill 2007); Li-Ann Thio, *Control, Co-optation and Co-operation: Managing Religious Harmony in Singapore's Multi-ethnic, Quasi-Secular State*, 33 HASTINGS CONST. L.Q. 197, 234 (2006). US style culture war in the Singapore context could also be even more divisive with the potential fault lines drawn between different religions or ethnic groups: Clarissa Oon, *Singapore v Taiwan: Seeking an Active Citizenry – Without the Fist Fights*, STRAITS TIMES (Sing.), Sep. 20, 2008.

⁶⁹ For example, the Maria Hertogh court case in 1950 sparked riots by Muslims against Christians, especially the Europeans and Eurasians. Maria Hertogh was a Dutch-Eurasian who was baptized as a Catholic but was later raised as a Muslim by a Muslim family after her parents were arrested by the Japanese during the Second World War. She went through a marriage ceremony with a Muslim but the court annulled the marriage and sent her to a Catholic convent. Given the colonial context, it is not surprising that the Malay Muslim population perceived the court judgment as imposing of European cultural, racial and religious supremacy: see TONG, *supra* note 68, at 232; KUAH-PEARCE, *supra* note 65, at 142-143. The Malay-Chinese riots in the 1964 similarly reflected the inextricable nature of race and religion in Singapore's socio-political dynamics. Racial tension was already strained over whether Malays should be granted special rights as indigenous people, but the flash point was alleged religious insults during the Muslim's possession in celebration of the Prophet Mohammed birthday: TONG, *supra* note 68, at 232-233; Tey Tsun Hang, *Excluding Religion from Politics and Enforcing Religious Harmony – Singapore-Style*, 2008 SING. J. LEGAL STUD. (Sing.) 118, 121 (2008); KUAH-PEARCE, *supra* note 65, at 143.

⁷⁰ Arti Mulchand, *Religion: The Big Switch*, STRAITS TIMES (Sing.), Aug. 9, 2008.

⁷¹ Pre-independence population census by the Colonial government had included religious affiliation till 1931, when the persistent close correlation between race and religion rendered enquires of little value. Collection on religious affiliation data was only resumed in 1980: TONG, *supra* note 68, at 58-59.

⁷² SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 13.

make.⁷³ The fluctuations in the proportions of Buddhism and Taoism often involve reclassification between the two religions.⁷⁴

The fluctuations in the populations of Buddhism and Taoism underlie a general and steady decline of these two religions, from 56% in 1980 to 44.2% in 2010. This corresponds with the gains of Christianity and those who profess no religious affiliation. The Christian population has experienced consistent growth, from 10.1% in 1980 to 18.3% in 2010. This echoes a 2008 survey that found that although only 5.7% of youth switched religions, most conversions were from Buddhism or Taoism to Christianity.⁷⁵ People who professed no religious affiliation also increased from 13.0% in 1980 to 17.0% in 2010.

The religious composition of Malays and Indians has remained fairly stable over the time period.⁷⁶ Most religious conversions and switching are concentrated in the Chinese population.⁷⁷ Christianity, with its growth of rate of 25% per decade, has replaced Taoism as the second most important religion of the Chinese, but Christianity has not gained ground among Malay and Indians.⁷⁸ Indeed, a significant number of Christian Indians have already converted to Christianity

⁷³ KOH & HO, *supra* note 61, at 32; JOSEPH B. TAMNEY & RIAZ HASSAN, RELIGIOUS SWITCHING IN SINGAPORE: A STUDY OF RELIGIOUS MOBILITY 6 (Select Books 1987).

⁷⁴ Richard Lim, *Buddhism's Draw is No Longer as a Folk Religion*, STRAITS TIMES (Sing.), May 20, 2005; TONG, *supra* note 68, at 89.

⁷⁵ *Four in Five Young People Here Believe in Religion*, STRAITS TIMES (Sing.), Sep. 3, 2008.

⁷⁶ SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 14.

⁷⁷ Li Xueying, *Reaping a Rich Harvest of Converts*, STRAITS TIMES (Sing.), July 16, 2005; Phyllis Ghim-Lian Chew, *Religious Switching and Knowledge Among Adolescents in Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE 381, 388-390 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008).

⁷⁸ LEOW BEE GEOK, CENSUS OF POPULATION 2000: ADVANCE DATA RELEASE 35 (2001); TONG, *supra* note 68, at 60-62.

in India prior to migrating to Singapore.⁷⁹ One reason for this phenomenon is that religion is not tied to the Chinese ethnicity. In contrast, conversion away from Islam and Hinduism is low due to the “close interrelationship between religion, ethnicity and the sense of community in these two religions, and conversion is often seen as giving up on their cultures.”⁸⁰

B. Legal Framework

1. Religious Liberty in the Constitution

As in most constitutions enacted after the Second World War, Singapore’s Constitution enshrined the guarantee of religious freedom. Article 15(1) provides, “Every person has the right to profess and practice his religion and to propagate it.” However, like most other constitutional guarantees in Singapore’s Constitution, article 15 is qualified by “any general law relating to public order, public health or morality.”⁸¹ Article 16(2) further provides for “the right to establish and maintain institutions for the education of children and provide therein instruction in its own religion.” In addition, article 16(3) states, “No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.” Interestingly, article 16 is one of the few constitutional provisions that does not have a limitation clause.

Article 15(3) further protects the autonomy of religious organizations: “Every religious group has the right (a) to manage its own religious affairs; (b) to establish and maintain institutions for religious or charitable purposes; and (c) to acquire and own property and hold and administer

⁷⁹ TONG, *supra* note 68, at 62. Also, 97.1% of Indians were “born into their religion”: *id.*, at 84.

⁸⁰ TONG, *supra* note 68, at 81.

⁸¹ Art 15(4), Constitution (Sing.).

it in accordance with law.” Religious institutional autonomy is further strengthened by article 12(3)(b). Article 12 is the equal protection clause of Singapore’s Constitution, which prohibits religious discrimination. However, article 12(3)(b) expressly permits religious institutions to exclude non-adherents from “office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion.”

There is no general prohibition against the establishment of religion under Singapore’s constitution. Nonetheless, there are certain provisions that indirectly address issues that are commonly associated with the establishment clause. For example, article 15(2) prevents the imposition of taxes “which are specially allocated in whole or in part for the purposes of a religion other than his own.” Government support for minority religions appears to be constitutionally prescribed under article 152(1), which renders the government responsible “to care for the interests of the racial and religious minorities in Singapore.” Article 153 also authorizes the government to make laws regulating Muslim religious affairs.

2. Legal Arsenal Against Offensive Proselytization

Proselytization has always been a sensitive issue in the diverse religious landscape of Singapore. Aggressive and insensitive proselytization has been perceived by the government as a threat to religious harmony.⁸² In response, there is a wide array of legal tools available for the sanctioning of offensive religious propagation.

⁸² Daryl Chin, *Ex-Foes Link up to Promote Religious Tolerance*, STRAITS TIMES (Sing.), Nov. 21, 2010; Zakir Hussain, *Religious Harmony: 20 Years of Keeping the Peace*, STRAITS TIMES (Sing.), July 24, 2009 (noting various government pronouncement about aggressive proselytization).

a) Maintenance of Religious Harmony Act

The Maintenance of Religious Harmony Act (“MRHA”) is legislation enacted in 1990 that grants broad discretionary power to the executive branch to issue restraining orders against any officials or leaders of religious groups for conduct that may threaten religious harmony. The first ground for the issuance of the restraining order is “causing feelings of enmity, hatred, ill-will or hostility between different religious groups.”⁸³ Notably, intention as a relevant factor is eliminated under the legislative scheme. The Minister is entrusted with pre-empting actions that have the potential to upset religious harmony, even if these actions are undertaken with the best intentions.⁸⁴ The restraining order is backed by imprisonment up to a maximum of two years for the first offence and three years for a repeated offence.⁸⁵ Judicial review is expressly excluded, with the discretion of the Minister only partially checked by the requirement for confirmation by the Elected President acting on the advice of the Presidential Council of Religious Harmony.⁸⁶

The key motivation of the clause is that aggressive proselytization, especially proselytization that includes offensive speech disparaging other religions, will upset the targeted

⁸³ Maintenance of Religious Harmony Act, c. 167A, §8 (2001) (Sing.).

⁸⁴ Jothie Rajah, *Policing Religion: Discursive Excursions into Singapore’s Maintenance of Religious Harmony Act*, in EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA 267, 276-277 (Penelope (Pip) Nicholson & Sarah Biddulph eds., Martinus Nijhoff 2009).

⁸⁵ Maintenance of Religious Harmony Act, *supra* note 83, at §16.

⁸⁶ *Id.*, at §§ 12 & 18. The Elected President is an position set up in 1991 to serve as institutional check on the parliamentary executive over various public finance and public administration matters. The Elected President is elected in a national election and served a four year term. The efficacy of the independent check provided by the Elected President is arguable given that the position has been occupied by individuals that are perceived as formerly affiliated or otherwise sympathetic to the ruling party: *see* Li-Ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 15-22 & 50-53 (2002). It is also worth pointing out that the this ouster clause has yet to be tested in courts.

religious adherents.⁸⁷ The White Paper leading to the MHRA expressly noted that “while every citizen is free to choose his own religion ... no citizen [should] infringe upon the rights and sensitivities of other citizens.”⁸⁸

To date, no restraining order has been issued pursuant to the MHRA. Nonetheless, in 2001, the government discussed three examples for which the MHRA was almost invoked. Two of the three examples involved offensive religious speech. The first case involved a Christian pastor who had criticized Buddhism, Taoism, and Catholicism in his church publications and during his sermons.⁸⁹ The second case involved an Islamic religious leader who claimed that a Hindu belief that statues of Ganesha could drink milk offerings was not a miracle but the work of Satan.⁹⁰ A government warning under the shadow of the MHRA was sufficient to stop these speeches.

The restraining order under the MHRA is essentially a pre-emptive tool that allows the government to intervene discreetly without a public criminal conviction.⁹¹ Notwithstanding the seeming lack of actual enforcement of the MHRA, the ramifications of the mere presence of the law are keenly felt by the various religious groups in Singapore. Religious leaders agreed that the law is an effective deterrent.⁹² The Hindu community, which had previously expressed grave concerns over aggressive proselytization by Christians, felt that the law helped to curb this

⁸⁷ TONG, *supra* note 68, at 247; M Nirmala, *Govt Reins in Religious Leaders*, STRAITS TIMES (Sing.), May 12, 2001, at 1.

⁸⁸ Maintenance of Religious Harmony White Paper (Cmd 21 of 1989), ¶ 5.

⁸⁹ Nirmala, *supra* note 87.

⁹⁰ *Id.*; Michael Hill, *The Rehabilitation and Regulation of Religion in Singapore*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 343, 356 (James T. Richardson ed., Kluwer Academic 2004).

⁹¹ Though the process is not secret. Section 15 requires the publication of the restraining order in the *Government Gazette: Maintenance of Religious Harmony Act*, *supra* note 83, at §15.

⁹² M Nirmala, *Keeping Faith – and Celebrating Differences*, STRAITS TIMES (Sing.), May 12, 2001, at H10.

proselytization and helped to maintain the proportion of Hindus at 4%.⁹³ The Christian Church has attempted to adjust its evangelistic methods by adopting more “gentleness and respect” in light of the MHRA.⁹⁴ Indeed, a booklet on the topic of inter-faith relationships, prepared by the National Church Council Singapore and distributed to its member churches, emphasized the power of available sanctions under the MHRA.⁹⁵ Similarly, a pamphlet produced by a Buddhist organization presented the MHRA as a possible legal remedy against insensitive proselytization.⁹⁶

b) Sedition Act

The Sedition Act is a legacy of colonial times.⁹⁷ Originally meant to protect the political institution of the country,⁹⁸ it has been employed in Singapore to sanction speech that offends religious and racial sensitivities. Under section 3(1)(e) of the Sedition Act, a tendency “to promote feelings of ill-will and hostility between different races or classes of the population of Singapore” would amount to a seditious tendency that is punishable by a fine and a maximum of three years imprisonment.⁹⁹ Significantly, the intention of the party is irrelevant.¹⁰⁰

⁹³ *Id.*

⁹⁴ Mathews, *supra* note 11, at, 193 (although this could also be due to the perception that less aggressive evangelistic strategy is more successful in the long term).

⁹⁵ Zhou Shuxin, *Ge zhongjiao tuanti linxiu: chuanjiao xu zhunzhong bieren zhongxiao xingyang* [*Various Religious Organization Leaders: Must Respect Others' Religious Belief During Proselytization*], LIANHE ZAOBAO (Sing.), Feb. 11, 2010.

⁹⁶ DEBBIE TAN, AGREE TO DISAGREE: CONVERSATIONS ON CONVERSION 18, available at www.conversion.buddhists.sg (last visited Feb. 1, 2013).

⁹⁷ Neo, *supra* note 9, at, 353-355 (discussing the historical origin of the Sedition Act).

⁹⁸ *Id.*, at 354-355.

⁹⁹ Sedition Act, c. 290 §4 (1985) (Sing.).

¹⁰⁰ *Id.*, at §3(3).

Until 2005, the last time the Sedition Act was employed was in the 1960s, when opposition Barisan Sosialis MPs were fined for “an article which accused the then People’s Action Party government of plotting to murder a political detainee.”¹⁰¹ In 2005, two Chinese men were charged under the Sedition Act for posting inflammatory racist and vicious remarks about Muslims and Malays online.¹⁰² They pleaded guilty and were sentenced to one month of imprisonment and one day of imprisonment. Koh Song Huat, who received the one-month jail term, posted comments that “spewed vulgarities at the Muslim Malay community, derided and mocked their customs and beliefs and profaned their religion,” according to the Public Prosecutor.¹⁰³ The prosecution was conducted against the backdrop of an increase in online racist remarks in recent years.¹⁰⁴

c) New Penal Code Provision: Section 298A

Singapore’s Penal Code was amended in 2007 to include a new criminal offense of “promoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony.”¹⁰⁵ The addition was intended to include actions that were previously not covered by the existing offence of deliberately wounding the religious feelings of another.¹⁰⁶ During parliamentary debate, the Senior Minister of State for Home Affairs (the proponent of the amendment bill) explained that the new section was not intended to include

¹⁰¹ Lydia Lim, Zakir Hussain & William Han, *Drawing the Line on Racist Remarks*, STRAITS TIMES (Sing.), Sep. 24, 2005; Neo, *supra* note 9, at, 356-357.

¹⁰² Chong Chee Kin, *Racist Bloggers Jailed*, STRAITS TIMES (Sing.), Oct. 8, 2005.

¹⁰³ *Id.* (“one comment compared the Muslim religion to Satanism”).

¹⁰⁴ Aaron Low, *Online or Off, If it Fans Hatred, Govt will Act*, STRAITS TIMES (Sing.), Sep. 18, 2005.

¹⁰⁵ Penal Code, c. 224, §298A (2008) (Sing.).

¹⁰⁶ *Penal Code (Amendment) Bill*, Parliament No. 11 HANSARD (Sing.) Vol. 15 (2007) (Ho Peng Kee); Penal Code, *supra* note 105, at, §298.

journalistic coverage of sensitive factual events or critical but “rational and objective discussion of religion and religious principles.” He reiterated that “everyone has the right to hold his own religious beliefs and to accept or not to accept any religion.”¹⁰⁷ In this regard, sharing one’s testimony of fulfillment through conversion is allowed as long as it does not involve denigrating another person’s religion.¹⁰⁸

The bill received broad support from the MPs.¹⁰⁹ One MP highlighted the “thin line between promoting religion and promoting enmity between different groups of people on grounds of religion” and noted that the “aggressive promotion of religion by any religious group will usually result in unhealthy competition, and tension among different religious groups, thus disrupting our national unity.”¹¹⁰

d) Internal Security Act

The final and perhaps most potent tool in the government’s arsenal is the infamous Internal Security Act.¹¹¹ The Internal Security Act is a relatively lengthy piece of legislation spanning 84 different sections that address a myriad of issues, such as regulations for security areas and prohibitions on quasi-military organizations. However, section 8 defines the Internal Security Act in the public imagination. Section 8 of the Internal Security Act prescribes the power of the executive branch to order detention without trial for up to two years, with the additional power to

¹⁰⁷ *Penal Code (Amendment) Bill*, *supra* note 106 (Ho Peng Kee).

¹⁰⁸ *Id.* (Ho Peng Kee).

¹⁰⁹ *Id.* (Zaqy Mohamad; Ong Kian Min; Muhammad Faishal Ibrahim; Charles Chong; Lim Biow Chuan).

¹¹⁰ *Id.* (Teo Ho Pin).

¹¹¹ Internal Security Act, c. 143 (1960) (Sing.).

extend the detention an infinite number of times. More significantly, judicial review of the detention order is restricted to procedural matters as expressly set forth under the Internal Security Act.¹¹² Such extensive and discretionary power vested in the executive branch can create “almost irrational fear among the people.”¹¹³ This is enhanced in the context of Singapore, where the overwhelming political dominance of the ruling party has been employed to amend the Constitution to limit the expansion of judicial review by the courts.¹¹⁴

The power of detention without trial was initially employed primarily against Communists and members of leftist political oppositions.¹¹⁵ However, religious leaders and individuals associated with religious organizations have also borne the brunt of the law in recent times. In 1986, 11 Christian leaders who had been evangelizing to Muslims were called by the Internal Security Department and advised “to avoid activities which cause misunderstanding or conflict.”¹¹⁶ In 1987, 22 men and women associated with Catholic organizations, including four Catholic priests, were detained under the Internal Security Act for participating in “a Marxist conspiracy out to topple the Government by illegal means.”¹¹⁷ In the aftermath of the 2001 terrorist

¹¹² *Id.*, at §8B. After the Court of Appeal (the highest court) held that an illegally, irrationally or procedurally improper exercise of government power would trigger judicial review even for the broadly defined discretion of detention powers under the Internal Security Act, the Constitution and the Internal Security Act were amended to revert the law to the doctrine prior to that decision: Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 79-81 (Tom Ginsburg & Tamir Moustafa ed., Cambridge University Press 2008); Thio, *supra* note 86, at 18, 58-63.

¹¹³ Farid Sufian Shuaib, *Controlling Political Communication in the Blogosphere: Business as Usual in Malaysia*, 16(1) *COMMS. L.* 27, 28-29 (2011) (discussing similar laws in Malaysia).

¹¹⁴ *Supra* note 112.

¹¹⁵ Kevin YL Tan, *Constitutionalism in Times of Economic Strife: Developments in Singapore*, 4 *NAT'L TAIWAN U. L. REV.* 115, 122 (2009); Tae Yul Nam, *Singapore's One-Party System: Its Relationship to Democracy and Political Stability*, 42(4) *PACIFIC AFFAIRS* 465, 472-473 (1969).

¹¹⁶ Thio, *supra* note 68, at 240.

¹¹⁷ Lydia Lim & Li Xueying, *The Legacy of 1987*, *STRAITS TIMES* (Sing.), July 7, 2007; TONG, *supra* note 68, at 239.

attacks in the United States, individuals professing radical Islamic beliefs have also been detained for plotting terrorist attacks in Singapore.¹¹⁸

C. *Regulating Offensive Proselytization in Practice: Four Recent Incidents*

These various legal tools have been employed separately in a series of incidents over the short time span between 2009 and 2010.

1. “Seditious” Comics: the Ong Kian Cheong Case

The case of Public Prosecutor v. Ong Kian Cheong (“Ong Kian Cheong case”)¹¹⁹ involved the use of the Sedition Act. A couple who attended the Berean Christian Church at the time of the offences¹²⁰ was charged with distributing certain evangelical comic tracts published by Chick Publications that were seditious and promoted feelings of ill-will between Christians and Muslims.¹²¹ Chick Publications is an American publishing company that produces “Protestant fundamentalist” materials.¹²² The couple was also charged with possession of other seditious publications, also by Chick Publications, which denigrated Islam, the Catholic Church, and other religious groups.¹²³ The couple was arrested on January 30, 2008, when the police “laid an ambush”

¹¹⁸ Between 2001 to 2002, 36 people were detained by the ISD under the Internal Security Act for alleged involvement in planning a radical Islamist terrorist attack on Singapore: Senia Febrica, *Securitizing Terrorism in Southeast Asia: Accounting for the Varying Responses of Singapore and Indonesia*, 50(3) ASIAN SURVEY 569, 576-577 (2010). In February 2007, a law graduate was detained under the Internal Security Act for training for a militant jihad: Ken Kwek, *Learn About Islam from Credible Sources*, STRAITS TIMES (Sing.), June 16, 2007.

¹¹⁹ Ong Kian Cheong case, *supra* note 6.

¹²⁰ Elena Chong, *Couple Admitted Sending Out Tracts*, STRAITS TIMES (Sing.), Dec. 6, 2008.

¹²¹ Ong Kian Cheong case, *supra* note 6, at ¶ 4; Elena Chong, *Couple Go on Trial for Sedition*, STRAITS TIMES (Sing.), Dec. 5, 2008.

¹²² Chong, *supra* note 121.

¹²³ Ong Kian Cheong case, *supra* note 6, at ¶ 4 & 16.

at the post box where the couple dropped off the materials.¹²⁴ The Media Development Authority had previously informed the couple in November 2007 that two of the seven publications by Chick Publications that they had ordered were objectionable and had to be destroyed.¹²⁵

The couple had been distributing religious pamphlets since 1987, switching from randomly stuffing the tracts in letter boxes to posting them to addresses taken from the phone directory.¹²⁶ From 2000 until their arrest, 20,000 tracts were sent out.¹²⁷ The couple deliberately sent the tracts critiquing Islam to persons with Muslim names.¹²⁸ The tracts were sent anonymously.¹²⁹

The couple proclaimed that they only wanted to spread Christianity and apologized for any hurt feelings.¹³⁰ One of the defenses offered by the accused was that the materials she distributed were not different from other publicly available materials, particularly the *Da Vinci Code* in book and film format.¹³¹ The prosecution expert witness, Mr. A.R. Madeei, the Media Development Authority's senior assistant director (publications), testified in court that there was a distinction

¹²⁴ *Id.*, at ¶ 6; Chong, *supra* note 121.

¹²⁵ Ong Kian Cheong case, *supra* note 6, at ¶ 17-19. This resulted in three visits by the couple to the MDA. In the third visit, the couple took home the tracts which were not found objectionable by MDA, though the couple denied being told why the tracts were detained. The wife also claimed that the husband “was not paying attention and occupied himself looking at the posters displayed in the office” when she was talking to the MDA officer: *id.*, at ¶ 17-19. The couple had approached the case with a diminished role of the husband in the activities, i.e. involved only in the physical activity of posting: *id.*, at ¶ 27, 43 & 61.

¹²⁶ *Id.*, at ¶ 25-27 & 29-32; Elena Chong, *Accused Says He Had Not Read Offensive Comics*, STRAITS TIMES (Sing.), Jan. 30, 2009. Direct mailing as a means of spreading the gospel messages has been an established strategy of Christian evangelicalism in Singapore: KUAH-PEARCE, *supra* note 65, at 279-280.

¹²⁷ Elena Chong, ‘20,000’ Tracts Mailed over 7 Years, STRAITS TIMES (Sing.), Apr. 7, 2009.

¹²⁸ Ong Kian Cheong case, *supra* note 6, at, ¶ 35.

¹²⁹ The couple testified that they did not identify themselves as senders on the envelopes because they did not see the need to communicate at all with the tract recipients: *id.*, at ¶ 26 & 32. The judge agreed with the public prosecutor that the anonymity was intended to avoid detection: *id.*, at ¶ 73 & 83.

¹³⁰ Chong, *supra* note 120.

¹³¹ Carolyn Quek, *Tracts ‘No Different from Da Vinci Code’*, STRAITS TIMES (Sing.), Mar. 11, 2009.

between books such as *God is Not Great*, *The End of Faith*, *The Da Vinci Code*, and *The God Delusion* and a comic tract that was easily accessible and understood by the young and vulnerable.¹³² Another defense advanced by the couple was ignorance of the content of the tracts,¹³³ especially with tracts being openly sold in bookstores in Singapore.¹³⁴ These defenses were rejected, and the couple was convicted and jailed eight weeks.¹³⁵

2. “Injurious” Cards: the Andrew Kiong Case

The new Penal Code Provision section 298A was employed once, in 2010. An air-conditioning repairman, Andrew Kiong Kheng Kiat, was jailed for two weeks after he was convicted under section 298A for “injuring religious feelings of another person.”¹³⁶ During his work at several condominiums, he moved around the car parks leaving envelope-sized cards on the windshields of cars that he believed belonged to Muslim residents.¹³⁷ The cards “contained questions about the Prophet Muhammad that were calculated to insult Muslims.”¹³⁸ The Muslim owners of the cars consulted the Islamic Religious Council of Singapore (Muis), a statutory board

¹³² Ong Kian Cheong case, *supra* note 6, at, ¶ 55-56; Elena Chong, *Booklets Available in Store, Says Lawyers*, STRAITS TIMES (Sing.), Jan. 29, 2009.

¹³³ Ong Kian Cheong case, *supra* note 6, at, ¶ 28, 33; Chong, *supra* note 126. Section 6(2) of the Sedition Act provides an affirmative defence of ignorance of publication’s seditious tendency, if there was no “want of due care or caution.”

¹³⁴ Ong Kian Cheong case, *supra* note 6, at, ¶ 33 (The couple provided evidence by way of photographs taken in November 2008 of the tracts being sold at a local bookstore, although the judge noted that the couple had been ordering the tracts directly online from Chick Publications since 2000, and thus did not believe the couple’s defence that the offensive tracts were purchased at the local bookstore.).

¹³⁵ Ong Kian Cheong case, *supra* note 6, at, ¶ 44-66, 86; Carolyn Quek, *Seditious Tract Duo Jailed Eight Weeks*, STRAITS TIMES (Sing.), June 11, 2009.

¹³⁶ Khushwant Singh, *supra* note 6.

¹³⁷ *Id.*

¹³⁸ *Id.*

in charge of Muslim affairs,¹³⁹ before lodging the police report that led to the arrest.¹⁴⁰ Compared to the Ong Kian Cheong case, this case received much less media publicity in the mainstream press. Academic discussion on the case was also scant.¹⁴¹

3. “Unacceptable” Testimonials: the Pastor Tan Incident

In February 2010, Senior Pastor Rony Tan, founder of the Lighthouse Evangelism Church, was called up by the Internal Security Department over three video clips posted on the church website.¹⁴² The three clips involved testimonials of people who converted to Christianity from other religions. The first two video clips showed Pastor Tan interviewing a former Buddhist monk regarding his frustration about chanting words he did not understand and not receiving straight answers from Buddhist elders about attaining nirvana. “Pastor Tan drew laughter from his audience with his remarks on the chanting, and compared [the former Buddhist monk’s] effort to seek answers from his mentors as ‘the blind leading the blind.’”¹⁴³ In the third clip, Pastor Tan suggested that the meditation experience of another former Buddhist was the work of a “demon.”¹⁴⁴ Pastor Tan also critiqued the Buddhist precepts of rebirth, karma, and nirvana.¹⁴⁵

¹³⁹ See Ahmad Nizam Bin Abbas, *The Islamic Legal System in Singapore*, 21 PAC. RIM L. & POL’Y J. 163, 167-171 (2012) (discussing the function and structure of MUIS).

¹⁴⁰ Khushwant Singh, *supra* note 6.

¹⁴¹ The case was mentioned in passing in Jaclyn Ling-Chien Neo, *supra* note 9, at 363.

¹⁴² Yen Feng, *ISD Calls up Pastor for Insensitive Comments*, STRAITS TIMES (Sing.), Feb. 9, 2010. For a background of Pastor Rony Tan, see Jennani Durai, *The Man Behind the Controversy*, STRAITS TIMES (Sing.), Feb. 9, 2010.

¹⁴³ Yen, *supra* note 142.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

According to the official statement by the Home Affairs Ministry that confirmed that the “called up,” “Pastor Tan’s comments were highly inappropriate and unacceptable as they trivialized and insulted the beliefs of Buddhists and Taoists.”¹⁴⁶ Pastor Tan was “told” by the ISD that “in preaching or proselytizing his faith, he must not run down other religions, and must be mindful of the sensitivities of other religions.”¹⁴⁷ The Deputy Prime Minister, Wong Kan Seng, publicly noted that the ISD warning was no less serious than a police investigation.¹⁴⁸

The matter was resolved after Pastor Tan’s various apologies. First, he removed the video and posted an apology on the website.¹⁴⁹ The government statement noted, “Pastor Tan has expressed his deepest apologies and remorse” during the ISD “call up.”¹⁵⁰ The Buddhist and Taoist leaders were initially indifferent to the apology and emphasized the need to prevent future incidents.¹⁵¹ Pastor Tan paid a personal visit the next day to the Buddhist and Taoist religious leaders to apologize. This led to reconciliation with the Buddhist and Taoist leaders, who appreciated the sincerity of Pastor Tan’s apology.¹⁵² This was followed by an apology to his church

¹⁴⁶ *ISD Acts*, STRAITS TIMES (Sing.), Feb. 9, 2010.

¹⁴⁷ *Id.*

¹⁴⁸ Chua Hian Hou, *Racist Facebook Postings: Three Youths Won’t Be Charged*, STRAITS TIMES (Sing.), Feb. 13, 2010.

¹⁴⁹ *Pastor’s Apology*, STRAITS TIMES (Sing.), Feb. 9, 2010.

¹⁵⁰ *ISD Acts*, *supra* note 146.

¹⁵¹ Grace Chua, *Leaders of Buddhist, Taoist Groups Urge Restraint*, STRAITS TIMES (Sing.), Feb. 9, 2010 (Singapore Buddhist Federation’ secretary-general, Venerable Kwang Phing: “It is good that the authorities have looked at this matter, but this is a matter of national concern. We want to appeal to the public and the authorities to make sure there is no second time.”; Singapore Taoist Federation chairman Tan Thiam Lye: “If (Pastor Tan) is sincere, we accept his apology, and hope this sort of thing does not happen again.”). *See also* Yang Zhengjiang, *Mushi dao xian xianlan bugou chengyi* [Apology by pastor is Clearly not Sufficiently Sincere], LIANHE ZAOBAO (Sing.), Feb. 13, 2010 (a member of the public writing to the Chinese press opining that the online apology is not sufficiently sincere).

¹⁵² Yen Feng, *Buddhist, Taoist Leaders Accept Pastor’s Apology*, STRAITS TIMES (Sing.), Feb. 10, 2010.

members and an appeal to them not to defend or justify his actions to others.¹⁵³ All of these actions led Deputy Prime Minister and Minister for Home Affairs Wong Kan Seng to tell the press that the religious leaders had led and set the right example.¹⁵⁴

4. “Looked Into” Sermons: the Pastor Ng Incident

A similar incident occurred a few months after the Pastor Tan incident. In June 2010, the ISD was in action again, this time involving a video sermon by Pastor Mark Ng of New Creation Church, an independent church with 20,000 members.¹⁵⁵ In the video, he “can be heard joking with the congregation about Chinese rituals; in one instance, he compared praying to Taoist deities to ‘seeking protection from secret society gangsters.’”¹⁵⁶ Although the video was posted online by others, the ISD nevertheless “looked into it and [took] up the matter with the New Creation Church.”¹⁵⁷

The manner of resolution was similar to the Pastor Tan incident. The New Creation Church took steps to remove the sermon in question and to prevent distribution/reproduction. An initial apology was posted online on its website.¹⁵⁸ Similar to the Pastor Tan incident, this initial apology was deemed inadequate by the offended parties. The Taoist Federations responded that “[m]any

¹⁵³ Yen Feng, *Pastor: I’ve Let Many People Down*, STRAITS TIMES (Sing.), Feb. 16, 2010.

¹⁵⁴ Yen, *supra* note 152.

¹⁵⁵ Yen Feng, *ISD Looks into Clip of Sermon Which Mocked Taoist Beliefs*, STRAITS TIMES (Sing.), June 15, 2010.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (statement by the Ministry of Home Affairs).

¹⁵⁸ *Id.*

Taoists neither use the Internet nor speak English. ... It is not good enough that someone can make fun of our faith, and then just write an apology on the Internet.”¹⁵⁹

Similar to Pastor Tan, in response, Pastor Ng issued a statement to the press seeking forgiveness for his “serious indiscretion,”¹⁶⁰ which was followed by a personal visit to the Taoist Federation chairman at his office to apologize.¹⁶¹ The Taoist Federation chairman, Tan Thiam Lye, accepted the apology, noting that the matter is now completely over and that both of them had become friends.¹⁶² Later that year, at a gathering celebrating the Taoist Federation’s 20th Anniversary, Mr. Kang from the New Creation Church and Tan Thiam Lye sang a duet, the Hokkien ditty of love and kinship “Jit Lang Jit Puah,” or “One Half for Each [Friend].”¹⁶³ A picture perfect happy ending.

IV. ANALYSIS: FEATURES OF SINGAPORE’S RESTRICTIONS ON RELIGIOUS PROPAGATION

Although the restrictions and their application to recent incidents have been subjected to significant commentary by local academics,¹⁶⁴ this Part adds to the discourse by identifying several nuances and features of Singapore’s regime that have been otherwise overlooked. In particular, this Part discusses the breath of the restrictions, the constitutional issue of “religious propagation,” and the state’s involvement in religious reconciliation.

¹⁵⁹ Yen Feng, *New Creation Pastor Apologises for ‘Indiscretion’*, STRAITS TIMES (Sing.), June 16, 2010.

¹⁶⁰ *Id.*

¹⁶¹ Yen Feng, *Pastor Says Sorry and Gains a Friend*, STRAITS TIMES (Sing.), June 17, 2010.

¹⁶² *Id.*

¹⁶³ Yen Feng, *Different Faiths to Gather at Taoist Festivity*, STRAITS TIMES (Sing.), Dec. 1, 2010.

¹⁶⁴ *E.g.*, Neo, *supra* note 9; Thio Li-ann, *supra* note 3; Zhong Zewei, *supra* note 7.

A. *Beyond Offensive Proselytization: The Breadth of Singapore's Restrictions*

Proselytization has always been a sensitive issue in the diverse religious landscape of Singapore. Aggressive proselytization has been perceived by the government as a threat to religious harmony¹⁶⁵ given the appreciation that “no religion will idly stand by while its members are drawn away.”¹⁶⁶ In particular, “the government has always been alert to Muslim sensitivities towards Christian evangelism,”¹⁶⁷ especially in the context of being surrounded by Muslim majority countries and where Islam is a focal point for Malay nationalism.¹⁶⁸ The government has taken care to emphasize that it is not against religious competition (obtaining more followers) per se but that sensitivity is required in Singapore's multi-racial and multi-religious setting.¹⁶⁹ Indeed, “the government has urged that [proselytization] must be exercised sensitively, by drawing a distinction between interested persons and attempts to convert people out of their faith by denigrating his religion, which could cause great offense.”¹⁷⁰ During the parliamentary debate on the new Penal Code provision, the Senior Minister of State for Home Affairs observed that “[i]t is one thing to preach to a person who is interested to hear your views. However, it is quite another to try to convert a person to your religion by denigrating his religion, especially when he has no desire to be converted.”¹⁷¹

¹⁶⁵ Chin, *supra* note 82; Hussain, *supra* note 82.

¹⁶⁶ TONG, *supra* note 68, at 267.

¹⁶⁷ Thio, *supra* note 68, at 238; DeBernardi, *supra* note 11, at 258.

¹⁶⁸ DeBernardi, *supra* note 11, at 259-260; Thio, *supra* note 68, at 238.

¹⁶⁹ *Foolhardy to Take Harmony for Granted*, STRAITS TIMES (Sing.), July 25, 2009 (Senior Minister and Coordinating Minister for National Security S. Jayakumar).

¹⁷⁰ Thio, *supra* note 68, at 237.

¹⁷¹ *Penal Code (Amendment) Bill*, *supra* note 106 (Ho Peng Kee).

The recent incidents reflect the conventional attitude of Singapore's government toward insensitive proselytization. In essence, religious propagation in Singapore is restricted by the rule that it should not "run down" other religions and must be mindful of other religions' sensitivities. This is beyond the concept of religious hate speech, where some type of incitement of discrimination, hostility, or violence is usually required.¹⁷² In terms of content, Pastor Tan's critique of Buddhism and Taoism may be flippant in tone, but there is no suggestion of demonizing or ostracizing the Buddhist and Taoist communities. Similarly, although the Chick Publication comic tracts were highly critical of Islam and certainly did not depict Muslim characters in a flattering light, they are still arguably within the boundaries of reasoned discourse. The inability to directly access the materials in the Pastor Ng incident and the Andrew Kiong case prevented direct commentary on the content in this Article, although there is nothing in the reported press to suggest greater severity of these offences in terms of tone or content.

Although the concept of "offensive" as the basis for sanctions has been given a broad and arguably crude definition, it is worth noting an interesting factual nuance that has been missed by most commentary and reports on the Ong Kian Cheong case that shed important light on the types of restrictions at hand. The publication the couple was caught mailing, another Chick Publications tract titled "Set Free," was actually not listed as a seditious publication in the charges.¹⁷³ The couple had deliberately sent that particular tract to addresses with Chinese names.¹⁷⁴ The tract

¹⁷² SCOLNICOV, *supra* note 21, at 206-207; Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 325-326 (2009). *See also* BRETT A. BARNETT, UNTANGLING THE WEB OF HATE: ARE ONLINE "HATE SITES" DESERVING OF FIRST AMENDMENT PROTECTION? 134 (Cambria Press 2007) (observing that religious speech was "a major component of the vast majority of the sampled hate sites.").

¹⁷³ Ong Kian Cheong case, *supra* note 6, at, ¶ 6.

¹⁷⁴ *Id.*, at ¶ 35.

contained the typical evangelical message of the other Chick Publications tracts (sinners going to hell, Jesus Christ dying for humans' sins, faith in Jesus Christ as the only path of salvation) but did not explicitly mention any other religion.¹⁷⁵ This confirms that it is not religious propagation per se but only a particular form of religious propagation involving criticisms of other religions that is legally penalized.

However, the Pastor Tan and Pastor Ng incidents represent more than restrictions on insensitive proselytization. Although Pastor Tan and Pastor Ng were not ultimately subject to legal punishments, the publicly announced call-up by ISD constitutes a strong rebuke by the government. Their behavior was deemed “unacceptable,” necessitating public apologies that were to be accepted by the offended parties.¹⁷⁶ Close examination of the conduct of Pastor Tan and Pastor Ng reveals important distinctions from the insensitive proselytization that was punished in the Ong Kian Cheong case and the Andrew Kiong case.

First, the “offensive” religious speeches by Pastor Tan and Pastor Ng were made to their own respective congregations. Although Pastor Tan uploaded a video containing the relevant religious speeches onto the internet, this was done through the church’s own website and not through a public file-sharing medium. The video by Pastor Ng, which was distributed by the church in the form of compact discs,¹⁷⁷ was actually uploaded by third parties intending to bring the issue

¹⁷⁵ JACK T. CHICK, SET FREE (Chick Publications 2007), available at http://www.chick.com/reading/tracts/1037/1037_01.asp (last visited Feb. 1, 2013).

¹⁷⁶ *Supra* III.C.3 & III.C.4.

¹⁷⁷ Yen, *supra* note 155. The church reported that the church “stop reproducing” the particular sermons after the church reviewed their archive for insensitive materials after the Pastor Tan incident (Feb. 2010), although the third party who uploaded the clip told the press that he received the materials from a Christian whom he presumed is the adherent of the New Creation church in May 2010: *id.*

to light. This is unlike the two criminal cases in which the propagators specifically intended the religious materials criticizing Islam to be received by Muslims.

Second, the venues of the religious speeches were their respective places of worship. There was no unsolicited intrusion on the personal sphere of the offended parties, unlike in the two criminal cases, where the religious materials were placed either on private property (the Andrew Kiong case) or in personally addressed parcels (the Ong Kian Cheong case). These cases also do not involve the more troubling practice of proselytizing in “public institutions such as governments, schools, hospitals or offices.”¹⁷⁸

It appears that the “don’t run others down” principle has been applied in Singapore to extend beyond mere proselytizing. Such “insensitive” criticisms, even if they are only meant for consumption by one’s congregation, are liable to result in sanctions and rebuke whenever they come to public awareness.

B. Religious Propagation as a Constitutional Right

The Singapore incidents involve a particular constitutional issue beyond the usual considerations of religious liberty. Prominent local constitutional scholar Thio Li-ann criticized the court in the Ong Kian Cheong case for side-stepping the general constitutional question of religious liberty and the importance of the expressly stipulated constitutional right to religious propagation.¹⁷⁹ Indeed, she emphasized the specific inclusion of “propagation” in the Singapore Constitution as a distinguishing characteristic vis-à-vis other constitutional or human rights

¹⁷⁸ Li Xueying & Ken Kwek, *Say Aah...men*, STRAITS TIMES (Sing.), Oct. 15, 2005.

¹⁷⁹ Thio, *supra* note 3, at 506-508.

religious freedom formulations.¹⁸⁰ She argued that the significance of the Singapore Constitution's inclusion of the express right to religious propagation is enhanced by the fact that restrictions against religious propagation among Muslim adherents were deliberately omitted from Singapore's Constitution.¹⁸¹

However, it is possible to attach excessive significance to the particularity of Singapore's constitutional wording. Thio Li-ann acknowledged that the right to "propagation" is "included in the Constitutions of some former British colonies in Asia (Singapore, Malaysia, India, Bangladesh, Pakistan), Africa (Botswana) and the Caribbean (St Lucia, Jamaica)."¹⁸² This suggests path dependency based on British colonial influence rather than a genuine bottom-up or otherwise local decision to incorporate such a phrase.¹⁸³ Tellingly, the Singapore Constitutional Commission was composed mainly of English-trained lawyers, and "the proceedings were conducted entirely in English and the participants were mostly English-educated ... with absence of public discussion and scant press coverage."¹⁸⁴ This is arguably unfortunate in a multi-linguistic society where the vast majority of the population did not understand English at that time.¹⁸⁵

¹⁸⁰ *Id.*, at 485-486; Thio, *supra* note 45, at 422.

¹⁸¹ Thio, *supra* note 3, at 485-488.

¹⁸² *Id.*, at 485.

¹⁸³ Li-ann Thio, *The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission, in EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 7, 7 (Li-ann Thio & Kevin YL Tan eds., Routledge-Cavendish 2009) ("In its genesis, the Singapore Constitution was not a product of mature deliberation or a broad-based popular, consultative process.").

¹⁸⁴ *Id.*, at 11-12.

¹⁸⁵ While statistics on the English literacy of the population during that period is not readily available, it is telling that even after nearly two decades of concerted government efforts in promoting the English language, only 33.7% are literate in English in the 1970 population census, and 56.6% indicating comprehension of English in a 1975 survey: S. Gopinathan, *Singapore Language Policies: Strategies for a Plural Society*, 1979 SOUTHEAST ASIAN AFFAIRS 280, 282 (1979); Eddie C. Y. Kuo, *Multilingualism and Mass Media Communications in Singapore*, 18(10) ASIAN SURVEY 1067, 1068 (1978).

The 1966 Constitutional Commission made a conscious decision to adhere to the form and manner in which constitutional fundamental liberties were presented in the Constitution of Malaysia, departing only when “necessary and desirable.”¹⁸⁶ In the context of the religious liberty clause, the discussion was solely focused on whether the Malaysian constitutional restriction of religious propagation to Muslim adherents should be retained.¹⁸⁷ Moving a level up, the Federation of Malaya Constitutional Commission report in relation to the original Constitution of Malaysia contains scant discussion about religious propagation as well.¹⁸⁸ This is unlike the Indian Constituent Assembly, where the constitutional provision and importance of religious propagation was given specific attention and debate.¹⁸⁹ More importantly, the Malaysian constitutional restriction was rejected in Singapore on equality grounds without discussion of the importance or particularity of religious propagation.¹⁹⁰ Hence, even if the original intent of the framers is given due emphasis,¹⁹¹ there is no guidance provided for Singapore’s religious propagation restrictions

¹⁸⁶ *Report of the Constitutional Commission 1966*, in KEVIN TAN YEW LEE ET AL., CONSTITUTIONAL LAW IN MALAYSIA & SINGAPORE Appendix D, ¶ 14 (Malayan Law Journal 1991).

¹⁸⁷ *Id.*, at ¶ 38.

¹⁸⁸ *Federation of Malaya Constitutional Commission, 1956-1957 Report*, in KEVIN TAN YEW LEE ET AL., CONSTITUTIONAL LAW IN MALAYSIA & SINGAPORE Appendix A, ¶ 162 (Malayan Law Journal 1991) (It was a one-liner: “And we recommend (art 11) that freedom of religion should be guaranteed to every person including the right to profess practice and propagate his religion subject to the requirements of public order, health and morality, and-that subject also to these requirements, each religious groups should have the right to manage its own affairs, to maintain religious or charitable institutions including schools, and to hold property for these purposes (art 12).”). The main debate on religion is about whether Islam should be designated as the state religion: *id.*, at ¶ 169.

¹⁸⁹ Neufeldt, *supra* note 30, at, 383-388; Thio, *supra* note 3, at 494-496; KRISHNA PRASAD DE, RELIGIOUS FREEDOM UNDER THE INDIAN CONSTITUTION 46-47 (Minerva Associates 1977). *See also* Gurpreet Mahajan, *Religion and the Indian Constitution: Questions of Separation and Equality*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 297 (Rajeev Bhargava ed., Oxford University Press 2008) (discussing the broader political backdrop and issues underpinning the Indian constitutional debate of religion).

¹⁹⁰ *Report of the Constitutional Commission 1966*, *supra* note 186, at ¶ 38.

¹⁹¹ *See* Thio Li-ann, “It Is a Little Known Legal Fact”: Originalism, Customary Human Rights Law and Constitutional Interpretation, 2010 SING. J. LEGAL STUD. 558, 569-570 (2010) (arguing for originalism in judicial interpretation of the Singapore Constitution). *Cf.*, Yap Po Jen, *Constitutionalising Capital Crimes: Judicial Virtue or “Originalism” Sin?*, 2011 SING. J. LEGAL STUD. 281 (2011) (rebutting Thio on the normative desirability of originalism in the context of Singapore).

based on the public order justification of religious harmony rather than the unequal protection of any particular religion. In addition, notwithstanding the Indian Constitution's express inclusion of the right to religious propagation, Indian courts have upheld laws that restrict certain forms of religious propagation¹⁹² with legal reasoning that echoed the Singapore court's emphasis on public order concerns when interpreting constitutional liberty.¹⁹³

C. *Reconciliation Under the Shadow of the Law*

Thio Li-ann provided a positive appraisal for the handling and resolution of the Lighthouse Evangelism incident. She singled out for praise the “responsible, repentant attitude of Pastor Tan”¹⁹⁴ and noted with approval the “responsible, if not graceful” acceptance of the apology by the Buddhist and Taoist leaders¹⁹⁵ and the calibrated government intervention.¹⁹⁶ This combination of apology, forgiveness, and government intervention was highly regarded by other commentators writing in the press¹⁹⁷ and reflects the official government narrative.¹⁹⁸

¹⁹² Neufeldt, *supra* note 30, at 388-398 (discussing the relevant legislature at the three Indian provinces and the subsequent upholding by the courts); Robert D. Baird, *Traditional Values, Government Values, and Religious Conflict in Contemporary India*, 1988 B.Y.U. L. REV. 337, 351-354 (1998) (discussing the relevant legislature at the three Indian provinces and the subsequent upholding by the courts); James Andrew Huff, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J. L. & RELIGION 3, 7-13 & 35-44 (2009).

¹⁹³ Tsun Hang Tey, *Judicial Internalizing of Singapore's Supreme Political Ideology*, 40 HONG KONG L. J. 293, 320 (2010); Thio, *supra* note 68, at, 209-210.

¹⁹⁴ Thio, *supra* note 3, at, 502.

¹⁹⁵ *Id.*, at 504.

¹⁹⁶ Thio, *supra* note 3, at 504-505.

¹⁹⁷ William Goh, *Constant Vigilance the Answer*, STRAITS TIMES (Sing.), Feb. 11, 2010; Wu Jungang, *Quebao zhongjiao hexie de youxing zhi shou* [The Visible Hand That Ensures Religious Harmony], LIANHE ZAobao (Sing.), Feb. 10, 2010.

¹⁹⁸ Yen, *supra* note 152; *Need to Deal with Such Problems Quickly: PM*, STRAITS TIMES (Sing.), Feb. 16, 2010; Kor Kian Beng, *Don't Trivialise Beliefs of Others: SM Goh*, STRAITS TIMES (Sing.), Feb. 14, 2010.

Careful comparative examinations of the Pastor Tan and Pastor Ng incidents reveal additional nuances. First, the apologies by both pastors were initiated after the ISD had looked into the matter and contacted the relevant individual. Deputy Prime Minister Wong Kan Seng publicly noted that the ISD warning was no less serious than a police investigation.¹⁹⁹ In any event, religious leaders in Singapore would probably need no additional reminders of the severity when the ISD is involved. The power of infinite detention without court trial under the ISD has been deployed against individuals on matters associated with religion. The specter of the Marxist conspiracy lingers, and the detention of radical Islamic terrorists over the past few years provides fresh reminders.²⁰⁰

Second, the initial apologies by Pastor Tan and Pastor Ng were declaratory statements posted on their respective church websites and were not well received by the religious leaders of the offended religions. In particular, the online apology by Pastor Ng was essentially rejected by Taoist leaders.²⁰¹ It was after these reservations by the religious leaders were reported in the press that the personal visits were initiated. The personal visits to the Buddhist and Taoist leaders are crucial because the reconciliations took place at that stage.

Third, although all of the religious leaders “spoke with a united voice, rejecting the making of insensitive comments against other religions and reiterating the common interest in religious harmony,”²⁰² there is a difference in the religious leaders’ statements. In addition to speaking out

¹⁹⁹ Chua, *supra* note 148.

²⁰⁰ *Supra* III.B.2.d.

²⁰¹ *Supra* III.C.4.

²⁰² Thio, *supra* note 3, at 503. See also Li-Ann Thio, *Relational Constitutionalism and the Management of Religious Disputes: the Singapore ‘Secularism with a Soul’ Model*, OXFORD JOURNAL OF LAW AND RELIGION 1, 19-20 (2012).

against insensitive conduct, Hindu and Buddhist religious leaders praised the authorities for the intervention and emphasized the need to prevent its recurrence. The Chairman of the Hindu Endowments Board was “glad to note” the vigilance of the ISD and hoped the insensitive conduct would not recur in the future.²⁰³ The Singapore Buddhist Federation also “applaud[ed] the timely involvement and advice by the relevant authorities” and hoped that the deeds would not be repeated.²⁰⁴ Such sentiments, absent from the reported comments of Christian and Muslim leaders, are perhaps unsurprising. The insensitive religious speeches by Pastor Tan and Pastor Ng are by no means one-off incidents. Indeed, their “offensive” religious speeches are relatively mild compared to some practices by other Christians. Although Pastor Ng compared Taoist deities to secret society gangsters, Chinese religious worship was compared to the worship of demons by another Singaporean Charismatic leader.²⁰⁵ A common critique in Christian religious propagation is the characterization of other religions as false religions.²⁰⁶ Idol smashing, involving the destruction of Buddhist and Taoist artifacts, has been encouraged and sometimes mandated upon conversion, a thorny issue when other family members have not converted.²⁰⁷ The Pastor Tan and Pastor Ng incidents arguably reflect a longstanding frustration among the targeted religious groups that is beginning to fester.²⁰⁸ Likewise, the distribution of materials criticizing Islam is certainly not a new practice. As early as 2001, there were complaints of Muslims receiving articles

²⁰³ *What Others Say About the Incident*, STRAITS TIMES (Sing.), Feb. 10, 2010.

²⁰⁴ *Statements from Buddhist and Taoist Federations and DPM Wong Kan Seng*, STRAITS TIMES (Sing.), Feb. 10, 2010.

²⁰⁵ DeBernardi, *supra* note 11, at, 265.

²⁰⁶ KUAH-PEARCE, *supra* note 65, at 272-277.

²⁰⁷ DeBernardi, *supra* note 11, at, 266-267; Hussain, *supra* note 82.

²⁰⁸ Hussain, *supra* note 82 (“Ms Angie Monksfield, president of the Buddhist Fellowship, told Insight that the notice [about MHRA and notifying authorities] was put up ‘in response to members’ complaints [of unwanted proselytization and idol-smashing] ... We’ve received complaints for years; we finally decided to do something about it.”).

criticizing Islam in the mail and school children being given Bibles outside the school gates.²⁰⁹ The high-profile intervention by the government appears to be a welcome, possibly even overdue, relief for these targeted religions.

These considerations do not necessarily distract from the sincerity or genuineness of the apologies. Indeed, it is important to note that there appears to be genuine reconciliation between both sets of religious leaders. In particular, the Buddhist and Taoist leaders all reported being moved by the sincerity of Pastor Tan and Pastor Ng during their personal visits.²¹⁰

Nonetheless, two takeaways emerge from this analysis. First, face-to-face meetings are important for genuine reconciliation and inter-faith religious harmony. “Many commentators view a face-to-face interaction between offender and offended as essential to effective expressions of remorse and apology.”²¹¹ These interactions serve to enhance understanding between the two parties and to promote genuine reconciliation.²¹² These interactions are particularly important for groups that otherwise have little opportunity to interact under normal circumstances.²¹³ This point is relevant in Singapore, where the more conservative Christians often have reservations about interfaith interactions and cooperation with other religious organizations for fear that it may give

²⁰⁹ Nirmala, *supra* note 92.

²¹⁰ Yen, *supra* note 161; Yen, *supra* note 152.

²¹¹ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. REV. 114, 114 (2004).

²¹² Robert D. Sloane, *The Expressive Capacity of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 86 (2007); Susan Sarnoff, *Restoring Justice to the Community: A Realistic Goal?*, 65-JUN FED. PROBATION 33, 34 (2001).

²¹³ Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 373 (2011). See Martha Minow, *Education for Co-existence*, 44 ARIZ. L. REV. 1, 13-15 (2002) (discussing the relatively successful integration experimental program in Israel for Jews and Palestinian Arab).

the impression that all religions are equal.²¹⁴ It is noteworthy that this relationship-building function of face-to-face interactions remains even if the interactions take place under quasi-mandatory circumstances.²¹⁵ Moreover, although one may doubt the sincerity of apologies made under heavy government pressure, such “compelled” apologies are still better than none because these apologies can still serve as a vindication for the “victims” while facilitating the internalization of norms for the “offender” by forcing the “offender” to acknowledge and confront the “wrongness” of his or her actions.²¹⁶

Second, the heavily criticized draconian authoritarian legal sanctions and political hegemony are integral to these happy endings. Religious harmony is a constant emphasis by the ruling party that has maintained a firm hegemony over Singapore’s political landscape.²¹⁷ The implicit threat of sanctions from the executive branch, whether the ISD itself or under the MHRA, is unambiguously real and severe once the government has publicly taken a stance, as is the case when the ISD involvement is publicly reported. The intervention of the ISD would deter all but the most courageous (or defiant) religious leaders. This can be contrasted with cases of substantially more hateful protests by the Westboro Baptist Church and the Quran-burning antics of the Florida Pastor Terry Jones in the United States, where the public and political condemnation of those antics cannot be supported by legal sanctions given the free speech laws in the U.S.²¹⁸ In

²¹⁴ Mathew Mathews, *Negotiating Christianity with Other Religions: The Views of Christian Clergymen in Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE 571, 581-582 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008).

²¹⁵ Lester, *supra* note 213, at, 373.

²¹⁶ Bibas & Bierschbach, *supra* note 211, at 143.

²¹⁷ Febrica, *supra* note 118, at 573-581; Tey, *supra* note 69, at 120-125.

²¹⁸ Russell Adams, *Tensions Still on Boil in Mosque Fight*, WALL ST. J., Sep. 13, 2010, at A5; Jess Bravin & Brent Kendall, *Supreme Court Wades into Funeral Protests*, WALL ST. J., Mar. 9, 2010, at A2.

contrast, the MHRA and the Internal Security Act would amply allow the Singapore government to treat the actions and speeches by the two pastors as liable for legal sanctions if the government wishes to pursue them.²¹⁹

Notably, this backdrop of real sanctions not only provides a strong incentive for the offending religious leader to undertake the necessary remedial steps but also facilitates the forgiveness of the offended party. Local commentator Ang Peng Hwa noted that the incidents reflect trust in the government and authorities because people turned to the authorities to mediate the responses.²²⁰ Indeed, the perceived strength of these sanctions gives confidence and comfort to the offended religious leaders and reduces the need to independently exert their displeasure or otherwise remedy matters themselves, even if the Buddhist and Hindus religious leaders still see the need for explicit reminders to avoid future incidents. Their sense of “insecurity”²²¹ would likely be aggravated if the severity and reliability of the sanctions was doubted. In any event, it is ironic that the “relational constitutionalism” in Singapore²²² discussed below²²³ is achieved in the shadow of the MHRA and the Internal Security Act, which are often criticized for undermining the constitutional protection of free speech and religious liberty.²²⁴

²¹⁹ *Supra* II.B.2.a & II.B.2.d.

²²⁰ Ang Peng Hwa, *All S'poreans have Role, not just Leaders*, STRAITS TIMES (Sing.), Mar. 11, 2010.

²²¹ Thio, *supra* note 45, at 423; Thio, *supra* note 68, at 239.

²²² Thio, *supra* note 202, at 22-24; Thio, *supra* note 3, at 513.

²²³ *Infra* V.D.

²²⁴ Tey, *supra* note 69, at 137; Thio, *supra* note 68, at 233.

V. THE ATYPICAL CASE OF SINGAPORE’S PROSELYTIZATION RESTRICTIONS

The broad and occasionally harsh restrictions on religious propagation are certainly controversial. Criticism of Singapore’s restrictions on offensive religious propagation reflects typical objections to proselytization restrictions in general—namely, the discriminatory effect on minority religions and the harm to religious liberty and religious truth-seeking. In addition, local academics have proffered the argument that restricting religious propagation to secure social peace can be counterproductive given how these restrictions may induce “spiritual balkanization” and impede “integration.” This Part critically examines these objections to highlight their limitations before mounting a tentative defense of limited restrictions.

A. *The Dynamic of Majority-Minority Re-examined*

At first glance, the proselytization restrictions in Singapore suggest a typical regulated religious market that is hostile toward religious minorities. The parties penalized in all four incidents were Christians propagating the Christian faith. With Christians constituting 18.3% of Singapore’s population,²²⁵ it is not surprising that there are public musings by some Singaporean Christians that the Christian community is discriminated against in the regulations on offensive religious speeches.²²⁶ The status of Christians as a religious minority is an important theme in Thio

²²⁵ *Supra* III.A.

²²⁶ Alex Tan, *Double Standards: In Sedition Case and DBS Charity Tie-up*, STRAITS TIMES (Sing.), Dec. 9, 2008 (citing examples of the Da Vinci Code and Richard Dawkin’s *The God Delusion* and arguing that “it is disheartening that this action [of maintaining the fragile religious balance] is not applied universally to all. There seems to be a greater tolerance of ‘attacks’ on Christianity than other major religions.”). Although it is worth noting that Martin Scorsese’s film, *The Last Temptation of Christ*, was previously banned in Singapore for offending Christian’s sensitivities: Tan, *supra* note 62, at, 67.

Li-ann's narrative, justifying her call against the criminal prosecution of Pastor Tan,²²⁷ the potential need for sanctions against those who demanded legal sanctions against Pastor Tan,²²⁸ and the requirement of a "sense of proportion, tolerance and forgiveness" by the non-Christian recipients of offensive religious propagation.²²⁹

Upon closer examination, the numbers do not add up. Muslims, the religious community protected in the Ong Kian Cheong case and the Andrew Kiong cases, stand at 14.7% of the population, slightly less than the Christian population at 18.3%. Taoists, implicated in the religious speeches by Pastor Tan and Pastor Ng, make up an even smaller community, at 10.9% of the population. The Buddhist population ratio of 33.3% exceeds the Christian population ratio, but it does not present Buddhism with an absolute majority or domineering numerical superiority over the Christian community. Thio Li-ann's religious minority narrative is achieved by combining the Buddhist and Taoist populations and pitting the combined 44.21% against the Christian minority of 18.3%.²³⁰ Thio Li-ann does not explain the rationale for this combination,²³¹ although it is true that it is often difficult to distinguish between Buddhism, Taoism, and Chinese traditional religion

²²⁷ Thio, *supra* note 3, at 505. *See also* Thio, *supra* note 202, at 20.

²²⁸ Thio, *supra* note 3, at 512. *See also* Thio, *supra* note 202, at 20.

²²⁹ Thio, *supra* note 3, at 512 ("[l]eaders of majority religious groups must demonstrate a sense of proportion, tolerance and forgiveness, towards leaders from minority religions who commit acts or make statements they find offensive, but who show genuine contribution.").

²³⁰ Thio, *supra* note 202, at 1n.1 & 19. *See also* Thio, *supra* note 3, at 503 ("The response of representatives of majority religious groups.").

²³¹ One possible reason is that she was merely following the categorization used in the table in the executive summary of the Singapore census 2010, which has a category "Buddhism/Taoism" with a sub-categories of "Buddhism" and "Taoism." Other religions such as "Christianity", "Islam" exist as independent category without any sub-category: SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 13. No particular reason or significance is attached to this categorization by the census report. In the actual table, "Buddhism" and "Taoism" are independent categories, with "Taoism" including traditional Chinese beliefs: *id.*, at 154-155.

as practiced by the Chinese population in Singapore.²³² Nonetheless, the Pastor Ng incident involved only Taoism²³³ and would not have fit into the narrative.

Christians are by no means a disadvantaged minority group in Singapore, either socially or economically. Despite constituting 18.3% of the population, Christians make up 32.2% of those holding university degrees²³⁴ and 35.4% of private property residents.²³⁵ The latter is a significant measure of wealth disparity, with the bulk of Singapore's households (82.4%) residing in public subsidized HDB flats.²³⁶ The disproportionate representation in the upper echelon of society was even starker in 1990 when, despite composing 12.7% of the population, Christians made up 39.3% of the graduate population and 34.3% of the population living in private flats and houses.²³⁷ They are also strongly represented in different professions and in higher levels of civil service.²³⁸

These findings are in contrast with the religious communities that benefit from Singapore's restrictions. The census statistics indicate an underrepresentation of Muslims in these socio-economic indicators. Muslims represent 14.7% of the population, but they make up only 4.3% of those holding university degrees²³⁹ and 3.2% of those residing in private property residences.²⁴⁰

²³² KOH & HO, *supra* note 61, at 32; TAMNEY & HASSAN, *supra* note 73, at 6.

²³³ Unlike the Pastor Rony Tan incident, the Buddhist Federations was not involved in Pastor Mark Ng incident. Pastor Mark Ng only went to the Taoist Federations to apologize.

²³⁴ SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 16.

²³⁵ *Id.*, at 159-160.

²³⁶ SINGAPORE DEPARTMENT OF STATISTICS, CENSUS OF POPULATION 2010 STATISTICAL RELEASE 2: HOUSEHOLDS AND HOUSING xi (2011).

²³⁷ LEOW, *supra* note 78, at 38.

²³⁸ JOHN CLAMMER, THE SOCIOLOGY OF SINGAPORE RELIGION: STUDIES IN CHRISTIANITY AND CHINESE CULTURE 25 (Chopmen 1991); KUAH-PEARCE, *supra* note 65, at 269.

²³⁹ SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 16.

²⁴⁰ *Id.*, at 159-160.

Nevertheless, this is an improvement from the previous decade, when the 14.9% Muslim population constituted 3.5% of the graduate population and 2.8% of private property residents.²⁴¹ The Buddhist and Taoist communities in Singapore face similar underrepresentation, albeit to a lesser degree.²⁴²

More crucially, the Christian community is by no means politically marginalized. In Singapore's Westminster parliamentary system, where the parliament is the primary political arena,²⁴³ publicly self-identified Christians make up 40% of the members of parliament in 2011.²⁴⁴ At least half of the new candidates of the incumbent ruling party in the most recent elections identified as Christians, and almost all were elected.²⁴⁵ Indeed, commentators have observed that Christians exert "an influence, politically, socially and economically, far greater than the number they represent in the population."²⁴⁶

Christianity as a religion is not discriminated against in state assistance to religions. The Singapore government generally views religions in a positive light and as useful partners in the

²⁴¹ LEOW, *supra* note 78, at 38-40. The underrepresentation is even more severe in the 60s and 70s: JOHN CLAMMER, SINGAPORE: IDEOLOGY SOCIETY CULTURE 122-123 (Chopmen 1985).

²⁴² With a population ratio of 10.9%, Taoists only made up 5.3% of those holding university degrees and 6.4% of those residing in private property. Buddhists, with 33.3% of the population, made up 23.6% of those holding university degrees and 11.5% of those residing in private property: SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 16 & 159-160.

²⁴³ See Thio Li-Ann, *Recent Constitutional Development: of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs*, 2002 SING. J. LEGAL STUD. (Sing.) 328, 329-334 (2002) (discussing Singapore parliamentary system).

²⁴⁴ Sam Holmes, *In Singapore, Faith Debate Simmers as Election Nears*, WALL ST. J., May 7, 2011, at A9.

²⁴⁵ *Id.*; Li zongli: *Zhengfu juebu yunxu guanyuan zhongjiao xingyang yingxiang zhengce* [PM Lee: *The Government Absolutely does not Permit the Religious Faith of Government Officials to Affect policy*], LIANHE ZAobao (Sing.), Apr. 17, 2011, at 10.

²⁴⁶ Mathews, *supra* note 11, at 187); DeBernardi, *supra* note 11, at 257.

promotion of the common good (as defined by the state).²⁴⁷ Without the constraints of an Establishment Clause, charitable religious activities are actively encouraged by the government because “they represent the privatization of compassion, which is consonant with the government’s anti-welfarism policy.”²⁴⁸ Education is one area of strong state-church cooperation, with the government providing substantial funding to religiously affiliated schools. Among the government-funded religiously affiliated schools, the vast majority are Christian mission schools. In 1998, there were 30 government-aided church-run primary schools and 29 government-aided church-run secondary schools, amounting to 15% of all primary and secondary schools in Singapore.²⁴⁹ In contrast, there was only one Buddhist secondary school and two Buddhist primary schools, with no schools affiliated with Taoism.²⁵⁰ Religious services and religious indoctrination are permitted in these religiously affiliated schools. Government funding only comes with a formal prohibition against compelling any student to attend mass or to receive religious instruction against the student’s wishes.²⁵¹ However, the religious influence and pressure in these schools²⁵² arguably

²⁴⁷ Lydia Lim, *Religion Should Help People Cope with Change: PM*, STRAITS TIMES (Sing.), June 23, 2003; Li Xueying & Keith Lin, *Does God Get in the Way of Social Cohesion*, STRAITS TIMES (Sing.), Oct. 21, 2006.

²⁴⁸ Tan, *supra* note 62, at 69; Thio, *supra* note 68, at 224; Kenneth Paul Tan, *Pragmatic Secularism, Civil Religion, and Political Legitimacy in Singapore*, in STATE AND SECULARISM: PERSPECTIVES FROM ASIA 339, 343 (Michael Heng Siam-Heng & Ten Chin Liew eds., World Scientific Publishing 2010).

²⁴⁹ Jason Tan, *The Politics of Religious Knowledge in Singapore Secondary Schools*, in CURRICULUM POLITICS, POLICY, PRACTICE: CASES IN COMPARATIVE CONTEXT 77, 97 n.1 (Catherine Cornbleth ed., State University of New York Press 2000).

²⁵⁰ KUAH-PEARCE, *supra* note 65, at 282 (the first Buddhist mission secondary school was set up in 1984 to complement the existing 2 Buddhist mission primary school); TAMNEY & HASSAN, *supra* note 73, at 43.

²⁵¹ Art 15(4), Constitution (Sing.); Li & Kwek, *supra* note 178.

²⁵² Tan, *supra* note 249, at, 80; Trevor Ling, *Religion*, in MANAGEMENT OF SUCCESS: THE MOULDING OF MODERN SINGAPORE 692, 701 (Kernial Singh Sandhu & Paul Wheatley eds., Institute of Southeast Asian Studies, Singapore 1989). The Ministry of Education saw the need to “remind” missions schools in 1992 of the prohibition against compulsion in religious services: Janadas Devan, *Secularism – Not from Theory but Bloody History*, STRAITS TIMES (Sing.), Nov. 24, 2007.

contributes to the correlation between attending such a school as a student and conversion to Christianity.²⁵³

Beyond direct substantive aid, Buddhism and Taoism do not enjoy much in the realm of state symbolism. The religious holidays of major religions are celebrated as official state holidays in Singapore, with government funding provided for public displays of holiday-related decorations.²⁵⁴ Among these official holidays, there are two for Christianity (Christmas and Good Friday), two for Islam (Hari Raya Puasa and Hari Raya Haji), one for Hinduism (Deepavali), and one for Buddhism (Vesak Day). Despite calls by the Taoist community for a religious holiday based on the birthday of Lao Zi (a key figure in Taoism), there is no official religious holiday for Taoism in Singapore.²⁵⁵ When the government introduced the Religious Knowledge curriculum in schools during the 1980s in an attempt to use religion to inculcate moral values among Singapore youths, Taoism was conspicuously absent from the curriculum, which included Christianity, Islam, Buddhism, and Hinduism.²⁵⁶

The case of Muslims is more complex. Legal academic Jaclyn Neo opined, “Singapore privileges Islam over other religions.”²⁵⁷ She also expressed concern at the perceived bias in favor

²⁵³ TONG, *supra* note 68, at 102; TAMNEY & HASSAN, *supra* note 73, at 12-13; CLAMMER, *supra* note 241, at 38; KUAH-PEARCE, *supra* note 65, at 268.

²⁵⁴ TAN-CHOW MAY LING, *PENTECOSTAL THEOLOGY FOR THE TWENTY-FIRST CENTURY: ENGAGING WITH MULTI-FAITH SINGAPORE* 10 (Ashgate 2007).

²⁵⁵ *Taoists Agree on Common Festive Day*, STRAITS TIMES (Sing.), Apr. 30, 2001, at H3.

²⁵⁶ TONG, *supra* note 68, at 249; KUAH-PEARCE, *supra* note 65, at 196-197. For general discussion of the curriculum, see Thio, *supra* note 68, at 219-221; Tan, *supra* note 249.

²⁵⁷ Jaclyn Ling-Chien Neo, *The Protection of Minorities and the Constitution: A Judicious Balance?*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 234, 247 (Li-ann Thio & Kevin YL Tan eds., Routledge-Cavendish 2009).

of the Malay-Muslim community in terms of the state's sanctions of offensive religious speech.²⁵⁸ Islamic religious practices are given special accommodation in Singapore. A special court administers Islamic law in matters of marriage, inheritance, and Islamic charitable trust property (*wakaf*).²⁵⁹ Muslim private religious schools (the *madrasah*) are given special and rare exemptions from the Compulsory Education Act.²⁶⁰ Muslim civil servants are allowed time off for Friday prayers.²⁶¹ Furthermore, the land use authority ensures that there is at least one mosque in each new town.²⁶² There is special statutory permission in the establishment of the Muslim Religious Council of Singapore (Muis) to raise funds for the construction of mosques and to collect *zakat* (tithes) to administer Islamic charitable activities.²⁶³ On the level of international law, Singapore maintains reservations from various provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) because of respect for the personal and religious beliefs of Muslim citizens under the Administration of Muslim Law Act.²⁶⁴ Such reservations are necessary given that Muslim polygamous marriage and the Islamic inheritance rule (a male should

²⁵⁸ Neo, *supra* note 9, at 364-365.

²⁵⁹ Neo, *supra* note 257, at 247; Ahmad Nizam Abbas, *The Fine Balance of Civil and Syariah Law in Singapore*, STRAITS TIMES (Sing.), Feb. 17, 2008; Li-ann Thio, 'She's a Woman But She Acts Very Fast': *Women, Religion and Law in Singapore*, in MIXED BLESSINGS: LAWS, RELIGIONS, AND WOMEN'S RIGHTS IN THE ASIA-PACIFIC REGION 241, 267-269 (Amanda Whiting & Carolyn Evans eds., Martinus Nijhoff Publishers 2006).

²⁶⁰ Neo, *supra* note 257, at 254; Thio, *supra* note 259, at 268. The exemption is subject to meeting government education standards for secular subjects such as English, Maths and Sciences. For a discussion of the historical evolution of Madrasah, see Sa'eda Buang, *Religious Education as Locus of Curriculum: A Brief Inquiry into Madrasah Curriculum in Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE 342 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008).

²⁶¹ Ahmad Osman, *Boosting Integration in Aftermath of Tudung Row*, STRAITS TIMES (Sing.), Feb. 10, 2002; Thio, *supra* note 243, at 364; Thio, *supra* note 68, at 214-215.

²⁶² Thio, *supra* note 45, at 428; Thio, *supra* note 68, at 218; CLAMMER, *supra* note 241, at 45.

²⁶³ Neo, *supra* note 257, at 247; Thio, *supra* note 259, at 268; Tan, *supra* note 62, at 62.

²⁶⁴ Braema Mathi, *UN Convention on Women: Govt has Reservations*, STRAITS TIMES (Sing.), July 11, 2001, at H10; Thio, *supra* note 68, at 216; Neo, *supra* note 257, at 255-256; Thio, *supra* note 259, at 270-271.

receive double the share of a female) are given legal recognition in Singapore.²⁶⁵ The recognition of Muslim polygamous marriage is particularly significant given that such exemptions were not given to the Chinese community even though polygamy can be arguably considered part of the Chinese religion of ancestral worship.²⁶⁶

Nonetheless, it is worth noting that academics elsewhere have argued for the normative desirability of giving extra protection to disadvantaged minorities.²⁶⁷ It is also possible to conceive of a version of religious equality that seeks to advance substantial equality through affirmative action in favor of traditionally disadvantaged minority groups.²⁶⁸ This is, in fact, enshrined in the Singapore Constitution; article 152(1) expressly stipulates the government's responsibility to "constantly ... care for the interests of the racial and religious minorities in Singapore." In addition, article 152(2) provides, "The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language."²⁶⁹ Similarly, Zhong Zewei suggested that in the circumstances of the systematic marginalization of the Malay-Muslim community, the Ong Kian Cheong case may be justified as

²⁶⁵ Neo, *supra* note 257, at 254-255.

²⁶⁶ Thio, *supra* note 259, at 253 (the colonial Straits Settlement Court of Appeal in 1911 recognized the religious nature of Chinese polygamous marriage).

²⁶⁷ Matthias Mahlmann, *Free Speech and the Rights of Religion*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 41, 67 (András Sajó ed., Eleven International Publishing 2007); Ruti Teitel, *Militating Constitutional Democracy: Comparative Perspectives*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 71, 77 (András Sajó ed., Eleven International Publishing 2007).

²⁶⁸ VINCENT D. ROUGEAU, *CHRISTIANS IN THE AMERICAN EMPIRE: FAITH AND CITIZENSHIP IN THE NEW WORLD ORDER* 101-109 (Oxford University Press 2008); NEERA CHANDHOKE, *BEYOND SECULARISM: THE RIGHTS OF RELIGIOUS MINORITIES* 143-165 (Oxford University Press 1999).

²⁶⁹ See Neo, *supra* note 257, at 240-248 (discussing the constitutional provision).

victim-centric hate speech.²⁷⁰ The Muslim community in Singapore is one of the most socially and economically disadvantaged religious communities in the country. Muslims do not enjoy over-representation in Parliament, unlike Christians.²⁷¹ Indeed, only one of the 15 cabinet appointments is a Muslim.²⁷² Even if the argument that Singapore's government affords special treatment and protection to Muslims is true, it is still very different from the typical scenario of a politically dominant religion oppressing other religions via state power.

In summary, Singapore's restrictions on proselytization represent a significant departure from proselytization restrictions elsewhere. The religious communities that are protected under the Singapore restrictions are not only small numerical minorities but also generally have lower socio-economic profiles. The Christian community, which has borne the brunt of the restrictions, is anything but a marginalized religious minority in Singapore, whether socially, economically, or politically.

B. Religious Liberty and Religious Truth-Seeking

Although the argument of discrimination against politically vulnerable religious minorities is not applicable to Singapore, criticisms of infringing religious liberty and impeding religious truth-finding²⁷³ apply to Singapore's measures. Singapore's restrictions on proselytization are a substantial impediment to the key tenet of Christianity as practiced in Singapore. Singaporean

²⁷⁰ Zhong, *supra* note 7, at 52-53 & 56.

²⁷¹ Muslims made up 13 of the 99 members of parliament: <http://www.parliament.gov.sg/list-of-current-mps> (last visited July 20, 2012).

²⁷² <http://www.cabinet.gov.sg/content/cabinet/appointments.html> (last visited July 20, 2012).

²⁷³ *Supra* II.B.

Christians are generally committed to evangelism²⁷⁴ and reject the liberal Protestant perspective that questions the appropriateness of proselytization.²⁷⁵ In addition, the Protestant faith in Singapore is largely of the conservative and exclusivist school, which believes that its faith represents the absolute truth.²⁷⁶ Although Christians in Singapore appreciate that sensitivity to others' religions while proselytizing may be practically more effective,²⁷⁷ the prohibition on critical commentary of other religions under the Singaporean restrictions risks violating their important religious tenet.²⁷⁸

Similarly, religious truth-seeking is compromised under the Singapore measures. The recent incidents involve critical commentaries of other religions that fall short of hate speech.²⁷⁹ However, these debates about the truth of different religions are penalized under the Singapore measures. Indeed, notwithstanding the ostensible absence of legal sanctions, the Pastor Tan and

²⁷⁴ DeBernardi, *supra* note 11, at 256-257; TAN-CHOW, *supra* note 254, at 22; Li, *supra* note 77; Mathews, *supra* note 214, at 585-590.

²⁷⁵ DeBernardi, *supra* note 11, at 257; Mathews, *supra* note 214, at 585-586. For observations and critique of the evolution of American Christians' attitude towards missions and proselytization, see Brad A. Greenberg, *How Missionaries Lost Their Chariots of Fire*, WALL ST. J., July 2, 2010, at W9.

²⁷⁶ Mathews, *supra* note 11, at 188; TAN-CHOW, *supra* note 254, at 21-23.

²⁷⁷ Edmond Chua, *Bishop Says Preaches Must watch Sermon Content, Presentation*, CHRISTIAN POST (SING. ED.), Sep. 23, 2010, available at <http://sg.christianpost.com/dbase.php?cat=church&id=2594> (last visited Feb. 1, 2013); *Christianity: Winning Others or Helping Others Win?*, CHRISTIAN POST (SING. ED.), June 28, 2010, available at <http://sg.christianpost.com/dbase/editorial/732/section/1.htm> (last visited Feb. 1, 2013).

²⁷⁸ Nathanael Ng, *Be Sensitive, But Do Not Compromise: Pastor*, CHRISTIAN POST (SING. ED.), Feb. 23, 2010, available at <http://sg.christianpost.com/dbase.php?cat=church&id=2444> (last visited Feb. 1, 2013) (Cornerstone Community Church senior pastor Rev. Yang Tuck Yoong: "When preaching the Gospel, we must not dilute, adulterate or compromise on the potency of the Word; because it's Truth,"); Roland Chia, *Christians Do Not Hold That All Religions are the Same*, CHRISTIAN POST (SING. ED.), Feb. 17, 2010, available at <http://sg.christianpost.com/dbase/editorial/593/section/1.htm> (last visited Feb. 1, 2013); Tan Cheng Huat, *What Would Jesus Do (WWJD)?*, CHRISTIAN POST (SING. ED.), Mar. 15, 2010, available at <http://sg.christianpost.com/dbase/editorial/604/section/1.htm> (last visited Feb. 1, 2013) ("A series of happenings in recent weeks [Pastor Rony incident is in February 2010] drives me to rethink if our faith has reached such a point where the fear of imposing our views on others has gradually led us to a state where we do not profess clearly what we believe in.").

²⁷⁹ *Supra* IV.A.

Pastor Ng incidents are particularly troubling from religious truth-seeking perspectives given that the statements critical of other religions were made during sermons directed at their congregations.²⁸⁰ It can be envisaged that the Singapore measures have far-reaching, chilling effects on critical discussion relating to religions, both internally and publicly. This is certainly not conducive for a vigorous debate about the merits of different religions and the emergence of religious truth.

However, the diverse religious landscape of Singapore introduces important complexities to the applicability of these critiques, especially in light of the fact that Singapore's proselytization restrictions do not represent the common practice of oppression of religious minorities by religious majorities.²⁸¹ Indeed, close examination of the various religious outlooks of the different religions that make up Singapore's polity reveals a different set of underlying religious assumptions of proselytization and truth-seeking that challenges the applicability of the critiques.

1. Disparity in "Competitiveness" and Pressure to Compete

While arguing for a church-state model in Singapore that envisaged different religions freely competing with one another for adherents without the interference of the state,²⁸² Thio Li-Ann acknowledged that religions that do not espouse an objective truth may be at a competitive disadvantage.²⁸³ Barry A. Kosmin and Ariela Keysar also observed that "[e]xpanding the flock through evangelism is a core principle of Christianity and is a major force in a competitive system

²⁸⁰ *Supra* IV.A.

²⁸¹ *Supra* V.A.

²⁸² KEVIN YL TAN & THIO LI-ANN, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 876 (Butterworths 1997); Thio, *supra* note 45, at 422.

²⁸³ Thio, *supra* note 3, at 490 & n.38.

built on proselytizing.”²⁸⁴ Many religions, in contrast, have a different religious outlook on proselytization and religious competition. Proselytization is a completely alien concept to animistic religions, which do not even have a concept of “religion” distinct from other rituals.²⁸⁵ Conversion and evangelism are conspicuously absent in Spiritualism.²⁸⁶ Other major world religions, such as Buddhism and Hinduism, do not share the evangelical zeal of their Christian and Muslim counterparts.²⁸⁷ An emphasis on evangelicalism is not even universal among Semitic religions; for example, external outreach is unimportant in Judaism.²⁸⁸

This diversity in religious worldviews is particularly salient in Singapore. The evangelistic zeal and commitment to exclusive truth of Singaporean Christians can be contrasted with the polytheistic religions of Hinduism, Taoism, and Buddhism, which have traditionally been non-proselytizing as practiced in Singapore.²⁸⁹ For example, “[e]ven those [Buddhists] who recognize that the Singapore Chinese population is largely uninformed about Buddhism, and who see this as a problem, often do not consider it an urgent problem. For centuries Buddhist monks have accepted the idea that people require a variety of religious traditions.”²⁹⁰ The key Taoist tenet of *wu wei*, “action through inaction,” accounts for the relatively passive attitude by Taoist adherents toward

²⁸⁴ KOSMIN & KEYSAR, *supra* note 1, at 11.

²⁸⁵ Paul Harvey, *Proselytization*, in RELIGION AND AMERICAN CULTURE 39, 41-42 (Philip Goff & Paul Harvey eds., University of North Carolina Press 2004). For a discussion of the religious tenets and worldview of Sierra Leone indigenous religions, see PRINCE SORIE CONTEH, TRADITIONALISTS, MUSLIMS, AND CHRISTIANS IN AFRICA 19-62 (Cambria Press 2009).

²⁸⁶ Deirdre Meintel, *When There is No Conversion: Spiritualists and Personal Religious Change*, 49(1) ANTHROPOLOGICA 149, 149 (2007).

²⁸⁷ Jeff Spinner-Haley, *Hinduism, Christianity, and Liberal Religious Toleration*, 33(1) POLITICAL THEORY 28, 37 (2005); KUAH-PEARCE, *supra* note 65, at 137; TONG, *supra* note 68, at 152-153.

²⁸⁸ Kao, *supra* note 3, at 83-84; Harvey, *supra* note 285, at 56-57.

²⁸⁹ KUAH-PEARCE, *supra* note 65, at 137; TONG, *supra* note 68, at 152-153).

²⁹⁰ TAMNEY & HASSAN, *supra* note 73, at 43.

the decline in numbers.²⁹¹ Proselytizing is discouraged by the official Hindu organization in Singapore.²⁹² Even the Muslim community in Singapore has not displayed a significant evangelical orientation.²⁹³

It must be recognized that given the prestige and material resources associated with larger congregations, there are incentives even for non-proselytizing religions to seek to increase their membership.²⁹⁴ Nonetheless, there is still a disparity in motivation between the proselytizing and non-proselytizing religions.²⁹⁵

Moreover, the issue is not simply about the disparity in competitiveness. Thio Li-ann noted that in response to the constitutional right to religious propagation, “religious groups are entitled ... to take self-preservationist measures.”²⁹⁶ Indeed, the “competitive pressure” from proselytizing religions has caused formerly non-proselytizing religions to proselytize²⁹⁷ or otherwise react defensively.²⁹⁸ Buddhists and Taoists in Singapore, in reaction to the steady decline of their

²⁹¹ *The Way of the Future*, STRAITS TIMES (Sing.), June 19, 2010.

²⁹² Mulchand, *supra* note 70 (“conversion to Hinduism is ‘downright impossible’, says the Hindu Endowments Board on its website. It is a faith one is born into, though there are a minority who choose to take on and practice the tenets of Hinduism.”).

²⁹³ KUAH-PEARCE, *supra* note 65, at 137.

²⁹⁴ CHESNUT, *supra* note 1, at 11; KOSMIN & KEYSAR, *supra* note 1, at 170-171.

²⁹⁵ CHESNUT, *supra* note 1, at 11.

²⁹⁶ Thio, *supra* note 3, at, 515.

²⁹⁷ Jean-Francois Mayer, *Conflicts over Proselytism: An Overview and Comparative Perspective*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 35, 46-48 (Rosalind I.J. Hackett ed., Equinox 2008); Rachelle M. Scott, *Promoting World Peace through Inner Peace: The Discourses and Technologies of Dhammakāya Proselytization*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 231, 235-236 (Rosalind I.J. Hackett ed., Equinox 2008).

²⁹⁸ Berkwitz, *supra* note 31, at, 203-204; Thomas Robbins, *Notes on the Contemporary Peril to Religious Freedom*, in CHALLENGING RELIGION 71, 73 (James A. Beckford & James T. Richardson eds., Routledge 2003); Tessa Bartholomeusz, *First Among Equals: Buddhism and the Sri Lankan State*, in BUDDHISM AND POLITICS IN TWENTIETH-CENTURY ASIA 173, 176-177 (Ian Harris ed., Pinter 1999).

numbers that mirrored gains by Christians,²⁹⁹ have strengthened their organization and have begun programs to proselytize.³⁰⁰ It is crucial to recognize that these “self-preservationist measures” represent changes to the existing religious tenets and practices of religions that have previously shunned such organization and proselytization activities.³⁰¹

These changes and the pressure that induced them are not necessarily negative. If previously non-proselytizing religions are compelled to participate in religious competition, individuals will be presented with more information regarding a greater variety of religions and religious practices. The articulation of one’s beliefs in the process of religious propagation also facilitates the re-examination of those beliefs; one often must persuade oneself before persuading others. All of these factors enable a more informed decision about religious choice and facilitate religious truth-seeking. The problem, as will be examined in the next section, is that the religious truth-seeking justification itself rests on assumptions that are specific to some religions only.

2. Religious Truth-Seeking

In addition to treating the behavior-modifying pressure exerted on non-proselytizing religions as a positive development, the religious truth-seeking justification is an important counterweight to restricting religious propagation that may otherwise be offensive or harmful. Echoing the “marketplace of ideas” justification of free speech,³⁰² the potentially disconcerting

²⁹⁹ *Supra* III.A.

³⁰⁰ TONG, *supra* note 68, at 192 & 267-268; CLAMMER, *supra* note 238, at 74-77; KUAH-PEARCE, *supra* note 65, at 283.

³⁰¹ *Supra* notes 289-293 and accompany text.

³⁰² STONE ET AL., *supra* note 17, at 1054-1056; Marshall, *supra* note 17, at 256; Rosenthal, *supra* note 17, at 61-62 & 61 n.288; Gey, *supra* note 17, at 6-9.

and unsettling effect on the recipients of this “offensive” religious propagation must be balanced by the need to facilitate the emergence of religious truth through free competition among the different religions.³⁰³

Many religions, such as Christianity and Islam, are predicated on exclusive claims of religious truth and place enormous emphasis on religious truth-seeking.³⁰⁴ However, not all religions are predicated on truth claims.³⁰⁵ For example, Hinduism does not claim an exclusive truth³⁰⁶ and does not posit salvation through faith in a true religion.³⁰⁷ This ambivalence toward religious truth-seeking is reflected in Buddhism³⁰⁸ and Taoism³⁰⁹ as well. Inherent in Christianity and Islam’s emphases on evangelicalism is the notion that other religions are rivals with which one must actively compete.³¹⁰ In contrast, Hindu, Jain, and Buddhist traditions view other religions

³⁰³ Conkle, *supra* note 18, at 1757-1762; Thio, *supra* note 3, at 493; Ogilvie, *supra* note 18, at 154; Marshall, *supra* note 17, at 255-256.

³⁰⁴ Sarah Claerhout & Jakob De Roover, *Conversion of the World: Proselytization in India and the Universalization of Christianity*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 53, 65 (Rosalind I.J. Hackett ed., Equinox 2008) For a discussion on the exclusivity under Islam, see Heather J. Sharkey, *Muslim Apostasy, Christian Conversion, and Religious Freedom in Egypt: A Study of American Missionaries, Western Imperialism, and Human Rights Agendas*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 139, 141 (Rosalind I.J. Hackett ed., Equinox 2008).

³⁰⁵ Claerhout & Roover, *supra* note 304, at 65. See generally S. A. NIGOSIAN, WORLD RELIGIONS: A HISTORICAL APPROACH 414-419 (Bedford/St. Martin’s 3rd ed. 2000) (discussing how the different religions differ in their conceptions of religious path and goals).

³⁰⁶ P.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, in RELIGION AND LAW IN INDEPENDENT INDIA 35, 39 (Robert D. Baird ed., Manohar 2d ed. 2005); Tan Chin Liew, *Secularism and Its Limits*, in STATE AND SECULARISM: PERSPECTIVES FROM ASIA 7, 18 (Michael Heng Siam-Heng & Ten Chin Liew eds., World Scientific Publishing 2010); Conkle, *supra* note 18, at 1764; Spinner-Haley, *supra* note 287, at 37.

³⁰⁷ Bhagwati, *supra* note 306, at 39; Tan, *supra* note 306, at 18.

³⁰⁸ Conkle, *supra* note 18, at 1764-1765 (noting how Buddhism’s de-emphasis of universal truth contributes to its more tolerant attitude towards other faith).

³⁰⁹ See generally Francisca Cho, *Leaping into the Boundless: A Daoist Reading of Comparative Religious Ethics*, 26(1) THE JOURNAL OF RELIGIOUS ETHICS 139 (1998) (discussing and noting Taoism nuanced approach towards truth, reflecting at page 163 “[T]aoist view of reality which avers that knowledge is never fixed.”).

³¹⁰ Claerhout & Roover, *supra* note 304, at 63-64 (“Islam and Christianity are each other’s rivals in the restoration of divine truth, while the Hindu, Buddhist and Jain traditions are idolatry or false religion.”); TAN-CHOW, *supra* note 254, at 22-23; DeBernardi, *supra* note 11, at, 265; KUAH-PEARCE, *supra* note 65, at 272-277.

not as religious rivals but simply as different ways within different contexts of reaching salvation.³¹¹

This divergence in religious outlooks is particularly salient in Singapore, where Buddhism, Taoism, and Hinduism make up 49.3% of the population.³¹² In the aftermath of the Pastor Tan incident, the secretary-general of the Singapore Buddhist Federation, Venerable Kwang Phing, observed, “Singapore is a multi-religious, multiracial society. There is no point arguing over who is right and who is wrong.”³¹³ This contrast in conceptualization can be further epitomized by the following two statements from the religious leaders of the two major religious organizations in Singapore. Dr. Robert Solomon (president of the National Council of Churches of Singapore) opined, “[f]rom the Church perspective, we understand religious harmony not so much as harmony of religion because we think that route is very theoretical and doctrinal and has many problems anyway ... It makes us more relaxed if we define religious harmony as harmony among people of different faiths living in a multi-religious society.”³¹⁴ In contrast, Venerable Kwang Sheng (president of Singapore Buddhist Federation) had little reservation about the perception of “religious equality” and noted, “Buddhism advocates respect for other religions and acceptance of others’ values. Peace and happiness in a society can be achieved only through an appreciation of the different faiths.”³¹⁵ Together with the Singapore Muslim community, which does not display

³¹¹ Claerhout & Roover, *supra* note 304, at 64-65.

³¹² SINGAPORE DEPARTMENT OF STATISTICS, *supra* note 10, at 13.

³¹³ Chua, *supra* note 151.

³¹⁴ “*We Need to Focus More on Common Spaces*”, STRAITS TIMES (Sing.), Oct. 21, 2006.

³¹⁵ *Foster Harmony*, STRAITS TIMES (Sing.), May 3, 2009.

a strong evangelical outlook, it is arguable that the majority of Singapore's religious adherents do not share the emphasis on religious truth-seeking.

3. Summary: The Contested Assumptions of Religious Truth-Seeking

Religious truth-seeking, despite its attractiveness as a normative principle, is based on religious assumptions that are not shared by other religious outlooks. As acknowledged by William P. Marshall, who otherwise advocated for religious truth-seeking as a normative guiding principle, “[f]or other religions truth may not be a meaningful concept, and to them the search for truth might be seen as something that is largely irrelevant.”³¹⁶ In the context of Singapore where there is no broad acceptance of religious truth-seeking as a normative goal among the diverse religious outlooks of the polity, the case for tolerating offensive religious propagation is deprived of this otherwise compelling justification.

C. *Spiritual Balkanization and Religious Harmony in a Religiously Pluralistic Society*

If consensus among the different religions is not possible and the design of laws on religious propagation would inevitably favor either the truth-predicating religions or their non-evangelical competitors,³¹⁷ a possible way forward is to rely on justifications that are not predicated on assumptions about religion. Religious and racial harmony has been a perpetual obsession of Singapore's government as an integral condition for the survival of the young nation

³¹⁶ Marshall, *supra* note 17, at 265.

³¹⁷ Claerhout & Roover, *supra* note 304, at 69.

state.³¹⁸ Religious and racial riots in the past have been a prominent feature in the government's arguments for strict state controls over religions.³¹⁹ Although commentators have expressed skepticism about the precariousness of religious relations in Singapore,³²⁰ frequent reports of religious strife in other religiously pluralistic societies³²¹ affirm the validity and importance of social harmony as a consideration. In this regard, Thio Li-ann warned that restricting evangelism to secure social peace may be counterproductive because such restrictions may result in "spiritual balkanization" that deepens social rifts when a committed evangelical religionist begins to view "non-members as 'others' to be shunned rather than as 'brothers and sisters who need to be turned to the truth.'"³²² This is echoed by Jaclyn Ling-Chien Neo, who, in the discussion of the Ong Kian Cheong case, opined that "[r]epressing open communication may lead to suspicion, resentment and division, thereby impeding true integration and the creation of a true community."³²³

In this regard, the premise of criticisms about "spiritual balkanization" or "integration" is flawed. Jaclyn Neo argued that the "creation of a true community ... requires some measure of free, open and reasoned debate about racial and religious differences, and how to possibly bridge those differences and foster a commitment to a shared identity."³²⁴ This assumes that religious adherents who are committed to religious propagation and pro-active proselytization are eager to

³¹⁸ Thio, *supra* note 68, at 202.

³¹⁹ DeBernardi, *supra* note 11, at 261.

³²⁰ Michael Hill, *The Making of a Moral Panic: Religion and State in Singapore*, in CHALLENGING RELIGION 114, 125 (James A. Beckford & James T. Richardson eds., Routledge 2003). *See also* Thio, *supra* note 68, at 202.

³²¹ E.g., Drew Hinshaw, *Nigeria Torn by Rising Religious Violence*, WALL ST. J., Jan. 12, 2012, at A12; Patrick Barta, *Suicide Attack Strikes Church in Indonesia*, WALL ST. J., Sep. 26, 2011, at A10.

³²² Thio, *supra* note 3, at 493.

³²³ Neo, *supra* note 9, at 371-372.

³²⁴ *Id.*, at 365-372.

utilize the freedom of religious propagation to engage other religions in dialogue about bridging differences and fostering a shared identity. This assumption does not gel with the actual motivation of most proselytizing activities (especially the penalized offensive religious propagation in Singapore), in which conversion and renunciation of the former religious identity are typically the “endgame of religious propagation.”³²⁵ If anything, religious propagations that are highly critical of other religions not only serve to reinforce the stark and unbridgeable differences between religious communities but also highlight that the propagating community views the recipient community negatively and, depending on the harshness and tone of the materials, as a dangerous threat to overall society.³²⁶ Similarly, the threat of “spiritual balkanization” alluded to by Thio Li-ann is just as likely if her hypothetical committed religionist is allowed to continue to propagate the faith but treats those non-members who stubbornly refuse to accept the truth as “others” to be shunned.

Indeed, the experience in Singapore proves contrary to such concerns. First, the deep commitment to convert others has not translated into genuine inter-faith interactions and understanding. Christian scholars have indicated that non-Catholic Protestant Christians in Singapore traditionally adopt a conservative religious outlook that “shun[s] any attempt to compromise this exclusivity.”³²⁷ One way that this exclusivity manifests is the evangelistic fervor by which the Church “takes pains to ensure that its market share within the religious economy is growing, an indication that it is heeding the divine mandate to reach as many people as possible

³²⁵ Thio, *supra* note 3, at 488.

³²⁶ One material distributed in the Ong Kian Cheong case stated that there is a “very *dangerous* religion called ‘Islam’” that is “spreading into our neighborhood” (emphasis original): JACK T. CHICK, *LITTLE BRIDE* (Chick Publications 2004), available at http://www.chick.com/reading/tracts/1054/1054_01.asp (last visited Feb. 1, 2013).

³²⁷ Mathews, *supra* note 11, at 188; TAN-CHOW, *supra* note 254, at 21-23.

with the Christian message.”³²⁸ This eagerness to treat other members of the population as “brothers and sisters who need to be turned to the truth”³²⁹ has not resulted in more harmonious relationships with other religious communities. On the contrary, these sentiments may actually impede inter-religious interactions in a multi-religious society. In a poll of 183 clergymen, 41.5% “[found] it difficult to collaborate with a non-Christian religious leader for a charity drive. They fear it would lead to the perception that ‘all religions are equal.’”³³⁰ Such reservations exist for participation in interfaith dialogue with other religions as well.³³¹ Based on interviews with Christian leaders in 2004, Jean DeBernardi noted that “[a]lthough some Christian leaders have welcomed the opportunity for greater dialogue with non-Christians (in particular Muslim leaders), others participate grudgingly or delegate the responsibility to others.”³³² “One reason the clergy is apprehensive is the fear that the media will ‘misrepresent’ such dialogues as an admission that ‘all religions are one.’”³³³

This aversion to inter-faith interactions limits face time and relationship building among the different religions. As noted in the Pastor Tan and Pastor Ng incidents, face-to-face interactions between religious leaders of different faiths are essential for genuine reconciliation. The initial declaratory apology posted online would have been insufficient to bridge the inter-religious rifts. Moreover, an exclusivist outlook by a religious community is likely to prompt negative reactions

³²⁸ Mathews, *supra* note 11, at 188.

³²⁹ Thio, *supra* note 3, at 493.

³³⁰ Mathews, *supra* note 214, at 581-582; Li Xueying, *Clergy ‘Wary of Inter-faith Talks’*, STRAITS TIMES (Sing.), Sep. 3, 2008.

³³¹ TAN-CHOW, *supra* note 254, at 21.

³³² Jean, *supra* note 11, at 261.

³³³ Andy Ho, *Interfaith Dialogue: Why Some Clam Up*, STRAITS TIMES (Sing.), Sep. 18, 2008; Mathews, *supra* note 11, at 193.

from other religious communities, who, despite being otherwise accommodating on religious matter, may draw a line from the exclusive religious community. This dynamic can be seen in a 2008 incident in which a local bank withdrew a charity tie-in promotion with Focus on the Family, a local voluntary welfare organization with links to the conservative Christian organization in the United States,³³⁴ after complaints by members of the public that “the charity’s United States parent organization, and its Singapore arm, are anti-gay, anti-abortion and pro-abstinence.”³³⁵ The president of Focus on the Family (Singapore) wrote to the media expressing concerns about the bank’s withdrawal based upon complaints by small group of activists and argued that the charity “function[s] akin to other faith-based organizations such as the Thye Hua Kwan Moral Society and Care Corner Family Service Centre in Singapore, or World Vision and YMCA internationally.”³³⁶ However, instead of standing together with a fellow religious organization, as one might expect given the purported culture war waged by anti-religious militant secularists against religion,³³⁷ the Thye Hua Kwan Moral Society (a Taoist charity) promptly wrote to the press to clarify and distance itself from association with Focus on the Family. In particular, the Society emphasized its respectful and accommodating attitudes toward other religions,³³⁸ a less-

³³⁴ For a detailed discussion of the activities (including political activities) of Focus of the Family in the US: see DAN GILGOFF, *THE JESUS MACHINE: HOW JAMES DOBSON, FOCUS ON THE FAMILY AND EVANGELICAL AMERICA ARE WINNING THE CULTURE WAR* (St Martin’s Press 2007).

³³⁵ Grace Chua, *DBS’ Charity Tie-up Draws Flak*, STRAITS TIMES (Sing.), Dec. 5, 2008.

³³⁶ *Id.*

³³⁷ E.g., Edmond Chua, *Militant Secularists Demand Rony Tan’s Arrest*, CHRISTIAN POST (SING. ED.), Feb. 11, 2010, available at <http://sg.christianpost.com/dbase.php?cat=church&id=2563> (last visited Feb. 1, 2013); Thio, *supra* note 68, at 225 n.170.

³³⁸ In the press statement, the Taoist charity emphasized that the society is “happy that people from diverse cultural and religious backgrounds feel comfortable using our services”, “aim[s] to provide culturally-sensitive services that our clients’ values and beliefs,” and “all our Centres and Homes observe equally the festivals of Christmas, Hari Raya, Deepavali, Confucius’ birthday, Vesak Day and Lao Zi’s birthday.”: *Society Aims to Serve Singaporeans of All Backgrounds*, STRAITS TIMES (Sing.), Dec. 22, 2008.

than-subtle reference and rebuttal of the perceived exclusive religious outlook of conservative Christian charitable organizations.

Indeed, notwithstanding the conspicuous lack of evangelical zeal, Buddhist and Taoist charitable organizations in Singapore are traditionally more willing to work with religious charitable organizations that are affiliated with other faiths. Although it is common practice for religious organizations in Singapore to provide welfare services regardless of race or religion, Buddhist groups in Singapore go further and are comfortable donating directly to charitable groups of other religions.³³⁹ Buddhist and Taoist religious organizations also readily cater to different religious requirements in their provision of charitable services,³⁴⁰ such as the special provision of *halal* food during the regular distribution of free meals by the Thye Hua Kwan Moral Society (Taoist).³⁴¹ This approach has been praised by the government for its contribution to racial and religious harmony,³⁴² and some Muslim organizations have recently begun to follow suit.³⁴³ Indeed, Muslim charitable organizations generally do not see conversion as an objective and hence do not have major problems collaborating with non-Muslim organizations.³⁴⁴

³³⁹ Asad Latif, *Warriors at the Front Line of Tolerance*, STRAITS TIMES (Sing.), Nov. 15, 2004 (Buddhist Lodge donated a third of its \$3 million raised fund to Muslim, Hindu and Christian organizations); Yap Kim Hao, *Hongbao Giveaway Boosts Inter-faith Cooperation*, STRAITS TIMES (Sing.), Jan. 14, 2003 (“Buddhist Lodge sought the participation of Jamiyah Singapore and Hindu Endowments Board in the planning and distribution” of hongbao – red packets containing money); Chin Soo Fang, *Monk’s \$ 100,000 Gift to Catholics*, STRAITS TIMES (Sing.), May 16, 1999, at 3 (donating to the Catholic Canossian Missions, and other Muslim and Hindu groups).

³⁴⁰ *3,200 Gather in a Festive Feast for All*, STRAITS TIMES (Sing.), Feb. 15, 1999, at 1 (Food were blessed by religious leaders from seven major faiths.).

³⁴¹ Mak Mun San, *Happy Meals*, STRAITS TIMES (Sing.), Nov. 9, 2003.

³⁴² *Religion Still Relevant, Says President*, STRAITS TIMES (Sing.), May 19, 2000, at 3.

³⁴³ Zakir Hussain, *Mosques Feed 1,000 Needy S’poreans*, STRAITS TIMES (Sing.), July 14, 2008 (Muslim organizations providing vegetarian option in the distribution of free meals).

³⁴⁴ Enon Mansor & Nur Amali Ibrahim, *Muslim Organizations and Mosque as Social Service Providers*, in RELIGIOUS DIVERSITY IN SINGAPORE 459, 464-470 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008).

In short, there is hardly any plausible reason why allowing aggressive criticisms of other religions in religious propagation is conducive to social harmony in a religiously pluralistic society. The case study of Singapore indicates the opposite. Indeed, despite the aforementioned studies on Christian attitudes in Singapore, it is interesting to note the subtle but important change in stance by Christian leaders and the NCCS in recent times. The NCCS and other prominent church leaders have now spoken out strongly against insensitive proselytization³⁴⁵ and have provided support for inter-faith religious dialogue and greater inter-faith collaboration in social work.³⁴⁶ Further sociological studies will be necessary to determine the cause of this transformation from a previously exclusive and conservative outlook.³⁴⁷ However, two factors appear to play a part. First, there is the recognition that this approach is more effective in the context of Singapore's religiously pluralistic society.³⁴⁸ Second, and more importantly in the analysis of the appropriate legal regime, increased government pressure under the legal framework of the MHRA has played a part in the change in attitude.³⁴⁹ Legal restrictions alone may be insufficient to ensure genuine religious harmony,³⁵⁰ but Singapore's experience suggests that they may form a conducive foundation for inter-religious interactions.

³⁴⁵ Edmond Chua, *Christians Must Respect Beliefs of Non-Christians, Theologian Stress*, CHRISTIAN POST (SING. ED.), Apr. 28, 2010, available at <http://sg.christianpost.com/dbase.php?cat=education&id=787> (last visited Feb. 1, 2013); *What Others Say About the Incident*, *supra* note 203.

³⁴⁶ Clarissa Oon, *Talk and Let Live*, STRAITS TIMES (Sing.), Feb. 23, 2010.

³⁴⁷ *Supra* V.B. See generally Mathews, *supra* note 214.

³⁴⁸ Chua, *supra* note 277; *Christianity: Winning Others or Helping Others Win?*, *supra* note 277.

³⁴⁹ Mathews, *supra* note 11, at 193.

³⁵⁰ Thio, *supra* note 3, at 513.

D. *A Tentative Defense for Limited Restrictions*

The limited applicability and veracity of the arguments against proselytization restrictions highlighted in the preceding analysis do not necessarily justify restrictions on proselytization, whether in Singapore or elsewhere. The religious liberty of adherents of evangelical religions to proselytize and propagate their faith should always be an important consideration against restrictions of these activities. As argued even by critics of Singapore's measures, the question is one of balance between the individual's right to free speech and religious liberty and the state's interest in the preservation of social harmony.³⁵¹ This Article argues that the problem occurs when the contested assumption of religious truth-seeking and the doubtful benefits of religious integration are given undue weight against the restrictions. A more circumspect inspection of the level of restrictions and the harm caused may justify limited restrictions on offensive religious propagation.

First, it is important to distinguish between restrictions on religious propagation and religious switching. The fact that religious propagation is "intrinsically bound" to religious conversion³⁵² should not obfuscate the various considerations at play. The freedom to change religion/belief is absolute.³⁵³ This is unsurprising given the far-reaching effects on individual autonomy arising from restrictions on conversion and the limited and tenacious implications of the

³⁵¹ Neo, *supra* note 9, at 354; Thio, *supra* note 3, at 493.

³⁵² Thio, *supra* note 3, at 488.

³⁵³ ARVIND SHARMA, PROBLEMATIZING RELIGIOUS FREEDOM 221 (Springer 2011); Farr, *supra* note 35, at 862; Kyriazopoulos, *supra* note 27, at 169.

rights and interests of others.³⁵⁴ Moreover, the inherent double standards in theological arguments for apostasy, where conversion away from other religions is acceptable but not vice-versa,³⁵⁵ place such restrictions on shaky normative grounds. In this regard, it is important to note that there are no restrictions on religious switching in Singapore,³⁵⁶ including restrictions of Muslim apostasy that continued to be enforced in Malaysia and elsewhere.³⁵⁷

The relationship between proselytization restrictions and the absolute right to change religion/belief is more complex. Restricting religious propagation can impede informed religious choice.³⁵⁸ One might choose to leave one's original religion if one receives information revealing the deficiencies of one's religion. Restricting the unsolicited supply of this information may arguably delay or even impede changes in religious belief. However, this is a far cry from mandating or coercing a particular religious choice.³⁵⁹ Moreover, proselytization implicates the rights and interests of a third party (i.e., the receiving party) and is often framed as a balance between competing rights between the proselytizers and the proselytized.³⁶⁰ Thus, the enquiry concerns the extent of the proselytization restrictions, where an overly broad restriction would

³⁵⁴ See Dian Abdul Hamed Shah & Mohd Azizuddin Mohd Sani, *Freedom of Religion in Malaysia: A Tangled Web of Legal, Political, and Social Issues*, 36 N.C. J. INT'L L. & COM. REG. 647, 664-669 (2011) (discussing the conversion restrictions in Malaysia).

³⁵⁵ SHARMA, *supra* note 353; Sharkey, *supra* note 304, at 141.

³⁵⁶ Neo, *supra* note 9, at, 365-366.

³⁵⁷ *C.f.* DeBernardi, *supra* note 11, at 258 ("Although apostasy is not considered to be an offense in Singapore, nonetheless on conversion Singaporean Malay Christians reportedly experience social stigma and ostracism.").

³⁵⁸ Berkwitz, *supra* note 31, at 216; Thio, *supra* note 3, at 510.

³⁵⁹ See *Olmedo-Bustos v Chile*, Inter-American Court of Human Rights (Ser. C) No. 73 (2001). *C.f.* SCOLNICOV, *supra* note 21, at 195-196 (disagreeing with the court's narrow interpretation of right to religious belief).

³⁶⁰ Thio, *supra* note 3, at 493; Farr, *supra* note 35, at 862.

unduly curtail religious liberty without sufficient justification from the competing interests of third parties and the state.

The Singapore official approach towards proselytization restrictions essentially categorizes proselytization based on two characteristics: whether the religious propagation is solicited and whether the religious propagation involves critical commentary of other religions. The first category – solicited religious propagation without any critical commentary of other religions – is uncontroversial in Singapore and clearly permitted. The second category – unsolicited distribution of materials promoting the merits of one’s religion – is allowed as well.³⁶¹ The third category – unsolicited proselytization that denigrated other religions – is the redline taboo as reflected in the criminal sanctions in the Ong Kian Cheong case and the Andrew Kiong case and the frequent exhortations by the government. The fourth category – solicited religious propagations that are critical of other religions – appears to be prohibited in the Pastor Tan and Pastor Ng incidents.

The correct balance is arguably struck in the context of Singapore if the restrictions on proselytization are limited only to the third category where the risk of religious tension is the greatest. Unsolicited religious propagation is permitted, ensuring that religious adherents can fulfill their duty to spread their faith. Moreover, solicited religious propagation involving critical commentary of other religions remains unrestricted. Once recipients of unsolicited promotion of a particular religion are interested to learn more of that particular religion and proceed to approach either the propagator or the places of worship of that particular religion for more information, the circumstance shifts away from the restrictive category of unsolicited religious propagation. Of

³⁶¹ *Supra* IV.A.

course, the limitation on critical comparisons of other religions in unsolicited religious propagation is certainly a non-trivial restriction, but the offense to the unwilling recipients and the corresponding religious tension are countervailing considerations as well. As noted above, unsolicited, offensive religious propagation is likely to aggravate fault lines between different religious communities, especially for the receiving religious community. In addition, the ability to conduct such religious propagation provides little “integration” effect for the propagating religious community. In this regard, this Article argues that there is sufficient normative justification for the prohibition of unsolicited “offensive” religious propagation penalized the Ong Kian Cheong case and the Andrew Kiong case, notwithstanding the potential jurisprudential deficiency in the courts’ interpretation of the legal provisions.³⁶²

In contrast, the extension of restrictions to the fourth category of religious propagation in the Pastor Tan and Pastor Ng incidents is problematic. Although no concrete legal sanctions were levied on the two pastors, the public involvement by the ISD made it abundantly clear to the two pastors and the public at large that such actions were not permitted and were liable to attract some forms of punitive sanctions. However, the justification for prohibiting such speeches is considerably weaker than the Ong Kian Cheong and Andrew Kiong cases. In both the Pastor Tan and the Pastor Ng incidents, the “offensive” religious speeches were made on their respective church premises to voluntary audiences. The critical commentary of other religions, while arguably insensitive and perhaps inaccurate, appears to simply be part of religious propagation toward persons who are clearly interested in knowing more about how the propagated religion is different from (and superior to) other available religions. There is no attempt at unsolicited

³⁶² See Neo, *supra* note 9, at 361-364.

proselytization. Indeed, according to the distinction established by the government, both incidents should fall within the permitted realm of religious propagation to “interested” persons. When recipients are interested in conversion, the risk of offense and religious tension is significantly reduced. The right to religious belief – especially the right to change religions – is more directly and adversely implicated. Substantially more leeway in the content of the speech, including critiques of other religions, should be afforded in these circumstances.

In this respect, Thio Li-ann is perhaps correct to argue that the bluntness of legal sanctions makes these sanctions poorly equipped to address these types of cases, where only the vague “soft constitutional norms” restricting insensitive religious propagation are involved.³⁶³ Rather, a calibrated political response, such as that demonstrated by the government in the Pastor Tan incident, which involves collective resolution through the religious communities³⁶⁴ would be preferable approach to achieve true solidarity.³⁶⁵ This “relational constitutionalism,” which looks beyond strict reliance on legal norms and sanctions, is arguably more effective for cultivating true solidarity within the polity.³⁶⁶ Nonetheless, as noted above, one must not lose sight of the fact that the calibrated political resolution of the Pastor Tan and Pastor Ng incidents is only possible with a backdrop of legal provisions that grant the executive branch of the government broad discretionary power in matters of religious harmony.

³⁶³ Thio, *supra* note 202, at 19-21; Thio, *supra* note 3, at 504-505.

³⁶⁴ Thio, *supra* note 3, at 505.

³⁶⁵ *Id.*, at 513.

³⁶⁶ *Id.*

Thus, although this Article argues that relatively limited and well-defined restrictions on unsolicited critiques of others' religions are arguably justified in the context of Singapore, this Article is ambivalent about restricting critical commentary of other religions that is directed at a voluntary interested audience and does not involve religious hate speech. These types of speeches certainly do not promote religious harmony, but imposing and/or threatening legal sanctions unduly curtails the religious liberty of both the speakers and their voluntary audience. The successful internalization of soft constitutional norms³⁶⁷ to achieve positive outcomes in both the Pastor Tan and Pastor Ng incidents should not distract from the fact that the underlying legal backdrop is problematic.

VI. CONCLUSION: DESPERATELY SEEKING OVERLAPPING CONSENSUS

The tendency of proselytization restrictions to be regarded as simply capture of the state's coercive power by politically dominant religious majorities to serve their own interests has prevented a more circumspect analysis of such restrictions. Departing from this questionable practice, the atypical case of Singapore's restrictions highlights the limited applicability of religious truth-seeking as a normative principle. Although it is true that "evangelism is built into the soul of many religions,"³⁶⁸ "many" is not "all." "Many" may also not even mean "majority." Where this religious truth-seeking emphasis is not shared by the majority of the religious outlooks in a polity, a tentative case can be made for limited restrictions on offensive religious propagation. This Article does not suggest that Singapore's regime is an unqualified success or should be replicated as a normative model. Although restrictions on unsolicited critiques of other religions

³⁶⁷ Thio, *supra* note 202, at 19-20.

³⁶⁸ Thio, *supra* note 3, at 493.

can be justified without the otherwise dominant consideration of religious truth-seeking, there is no coherent normative principle restricting mere critical commentary of other religions directed at a voluntary audience.

On a broader note, the case study of Singapore highlights the challenge in finding an appropriate approach toward religious liberty issues such as proselytization. One possible solution in dealing with plurality is to achieve broadly supported common grounds or an overlapping consensus. An overlapping consensus, if attained, may provide a foundational constitutional principle to frame the church-state relation in a polity.³⁶⁹ The classic example is the U.S. constitutional prohibition on the state establishment of religion, which is supported by both the religious rationales of the Evangelical Christians and the secular considerations of Enlightenment Lockeans.³⁷⁰ However, the challenge of finding such an overlapping consensus is fraught with greater complications in a truly religiously pluralistic society such as Singapore, where the diverse religious outlooks of different world religions all enjoy significant population representation.

In this regard, even the acceptance of the premise that religion is good thing³⁷¹ is insufficient, notwithstanding the tendency to lump all religious believers together to form an ostensible majority of “more than 80%” of Singapore’s population.³⁷² Different religions have

³⁶⁹ See Koppelman, *supra* note 39, at 1843 (discussing overlapping consensus as a political mechanism to cope with religious pluralism). See generally John Rawls, *The Idea of an Overlapping Consensus*, OXFORD J. LEG. STUD. 1 (1987).

³⁷⁰ Koppelman, *supra* note 39, at 1875-76; JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 40-41 (Lexington Books 2002).

³⁷¹ Thio, *supra* note 3, at 489 (“[Religious propagation] may be justified on several grounds, resting on the premise that law considers a religion a good thing, deserving protection.”).

³⁷² E.g., Thio Li-ann, *Between Eden and Armageddon: Navigating ‘Religion’ and ‘Politics’ in Singapore*, 2009 SING. J. LEGAL STUD. 265, 379 (2009) (“this [exclusion of religious perspective in public debate] would discriminate against the more than 80% of Singaporeans with Singaporeans with religious affiliation in voting, taking part in elections and debating public issues.”); Vincent Chia Wei Meng, *Govt Should Consider Carefully the Moral Value System of the*

different conceptions and assumptions about the purpose of religion. In the particular area of religious propagation and its underlying assumption of the importance of religious truth-seeking, there is genuine divergence among the different religious communities in Singapore. There is no easy overlapping consensus even if we are prepared to exclude the 17% of Singapore's population with no religious affiliation.³⁷³ Religious truth-seeking, premised upon a distinct religious worldview, is not a magic bullet in grappling with religious plurality in the interpretation of religious liberty.

Majority Before Making Decision, STRAITS TIMES (Sing.), July 26, 2007, Online Forum ("According to Statistics Singapore, the majority of Singaporeans are not atheists, agnostics or secular humanists without religious affiliations ... Within our multi-religious society, a common consensus on this issue can only be achieved by being mindful of the morality of the religious majority.").

³⁷³ For two recent discussions on the political and legal status of non-religious persons, see Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011) (arguing for a polyvalent approach towards non-believers where the courts' handling of non-believers under religious freedom law should be context sensitive towards the different values and considerations animating the particular law); Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA. L. REV. 347 (2012) (arguing that government religious speech violates the Establishment Clause as such speech undermines the equality and liberty of nonbelievers).

CHAPTER 4:

LAW & RELIGIOUS MARKET

I. INTRODUCTION

Appealing to sources beyond easy human understanding and verification and with the capacity to evoke intense conviction that can overcome even the fear of death, religion¹ has always been a difficult subject matter for law. Driven by the bloody lessons of past and present religious conflicts and compelled by the reality of continuing and increasing religious diversity, the dominant legal discourse in law and religion is premised on state neutrality between religions (or for some, between religion and non-religion)² and an aversion to consciously shaping religious practices and doctrines via state instruments.³ Underpinning this approach is the laudable recognition of the limitation of states' capabilities in assessing the spiritual realm and the potential harm to both state and religions

¹ What is religion is of course itself a controversial issue with no general consensus, starting with whether a theistic component is necessary: *infra* notes 166-168 and accompany text. In addition, from an individual perspective, there are the different dimensions of religion as a belief, an identity and/or manifested behaviors. There is also the difficult issue of what constitute a religion in the evaluation of whether the law/policy is beneficial or harmful to the religion – should it be evaluated at the level of religious organization, the religious community, the individual adherents, and/or the “true” understanding of the religion. For the purpose of this Article, religion is defined as either those commonly accepted world religions (e.g., Christianity, Islam, Buddhism) or belief systems which include theistic component. This is to facilitate the critical discussion about the role of secular beliefs in the religious market. Religion is also considered primarily as a community identity (whether self or externally identified), with the recognition that intra-religious competition can be equally considered as inter-religious competition (the later a more narrowly defined community identifier) without affecting the analytical and normative thrust of Law & Religious Market presented in this Article.

² E.g., RESEARCH DIVISION, OVERVIEW OF THE COURT’S CASE-LAW ON FREEDOM OF RELIGION 6-7 (Council of Europe/European Courts of Human Rights 2013) (discussing the principles of equality and plurality established by the jurisprudence from the European Courts of Human Rights); Nicholas Gibson, *Faith in the Courts: Religious Dress and Human Rights*, 2007 CAMBRIDGE L. J. 657, 681-682 & 686-691 (2007) (noting the appropriate assumption over secularism in assessing religious liberty cases); William Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 INDIANA L.J. 193, 194-202 (2000) (discussing the development of the equality principle underpinning U.S. First Amendment jurisprudence). *See infra* IV.

³ E.g., Andrew Koppelman, *And I Don’t Care What It Is*, 39 PEPP. L. REV. 1115, 1120 (2013); RESEARCH DIVISION, *supra* note 2, at 19 (“Save for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”); Marshall, *supra* note 2, at 208 (this would violate both the Establishment and Free Exercise clause of the U.S. First Amendment). *See infra* IV.

arising from state entanglement with religion.⁴ Flowing from this theoretical foundation, the consequential legal issue that dominates the law and religion literature is thus typically framed as whether impediments to specific religious practices can be sufficiently justified by public interests.⁵

Challenging this conventional approach, this Article presents Law & Religious Market as an alternative critical perspective of examining the normative considerations associated with laws/policies affecting religion. Drawing from sociological and economic research on religions, the foundational premise of Law & Religious Market perspective is the recognition that the impact of law (and other state instruments) on religion extends beyond circumstances where there are conscious and/or explicit support/suppression of particular religions or religion in general. Law continues to exert a far-reaching influence on prevailing religions and religious practices within jurisdictions through shaping the

⁴ Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1835 (2009); M. D. Litonjua, *Religious Zealotry and Political Violence in Christianity and Islam*, 35(2) INTERNATIONAL REVIEW OF MODERN SOCIOLOGY 307, 308-311 (2009); Robert F. Cochran, Jr., *Evangelicals, Law, and Abortion*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 91, 101 (Robert F. Cochran, Jr. ed., New York University Press 2008); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 44-45 (2004). See also Raymond Firth, *Spiritual Aroma: Religion and Politics*, 83(3) AMERICAN ANTHROPOLOGIST 582 (1981) (discussing from an anthropological perspective the dynamic and mutual impact – both good and bad – in the inevitable religious engagement with politics).

⁵ T. Jeremy Gunn, *Permissible Limitations on the Freedom of Religion or Belief*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 254, 259-262 (John Witte, Jr. & M. Christian Green eds., Oxford University Press 2012); Ofrit Liviatan, *Faith in the Law: The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities*, 34 B.C. INT'L & COMP. L. REV. 53, 58-59 (2011); ROBIN C A WHITE & CLARE OVERY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 315-332 & 409-418 (Oxford University Press 5th ed. 2010); Gibson, *supra* note 2, at 662-679; ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 595-621 (Oxford University Press 2nd ed. 2007). See also R. George Wright, *Can We Make Sense of "Neutrality" in the Religion Cases?: Seven Rescue Attempts and a Viable Alternative*, 65 SMU L. REV. 877, 906-908 (2012) (proposing, as an alternative to religious neutrality, an approach akin to the Takings doctrines that allows better illumination of the factors affecting the burdens on religions and the underlying justifications). See *infra* III.B.

permissible competitive interaction between religions and the consequent effects on the identities and characteristics of the religions that emerge victorious over their religious rivals.

This inter-disciplinary insight allows Law & Religious Market perspective to make two contributions to the discourse of law and religion. The first is the addition of a new descriptive account. Departing from the dichotomous assessment of whether specific religious practices has been burdened by law, Law & Religious Market perspective focuses on the holistic assessment of how the law in question – in conjunction with the overall legal regime – affects religious competition. This focus can generate new and surprising perspectives, such as circumstances in which apparent restrictions on religious practices can actually foster religious competition that promotes normatively desirable characteristics among religions. The second is normative. Building on the new descriptive account, Law & Religious Market perspective highlights the deficiencies of the current conception of neutrality and the necessity to confront the difficult conversation as to the normatively desirable characteristics of religions that should inform the assessment of law and religion.

This Article is divided into five parts. Part II presents Law & Religious Market perspective by examining the sociological conception of the religious economic model, the dynamic between laws and religious competition, and the fallacy in the current dominant discourse of the religious free market as a normative constitutional principle. Part III illustrates the informative value of Law & Religious Market perspective by applying it to the controversies surrounding the inclusion of religious content in social service provision by religious charitable organizations and the judicial granting of religious exemptions to generally applicable law. Part IV discusses the implications of Law & Religious Market

perspective on the broader debate relating to the different church-state models and argues that the central premise of neutrality underpinning the various church-state models should not distract from the factual and normative assessment as to the impact of law on religious competition. Part V concludes.

II. RELIGIOUS MARKET, RELIGIOUS COMPETITION AND THE LAW

A. *Religion Choice under the Religious Economic Model*

Law & Religious Market perspective is premised on the religious economic model. This model is an interdisciplinary fusion of sociology and economics to explain the continued vibrancy of religion in society.⁶ The model represents a departure from both the conventional view of religion as a somewhat elusive and mystifying phenomenon and the then-prevailing sociological approach of treating religion as being in decline in the face of secularization.⁷ In a nutshell, the religious economic model treats religious adherents as individual actors making decisions about the choice of religion and the level of religious

⁶ Keith N. Hylton et al., *Church and State: An Economic Analysis*, 13(2) AMERICAN LAW AND ECONOMICS REVIEW 402, 407 (2011); Evelyn Bush, *Explaining Religious Market Failure: A Gendered Critique of the Religious Economies Model*, 28(3) SOCIOLOGICAL THEORY 304, 305-306 (2010); YUNFENG LU, THE TRANSFORMATION OF YIGUAN DAO IN TAIWAN: ADAPTING TO A CHANGING RELIGIOUS ECONOMY 7 (Lexington Books 2008); R. ANDREW CHESNUT, COMPETITIVE SPIRITS: LATIN AMERICA'S NEW RELIGIOUS ECONOMY 6-8 (Oxford University Press 2003); RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 27-41 (University of California Press 2000); Laurence R. Iannaccone, *Introduction to the Economics of Religion*, 36 JOURNAL OF ECONOMIC LITERATURE 1465, 1489-1492 (1998).

⁷ See James A. Beckford, *The Insulation and Isolation of the Sociology of Religion*, 46(4) SOCIOLOGICAL ANALYSIS 347, 348 & 350 (1985) (contemporaneously discussing the methodological and epistemological crisis of the then sociological study of religion); Firth, *supra* note 4, at 584 (“[From an anthropological perspective], one basic character of religion is clear- after a certain point it becomes the art of the implausible, in the sense of resting upon postulates which are nonempirical, which claim an inner rather than an outer appearance of truth, since they may run counter to what are ordinarily thought of as natural laws.”); Walter Houston Clark, *The Mystical Consciousness and World Understanding*, 4(2) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 152 (1965) (arguing for the recognition of mysticism in the studies of religion).

participation in a manner akin to other decisions, namely, to maximize one's utility.⁸ Under the model, a successful religion is one that, for one reason or another, manages to retain its existing followers while attracting new adherents. This condensed presentation of the religious economic model inevitably obscures its numerous complexities and nuances. In particular, the phrases that are highlighted with underlined italic font warrant further elaboration to dispel several of the common misconceptions and the corresponding critiques.

First and foremost is the often-controversial assumption of rationality that underpins the “making decisions ... to maximize one's utility” component of the religious economic model. Reflecting its economic heritage, the religious economic model does assume that the individual undertakes a cost-benefit analysis to determine which religion to follow and what religious activities to pursue. However, it is important to note that perfect rationality – if there is such a concept for decisions on religious matters – is not assumed. Rather, the choice of the individual will be affected by limited information, status quo preference and/or other cognitive bias.⁹ Similarly, while most critiques of the religious economic model are primarily based on an understandable discomfort at the seeming reduction of an arguably intensely spiritual, conscientious and/or sacred human endeavor to mere consumption choices, it is important to appreciate that the “utility” (and the economic notions of “benefit”

⁸ LARRY WITHAM, *MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION* 12-13 (Oxford University Press 2010); ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* 28-31 (Cambridge University Press 2008); BARRY A. KOSMIN & ARIELA KEYSAR, *RELIGION IN A FREE MARKET* 4-5 (Paramount Market Publishing 2006); START & FINKE, *supra* note 6, at 85-87.

⁹ Shaun P. Hargreaves Heap, *What is the Meaning of Behavioural Economics?*, 37 *CAMBRIDGE JOURNAL OF ECONOMICS* 985, 986-989 (2013). *See also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 20 (Aspen, 8th ed., 2011) (“the economic concept of rationality is objective rather than subjective; it is the ability and inclination to use instrumental reasoning to get on in life and thus does not assume consciousness (rational decisions are often intuitive)”).

and “cost”) is not simply about monetary and/or pragmatic considerations even within conventional economic literature.¹⁰ Intangible factors ranging from superficial emotional enjoyment and peer/social pressure to deep spiritual fulfillment and sincere fear of divine retribution could all well be influencing or dictating the individual’s religious decisions.¹¹ The religious economic model does not necessarily relegate individuals’ religious choices to everyday consumer decisions.¹²

Second, while the religious economic model posits that a “*successful religion*” is one that manages to attract a good number of adherents, this success need not be consciously intended. It is certainly true that religious leaders, as rational actors like religious adherents, are not mere passive suppliers of religious faith. They react to the “market conditions” and modify religious doctrines and practices to maintain the attractiveness of the religion to its adherents.¹³ Numerous sociological studies of religions around the globe have confirmed this convergence of religions on the core characteristics that match the prevailing consumer

¹⁰ POSNER, *supra* note 9, at 15-16; STEPHEN J. SPURR, *ECONOMIC FOUNDATIONS OF LAW* 2-4 (Routledge 2nd ed. 2010).

¹¹ Bush, *supra* note 6, at 313; Fengang Yang, *Lost in the Market, Saved at McDonald’s: Conversion to Christianity in Urban China*, 44(4) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 423, 433-434 (2005); Christopher R. Duncan, *Untangling Conversion: Religious Change and Identity Among the Forest Tobelo of Indonesia*, 42(4) ETHNOLOGY 307, 316-319 (2003); Joseph B. Tamney, *A Study of Spiritual Involvement*, 27(3) SOCIOLOGICAL ANALYSIS 146, 150-154 (1966).

¹² Consumer decisions may be driven by ethical and other non-materialistic concerns: C.B. Bhattacharya & SAnkar Sen, *Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives*, 47(1) CALIFORNIA MANAGEMENT REVIEW 9, 9-10 (2004); Eleonora Curlo, *Marketing Strategy, Product Safety, and Ethical Factors in Consumer Choice*, 21(1) JOURNAL OF BUSINESS ETHICS 37, 40 (1999); R. W. D. Turner, *Vegan Diet And Health*, THE BRITISH MEDICAL JOURNAL, Mar. 3 1979, at 613. Indeed, research into the decision making process involve in conventional consumer’s choice has revealed the often complex and elusive cognitive dynamic: James R. Bettman, Mary Frances Luce & John W. Payne, *Constructive Consumer Choice Processes*, 25(3) JOURNAL OF CONSUMER RESEARCH 187, 207-209 (1998).

¹³ See also Bush, *supra* note 6, at 319-321 (using the case study of the prevalence of patriarchal religions despite the higher religiosity of women to argue for more emphasis to the supply side aspect of the religious economy).

preferences.¹⁴ Examples include how the three most successful religions (Pentecostals, Catholic Charismatics, and African diasporan groups) in Latin America shared the “common marquee product of pneumacentrism” and the provision of faith healing,¹⁵ the relaxation of Yiguan Dao’s (a Chinese religious sect) initial theological prohibition of meditation to accommodate the equivalence of meditation practices in light of the increasing popularity of meditation among the Taiwanese society in which it operates,¹⁶ and the evolving Christian church doctrines (and the occasional church split over) on the issue of homosexuality.¹⁷ However, this convergence does not necessarily indicate that the changes are motivated primarily or at all by the desire to appeal to the masses.¹⁸ The practices and doctrines that are well received by existing followers and/or new adherents may be formulated/adopted by the religion based on pure theological reasoning without any conscious assessment of the appeal of the practices and doctrines. The religious economic model does not reduce the activities and interactions within and among religions to mere follower-grabbing exercises.¹⁹

¹⁴ For a more comprehensive discussions of the various studies examples, see Jianlin Chen, *Money and Power in Religious Competition: A Critique of the Religious Free Market*, 3(2) OXFORD J. L. & RELIG. 212, 217-219 (2014).

¹⁵ CHESNUT, *supra* note 6, at 152-154.

¹⁶ LU, *supra* note 6, at 102-107.

¹⁷ Stephanie Simon, *Episcopal Church Tensions Stirred*, WALL ST J., Dec. 7, 2009, at A4; Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67-AUT LAW & CONTEMP. PROBS. 27, 50 (2004); ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 38-39 (Westview Press 4th ed. 2010).

¹⁸ For an (unfortunate) example of such mistaken application, see Graeme Lang et al., *Temples and the Religious Economy*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 149, 150 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005) ([wrongly] understanding the “religious economy paradigm” as requiring religious leaders to consciously adapt religious practices to meet perceived local preferences and engaging in such market adaptation only because of revenue pressures).

¹⁹ In this regard, neither is a conscious profit motive the prerequisite for success in the commercial sphere. For example, a restaurant may turn out to be hugely popular and highly profitable simply because of the chef’s single minded dedication of culinary excellence or creativity: Silviya Svejenova, Carmelo Mazza & Marcel

Third, and reflecting the “*for one reason or another*” component, the religious economic model does not necessarily deny divinity in religion. It is true that sociological research on religious conversions has found that many religious choices are made for rather mundane and pragmatic reasons that are not always closely connected with the spiritual or sacred realm.²⁰ For example, religious participation may be induced by valuable aid that is conditioned on conversion to the aid provider’s religion²¹ or the desire to conserve/increase one’s social capital.²² Compulsion under threats of legal sanctions or violence, whether under a harsh theocracy²³ or in the aftermath of religious war,²⁴ may also be the predominant factor driving religious decisions. Nonetheless, the religious economic model leaves open the possibility that success in the religious market could well be due to divine forces acting

Planellas, *Cooking up Change in Haute Cuisine: Ferran Adrià as an Institutional Entrepreneur*, 28(5) JOURNAL OF ORGANIZATIONAL BEHAVIOR 539, 540-544 (2007). See Steven Watts, *Walt Disney: Art and Politics in the American Century*, 82(1) THE JOURNAL OF AMERICAN HISTORY 84, 85-96 (1995) (discussing the aesthetic impulses and innovation of the founder that drives the commercially successful Walt Disney enterprise).

²⁰ KOSMIN & KEYSAR, *supra* note 8, at 4 (noting Adam Smith’s argument that the successful religion in a free market of religion may simply be “led by popular and bold, though perhaps stupid and ignorant enthusiasts.”); R. LAURENCE MOORE, *SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE* 10 (Oxford University Press 1994) (“When religion began to sell itself in earnest, it contributed to a process of democratization that did not yield impressive enlightenment.”).

²¹ Grace Y. Kao, *The Logic of Anti-proselytization, Revisited*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 76, 79 (Rosalind I.J. Hackett ed., Equinox 2008). See Paul Harvey, *Proselytization*, in RELIGION AND AMERICAN CULTURE 39, 44 (Philip Goff & Paul Harvey eds., University of North Carolina Press 2004) (describing the “proselytization by material acculturation” by the early Spanish missionaries in Americas whereby material enticement is used to attract younger native men and severing the economic dominance of older elders).

²² Bush, *supra* note 6, at 310-315; STARK & FINKE, *supra* note 6, at 118-119.

²³ For example, Iran: NINIAN SMART, *THE WORLD’S RELIGIONS: OLD TRADITIONS AND MODERN TRANSFORMATIONS* 477-481 (Cambridge University Press 1989).

²⁴ E.g., Michael Crowley, *Iraq’s Eternal War*, 183(25) TIME 18, 20-23 (2014) (discussing the religious conflicts in Iraq involving the violent and oppressive Islamic State of Iraq and Greater Syria).

directly (for example, the seemingly sudden and miraculous “conversion” of an individual)²⁵ or indirectly (for example, by providing financial wealth, electoral success, military victory and/or other material factors that increase religious competitiveness).²⁶ Indeed, it is relatively common in sociological studies of religions to acknowledge self-reported divine intervention by adherents as reasons for religious participation/conversion.²⁷ The absence of any substantial discussion of divine forces under the religious economic model is simply due to the difficulty in observing and verifying divine intervention.

B. Religious Competition and the Law

The choices of each religious adherents and religious leader, and the interactive dynamic thereof, accumulate into the religious market where a religion grows and prospers because it proves to be more attractive to adherents vis-à-vis other religions or belief systems (including non-belief), and vice-versa. Religious competition – and it is worth repeating that

²⁵ Yang, *supra* note 11, at 433-434.

²⁶ E.g., Tamer El-Ghobashy & Abi-Habib, *Shitte ‘Soliders of God’ Color Tikrit Battle*, WALL ST. J., Mar. 13, 2015, at A6 (observing how Shitte fighters attribute their relatively easy military victory against ISIS to their religious faith); Mark Ellis, *Miracles in Israel: Hand of God Diverts Incoming Missile, Mysterious Fog Helps Troops*, Aug. 20, 2014, available at <http://blog.godreports.com/2014/08/miracles-in-israel-hand-of-god-diverts-incoming-missile-mysterious-fog-helps-troops/> (last visited Aug. 22, 2014) (attributing divine intervention for Israel military success against Hamas); Jennifer Graber, *Mighty Upheaval on the Minnesota Frontier: Violence, War, and Death in Dakota and Missionary Christianity*, 80(1) CHURCH HISTORY 76, 94 (2011) (“Military defeat and the hangings became symbols of the Dakotas’ spiritual failure and the superior power of the Christian God” for the nineteenth century Christian missionaries seeking to convert imprisoned Dakotas); Yunfeng Lu, Byron Johnson & Rodney Stark, *Deregulation and the Religious Market in Taiwan: A Research Note*, 49(1) THE SOCIOLOGICAL QUARTERLY 139, 143 (2008) (discussing the perceived efficacy in granting the wishes of worshippers is an important factor in the success of Chinese folk temples in Taiwan); Yang, *supra* note 11, at 435 (noting how some converted Christians in China attributed good business fortune on the personal level to how “Christians were elected and blessed by God.”).

²⁷ Yang, *supra* note 11, at 433-434; Tamney, *supra* note 11, at 150-154.

this competition can include both conscious decisions and unintended side effects²⁸ – constitutes the operation of the religious market. Two preliminary observations on religious competition are warranted at this point. First, “more attractive” is the key to understanding religious competition because a successful religion need only be superior to its contemporaneous competitors (although those competitors will include “non-participation”) rather than meet some objective benchmark of quality or merit. Thus, success in the religious market does not necessarily evidence the merits of the religion nor vindicate its claim to truth.

Second, what count as contemporaneous competitors – or what is known as the perimeter of the religious market – vary in accordance with the state of technological advancement and socioeconomic circumstances. While the globalization of religion began millennia ago with the transnational and sometimes transcontinental missionary activities of what are today the world religions,²⁹ the technologically driven socioeconomic connectivity of globalization in the modern era acutely expands the faith options available to an individual beyond those within his or her geographical confines.³⁰

²⁸ *Supra* notes 13-19 and accompany text.

²⁹ SMART, *supra* note 23, at 120, 295 & 315 (discussing the global spread of Buddhism, Islam and Christianity).

³⁰ For discussions on the effect on globalization and religion in the modern era, see Robert Wuthnow & Stephen Offutt, *Transnational Religious Connections*, 69(2) SOCIOLOGY OF RELIGION 209, 213-217 (2008); Jean-Francois Mayer, *Conflicts over Proselytism: An Overview and Comparative Perspective*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 35, 37-38 (Rosalind I.J. Hackett ed., Equinox 2008); Kim-Kwong Chan, *China's Socioeconomic Changes and the Implications for the Religion-State Dynamic in China*, 2004 B.Y.U. L. REV. 325, 336 (2004).

From the legal perspective, the implication arising from the religious economic model and the corresponding conceptualization of the religious market will be the factual and normative inquiry as to the role of law in shaping religious competition. The factual aspect of the impact of law on religious competition has been touched on rather frequently by the various sociological studies of religion premised on the religious economic model. For example, comparative research between monopolized, regulated and unregulated religious markets³¹ found that where law restricts religious competition – whether through establishing a religious monopoly or a heavily regulated market – there is a lower consumption of religion (i.e., less religiosity) because the lack of competition causes the established religions to be “lazy” in producing high-quality religious goods.³² This perspective can be traced all the way back to the arguable founder of the model, Adam Smith, who extended his general disdain toward state-sanctioned monopolies to religious enterprises to critique the inefficient European state-sponsored religious monopolies, such as the Church of England or the established Catholic and Lutheran churches in continental Europe.³³

Further examination of the regulated religious markets – the norm rather than the exception around the globe, both contemporary and historical – recognizes the two

³¹ WITHAM, *supra* note 8, at 115-138; KOSMIN & KEYSAR, *supra* note 8, at 6; CHESNUT, *supra* note 6, at 8-10.

³² KOSMIN & KEYSAR, *supra* note 8, at 5; CHESNUT, *supra* note 6, at 9; STARK & FINKE, *supra* note 6, at 201-202.

³³ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 846-875 (Edwin Cannan ed., Modern Library 1994); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 185-187 (D. D. Raphael & A. L. Macfie eds., Oxford University Press 1979). For contemporaneous discussion and reference, see Hylton et al., *supra* note 6, at 406; KOSMIN & KEYSAR, *supra* note 8, at 2; Michael W. McConnell, *Why is Religious Liberty the ‘First Freedom’?*, 21 CARDOZO L. REV. 1243, 1255 (2000).

categories of religious markets that operate outside the boundaries of law, namely the “black market” of religions that are explicitly prohibited and the “gray market” of religions that “operate in zones of uncertainty.”³⁴ The continued existence of these two non-legal religious markets reflects how intense demand for a certain religious niche can outweigh harsh legal sanctions.³⁵

The main inadequacy of this literature from the legal perspective is that the legal regime is essentially treated as a variable on a linear continuum that has “monopoly” and “free market” at opposite ends of the spectrum. The nuances and different facets of religious competition under the different legal regimes are unfortunately lost in this treatment. For example, a jurisdiction that imposed a stringent registration requirement that was based on the numbers of adherents³⁶ and a jurisdiction that imposed stringent zoning restrictions on religious land use³⁷ would both be considered “regulated” religious markets, notwithstanding the difference in their impacts on religions and religious competition.³⁸ In this regard, while there are other sociological studies that examine the various facets of

³⁴ Liu Peng, Brett G. Scharffs & Carl Hollan, *Constitutional, Legislative and Regulatory Change Regarding Religion in China*, in LAW, RELIGION, CONSTITUTION 247, 257 (W. Cole Durham et al. eds., Ashgate 2013); WITHAM, *supra* note 8, at 135-136; Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, THE SOCIOLOGICAL QUARTERLY 93, 97-98 (2006).

³⁵ Yang, *supra* note 34, at 98.

³⁶ E.g., Liviatan, *supra* note 5, at 63-64; GILL, *supra* note 8, at 14-15 (noting example of Czech Republic where enjoyment of certain rights requires membership of at least 0.1 percent of population, favoring the Catholic Church – the largest religion in Czech Republic, but to the detriment of independent Protestant Churches).

³⁷ E.g., CHEE KIONG TONG, RATIONALIZING RELIGION: RELIGIOUS CONVERSION, REVIVALISM, AND COMPETITION IN SINGAPORE SOCIETY 251 (Koninklijke Brill 2007) (discussing the religious land-use policy in the land-scarce island nation state of Singapore).

³⁸ The former restriction is prejudicial to emerging religions, while the later restriction adversely affect religions with limited financial resources.

religious competition, most of the discussions of the impact of laws are – reflecting the understandable focus of the discipline – typically incidental rather than the main subject of inquiry. Nonetheless, all this sociological literature does provide a rich source of valuable information as to the interaction of law and the different facets of religious competition.

On the normative aspects of law and religious competition, a useful starting point is to appreciate the nature of religious competition that would occur in an environment without any legal constraints on religious competition. Tellingly, the resulting religious competition less resembles the idealized portrayal of religious free competition epitomized by the oft-quoted statement from the U.S. Supreme Court case of *Zorach v. Claiborn* of “each [religious group] flourish[ing] according to the zeal of its adherents and the appeal of its dogma”³⁹ than a state of violence and warfare. The growth and flourishing of religions in pre-modern mankind have frequently been associated with military conquest, imperial expansion and colonization.⁴⁰ Without the meaningful existence of any international law or human rights protections, widespread coercion of faith conversion under the threat of death or worse can

³⁹ 343 U.S. 306, 313 (1952) (“We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.”). This phrase has subsequently become a popular reference phrase by academics: e.g., Jorge O. Elorza, *Secularism and the Constitution: Can Government be Too Secular?*, 72 U. PITT L. REV. 53, 56 n.4 (2010); Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT’L L. REV. 1187, 1204 n.80 (2005); Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 400 (2004); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 544 (1991); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 896-897 (1991); Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533, 555-556 (1982).

⁴⁰ SMART, *supra* note 23, at 490-499 & 532-548. See RICHARD BLAKE, RELIGION IN THE BRITISH NAVY, 1815-1879, at 156-186 (Boydell Press 2014) (discussing the range of passive and active manner in which the British navy was involved in the Christian mission and the spread of Christian influence in the British colonies).

provide for rapid growth in adherents,⁴¹ while extermination of the adherents of competing religions – whether intended or as inevitable consequences of conquest – is brutally efficient and effective in eliminating competitors from the religious market.⁴² Even the treaties of Westphalia, purportedly representing the emergence of international law restricting violence between states,⁴³ reaffirmed the importance of military might in religious competition with the principle that the religion of each state shall be determined by the state ruler.⁴⁴ Under this governing principle, the defeat of one state by another would mark the demise of the religion associated with the losing state at the expense of the victorious one. Most unfortunately, the advent of human rights protecting religious liberty and international law denouncing religious violence⁴⁵ have not prevented the continued existence of pockets of effectively lawless regions where military capabilities still play a substantial role in determining the outcome of religious markets, with examples including the Taliban in

⁴¹ Gordon A. Christenson, “*Liberty of the Exercise of Religion*”, 21 TRANSNAT’L L. & CONTEMP. PROBS. 721, 728-729 (2013); Monica Duffy Toft, *Getting Religion?: The Puzzling Case of Islam and Civil War*, 31(4) INTERNATIONAL SECURITY 97, 106-107 (2007). *See also* Graber, *supra* note 26, at 93-99 (While there was no explicit compulsion of conversion, imprisonments and executions in the aftermath of military defeat provide a conducive environment for Christian missionaries evangelizing to Dakota prisoners on the message of how their current predicaments is evidence of the superior of the Christian God.).

⁴² For example, the disastrous reduction of native Latin America population by the Spanish Conquistadores through de facto slavery and diseases: SMART, *supra* note 23, at 533. *See* Litonjua, *supra* note 4, at 312-313 (discussing how paganism and heresies in medieval Christendom are wiped out by extermination).

⁴³ Christenson, *supra* note 41, at 737-740; Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27, 29-31 (2010); Toft, *supra* note 41, at 107-109; Leo Gross, *The Peace of Westphalia, 1648-1948*, 42(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 20, 26 (1948).

⁴⁴ Christenson, *supra* note 41, at 740; Sascha O. Becker & Ludger Woessmann, *Was Weber Wrong? A Human Capital Theory of Protestant Economic History*, QUARTERLY JOURNAL OF ECONOMICS, May 2009, 531, at 555-556 (2009); Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55(1) WORLD POLITICS 66, 71-72 (2002); SMART, *supra* note 23, at 324.

⁴⁵ H. Victor Condé, *Protection of Religious Freedom Under International Humanitarian Law and International Human Rights Law in Times of Armed Conflict*, 5 U.C. DAVIS J. INT’L L. & POL’Y 95, 102-107 (1999); Gross, *supra* note 43, at 22-27.

Afghanistan,⁴⁶ the longest modern civil war in Sudan,⁴⁷ and the growing religion-related civil war in Iraq.⁴⁸

Of course, the use of military conquest as a component of religious competition has now been almost universally rejected by all quarters. However, the stark image of brutal violence driving success in the religious market, while largely irrelevant in and absent from most polities with functional legal and governance institutions, provides the perfect illustration of the dynamics of laws and religious competition. Given the multitude of material and intangible reasons driving religious choice,⁴⁹ it inevitably follows that religious competition would involve more than spiritual and doctrinal competition. That military competition is now largely excluded from most religious competition reflects how law – responding to normative concerns about the acceptable forms of religious competition – can shape the contours of religious competition.

⁴⁶ Amalendu Misra, *The Taliban, Radical Islam and Afghanistan*, 23 (3) THIRD WORLD QUARTERLY 577, 580-585 (2002); PETER MARSDEN, *THE TALIBAN: WAR AND RELIGION IN AFGHANISTAN* 57-66 (Zed Books Ltd. 2002).

⁴⁷ The civil war in Sudan took place between the Muslim majority Northern Sudan and the Christian dominated Southern Sudan, and largely involves the conflict focal point of Sharia implementation across the nation: Carolyn Fluehr-Lobban, *Religion, War, and Peacemaking in Sudan: Shari'a, Identity Politics, and Human Rights*, in BETWEEN TERROR AND TOLERANCE: RELIGIOUS LEADERS, CONFLICT, AND PEACEMAKING 105, 108-110 (Timothy D.S. ed., Georgetown University Press 2011); Toft, *supra* note 41, at 117-124.

⁴⁸ See El-Ghobashy & Abi-Habib, *supra* note 26 (discussing the recent military successes against ISIS in light of military support from U.S. and Iran); Crowley, *supra* note 24, at 20-23 (discussing the religious conflicts between Sunnis and Shi'ites that drives the current civil war in Iraq, and noting the military success of the Islamic State of Iraq and Greater Syria establishes its version of Sunni Islam in the conquered areas to the exclusion of Shi'ite Islam and other religions that previously are practiced in those region).

⁴⁹ *Supra* notes 20-27 and accompanying text.

C. *Picking Winners and Losers through Shaping Religious Competition*

The legal exclusion of military competition from religious competition demonstrates the two ways in which law can impact the resulting religious market. The first is redistribution. The legal prohibition of religious violence deprives religions that possess superior military might the ability to translate this advantage into easy gains in the religious market. This superior military might could be due to extraneous reasons, such as brilliant military leaders or technologically advanced weaponry⁵⁰ but could also reflect theological outlooks compatible with military mobilization and military training.⁵¹ Regardless, the legal prohibition effectively disadvantages these religions while benefiting militarily challenged religions, including pacifist religions that are theologically averse to physical violence.

The second way, with more far-reaching implications than the first, is the incentive/pressure that the legal rules (or the absence thereof) create for existing religions. Under a regime in which military conquest is a permissible mechanism for religious growth, all religions, regardless of their initial theological outlooks, will be compelled to respond to this military competition. This obligation may at times result in reluctant participation in

⁵⁰ Toft, *supra* note 41, at 111. See Borzou Daragahi, *Surface Change in Iraq's Politics Allows Deep Wounds to Fester*, FINANCIAL TIMES (U.K.), Sep. 8, 2014, at 2 (discussing how ISIS in Iraq have “adapted its battlefield tactics to larger and better-armed adversaries and turned seeming defeats or stalemates into victories within weeks.”). See MARSDEN, *supra* note 46, at 46-60 (analyzing the military aspect, both hardware and tactics, of Taliban success in Afghanistan).

⁵¹ Toft, *supra* note 41, at 111 (“Although military analysts in the West were apt to credit high technology (specifically, U.S.-made Stinger surface-to-air missiles) with the Soviet defeat in Afghanistan, to Islam's more conservative clerics and to many Muslims, jihad's external aspect was responsible for defeating a nuclear-armed, advanced-industrial Christian state.”). See also El-Ghobashy & Abi-Habib, *supra* note 26 (noting how the Shiite reinforcements in the military success against ISIS are religiously motivated, no less by a fatwa that promised paradise for martyrs in battle); Misra, *supra* note 46, at 584 -585 (discussing how the radical interpretation of jihad by the Taliban theologically requires followers to “arm themselves against all non-Muslim forces competing to undermine them”).

military resistance⁵² but may at other times include changing theological doctrine to render military actions religiously acceptable.⁵³ For adherents of religions that steadfastly refuse to take up arms on theological grounds, their available options remain heavily influenced by the shadow of military conquest: elimination by extermination or exit (fleeing) from that religious market.⁵⁴ In any event, the end result will be a religious market populated mostly by religions that are at least partially oriented toward military competition. Conversely, where military competition is legally or otherwise excluded, as in most modern societies, cultivation of military might will no longer be the characteristic associated with or emphasized in most religions.⁵⁵

There are two complications that can affect the way that redistribution and incentives actually manifest in religious competition and religious practices. The first complication arises from the nature of religion as credence goods. Credence goods is an economic concept for products (including intangible products, such as services) whose quality cannot be judged before or after purchase/consumption, rendering the credibility of the supplier of

⁵² *E.g.*, Fluehr-Lobban, *supra* note 47, at 109-110 (the southern resistance faction in Sudan civil war arose largely in opposition to the harsh Islamic regime imposed from the predominantly Muslim northern region).

⁵³ *E.g.*, JOHN C. SUPER & BRIANE K. TURLEY, *RELIGIONS IN WORLD HISTORY: THE PERSISTENCE OF IMPERIAL COMMUNION* 103-106 (Routledge 2006) (discussing the evolution of Christian position on war, in particular the concept of just war); LARRY JOHN ESPOSITO & DARELL FASCHING & TODD LEWIS, *WORLD RELIGIONS TODAY* 68-70 (Oxford University Press 2002) (discussing the violence against Jews and Muslims by Crusaders and its then underlying theological premises). *See also* Graber, *supra* note 26, at 102-106 (discussing how the conversion success arising from military victory prompted missionaries working on Native Americans to alter their previous “commitments about evangelical persuasion to support of arrangements that forcefully imposed Christian doctrine and structures of American civilization”).

⁵⁴ *See* Harold S. Bender, *The Pacifism of the Sixteenth Century Anabaptists*, 24(2) *CHURCH HISTORY* 119, 119-122 (1955) (discussing the Anabaptists’ insistence of non-violence in an era of bloody religious conflicts, and the consequent large scale martyrdom).

⁵⁵ Koppelman, *supra* note 3, at 1129 (noting how the criminal law prohibition of violence has render religious that “violently crush nonadherents” to be “nearly extinct in the contemporary United States.”).

particularly salient consideration in the calculus of consumers.⁵⁶ Religion, given its allusion to divinity, the spiritual realm, the afterlife and other effectively unverifiable concerns, is the ultimate credence good.⁵⁷ In these circumstances, adverse state actions, ranging from martyrdom of leaders to milder discriminatory suppression, can actually enhance the credibility of the sanctioned religion because these sacrifices can be interpreted as mutually reinforcing signals to both adherents and outsiders on the value of the religion and the strength of religious commitment.⁵⁸ Thus, unless the adverse state action is so extensive and draconian (e.g., holocaust, religious genocides) such that the religion will be eliminated from the market altogether,⁵⁹ the negative incentive created by the state actions to leave the religion will often be counteracted by the increase in perceived credibility. Depending on the interplay between the two factors, this phenomenon can at times result in a reduction in overall numbers but preservation of a highly-committed core that continues to operate underground,⁶⁰ while at other times, especially where the adverse actions are milder and/or

⁵⁶ Uwe Dulleck, Rudolf Kerschbamer & Matthias Sutter, *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101(2) AMERICAN ECONOMIC REVIEW 526, 526-527 (2011); Winand Emons, *Credence Goods and Fraudulent Experts*, 28(1) THE RAND JOURNAL OF ECONOMICS 107, 107 (1997).

⁵⁷ WITHAM, *supra* note 8, at 61-62; GILL, *supra* note 8, at 41-42.

⁵⁸ WITHAM, *supra* note 8, at 61-65; STARK & FINKE, *supra* note 6, at 106-113.

⁵⁹ See Robert Melson, *Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions*, 548 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 156, 155-161 (1996) (discussing the Armenian genocide and the Holocaust).

⁶⁰ For example, the vigorously enforced criminalization of the Falungong sect by the Chinese government has largely eliminate the public presence in China without eradicating continued practice of its teachings in private/secret": Peng, Scharffs & Hollan, *supra* note 34, at 256; JAMES W. TONG, *REVENGE OF THE FORBIDDEN CITY: THE SUPPRESSION OF THE FALUNGONG IN CHINA, 1999-2005*, at 205 (Oxford University Press 2009); Pasty Rahn, *Proselytization as Secular Protest: Rearticulating the Falun Gong Message*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 301, 302 (Rosalind I.J. Hackett ed., Equinox 2008); Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: the Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1, 21-26 (2004).

successfully infused with theological meaning, it promotes overall growth.⁶¹ A similar dynamic is applicable where the state action is targeted at a particular dimension of religious competition. For example, where the political dimension of religious competition is legalized due to democratization, there is an arguable credibility enhancing effect for religious organizations that explicitly disavow any political engagement.⁶²

The second complication is that in most circumstances, the effect of a particular law or policy on the identified characteristics is usually a mere variation in terms of the degree of salience of a particular component of religious competition, e.g., increasing or decreasing the importance of financial wealth rather than elimination or entrenchment of the relevance of financial wealth. Additionally, the multi-faceted nature of religious competition means that a religion whose advantages in one dimension are reduced by the law/policy may retain other competitive advantages vis-à-vis other religions such that there is no immediate or strong pressure for that religion to modify its practice and doctrine. Thus, the shaping effect

⁶¹ To use another example from China, only state-sanctioned religious organizations are considered legal. Independent Protestant “churches” that refused to join the official Protestant church organization are thus technically in state of legal ambiguity that involves general tolerance (but no official reorganization) punctuated with occasional and limited crackdowns. However, this has not impeded the continued growth of such “churches.” Given that sociologists have observed that the differences in theology and doctrines between official and underground churches are not particularly significant, one possible explanation is that credibility gained from refusing to submit to state control has outweighs the resulting discriminatory inconvenience: Peng, Scharffs & Hollan, *supra* note 34, at 257; Yang, *supra* note 34, at 97-98; Jianbo Huang & Fenggang Yang, *The Cross Faces the Loudspeakers: A Village Church Preserves Under State Power*, in *STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES* 41, 45-46 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005); Jacqueline E. Wenger, *Official vs. Underground Protestant Churches in China: Challenges for Reconciliation and Social Influence*, 46(2) *REVIEW OF RELIGIOUS RESEARCH* 169, 170-171 (2004).

⁶² E.g., CHENG-TIAN KUO, *RELIGION AND DEMOCRACY IN TAIWAN* 28 (State University of New York Press 2008) (noting the strict neutrality by the Ciji – one of the largest Buddhist organization in Taiwan – that never endorses any political candidates and requires any of its members to resign from all Ciji posts and not mention any affiliation with Ciji if they chose to run for office).

of any individual law/policy is usually marginal⁶³ rather than a wholesale transformation of the religious market. This fact, however, does not detract from the usefulness of Law & Religious Market perspective in examining particular laws and policies but does indicate the need for a holistic assessment of the religious market as a whole.

D. The Fallacy of the Religious Free Market

The insight of the profound influence that law exerts on religious competition is unfortunately largely lost in the normative inquiry as to the role that law should play in the religious market. The dominant argument in the current literature is that the law/state should create the “religious free market” through minimal interference in religious competition. This normative conception of religious liberty can arguably be traced to the American Founders, who sought to enshrine the religious free market in the Constitution⁶⁴ via the Free Exercise Clause, which guarantees the freedom to conduct religious activities, and the Establishment Clause, which prohibits the state from tipping the scale in favor of a particular

⁶³ For an example of empirical study on the effect of a law on religious practices on the margin, see Jonathan Gruber & Daniel M. Hungerman, *The Church Versus the Mall: What Happens when Religion Faces Increased Secular Competition*, THE QUARTERLY JOURNAL OF ECONOMICS, May 2008, 831 (2008) (finding that “repealing the [Sunday closing] laws causes a reduction in religious participation along both the giving and going margins” given the increase in consumption opportunities for non-religious activities).

⁶⁴ KOSMIN & KEYSAR, *supra* note 8, at 3; PATRICK M. GARRY, WRESTLING WITH GOD: THE COURT’S TORTUOUS TREATMENT OF RELIGION 96-97 (Catholic University of America Press 2006); Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1, 13 (1987); McConnell, *supra* note 33, at 1255; Hylton et al., *supra* note 6, at 404-406; Victor N. Metallo, *Procedamus in pace Serving Justice: RLUIPA Resonates the Teachings of Dignitatis Humanae, and the Third Circuit’s ‘Substantial Burden’ Test Provides a Thorough, Fair Inquiry into a Prisoner’s Religious Exercise*, 88 U. Det. Mercy L. Rev. 497, 499 (2011).

religion.⁶⁵ Coinciding with the emergence of the religious economic model in the 1980s,⁶⁶ the normative conception was imbued with renewed vigor, with legal scholars, such as Richard Posner, Michael W. McDonnell and Daniel A. Spiro articulating the religious free market as a normative constitutional principle – i.e., the law should create a religious free market.⁶⁷ Since then, many other U.S. legal academics have simply utilized the religious free market principle to analyze the Establishment Clause in particular⁶⁸ and the Religion Clauses in general.⁶⁹ The concept has also been adopted by legal scholars abroad, such as Russell Sandberg’s assessment of the European Court of Human Rights,⁷⁰ Kyriakos N.

⁶⁵ U.S. Constitution amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁶⁶ *Supra* III.A.

⁶⁷ E.g., see Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 18 (1987); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Spiro, *supra* note 64, at 5-14. See also Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 704 (1997); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 25 (1994).

⁶⁸ Daniel M. Hinkle, *Preemptory Challenges Based on Religious Affiliation: Are they Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 154 (2005); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1335-1336 (1996). See also Andrew P. Morriss & Benjamin D. Crammer, *Disestablishing Environmentalism*, 39 ENVTL. L. 309, 386-392 (2009) (Under the premise that the Establishment clause produce the free-market of religion, the authors utilizes the merits and benefits of the free-market of religion to argue for the “disestablishment” of environmentalism.)

⁶⁹ The religious free market benchmark has been used to argue against restriction of religious speech: Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 350 (1996); Joel S. Jacobs, *Endorsement as “Adoptive Action:” A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29, 69-70 (1994). The benchmark is also applied to support restriction of religious speech: Delgado, *supra* note 39, at 555-556. See also Metallo, *supra* note 64, at 525-526; Rosalind I. J. Hackett, *Religious Pluralism in an Undecidedly Secular World*, 33-SUM HUM. RTS. 21, 22 (2006); Richard M. Esenberg, *You Cannot Lose if You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 65 (2006).

⁷⁰ RUSSELL SANDBERG, *LAW AND RELIGION* 35 & 70 (Cambridge University Press 2011).

Kyriazopoulos's critique of Greek anti-proselytization laws,⁷¹ and Li-Ann Thio's advocacy of the concept in Singapore.⁷²

The main shortcomings of the current discourse on the religious free market as a normative principle can be classified into two categories, namely conceptual ambiguity and religious non-neutrality. Conceptual ambiguity is inherent in the legal components of the religious free market. While the general consensus is that the twin legal guarantees arising from the Establishment and Free Exercise Clauses were necessary for the creation of the religious free market, the wide divergence as to the desirable normative interpretations of these clauses and the underlying definition of religion⁷³ mean that the nature of the resulting market will depend on one's choice among these hotly contested interpretations. In particular, a legal regime that attempts to provide hugely preferential treatment to religion by adopting a combination of strong free exercise protection, an accommodationist approach to the Establishment Clause and a definition of religion that excludes secular beliefs is but one of the many plausible and at times polar conceptions of the religious free market.⁷⁴

⁷¹ Kyriakos N. Kyriazopoulos, *Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality*, 20 J. LAW & RELIGION 149, 149-150 (2004).

⁷² Thio Li-Ann, *Constitutional 'Soft' Law and Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony*, 2004 SING. J. LEGAL STUD. 414, 422 (2004); KEVIN YL TAN & THIO LI-ANN, *CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE* 876 (Butterworths 1997).

⁷³ For discussions on First Amendment Religion Clauses jurisprudence, *see generally* PETER K. ROFES, *THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (Praeger 2005); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1485-1581 (Aspen Publishers, 5th ed., 2005); JAMES HITCHCOCK, *THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: VOLUME I THE ODYSSEY OF THE RELIGION CLAUSES* (Princeton University Press 2004); MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* (Aspen 2002).

⁷⁴ For a full discussion about the dynamics and implications arising from the different combinations of interpretation, *see* Jianlin Chen, *Deconstructing the Religious Free Market*, J. L., RELIG. & STATE (forthcoming). *See also* Yang, *supra* note 34, at 95 (observing that there is no completely unregulated market).

More tellingly, the ambiguity extends to the very understanding of what constitutes religious free competition. The laudable goal of religious liberty that underpins the religious free market normative principle⁷⁵ means that violence and coercion are legally excluded from permissible religious competition, notwithstanding the common lack of explicit recognition of this integral state intervention necessary to secure “free” competition. However, the harsh realities of competition in the economic and political spheres are typically glossed over or overlooked.⁷⁶ Material wealth, while not itself a sufficient or determinative criterion of a religion’s ultimate success, remains instrumental to religious competition by facilitating religious propagation amidst competing messages⁷⁷ and supporting basic operational needs.⁷⁸ Similarly, the political competitiveness of a religion allows the religion to disproportionately benefit from purportedly neutral state aid to religions⁷⁹ and legislative exemptions from generally applicable law.⁸⁰ How the religious

⁷⁵ WITHAM, *supra* note 8, at 194; KOSMIN & KEYSAR, *supra* note 8, at 4 (noting argument of Adam Smith).

⁷⁶ For a full treatment on the role of money and political power in the success of a religion, and the consequential implications on legal issues such as affirmative action and restrictions of religious involvement in politics, *see* Chen, *supra* note 14.

⁷⁷ As a form of speech, religious propagation is facilitated by money just like any other speech: Deborah Hellman, *Money Talks But It Isn’t Speech*, 95 MINN. L. REV. 953, 955 (2011). For discussion of contributions of financial resources in terms of proselytizing, *see* Hackett, *supra* note 69, at 22; Harvey, *supra* note 21, at 59-60 (noting the substantial financial resources necessary to support the massive overseas missions by American Christians); Duncan, *supra* note 11, at 311-313 (discussing the evangelical efforts by American-based nondenominational Protestant organization, New Tribes Mission, in Indonesia rural tribes that includes financial assistance and modern medical aid).

⁷⁸ MOORE, *supra* note 20, at 272. Wealth is particularly important where critical resource – such as land – is scarce: CHEE, *supra* note 37, at 251.

⁷⁹ Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 168-172 (2011) (using a public choice analysis). *See also* Eli Berman, *Sect, Subsidy, and Sacrifice: An Economist’s View of Ultra-Orthodox Jews*, 115(3) THE QUARTERLY JOURNAL OF ECONOMICS 905, 912 (2000) (example of Ultra-Orthodox in Israel).

⁸⁰ Robinson, *supra* note 79, at 168-170; David Tabb Stewart & James T. Richardson, *Mundane Materialism: Economic Survival and Theological Evolution Within Jesus Movement Groups*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 491, 500 (James T. Richardson ed., Kluwer Academic 2004); KENT

free market should accommodate this economic and political competition is largely unarticulated by proponents of the concept but would have drastic implications for the consequent legal regime. For if one conceives of the religious free market as primarily facilitating spiritual and theological competition among religions, then controversial state interference with religion – such as financial affirmative action for socioeconomically disadvantaged minority religions and restrictions on religious involvement in politics – are actually consistent with the religious free market principle, with the converse true as well.⁸¹

Beyond the conceptual ambiguity, the normative force of the religious free market is undercut by the religious non-neutrality arising from the redistributive effect on existing religions and the incentives/pressures created on religions moving forward. Echoing the recognition of the undeniable but easily overlooked contributions of money and political power in religious competition, the conception of a religious free market to include the economic and political dimensions will naturally benefit religions that are economically and politically competitive and vice versa.⁸² Insofar as theological outlooks and religious doctrines have material impacts on the economic and political competitiveness of a religion,⁸³ neither inclusion nor exclusion of economic and/or political competition will be

GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 81 (Princeton University Press 2006).

⁸¹ Chen, *supra* note 14, at 235.

⁸² *Id.*, at 222-223 & 229-231.

⁸³ For example, some religions may encourage savings, emphasize education and promote other “economic-friendly” attitudes: Robert D. Woodberry, *Pentecostalism and Economic Development*, in MARKETS, MORALS & RELIGION 157, 165-167 (Jonathan B. Imber ed., Transaction Publishers 2008); Luigi Guiso et al., *Does Culture Affect Economic Outcomes?*, 20(2) THE JOURNAL OF ECONOMIC PERSPECTIVES 23, 38 (2006). See Metin M. Cosgel, *Religious Culture and Economic Performance: Agricultural Productivity of the Amish, 1850-80*, 53(2) THE JOURNAL OF ECONOMIC HISTORY 319, 330 (1993) (“The case of Amish in Iowa does show, however, that the shared beliefs and objectives of a religious community can produce distinct patterns of

theologically neutral for the different religions. More significant, religions will be compelled to adapt their religious practices and doctrines, for better or worse, to meet the competitive pressures arising from the resulting religious competition.⁸⁴ There will also be frequent convergences in religious practices, with religions learning and adopting the practices of successful competitors in the religious marketplace.⁸⁵

Indeed, the expectation that religions compete vigorously with one another for religious converts under the religious free market⁸⁶ assumes that religions are or should be evangelical in nature. However, while evangelicalism is an integral aspect of monotheistic religions, such as Christianity⁸⁷ and Islam,⁸⁸ this emphasis is not shared by other religious

economic behavior and affect their productivity.”). The religious teachings of other religions may be averse towards political participation and are consequential overlooked in the political process: Alejandro Frigerio & Hilario Wynarczyk, *Cult Controversies and Government Control of New Religious Movements in Argentina, 1985-2002*, in *REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE* 453, 471 (James T. Richardson ed., Kluwer Academic 2004) (Spiritists in Argentina); KAI-TI CHOU, *CONTEMPORARY RELIGIOUS MOVEMENTS IN TAIWAN: RHETORICS OF PERSUASION* 67-68 (Edwin Mellen Press 2007) (Tzu Chi, one of the largest Buddhist organizations in Taiwan.).

⁸⁴ Peter L. Berger, *Pluralism, Protestantization, and the Voluntary Principle*, in *DEMOCRACY AND THE NEW RELIGIOUS PLURALISM* 19, 21-25 (Thomas Banchoff ed., Oxford University Press 2007); CHESNUT, *supra* note 6, at 151. See also Ian Harris, *Buddhism and Politics in Asia: the Textual and Historical Roots*, in *BUDDHISM AND POLITICS IN TWENTIETH-CENTURY ASIA* 1, 16 (Ian Harris ed., Pinter 1999) (noting how the arrival of Christian missionary activities in colonial Asia helps revitalizes the incumbent Buddhists into modernizing reforms).

⁸⁵ Harvey, *supra* note 21, at 68; Bryan R. Wilson, *Absolutes and Relatives: Two Problems for New Religious Movements*, in *CHALLENGING RELIGION* 13, 17 (James A. Beckford & James T. Richardson eds., Routledge 2003).

⁸⁶ CHESNUT, *supra* note 6, at 11; Berger, *supra* note 84, at 21.

⁸⁷ KOSMIN & KEYSAR, *supra* note 8, at 11; CHESNUT, *supra* note 6, at 11; Wilson, *supra* note 85, at 16; Peter Radan, *International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights*, in *LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW* 9, 17 (Peter Radan et al. eds., Routledge 2005). See Stephen C. Berkwitz, *Religious Conflict and the Politics of Conversion in Sri Lanka*, in *PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS* 199, 212 (Rosalind I.J. Hackett ed., Equinox 2008) (noting distinction between evangelical Christian and mainline Christian churches which have “come to deemphasize the call to convert and instead focus on ministering to the already faithful.”).

⁸⁸ CHESNUT, *supra* note 6, at 11; Radan, *supra* note 87, at 17.

traditions, such as Native American religions,⁸⁹ Spiritualism,⁹⁰ Buddhism, Hinduism⁹¹ or local animistic religions.⁹² Indeed, religious truth-seeking – the otherwise important justification for the religious free market – is not universal either.⁹³ Imposing a religious free market benefits evangelical truth-predicating religions to the detriment of others and will be particularly problematic in polities where the religious outlook of the majority does not share these underlying assumptions⁹⁴ and has caused previously non-proselytizing religions to proselytize⁹⁵ or otherwise react defensively.⁹⁶

⁸⁹ Harvey, *supra* note 21, at 41-42 (“Without a separate concept of ‘religion’ as distinct from other rituals of life, Native Americans could not engage in, or even conceive of, proselytization. Recruiting people into a separate and identifiable faith was far removed from their cosmos.”).

⁹⁰ Deirdre Meintel, *When There is No Conversion: Spiritualists and Personal Religious Change*, 49(1) ANTHROPOLOGICA 149, 149 (2007) (“Although Spiritualism was born in the modern era, conversion is not evident among the spiritualists in the study, and still less, proselytization.”).

⁹¹ Jeff Spinner-Haley, *Hinduism, Christianity, and Liberal Religious Toleration*, 33(1) POLITICAL THEORY 28, 37 (2005); KUAH-PEARCE KHUN ENG, STATE, SOCIETY AND RELIGIOUS ENGINEERING: TOWARDS A REFORMIST BUDDHISM IN SINGAPORE 137 (Eastern Universities Press 2003); CHEE, *supra* note 37, at 152-153.

⁹² For a discussion of the religious tenets and worldview of Sierra Leone indigenous religions, see PRINCE SORIE CONTEH, TRADITIONALISTS, MUSLIMS, AND CHRISTIANS IN AFRICA 19-62 (Cambria Press 2009).

⁹³ Sarah Claerhout & Jakob De Roover, *Conversion of the World: Proselytization in India and the Universalization of Christianity*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 53, 65 (Rosalind I.J. Hackett ed., Equinox 2008); S.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, in RELIGION AND LAW IN INDEPENDENT INDIA 35, 39 (Robert D. Baird ed., Manohar 2d ed. 2005). See Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1764-1765 (2011) (noting how Buddhism’s de-emphasis of universal truth contributes to its more tolerant attitude towards other faith). See generally S. A. NIGOSIAN, WORLD RELIGIONS: A HISTORICAL APPROACH 414-419 (Bedford/St. Martin’s 3rd ed. 2000) (discussing how the different religions differ in their conceptions of religious path and goals).

⁹⁴ For a critical case study of one such polity (Singapore), see Jianlin Chen, *Bias and Religious Truth-Seeking in Proselytization Restrictions: An Atypical Case Study of Singapore*, 8 ASIAN J. COMP. L. 21, 66-73 (2013).

⁹⁵ Mayer, *supra* note 30, at 46-48 (noting examples of India’s Hinduism’s *shuddhi* (reconversions) in reactions to Muslims and Christians conversions and organization/restructuring of tribal religious groups in India in reaction to Christian and Hindu proselytization efforts); Rachelle M. Scott, *Promoting World Peace through Inner Peace: The Discourses and Technologies of Dhammakāya Proselytization*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 231, 235-236 (Rosalind I.J. Hackett ed., Equinox 2008) (example of Anagarika Dharmapala’ reformist Buddhism in Sri Lanka).

⁹⁶ Berkwitz, *supra* note 87, at 203-204 (noting the example of nineteenth century Sri Lanka where Buddhism, after initial resistance to participate in the dispute about religious truth as raised and provoked by Christian

E. *The Proper Inquiry: Law & Religious Market*

Notwithstanding the critiques of the religious free market as a normative principle above, this Article recognizes that there is no obvious alternative model that is superior on its face to the religious free market and is sympathetic to the notion that the religious free market may ultimately resemble democracy – flawed but still superior to all other alternatives.⁹⁷ Nonetheless, the conceptual ambiguity and non-neutrality reaffirm the need to articulate the precise nature of religious competition (whether labeled “free” or otherwise) that the law is supposed to foster and to engage in the corresponding debate as to the normative considerations underpinning this conception of religious competition. While the religious free market reflects laudable concerns about the fallacy of human governing institutions in determining religious matters, “free” competition is a misleadingly attractive misnomer. Whether intended or unintended, whether through direct interaction or passive omission, law will be a substantial factor shaping religious competition in the religious market, which in turn will affect the identities and characteristics of the successful religions.

missionaries, were compelled to engage the missionaries on their terms (debate of religious truth) after repeated denunciations and challenges of the missionaries); Thomas Robbins, *Notes on the Contemporary Peril to Religious Freedom*, in CHALLENGING RELIGION 71, 73 (James A. Beckford & James T. Richardson eds., Routledge 2003) (“One consequence may be the emergence of militant ‘fundamentalist’ or neo-traditionalist, puritanical-primitivist movements, which in Islamic cultures react not only against globalist cultural relativisation but more specifically against the politico-economic as well as cultural hegemony of the Christian/secular West and their own perceive helplessness and oppression.”); Tessa Bartholomeusz, *First Among Equals: Buddhism and the Sri Lankan State*, in BUDDHISM AND POLITICS IN TWENTIETH-CENTURY ASIA 173, 176-177 (Ian Harris ed., Pinter 1999).

⁹⁷ See Kimon Valaskakis, *The Perils of “Dumb” Democracy*, 13 WIDENER L. REV. 295, 295 (2007) (using this statement that is commonly attributed to Winston Churchill as the starting and end point of his Article to examine the misconceptions about democratic governance). See also Alexander J. Bandza, *Epidemiological-Study Reanalyses and Daubert: A Modest Proposal to Level the Playing Field in Toxic Tort Litigation*, 39 ECOLOGY L.Q. 247, 273 (2012) (using this line of argument for editorial peer review in determining veracity of scientific evidence).

Here Law & Religious Market perspective becomes relevant. Recognizing the dynamic between law and religious competition, Law & Religious Market perspective approaches issues relating to law and religion by examining the nature of the competition fostered by the relevant laws and regulations. This inquiry involves not only identifying the benefits and burdens imposed on the different religions⁹⁸ but also teasing out the characteristics of the religions that are salient to the identified redistributive consequences. The latter is of particular importance because most laws and regulations do not explicitly single out religions by name, even if the underlying legislative intent is to target that religion,⁹⁹ and in any event often indirectly and unintentionally affect the significance of selected characteristics on religious competition. The characteristics can be broadly construed, such as the military, economic and political dimensions of religious competition discussed in the preceding section, or more narrowly defined as illustrated in the case studies application in the next Part. Through identifying these characteristics, the inquiry can then focus on the normative aspect as to whether those characteristics are desirable and should be fostered.

⁹⁸ *Cf.*, GILL, *supra* note 8, at 10-11 (arguing for approaching religious liberty as government regulation so as to allow co-opting of the cost-benefit analysis from studies on regulatory policy to illuminate who win and who lose in any given government policy and to avoid a dichotomous view on religious liberty, but allows for multidimensional appreciation of the religious liberty).

⁹⁹ For example, the regulatory prohibition in the U.S. Supreme Court case of *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) reflected specific animosity to the Santeria religion and its religious practices of ritual animal but is worded simply as prohibition of "unnecessar[y]" killing of "an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."

III. ILLUSTRATIVE APPLICATION

This Part applies Law & Religious Market perspective to two of the recurring controversies in law and religion, namely the permissibility of religious content in the provision of social services and the threshold of free exercise exemptions.

A. *Religious Content in Provision of Social Services*

One recurring controversy in law and religion around the globe is the extent to which religious content may be incorporated during the provision of social services. Charity is a laudable aspiration that is common to the teachings of many religions.¹⁰⁰ The seemingly altruistic nature of charity does not contradict the utility maximization assumption of individuals under Law & Religious Market perspective because, whether innate in human nature or cultivated through education, many people do derive genuine happiness (i.e., utility) from helping others.¹⁰¹ Moreover, religious engagement in charitable work can result in competitive advantages in the religious market, such as the enhancement of credibility¹⁰² or, perhaps more important, as a means to reach out to and/or retain adherents.¹⁰³ Indeed, it is not uncommon for religions to theologically conceive of charitable works explicitly as a

¹⁰⁰ James Leiby, *Charity Organization Reconsidered*, 58(4) SOCIAL SERVICE REVIEW 523, 526-527 (1984); Frederick B. Bird, *A Comparative Study of The Work of Charity in Christianity and Judaism*, 10(1) THE JOURNAL OF RELIGIOUS ETHICS 144, 164-166 (1982); Frederic Siedenburg, *The Religious Value of Social Work*, 27(5) AMERICAN JOURNAL OF SOCIOLOGY 637, 639-643 (1922).

¹⁰¹ Leonard Ray, *Why We Give: Testing Economic and Social Psychological Accounts of Altruism*, 30 POLITY 383, 393-395 (1998); Jerome C. Wakefield, *Is Altruism Part of Human Nature? Toward a Theoretical Foundation for the Helping Professions*, 67(3) SOCIAL SERVICE REVIEW 406 (1993)

¹⁰² See discussion on the credence goods nature of religion: *supra* III.C.1.

¹⁰³ Susan K. McCarthy, *Serving Society, Repurposing the State: Religious Charity and Resistance in China*, 70 THE CHINA JOURNAL 48, 55 (2013); Kao, *supra* note 21, at 79; MOORE, *supra* note 20, at 273.

missionary endeavor.¹⁰⁴ While the provision of these social services was generally welcome by the state in the pre-modern world,¹⁰⁵ the growth of the welfare state (i.e., states are increasingly the providers of social services) and the expansion of the regulatory state (i.e., states increasingly regulate the provision of social services)¹⁰⁶ meant that the provision of social services would inevitably become contentious points of intersection between law and religion.

One main point of dispute is whether religious content can be included in the provision of social services, for which there are various possible legal regimes.¹⁰⁷ At one end of the spectrum, religious content is freely permitted even for publicly-funded and state-managed social service providers,¹⁰⁸ while at the other end is the total exclusion of religious content from all provision of social services, even for private organizations not receiving any state funding.¹⁰⁹ Intermediate regimes may make a distinction between state-managed

¹⁰⁴ Leiby, *supra* note 100, at 530; Martin E. Marty, *Social Service: Godly and Godless*, 54(4) SOCIAL SERVICE REVIEW 463, 468-469 (1980).

¹⁰⁵ Bird, *supra* note 100, at 163; Siedenburg, *supra* note 100, at 642-645.

¹⁰⁶ BARBRA MANN WALL, *AMERICAN CATHOLIC HOSPITALS: A CENTURY OF CHANGING MARKETS AND MISSIONS* 106 (Rutgers University Press, 2011); Laurence E. Lynn, Jr., *Social Service and the State: The Public Appropriation of Private Charity*, 76(1) SOCIAL SERVICE REVIEW 58, 65-66 (2002); Leiby, *supra* note 100, at 523-524.

¹⁰⁷ See Heidi Rolland Unruh, *Religious Elements of Church-Based Social Service Programs: Types, Variables and Integrative Strategies*, 45(4) REVIEW OF RELIGIOUS RESEARCH 317, 329-331 (2004) (discussing the varying degrees of religious content in the provisions of social service, ranging from – in accordance to the intensity, prevalence and compulsion – implicit, invitational, relational, integrated-optional and integrated-mandatory); Helen Rose Ebaugh et al., *Where's the Religion? Distinguishing Faith-Based from Secular Social Service Agencies*, 42(3) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 411, 422-424 (2003) (discussing how religion may affect/influence the provision of social services by faith-based charitable organizations).

¹⁰⁸ E.g., R. MURRAY THOMAS, *RELIGIONS IN SCHOOLS: CONTROVERSIES AROUND THE WORLD* 182-183 (Praeger 2006) (public schools in Saudi Arabia).

¹⁰⁹ One example is China, where the more supportive stance of the government towards religious organizations' engagement in social services provision and charitable works is accompanied by the explicit prohibition of religious propagation in such activities: art. 6(1), *Guanyu guli he guifan zongjiaojie congshi gongyi cishan*

social service providers and privately-run providers receiving state subsidies and give more leeway to the latter.¹¹⁰ Regulations may also circumscribe the permissible religious content and/or the manner in which the content is delivered where religious content is ostensibly permitted in the provision of social services.¹¹¹

That the various legal regimes can be categorized on a linear scale of increasing permissibility of religious content in social services belies their different impacts on the different aspects of religious competition. The most obvious, given the importance of financial resources in the provision of social services, would be the economic dimension. The economic competitiveness of religions becomes particularly salient in regimes where restrictions are attached to public funds, whether partial subsidies or full funding. In this regime, religions with sufficient financial resources can avoid those constraints altogether by refusing public funding.¹¹² This advantage persists whether the state is a functioning and encompassing welfare state or a state with failing public institutions. In the former, the sufficiently wealthy religion would preserve the provision of social service as an

huodong de yijian [Opinions on Encouraging and Regulating Religious Participation of Charity Activities] (promulgated by Administration for Religious Affairs, United Front Work Department of CPC Central Comm., National Development and Reform Commission, Feb. 16, 2012, effective Feb. 16, 2012) (P. R. C.).

¹¹⁰ E.g., U.S.: Helen Rose Ebaugh, Janet Saltzman Chafetz & Paula F. Pipes, *The Influence of Evangelicalism on Government Funding of Faith-Based Social Service*, 47(4) REVIEW OF RELIGIOUS RESEARCH 380, 381 (2006) (discussing the government funding under Charitable Choice provision in the Welfare Reform Act of 1996 and the Faith-Based and Community Initiative that “allow religious groups to accept government funds while maintaining their religious character”).

¹¹¹ For example, private schools – religious or otherwise – might still be subjected to state imposed curriculum standards: GERHARD ROBBERS, RELIGION AND LAW IN GERMANY 296-297 (Kluwer Law International 2010); THOMAS, *supra* note 108, at 127; Rory O’Connell, *Theories of Religious Education in Ireland*, 14(2) JOURNAL OF LAW & RELIGION 433, 443-444 (1999).

¹¹² See Ebaugh, Chafetz & Pipes, *supra* note 110, at 390 (observing that due to the restrictions of proselytization attached to government funding, religious charitable organizations that are expressively evangelical or have high level of service religiosity are more hesitant to apply for available government funding).

unadulterated vehicle to spread its religious message and attract new adherents, a privilege not available to competing religions that are unable to provide social services independently without state funding.¹¹³ In the latter, the inferior quality of public social services would mean that high-quality social services, even if accompanied by religious content or conditioned on religious participation, would be highly sought after by non-adherents.¹¹⁴

Interestingly, the salience of economic competitiveness is neither proportionate nor inversely proportionate to the permissibility of religious content. Rather, financial resources are of decreased importance at either end of the spectrum. Where religious content is completely prohibited in all provision of social services, this important avenue by which economic superiority can be used to promote religious growth is curtailed. The stripping of religious content from these social services, while not completely negating the religious

¹¹³ Wright, *supra* note 5, at 884. See also Unruh, *supra* note 107, at 324 (noting how a church administering a government-funded and thus secular program curriculum utilize the self-funded lunch break to conduct a Bible study). See generally Lynn, *supra* note 106, at 68-69 (discussing how the expansion of public funding for social services render a heavy financial dependence of non-profit organizations on state subsidies, and the consequential loss in independence).

¹¹⁴ For example, Christian mission schools in developing countries: e.g., Sri Lanka: Berkwitz, *supra* note 87, at 204; Singapore: Robbie B. H. Goh, *Mission Schools in Singapore: Religious Harmony, Social Identities, and the Negotiation of Evangelical Cultures*, in RELIGIOUS DIVERSITY IN SINGAPORE 362, 365-366 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008); Tanzania: Wolfgang Gabbert, *Social and Cultural Conditions of Religious Conversion in Colonial Southwest Tanzania 1891-1939*, 40(4) ETHNOLOGY 291, 299-300 (2001).

propagating impact,¹¹⁵ does limit the proselytizing effect of those activities.¹¹⁶ Religions are still likely to engage in social service provision under these conditions, although to fulfill their theological commitments and less for evangelical purposes.¹¹⁷

At the other end of the spectrum where there are no or limited restrictions on religious content, political competitiveness is likely to take center stage. Where religious content may be included even for social service providers that are managed directly by the state, politically influential religions are in a good position to ensure inclusion of their preferred religious content while excluding the religious content of their competitors.¹¹⁸ Political competitiveness remains important for intermediate regimes that do not condition state subsidies to private service providers on adherence to restrictions on religious content. The successful lobbying of state agencies to fund social services that are infused with religious content by a religion can allow that religion to maintain a larger scale of social service

¹¹⁵ Even without explicit evangelistic activity, the mere display of love and care in the provision of social services can serve as powerful testimonies of the underlying religious faith of the social service providers: McCarthy, *supra* note 103, at 58; Mathew Mathews, *Saving the City Through Good Works: Christian Involvement in Social Services*, in RELIGIOUS DIVERSITY IN SINGAPORE 524, 540-543 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008). See also Deana Hall, *Managing to Recruit: Religious Conversion in the Workplace*, 59(4) SOCIOLOGY OF RELIGION 393, 402-404 (1998) (describing how the ostensibly secular management training program offered by Scientology-linked management consultation companies can provide exposure to Scientology doctrine and practices through identifying problems of which Scientology would be the solution).

¹¹⁶ There is an interesting paradox that while the provisions of financial aid and other valuable social service can serve to simulate effective religious growth, such converts typically possesses less robust conviction and faith and may be particularly vulnerable to exit when the aid ceases or when challenges to faith arose: see JU HAIYUAN, *Zongjiao, shushu yu shehui bianqian* [RELIGION, SUPERSTITION AND SOCIAL CHANGE] 46-48 (Guiguan 2006) (discussing the role of material aids as an explanation of the growth pattern of Catholics in Taiwan that see an initial rapid expansion from 1949 to 1963, but stagnation from 1964 onward).

¹¹⁷ See Mathews, *supra* note 115, at 535-537 & 540-543 (observing how Christian charitable organizations in Singapore are publicly proud of the Christian theological teachings of charity as their driving motivations, while more subtle and discreet about evangelic motivation).

¹¹⁸ E.g., THOMAS, *supra* note 108, at 60-61 (observing how the specific content of religious education mandated in the U.K. is influenced by the dominant religion(s) at the local level).

provision.¹¹⁹ The requirement that state subsidies be religiously neutral mitigates but does not eliminate the problem. Given the different (material and doctrinal) needs of different religions, the politically dominant religious groups are likely to procure government aid in areas that will produce the greatest benefits for the dominant religious groups and thus disproportionately benefit even from ostensibly non-preferential state subsidies.¹²⁰

Moving beyond the conventional treatment that *prima facie* views these restrictions as curtailing religious liberty¹²¹ and the Establishment concern predominant (although not limited) in the U.S. that is triggered whenever state funding is involved,¹²² Law & Religious Market perspective generates two important implications in this legal controversy. The first implication concerns the conception of religious competition at a broader level. Instead of focusing on the religious liberty of the religions wishing to incorporate religious content into their provision of social services and/or whether there is coercion or inequality resulting from state establishment of religion, the inquiry is recast as the extent to which the political and economic competitiveness of religions should be normatively fostered by the legal regime. This inquiry produces a surprising conclusion that the regime that is seemingly the most restrictive to religions – namely the prohibition of religious content in all provision of

¹¹⁹ WALL, *supra* note 106, at 107-108; Paula F. Pipes & Helen Rose Ebaugh, *Faith-Based Coalitions, Social Services, and Government Funding*, 63(1) SOCIOLOGY OF RELIGION 49, 50 (2002).

¹²⁰ Wright, *supra* note 5, at 888-889; Robinson, *supra* note 79, at 168-172; L. Scott Smith, “*Religion-Neutral*” *Jurisprudence: An Examination of Its Meanings and End*, 13 WM. & MARY BILL RTS. J. 841, 890-894 (2005).

¹²¹ Michael D. Waggoner, *Negotiating the New Commons in Religion and Education*, in RELIGION IN THE PUBLIC SCHOOLS 7, 9-12 (Michael D. Waggoner ed., Rowman & Littlefield Education 2013) (discussing the reaction towards the judicial prohibition of Bible in public schools in the U.S.).

¹²² E.g., Wright, *supra* note 5, at 884-885; Smith, *supra* note 120, at 890-894; Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 914 (2004).

social services – may actually be most conducive to ensuring that the spiritual and theological competition among religions is least affected by political and economic considerations. This conception may be driven by the negative externalities associated with heavy religious involvement in this aspect¹²³ or, rather paternalistically, protect religion from the corrupting influence of this involvement.¹²⁴

The second implication relates to the finer aspects of religious competition. In addition to modifying the salience of the economic and political dimensions of religious competition, the legal regime also affects how religions approach the provision of social services. Where religions are faced with restrictions on the inclusion of religious content, whether due to a blanket prohibition or conditions attached to state funding, the evangelical motivation of social service provision is inhibited. The theological underpinning of social service provision will shift toward the charitable rationale, at least publicly.¹²⁵ This development may arguably be, on balance, normatively welcome. On one hand, these restrictions may result in an overall decrease in social services provided by religions or religiously-affiliated charitable organizations, given that religions with theological emphasis

¹²³ Critiques commonly levied on religiously inspired politics include irrationality, exclusivity, divisiveness, non-compromising, and discriminatory: Christopher L. Eisgruber & Lawrence G. Sager, *Does it Matter What Religion is?*, 84 NOTRE DAME L. REV. 807, 829 (2009); Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253, 282 (2009); Eric Barendt, *Free Speech and Religion: Secular and Religious Perspectives on Truth*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 23, 31 (András Sajó ed., Eleven International Publishing 2007); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1050 (2005); Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 B.Y.U.L. REV. 1005, 1011 (2004).

¹²⁴ For corrupting influence of politics on religion, see KARRIE J. KOESEL, RELIGION AND AUTHORITARIANISM: COOPERATION, CONFLICT, AND THE CONSEQUENCES 124-126 (Cambridge University Press 2014); Koppelman, *supra* note 4, at 1835; Cochran, *supra* note 4, at 100-101; Shiffrin, *supra* note 4, at 44.

¹²⁵ Mathews, *supra* note 115, at 535-537 & 540-543.

on religious propagation would likely divert their resources to avenues that allow for greater liberty in proselytization. On the other hand, if the motivation of religions to provide social services is now primarily charitable, the social services provided will more likely cater to the religious needs and practices of adherents of other religions, such as providing food that complies with particular religious requirements in homes for the elderly and charitable food drives¹²⁶ and inclusion of religious items for the aid recipients in rebuilding during disaster relief operations.¹²⁷ If the provision of social welfare functions is an important benefit associated with religion¹²⁸ that warrants granting religion special status and protection under the law, then the pressure exerted by the legal regime on religions to reorient social service

¹²⁶ In multi-religious Singapore, charitable organizations that do not place ostensible emphasis on proselytization, such as various Buddhist, Taoist and Muslim affiliated religious organizations, do tend to cater to the religious needs of the recipients of social services and make direct donations to charitable organizations affiliated with other faiths. This can be contrasted with the aversion of cooperation with charitable organizations affiliated with other religions by selected Christian charitable organizations that have more exclusive religious world view and greater emphasis on religious propagation: Chen, *supra* note 94, at 75-78. *See also* Leiby, *supra* note 100, at 530 (“Sectarian enthusiasts were interested in proselytizing people into their particular group and practices ... [they] regard charity as flowing from correct theology and toward sectarian identification. The ‘city missions’ sponsored by many denominations mixed helping and preaching, and religious-sponsored hospitals (a very important charity) assured that sectarian notions such as dietary laws would be properly observed.”).

¹²⁷ *Tsunami Victims Move Into Tzu Chi Housing*, THE CHINA POST (Taiwan), Jan. 15, 2006 (the Buddhist charitable organization, Tzu Chi, included Muslim prayer carpets when furnishing its housing communities for survivors of the 2004 tsunami in Indonesia). Proselytization and evangelical motives of certain foreign religious charitable organizations have raised controversies: Timothy Mapes & Andrew Higgins, *Radical Islamic Strain Clouds the Tolerance Displayed by Indonesia: Hard-Edged Justice Party Rushed in to Aid the Victims of the Tsunami*, ASIAN WALL ST. J., Feb. 25, 2005, at A1; Mehul Srivastava, *Evangelism Angers Hindi Tsunami Victims*, DAYTON DAILY NEWS, Feb. 5, 2005, at E3. *See also* Paul M. Taylor, *Religion and Freedom of Choice*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 170, 178 (John Witte, Jr. & M. Christian Green eds., Oxford University Press 2012) (noting the recommendation by the Special Rapporteur investigating complaints of unethical religious proselytization in the aftermath of the 2004 tsunami in Sri Lanka that, notwithstanding the lack of any evidence of conversion/proselytizing that would have violated human rights protection of religious freedom, religious groups should separate religious work from humanitarian efforts and should respect other religious beliefs).

¹²⁸ GARRY, *supra* note 64, at 152; WITHAM, *supra* note 8, at 189-190. *See* KOSMIN & KEYSAR, *supra* note 8, at 9 (“Ninety-two percent of congregations [in U.S.] offer human services such as homeless shelters, food pantries, soup kitchens, and 90 percent offer health programs.”).

provision purely to the charitable aspect with reduced distraction from evangelism can enhance the quality of the social services provided by the religion,¹²⁹ especially in religiously pluralistic polities.

B. The Threshold of Free Exercise Exemptions

Another hot button issue in the field of law and religion is the granting of religious exemptions to generally applicable laws. In the U.S., this issue manifested in the form of the controversy surrounding the use of strict scrutiny by the U.S. Supreme Court in assessing religions' Free Exercise claims in *Employment Division, Department of Human Resources v. Smith*¹³⁰ and the corresponding attempt to restore the prior test via the Religious Freedom Restoration Act.¹³¹ In Europe, the tension is reflected in the delicate balancing test between the underlying interests and the restrictions of religious practices in the assessment of article

¹²⁹ See Rebecca Sager, *Faith-Based Social Services: Saving the Body or the Soul? A Research Note*, 50(1) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 201, 204-208 (2011) (Noting how religious charitable soup kitchens that have underlying objectives of conversions are more likely to include religious messages and religious participations – at times mandatory – in the provision of food to homeless people, which are viewed negatively by clients who have differing religious views. Though the survey also found that soup kitchens with more religious content also have better food, which is highly valued by clients); Lynn, *supra* note 106, at 59 (“Another benefit is that governmental influence, for example in child welfare, has arguably reduced discrimination, overuse of institutionalization, religious intolerance, and indifference to permanence. In welfare-related services, governmental influence tends toward the promotion of equity and service based on need and disadvantage.”); Leiby, *supra* note 100, at 530-531 (noting how charitable organizations motivated primarily by the “ethical side of religion – practical helping rather than sectarian proselytizing” were more inclusive during the provisions of social services).

¹³⁰ 494 U.S. 872 (1990).

¹³¹ Bette Novit Evans, *The Constitutions of Religious Pluralism in the United States*, in RELIGION AND DEMOCRACY IN THE UNITED STATES: DANGER OF OPPORTUNITY? 114, 132-133 (Alan Wolfe & Ira Katznelson eds., Princeton University Press 2010); EDWIN S. GAUSTAD, PROCLAIM LIBERTY THROUGHOUT ALL THE LAND 130-134 (Oxford University Press 2003); John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 535, 537-538 (James T. Richardson ed., Kluwer Academic 2004).

9(2) of the European Convention of Human Rights.¹³² The enhanced difficulty for religions to judicially seek exemptions from generally applicable law that might otherwise impede religiously-motivated actions typically attracts strong claims of violation of religious liberty by academics.¹³³

Under Law & Religious Market perspective, as argued elsewhere,¹³⁴ the issue is less about religious liberty than the extent to which political competition is integral to religious competition. A low level of Free Exercise protection means that religions wanting to avoid the burdens and restrictions arising from the generally applicable laws must actively make their cases in the political process.¹³⁵ Under this regime, religions that lack the capability for political mobilization or are theologically averse toward political participation will inevitably be disproportionately burdened by otherwise neutral laws even absent active

¹³² Elizabeth Wicks, *Religion, Law and Medicine: Legislating on Birth and Death in a Christian State*, 17 MED. L. REV. (U.K.) 410, 411 (2009); Gibson, *supra* note 2, at 661-679; Malcolm D. Evans, *Religion, Law and Human Rights: Locating the Debate*, in LAW AND RELIGION IN CONTEMPORARY SOCIETY 177, 185 (Peter W. Edge & Graham Harvey eds., Ashgate 2000).

¹³³ Conkle, *supra* note 93, at 1755-1756; JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 32 (Lexington Books 2002); GAUSTAD, *supra* note 131, at 130; GREENAWALT, *supra* note 80, at 77-85; Wybraniec & Finke, *supra* note 131, at 536-538; Sam Marcossion, *The Special Status of Religion Under the First Amendment ... and What it Means for Gay Rights and Antidiscrimination Laws*, in MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 135, 144-145 (Gordon A. Babst et al. eds., Lexington Books 2009); PHILLIP E. HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN THE FREEDOM OF CONSCIENCE IN AMERICA 139-140 (Altamira Press 2004).

¹³⁴ Chen, *supra* note 14, at 227-228.

¹³⁵ Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1820-1823 (2011); Robinson, *supra* note 79, at 165-166; Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1411 (2003).

discrimination. These religions will either suffer competitive disadvantages in the religious market or be pressured to politically organize themselves.¹³⁶

Depending on one's conception of religion, this outcome is not necessarily undesirable. Kathleen M. Sullivan identified four different accounts of religious organizations that underpinned the different normative interpretations of the Religion Clauses: quasi-government, private associations, discrete and insular minorities, and ordinary interest groups, with those who consider religions ordinary interest groups (such as Justice Antonin Scalia) asserting that religions "may participate freely in politics but should expect no particular judicial solicitude from courts interpreting either of the Religion Clauses."¹³⁷ However, Law & Religious Market perspective stresses that the issue is not only whether the conception is factually accurate in religiously pluralistic societies where different religions are likely to diverge in their theological outlooks toward political participation and church-state relationship but that the resulting constitutional approach to the Religion Clauses will be a self-fulfilling prophecy. If the legal regime expects religions to fend for themselves in the political arena just like any other interest groups, then religions

¹³⁶ For example, the lack of organization among the Taoist community in Singapore meant that, despite their significant numbers, they do not have a single religious holiday unlike the other religious communities: *Taoists Agree on Common Festive Day*, STRAITS TIMES (Sing.), Apr. 30, 2001, at H3; JOSEPH B. TAMNEY & RIAZ HASSAN, RELIGIOUS SWITCHING IN SINGAPORE: A STUDY OF RELIGIOUS MOBILITY 5 (Select Books 1987). Attempts to organize was not particularly effective, and arguably run counter to their religious tenet of "wu wuei" ('action through inaction): *The Way of the Future*, STRAITS TIMES (Sing.), June 19, 2010. Spiritists in Argentine experienced similar dynamics arising from the religiously-inspired reluctance of political participation: Frigerio & Wyncarczyk, *supra* note 83, at 471.

¹³⁷ Sullivan, *supra* note 135, at 1409-1411. See also Kevin Pybas, *Religious Groups in Free Society*, 86 U. DET. MERCY L. REV. 685 (2009) (endorsing the descriptive aspect of the taxonomy but disagreed with Kathleen M. Sullivan's analysis which Kevin Pybas argued prioritized social stability over religious liberty).

under this legal regime will converge toward the functional characteristics of ordinary interest groups (i.e., organized for political lobbying).¹³⁸

An interesting issue does arise in which a lower standard of Free Exercise protection is coupled with direct restrictions on the political activities of religions. It is commonly observed that, regardless the merits of the political participation and/or public involvement of religions, it is impossible to confine religion entirely within the private realm.¹³⁹ Nonetheless, there are various legal mechanisms to restrict the political activities of religious organizations and consequently reduce the impact of political competitiveness on religious competition.¹⁴⁰ The most obvious example would be the U.S. Establishment Clause, which, by theoretically removing the ability of selected religious organizations to utilize state machinery to advance their religious interests and causes, was originally conceived to prevent the majority religion from translating its political dominance into perpetual religious dominance.¹⁴¹ Another example from the U.S. is the first prong of the infamous test in *Lemon v. Kurtzman* that prohibits government actions being motivated by religious

¹³⁸ See also Allan J. Cigler & Mark Joslyn, *Groups, Social Capital and Democratic Orientations*, in *INTEREST GROUP POLITICS* 37, 41 (Burdett A. Loomis & Allan J. Cigler ed., CQ Press 2002) (“The proliferation of interest groups in recent decades has created a universe of associations with narrower and narrower interests, characterized by relatively homogenous – not diverse – membership bodies. Attracting members often requires emphasizing the threat of ‘collective bads’ and demonizing opponents.”).

¹³⁹ Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 *MISS. L.J.* 453, 497 (2009); Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 *U. MEM. L. REV.* 973, 984 (2009); Feldman, *supra* note 123, at 286; Wicks, *supra* note 132, at 413; STRONKS, *supra* note 133, at 36; GARRY, *supra* note 64, at 44; STEPHEN L. CARTER, *GOD’S NAME IN VAIN* 159-160 (Basic Books 2000).

¹⁴⁰ See Chen, *supra* note 14, at 232.

¹⁴¹ Eskridge, *supra* note 123, at 1050; Green, *supra* note 122, at 946-947.

purposes.¹⁴² Tax exemptions for religious organizations may also be conditioned on the prohibition of political campaigning, lobbying and other political activities.¹⁴³ More drastic measures can include direct prohibition of religious leaders'/organizations' participation in the electoral process – such as advocating for particular political parties or candidates.¹⁴⁴

By reducing the salience of political competitiveness in religious competition, these restrictions on the political activities of religions – to varying degrees – help mitigate the pressures/incentive on religions to mobilize politically under a regime of weak Free Exercise protection. However, this move toward parity among religions in the context of different political competitiveness would introduce other forms of pressure on religious competition, in particular, compliance with the political ideology that underpins the legal regime. Religions would be expected to conform to the underlying political ideology as manifested through its various laws, with limited ability to seek recourse via the judiciary and restricted avenues to modify that political ideology through political participation.

This requirement of conformity to the underlying political ideology is less startlingly controversial than it first appears. The functioning of modern nation states inevitably requires the underlying polity, including religious adherents and religious organizations, to subscribe to certain premises as to political process and governance institutions. Even

¹⁴² *Lemon v Kurtzman*, 403 U.S. 602 (1971).

¹⁴³ *E.g.*, §501(c)(3), Internal Revenue Code (U.S.).

¹⁴⁴ *E.g.*, Singapore: Tey Tsun Hang, *Excluding Religion from Politics and Enforcing Religious Harmony – Singapore-Style*, 2008 SING. J. LEGAL STUD. 118, 124-125 (2008); Michael Hill, *The Rehabilitation and Regulation of Religion in Singapore*, in *REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE* 343, 356 (James T. Richardson ed., Kluwer Academic 2004).

religions in Western liberal democracies are legally required to conform to the political ideology of liberal democracy – such as respect for the religious freedom of others, the upholding of the rule of law, adherence to the notion of equality, and respect for the democratic process.¹⁴⁵ Religions whose doctrines and practices violate these norms – whether a “traditional” view of gender roles,¹⁴⁶ hostile attitude toward non-believers,¹⁴⁷ or regressive conception of racial relationships¹⁴⁸ – are normatively extorted and at times legally compelled¹⁴⁹ to modify their practices. That religions are typically not barred from

¹⁴⁵ Liviatan, *supra* note 5, at 79-80; Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2771 (2009); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198-202 (1992); Firth, *supra* note 4, at 584. See Gunnar Shirbekk, *Science and Religion?*, in SACRED SCIENCE? 25 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012) (arguing that religions are “faced with the same needs for epistemic and institutional adaptation to the positive and necessary demands for an enlightened modernity” that includes respect of scientific knowledge, self-critical recognition of religious plurality and differentiation between legal system and religion); Michael J. Reiss, *What Should be the Role of Religion in Science Education and Bioethics?*, in SACRED SCIENCE? 127, 135-136 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012). See also Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 169-173 (2011) (noting how liberal democracy imposes constraints on religions, and arguing for allowing religious arguments in political discourse since liberal democracy should provide the opportunity for change in institution). For discussion about the substantive content of liberal democracy, see Robert Audi, *Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 197, 198-204 (2005); Paul B. Stephan III, *The Fall – Understanding the Collapse of the Soviet System*, 29 SUFFOLK U. L. REV. 17, 28-29 (1995).

¹⁴⁶ E.g., DENNIS C. MUELLER, *REASON, RELIGION & DEMOCRACY* 386-390 (Cambridge University Press 2009) (discussing examples of opposition to women’s rights from Catholic Church, conservative Christianity and Islam).

¹⁴⁷ E.g., Aryn Baker, *Unholy Choices: Christians in the Middle East Find Themselves at a Crossroads in Region Rocked by War and Revolution*, 183(15) TIME 18, 20-21 (2014) (discussing the existence plight faced by Christians amidst rise of religious extremism).

¹⁴⁸ E.g., BRETT A. BARNETT, *UNTANGLING THE WEB OF HATE: ARE ONLINE “HATE SITES” DESERVING OF FIRST AMENDMENT PROTECTION?* 140 (Cambria Press 2007) (“[Orange County Assembly of Christ] defended its anti-Semitism by pointing to verses from the Christian Bible and the expulsion of Jews from various countries throughout history.”); Shiffrin, *supra* note 4, at 40 (“The Ku Klux Klan has spread a reign of terror designed to produce a White ‘Christian’ America.”).

¹⁴⁹ E.g., *Brown v. Dade Christian School, Inc.*, 556 F.2d 310 (5th Cir. 1977) (compelling the school to racially desegregate despite claims of religious beliefs against desegregation). See Simen Andersen Øyen, *The Religious Belief in Rationality, Science and Democracy*, in SACRED SCIENCE? 65, 69 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012) (observing the incompatibility of indigenous values – such as gender hierarchy - and practices – collective rights in land - with the modern

political engagement in liberal democracy is often scant consolation for unpopular and/or minority religions that lack political influence to shape the prevailing values,¹⁵⁰ such as Catholics in the nineteenth-century U.S.¹⁵¹ or Muslims in modern Europe.¹⁵²

The manifestation of this pressure is contingent on the specific circumstances of the polity. In most cases, emerging and/or minority religions are likely to face the brunt of these legal restrictions compared with religions that are well-established and/or in the majority. Even in circumstances where existing politically dominant religions are unable to actively co-opt the state to enhance their religious competitiveness, the residual legacy effect means that the existing political ideology usually largely reflects the religious worldview of the prevailing religions in the polity.¹⁵³ However, where the peculiar circumstances of state

Western democratic institutions); Gey, *supra* note 123, at 1028 (example of where “the Ku Klu Klan may run for political office, but they may not enact into law their most cherished discriminatory policies.”).

¹⁵⁰ Liviatan, *supra* note 5, at 86 (“As long as unpopular religious minorities are presumed threatening to the dominant cultural mainstream, they remain external to the arena of legal possibilities. As outsiders, they are often barred from obtaining judicial protection and the support of the greater political system.”).

¹⁵¹ Feldman, *supra* note 123, at 287-288; Shiffrin, *supra* note 4, at 71; David Robertson, *Neutrality Between Religions or Neutrality Between Religion and Non-religion*, in *LAW AND RELIGION IN CONTEMPORARY SOCIETY* 31, 35 (Peter W. Edge & Graham Harvey eds., Ashgate 2000).

¹⁵² Liviatan, *supra* note 5, at 64-70. Certain schools in UK that have predominantly Muslim students populations were investigated and punished with special measures by the government education department for alleged problematic practices such as “cancellation of Christmas events, the curtailment of exchange visits with nearby churches, the decision not to have a tombola or raffles at the school fete”: Richard Adams & Shiv Malik, *Birmingham Schools: Dossier of Evidence Finally Laid Bare After Leaks and Allegations*, *THE GUARDIAN* (U.K.), June 10, 2014, at 6; John Bingham, *More Schools Investigated in Muslim “Takeover Plot” Inquiry*, *THE DAILY TELEGRAPH* (U.K.), Apr. 15, 2014, at 1. The Prime Minister has advocated the acceptance “British values” (e.g., values such “belief in freedom, tolerance of others, accepting personal and social responsibility, respecting and upholding the rule of law”) in response, while one legislator goes to urge UK Muslims to accept that they have to accept UK sense of citizenship values that are Christian-based: Simon Walters, *Cameron Tell UK Muslims: Be More British*, *THE MAIL* (U.K.), June 15, 2014, at 1; Matthew Holehouse, *Accept Christian Values, Muslims Told*, *THE DAILY TELEGRAPH* (U.K.), Apr. 22, 2014, at 2.

¹⁵³ Liviatan, *supra* note 5, at 54-55. See Wendy Cadge, Peggy Levitt & David Smilde, *De-Centering and Re-Centering: Rethinking Concepts and Methods in the Sociological Study of Religion*, 50(3) *JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION* 437, 439 (2011) (“The Christian (read Protestant) values and organizational forms that pervade many aspects of U.S. political and civic life”)

formation are less religiously inspired,¹⁵⁴ or more commonly, where the society has become less religious and more secular in worldview,¹⁵⁵ the competitive pressure will be toward privatization and non-exclusivity of religion. Religions that are comprehensive and all-encompassing in worldview have greater numbers of potential interaction points where religious values/practices are in conflict with the laws and underlying political ideology, while exclusive claims to truth by religions perceive contradictory political values as a grave threat.¹⁵⁶ In contrast, religions that are privatized have much less arenas where secular ideology is viewed as intruding, while religions that are non-exclusive are theologically less challenged by the existence of alternative inconsistent worldviews, whether political or religious.¹⁵⁷

¹⁵⁴ For example, by the pre- and post-revolution Chinese Nationalist government has an ambivalent and even at times marginally hostile view of religion: Xie Donghui, *Linglei Fawenhua Jiedu: Minguo Shiqi de Zongjiao yu Fajilue* [Reading of Non-mainstream Legal Culture: Religion and Legal Discourse in Republican Time of China], 33 (11) DONG YUE TRIBUNE 177, 177-179 & 181 (2012); MA LI, *Xiandai Xing Shiyu Xia Minguo Zhengfu Zongjiao Zhengce Yanjiu* [A STUDY OF RELIGIOUS POLICIES OF THE REPUBLICAN GOVERNMENT IN A MODERN VIEW] 41-57 (China Social Sciences Publishing House 2010).

¹⁵⁵ E.g., Zdeněk R. Nešpor, *Religious Processes in Contemporary Czech Society*, 40 (3) CZECH SOCIOLOGICAL REV. 277, 282-287 (2004) (examining the privatization of religion in Czech Republic in the context of the general secularization trend in Western Europe); Grace Davie, *Europe: The Exception That Proves the Rule?* in *THE DESECULARIZATION OF THE WORLD RESURGENT RELIGION AND WORLD POLITICS* 65 (Peter L. Berger ed al. William B. Eerdmans Publishing Company 1999) (discussing the societal attitudes towards religion in Europe).

¹⁵⁶ Liviatan, *supra* note 5, at 79-80.

¹⁵⁷ See also JOHN HICK, *THE NEW FRONTIER OF RELIGION AND SCIENCE: RELIGIOUS EXPERIENCE, NEUROSCIENCE AND THE TRANSCENDENT* 135 (Palgrave Macmillan 2006) (observing that the issue of tensions and contradictions with science and other secular perspectives is much less pronounced for Buddhism and Hinduism).

C. Key Takeaways

Two major takeaways emerge from the above case study application of Law & Religious Market perspective. The first and most important takeaway is the value of an approach to law and religion that ventures beyond the conventional dichotomous approach to religious liberty. Instead of focusing on the restrictions/impediments on religions that are affected by the law, the religious analytical perspective makes a holistic assessment of the impact of the law on religious competition among all the participants in the religious market. This inquiry reveals how apparent restrictions on religious practices can foster religious competition that promotes normatively desirable characteristics among religions. As demonstrated in the case study of religious content regulation in social service provision, a blanket prohibition of religious content in all social service provision can promote a religious outlook that is less oriented toward the political and economic aspects. Tellingly, the seeming absence of restrictions does not render the state neutral among religions because this absence itself affirms that the dimension of religious competition affected by the restriction is a component that should be included in religious competition. The inquiry under Law & Religious Market perspective cannot be dispensed with even if the preferred governance approach for the selected law and religion issue is minimal state intervention.

The second takeaway relates to the intertwined dynamics among the different facets of religious competition and different legal rules. As illustrated in the case study of Free Exercise, the redistribution and incentives created by the choice of a certain legal regime (e.g., political competition under a weak Free Exercise regime) can be mitigated by the institution of other legal rules (i.e., restrictions on political participation by religions), which

itself introduces new competitive pressure on the religious market (i.e., privatization and non-exclusivity). Similarly, the functional aspect of religions – such as the provision of social services – will be affected by the restrictions, or absence thereof, on the extent to which religious content may be incorporated. Beyond avoiding a dichotomous view on religious liberty, Law & Religious Market perspective stresses that while it is often prudent to use the law/policy in dispute as the starting point, a holistic assessment of the law in the context of the overall legal regime will be necessary to effectively appreciate the impact of the religious market.

IV. BROADER IMPLICATIONS: THE CASE FOR RELIGIOUS NON-NEUTRALITY

Law & Religious Market perspective has broad implications for the current debate among the three prevailing normative theories on church-state religion: the accommodationist, substantive-neutrality, and strict separationist. Seemingly polar opposites are the accommodationist and strict separationist: the accommodationist approach arguing that as long as the state does not give preference to any particular religion, religion as a whole can and should be given preferential treatment over non-religious beliefs,¹⁵⁸ while the strict separationist approach disavowing any state support for and/or association with

¹⁵⁸ GARRY, *supra* note 64, at 69; STRONKS, *supra* note 133, at 36; Richard M. Esenberg, *Must God be Dead or Irrelevant: Drawing a Circle that Lets Me in*, 18 WM. & MARY BILL RTS. J. 1, 14 (2009); FOWLER ET AL., *supra* note 17, at 237-240; Douglas W. Kmiec, *America's "Culture War" – The Sinister Denial of Virtue and Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 201 (1993).

religions.¹⁵⁹ Substantive neutrality occupies the apparent middle ground by not giving religions and religion any preferential or detrimental treatment.¹⁶⁰

The normative debate is at its core about whether religion is good or bad and whether this characterization is uniquely religious.¹⁶¹ Underpinning the accommodationist approach is an assumption of the unique social values of religion, typically accompanied by a glowing account of the merits and positive contributions of religions and religious organizations.¹⁶² In this regard, the strict separationist approach actually overlaps considerably with the accommodationist approach – for it assumes that religion is unique, albeit in the negative aspect.¹⁶³ Substantive neutrality, in contrast, does not perceive the merits and harms associated with religions as particular to the religions.¹⁶⁴

Factually, the assumption underlying substantive neutrality is the closest to the existing reality. Given the diverse variety of religions that are recognized under the current

¹⁵⁹ STRONKS, *supra* note 133, at 35-36; FOWLER ET AL., *supra* note 17, at 235-236. *See also* Raday, *supra* note 145 (arguing that law and policy should not impose religious values).

¹⁶⁰ Esenberg, *supra* note 158, at 15; Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54-67 (2007); Pybas, *supra* note 137, at 719-720; Robertson, *supra* note 151, at 46; Marshall, *supra* note 2, at 194-202.

¹⁶¹ *See* Cecile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20(1) LEGAL THEORY 52-57 (2014) (disserting the assumptions that underpins the egalitarian theories of religious freedom); Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 MISS. C. L. REV. 67, 68-83 (2007) (discussing how the underlying perception of religion, including the relationship between religion and the society, affects one's view on the preferred interpretation of the Religious Clauses).

¹⁶² Richard M. senberg, *supra* note 158, at 14; Koppelman, *supra* note 4, at 1844; GARRY, *supra* note 64, at 150-159.

¹⁶³ Such view typically relies on parades of horrors in the name of religions, such as gender discrimination and oppression of other religious minorities, to justify a more restricted role of religions in the public sphere: *see* MUELLER, *supra* note 146, at 386-390; Raday, *supra* note 145, at 2776-2798; Feldman, *supra* note 123, at 288-293 (2009).

¹⁶⁴ *See* Marshall, *supra* note 2, at 205-207 (refuting the argument that religion is innately distinctively from non-religions as a justification for special treatment of religion under the law).

legal and normative discourse, any attempt to tease out characteristics that are universal of all religions is likely to be futile. The attempt to forge a basic substantive definition of religion is itself fraught with difficulty, with many uncontroversial well-established religions not possessing the seemingly common characteristics of “religion as an ethical code” (e.g., Shintoism), “includ[ing] worship” (e.g., Hinduism and Buddhism), and/or “includ[ing] a Supreme Being.” (e.g., Hinduism and Buddhism).¹⁶⁵ While the lack of cases regarding the definition of religion in the U.S. Supreme Court has prompted commentators to note that the issue is not a problem,¹⁶⁶ Scott C. Idleman is likely correct in attributing this reluctance to the conundrum faced by the Court, which is wary of the far-reaching implications arising from a broad definition of religion while recognizing that a narrow interpretation facilitates feasible operation at the expense of running contrary to contemporary understandings of religion.¹⁶⁷

This factual inaccuracy of the assumed uniqueness of religions under the accommodationist approach means that the application of the approach must rely on a selective definition of religion to rationalize the state support for religions in general, leading to frequent allegations that the accommodationist approach will effectively establish a

¹⁶⁵ STRONKS, *supra* note 133, at 113. *C.f.*, Koppelman, *supra* note 3, at 1122 (“The question of what ‘religion’ means is theoretically intractable, but, as a practical matter, barely relevant. We know it when we see it. And when we see it, we treat it as something good.”).

¹⁶⁶ Koppelman, *supra* note 4, at 1907; STEVEN GOLDBERG, BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE 109 (Stanford University Press 2008); LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 14 (Hart Press 2008).

¹⁶⁷ Idleman, *supra* note 161, at 73-81. *See also* Celia G. Kenny, *Law and the Art of Defining Religion*, 16(1) ECCLESIASTICAL L. J. 18, 23-27 (2014) (discussing this tension of definition in the U.K. courts).

dominant religion/religions in the society.¹⁶⁸ This dynamic can be illustrated via state support for school prayer under the No Child Left Behind Act in the U.S.¹⁶⁹ In light of the diverse natures of prayer in different religions, the ostensible availability of prayer to all the religions does not prevent these prayer activities from being less meaningful and useful to those religions whose religious worship does not conform to the monotheistic conception of prayer envisaged under the law or whose religious worship requires designated time outside of the prescribed time period.¹⁷⁰ This phenomenon is certainly not new. The laudable advocacy of religious liberty and freedom of conscience by John Locke was premised on the exclusion of Muslims and atheists as beneficiaries of these rights.¹⁷¹ In historical England, accommodation of Protestant dissenters under the Act of Toleration continued to exclude Catholics, Jews and atheists from the protection of religious liberty and equality.¹⁷² In the same vein, the strict separationist approach in rejecting all state support for and engagement with religions must be premised on treating secular beliefs as non-religious, even if those secular beliefs address “fundamental questions”/“ultimate values” and

¹⁶⁸ Smith, *supra* note 120, at 890-893; Shiffrin, *supra* note 4, at 70; Robertson, *supra* note 151, at 35. See Chen, *supra* note 14, at 225-229.

¹⁶⁹ JOHN C. BLAKEMAN, *THE BIBLE IN THE PARK: RELIGIOUS EXPRESSION, PUBLIC FORUMS, AND FEDERAL DISTRICT COURTS* 240 (University of Akron Press 2005).

¹⁷⁰ Chen, *supra* note 14, at 228; Wright, *supra* note 5, at 888-889. See also Cadge, Levitt & Smilde, *supra* note 153, at 445-446 (discussing how the well-intentioned drive to promote interfaith relations on U.S. college campus is “organized among groups expected to fit easily categorized packages, similar to Christian denominations” that may be incompatible with the style or forms of non-Judeo Christian religious practices).

¹⁷¹ Koppelman, *supra* note 4, at 1859; SAMANTHA KNIGHTS, *FREEDOM OF RELIGION, MINORITIES, AND THE LAW* 9 (Oxford University Press 2007); A. JAMES REICHLEY, *FAITH IN POLITICS* 91 (Brookings Institution Press 2002).

¹⁷² SANDBERG, *supra* note 70, at 26-28; KNIGHTS, *supra* note 171, at 3; Andrew Lynch, *The Constitutional Significance of the Church of England*, in *LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW* 168, 178-179 (Peter Radan et al. eds., Routledge 2005).

arguably perform functions akin to religious beliefs.¹⁷³ Unsurprisingly, the strict separationist approach has been criticized as promoting/endorsing a secular ideology.¹⁷⁴

Substantive neutrality seeks to avoid this shortcoming by abandoning the special status for religions; however, the purported neutrality toward religions and secular beliefs remains elusive. Beyond the cliché of imposing the value of “value neutrality”,¹⁷⁵ a state-funded education system that sought to be “value-neutral” would be contrary to an exclusive worldview, whether religious or non-religious.¹⁷⁶ A state subsidy program that is open to both secular and religious charitable organizations would still invariably make normative value judgments when formulating the conditions/criteria by which the funding would be allocated.¹⁷⁷

¹⁷³ Lori G. Beaman, *Defining Religion: The Promise and the Peril of Legal Interpretation*, in LAW AND RELIGIOUS PLURALISM IN CANADA 192, 193 (Richard Moon ed., UBC Press 2008); GOLDBERG, *supra* note 166, at 111-113; STRONKS, *supra* note 133, at 11 (Lexington Books 2002). *See also* GREENAWALT, *supra* note 80, at 129-156 (Distinguishing between “single factor approaches” and “multifactor approaches”, and advocating a multifactor analogical approach); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1136-1137 (2011) (endorsing Kent Greenawalt’s approach).

¹⁷⁴ Pybas, *supra* note 137, at 714; Wicks, *supra* note 132, at 418; STRONKS, *supra* note 133, at 41; William Cobern, *The Competing Influence of Secularism and Religion on Science Education in a Secular Society*, in SECULARISM & SCIENCE IN THE 21ST CENTURY 89, 93-94 (Ariela Keysar & Barry A. Kosmin eds., ISSSC 2008); Patrick M. Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 500 (2004); REICHLEY, *supra* note 171, at 158.

¹⁷⁵ STRONKS, *supra* note 133, at 60; M. H. Ogilvie, *Between Liberté and Égalité: Religion and the State in Canada*, in LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 134, 160 (Peter Radan et al. eds., Routledge 2005). *See also* Wright, *supra* note 5, at 889 (“Emphasizing non-divisiveness is itself divisive.”).

¹⁷⁶ Michel Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religion Revival?*, 30 CARDOZO L. REV. 2333, 2348 (2009); Ogilvie, *supra* note 175, at 149; STRONKS, *supra* note 133, at 60.

¹⁷⁷ Lynn, *supra* note 106, at 59 & 69; Laura S. Underkuffler, *Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society* 27 (4) OXFORD REVIEW OF EDUCATION 577, 586-587 (2001).

Under Law & Religious Market perspective, the fundamental issue lies in the flawed attempt to achieve neutrality that is central in all three approaches, whether among religions or between religions and secular beliefs. Proponents of each approach rightly criticize the lack of true neutrality under the other approaches but proceed to propose an alternative conception of neutrality that falls prey to the very same critique of non-neutrality. This striving for neutrality is understandable, for state neutrality can be a source of legitimacy and moral authority in a pluralistic polity.¹⁷⁸ However, the fixation on neutrality and the aversion to consciously interfering with or modifying religious practices merely obscure the inevitable and profound impact of law (and other state instruments) in selecting winners and losers through determining the rules of religious competition.

Tellingly, this problem appears rather unique to religion. That the design of the rules of competition has a substantial and often decisive influence on the emerging winner has been widely recognized in a host of settings. Campaign finance restrictions, or the lack thereof, materially affect how electoral competitions are funded and conducted, which in turn contributes to the rise and fall of different political actors.¹⁷⁹ In the commercial realm, it is recognized that the lack of effective regulation may simply result in companies engaging

¹⁷⁸ Koppelman, *supra* note 3, at 1117-1124; Kenneth Paul Tan, *Pragmatic Secularism, Civil Religion, and Political Legitimacy in Singapore*, in *STATE AND SECULARISM: PERSPECTIVES FROM ASIA* 339, 341 (Michael Heng Siam-Heng & Ten Chin Liew eds., World Scientific Publishing 2010); Brian M. Awe, *Religion in the EU: Using Modified Public Reason to Define European Human Rights*, 10 *GERMAN L.J.* 1439, 1442 n.15 (2009). *Cf.*, Smith, *supra* note 120, at 895 (“[The term “neutrality”] stamps with the air of public legitimacy the underlying political theory that it serves to conceal, whether the theory is classical liberalism, communitarianism, revised liberalism, de facto establishmentarianism, or some intermediate position.”).

¹⁷⁹ Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: the Resurgence of Economic Theory*, 18 *VA. J. SOC. POL’Y & L.* 395, 414-448 (2011); Hellman, *supra* note 77; Michael Bailey, *The Two Sides of Money in Politics: A Synthesis and Framework*, 3 *ELECTION L.J.* 653 (2004).

in child labor, degeneration of the environment, and production of other social externalities ousting competitors who do not participate in these “cost-saving” measures.¹⁸⁰ Even in the realm of legal education, whether be it the performing/requiring of peer-review for journal articles that qualify for tenure/promotion¹⁸¹ or the inclusion of standardized test scores in school admissions (e.g., SAT, LSAT),¹⁸² the choice of criteria that determine success will inevitably affect the characteristics of the resulting pool of scholars and students. On a basic level, Karl Polanyi and subsequent like-minded scholars have challenged the myths of a self-regulating market free of government intervention as an unattainable utopian given how market is always the dynamic construct of politics, law and culture, with the resulting advocacy for the need for greater democratic institution to check the government power shaping the market.¹⁸³ These basic insights are unfortunately lost for religion, whose

¹⁸⁰ Rafeal Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT’L L.J. 345, 399-400 (2009); Gerard Brooks, *Environmental Economics and International Trade: An Adaptive Approach*, 5 GEO. INT’L ENVTL. L. REV. 277, 284-290 (1993). See Elizabeth R. DeSombre, *Environmental Harm as Economic Subsidy: New Perspectives on the Feasibility of Trade Sanctions for Environmental Protection*, 4(1) INTERNATIONAL JOURNAL OF PEACE STUDIES 47, 51-52 (1999) (arguing that products which involve environmental harm in their product should be considered to have receive an economic subsidy which distort international commercial competition and which would justify imposition of trade sanctions); Curlo, *supra* note 12, at 44-46 (discussing how the information function of the tort regime can remedy the competitive advantages of firms making unsafe products that are not easy to detect by consumers).

¹⁸¹ For recent discussions and empirical works on this issue, see Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 70-74 (2013); Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS 309, 309-311 (2013).

¹⁸² See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 (4) CAL. L. REV. 1055, 1119-1124 (2002) (empirically demonstrating that LSAT is far from a racially- and ethnically- neutral reflection of educational achievement); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102(6) COLUM L. REV. 1696, 1699-1700 (2002) (observing the limitations of the written bar exam, and arguing for a more holistic performance-based admission test that evaluate the currently unassessed skill sets integral to the legal profession).

¹⁸³ KARL POLANYI, *THE GREAT TRANSFORMATION* 68-76 & 192-200 (Beacon Press 1957). For recent contemporaneous scholarship, see FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI’S CRITIQUE* 28-43 (Harvard University Press 2014) (challenging the contemporaneous allusion to free market in current political and public discourse); KARL POLANYI,

seemingly incomprehensible mystical qualities and relentless plurality contribute to the tendency to treat religion as *sui generis* and less susceptible to the usual rules of human intervention.

There are increased academic recognition of the fallacy of neutrality in the Religion Clauses, with scholars rejecting neutrality as the normative objective typically identified the different underlying political theories and the need to make conscious choices about them. For example, L. Scott Smith observes that the neutrality reflected in various U.S. court cases reflects four possible political typologies classified based on the level of intervention and the underlying assumptions about religions.¹⁸⁴ R. George Wright, after refuting possible alternative uses of neutrality that are based on the functionality of an otherwise flawed theory, concludes that formulation of other separate policy objectives would be necessary to provide coherent guidance to the Religion Clauses.¹⁸⁵ Ofrit Liviatan, comparatively examining the disconnect between the ideals and actual application of religious neutrality in Europe and the U.S., emphasizes how political preferences in the context of enduring cultural conflicts are enshrined by the supposedly liberal, neutral law.¹⁸⁶ Gidon Sapir observes that the “state cannot remain neutral among competing positions since any state activity involves – implicitly and at times even explicitly – cultural and moral positions” and thus argues for

GLOBALIZATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS (Christian Joerges & Josef Falke eds., Hart 2011) (an edited collection examining the implications on transnational market).

¹⁸⁴ Smith, *supra* note 120, at 843-847.

¹⁸⁵ Wright, *supra* note 5, at 895-905.

¹⁸⁶ Liviatan, *supra* note 5, at 85-88.

explicit allowance of religions to “participate in the majoritarian political-cultural process” with the ability to decide the winners and losers.¹⁸⁷

This is certainly a welcomed trend. Nonetheless, Law & Religious Market perspective adds to this discourse by arguing for a simultaneously narrower and broader approach. The narrow aspect relates to the issue of divinity. The law (and the state) can and arguably should avoid making normative claims about the divinity of religions on the spiritual and theological level (i.e., whether there is a God(s) and which God(s) is the true one). However, on the broader level, the impossibility of genuine neutrality beyond purely supernatural functions means that the state must not only choose among the competing political theories in relation to church and state but must further confront the issue of the normatively desired characteristics of religions and/or equivalent belief systems that the state should work toward. As evidenced by the competitive pressures generated by laws (or the absence thereof), the state will invariably be involved in the functional aspects of religions – the manifestations of the religion in practices and worldview (e.g., participation in the economic and political spheres or exclusivity in religious outlook).¹⁸⁸ This capability

¹⁸⁷ Gidon Sapir, *Religion and State: A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 634-639 (1999).

¹⁸⁸ Depending on the rules of religious competition, supposedly non-exclusive religion (like Buddhism) can manifest intolerant exclusivist attitudes and actions towards other religions. For report/discussion of the development of radical Buddhism in Myanmar and Sri Lanka where the states are unable or unwilling to rein in on inter-religious violence, see James Crabtree & Michael Peel, *Rise of Militant Buddhist Groups Triggers International Concern*, FINANCIAL TIMES (U.K.), Dec. 29, 2014, at 3; Hannah Beech, *When Buddhists God Bad*, 182(1) TIME 14, 16-21 (2013).

of law and state must be recognized and embraced, for only then can the issue of the normative role that law should play be earnestly confronted.¹⁸⁹

V. CONCLUSION

Notwithstanding the currently discredited predictions of the demise of religion¹⁹⁰ or the continued unfulfilled hope of one true religion taking hold over particular jurisdiction if not the entire world,¹⁹¹ religions – all of their diverse manifestations and their complex internal and external competitive dynamics – are here to stay. Neutrality is not an option in setting the rules of religious competition, the fruits of which are displayed via the ever-changing fortunes of the different religions over different times and across different regions. Through determination of the contours of religious competition, the law will – consciously or unintentionally – affect the emergence, growth, decline, and/or resurgence of the different religions. Law & Religious Market perspective presented in this Article provides a starting

¹⁸⁹ See also Gerald F. Cavanagh & Mark R. Bandsuchy, *Virtue as a Benchmark for Spirituality in Business*, 38 JOURNAL OF BUSINESS ETHNICS 109 (2002) (Correctly recognizing that spirituality – aka religion – in the workplace can have both the potential benefits such as bringing greater integrity and job satisfaction while introducing potential harms such as divisiveness and distrust, the authors propose normative solution of business managers supporting a variety of spiritualities in the workgroup, but limiting the support only to those spiritualities (regardless of spiritual/theological origin) that promote good moral behavior and good character.)

¹⁹⁰ For example, the secularization thesis – now discredited – that predicted the disappearance of religions with the advancement of scientific knowledge: Peter L. Berger, *The Desecularisation of the World: A Global Overview*, in THE DESECULARIZATION OF THE WORLD RESURGENT RELIGION AND WORLD POLITICS 1, 3-9 (Peter L. Berger ed., William B. Eerdmans Publishing Company 1999); Philpott, *supra* note 44, at 81-83; Iannaccone, *supra* note 6, at 1468-1472.

¹⁹¹ E.g., Andrew E. Barnes, 'Religious Insults': *Christian Critiques of Islam and the Government in Colonial Northern Nigeria*, 34 JOURNAL OF RELIGION IN AFRICA 62, 62 & 73 (2004) (discussing how the Christian evangelists operating in Africa during the colonial era were at one time optimistic of establishing Christianity to the exclusion of Islam in Africa).

point for the difficult but necessary normative considerations as to what sort of religious competition – and what sort of religious winner – will and should the law foster.¹⁹²

¹⁹² See also KARL POLANYI, *supra* note 183, at 258B (“Uncomplaining acceptance of the reality of society gives man indomitable courage and strength to remove all removable injustice and unfreedom. As long as he is true to his task of creating more abundant freedom for all, he need not fear that either power or planning will turn against him and destroy the freedom he is building by their instrumentality.”).

CHAPTER 5:

LAW & RELIGIOUS MARKET IN CHINA

I. INTRODUCTION

As the most populous nation under authoritarian rule by an ostensibly atheistic regime, the People's Republic of China ["PRC"] unsurprisingly has received copious scholarly attention with regard to its status of religious liberty. The first category of literature focuses on persecutions, typically of Tibetan Buddhists, Uighur Muslims, Christians, and the Chinese religious sect of Falun Gong, and decries the violation of religious liberty in China.¹ The second category of literature examines the domineering state control over religious affairs and the risks that this state interference poses to religious freedom, typically without an outright condemnation of the

¹ E.g., Richard Klein, *An Analysis of China's Human Rights Policies in Tibet: China's Complicance with the Mandates of International Law Regarding Civil and Political Rights*, 18 ILSA J. INT'L & COMP. L. 115 (2011) (discussing the various forms of human rights violation in Tibet); Evan Mascagni, *The Legal Process of Cultural Genocide: Chinese Destruction of Tibetan Culture v. U.S. Destruction of Native American Culture*, U. D.C. L. REV. 241 (2011) (comparing the Tibetan situation with the destruction of Native American culture in the U.S.); Lawrence Cox, *Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China's Internal Migrant Workers*, 8 ASIAN-PAC. L. & POL'Y J. 370 (2007) (highlighting how China's law and policy are incompatible with Christian doctrines, and thus infringing of their religious freedom); Ellen S. Reinstein, *Turn the Other Cheek, or Demand an Eye for an Eye? Religious Persecution in China and Western Response*, 20 CONN. J. INT'L L. 1 (2004) (discussing religious oppression of those four groups in the context of appropriate Western responses); Sonia M. Kim, *Old World Religious Persecution in a New World Setting: How International Relationships Can Affect China's Treatment Towards Its Religious People*, 2 RUGERS J. L. & RELIGION 2 (2000) (discussing how the international community should respond to the religious persecution in China); Eleftherios Georgiou, *China: Where the Failure to Adhere to Domestic Political Laws Often Leads to Religious Oppression*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 355, 374-382 (2000) (religious oppressions of religious activities not sanctioned by the state). See also Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: the Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1 (2004) (discussing the concept of cult under Chinese legal regime in the context of suppression of Falun Gong). See also Li Heping et al., *The Supremacy of the Constitution, and Freedom of Religion*, in A SWORD AND A SHIELD: CHINA'S HUMAN RIGHTS LAWYERS 70 (China Human Rights Lawyers Concern Group 2009) (a court defense plea on behalf of Falun Gong practitioners in China explaining the violation of constitutional provision on religious liberty).

deprivation of religious freedom² and at times reflecting a positive outlook moving forward.³ Notwithstanding their differing assessment of the current stage of religious liberty in China, both categories of literature retain the conventional premise of the dominant legal discourse in law and religion – namely, that the state should be neutral between religions (or, for some, between religion and non-religion)⁴ and that the state should avoid consciously shaping religious practices and doctrines.⁵ Reflecting the conventional normative prescription that impediments to religious practices must be kept to a minimum and only when sufficiently justified by public interests,⁶ the

² E.g., Ping Xiong, *Freedom of Religion in China Under the Current Legal Framework and Foreign Religious Bodies*, 2013 B.Y.U. L. REV. 605, 610-616 (2013) (examining both the general regulatory framework and the particular control over foreign religious bodies); Zhang Qianfan & Zhu Yingping, *Religious Freedom and Its Legal Restrictions in China*, 2011 B.Y.U. L. REV. 783 (2011) (discussing the various legal restrictions on religious activities); Eric R. Carlson, *China's New Regulations on Religion: A Small Step, Not a Great Leap, Forward*, 2005 B.Y.U. L. REV. 747, 765-781 (2005) (discussing the continued maintenance of strong state control over religion under the Regulations on Religious Affairs); Kim-Kwong Chan, *China's Socioeconomic Changes and the Implications for the Religion-State Dynamic in China*, 2004 B.Y.U. L. REV. 325 (2004) (discussing the evolution of China's church-state policy in light of globalization under the WTO accession). See also Zeng Chuanhui, *Coalition and Hegemony: Religions' Role in the Progress of Modernization in Reformed China*, 2011 B.Y.U. L. REV. 759, 759 (2011) (discussing the control and coopting of religion in governance).

³ E.g., James W. Tong, *The New Religious Policy in China: Catching up with Systemic Reforms*, 50 (5) ASIAN SURVEY 859, 884-887 (2010) (arguing that the recent reform in China's policies on religion, together with general reform towards more limited and accountable government, represent a "clear" "overall direction" towards religious liberty for the polity, notwithstanding the acknowledged continued heavy state interference of the state); Chen Huanzhong, *A Brief Overview of Law and Religion in the People's Republic of China*, 2003 B.Y.U. L. REV. 465 (2003) (a descriptive overview of law and religion that is ended with a positive future outlook consequential of greater international exposure of China's younger generation).

⁴ E.g., RESEARCH DIVISION, OVERVIEW OF THE COURT'S CASE-LAW ON FREEDOM OF RELIGION 6-7 (Council of Europe/European Courts of Human Rights 2013) (discussing the principles of equality and plurality established by the jurisprudence from the European Courts of Human Rights); Nicholas Gibson, *Faith in the Courts: Religious Dress and Human Rights*, 2007 CAMBRIDGE L. J. 657, 681-682 & 686-691 (2007) (noting the appropriate assumption over secularism in assessing religious liberty cases); William Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 INDIANA L.J. 193, 194-202 (2000) (discussing the development of the equality principle underpinning U.S. First Amendment jurisprudence).

⁵ E.g., Andrew Koppelman, *And I Don't Care What It Is*, 39 PEPP. L. REV. 1115, 1120 (2013); RESEARCH DIVISION, *supra* note 4, at 19 ("Save for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."); Marshall, *supra* note 4, at 208 (this would violate both the Establishment and Free Exercise clause of the U.S. First Amendment).

⁶ Ofrit Liviatan, *Faith in the Law: The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities*, 34 B.C. INT'L & COMP. L. REV. 53, 58-59 (2011); ROBIN C A WHITE & CLARE OVERY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 315-332 & 409-418 (Oxford University Press 5th ed. 2010); Gibson, *supra* note 4, at 662-679; ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 595-621 (Oxford

general consensus in the current literature on law and religion in China is the desirability of legal reforms to reduce state control and the regulation of religions.⁷

Departing from this conventional approach, this Article utilizes Law & Religious Market perspective to present an alternative factual and normative account of law and religion in China. Law & Religious Market is an emerging critical perspective that draws on the religious economic model, an interdisciplinary approach to religion⁸ that analyzes the success and failure of religion through individual decisions on religious matters by religious adherents and religious leaders.⁹

University Press 2nd ed. 2007). See also R. George Wright, *Can We Make Sense of "Neutrality" in the Religion Cases?: Seven Rescue Attempts and a Viable Alternative*, 65 SMU L. REV. 877, 906-908 (2012) (proposing, as an alternative to religious neutrality, an approach akin to the Takings doctrines that allows better illumination of the factors affecting the burdens on religions and the underlying justifications).

⁷ E.g., Guobin Zhu, *Prosecuting "Evil Cults": A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China*, 32 HUM. RTS. Q. 471, 498-501 (2010); ZHIEBIN XIE, RELIGIOUS DIVERSITY AND PUBLIC RELIGION IN CHINA 87-90 & 94-103 (Ashgate 2006); Carlson, *supra* note 2, at 765-767. See Cox, *supra* note 1, at 427-430 (prescribing a list of specific and "immediate" reform measures, including adopt a nondiscriminatory and board definition of religion, abolishing the requirement of registration, grant full access to non-local religious communities etc.); Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 16(3) HUMAN RIGHTS QUARTERLY 455, 483-489 (1994) (discussing the incompatibility of China's regime on religious freedom with relevant international law, and advocating reform to bring it up to international law standard). See also Richard Klein, *An Analysis of China's Human Rights Policies in Tibet: China's Compliance with the Mandates of International Law Regarding Civil and Political Rights*, 18 ILSA J. INT'L & COMP. L. 115, 120-135 & 164-165 (2011) (urging greater united action by human rights advocates to remedy the violation of religious freedom, among other alleged human rights violations, by the Chinese government in Tibet); Reinstein, *supra* note 1, at 22-36 (comparing the advantages and disadvantages of the different international responses in promoting religious freedom in China, ranging from punitive state sanctions and international and domestic legal responses, to collaborative dialogues and business influence); Georgiou, *supra* note 1, at 383-385 (proposing the setting up of a regional human rights courts to police religious persecutions in China).

⁸ What religion is, of course, is itself a controversial issue with no general consensus, starting with whether a theistic component is necessary: see Jianlin Chen, *Deconstructing the Religious Free Market*, 3 J. L., RELIG. & STATE 1, 17-19 (2014). In addition, from an individual perspective, there are different dimensions of religion as a belief, an identity and/or manifested behaviors. There is also the difficult issue of what constitutes a religion in the evaluation of whether a law/policy is beneficial or harmful to the religion – should it be evaluated at the level of the religious organization, the religious community, the individual adherents, and/or the "true" understanding of the religion? For the purpose of this Article, religion is defined as the commonly accepted world religions (e.g., Christianity, Islam, Buddhism) or belief systems that include a theistic component. This is to facilitate critical discussion about the role of secular beliefs in the religious market. Religion is also considered primarily a community identity (whether self- or externally identified), with the recognition that intra-religious competition can be equally considered inter-religious competition (the latter is a more narrowly defined community identifier) without affecting the analytical and normative thrust of Law & Religious Market perspective presented in this Article.

⁹ Keith N. Hylton et al., *Church and State: An Economic Analysis*, 13(2) AMERICAN LAW AND ECONOMICS REVIEW 402, 407 (2011); Evelyn Bush, *Explaining Religious Market Failure: A Gendered Critique of the Religious Economies*

Building on this insight on the interactive and competitive dynamics within and between different religions, Law & Religious Market perspective highlights the profound effects that law and other state instruments exert on the contours of religious competition and the consequential winners and losers in the religious market.¹⁰ Thus, instead of a dichotomous assessment of whether religious liberty is violated, Law & Religious Market perspective focuses on identifying the pressures and incentives created by law (or often as importantly, the absence of law) on different religions to fully appreciate the nature of religious competition that would be produced under the legal regime.¹¹ This approach can generate new and surprising insights, such as the finding that religious competition that is conducive to the emergence of religions associated with normatively desirable characteristics may actually be fostered by restrictions on religious practices that otherwise attract instinctive criticisms.¹² More fundamentally, Law & Religious Market perspective reorients the discourse from the prevailing emphasis of state neutrality and state minimalism in the realm of religion to confront headlong the difficult but inevitable question of the nature of religious competition – and the consequential religious winner – that the law should foster.

The application of Law & Religious Market perspective to China enables this Article to make both factual and normative contributions. Factually, this Article presents the precise nature

Model, 28(3) SOCIOLOGICAL THEORY 304, 305-306 (2010); YUNFENG LU, THE TRANSFORMATION OF YIGUAN DAO IN TAIWAN: ADAPTING TO A CHANGING RELIGIOUS ECONOMY 7 (Lexington Books 2008); R. ANDREW CHESNUT, COMPETITIVE SPIRITS: LATIN AMERICA'S NEW RELIGIOUS ECONOMY 6-8 (Oxford University Press 2003); RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION 27-41 (University of California Press 2000); Laurence R. Iannaccone, *Introduction to the Economics of Religion*, 36 JOURNAL OF ECONOMIC LITERATURE 1465, 1489-1492 (1998). *See infra* II.

¹⁰ Jianli Chen, *Law & Religious Market*, _____. *See infra* II.

¹¹ *Infra* II.

¹² Jianlin Chen, *Money and Power in Religious Competition: A Critique of the Religious Free Market*, 3(2) OXFORD J. L. & RELIG. 212, 223-224 & 220- 223 (2014). *See infra* V & VI.

of religious competition as envisaged by the current legal regime in China. Instead of the typical mere identification of how religious practices are restricted in China – and there are undoubtedly many restrictions – this novel factual account engages in the holistic assessment of the treatment of religion across the entire spectrum of laws and regulation beyond those national laws and regulations that specifically address religion. This assessment teases out the overall impact of the legal regime in all the different facets of religious competition through the examination of *all* references to “religion” and related terms in Chinese laws, national regulations and policy documents by using keyword searches via the most widely used and comprehensive online database of primary Chinese legal materials (i.e., Chinalawinfo.com) and supplementing the analysis with copious amounts of academic literature from law and other social science disciplines. The religious market that emerges from this analysis reveals a more nuanced regulatory landscape in which harmonious, apolitical and indigenized religious competition is envisaged and promoted.¹³

Normatively, this Article makes two arguments. First, the existing conscious differentiation of religions under the Chinese regulatory regime that is primarily based on the practical impact on society rather than the theological content is actually the proper inquiry that should be preserved in any legal reform. The fact that the current normative assessment by the Chinese government of what constitute a “desirable” or “acceptable” practical impact is admittedly clouded by compulsive concerns over the maintenance of political control should not distract from

¹³ *Infra* III.E.

the necessity and desirability of recognizing that law will shape the characteristics of religions, whether intentionally or unintentionally and whether actively or in absentia.

Second, several of the current restrictions on religious activities, such as those that limit the impact of economic, political and international advantages on religious competition, are normatively useful to moderate religious competition in the context of China. This remains true even if the religious free market – however it is defined¹⁴ – is the normative benchmark for reform. Akin to the way that gradual market reform in China is comparatively superior to the drastic legal changes experienced in post-Soviet Russia,¹⁵ the transitional nature of China’s religious market, which is still recovering from the wanton destruction of all things religious during the decade-long Cultural Revolution,¹⁶ necessitates a carefully calibrated pace of market liberalization.

This Article is organized into seven Parts. Part II sets out a concise disposition of the Law & Religious Market theoretical framework. Part III presents a factual description of the current

¹⁴ See *infra* II. See also generally Chen, *supra* note 8.

¹⁵ Theodore P. Gerber & Michael Hout, *More Shock than Therapy: market Transition, Employment, and income in Russia, 1991-1995*, 104(1) AMERICAN JOURNAL OF SOCIOLOGY 1, 35-38 (1998) (empirically demonstrating the limited success of Russia market reform, and noting the distinction from China’s gradual – and more circumstances appropriate – market transition); Victor Nee & Rebecca Mathews, *Market Transition and Societal Transformation in Reforming State Socialism*, 22 ANNUAL REVIEW OF SOCIOLOGY 401, 417-419 (1996) (discussing the emerging literature on how the piecemeal partial reform in China is unexpectedly more successful than the “big-bang” approach in Eastern Europe, and the takeaway implication on the desirability of not radically destroying/replacing existing institution). For general discussion on the misconceived radical market transition in Eastern Europe, see Jan Svejnar, *Transition Economies: Performance and Challenges*, 16(1) THE JOURNAL OF ECONOMIC PERSPECTIVE 3, 4-7 & 23-25 (2002); Peter Rutland, *Mission Impossible? The IMF and the Failure of the Market Transition in Russia*, 25 REVIEW OF INTERNATIONAL STUDIES 183, 185-188 & 190-191 (1999). See also Andrew Kohut & Richard Wike, *Pew Research center Presents...Buyer’s Remorse? Twenty Years after the Post-Soviet Transition*, 31(4) HARVARD INTERNATIONAL REVIEW 66 (2010) (discussing the 2009 opinion polls in former Communist European countries that revealed how the population generally feel that life was better since the fall of Communist two decades ago, but disagree as to whether ordinary citizens have benefited from the transition).

¹⁶ Liu Peng, Brett G. Scharffs & Carl Hollan, *Constitutional, Legislative and Regulatory Change Regarding Religion in China*, in LAW, RELIGION, CONSTITUTION 247, 251 (W. Cole Durham et al. eds., Ashgate 2013); XIE, *supra* note 7, at 82; Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, THE SOCIOLOGICAL QUARTERLY 93, 100 (2006). For a concise introduction of the Cultural Revolution, see generally RICHARD CURT KRAUS, THE CULTURAL REVOLUTION: A VERY SHORT INTRODUCTION (Oxford University Press 2012).

religious market in China, starting with the religious composition of the polity and then examining how the different dimensions of religious competition are shaped by the various laws and state instruments in China. Part IV discusses how the basic thrust of the Chinese regulatory approach to religion that compels religious doctrines and practices to adapt to the prevailing political conception of societal interest is actually less controversial than immediately apparent and is, in any event, consistent with the normative insight of Law & Religious Market perspective. Part V explains how the moderated religious competition that limits the role of direct proselytization, monetary wealth, and overseas support in religious competition can, in principle, be normatively justified as interim measures in light of China's transitional religious market. Part VI analyzes the unique dilemma posed by any attempt to reform the political aspect of religious competition, whereby the circumstances in which political competition among religions is the most harmful are the same circumstances in which restrictions are less forthcoming from a public choice perspective. Part VII concludes.

II. LAW & RELIGIOUS MARKET

The premise of Law & Religious Market perspective is the religious economic model. The religious economic model is an interdisciplinary fusion of sociology and economics¹⁷ to explain the success and failure of religions in any given society by treating religious adherents as individual

¹⁷ Hylton et al., *supra* note 9, at 407; Bush, *supra* note 9, at 305-306; LU, *supra* note 9, at 7; CHESNUT, *supra* note 9, at 6-8; STARK & FINKE, *supra* note 9, at 27-41; Iannaccone, *supra* note 9, at 1489-1492.

actors who make rational choices¹⁸ of utility maximization¹⁹ when deciding on the type of religion and the level of religious participation.²⁰ Religion that manages to retain its existing followers while attracting new adherents will grow and prosper, whereas the converse is true. Notably, although religious leaders and/or suppliers of religious faith are – like religious adherents – rational actors who react to “market conditions” and the ever-changing preference of the society in which they operate,²¹ it is important to appreciate that this convergence is not necessarily the result of a conscious desire to appeal to the masses. Attractive religious doctrines/practices may be formulated based on genuine and sincere theological reasoning without any consideration of their mass appeal. In addition, whereas sociological research under the religious economic model has found that many religious conversions are based on rather mundane and pragmatic reasons that are not directly connected with the spiritual or sacred realm,²² the religious economic model does not

¹⁸ The religious economic model, like modern economic perspective, does not assume perfect rationality and recognizes the various cognitive bias such as limited information and status quo preference: Shaun P. Hargreaves Heap, *What is the Meaning of Behavioural Economics?*, 37 CAMBRIDGE JOURNAL OF ECONOMICS 985, 986-989 (2013). See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 20 (Aspen, 8th ed., 2011) (“the economic concept of rationality is objective rather than subjective; it is the ability and inclination to use instrumental reasoning to get on in life and thus does not assume consciousness (rational decisions are often intuitive)”).

¹⁹ Utility, even under conventional economic literature, is not restricted to monetary and/or pragmatic factors, and does include intangible considerations ranging from superficial emotional enjoyment and peer/social pressure to deep spiritual fulfillment and sincere fear of divine retribution: Bush, *supra* note 9, at 313; Fengang Yang, *Lost in the Market, Saved at McDonald's: Conversion to Christianity in Urban China*, 44(4) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 423, 433-434 (2005); Christopher R. Duncan, *Untangling Conversion: Religious Change and Identity Among the Forest Tobelo of Indonesia*, 42(4) ETHNOLOGY 307, 316-319 (2003); Joseph B. Tamney, *A Study of Spiritual Involvement*, 27(3) SOCIOLOGICAL ANALYSIS 146, 150-154 (1966).

²⁰ LARRY WITHAM, *MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION* 12-13 (Oxford University Press 2010); ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* 28-31 (Cambridge University Press 2008); BARRY A. KOSMIN & ARIELA KEYSAR, *RELIGION IN A FREE MARKET* 4-5 (Paramount Market Publishing 2006); STARK & FINKE, *supra* note 9, at 85-87.

²¹ See also Bush, *supra* note 9, at 319-321 (using the case study of the prevalence of patriarchal religions despite the higher religiosity of women to argue for more emphasis to the supply side aspect of the religious economy). There are numerous sociological studies of religions that evidenced this interactive convergence of the core characteristics of different religious practices and the prevailing consumer preferences: Chen, *supra* note 12, at 217-219.

²² KOSMIN & KEYSAR, *supra* note 20, at 4 (noting Adam Smith's argument that the successful religion in a free market of religion may simply be “led by popular and bold, though perhaps stupid and ignorant enthusiasts.”); R. LAURENCE MOORE, *SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE* 10 (Oxford University Press 1994)

exclude the possibility of divine intervention, whether directly (for example, the seemingly sudden and miraculous “conversion” of an individual)²³ or indirectly (for example, by providing financial wealth, electoral success, military victory and/or other material factors that increase religious competitiveness).²⁴ The religious economic model synthesizes the interactive dynamic between the choices of each religious adherent and religious leaders to generate the key analytical insight of how religious competition determines the winners and losers in the religious market.²⁵

The Law & Religious Market perspective is built on this insight by engaging in a factual and normative inquiry as to the role of law in shaping religious competition. The relevant inquiry can be amply illustrated by – perhaps with a little irony – examining the nature of religious competition shorn of any legal constraints on religious competition. The starting point is that the resulting religious competition will not be the idealized portrayal of religious free competition represented by the oft-quoted statement from the U.S. Supreme Court case of *Zorach v. Clauson*

(“When religion began to sell itself in earnest, it contributed to a process of democratization that did not yield impressive enlightenment.”).

²³ Yang, *supra* note 19, at 433-434.

²⁴ E.g., Mark Ellis, *Miracles in Israel: Hand of God Diverts Incoming missile, Mysterious Fog Helps Troops*, Aug. 20, 2014, available at <http://blog.godreports.com/2014/08/miracles-in-israel-hand-of-god-diverts-incoming-missile-mysterious-fog-helps-troops/> (last visited Apr. 23, 2015) (attributing divine intervention for Israel military success against Hamas); Jennifer Graber, *Mighty Upheaval on the Minnesota Frontier: Violence, War, and Death in Dakota and Missionary Christianity*, 80(1) CHURCH HISTORY 76, 94 (2011) (“Military defeat and the hangings became symbols of the Dakotas’ spiritual failure and the superior power of the Christian God” for the nineteenth century Christian missionaries seeking to convert imprisoned Dakotas); Yunfeng Lu, Byron Johnson & Rodney Stark, *Deregulation and the Religious Market in Taiwan: A Research Note*, 49(1) THE SOCIOLOGICAL QUARTERLY 139, 143 (2008) (discussing the perceived efficacy in granting the wishes of worshippers is an important factor in the success of Chinese folk temples in Taiwan); Yang, *supra* note 19, at 435 (noting how some converted Christians in China attributed good business fortune on the personal level to how “Christians were elected and blessed by God.”).

²⁵ The relevant religious market – and the religious competitor – is contingent on the prevailing socioeconomic conditions and level of communication technology. The connectivity under the modern globalized era has dramatically increases the religious choices available to an individual beyond one’s geographical confines. For discussions on the effect on globalization and religion in the modern era, see Robert Wuthnow & Stephen Offutt, *Transnational Religious Connections*, 69(2) SOCIOLOGY OF RELIGION 209, 213-217 (2008); Jean-Francois Mayer, *Conflicts over Proselytism: An Overview and Comparative Perspective*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 35, 37-38 (Rosalind I.J. Hackett ed., Equinox 2008); Chan, *supra* note 2, at 336.

of “each [religious group] flourish[ing] according to the zeal of its adherents and the appeal of its dogma.”²⁶ Rather, violence and warfare are likely to take central stage, as evidenced by the way that military conquest, imperial expansion and colonization were frequent drivers of religious growth and expansion in pre-modern history.²⁷ Ranks of religious adherents can be rapidly bolstered by coerced faith conversion under threat of death or worse.²⁸ Religious competitors can be eliminated from the religious market by the physical extermination, whether intended or as the inevitable consequence of conquest, of religious adherents.²⁹ The emergence of human rights protecting religious liberty and international law denouncing religious violence³⁰ helped to constrain the prevalence of such brutal forms of religious competition. Nonetheless, regions remain where an effective vacuum of law and order means that military might can still be

²⁶ 343 U.S. 306, 313 (1952) (“We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.”). This phrase has subsequently become a popular reference phrase by academics: e.g., Jorge O. Elorza, *Secularism and the Constitution: Can Government be Too Secular?*, 72 U. PITT L. REV. 53, 56 n.4 (2010); Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT’L L. REV. 1187, 1204 n.80 (2005); Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 400 (2004); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 544 (1991); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 896-897 (1991); Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533, 555-556 (1982).

²⁷ NINIAN SMART, *THE WORLD’S RELIGIONS: OLD TRADITIONS AND MODERN TRANSFORMATIONS* 490-499 & 532-548 (Cambridge University Press 1989). See RICHARD BLAKE, *RELIGION IN THE BRITISH NAVY, 1815-1879*, at 156-186 (Boydell Press 2014) (discussing the range of passive and active manner in which the British navy was involved in the Christian mission and the spread of Christian influence in the British colonies).

²⁸ Gordon A. Christenson, “*Liberty of the Exercise of Religion*”, 21 TRANSNAT’L L. & CONTEMP. PROBS. 721, 728-729 (2013); Monica Duffy Toft, *Getting Religion?: The Puzzling Case of Islam and Civil War*, 31(4) INTERNATIONAL SECURITY 97, 106-107 (2007). See also Graber, *supra* note 24, at 93-99 (While there was no explicit compulsion of conversion, imprisonments and executions in the aftermath of military defeat provide a conducive environment for Christian missionaries evangelizing to Dakota prisoners on the message of how their current predicaments is evidence of the superior of the Christian God.).

²⁹ For example, the disastrous reduction of native Latin America population by the Spanish Conquistadores through de facto slavery and diseases: SMART, *supra* note 27, at 533. See M. D. Litonjua, *Religious Zealotry and Political Violence in Christianity and Islam*, 35(2) INTERNATIONAL REVIEW OF MODERN SOCIOLOGY 307, 312-313 (2009) (discussing how paganism and heresies in medieval Christendom are wiped out by extermination).

³⁰ H. Victor Condé, *Protection of Religious Freedom Under International Humanitarian Law and International Human Rights Law in Times of Armed Conflict*, 5 U.C. DAVIS J. INT’L L. & POL’Y 95, 102-107 (1999); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 20, 22-27 (1948).

instrumental in deciding the outcome of the religious markets, with unfortunate examples including the Taliban in Afghanistan³¹ and ISIS in Iraq.³²

The above account of the military dimension of religious competition highlights the two ways in which law can factually shape the resulting religious market, notwithstanding the complication posed by religion as credence goods.³³ The first is redistribution. Religions that enjoy superior military prowess – whether due to extraneous reasons or a militarily compatible theological outlook³⁴ – are deprived of this relatively effective and efficient avenue of religious market domination under the current regime that prohibits religious violence. Conversely, pacifist religions that are theologically averse to physical violence and/or religions that are militarily inferior are the key beneficiaries.

The second is the pressure/incentive created by the legal regime for existing religions. Where there are no effective legal constraints on religious violence, all religions – regardless of their initial theological outlooks – must inevitably confront the implications arising from military

³¹ Amalendu Misra, *The Taliban, Radical Islam and Afghanistan*, 23 (3) THIRD WORLD QUARTERLY 577, 580-585 (2002); PETER MARSDEN, *THE TALIBAN: WAR AND RELIGION IN AFGHANISTAN* 57-66 (Zed Books Ltd. 2002).

³² See Michael Crowley, *Iraq's Eternal War*, 183(25) TIME 18, 20-23 (2014) (discussing the religious conflicts between Sunnis and Shi'ites that drives the current civil war in Iraq, and noting the military success of the Islamic State of Iraq and Greater Syria establishes its version of Sunni Islam in the conquered areas to the exclusion of Shi'ite Islam and other religions that previously are practiced in those region).

³³ Credence goods are products and services where the perceived credibility of the supplier is of particular salience given how the quality of the products and services cannot be assessed even after consumption, and religion is perhaps to ultimate credence good: WITHAM, *supra* note 20, at 61-62; GILL, *supra* note 20, at 41-42. Suffering induced by adverse state actions can actually increase the perceived credibility of the religion, and may counteract the negative incentive to leave the sanctioned religion: WITHAM, *supra* note 20, at 61-65; STARK & FINKE, *supra* note 9, at 106-113.

³⁴ Toft, *supra* note 28, at 111 (“Although military analysts in the West were apt to credit high technology (specifically, U.S.-made Stinger surface-to-air missiles) with the Soviet defeat in Afghanistan, to Islam's more conservative clerics and to many Muslims, jihad's external aspect was responsible for defeating a nuclear-armed, advanced-industrial Christian state.”). See also Misra, *supra* note 31, at 584 -585 (discussing how the radical interpretation of jihad by the Taliban theologically requires followers to “arm themselves against all non-Muslim forces competing to undermine them”).

competition. Religions may alter their initial theological aversion toward military actions to respond in kind.³⁵ Staunchly pacifist religions that steadfastly refuse to retaliate are left with elimination by extermination or exit (fleeing).³⁶ In all three scenarios, the resulting religious market will consist primarily of religions that are at least partially geared toward military competition. Conversely, physical and military prowess are not the predominant characteristics associated with religions in most modern societies, evidencing the redistributive and incentivizing effects of the legal exclusion of military competition.³⁷

Thus, the inquiry under Law & Religious Market perspective focuses on the nature of the competition fostered by relevant laws and regulations. In particular, the inquiry involves the identification of the benefits and burdens implicated in different religions³⁸ and the further differentiation of the characteristics of the religions that contribute to the identified redistributive consequences. This inquiry can set the stage for a normative analysis of whether those characteristics are desirable and should be fostered. This inquiry represents a departure beyond the conventional dichotomous approach to law and religion that assesses whether specific religious

³⁵ *E.g.*, JOHN C. SUPER & BRIANE K. TURLEY, RELIGIONS IN WORLD HISTORY: THE PERSISTENCE OF IMPERIAL COMMUNION 103-106 (Routledge 2006) (discussing the evolution of Christian position on war, in particular the concept of just war); LARRY JOHN ESPOSITO & DARELL FASCHING & TODD LEWIS, WORLD RELIGIONS TODAY 68-70 (Oxford University Press 2002) (discussing the violence against Jews and Muslims by Crusaders and its then underlying theological premises). *See also* Graber, *supra* note 24, at 102-106 (discussing how the conversion success arising from military victory prompted missionaries working on Native Americans to alter their previous “commitments about evangelical persuasion to support of arrangements that forcefully imposed Christian doctrine and structures of American civilization”).

³⁶ *See* Harold S. Bender, *The Pacifism of the Sixteenth Century Anabaptists*, 24(2) CHURCH HISTORY 119, 119-122 (1955) (discussing the Anabaptists’ insistence of non-violence in an era of bloody religious conflicts, and the consequent large scale martyrdom).

³⁷ Koppelman, *supra* note 5, at 1129 (noting how the criminal law prohibition of violence has render religious that “violently crush nonadherents” to be “nearly extinct in the contemporary United States.”).

³⁸ *C.f.*, GILL, *supra* note 20, at 10-11 (arguing for approaching religious liberty as government regulation so as to allow co-opting of the cost-benefit analysis from studies on regulatory policy to illuminate who win and who lose in any given government policy and to avoids a dichotomous view on religious liberty, but allows for multidimensional appreciation of the religious liberty).

practices have been impeded and whether the impediments are sufficiently justified by legitimate public interest.³⁹ Law & Religious Market perspective recognizes that selected restrictions on religious practices can foster religious competition that is conducive to the success of religions with normatively desirable characteristics among religions, as starkly but illustratively demonstrated by the evolution of relevant laws in relation to religious violence. In addition, Law & Religious Market perspective rejects the normative and factual premise of state neutrality between religions (or, for some, between religion and non-religion)⁴⁰ and the aversion to the state consciously shaping religious practices and doctrines.⁴¹ Law, or the absence thereof, will always generate corresponding competitive pressures that will shape winners and losers in the religious market. Regardless of inclination, the state will inevitably influence the manifestations of religion in practices and worldview. Law & Religious Market perspective advocates for the recognition and embrace of this profound capability of the law to begin the difficult but necessary normative considerations regarding what sort of religious competition – and what sort of religious winner – the law will and should foster.⁴²

³⁹ *Supra* note 6 and accompany text.

⁴⁰ *Supra* note 4 and accompany text.

⁴¹ *Supra* note 5 and accompany text.

⁴² See also Gerald F. Cavanagh & Mark R. Bandsuchy, *Virtue as a Benchmark for Spirituality in Business*, 38 JOURNAL OF BUSINESS ETHNICS 109 (2002) (Correctly recognizing that spirituality – aka religion – in the workplace can have both the potential benefits such as bringing greater integrity and job satisfaction while introducing potential harms such as divisiveness and distrust, the authors propose normative solution of business managers supporting a variety of spiritualities in the workgroup, but limiting the support only to those spiritualities (regardless of spiritual/theological origin) that promote good moral behavior and good character.)

III. REGULATING CHINA’S RELIGIOUS MARKET

Building on the factual and normative analytical perspectives generated by the Law & Religious Market perspective, this Part begins the case study of China by setting out the contours of the religious market that is currently envisaged by the Chinese legal regime. This Part first briefly describes the historical backdrop and current religious landscape before examining the status of secular beliefs vis-à-vis religions, inter-religious competitions and the different dimensions of religious competition.

A. *Religious Landscape*

Religion has always been an indispensable feature in human history, and China is no exception. From the shamanism and mythology practiced by early human society to the establishment of Confucianism – with syncretic elements from Daoism and Buddhism – as the dominant worldview in Imperial China and punctuated throughout by the importation of world religions from abroad and the emergence of new religious movements at home, the religious history of China is diverse and complex.⁴³ Indeed, any attempted account of the religious history of China is complicated by the fact that the very definition of “religion” is a western concept that does not translate well into the corresponding Chinese understanding. Instead of treating other “religions” as mutually exclusive communities, the relationship of the three Chinese “religions” – Confucianism, Taoism and Buddhism – is a more subtle dynamic of accommodation that allows

⁴³ For a concise summary of historical developments of religions in China, see ZHAO JIANMIN, RELIGION AND LAW IN CHINA 18-23 (Wolters Kluwer 2014); Francesca Tarocco, *Pluralism and its Discontents: Buddhism and Proselytizing in Modern China*, in PROSELYTIZING AND THE LIMITS OF RELIGIOUS PLURALISM IN CONTEMPORARY ASIA 237, 238-242 (Juliana Finucane & R. Michael Feener eds., Springer 2014); Mou Zhongjian & Zhang Jian, *Zhongguo zongjiao tongshi* 中国宗教通史 (下) [History of Chinese Religion (II)] 914-917 (China Social Science Publishing 2007).

the possibility of simultaneous “religious identity,”⁴⁴ even if accommodation traces its origin to a historical political compromise between these three factions driven by unsavory power struggles⁴⁵ and competitive tension continues between these three religions.⁴⁶

The establishment of the P.R.C. by the ostensibly atheistic Chinese Communist Party [“CCP”] represents a significant turn of events for religions in China,⁴⁷ but it was the Cultural Revolution that radically recalibrated the religious landscape. During the tumultuous decade spanning the mid-sixties to the mid-seventies, there was the attempted eradication of religion – one of the perceived undesirable social elements of the old world that had to be purged – through widespread persecution of religious adherents and the destruction of religious premises.⁴⁸

⁴⁴ JINGHAO ZHOU, CHINESE VS. WESTERN PERSPECTIVES: UNDERSTANDING CONTEMPORARY CHINA 134-136 (Lexington Books 2014); Tarocco, *supra* note 43, at 241-242; Anna Xiao Dong Sun, *The Fate of Confucianism as a Religion in Socialist China: Controversies and Paradoxes*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 229, 232-233 & 236 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005). See DAI LIYONG, *Xiandaixing yu zhongguo zongjiao 现代性与中国宗教* [MODERNITY AND CHINESE RELIGION] 279-287 (China Social Science Publishing 2008) (From the perspective of Confucianism, a person can be a Buddhist or Taoist while being part of Confucianism since Buddhism and Taoism addresses concerns of a different realm. For Buddhism and Taoism, the permissibility of “believing” without “belonging” allows their adherents to continue to participate in Confucianism).

⁴⁵ DAI, *supra* note 44, at 281-287 (Confucianism achieved supremacy via endorsement by the state, but its lack of comprehensiveness, together with the harmonizing adjustment made by Buddhism and Taoism vis-à-vis Confucianism, allows for accommodation of Buddhism and Taoism).

⁴⁶ *Id.*, at 291-296.

⁴⁷ Tarocco, *supra* note 43, at 244-245; Pitman B. Potter, *Belief in Control: Regulation of Religion in China*, 174 CHINA QUARTELY 317, 317-318 (2003). See Duan Dezhi, *Xingzhongguo zongjiao gongzuo shi 新中国宗教工作史* [A History of Religion Work in New China] 1-98 (Remin Publisher 2013) (discussing the religious policies in China from 1949 to 1957). *C.f.*, PETER VAN DER VEER, *THE MODERN SPIRIT OF ASIA: THE SPIRITUAL AND THE SECULAR IN CHINA AND INDIA* 140-167 (Princeton University Press 2014) (comparative discussing the secularism project in China that demonstrated at times strong anti-religious sentiment even in pre-Communist China); PAUL R. KATZ, *RELIGION IN CHINA & ITS MODERN FATE* 18-43 (Brandeis University Press 2014) (discussing the temple destruction campaigns by the Nationalist government during the 1930s and 1940s).

⁴⁸ Liu, Scharffs & Hollan, *supra* note 16, at 251; XIE, *supra* note 7, at 82; Yang, *supra* note 16, at 100; KRAUS, *supra* note 16.

Since then, China has witnessed a rapid increase in religious adherents among the population,⁴⁹ though estimated figures vary widely given that a large portion of religious activities are conducted in the grey area of the law where local government officials turn a blind eye without officially condoning such activities, leading to a lack of information in this regard.⁵⁰ The Pew Research Center's 2012 global survey of religious groups found that as of 2010, the estimated distribution of the Chinese population was, in order of proportion, unaffiliated (52.2%), Chinese folk religions (21.9%), Buddhism (18.2%), Christianity (5.1%), Islam (1.8%), and other religions (1%).⁵¹ In contrast, the Chinese Spiritual Life Survey, a large-scale national survey that involved 7021 respondents, found the distribution to be "none" (77.1%), Buddhism (18.1%), Christianity (2.7%), Taoism & Confucianism (0.8%), Islam (0.2%), and other/don't know (1.1%).⁵² Notably, caution is necessary in considering the figures in the Chinese Spiritual Life Survey due to the underreporting of Islam (due to most Muslims in China living in border areas that are not included in the survey) and Christianity (due to perceived concerns over confidentiality that might expose their participation in officially illegal house and underground churches).⁵³ Moreover, many of those who reported no religious affiliation in the survey engaged in activities that are associated with Chinese folk religions and would be considered by religious by Western observers.⁵⁴

⁴⁹ Liu, Scharffs & Hollan, *supra* note 16, at 248; Zeng, *supra* note 2, at 767; Yang, *supra* note 16, at 102-103; Reinstein, *supra* note 1, at 1.

⁵⁰ Peng, Scharffs & Hollan, *supra* note 16, at 258; Yang, *supra* note 16, at 115.

⁵¹ PEW RESEARCH CENTER, THE GLOBAL RELIGIOUS LANDSCAPE 46 (2012).

⁵² ZHAO, *supra* note 43, at 18-21; Rodney Stark & Eric Y. Liu, *People's Republic of China: Religions and Churches Statistical Overview 2011*, 52(3) REVIEW OF RELIGIOUS RESEARCH 282, 286 (2011).

⁵³ Stark & Liu, *supra* note 52, at 285-286).

⁵⁴ Katharina Wenzel-Teuber, *The Religious Awakening in China*, in RELIGIONS & CHRISTIANITY IN TODAY'S CHINA, VOL. II, NO. 3, 29, at 29-30 (2012); Stark & Liu, *supra* note 52, at 284. *See also* XIE, *supra* note 7, at 71-73 (arguing for the prevalence of customary beliefs and practices among China's population).

An important characteristic of the Chinese religious landscape is the association of certain religions with particular minority ethnicities. These include well-known ethnicities such as Tibetan Buddhism for Tibetans and Muslim for Uighurs⁵⁵ to smaller ethnicities such as Theravāda Buddhism for the Dai ethnicity in Southwest China.⁵⁶ Given that the population distribution of minority ethnicities tends to be concentrated in their respective parts of China, this results in local dominance of these religions in those regions, notwithstanding the lack of any dominant religious faith on the national level. Other regional concentrations of religions include the vibrancy of Chinese folk religions in coastal regions in Southeast China⁵⁷ or Christianity in Wenzhou.⁵⁸

B. Competition with Secular Beliefs

Given the proclaimed atheistic ideology of the Chinese Communist regime, it is perhaps appropriate to begin the construction of the Chinese religious market by examining the legally envisaged competitive relationship between religions and secular beliefs. Interestingly, the religious liberty provision in the constitution provides for equal treatment between citizens with religious faiths and those without,⁵⁹ ostensibly indicating that competition between religions and non-religions is to be on a level playing field. The evolution of the constitutional text itself is

⁵⁵ XIE, *supra* note 7, at 72-73.

⁵⁶ Thomas Borchert, *Of Temples and Tourists: The Effects of the Tourist Political Economy on a Minority Buddhist Community in Southwest China*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 87, 97 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005).

⁵⁷ XIE, *supra* note 7, at 72.

⁵⁸ NANLAI CHAO, CONSTRUCTING CHINA'S JERUSALEM, CHRISTIANS, POWERS AND PLACE IN CONTEMPORARY WENZHOU 1-2 (Stanford University Press 2011).

⁵⁹ Art. 36, XIAN FA [Constitution] (2004) (P.R.C.). ("Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.").

significant. Like most constitutions in the world, including those of the Soviet Union,⁶⁰ there is an express provision that purportedly guarantees the religious liberty of citizens in the P.R.C. Constitution. In the first Constitution of 1954, article 88 simply states that “P.R.C. citizens have the freedom of religious belief.”⁶¹ This was expanded to include religious non-belief in the 1975 Constitution, though the 1978 and 1975 Constitutions included additional express stipulations of the “freedom to propagate atheism.”⁶² The religious liberty clause was considerably reworked in 1982 to remove the explicit promotion of atheism,⁶³ and the provision has since remained unchanged through the constitutional amendments in 1993,⁶⁴ 1999⁶⁵ and 2004.⁶⁶

Like many other areas of law in China, the constitutional provision is not always reflected in the state of affairs or even the laws and regulations that should otherwise conform to the Constitution. With the typical admonishment by commentators on how the authoritarian Chinese Communist government promotes and imposes atheistic Marxism as the dominant ideology,⁶⁷ it is

⁶⁰ JOHN N. HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, *THE SOVIET LEGAL SYSTEM* 90-94 & 603 (Oceana Publications 3rd ed. 1977). See Lauren B. Homera & Lawrence A. Uzzellaa, *Federal and Provincial Religious Freedom laws in Russia: A Struggle for and Against Federalism and the Rule of Law*, 12 EMORY INT’L L. REV. 247, 256-258 (1998) (discussing the legal control of religions in the Soviet era).

⁶¹ Art. 88, XIAN FA [Constitution] (1954) (P.R.C.).

⁶² Art. 46, XIAN FA [Constitution] (1978) (P.R.C.); Art. 28 XIAN FA [Constitution] (1975) (P.R.C.).

⁶³ Art. 36, XIAN FA [Constitution] (1982) (P.R.C.). For a concise discussion about the political backdrop surrounding the evolution of the constitutional position of religion, see ZHAO, *supra* note 43, at 25-27.

⁶⁴ Art. 36, XIAN FA [Constitution] (1993) (P.R.C.).

⁶⁵ Art. 36, XIAN FA [Constitution] (1999) (P.R.C.).

⁶⁶ Art. 36, XIAN FA [Constitution] (2004) (P.R.C.).

⁶⁷ Cox, *supra* note 1, at 379-380; Georgiou, *supra* note 1, at 355-356. Others academics, echoes the various official government policy statements, observes that the post-Cultural Revolution CCP adopts a pragmatic accommodation of religions that recognizes that religions will always be practiced by segments of population: ¶1-3, Zongjiao gongzuo zhengce yaodian 宗教工作政策要点 [Key Points on Religious Work Policies] (promulgated by Administration for Religious Affairs, Mar. 22, 1996, effective Mar. 22, 1996) (P. R. C.); Liu, Scharffs & I Hollan, *supra* note 16, at 252-253; Fenggang Yang, *supra* note 16, at, 100-101 (2006). See also Liang Yongjia, *Hierarchical Plurality: State, Religion and Pluralism in Southwest China*, in RELIGIOUS PLURALISM, STATE AND SOCIETY IN ASIA 51, 54-55 (Chiara Formichi ed., Routledge 2014) (discussing how the post-1949 CCP regime makes an explicit claim of transcendence in the form of communist utopia and Chinese nationalistic revival that should be understood in terms of religion).

seemingly obvious that religions as a whole must inevitably be placed at a disadvantage when compared to secular beliefs in general and atheism in particular. Indeed, Chinese laws and policies have always been heavily influenced by the communist/socialist tradition in Chinese law and policies.⁶⁸ In the particular context of religious affairs, the promotion of the official ideology often relies on the euphemism of the “Marxist perspective on religions,”⁶⁹ “state’s/party’s religious policy,”⁷⁰ and/or the compatibility of religion with socialism.⁷¹ At times, the laws and policies can

⁶⁸ *E.g.*, Article 3, *Wuquan fa* 物权法 [Property Law] (promulgated by Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) (P.R.C.) (“In the primary stage of socialism, the state upholds the basic economic system under which the public ownership shall play a dominant role and diversified forms of ownership may develop side by side.”). *See* Preamble, *XIAN FA* [Constitution] (2004) (P.R.C.). *See also* *Shehui zhuyi jingji jianshe de lishi, lilun yu shijian* 社会主义经济建设的历史, 理论与实践 [THE HISTORY, THEORY AND IMPLEMENTATION OF SOCIALIST ECONOMY] 207-357 (Zhang Guanyi ed., China Social Science Publishing 2007) (discussing the ideological evolution of China’s socio-economic model since 1949).

⁶⁹ Art. 26, *Guojia zhongchangqi jiaoyu gaige he fazhan guihua gangyao* (2010-2020 nian) 国家中长期教育改革和规划纲要 (2010 - 2020 年) [Outline of The National Plan on Long-Term Educational Reform and Development in 2010-2020] (promulgated by St. Council, July 8, 2010, effective July 8, 2010) (P.R.C.); art. 12, *2002—2005 nian quanguo rencai duiwu jianshe guihua gangyao* 2002—2005 年全国人才队伍建设规划纲要 [Outline of Cultivation Plan of National Talents Team in 2002-2005] (promulgated by CPC Central Comm. and St. Council, May 7, 2002, effective May 7, 2002) (P.R.C.); ¶1, *Guanyu zhizhi luanjian miaoyu he lutian foxiang de yijian* 关于制止乱建庙宇和露天佛像的意见 [Opinions on Forbidding Unauthorised Construction of Temples and Outdoor Buddhist Statues] (promulgated by United Front Work Department of CPC Central Comm. and Administration for Religious Affairs, Dec. 13, 1996, effective Dec. 13, 1996) (P. R. C.).

⁷⁰ Reflecting the conflation between state and party, there is no coherent or consistent usage of the terms “state’s religious policy” and “party’s religious policy”: *e.g.*, art. 7(4), *Guanyu jiaokuai fazhan xiandai nongye jinyibu zengqiang nongcun fazhan huoli de ruogan yijian* 关于加快发展现代农业进一步增强农村发展活力的若干意见 [Opinions on Accelerating the Development of Modern Agriculture and Further Enhancing the Development Vitality of Rural Areas] (promulgated by St. Council and CPC Central Comm., Dec.31, 2012, effective Dec.31, 2012) (P.R.C.) (party’s); Art. 24, *Renmin fayuan gongzuo renyuan chufen tiaoli* 人民法院工作人员处分条例 [Regulation on Disciplinary Actions against Staff Members of the People’s Courts] (promulgated by Supreme People’s Court, Dec.31, 2009, effective Dec.31, 2009) (P.R.C.) (state’s); art. 31, *Jiancha renyuan jilv chufen tiaoli (shixing)* 检察人员纪律处分条例 (试行) [Regulation of the People’s Procuratorate on Disciplinary Actions (for Trial Implementation)] (promulgated by Supreme People’s Procuratorate, June 21, 2004, effective June 21, 2004, ineffective May 14, 2007) (P.R.C.) (state’s and party’s); art. 18(3), *Xingzheng jiguan gongwuyuan chufen tiaoli* 行政机关公务员处分条例 [Regulation on the Punishment of Civil Servants of Administrative Organs] (promulgated by St. Council, Apr.22, 2007, effective Apr.22, 2007) (P.R.C.) (state’s); art. 5, *Quanguo yongjun youshu yongzheng aimin gongzuo huiyi jiyao* 全国拥军优属拥政爱民工作会议纪要 [Summary of National Meeting on Supporting the Army, Giving Preferential Treatment to Families of Soldiers, Army Supporting the Government and Protecting the People] (promulgated by St. Council and Central Military Commission, May 11, 2004, effective May 11, 2004) (P.R.C.) (party’s).

⁷¹ ¶ 43(1), *Guomin jingji he shehui fazhan di shiyi ge wunian guihua gangyao* 国民经济和社会发展第十一个五年规划纲要 [Outline of the Eleventh Five-Year Plan of National Economic and Social Development] (promulgated by

include the explicit promotion of “atheism” (wushen lun)⁷² or the similar notion of scientific thoughts and materialist philosophy.⁷³ Furthermore, Communist party members cannot believe in any religion,⁷⁴ which is a critical handicap for religious adherents because Communist party membership is a prerequisite for high-level government positions in the state apparatus.⁷⁵

This undeniably blatant state advocacy of the official secular belief should not obscure other regulations that give recognition and/or preference to religions. For example, there is a wide

Nat'l People's Cong., Mar. 14, 2006, effective Mar. 14, 2006) (P.R.C.); ¶1(9), Zhengfu gongzuo baogao (2004) 政府工作报告 (2004) [Government Working Report (2004)] (promulgated by Nat'l People's Cong., Mar. 14, 2004, effective Mar. 14, 2004) (P.R.C.); ¶ 8(22), Guanyu guomin jingji he shehui fazhan dishige wunian jihua gangyao ji guanyu gangyao baogao de jueyi 关于国民经济和社会发展第十个五年计划纲要及关于纲要报告的决议 [Decision on the Outline of Tenth Five-Year Plan for National Economic and Social Development and the Report of the Outline] (promulgated by Nat'l People's Cong., Mar. 15, 2001, effective Mar. 15, 2001) (P.R.C.); ¶ 5, Zhengfu gongzuo baogao (1994) 政府工作报告(1994) [Government Working Report (1994)] (promulgated by Nat'l People's Cong., Mar. 22, 1994, effective Mar. 22, 1994) (P.R.C.). Compatibility with socialism, according to official explanation, does not require the abandonment of theistic beliefs or religious faith. Rather, it is a political commitment to “passionately love the country”, “support the socialism institution” and “support the leadership of the Communist Party.” In addition, religious adherents should obey all the laws and policy of the government, and self-consciously modify religious teachings/practices that are not harmful to health and social moral of socialist society: ¶22-27, Key Points on Religious Work Policies, *supra* note 67. See XIE, *supra* note 7, at 83-85 (discussing the changes in practices and rhetoric by religious leaders to conform to this policy). Sociological fieldwork also suggested that ostensible but superficial acknowledgement of political loyalty and affirmation of political ideology is sufficient for government officials: Jianbo Huang & Fenggang Yang, *The Cross Faces the Loudspeakers: A Village Church Preserves Under State Power*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 41, 50-51 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005).

⁷² Art. 2(2), Guanyu shenhua gaige jiakuai fazhan minzu jiaoyu de jue ding 关于深化改革加快发展民族教育的决定 [Decisions on Further Reform and Accelerating Development of National Education] (promulgated by St. Council, July 7, 2002, effective July 7, 2002) (P. R. C.). This provision is profoundly ironic since it sought to mobilize “patriotic” religious leaders to mobilize religious flock to support national education initiative that is explicitly stated to involve the promotion of atheism in the *same* provision.

⁷³ Art. 88, Faguan xingwei guifan 法官行为规范 [Code of Conduct for Judges] (promulgated by Supreme People's Court, Dec.6, 2010, effective Dec.6, 2010) (P.R.C.). See ¶10, Key Points on Religious Work Policies, *supra* note 67.

⁷⁴ ¶10, Key Points on Religious Work Policies, *supra* note 67. See Liu, Scharffs & Hollan, *supra* note 16, at 252; Zhu, *supra* note 7, at 483; Reinstein, *supra* note 1, at 8.

⁷⁵ Reinstein, *supra* note 1, at 8. *C.f.*, ZHAO, *supra* note 43, at 122 (arguing that “religion influence in Chinese politics mainly is in the prior established political system, such as religious personal's participation at all levels in the Chinese people's congresses and the [Chinese People's Consultative Conference] as well as the certain level consultation in formulation of religious policy and law”).

range of tax exemptions for religious organizations,⁷⁶ including business tax,⁷⁷ land use tax⁷⁸ and property tax.⁷⁹ This practice of religious tax exemption can be traced back to the early period of the P.R.C.⁸⁰ Religious activities are also conceived as activities that are worth archiving in light of their contribution to the nation and society,⁸¹ given privacy protection vis-à-vis private investigators,⁸² and exempted from the default cremation of executed inmates.⁸³

There is also a surprisingly copious amount of legal extortion in various laws and regulations on the need to respect religious beliefs (often, but not always, together with cultural practices) in contexts such as that of travelers and the travelled locations⁸⁴ of foreign workplaces

⁷⁶ Art. 36, Zongjiao shiwu tiaoli 宗教事务条例 [Regulation on Religious Affairs] (promulgated by General Office of the St. Council, Nov. 30, 2004, effective Nov. 30, 2004) (P. R. C.); Zhang & Zhu, *supra* note 2, at 804.

⁷⁷ Art. 8, Yingye shui zanxing tiaoli 营业税暂行条例 [Interim Regulation on Business Tax] (promulgated by St. Council, Jan.1, 2009, effective Jan.1, 2009) (P.R.C.).

⁷⁸ Art. 6, Chengzhen tudi shiyong shui zanxing tiaoli 城镇土地使用税暂行条例 [Provisional Regulations Governing Land Use Tax in Cities and Towns] (promulgated by St. Council, Nov.1, 1988, effective Nov.1, 1988, amended Dec.31, 2006) (P.R.C.).

⁷⁹ Art. 5, Fangchan shui zanxing tiaoli 房产税暂行条例 [Provisional Regulations on Real Estate Tax] (promulgated by St. Council, Sept.15, 1986, effective Sept.15, 1986) (P.R.C.). For a general discussion of overall tax regime and the various forms of taxation, see ZHANG SHOUWEN, Caishui faxue 财税法学 [FINANCIAL AND TAX LAW] 221-355 (Renmin Univeristy Press 2nd ed. 2010).

⁸⁰ Art. 4, Chengshi fangdichan shui zanxing tiaoli 城市房地产税暂行条例 [Interim Regulation Governing the Urban Real Estate Tax] (promulgated by Administration Council, Aug.8, 1951, effective Aug.8, 1951) (P.R.C.).

⁸¹ Art. 2, Dang'an fa [Archives Law] (promulgated by Standing Comm. Nat'l People's Cong., July 5, 1996, effective Jan. 1, 1988) (P.R.C.).

⁸² Art. 14, Zhengxinye guanli tiaoli 征信业管理条例 [Regulation on the Administration of Credit Investigation Industry] (promulgated by St. Council, Mar.15, 2013, effective Mar.15, 2013) (P.R.C.) (the other stipulated prohibited grounds are information relating to genome, fingerprint, blood type, and medical history).

⁸³ Art. 428, Guanyu shiyong zhonghua renmin gongheguo xingshi susong fa de jieshi 关于适用《中华人民共和国刑事诉讼法》的解释 [Interpretations for Implementing the Criminal Procedural Law of People's Republic of China] (promulgated by Supreme People's Court, Jan.1, 2013, effective Jan.1, 2013) (P. R. C.) (the other stipulated ground of exemption is ethnicity).

⁸⁴ Art. 10, 13, 41 & 62, Lvyou fa 旅游法 [Tourism Law] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 25, 2013, effective Oct.1, 2013) (P.R.C.).

for Chinese workers⁸⁵ and during overseas study by Chinese students.⁸⁶ Although these are arguably mere reflections of prudence in dealing with foreigners and/or situations beyond the jurisdiction of China, this respect of religious beliefs is similarly stipulated in domestic contexts, such as the police in their dealings with citizens,⁸⁷ and in the guidelines on the use of language by prosecution.⁸⁸ It is also telling that publications with religious content (i.e., publications that not only include religious materials but potentially also include social/political commentary on religion) are prohibited from containing content that insults either religious or non-religious citizens.⁸⁹ Although a civil action by a lawyer in 2004 to challenge a book on Marxist philosophy that included a passage proclaiming religion a “spiritual opium for the working people” was declined review by the court,⁹⁰ it is worth observing that a 1996 official policy statement on religious policies expressly stated that publications dealing with religious issues should be careful not to hurt the feelings of religious adherents.⁹¹

⁸⁵ Art. 12, *Duiwai laowu hezuo guanli tiaoli* 对外劳务合作管理条例 [Regulation on the Administration of Foreign Labor Cooperation] (promulgated by St. Council, Aug.1, 2012, effective Aug.1, 2012) (P.R.C.).

⁸⁶ Art. 1(5), *Guanyu chuguo liuxue renyuan gongzuo de ruogan zanxing guiding* 关于出国留学人员工作的若干暂行规定 [Temporary Rules for Work of People Studying Abroad] (promulgated St. Council, Dec.13, 1986, effective Dec.13, 1986) (P. R. C.).

⁸⁷ Art. 21, *Renmin wuzhuang jincha fa* 人民武装警察法 [Armed Police Force Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009) (P.R.C.).

⁸⁸ Art. 4, *Jiancha jiguan wenming yongyu guize* 检察机关文明用语规则 [Rules for Use of Civilized Language by Prosecutorial Organs] (promulgated by Supreme People's Procuratorate, June 9, 2010, effective June 9, 2010) (P.R.C.).

⁸⁹ Art. 7(1)-7(3), *Regulation on Religious Affairs*, *supra* note 76.

⁹⁰ Professor Zhang Qianfan (Beijing University) and Zhu Yingping (East China University of Political Science and Law) argued that while the fact the book was not intended to be use by religious believers do reduce the harm of religious insult, there is an element of state approval since all text books requires regulatory approval: Zhang & Zhu, *supra* note 2, at 790.

⁹¹ ¶10, *Key Points on Religious Work Policies*, *supra* note 67.

In summary, although the various religions are clearly disadvantaged vis-à-vis the broadly atheistic communist/socialist ideology, the treatment of religion in general is at least somewhat parallel and at times preferred over other secular beliefs/practices.

C. *Competition Between Religions*

As reflected in the same constitutional provision discussed in the preceding section, the different religions are to be given equal treatment. Legal provisions prohibiting discrimination on the basis of religion⁹² are repeated in the spectrum of law governing rights, such as the right to educational opportunities,⁹³ the rights of minors,⁹⁴ the right to employment,⁹⁵ the right to join unions,⁹⁶ in advertising,⁹⁷ and in judging.⁹⁸ Religious discrimination prohibitions are inserted for the qualifying criteria of electors and the elected for the elections of members of the national and

⁹² In China, religion, together with ethnicity, race and gender, are the four categories that are universally included in anti-discrimination provisions. For political rights and obligations such as electoral rights, right to fair trial, and military obligations, additional categories of family background, occupation, educational background, and at times, wealth, are stipulated as well. See Jiefeng Lu, *Employment Discrimination in China: The Current Situation and Principle Challenges*, 32 HAMLINE L. REV. 133, 173-178 (2009) (discussing the categories protected in the employment context); Gulazat Tursun, *Integrating Minorities through Legislation: A Chinese Point of Law*, 12(1) ASIA-PACIFIC JOURNAL OF HUMAN RIGHTS AND THE LAW 27, 33-39 (2001) (discussing legal responses to the integration of minorities).

⁹³ Art. 9, Jiaoyu fa 教育法 [Education Law] (promulgated by Nat'l People's Cong., Mar. 18, 1995, effective Sept. 1, 1995) (P.R.C.); art. 4, Yiwu jiaoyu fa 义务教育法 [Compulsory Education Law] (promulgated by Standing Comm. Nat'l People's Cong., June 29, 2006, effective Sept. 1, 2006) (P.R.C.).

⁹⁴ Art. 3, Weichengnian ren baohu fa 未成年人保护法 [Law of Protection of Minors] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective June 1, 2007) (P.R.C.).

⁹⁵ Art. 3, Jiuye cujin fa 就业促进法 [Employment Promotion Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (P.R.C.).

⁹⁶ Art. 3, Gonghui fa 工会法 [Trade Union Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).

⁹⁷ Art. 7(7), Guanggao fa 广告法 [Advertising Law] (promulgated by Nat'l People's Cong., Oct. 27, 1994, effective Feb. 1, 1994) (P.R.C.).

⁹⁸ Art. 5, Renmin fayuan zuzhi fa 人民法院组织法 [Organic Law of the People's Courts] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 1980) (P.R.C.).

local people's congress,⁹⁹ village commissioners,¹⁰⁰ and urban resident commissioners.¹⁰¹ Unsurprisingly, equal treatment is also mandated for the imposition of obligations such as the obligation of compulsory education¹⁰² and military conscription.¹⁰³ This seemingly laudable equal treatment of the different religions under the law obscures several loopholes and nuances. This section examines how the actual legal treatment of the law hinges on three categorizations, namely, 1) whether the religious activities are “normal”; 2) whether the religion is considered a “cult” or “superstitious”; and 3) whether the religion is closely connected with a recognized “ethnic minority.”

1. Normal vs. Abnormal Religious Activities

Just as some advocates and jurisdictions that otherwise push for religious liberty have restrictively interpreted and applied the definition of religion to exclude competing religions that are perceived as undesirable,¹⁰⁴ the major issue in the Chinese regime is the definition of religion,

⁹⁹ Art. 3, Quanguo renmin daibiao dahui he defang geji renmin daibiao dahui xuanju fa 全国人民代表大会和地方各级人民代表大会选举法 Electoral Law of the People's Republic of China for the National People's Congress and Local People's Congresses (promulgated by Nat'l People's Cong., Mar. 14, 2010, effective Mar. 14, 2010) (P.R.C.).

¹⁰⁰ Art. 13, Cunmin weiyuanhui zuzhifa 村民委员会组织法 [Organic Law of the Villagers' Committees] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Nov. 4, 1998) (P.R.C.).

¹⁰¹ Art. 8, Chengshi jumin weiyuanhui zuzhi fa 城市居民委员会组织法 [Organic Law of the Urban Residents Committee] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Jan. 1, 1990) (P.R.C.).

¹⁰² Art. 4, Compulsory Education Law, *supra* note 93.

¹⁰³ Art. 3, Bingyi fa 兵役法 [Military Service Law] (promulgated by Nat'l People's Cong., Oct. 29, 2011, effective Oct. 1, 1984) (P.R.C.).

¹⁰⁴ John Locke expressly excluded Muslims and atheists in his advocacy for religious liberty and freedom of conscience: Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1859 (2009); SAMANTHA KNIGHTS, FREEDOM OF RELIGION, MINORITIES, AND THE LAW 9 (Oxford University Press 2007); A. JAMES REICHLEY, FAITH IN POLITICS 91 (Brookings Institution Press 2002) (John Locke thought that religious liberty and toleration should not be extended to Mohammedanism and atheism, though he also viewed that their civil rights should not be excluded because of religion). In England, non-Christian religions were historically excluded from the definition of religion: RUSSELL SANDBERG, LAW AND RELIGION 42 (Cambridge University Press 2011). Indeed, the “[w]hile the *Act of Toleration* ensured that most Protestant dissenters were afforded relief fairly quickly, Catholics, Jews and atheists had to wait much longer before suppression of their freedom of individual belief

for which the starting point is rather ominous: the explicit stipulation in article 36 of the Constitution that only “normal religious activities” are protected.¹⁰⁵ What is deemed “normal” religious activity is not specified in the Constitution or in any other laws, but the remainder of article 36 indicates that “[religious] activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state” would be prohibited abnormal religious activities. In this regard, “disrupt[ing] public order” and “impair[ing] the health of citizens” appear to be relatively uncontroversial illustrations of what is not “normal religious activities,” notwithstanding the criticisms about the ambiguity of the terms.¹⁰⁶ The provision “interfere with the educational system of the state” appears strangely specific, but it is reflective of the Soviet Constitution, which similarly singled out the separation of education from religion.¹⁰⁷

The concept of “normal religious activities” is slightly clarified by The Regulation on Religious Affairs, which was promulgated in 2004 and is the current leading regulation affecting religion.¹⁰⁸ Under this regulation, the three “abnormality” pillars of disrupting public order, harming citizens’ health and interfering with the state education system are expressly provided together with a general catch-all clause.¹⁰⁹ In addition, one can infer from the provision that

and disability from public office were eventually lifted.”: Andrew Lynch, *The Constitutional Significance of the Church of England*, in *LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW* 168, 178-179 (Peter Radan et al. eds., Routledge 2005). Similar pattern occurs in the U.S. as well: WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* 17 (Yale University Press 2003); Jeremy Webber, *Understanding the Religion in Freedom of Religion*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 26, 43 (Peter Cane et al. eds., Cambridge University Press 2008).

¹⁰⁵ Art. 36, XIAN FA [Constitution] (2004) (P.R.C.).

¹⁰⁶ E.g., Zhu, *supra* note 7, at 484-485; Carlson, *supra* note 2, at 766-767.

¹⁰⁷ HAZARD, BUTLER & MAGGS, *supra* note 60, at 603.

¹⁰⁸ Regulation on Religious Affairs, *supra* note 76. For general discussion of this piece of regulation and its significance in the context of the overall legal regime dealing with religion, see ZHAO, *supra* note 43, at 28-31; Zhang & Zhu, *supra* note 2, at 790-795; Carlson, *supra* note 2.

¹⁰⁹ Art. 3, Regulation on Religious Affairs, *supra* note 76 (“other activities that harm the interest of the State, public interests, or lawful rights and interests of citizens”).

national unification, ethnic unity and social stability are also criteria to differentiate between normal and abnormal.¹¹⁰ “Religious extremism,” which is prohibited in publications containing religious materials, would be another example of “abnormal” religious activities.¹¹¹ Commentators frequently highlight the ambiguity inherent in the concept of “normal” and the resulting broad discretionary power of the administrative agency in regulating religious activities,¹¹² although one critic suggests that “the primary test of ‘normal religious activities’ is those activities that occur at a legally registered religious site.”¹¹³

This potential discriminatory effect of the “normal” vs. “abnormal” distinction is further aggravated by the state regulatory framework for religion. The five major religion of Buddhism, Taoism, Catholicism, Protestantism and Islam are officially allowed, but they must be managed through state-prescribed national religious organizations¹¹⁴ and exclude underground Catholic

¹¹⁰ *Id.*, (“The religious bodies, religious activity sites, and citizens believing in religion shall abide by the Constitution, laws, regulations and rules, as well as maintain the unity of the State, the solidarity of the nations, and social stability.”). Separatism is a big political taboo, and results in restrictions in religious freedom for ethnic religious minority (Tibetan Buddhist and Xinjiang Muslims) notwithstanding the general preferential policies to religious ethnic minority: Barry Sautman, *Scaling Back Minority Rights?: The Debate About China’s Ethnic Policies*, 46 STAN. J. INT’L L. 51, 71-72 (2010).

¹¹¹ Art. 7(4), Regulation on Religious Affairs, *supra* note 76.

¹¹² Klein, *supra* note 1, at 133-134; Zhang & Zhu, *supra* note 2, at 791; Cox, *supra* note 1, at 383-384; Carlson, *supra* note 2, at 766-767; Cheung, *supra* note 1, at 19.

¹¹³ Cox, *supra* note 1, at 383-384. *See* Zhu, *supra* note 7, at 484 (arguing that “according to the current law and practice”, normal religious activities “should be based on commonly accepted teachings and doctrines” as well).

¹¹⁴ KARRIE J. KOESEL, RELIGION AND AUTHORITARIANISM: COOPERATION, CONFLICT, AND THE CONSEQUENCES 45-47 (Cambridge University Press 2014); Xiong, *supra* note 2, at 607; Zeng, *supra* note 2, at 774); Cox, *supra* note 1, at 383 Yang, *supra* note 16, at 103-104; Reinstein, *supra* note 1, at 11; Cheung, *supra* note 1, at 19-21. *See* Zhang & Zhu, *supra* note 2, at 814-816 (noting the “obvious political characteristics” in the articles of association of these various state proscribed religious associations and the explicit provision of the State Bureau of Religious Affairs as the superior organ). *See also* Homera & Uzzellaa, *supra* note 60, at 256-257 (discussing how “registration”, as the key feature of the Soviet regime, is employed to control and restrict religious activities).

churches that adhere to the Pope directly¹¹⁵ and independent Protestant “house churches.”¹¹⁶ For Protestants, objections include political submission and liberal theology (i.e., less emphasis on proselytization).¹¹⁷ The state-sanctioned religious organizations modify their teachings in accordance with state objectives¹¹⁸ and are subjected to heavy state monitoring of management and matters relating to the appointment and qualifications of religious persons.¹¹⁹

In any event, unregistered religions operate in a state of legal ambiguity.¹²⁰ The distinction of official religions can be blurred, such as when attendants of official churches also participate in activities of underground churches and vice versa.¹²¹ In this regard, it is worth noting that certain quasi-religious practices such as qigong and folk religious practices (offerings/respect for ancient and legendary historical figures) are intentionally conducted under the banner of science (for the

¹¹⁵ Cox, *supra* note 1, at 387; Yang, *supra* note 16, at 104; Reinstein, *supra* note 1, at 17; Cheung, *supra* note 1, at 20; Potter, *supra* note 47, at 330; Georgiou, *supra* note 1, at 376.

¹¹⁶ Xiong, *supra* note 2, at 607-608; Reinstein, *supra* note 1, at 16-18; Cheung, *supra* note 1, at 20. For a in-depth analysis of the institutional and operational distinction between the official and unofficial Christian churches in China, see Jacqueline E. Wenger, *Official vs. Underground Protestant Churches in China: Challenges for Reconciliation and Social Influence*, 46(2) REVIEW OF RELIGIOUS RESEARCH 169 (2004).

¹¹⁷ KOESEL, *supra* note 114, at 125-126; Yang, *supra* note 16, at 105; Huang & Yang, *supra* note 71, at 45-46; Wenger, *supra* note 116, at 171.

¹¹⁸ Zeng, *supra* note 2, at 774-745 (“In order to respond to the hegemonic actions of the government, the five major religious organizations all propagate discourses relevant to their own doctrines in the name of serving society and promoting people’s well-being, reflected in the slogans of these religious organizations.” These include the “humanistic Buddhism” by Chinese Buddhist Association, of the “theology of love” by the Chinese Christian Council); XIE, *supra* note 7, at 83-85 (“the construction of Christian theological thought in China involves a process of transforming and reinterpreting certain theological doctrines, such as eschatology and justification by faith, which are not considered suitable for communist society”).

¹¹⁹ See KOESEL, *supra* note 114, at 45-47 (observing that the state-sponsored religious organizations “are not independent from the government but are considered branches of it” and notwithstanding the appearance of self-governance by religious leaders, the “management is procedural because there is little question about where ultimate loyalty”). See also ZHAO, *supra* note 43, at 18-51 detailing the legal rules regarding religious persons of the different religion, including the frequent need for government approvals in relation to appointment and qualifications).

¹²⁰ Liu, Scharffs & Hollan, *supra* note 16, at 257; Zhu, *supra* note 7, at 493; Yang, *supra* note 16, at 97-98.

¹²¹ Yang, *supra* note 19, at 426; Wenger, *supra* note 116, at 170.

former) and culture (for the latter) to avoid the regulations on religions.¹²² The State itself may similarly grant legitimacy to a religious practice without simultaneously extending legal approval as religion (which would otherwise attract corresponding legal complications and regulation) by recognizing the cultural dimension of the practice.¹²³ Conversely, temples that practice what are essentially Chinese folk religions may seek to be registered as Taoist or Buddhist temples, thus gaining legal legitimacy as religious organizations.¹²⁴

2. Cult and Superstitions

There is no ambiguity regarding the legal consequences associated with one class of religions: cults and superstitions. The organization of cult activities is criminalized and subjected to a basic penalty of three to seven years imprisonment.¹²⁵ This is supplemented by administrative

¹²² Yang, *supra* note 16, at 110-111; Adam Yuet Chau, *The Politics of Legitimation and the Revival of Popular Religion in Shaanbei, North-Central China*, 31(2) MODERN CHINA 236, 246-247 (2005). See also DAI, *supra* note 44, at 309 (noting how the rejection of the label of “religion” is method utilized by people to avoid religious regulation in jurisdictions with stringent religious regulatory control).

¹²³ See Liang, *supra* note 67, at 66-68 (discussing how the Gwer Sa La – a popular grassroots religious practice in Dali – was successfully included to first, the China’s national list of Intangible Cultural Heritage, and second, the United Nation’s international UNESCO’s list of Intangible Cultural Heritage); KOESEL, *supra* note 114, at 60 (example of Mazu cult in Fujian province).

¹²⁴ Xiaofei Kang, *Two Temples, Three Religions, and a Tourist Attraction: Contesting Sacred Space on China's Ethnic Frontier*, 35(3) MODERN CHINA 227, 236-237 (2009) (examining the fluidity and convenience that informed the religious label attached to the religious site in Huanglong area); Chau, *supra* note 122, at 244 & 259 (noting how temples worshipping dragon kings – religious deities that “hovered at the edge of official Daoism” – are being reistered as a Taoist temple). See also CHENG-TIAN KUO, RELIGION AND DEMOCRACY IN TAIWAN 59 (State University of New York Press 2008) (Taoist temples joining Buddhist associations during the Japanese occupation in Taiwan where Taoism is not recognized.); JU HAIYUAN, Zongjiao, shushu yu shehui bianqian 宗教, 术数与社会变迁 [RELIGION, SUPERSTITION AND SOCIAL CHANGE] 154 (Guiguan 2006) (discussing how Yiguandao adopted the similar measure of registering as Taoist or Buddhist organizations after it has been deregistered by the Taiwanese government in the 1960s).

¹²⁵ Art. 300, Xing fa 刑法 [Criminal Law] (promulgated by Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997, amended Feb. 25, 2011) (P.R.C.) (an imprisonment of between seven years and fifteen years may be imposed for serious offence). For academic discussion of the criminalization of cult in China, see Zhu, *supra* note 7, at 488-491.

detention of up to fifteen days as determined and administered by the police.¹²⁶ Superstitious activities per se are not criminalized and require the disruption of social order or harm to physical health before administrative sanctions are triggered¹²⁷ or violation of laws and regulations for criminal sanctions.¹²⁸ Indeed, superstitions have been more tolerated in recent times.¹²⁹ The state regulation of all forms of media is unsurprisingly utilized to prohibit the publication of materials that promote cults or superstitions in audio-visual media,¹³⁰ the provision of internet service,¹³¹ telecommunication,¹³² advertising,¹³³ and live performance.¹³⁴

A cult is defined as “冒用宗教、气功或者其他名义建立，神化首要分子，利用制造、散布迷信邪说等手段蛊惑、蒙骗他人，发展、控制成员，危害社会的非法组织，”¹³⁵ i.e., focusing on the deification of the key founding members of the religion, reliance on supernatural

¹²⁶ Art. 27, Zhi'an guanli chufa fa 治安管理处罚法 [Public Security Administration Punishments Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective Mar. 1, 2006) (P.R.C.) (a detention of between 10 to 15 days, plus a RMB 1000 fine).

¹²⁷ *Id.*

¹²⁸ Art. 300, Criminal Law, *supra* note 125.

¹²⁹ Zeng, *supra* note 2, at 778-779; Chau, *supra* note 122, at 243-245; Der-Ruey Yang, *The Changing Economy of Temple Daoism in Shanghai*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 113, 130 & 138 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005).

¹³⁰ Art. 3(5), Yinxiang zheping guanli tiaoli 音像制品管理条例 [Regulations on the Administration of Audio and Video Products] (promulgated by St. Council, Feb. 2, 2002, amended Mar. 19, 2011) (P.R.C.).

¹³¹ Art. 14(5), Hulanwang shangwang fuwu yingye changsuo guanli tiaoli 互联网上网服务营业场所管理条例 [Regulations on the Administration of Business Sites of Internet Access Services] (promulgated by St. Council, Sept. 29, 2002, effective Nov. 15, 2002, amended Jan. 8, 2011) (P.R.C.).

¹³² Art. 57(5), Dianxin tiaoli 电信条例 [Regulation on Telecommunications] (promulgated by St. Council, Sept. 25, 2000, effective Sept. 25, 2000) (P.R.C.).

¹³³ Art. 7(6), Advertising Law, *supra* note 97.

¹³⁴ Art. 26(6), Yingyexing yanchu guanli tiaoli 营业性演出管理条例 [Regulation on the Administration of Commercial Performances] (promulgated by St. Council, July 22, 2008, effective July 22, 2008) (P.R.C.).

¹³⁵ Art. 1, Guanyu banli zuzhi he liyong xiejiao zuzhi zuifan anjian juti yingyong falv ruogan wenti de jieshi 关于办理组织和利用邪教组织犯罪案件具体应用法律若干问题的解释 [Interpretation on the Concrete Application of Law on Handling the Cases of Committing Crimes by Organizing and Using Cult Organizations] (promulgated by Supreme People's Court and Supreme People's Procuratorate, Oct. 9, 1999, effective Oct. 9, 1999) (P. R. C.).

forces, and strong control of members. This focus on strong manipulative power over the members by the leaders reflects a popular – if controversial – derogatory definition of cults in the West.¹³⁶ Falungong is perhaps the most well known religious movement that has been heavily suppressed as a cult in China,¹³⁷ although the criminalization of cults has been a recurring occurrence in Chinese history given the state’s concerns about quasi-religious organizations as a subservient force.¹³⁸ Superstitious activities are distinguished from religious faith¹³⁹ and are essentially conceptualized as worship and allusions to supernatural forces in dealing with specific decisions in life (“求神问卜,” “参神拜庙”).¹⁴⁰ These definitions have been criticized by commentators as dangerously ambiguous and give the state the ability to abuse such definitional power to suppress

¹³⁶ Stephen A. Kent & Robin D. Willey, *Sects, Cults and the Attack on Jurisprudence*, 14 RUTGERS J. L. & RELIGION 306, 310-311 (2013); Zhu, *supra* note 7, at 476-477.

¹³⁷ Falungong is frequently specifically mentioned in government policy documents as an illegal cult that requires special enforcement attention: Chp 3(7)(5), Guanyu chengli quanguo fangzhi feidianxing feiyan zhihui bu de tongzhi 关于成立全国防治非典型肺炎指挥部的通知 [Notice on Forming National SARS prevention and control headquarters] (promulgated by General Office of St. Council, Apr. 28, 2003, effective Apr. 28, 2003) (P. R. C.); Preamble, Guanyu jinyibu jiaqiang shehui zhian zonghe guanli de yijian 关于进一步加强社会治安综合治理的意见 [Opinions on Further Strengthening the Comprehensive Management of Social Security] (promulgated by CPC Central Comm. and St. Council, Sept.5, 2001, effective Sept.5, 2001) (P. R. C.); ¶1, Guanyu qudi xiejiao zuzhi fangfan he chengzhi xiejiao huodong de jueding 关于取缔邪教组织、防范和惩治邪教活动的决定 [Decision on Banning Cults, Preventing and Punishing Cult Activities] (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 30, 1999, effective Oct. 30, 1999) (P.R.C.). For a discussion of the persecution faced by Falungong, see Pasty Rahn, *Proselytization as Secular Protest: Rearticulating the Falun Gong Message*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 301, 302 (Rosalind I.J. Hackett ed., Equinox 2008); Reinstein, *supra* note 1, at 18-20; Cheung, *supra* note 1, at 21-26.

¹³⁸ Zhu, *supra* note 7, at 487. See DAI, *supra* note 44, at 441-445 (discussing the different definitional approaches toward cults in China and examples of cult criminalization in historical China).

¹³⁹ ¶3(14), Guanyu shenru kaizhan nongcun shehui zhuyi jingshen wenming jianshe huodong de ruogan yijian 关于深入开展农村社会主义精神文明建设活动的若干意见 [Opinions on Further Promoting Socialist Spiritual Civilisation Activities in Rural Area] (promulgated by CPC Central Comm. Publicity Dept. and Ministry of Agriculture, Nov.29, 1995, effective Nov.29, 1995) (P. R. C.).

¹⁴⁰ *Id.*; ¶12, Guanyu jiaqiang kexue jishu puji gongzuo de ruogan yijian 关于加强科学技术普及工作的若干意见 [Opinions on Further Promoting the popularization of science and technology] (promulgated by CPC Central Comm. and St. Council, Dec.5, 1994, effective Dec.5, 1994) (P. R. C.). See Chau, *supra* note 122, at 243-245 (observing the evolving understanding of superstitious activities by the state). See also KATZ, *supra* note 47, at 20-24 (discussing the categorization and suppression of the superstition – as distinguished from religion – by the Nationalist government in the 1920s and 1930s).

groups it disagrees with and/or whose ideology/religion is incompatible with its own.¹⁴¹ Indeed, the designation of a cult is a potent tool by the government to strip a group that it deems immoral or socially harmful of any protection of religious freedom.¹⁴² International law on religious freedom argues for a focus on harmful activities that might otherwise be commonly associated with cults rather than the status of cults themselves,¹⁴³ although it is worth noting that the Chinese approach of distinguishing cults from other religions in terms of legal and state treatment resembles that of France, Belgian and, arguably, the U.S.¹⁴⁴

3. Religions of Ethnic Minorities

Beyond the clear legal disadvantages that befall any religions deemed to be abnormal, cultish or superstitious, there is another wrinkle to competition among religions. Religions that are closely associated with an ethnic minority are given distinct preferential treatment in China's laws

¹⁴¹ ROBERT J. SHEPHERD, FAITH IN HERITAGE: DISPLACEMENT, DEVELOPMENT, AND RELIGIOUS TOURISM IN CONTEMPORARY CHINA 83-84 (Left Coast Press 2013); JAMES W. TONG, REVENGE OF THE FORBIDDEN CITY: THE SUPPRESSION OF THE FALUNGONG IN CHINA, 1999-2005, at 73-74 (Oxford University Press 2009).

¹⁴² Zhang & Zhu, *supra* note 2, at 799; LIANG JIALIN, Zhongguo jiaohui de jinri yu mingtian 中国教会的今日与明天 [CHURCHES IN CHINA: TODAY AND TOMORROW] 154-159 (Alliance Bible Seminary 2006); Cheung, *supra* note 1, at 3.

¹⁴³ Cheung, *supra* note 1, at 6-7.

¹⁴⁴ Reinstein, *supra* note 1, at 20; Cheung, *supra* note 1, at 12. See Zhu, *supra* note 7, at 479 n.32 (discussing Belgian criminalization of "harmful cult"); Keturah A. Dunne, *Addressing Religious Intolerance in Europe*, 30 CAL. W. INT'L L.J. 117, 121-128 (1999) (discussing the French regime). See also Kent & Willey, *supra* note 136 (making a distinction between religions and cults, and noting that while cults have been discriminated and persecuted by law enforcement officials, "in far too many cases these officials have been on the receiving end of abuse, harassment, and attacks by these same groups."); Karel Dobbelaere & Jaak Billiet, *Religious Toleration in Western and Central European Countries*, in CHALLENGING RELIGION 142, 144-157 (James A. Beckford & James T. Richardson eds., Routledge 2003) (discussing in the context of Europe how negative news of a cult is often attributed to the structural characteristics of the new religions while that of mainstream religious is attributed to deviances of individuals).

and policies¹⁴⁵ given the recognition of how religion and ethnicity are closely intertwined for ethnic minorities in China.¹⁴⁶

The religious beliefs and cultural practices of ethnic minorities¹⁴⁷ are often respected in laws and policies. This can include a wide range of contexts, from general allusion¹⁴⁸ to specific contexts such as media production,¹⁴⁹ post-earthquake reconstruction,¹⁵⁰ and economic development.¹⁵¹ The national land use planning takes into account the religious beliefs of ethnic

¹⁴⁵ For a general discussion of China policy towards ethnic minority, see Sautman, *supra* note 110, at 67-72; Pitman B. Potter, *Governance of China's Periphery: Balancing Local Autonomy and National Unity*, 19 COLUM. J. ASIAN L. 293, 302-312 (2005); Liu Xingwu & Alatan, *China's Policy Towards Her Minority Nationalities*, 16(1) SOCIAL SCIENTIST 136, 157-158 (1988).

¹⁴⁶ Zhu Duanhua, *Xinzhongguo minzu zhengce fazhan de xiandai qishi* [Current Implications From the Development of New China Ethnic Policy], in SHEHUI ZHUYI YU XINZHONGGUO 60 NIAN [60 years of Socialism in China] 144, 146-147 (Marxism Research Society of China Higher Education Society et al. eds., China Social Science Publishing 2010).

¹⁴⁷ Religion research in China has increasingly been conducted under the perspective of culture since the 1990s. This is a useful and political savvy strategy that draws on the all-encompassing and esteemed status of culture in the Chinese context to side-step the possible objections from the ostensible atheistic ideology of the state since as a cultural phenomenon, the issue of ideological and scientific incorrectness in religion is muted: Fenggang Yang, *Between Secularist Ideology and Desecularizing Reality: The Birth and Growth of Religious Research in Communist China*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 19, 26-29 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005).

¹⁴⁸ Art. 53, Minzu quyue zizhi fa 民族区域自治法 [Regional National Autonomy Law] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 2001, effective Oct.1, 1984) (P.R.C.); ¶4(6), Guanyu guomin jingji he shehui fazhan shinian guihuahe dibage wunian jihua gangyao ji guanyu gangyao baogao de jueyi 关于国民经济和社会发展十年规划和第八个五年计划纲要及关于《纲要》报告的决议 [Decision on the Outline of Ten-Year Plan and the Eighth Five-Year Plan for National Economic and Social Development and the Report of the Outline] (promulgated by Nat'l People's Cong., Apr.9, 1991, effective Apr.9, 1991) (P.R.C.).

¹⁴⁹ Art. 17, Chengshi minzu gongzuo tiaoli 城市民族工作条例 [Regulations on Ethnical Groups Work in Urban Areas] (promulgated by St. Council, Sept.15, 1993, effective Sept.15, 1993) (P.R.C.).

¹⁵⁰ Art. 1(1), Guanyu zuohao yushu dizhen zaihou huihu chongjian gongzuo de zhidao yijian 关于做好玉树地震灾后恢复重建工作的指导意见 [Guiding Opinions on Better Carrying out Recovery and Reconstruction Work in Yushu after Earthquake] (promulgated by St. Council, May 24, 2010, effective May 24, 2010) (P. R. C.).

¹⁵¹ ¶9(40), Guanyu jinyibu cunjin neimenggu jingji shehui youhao youkuai fazhan de ruogan yijian 关于进一步促进内蒙古经济社会又好又快发展的若干意见 [Opinions on Further Promoting the Sound and Rapid Economic Development in Inner Mongolia] (promulgated by St. Council, June 26, 2011, effective June 26, 2011) (P. R. C.); ¶3(13) Guanyu jinyibu fanrong fazhan shaoshu minzu wenhua shiye de ruogan yijian 关于进一步繁荣发展少数民族文化事业的若干意见 [Some Advice on Further Prospering and Developing the Culture Cause of Ethnic Minorities] (promulgated by St. Council, July 5, 2009, effective July 5, 2009) (P. R. C.).

minorities (but not other religious beliefs).¹⁵² Indeed, where specific religious exemptions are provided for generally applicable laws, they are typically for minority faiths, such as the rearing of pork for Muslims,¹⁵³ gun ownership for the Miao and Tong ethnicities,¹⁵⁴ and religious education for the boy lamas of Tibetan Buddhism.¹⁵⁵ Greater leeway is also afforded to the religious practices of ethnic minorities that would otherwise be classified as legally objectionable superstition.¹⁵⁶ A government policy since the 1980s has called for fewer arrests and death penalties and more leniency in punishment for crimes involving ethnic minority defendants.¹⁵⁷

Such preferential treatment echoes the state conception of ethnic equality to include targeted affirmative action for ethnic minorities,¹⁵⁸ notwithstanding the tension from formal equality under the law that may restrict specific measures accommodating minority religions.¹⁵⁹ State-owned enterprises, which remained dominant in China's economy, similarly provided preferential hiring policies in favor of ethnic minorities.¹⁶⁰ Pursuant to the belief that economic

¹⁵² Chp 11(7), Quanguo zhuti gongnengqu guihua de tongzhi 全国主体功能区规划的通知 [Notice on Issuance of National Planning of Functional Areas] (promulgated by St. Council, Dec.21, 2010, effective Dec.21, 2010) (P. R. C.).

¹⁵³ Art. 6, Quanguo nongye fazhan gangyao 全国农业发展纲要 [Outline of National Agriculture Development] (promulgated by Nat'l People's Cong., Apr. 11, 1960, effective Apr. 11, 1960, ineffective Nov. 24, 1987) (P.R.C.).

¹⁵⁴ Zhang & Zhu, *supra* note 2, at 802.

¹⁵⁵ Yang, *supra* note 16, at 102-103.

¹⁵⁶ KATZ, *supra* note 47, at 59.

¹⁵⁷ Zhang & Zhu, *supra* note 2, at 802; Sautman, *supra* note 110, at 55-56 (this policy can be contrasted with other jurisdictions where minorities tend to be over-represented in the criminal legal process).

¹⁵⁸ ¶1, Guanyu yange zhixing dang he guojia minzu zhengce youguan wenti de tongzhi 关于严格执行党和国家民族政策有关问题的通知 [Notice on Strictly Confronting Issues Related to Party and National Ethnic Policies] (promulgated by St. Council General Office, Apr.23, 2008, effective Apr.23, 2008) (P.R.C.). See Potter, *supra* note 145, at 310 ("equality is interpreted mainly in terms of increasing material conditions for minority ethnic groups, so that they become more equal to the dominant Han.").

¹⁵⁹ Potter, *supra* note 145, at 310.

¹⁶⁰ Sautman, *supra* note 110, at 67-68.

development is the solution to ethnic issues,¹⁶¹ the government has initiated several economic development initiatives for regions with high proportions of ethnic minorities,¹⁶² though there is possible resentment by the Tibet Buddhists and Xinjiang Uighurs due to assimilation by the majority Han.¹⁶³ Indeed, economic development and consequential urbanization may be incompatible with local religious practices¹⁶⁴ despite the mitigation by intensified education and cultural assistance from the state.¹⁶⁵ Moreover, given the state concern about the secessionist movement among the Tibet Buddhists and Xinjiang Uighurs, these two ethnic minorities are subjected to extra government scrutiny and regulation to suppress such movements,¹⁶⁶ notwithstanding the overall preferential treatment.

D. The Nature of Competition

The Chinese regime does not favor any religion qua religion; the playing field is prima facie not tilted in favor of any particular religion. However, the nature and scope of religious competition between the religions is heavily circumscribed. This section examines the laws and regulations that either directly or indirectly dictate the permissible activities that religious organizations/adherents may undertake to be successful in the religious market.

¹⁶¹ Zhu, *supra* note 146, at 145.

¹⁶² Sautman, *supra* note 110, at 67; Zhu, *supra* note 146, at 145; Liu & Alatan, *supra* note 145, at 152-155. See Potter, *supra* note 145, at 314-317 (discussing state-driven economic initiatives in the minority regions of the West).

¹⁶³ Mascagni, *supra* note 1, at 248-249; Reinstein, *supra* note 1, at 6-8; Potter, *supra* note 47, at 328-329.

¹⁶⁴ Mascagni, *supra* note 1, at 245-249; Potter, *supra* note 145, at 304.

¹⁶⁵ Potter, *supra* note 145, at 304.

¹⁶⁶ Elizabeth Van Wie Davis, *Uyghur Muslim Ethnic Separatism in Xinjiang, China*, 35(1) ASIAN AFFAIRS 15,17-20 (2008); Potter, *supra* note 47, at 328-329.

1. Direct Competition

The most direct manner in which a religious organization can attract adherents to its fold is religious proselytization – or, to use a phrase with less negative connotations¹⁶⁷ – religious propagation. Interestingly, despite the copious amount of regulatory and legal restrictions on religious activities, there is no general prohibition on religious propagation/proselytization. There are only explicit prohibitions on proselytization by foreigners¹⁶⁸ and during the provision of charitable and social services (including education).¹⁶⁹ Of course, the absence of such a prohibition does not imply that Chinese citizens have a general constitutional/legal right to religious propagation. One major legal tool the state can employ to curb religious propagation is the prohibition of “abnormal religious activities.” Religious propagation that takes place outside the boundaries of registered religious premises and/or is otherwise perceived as socially undesirable risks being sanctioned under the broadly construed notion of “abnormal” religious activities.¹⁷⁰ Indeed, the officially registered Christian organization has tempered the traditional religious

¹⁶⁷ Proselytization is arguable the most controversial aspect of religious freedom: ANAT SCOLNICOV, *THE RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW* 198 (Routledge 2011); Thio Li-ann, *Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy*, 2010 SING. J. LEGAL STUD. 484, 484-487 (2010); Rosalind I.J. Hackett, *Revising Proselytization in the Twenty-first Century*, in *PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS* 1, 3-4 (Rosalind I.J. Hackett ed., Equinox 2008).

¹⁶⁸ *Infra* III.D.

¹⁶⁹ *Infra* III.B.

¹⁷⁰ Tarocco, *supra* note 43, at 245. *See supra* III.C.1.

emphasis on proselytization,¹⁷¹ a likely reflection of the prevailing state aversion toward proselytization.¹⁷²

Another major constraint on religious propagation is the prohibition of religious insult. Given the goal of conversion, proselytization often includes critical comparative commentaries on the religious faiths of the targeted audience and/or other rival religions in the polity.¹⁷³ This use of “comparative advertising”¹⁷⁴ in religious competition is severely curtailed under the Chinese regime that explicitly sanctions religious materials that insult the religious sentiments of other religions’ adherents.¹⁷⁵ Although this prohibition can arguably be conceived as a noteworthy state recognition and protection of religions in general,¹⁷⁶ it also limits the proselytizing activities

¹⁷¹ Yang, *supra* note 16, at 105; Huang & Yang, *supra* note 71, at 45-46; Wenger, *supra* note 116, at 171. C.f. FENGGAO YANG, RELIGION IN CHINA: SURVIVAL AND REVIVAL UNDER COMMUNIST RULE 108 (Oxford University Press 2011) (notwithstanding regulatory control of registered Christian organization, some registered organizations may nevertheless carry out proselytization in “unapproved gathering points”).

¹⁷² Reinstein, *supra* note 1, at 12. See Ye Xiaowen, Cong shenceng jiji wentuto di yindao zongjiao yu shehui zhuyi shehui xiang shiying 从深层积极稳妥地引导宗教与社会主义社会相适应 [Leading Religion Actively and Steadily to Adapt to the Socialist Society at a Fundamental Level], in THE UNITED FRONT WORK DEPARTMENT OF CPCCC, Aiguo aijiao tuan jie jinbu: Quanguo zongjiao tuanti lingdaoren dongbei yantaohui jikan 爱国爱教·团结进步: 全国宗教团体领导人东北研讨会辑刊 [UNITED AND EXCEL IN LOVE FOR THE STATE AND RELIGION: NATIONAL RELIGIOUS ORGANIZATION LEADERS NORTHEAST SUMMIT SEMINAR PUBLICATION] 18, 19-20 (Sino-Cultural Press 1997) (expressing disapproval on religious propagations that is premised on the “non-believer go to hell” message, and observing how rapid religious growth that are driven by such propagation would attract restrictions and other countermeasures from the state).

¹⁷³ E.g., Andrew E. Barnes, *Religious Insults: Christian Critiques of Islam and the Government in Colonial Northern Nigeria*, 34 JOURNAL OF RELIGION IN AFRICA 62 (2004) (discussing the Christian criticisms of Islam in Africa during the colonial era).

¹⁷⁴ Comparative advertising is the advertising practice of comparison one’s own product with that of the competitors, often by highlighting the advantages of one’s product and the disadvantages of the competitors’. Commentators have typically observed that such advertising is more common and legally acceptable in U.S. as compared to the rest of the world: see Lazaros G. Grigoriadis, *Comparing the Trademark Protections in Comparative and Keyword Advertising in the United States and European Union*, 44 CAL. W. INT’L L.J. 149, 159-173 (2014); Charlotte J. Romano, *Comparative Advertising in the United States and in France*, 25 NW. J. INT’L L. & BUS. 371, 371-374 & 393-412 (2005).

¹⁷⁵ Art. 7(1)-7(3), Regulation on Religious Affairs, *supra* note 76. See Tarocco, *supra* note 43, at 246 (noting the problem of vagueness of the restriction).

¹⁷⁶ *Supra* III.B.

available to religious organizations/adherents. Religious propagation is thus limited to the promotion of the merits of one's religion.

2. Economic Competition

The role of money in the religious competition shaped by the Chinese legal regime is rather nuanced. *Prima facie*, economic competition is envisaged to be a significant aspect of religious competition. Sufficient financial resources are a stipulated condition for the regulatory approval necessary to set up religious schools¹⁷⁷ and religious premises.¹⁷⁸ The main sources of income for religious organizations under Chinese law, apart from donations and government subsidies, are income from economic activities.¹⁷⁹ These include fees from the provision of religious services; gate receipts for admission to religious premises; revenue from the sale of religious paraphernalia, religious artifacts and religious publications; and income from charitable activities (!) and other social services.¹⁸⁰

¹⁷⁷ Art. 9(3), Regulation on Religious Affairs, *supra* note 76 (“having the necessary funds for running the institution or college, and stable sources of funds”); art. 7(5), 8(5) & 9(3), Zongjiao yuanxiao sheli banfa 宗教院校设立办法 [Measures for the Establishment of Religious Institutes] (promulgated by Administration for Religious Affairs, Aug. 1, 2007, effective Aug. 1, 2007) (P. R. C.).

¹⁷⁸ Art. 14(4), Regulation on Religious Affairs, *supra* note 76 (“necessary funds”); art. 4(4), Zongjiao huodong changsuo sheli shenpi he dengji banfa 宗教活动场所设立审批和登记办法 [Measures for the Examination, Approval and Registration of the Establishment of Religious Activity Venues] (promulgated by Administration for Religious Affairs, Apr. 21, 2005, effective Apr. 21, 2005) (P. R. C.).

¹⁷⁹ See KOESEL, *supra* note 114, at 67-71 & 81-87 (discussing the possible revenue sources of religions in China). See also Paula F. Pipes & Helen Rose Ebaugh, *Faith-Based Coalitions, Social Services, and Government Funding*, 63(1) SOCIOLOGY OF RELIGION 49, 59 (2002) (noting how revenues from quasi-commercial activities, such as resale shops that sell donated second-hand items, are a significant and at times substantial portion of the budget of surveyed faith-based coalition in social service provisions).

¹⁸⁰ Art. 14, Zongjiao huodong changsuo caiwu jiandu guanli banfa 宗教活动场所财务监督管理办法 (试行) [Measures for the Supervision and Administration of Financial Affairs of Religious Premises (for Trial Implementation)] (promulgated by Administration for Religious Affairs, Jan. 11, 2010, effective Jan. 11, 2010) (P. R. C.); art. 20, 21 & 34, Regulation on Religious Affairs, *supra* note 76.

The conceptualization of religious activities as economic activities is reinforced in the provisions relating to legal liability, in which it is common to provide for the confiscation of illegal gains and fines benchmarked on illegal gains for violations such as the unauthorized conduct of large-scale religious activities,¹⁸¹ the unauthorized conduct of religious activities and acceptance of religious donations,¹⁸² the unauthorized organization of pilgrimages abroad,¹⁸³ and the unauthorized building of large-scale outdoor religious statues.¹⁸⁴ Tellingly, religious organizations are treated as part of the service industry for official statistical purposes.¹⁸⁵ Sociologist Xiaofei Kang is arguably right to observe that “[f]or pragmatic and ideological purposes, [the Chinese government] requires churches, temples, and mosques to be economically self-supporting: in addition to collecting incense money and rents on properties and providing religious services, clergy are expected to take part in productive labor and set up profit-making enterprises.”¹⁸⁶

Nonetheless, the manner in which religious organizations conduct their income-generating activities is regulated. Most prominent is the prohibition of apportionment (including voluntarily contributions) as a manner of collecting donations,¹⁸⁷ which may prevent certain religions from

¹⁸¹ Art. 40, Regulation on Religious Affairs, *supra* note 76.

¹⁸² Art. 43, *id.*

¹⁸³ *Id.*

¹⁸⁴ Art. 44, *id.*

¹⁸⁵ Guanyu jiaqiang he wanshan fuwuye tongji gongzuo yijian de tongzhi 关于加强和完善服务业统计工作意见的通知 [Notice on Strengthening and Perfecting the Statistics of Service Industry] (promulgated by St. Council General Office, Sept.17, 2011, effective Sept.17, 2011) (P.R.C.). See Yang, *supra* note 129, at 113 (“Based on the data collected through this fieldwork, I [, a sociologist,] suggest viewing the material side of Daoism in Shanghai as a service industry or an economic sector”).

¹⁸⁶ Kang, *supra* note 124, at 229. See also KOESEL, *supra* note 114, at 81 (noting the diverse entrepreneurial activities that Chinese religious community engaged to support the religious organizations).

¹⁸⁷ Art. 20, Regulation on Religious Affairs, *supra* note 76 (“Religious organizations may accept donation from citizen in accordance with religious customs, but there can be no compulsion or apportionment”).

utilizing the otherwise highly efficient and effective fundraising mechanism of regular tilting.¹⁸⁸ Individuals and commercial enterprises are also prohibited from acquiring any commercial or operation interests (such as property interests or right to profit) by sponsoring or donating to religious organizations,¹⁸⁹ notwithstanding the potency of the increasingly common practice of generating substantial funds for the restoration, development and construction of religious premises.¹⁹⁰ In a similar vein, the sale of incense – an important source of income for Buddhist and Taoist religious premises – is regulated to prohibit excessive charging and excessive burning on the grounds of pollution, fire hazard and tourism fraud.¹⁹¹

There is an interesting regulatory direction on the collection of gate receipts for admission to religious premises that are either tourist attractions themselves or are part of tourist attractions. The direction requires that religious personnel and adherents of the same religion worshiped in the

¹⁸⁸ Joy Kooi-Chin Tong, *Religious Experience of a Young Megachurch Congregation in Singapore*, in *MEDIATING FAITHS: RELIGION AND SOCIO-CULTURAL CHANGE IN THE TWENTY-FIRST CENTURY* 168 (Michael Bailey & Guy Redden eds., Ashgate 2009). See Joseph Nathan Cruz, *A Spectacle of Worship: Technology, Modernity, and the Rise of the Christian Megachurch*, in *MEDIATING PIETY: TECHNOLOGY AND RELIGION IN CONTEMPORARY ASIA* 115, 133 (Francis Khek Gee Lim ed., Brill 2009) (“Another popular testimony is of businesses being blessed as a consequence of faithful tithing practices.”).

¹⁸⁹ Guanyu chuli sheji fojiao simiao daoqiao gongguan guanli youguan wenti de yijian 关于处理涉及佛教寺庙、道教宫观管理有关问题的意见 [Opinions on Dealing of Issues Related to Management of Buddhist and Taoist Temples] (promulgated by Administration for Religious Affairs, United Front Work Department of CPC Central Comm., National Development and Reform Commission, Oct. 8, 2012, effective Oct. 8, 2012) (P. R. C.).

¹⁹⁰ *Tantuosi Gongdexiang cheng shangsi gongsi xiaojinku?* 潭柘寺“功德箱”成上市公司“小金库”? [Donation Boxes in Tantu Temple Becomes Cash Cow for Listed Companies], THE BEIJING NEWS, Dec. 18, 2014, at A16, available at http://epaper.bjnews.com.cn/html/2014-12/18/content_552648.htm?div=-1 (last visited Apr. 23, 2015) (discussing the proliferation of donation boxes in temples that are set up by the religious organizations and the companies managing the tourism site where the temples are situated); Nanlai Cao, *Boss Christians: The Business of Religion in the “Wenzhou Model” of Christian Revival*, 59 THE CHINA JOURNAL 63, 69-75 (2008) (observing how the Wenzhou wealthy Christian entrepreneurs gained de facto ownership and management right upon being the major donor/sponsor in church building projects). See Kang, *supra* note 124, at 245-246 (noting how local government officials sometime turn a blind eye of such economically stimulating endeavors).

¹⁹¹ Guanyu jinyibu guifan quanguo zongjiao lvyou changsuo ranxiang huodong de yijian 关于进一步规范全国宗教旅游场所燃香活动的意见 [Opinions on Further Regulating Incense Burning in Religious Tourist-attractions Nationwide] (promulgated by Tourism Administration, Administration of Industry and Commerce, Administration of Quality Supervision, Inspection and Quarantine, Jun. 18, 2009, effective Jun. 18, 2009) (P. R. C.).

religious premises should be granted free admission with the exception of fees relating to tourist services (cable car rides, boat rides, etc.).¹⁹² This creates a perverse economic incentive for the religious organization running the premises (which are typically historically significant places of worship) to develop the premises to resemble a theme park rather than a simple place of pilgrimage for adherents because mere attendance by adherents does not contribute to gate receipts.¹⁹³ The proper management of religious premises that are also tourist attractions due to historical and cultural heritage has been a recurring problem since market reform in the 1980s given the tension between the capacity to generate substantial tourism-related income from local and overseas visitors and the potential for fraudulently misusing religion in the process.¹⁹⁴

¹⁹² Art. 2, Guanyu yu zongjiao huodong changsuo youguan de youlan canguandian dui zongjiao renshi shixing menpiao youhui wenti de tongzhi 关于与宗教活动场所有关的游览参观点对宗教人士实行门票优惠问题的通知 [Notice on Offering Ticket Discount to Religious People in Tourist-Attractions Relevant to Venues for Religious Activities] (promulgated by National Development and Reform Commission, Dec. 21, 2005, effective Dec. 21, 2005) (P. R. C.).

¹⁹³ E.g., Tourist Bureau of Leshan City, *E'mei Shan dazao chuangyi tiyan yuanqu* 峨眉山打造创意体验园区 [Mount E'mei is Constructing Creative Experience Park], GOVERNMENT NETWORK OF LESHAN TOURISM AND ATHLETICS DEVELOPMENT COMMITTEE, Nov. 10, 2014, available at <http://www.lستا.gov.cn/xwkd/jqdt/system/2014/11/10/000567152.html> (last visited Apr. 23, 2015) (the announcement by the local government for the commercial development of Mount E'mei – a famous Buddhist site – into an integrated tourism destination); Borchert, *supra* note 56, at 99-100 (the “Disneyfied” minority culture parks that either contain or are attached to Theravāda Buddhist temples in the Xishuangbanna ethnic minority region). See also Tarocco, *supra* note 43, at 248-249 (discussing the tension between local state organs interested in using religious tourism revenue to further promote tourism and monks who prefer expenditure oriented towards meditation and library facilities). For a general discussion about the state of religious tourism in China, see generally SHEPHERD, *supra* note 141.

¹⁹⁴ Chp 2(4), Guanyu luoshi dang de zongjiao zhengce ji youguan wenti de diaocha baogao 关于落实党的宗教政策及有关问题的调查报告 [Investigation Report on Implementation of the Party's Religious Policies and Relevant Issues] (promulgated by Central Comm. of the CPC's General Office and St. Council's General Office, Dec. 29, 1985, effective Dec. 29, 1985) (P. R. C.). See Zhang & Zhu, *supra* note 2, at 808-810 (discussing the state involvement – including funding – in the construction of a large Buddhist statue in Sanya, Hainan Province, that become a profitable commercial enterprise); Kang, *supra* note 124, at 243-245 (examining the role and incentives of the local religious bureau in managing the sacred religious site of Huanglong to advance tourism and unity propaganda goals at the expense of religious autonomy of the underlying religious organizations); Yang, *supra* note 16, at 105 (discussing government involvement in temple revivals for the purpose of attracting overseas Chinese investments and businesses); Borchert, *supra* note 56, at 100-109 (discussing the effects of tourism – both positive and negative – on religion). See also Hannah Beech, *Tibet's Slow Burn*, 183(25) TIME 26, 29-31 (2014) (discussing the tourism-driven economic

The provision of social services, an important avenue by which the economic resources of a religious organization can be translated to outreach to and attraction of new adherents,¹⁹⁵ is restrictively regulated. The government has recently adopted a more supportive stance toward religious organizations' engagement in social service provision and charitable work.¹⁹⁶ However, the propagation of religion, though not necessarily the inclusion of religious content,¹⁹⁷ is explicitly prohibited in such activities.¹⁹⁸ Education, a popular and effective form of social services for religious organizations in other jurisdictions,¹⁹⁹ is completely off limits for religious organizations save for passive donations of scholarship.²⁰⁰ Reflecting the constitutional

development in Tibet that draws Chinese Han tourists interested in or attracted to Tibetan Buddhism while ignorant of the political plight of Tibetans).

¹⁹⁵ Grace Y. Kao, *The Logic of Anti-proselytization, Revisited*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 76, 79 (Rosalind I.J. Hackett ed., Equinox 2008); Paul Harvey, *Proselytization*, in RELIGION AND AMERICAN CULTURE 39, 44 (Philip Goff & Paul Harvey eds., University of North Carolina Press 2004); Duncan, *supra* note 19, at 311-313.

¹⁹⁶ The driving rationale is the increase in social tension arising from economic and social reform: art. 1, Guanyu guli he guifan zongjiaojie congshi gongyi cishan huodong de yijian 关于鼓励和规范宗教界从事公益慈善活动的意见 [Opinions on Encouraging and Regulating Religious Participation of Charity Activities] (promulgated by Administration for Religious Affairs, United Front Work Department of CPC Central Comm., National Development and Reform Commission, Feb. 16, 2012, effective Feb. 16, 2012) (P. R. C.). See ZHAO, *supra* note 43, at 88 (discussing this policy change).

¹⁹⁷ Provisions of social services by religiously affiliated organizations may include a variety of religious elements, not all of which are easily recognized as religious propagations. Whereas religious worship, religious teachings, and explicit invitations to convert would be likely to run afoul of the ban, more ambiguous issues would be the passive presence of religious icons and imagery on the premises or religious doctrines informing the design of the program without any explicit mention. There are also issues of intensity, prevalence, and compulsion: see Heidi Rolland Unruh, *Religious Elements of Church-Based Social Service Programs: Types, Variables and Integrative Strategies*, 45(4) REVIEW OF RELIGIOUS RESEARCH 317, 322-328 (2004) (discussing the different types and degrees of religious elements); Helen Rose Ebaugh et al., *Where's the Religion? Distinguishing Faith-Based from Secular Social Service Agencies*, 42(3) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 411, 422-424 (2003) (discussing how religion may affect/influence the provision of social services by faith-based charitable organizations).

¹⁹⁸ Art. 6(1), Opinions on Encouraging and Regulating Religious Participation of Charity, *supra* note 196.

¹⁹⁹ Stephen C. Berkwitz, *Religious Conflict and the Politics of Conversion in Sri Lanka*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 199, 204 (Rosalind I.J. Hackett ed., Equinox 2008); Robbie B. H. Goh, *Mission Schools in Singapore: Religious Harmony, Social Identities, and the Negotiation of Evangelical Cultures*, in RELIGIOUS DIVERSITY IN SINGAPORE 362, 365-366 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008); Wolfgang Gabbert, *Social and Cultural Conditions of Religious Conversion in Colonial Southwest Tanzania 1891-1939*, 40(4) ETHNOLOGY 291, 299-300 (2001).

²⁰⁰ Art. 3, Opinions on Encouraging and Regulating Religious Participation of Charity Activities, *supra* note 196.

prohibition of religious interference with education,²⁰¹ the separation of religion and education is explicitly mandated,²⁰² even for private schools.²⁰³ Proselytization by any persons is also explicitly prohibited in schools.²⁰⁴

Another dilution of the benefit of economic wealth is in terms of religious land use. Under the latest Regulation on Religious Affairs, religious organizations applying for permits to construct or expand religious premises must demonstrate local residents' demands for frequently conducting collective religious activities and must conform to a reasonable layout that does not obstruct the normal production and life of neighborhood entities or residents.²⁰⁵ Separate approval is needed for the construction of large-scale outdoor religious statues.²⁰⁶ Restrictions on land use and the reluctance of the government to grant land use permits for religious premises²⁰⁷ are constraints on religious growth,²⁰⁸ even for religious organizations that have ample financial resources to expand.

In this regard, it is worth noting the recent 2010 policy shift toward ensuring adequate social security safety nets for religious persons – in particular, basic living and healthcare needs –

²⁰¹ *Supra* III.B.

²⁰² Art. 8, Education Law, *supra* note 93.

²⁰³ Art. 4, Minban jiaoyu cujin fa 民办教育促进法 [Non-state Education Promotion Law] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 28, 2002, effective Sept. 1, 2003, amended June 29, 2013) (P.R.C.).

²⁰⁴ ¶16, Guanyu jinyibu jiaqiang he gaijin daxuesheng sixiang zhengzhi jiaoyu de yijian 关于进一步加强和改进大学生思想政治教育的意见 [Opinions on Further Strengthening and Improving Moral and Political Education for University Students] (promulgated by CPC Central Comm. and St. Council, Aug. 26, 2004, effective Aug. 26, 2004) (P. R. C.); chp 2(2), Decisions on Further Reform and Accelerating Development of National Education, *supra* note 72.

²⁰⁵ Art. 14, Regulation on Religious Affairs, *supra* note 76.

²⁰⁶ Art. 24, *id.*

²⁰⁷ Tarocco, *supra* note 43, at 246-247; Yang, *supra* note 19, at 429.

²⁰⁸ Jennifer E. Walsh, *The Importance of Gathering Together: Religious Land Use in the United States and China*, in CHRISTIANITY IN CHINESE PUBLIC LIFE: RELIGION, SOCIETY, AND THE RULE OF LAW 57, 62-64 (Joel A. Carpenter & Kevin R. den Dulk eds., Palgrave 2014); Tarocco, *supra* note 43, at 247; Yang, *supra* note 19, at 429.

does seem to lower the impact of economic competitiveness, especially because the regulation specifically includes relief for concerns about the retirement and medical needs of these religious persons.²⁰⁹

3. Political Competition

In terms of the relationship between political competition and religious competition, a surprising feature of the Chinese regime is actually how little the laws, regulations and policies address the issue of religious involvement in the political process. Given the numerous laws and regulations that restrict and regulate religious organizations with regard to a whole spectrum of activities, one would expect prohibition, or at least some form of regulation, on the involvement of political activities by religious organizations. However, there is no explicit mention, except in the context of village organizations.²¹⁰ The use of religions and/or clanship to interfere with or manipulate elections of village organizations or the management of village organizations is explicitly prohibited,²¹¹ with frequent mentions in policy documents of this issue as a matter of

²⁰⁹ Guanyu jinyibu jieju zongjiao jiaozhi ren yuan shehui baozhang wenti de tongzhi 关于进一步解决宗教教职人员社会保障问题的通知 [Notice on Further Solving the Social Security Issues for Religious Personnel] (promulgated by Administration for Religious Affairs, Ministry of Human Resources and Social Security, Ministry of Finance, Dec. 27, 2011, effective Dec. 27, 2011) (P. R. C.); Guanyu tuoshan jieju zongjiao jiaozhi ren yuan shehui baozhang wenti de yijian 关于妥善解决宗教教职人员社会保障问题的意见 [Opinions on Properly Solving the Social Security Issues for Religious Personnel] (promulgated by Administration for Religious Affairs, Ministry of Human Resources and Social Security, Ministry of Finance, Feb.10, 2010, effective Feb.10, 2010) (P. R. C.).

²¹⁰ The most likely reason is that the CCP remains the focal point of all political activities. With the exception of autonomous regions, where ethnic minorities with religious beliefs traditionally associated with the ethnic minority are given greater room for political participation, it is only at the village organization level that non-party members/entities may be directly involved in the political process. See Edmund Malesky, Regina Abrami & Yu Zheng, *Institutions and Inequality in Single-Party Regimes: A Comparative Analysis of Vietnam and China*, 43(4) COMPARATIVE POLITICS 401, 408-415 (2011).

²¹¹ Art. 2(3), Nongcun jiceng ganbu lianjie lvxing zhize ruogan guiding (shixing) 农村基层干部廉洁履行职责若干规定（试行） [Regulations on Maintaining Probity in Exercising Duty as Grass-roots Cadres] (promulgated by General Office of the CPC Central Comm. and General Office of St. Council, May 23, 2011, effective May 23, 2011) (P.R.C.); ¶4(2), Guanyu wei tuijin nongcun gaige fazhan tigong sifa baozhang he falv fuwu de ruogan yijian 关于为推进农村改革发展提供司法保障和法律服务的若干意见 [Opinions on Providing Judicial Protection and Legal

concern.²¹² This aversion to village-level political activities can be arguably traced to the pre-1949 Nationalist government policy on religion that negatively viewed the dominance of such religious groups in rural areas as competition for state influence and resources²¹³ and the danger of conversion to Christianity in light of the perceived primitive understanding of religion among peasants.²¹⁴

Of course, the lack of explicit mention beyond the context of village management does not by any means indicate that religious organizations may engage in political activities. The vague phrase “normal religious activities” could arguably be interpreted to exclude political activities.²¹⁵ Indeed, religious organizations that possess significant mobilization would be subjected to scrutiny (a particular bane of expanding religious organizations that are not part of official religious organizations),²¹⁶ whereas those that actually deploy mobilization capabilities in an attempt to influence public opinion will likely attract the dreaded designation of a cult, as typified by

Service for Promoting Reform and Development in Rural Area] (promulgated by Supreme People’s Court, Dec.3, 2008, effective Dec.3, 2008) (P. R. C.).

²¹² *E.g.*, ¶26, Guanyu jiada tongchou chengxiang fazhan lidu jinyibu lieshi nongye nongcun fazhan jichu de ruogan yijian 关于加大统筹城乡发展力度进一步夯实农业农村发展基础的若干意见 [Opinions on Exerting Greater Efforts in the Overall Planning of Urban and Rural Development and Further Solidifying the Foundation for Agricultural and Rural Development] (promulgated by CPC Central Comm. and St. Council, Dec. 31, 2009, effective Dec. 31, 2009) (P.R.C.); ¶6(3), Guanyu jianquan he wanshan cunwu gongkai he minzhu guanli zhidu de yijian 关于健全和完善村务公开和民主管理制度的意见 [Opinions on Perfecting and Improving the System of Openness and Democratic Administration of Village Affairs] (promulgated by CPC Central Comm. and St. Council, June 22, 2004, effective June 22, 2004) (P.R.C.). *See* Huang & Yang, *supra* note 71, at 55-56 (discussing how clanship ties and religions can be possible local political forces in the rural areas that can challenge the communist party leadership).

²¹³ Cheung, *supra* note 1, at 15-16.

²¹⁴ Cox, *supra* note 1, at 403. Interestingly, this primitive understanding of religion has spurned sects that while purportedly of Christian inspiration would be considered heretical by most mainstream Christians: Zhu, *supra* note 7, at 477; Yang, *supra* note 16, at 105-106.

²¹⁵ XIE, *supra* note 7, at 87-89. *See supra* III.C.1.

²¹⁶ Liang, *supra* note 67, at 59; XIE, *supra* note 7, at 85-86; LIANG, *supra* note 142, at 47-51.

Falungong.²¹⁷ Among other perceived “misdeeds,” the key triggering event for banning Falungong as a cult on July 22, 1999 was arguably the peaceful – but large – demonstration/gathering of 10,000 to 18,000 practitioners outside government headquarters in Beijing on April 25, 1999 to protest critical media treatment.²¹⁸ Indeed, the majority of officials and scholars in China view the attempt to challenge the political authority of the current regime under the banner of religion as the key defining characteristic – and, henceforth, the justification – of a criminalized cult.²¹⁹ A common strategy among religious organizations, especially those that are not entirely legal, is to keep a low profile in politics.²²⁰

4. Foreign Support

The religious competition envisaged by the Chinese legal regime clearly sought to minimize the influence of foreign religious organizations on the success of local religions. The Constitution establishes a bright line by explicitly mandating that “religious bodies and religious affairs are not subject to any foreign domination.”²²¹ This is elaborated further in the Regulation on Religious Affairs, which repeats the prohibition of foreign domination²²² while introducing the euphemism of “independent management”²²³ to reflect the local protectionist orientation of the religious market. “Violation of independent management” – but not foreign interference – was

²¹⁷ Cheung, *supra* note 1, at 26.

²¹⁸ KOESEL, *supra* note 114, at 54-56; Zhu, *supra* note 7, at 472-473; Rahn, *supra* note 137, at 302.

²¹⁹ LIANG, *supra* note 142, at 152-159 (observing but critical of this phenomenon).

²²⁰ XIE, *supra* note 7, at 86; Huang & Yang, *supra* note 71, at 56.

²²¹ Art. 36, XIAN FA [Constitution] (2004) (P.R.C.).

²²² For uses of the phrase in other laws, *see* art. 11, Regional National Autonomy Law, *supra* note 148.

²²³ Art. 4, Regulation on Religious Affairs, *supra* note 76. This term has been used frequently in government policy statement: *e.g.*, chp 43(1), Outline of the Eleventh Five-Year Plan of National Economic and Social Development, *supra* note 71; chp 7, Zhengfu gongzuo baogao 政府工作报告(2002) [Government Working Report] (promulgated by Nat'l People's Cong., Mar. 15, 2002, effective Mar. 15, 2002) (P.R.C.).

listed as grounds for prohibited publications.²²⁴ There are also particular concerns about the use of religion by foreign individuals and entities to support separatist movements, especially of Tibet and Xinjiang.²²⁵

The starting point is the heavy restrictions on the religious activities of foreigners in China. Foreigners are prohibited from setting up religious organization, establishing religious premises and proselytizing.²²⁶ Foreign religious organizations and religious persons are also not permitted to participate in the establishment of foreign-local educational joint ventures²²⁷ and are prohibited from interfering with the establishment of religious premises or the appointment of religious persons in China.²²⁸

In light of the numerous ways in which foreign religious organizations and persons can influence religious activities in China, the Regulation of Religious Affairs and a whole host of other laws and regulations contain provisions that implicate the interactions between local religious organizations and the outside world. Financial and material support inevitably attracts

²²⁴ Art. 7(5), Regulation on Religious Affairs, *supra* note 76.

²²⁵ Chp 5, Guanyu quanguo renmin daibiao dahui changwu weiyuanhui gongzuo baogao de jueyi 关于全国人民代表大会常务委员会工作报告的决议 [Decision on the Working Report of the Standing Comm. Nat'l People's Cong.] (promulgated by National People's Congress, Mar. 14, 2011) (P.R.C.); Preamble, Opinions on Further Strengthening the Comprehensive Management of Social Security, *supra* note 137.

²²⁶ Art. 16 & 17, Jingnei waiguoren zongjiao huodong guanli guiding shishi xize 境内外国人宗教活动管理规定实施细则 [Rules for the Implementation of Provisions on the Administration of Religious Activities of Aliens within the Territory of the People's Republic of China] (promulgated by Administration for Religious Affairs, Aug. 11, 2000, effective Aug. 11, 2000, amended Nov. 29, 2010) (P. R. C.); Art. 12, Guanyu difang duiwai jiaowang de ruogan guiding 关于地方对外交往的若干规定 [Regulations on Local Foreign Exchange] (promulgated by CPC Central Comm. and St. Council General Office, Nov.9, 1991, effective Nov.9,1991) (P. R. C.).

²²⁷ Art. 7, Zhongwai hezuo banxue tiaoli 中外合作办学条例 [Regulations on Chinese-foreign Cooperative Education] (promulgated by St. Council, Mar. 1, 2003, effective Mar. 1, 2003) (P.R.C.) (The educational joint-venture, like all other educational service providers, are prohibited from engaging in religious education and religious activities as well.).

²²⁸ Art. 16, Rules for the Implementation of Provisions on the Administration of Religious Activities of Aliens within the Territory of the People's Republic of China, *supra* note 226.

close regulatory scrutiny. Donations from abroad are subjected to specific regulation²²⁹ after being previously banned.²³⁰ Sponsorship by foreign religious organizations or individuals for the overseas religious education of Chinese nationals must be administered through Chinese national religious organizations and not selected or recruited by sponsors.²³¹ Similarly, national-level religious organizations must determine the receiving of foreign students and the sending of students abroad.²³² Importing foreign religious materials (even if they are not deemed harmful to China's national security and public interest) are prohibited except for those materials that are for the reasonable personal use of foreigners or are approved for academic/cultural exchange with local religious organizations.²³³ The hiring of foreign religious persons to teach in religious educational institutions²³⁴ is subject to regulations that limit the duration of their service,²³⁵ the prohibition of leadership roles in administration,²³⁶ and overall approval by the Bureau of

²²⁹ Art. 35, Regulation on Religious Affairs, *supra* note 76.

²³⁰ Zhang & Zhu, *supra* note 2, at 811.

²³¹ Art. 13, Rules for the Implementation of Provisions on the Administration of Religious Activities of Aliens within the Territory of the People's Republic of China, *supra* note 226.

²³² Art. 10, Regulation on Religious Affairs, *supra* note 76. *See* Tong, *supra* note 3, at 864-885 (noting that on average several hundred Chinese Christian pastors/priests/nuns were receiving religious training abroad – under the government approval – at any given time).

²³³ Art. 11 & 12, Rules for the Implementation of Provisions on the Administration of Religious Activities of Aliens within the Territory of the People's Republic of China, *supra* note 226.

²³⁴ This is subjected again to a regulatory framework that essentially limits one institution for each religion in each province and requires various substantive requirements: art. 6-8, Measures for the Establishment of Religious Institutes, *supra* note 177.

²³⁵ Hire of foreigners should be primarily for the short-term of less than six months, and with a maximum duration of a year: art. 7, Zongjiao yuanxiao pinyong waiji zhuan ye renshi banfa 宗教院校聘用外籍专业人员办法 [Measures for Appointment of Foreign Professionals in Religious Institutes] (promulgated by Administration for Religious Affairs, Administration of Foreign Experts Affairs, Ministry of Public Security, Nov. 19, 1998, effective Nov. 19, 1998) (P. R. C.).

²³⁶ Art. 8, *id.*

Religious Affairs.²³⁷ Exchange and cooperation with foreigners must not involve accession to their religious conditions.²³⁸

E. Summary: The Resulting Religious Market

Putting together the above discussions, the resulting religious market under the Chinese legal regime has the following features. First, the secular ideology of socialism together with atheism in the name of science are clearly preferred over all other secular ideologies and all religions. However, the status of religion as a whole has improved substantially from the aggressive suppression during the Cultural Revolution to a situation in which it is not only accommodated²³⁹ but actually enjoys some preferential protection (such as the protection of religious sentiment) that is not available to secular beliefs in general.

Second, the religious competition between the religions, while generally on an equal basis, is especially disadvantageous for religions that are unwilling to subject themselves to the political and regulatory control of the state and that are consequently subjected to state sanctions against abnormal, cultish and/or superstitious activities. Conversely, the religions of ethnic minorities are given more protection and state support.

²³⁷ Art. 15, *id.*

²³⁸ Art. 12, Regulations on Local Foreign Exchange, *supra* note 226. Religious conditions include requirement/expectation of proselytization, setting up of religious organizations and/or setting up of religious premises: ¶2, Guanyu jinyibu zuohao zongjiao gongzuo ruogan wenti de tongzhi 关于进一步做好宗教工作若干问题的通知 [Notice on Several Issues on Further Improvement in Religious Work] (promulgated by Central Comm. Of CPC, St. Council, Feb. 5, 1991, effective Feb. 5, 1991) (P. R. C.).

²³⁹ KOESEL, *supra* note 114, at 42-58; Liu, Scharffs & Hollan, *supra* note 16, at 251; Yang, *supra* note 16, at 100. See Yang, *supra* note 147, at 20-29 (discussing the evolution of religious research from a component of atheist propaganda to a more objective, scientific approach, the evolution of which corresponded to the prevailing state policies on religion).

Third, direct competition for adherents in the Chinese religious market is somewhat muted by the laws restricting religious propagation in terms of content (no insult to other religions) and venue (religious propagation beyond the narrow confines of registered religious premises can potentially be sanctioned).

Fourth, the role of economic competitiveness in the Chinese religious market is somewhat truncated. The regulatory regime envisaged that religious organizations are to be economically viable, with several regulatory approvals conditioned upon the demonstration of sufficient funding. In the general scarcity of state subsidies for religious activities save for affirmative actions available to religions of ethnic minorities, there is increased pressure on religious organizations to be able to attract donations and generate income. In contrast, restrictions relating to religious land use and the provision of social services mean that wealthy religious organizations are deprived of mechanisms that can otherwise translate material wealth into extensive religious outreach and propagation.

Fifth, any competitive advantage that might otherwise be derived from political competitiveness is largely negated in the Chinese legal regime, which is particularly wary of religious influence on governance. Religious adherents of all religious faiths are excluded from the core governance organs of the state and have very limited avenues of influencing state law and policies.

Sixth, the Chinese regime is very hostile toward foreign interference in local religious activities, from the explicit prohibition in the Constitution to various legal/regulatory restrictions on personal, funding, and material (including publications) input. This is essentially a local

protectionist stance toward religious competition. Notwithstanding the potential profound influence from abroad in the modern era of globalization,²⁴⁰ religions in the Chinese religious market must essentially rely on domestic resources – whether financial or human – to compete with one another. Foreign religions are not permitted to participate directly in the market, and local religions with strong foreign links are not allowed to draw on these advantages.

These different dimensions of the religious market will be critically examined in the next three Parts.

IV. ARTICULATING THE NORMATIVE BENCHMARK FOR THE STATE’S TREATMENT OF RELIGION

The suppression of religious liberty appears straightforward for the requirement that religions should be compatible with socialism, among other restrictions. How can the state justify compelling religions to adapt their doctrines and practices to suit the political ideology of the ruling party? This Part grapples with China’s explicit preference for its official ideology over religions and other beliefs to argue that the approach of calibrating law and policies to promote expressly articulated benchmarks to which religions are expected to measure up is the right approach under Law & Religious Market perspective, notwithstanding legitimate qualms about the desirability of the adopted benchmark.

²⁴⁰ See Wuthnow & Offutt, *supra* note 25, at 216-223 (discussing the large amount of international flow of human, economic and informational resources in the religious sphere); Peggy Levitt, *Redefining the Boundaries of Belonging: The Institutional Character of Transnational Religious Life*, 65(1) SOCIOLOGY OF RELIGION 1, 6-14 (2004) (discussing how transnational religious life impact religious institution). See also Ivan Strenski, *The Religion in Globalization*, 72(3) JOURNAL OF AMERICAN ACADEMY OF RELIGION 631, 631-633 (2004) (arguing how economic globalization can traces its roots and current manifestations to a certain Christian theologies). See also DAI, *supra* note 44, at 121-137 (discussing how the connectivity and plurality brought upon by globalization affects the internal and external dynamics of religious interactions).

A. *Religion and Political Ideology*

It is actually uncontroversial to expect and require religions in a particular jurisdiction to conform to the political norms of that jurisdiction. Religions in Western liberal democracies are legally required to conform to the political ideology of liberal democracy, such as respect for the religious freedom of others, the upholding of the rule of law, adherence to the notion of equality, and respect for the democratic process.²⁴¹ Religions whose doctrines and practices violate such norms, whether a “traditional” view of gender roles,²⁴² a hostile view of non-believers,²⁴³ or a regressive view of race,²⁴⁴ are normatively extorted and, at times, legally compelled²⁴⁵ to modify

²⁴¹ Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2771 (2009); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198-202 (1992). See Gunnar Shirbekk, *Science and Religion?*, in SACRED SCIENCE? 25 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012) (arguing that religions are “faced with the same needs for epistemic and institutional adaptation to the positive and necessary demands for an enlightened modernity” that includes respect of scientific knowledge, self-critical recognition of religious plurality and differentiation between legal system and religion); Michael J. Reiss, *What Should be the Role of Religion in Science Education and Bioethics?*, in SACRED SCIENCE? 127, 135-136 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012) (). See also Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 169-173 (2011) (noting how liberal democracy imposes constraints on religions, and arguing for allowing religious arguments in political discourse since liberal democracy should provide the opportunity for change in institution). For discussion about the substantive content of liberal democracy, see Robert Audi, *Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 197, 198-204 (2005); Paul B. Stephan III, *The Fall – Understanding the Collapse of the Soviet System*, 29 SUFFOLK U. L. REV. 17, 28-29 (1995).

²⁴² E.g., DENNIS C. MUELLER, REASON, RELIGION & DEMOCRACY 386-390 (Cambridge University Press 2009) (discussing examples of opposition to women’s rights from Catholic Church, conservative Christianity and Islam).

²⁴³ E.g., Aryn Baker, *Unholy Choices: Christians in the Middle East Find Themselves at a Crossroads in Region Rocked by War and Revolution*, 183(15) TIME 18, 20-21 (2014) (discussing the existence plight faced by Christians amidst rise of religious extremism).

²⁴⁴ E.g., BRETT A. BARNETT, UNTANGLING THE WEB OF HATE: ARE ONLINE “HATE SITES” DESERVING OF FIRST AMENDMENT PROTECTION? 140 (Cambria Press 2007) (“[Orange County Assembly of Christ] defended its anti-Semitism by pointing to verses from the Christian Bible and the expulsion of Jews from various countries throughout history.”); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 40 (2004) (“The Ku Klux Klan has spread a reign of terror designed to produce a White ‘Christian’ America.”).

²⁴⁵ E.g., *Brown v. Dade Christian School, Inc.*, 556 F.2d 310 (5th Cir. 1977) (compelling the school to racially desegregate despite claims of religious beliefs against desegregation). See Simen Andersen Øyen, *The Religious Belief in Rationality, Science and Democracy*, in SACRED SCIENCE? 65, 69 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012) (observing the incompatibility of indigenous values – such as gender hierarchy - and practices – collective rights in land - with the modern Western democratic institutions); Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 B.Y.U.L. REV. 1005, 1028

their practices. Similarly, civic education to promote values endorsed by the state is commonplace around the globe,²⁴⁶ whether in the U.S., which at one time envisaged a distinct Protestant worldview in contrast with the then-discriminated minority of Catholics,²⁴⁷ or in modern Europe, with concerns about recent Muslim immigrants.²⁴⁸ The functioning of the modern nation state inevitably requires the underlying polity, including religious adherents and religious organizations, to subscribe to certain premises such as political process and governance institutions.²⁴⁹

The fundamental problem with China is not that the state is promoting a political ideology or requiring religions to conform to this political ideology but that the political ideology is

(2004) (example of where “the Ku Klu Klan may run for political office, but they may not enact into law their most cherished discriminatory policies.”). In response to the alleged infiltration of Islamist extremists in state schools, the British Prime Minister James Cameron announced programs to promote, and the need for everyone to respect, “British values” that include “belief in freedom, tolerance of others, accepting personal and social responsibility, respecting and upholding the rule of law”: Simon Walters, *Cameron Tell UK Muslims: Be More British*, THE MAIL (U.K.), June 15, 2014, at 1.

²⁴⁶ Judith Torney-Purta, *Patterns in the Civic Knowledge, Engagement, and Attitudes of European Adolescents: The IEA Civic Education Study*, 37(2) EUROPEAN JOURNAL OF EDUCATION 129, 129-130 (2002); Steven E. Finkel, *Civic Education and the Mobilization of Political Participation in Developing Democracies*, 64(4) THE JOURNAL OF POLITICS 994, 994-995 (2002). See also Halleli Pinson, *Inclusive Curriculum? Challenges to the Role of Civic Education in a Jewish and Democratic State*, 37 (4) CURRICULUM INQUIRY 351, 369-373 (2007) (discussing the paradox of Israeli civic education that promote pluralism and inclusion while at the same time emphasizing and cultivating an ethno-nationalistic sense of Jewish collectivity).

²⁴⁷ Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253, 287-288 (2009); Shiffrin, *supra* note 244, at 71 (“Support the Protestants was considered neutral, common sense promotion of morals; supporting the Catholics was establishing a religion.”); David Robertson, *Neutrality Between Religions or Neutrality Between Religion and Non-religion*, in LAW AND RELIGION IN CONTEMPORARY SOCIETY 31, 35 (Peter W. Edge & Graham Harvey eds., Ashgate 2000) (“State-organized institutions such as high schools overtly indoctrinated into Protestantism, and the symbols of this Christianity were everywhere.”).

²⁴⁸ Certain schools in the UK that have predominantly Muslim student populations were investigated and punished with special measures by the government education department for allegedly problematic practices such as “cancellation of Christmas events, the curtailing of exchange visits with nearby churches, the decision not to have a tombola or raffles at the school fete”: Richard Adams & Shiv Malik, *Birmingham Schools: Dossier of Evidence Finally Laid Bare After Leaks and Allegations*, THE GUARDIAN (U.K.), June 10, 2014, at 6; John Bingham, *More Schools Investigated in Muslim “Takeover Plot” Inquiry*, THE DAILY TELEGRAPH (U.K.), Apr. 15, 2014, at 1. The Prime Minister has advocated the acceptance “British values” in response, whereas one legislator urged UK Muslims to acknowledge that they must accept the UK citizenship values that are Christian-based: Walters, *supra* note 245; Matthew Holehouse, *Accept Christian Values, Muslims Told*, THE DAILY TELEGRAPH (U.K.), Apr. 22, 2014, at 2.

²⁴⁹ Reiss, *supra* note 241, at 135-136; Liviatan, *supra* note 6, at 79-80; Magarian, *supra* note 241, at 169-173; Raday, *supra* note 241, at 198-202; Raymond Firth, *Spiritual Aroma: Religion and Politics*, 83(3) AMERICAN ANTHROPOLOGIST 582, 584 (1981).

normatively objectionable in the eyes of critics. This is unsurprising given the almost instinctive objection among Western commentators toward the Socialist ideology, especially with the Cold War ending in the collapse of the Soviet Union.²⁵⁰ Nonetheless, it is worth noting that some of the conformity to Socialism exerted by the Chinese regime on religions may arguably be normatively desirable. For example, gender inequality manifesting in the form of the inferior social and family status of women remains a concern for certain tribal customs of ethnic minorities²⁵¹ and has been targeted for reform in accordance with the more equal Socialist conception of gender.²⁵² The customary and religious outlooks of certain ethnic minorities may also not share the emphasis on education (in the form conceptualized by the state) and can frustrate the government emphasis on universal education.²⁵³ Indeed, the emphasis on public education by the Chinese state can provide important educational avenues for girls that might otherwise be excluded by the prevailing religious and cultural norms.²⁵⁴ The abolishment of serfdom in Tibet has also been frequently cited

²⁵⁰ *C.f.*, Stephan, *supra* note 241, at 19-30 (discussing and rebutting the widely perceived notion that the fall of the Soviet Union as evidence for the failure of Soviet communism).

²⁵¹ Li Rongrong, *Xinzhongguo chengli yilai Yunnan shaoshu minzu chuantong daode de shehui lishi bianqian* [Social and Historical Evolution of the Traditional Moral Values of Yunnan Ethnic Minorities Since the Formation of New China], in SHEHUI ZHUYI YU XINZHONGGUO 60 NIAN [60 years of Socialism in China] 149, 150-154 (Marxism Research Society of China Higher Education Society et al. eds., China Social Science Publishing 2010) (discussing the customs, traditional morality and religions of ethnic minority in Yunnan province, and also observing two other problems of superstitious activities – which is particular problematic when used as solutions to illness and problems – and tribal rules that are cumbersome).

²⁵² For general discussions about the conception of woman status under Chinese Socialist regime, especially in comparison with the relatively inferior treatment in pre-1949 Chinese society, see Lei Yun, *Xinzhongguo wei tigao funv diwei tigong de zhidu baozhang tanxi* [Analysis on the Institutional Protection Provided by New China for the Advancement of Woman Status], in SHEHUI ZHUYI YU XINZHONGGUO 60 NIAN [60 years of Socialism in China] 123 (Marxism Research Society of China Higher Education Society et al. eds., China Social Science Publishing 2010).

²⁵³ Chp 1, Guojia xibu diqu liangji gongjian jihua (2004- 2007 nian) 国家西部地区“两基”攻坚计划 (2004 - 2007 年) [National Programme for Western Area (2004-2007)] (promulgated by General Office of St. Council, Feb. 16, 2004, effective Feb. 16, 2004) (P. R. C.).

²⁵⁴ *E.g.*, Borchert, *supra* note 56, at 97 (Only boys are allowed to be ordained – and received the accompanying traditional temple education – under the Theravāda Buddhism practiced by the Dai ethnicity in Xishuangbanna. The availability of public education after 1950s resulted in a much greater participation rates for girls in the public education system as compared to boys). See Emily Hannum, *Educational Stratification by Ethnicity in China: Enrollment and Attainment in the Early Reform Years*, 39 (1) DEMOGRAPHY 95, 100-102 (2002) (discussing the

by the Chinese government as an improvement of the Communist regime as opposed to the previous religious feudalism,²⁵⁵ notwithstanding the possibility of overstating the oppressiveness of the serfdom and the resulting change in living status and social mobility.²⁵⁶

This Article is certainly not making the argument that the Communist regime is an unqualified success or even that the limited changes are themselves justifiable. Indeed, even within China, the continued entrenchment of Marxism as state ideology could not shield its abatement among Chinese elites and general public.²⁵⁷ The suggestion that some of the “pressured” changes imposed on religions in China are arguably desirable even by the standards of liberal democracy is merely to highlight the key takeaway that the debate should be about the normative desirability of the ideological premises and the degree of promotion of those premises.

B. The Argument from the Law & Religious Market

This insight into the inevitable necessity of an underlying political ideology that binds the polity and informs state actions echoes the key normative implication of Law & Religious Market

generally absence of gender education gap between ethnic minorities and the Han majority amidst efforts aimed to promote minority schoolings).

²⁵⁵ Solomon M. Karmel, *Ethnic Tension and the Struggle for Order: China's Policies in Tibet*, 68(4) PACIFIC AFFAIRS 485, 496-502 (1995); John Quansheng Zhao, *An Analysis of Unification: The PRC Perspective*, 23(10) ASIAN SURVEY 1095, 1103-1104 (1983); George Ginsburgs & Michael Mathos, *Communist China's Impact on Tibet: The First Decade (I)*, 29(7) FAR EASTERN SURVEY 102, 106-107 (1960). *See also* Liu & Alatan, *supra* note 145, at 138-139 & 155-157 (discussing the abolishment of slavery among the Yi ethnicity in the Southwest region of China).

²⁵⁶ Melvyn C. Goldstein, *Serfdom and Mobility: An Examination of the Institution of “Human Lease” in Traditional Tibetan Society*, 30(3) THE JOURNAL OF ASIAN STUDIES 521, 521 (1971) (“It will show how the dichotomy between flexibility and rigidity is misleading and inappropriate when applied to Tibet and how, in reality, one of the most salient features of Tibetan social organization was its incorporation of a significant potential for personal mobility within a matrix of hereditary and pervasive serfdom.”). *See also* WARREN W. SMITH JR., CHINA'S TIBET? AUTONOMY OR ASSIMILATION 14-16 & 51-119 (Rowman & Littlefield Publishers 2008) (arguing that the deliberate negative portrayal of pre-communist Tibetan society by the Chinese Communist state is to mask what was in fact a systematic transfer of power from traditional Tibetan elite to the Chinese elite).

²⁵⁷ ZHOU, *supra* note 44, at 186-189.

perspective – that religion can never be a sphere immune to state intervention. Instead of hiding behind a veil of purported neutrality, the state should consciously articulate the normative characteristics of religion that would inform the state’s actions affecting religions.²⁵⁸

In this regard, the Chinese regime actually fares well. The state has not been reluctant to articulate what it expects from “good” religions that should be accommodated and promoted by the state. In addition to compatibility with socialism, a “good” religion should be patriotic and keep a healthy distance from foreign power sources; it should not present an alternative power source to the CCP; it should not be assertively exclusive vis-à-vis other religions and, of course, the political authority; it should advocate morality in line with contemporaneous circumstances; and it should not be excessively obsessed with supernatural interventions in world affairs.²⁵⁹ There is, of course, ambiguity, especially at the margins, regarding the precise manifestations of these desirable qualities. However, these articulated benchmarks of acceptable religions provide strong explanatory forces for religious competition shaped by laws, policies and other state actions.

Of course, these characteristics, and the regulatory regime intended to foster these characteristics are far from normatively desirable. Commentators have rightly highlighted the domineering state control over religious affairs and the risks that this state interference poses to

²⁵⁸ *Supra* II.

²⁵⁹ See ZHAO, *supra* note 43, at 123-124; *Chinese Vice President Calls on Religious Circle in Tibet to Promote Patriotism, Maintain National Unity*, XINHUA NET, Jul. 23, 2011, available at http://news.xinhuanet.com/english2010/china/2011-07/23/c_131003381.htm (last visited Apr. 23, 2015); *Hu Jintao: Guanche dang de zongjiao gongzuofangzhen zuohao xin xingshixia zongjiaogongzuo* 胡锦涛:贯彻党的宗教工作方针 做好新形势下宗教工作 [Hu Jintao: Implement Party’s Directions on Religious Work, Perform Religious Work Under New Circumstances], XINHUA NET, Dec. 19 2007, available at http://news.xinhuanet.com/newscenter/2007-12/19/content_7281396.htm (last visited Apr. 23, 2015).

religious freedom.²⁶⁰ The personal plights faced by persecuted religious adherents – a rather disturbing list that includes Tibetan Buddhists, Uighur Muslims, Christians, and the Chinese religious sect of Falungong²⁶¹ – should not be slighted. Indeed, the authoritarian nature of the Chinese regime means that one cannot shake off the suspicion that these purported benchmarks are driven more by the desire of the CCP to retain dominant political control than genuine assessment of the public goods.²⁶²

However, like the critique on the mandated conformity of religion to socialism in the former section, the key concern here is that the benchmarks are normatively undesirable, whether substantively in terms of the content or vis-à-vis the undemocratic procedures in which they are formulated. That the state should clearly articulate the characteristics of “good” religion that is deserving of state support – directly or indirectly – is the necessary and desirable approach under the insights from Law & Religious Market perspective. The legitimate advocacy of reform in this area of Chinese law should preserve this approach and not throw the baby out with the bath water.

V. THE CASE FOR GRADUAL MARKET LIBERALIZATION

The Chinese regime is notorious for its heavy-handed regulatory control of religious activities. The numerous laws, regulations and state policies seek to define the restrictive scope and manner of religious activities that is permitted. It is no surprise that such policies prompt criticisms of religious liberty violations and corresponding calls for the abolishment of such

²⁶⁰ *Supra* note 2 and accompanying text.

²⁶¹ *Supra* note 1 and accompanying text.

²⁶² Beatrice Leung, *China's Religious Freedom Policy: The Art of Managing Religious Activity*, 184 THE CHINA QUARTERLY 894, 910-913 (2005); Cheung, *supra* note 1, at 18-19; Potter, *supra* note 47, at 319-324; Kolodner, *supra* note 7, at 465-468.

impediments to religious exercise.²⁶³ Given the extent and motivations of these restrictions, this Article agrees with the general consensus on the undesirability of the current Chinese regulatory and legal regime on religion. Nonetheless, an examination of the impact of specific laws/policies on religious competition indicates that not all restrictions or distortions are undesirable per se. In particular, this Part argues that existing laws and policies that limit proselytization, curtail the effect of money in religious competition, and provide for affirmative action to socio-economically disadvantaged religious minorities should be preserved, at least at the onset of market liberalization.

A. Proselytization and Harmonious Religious Competition

One might assume that any liberalization of the religious market in China would include greater freedom of religious propagation. This would be prima facie desirable²⁶⁴ because religious propagation is a form of religious expression that can be an integral aspect of individual fulfillment and autonomy.²⁶⁵ Given that evangelism is a prominent religious duty for many religions, such as

²⁶³ *Supra* note 7 and accompanying text.

²⁶⁴ For a discussion on the arguments in favor of religious propagation, see generally Jianlin Chen, *Bias and Religious Truth-Seeking in Proselytization Restrictions: An Atypical Case Study of Singapore*, 8(1) ASIAN J. COMP. L. 21, 29-31 (2013).

²⁶⁵ Richard M. Esenberg, *Must God be Dead or Irrelevant: Drawing a Circle that Lets Me in*, 18 WM. & MARY BILL RTS. J. 1, 37 (2009); Elizabeth Wicks, *Religion, Law and Medicine: Legislating on Birth and Death in a Christian State*, 17 MED. L. REV. (U.K.) 410, 411 (2009); LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 29-40 (Hart Press 2008); Thio Li-Ann, *Constitutional 'Soft' Law and Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony*, 2004 SING. J. LEGAL STUD. (Sing.) 414, 417 (2004).

Christianity²⁶⁶ and Islam,²⁶⁷ restrictions on proselytization impede the religious liberty of the adherents of these religions.²⁶⁸ In addition, religious propagation is necessary to facilitate the more informed selection, adoption and practice of religion.²⁶⁹

However, religious propagation can, in some circumstances, generate socially harmful consequences. There might be concerns about vulnerable individuals being the target of improper religious propagation that leverages the superior financial resources of the propagator,²⁷⁰ although these concerns can largely be addressed by directly limiting the role of money in religious competition.²⁷¹ More problematic is the disruption of social harmony by aggressive religious propagation that involves harsh criticism – or worse²⁷² – against other religions. The recipients of such religious propagation are inevitably put on the defensive by the demonstration of how negatively the propagating community views the recipient community, and this situation is

²⁶⁶ KOSMIN & KEYSAR, *supra* note 20, at 11; CHESNUT, *supra* note 9, at 11; Bryan R. Wilson, *Absolutes and Relatives: Two Problems for New Religious Movements*, in CHALLENGING RELIGION 13, 16 (James A. Beckford & James T. Richardson eds., Routledge 2003); Peter Radan, *International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights*, in LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 9, 17 (Peter Radan et al. eds., Routledge 2005); Timothy L. Hall, *Toleration and Dogmatism: The Contribution of Baptists to Law*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 77, 85 (Robert F. Cochran, Jr. ed., New York University Press 2008). *Cf.*, Berkwitz, *supra* note 199, at 212 (noting distinction between evangelical Christian and mainline Christian churches which have “come to deemphasize the call to convert and instead focus on ministering to the already faithful.”).

²⁶⁷ CHESNUT, *supra* note 9, at 11); Radan, *supra* note 266, at 17.

²⁶⁸ Hackett, *supra* note 167, at 3-4; M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR*, 17 DUKE J. COMP. & INT’L L. 91, 91-92 (2006).

²⁶⁹ Thio, *supra* note 167, at 510; Radan, *supra* note 266, at 17; Kyriakos N. Kyriazopoulos, *Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality*, 20 J. LAW & RELIGION 149, 168-179 (2004).

²⁷⁰ SCOLNICOV, *supra* note 167, at 198-199; Kao, *supra* note 195.

²⁷¹ *Infra* V.B.

²⁷² *E.g.*, JACK T. CHICK, LITTLE BRIDE (Chick Publications 2004), available at http://www.chick.com/reading/tracts/1054/1054_01.asp (last visited Apr. 23, 2015) (the Christian comic pamphlet stated that there is “very *dangerous* religion called ‘Islam’” that is “spreading into our neighborhood” (emphasis original)).

certainly not conducive to fostering a harmonious relationship between the two communities.²⁷³ In the context of China, such critical religious propagation is likely to aggravate the existing fault-lines of class and ethnicity between the communities – just imagine a Christian or Buddhist of Han ethnicity (the majority ethnicity in China that is of a significantly higher economic and social profile compared to other ethnicity)²⁷⁴ telling a Tibetan Buddhist or Uighur Muslim that his or her faith is fundamentally flawed.

That this rather undesirable scenario remains largely imaginary is due in no small part in the current legal exhortation to the need to maintain a harmonious and mutually respectful relationship between religious adherents of different faiths or citizens without religious faith²⁷⁵ that is buttressed by the prohibition of publications that insult either religious or non-religious citizens or otherwise disrupt religious/social harmony.²⁷⁶ Unsurprisingly, the current interpretation of these prohibitions gives much greater leeway for criticism of all religions from the Marxist perspective,²⁷⁷ reflecting the typical discriminatory application of similar laws elsewhere that protect the politically dominant religious groups,²⁷⁸ which in the case of China would be Socialism/Communism/Marxism. The current wording of the prohibition also suffers from the

²⁷³ For a case study confirming how aggressive religious propagations that involves harsh criticisms of other religions is harmful to religious harmony in religiously diverse society, see Chen, *supra* note 264, at 73-78.

²⁷⁴ For official data on the distributions of occupation and educational level in accordance with ethnicity, see *Tabulation on the 2010 Population Census of the People's Republic of China*, CHINA STATISTICS PRESS, 2010, available at <http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm> (last visited Apr. 23, 2015).

²⁷⁵ Art. 2, Regulation on Religious Affairs, *supra* note 76.

²⁷⁶ Art. 7(1)-7(3), *id.*

²⁷⁷ Zhang & Zhu, *supra* note 2, at 790.

²⁷⁸ E.g., Greece (Greek Orthodox): Kyriazopoulos, *supra* note 269, at 154-155; Malaysia (Islam): Article 11(4), CONSTITUTION (Malaysia); India (Hinduism): Robert W. Neufeldt, *To Convert or Not to Convert: Legal and Political Dimensions of Conversion in Independent India*, in RELIGION AND LAW IN INDEPENDENT INDIA 381, 399 (Robert D. Baird ed., Manohar 2d ed. 2005); Sri Lanka (Buddhist): Berkwitz, *supra* note 199, at 219.

problem of overbroad ambiguity that is an unfortunately common feature of the Chinese legal regime on law and religion.

Nonetheless, the basic premise of ensuring religious harmony by curbing religious insults among religions is the correct one, especially during the initial liberalization of the religious market. Even if the ideal of a society fully embracing free speech such that all participants do not overreact to criticisms and insults but either respond with reasoned arguments or by simply walking away²⁷⁹ is attainable in the long run, it would be highly unrealistic to assume such a state of affairs during the initial transition from the existing suppression of religious propagation, and no less with regard to such emotional issues as faith. A circumspect relaxation of religious propagation, such as one that makes a distinction based on whether religious propagation is solicited – with more leeway for criticism and negative commentary given to religious propagation that is solicited²⁸⁰ – would arguably strike the appropriate balance of the right to religious propagation and the disruption of religious harmony compared to a wanton dismantling of all restrictions on religious propagation.

B. Limiting Money in Religious Competition

Money matters in religious competition, and it is no different in China. Recent studies of successful religious organizations in China have typically highlighted the contribution of material wealth to religious success. A sociological study of the growth and development of Christianity in the wealthy Chinese city of Wenzhou shows how “newly rich entrepreneurs provide the vital

²⁷⁹ Thio, *supra* note 167, at 513-515; Jürgen Habermas, *Religion in the Public Sphere*, 14(1) EUROPEAN JOURNAL OF PHILOSOPHY 1, 13-15 (2006).

²⁸⁰ Chen, *supra* note 264, at 79-83.

financial capital for church-building projects, evangelical organizations and church initiatives,”²⁸¹ whereas the common trait of the more successful Taoist (Huang Daxian) temples in another sociological survey in Southeast China is the financial support from wealthy overseas businessmen.²⁸² This wealth translates well to religious competitiveness through the purchase of high-quality religious hardware, particularly well-constructed and convenient places of religious worship that are instrumental in attracting adherents.²⁸³ Successful income generation by religious organizations, especially via tourism, also provides political leverage vis-à-vis the local government given the benefits to the local economy and popular support from local residents.²⁸⁴ Sociological studies have also documented the phenomenon of the “Boss Christian,” in which wealthy entrepreneurs establish churches on their business premises to serve the spiritual needs of their employees.²⁸⁵

However, other important avenues in which economic superiority can be used to promote religious growth are restricted. The restrictive land-use policy means that, notwithstanding the

²⁸¹ Cao, *supra* note 190, at 66. *See also* Nanlai Cao, *In the World but Not of the World: Governing Grassroots Christian Charity in China*, in CHARITIES IN THE NON-WESTERN WORLD: THE DEVELOPMENT AND REGULATION OF INDIGENOUS AND ISLAMIC CHARITIES 187, 188-189 (Routledge 2013) (the wealth is also crucial in starting the first grassroots Christian charity in China).

²⁸² Graeme Lang et al., *Temples and the Religious Economy*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 149, 156 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005). *See also* Chan, *supra* note 2, at 338 (noting the “rapid increase of temples ... in coastal regions where wealth has concentrated”).

²⁸³ *E.g.*, Cao, *supra* note 190, at 70 (As observed in his sociological study, “[m]any potential converts are drawn to the local church by the beauty of the site.”). *See also* Tong, *supra* note 188, at 163-164 (observing the phenomenal growth of City Harvest Church in Singapore (a megachurch preaching prosperity gospel) can be attributed at least partly to its modern, sophisticated (and expensive) architecture and facilities); Lang et al., *supra* note 282, at 159-162 (noting in a sociological study of Chinese temples how favorable characteristics, such as an accessible location or positive geographical characteristics, are important factors in the success of that religious premises).

²⁸⁴ KOESEL, *supra* note 114, at 81-87; Tarocco, *supra* note 43, at 248-249; Borchert, *supra* note 56, at 100-104 & 107; Yang, *supra* note 129, at 143-144.

²⁸⁵ KOESEL, *supra* note 114, at 85-86. *See also* Cao, *supra* note 190. Interestingly, none of the studies mentioned the possibility of religious coercion/pressure on the employees to participate.

positive impact on religious competitiveness, religious organizations cannot readily purchase larger and grander religious premises even if funds are readily available. At a more basic level, it constrains basic expansion to accommodate previous growth.²⁸⁶ The restrictions on proselytization in the provisions of social services and education also disproportionately disadvantage wealthy religious organizations. “Financial growth for wealthy religious organizations means, once building campaigns and staff salaries are taken care of, having more money for charitable activity.”²⁸⁷ Although controversial, religious organizations can and often do require aid recipients to participate in the prescribed religious activities.²⁸⁸ The stripping of religious propagation from such social services, while not completely negating the religious propagating impact,²⁸⁹ limits the proselytizing effect of those activities.²⁹⁰

²⁸⁶ Recently in April 2014, a legally registered Christian church in Wenzhou was demolished for expansion that exceeds the approved plot area. It was reported that the church personals recognized the illegality of the expansion, but stated that it would not have been possible to get the additional area (5 times the approved plot area) approved even if the expansion was necessary for the operation of the church (pastor accommodation and office building): *Shuqian xintu shouye kanzheng wuxiao Wenzhou weijian dajiaodang nandao qianchai* 数千信徒守夜抗争无效 温州违建大教堂难逃强拆 [“Double Cooling Measures” Finally Passed], SINGTAO DAILY, Apr. 30, 2014, at A26.

²⁸⁷ MOORE, *supra* note 22, at 273.

²⁸⁸ Susan K. McCarthy, *Serving Society, Repurposing the State: Religious Charity and Resistance in China*, 70 THE CHINA JOURNAL 48, 55 (2013); Harvey, *supra* note 195, at 44; Kao, *supra* note 195, at 79; Unruh, *supra* note 197, at 327.

²⁸⁹ Even without explicit evangelistic activity, the mere display of love and care in the provision of social services can serve as powerful testimonies of the underlying religious faith of the social service providers: McCarthy, *supra* note 288, at 58; Mathew Mathews, *Saving the City Through Good Works: Christian Involvement in Social Services*, in RELIGIOUS DIVERSITY IN SINGAPORE 524, 540-543 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008). See also Deana Hall, *Managing to Recruit: Religious Conversion in the Workplace*, 59(4) SOCIOLOGY OF RELIGION 393, 402-404 (1998) (describing how the ostensibly secular management training program offered by Scientology-linked management consultation companies can provide exposure to Scientology doctrine and practices through identifying problems of which Scientology would be the solution).

²⁹⁰ There is an interesting paradox that whereas the provisions of financial aid and other valuable social services can serve to simulate effective religious growth, such converts typically possesses less robust conviction and faith and may be particularly vulnerable to exiting when the aid ceases or when challenges to faith arise: see JU, *supra* note 124, at 46-48 (discussing the role of material aids as an explanation for the growth pattern of Catholics in Taiwan that saw an initial rapid expansion from 1949 to 1963 but stagnation from 1964 onward).

The limiting effect of money under China's regime can be contrasted in other jurisdictions that do not place such limitations. In terms of land use, religious organizations elsewhere typically are allowed to purchase land and construct religious premises as their financial resources permit, subject to general zoning laws.²⁹¹ Where there are more stringent land-use controls due to more intense urbanization, the economic competitiveness of religious organizations is actually more crucial in light of the need to successfully bid for the limited land/premises that are zoned for religious uses.²⁹² Similarly, although the state would usually impose constraints on the manifestation of religious content in social service provisions in circumstances when the state is contributing part of the funding,²⁹³ religious organizations with sufficient financial wealth can simply avoid those constraints altogether by refusing public funding.²⁹⁴

Such a limitation is not necessarily a bad thing, especially if one takes the view that religious competition fostered by law should normatively be conceived as a primarily spiritual or

²⁹¹ For a discussion of the intersection between religious land use and zoning regulations in the U.S., see Walsh, *supra* note 208, at 65-71; KENT GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 233-245 (Princeton University Press 2006); JAMES A KUSHNER, COMPARATIVE URBAN PLANNING LAW 208-222 (Carolina Academic Press 2003).

²⁹² See CHEE KIONG TONG, RATIONALIZING RELIGION: RELIGIOUS CONVERSION, REVIVALISM, AND COMPETITION IN SINGAPORE SOCIETY 251 (Koninklijke Brill 2007) (discussing the religious land-use policy in the land-scarce island nation state of Singapore).

²⁹³ Helen Rose Ebaugh, Janet Saltzman Chafetz & Paula F. Pipes, *The Influence of Evangelicalism on Government Funding of Faith-Based Social Service*, 47(4) REVIEW OF RELIGIOUS RESEARCH 380, 381 (2006); Unruh, *supra* note 197, at 330; Pipes & Ebaugh, *supra* note 179, at 53. For example, there may be mandatory requirement of opt-up mechanism for religious services during provision of education: see Shue Sing Churk & Jianlin Chen, *Government-sponsored Religious Education in Hong Kong after Catholic Diocese of Hong Kong v Secretary for Justice*, 3(2) OXFORD JOURNAL OF LAW & RELIGION 340, 345-346 (2014) (examining the public funding for schools managed by religious organization in Hong Kong); Goh, *supra* note 199, at 374 (discussing the government funding mission schools in Singapore).

²⁹⁴ See Ebaugh, Chafetz & Pipes, *supra* note 293, at 390 (observing that due to the restrictions of proselytization attached to government funding, religious charitable organizations that are expressively evangelical or have high level of service religiosity are more hesitant to apply for available government funding). This may also include religions with isolationist outlook that are not involved in non-evangelical charitable activities: KUO, *supra* note 124, at 52 (examples of a Christian denomination – the Local Church – in Taiwan).

doctrinal contest.²⁹⁵ Indeed, for scholars and commentators who argue for special status and protection of religions, religion is portrayed as being a source of moral strength and guidance,²⁹⁶ a source of comfort and courage in times of adversity and hardship,²⁹⁷ and, at a deeper level, the source of salvation and “harmony with the transcendent origin of universal order”²⁹⁸ while at a societal level it promotes altruism²⁹⁹ and civic participation, especially a moral clause untainted by a profit motive.³⁰⁰ Notwithstanding critiques as to whether these benefits are unique to religion,³⁰¹ being successful in the economic sphere typically does not feature in this line of argument.³⁰²

The moderated economic pressures under the Chinese regime have compelled changes to the behavior of the members of religious organizations. One major source of material wealth is typically attributed to either the followers’ or founders’ successful commercial activities.³⁰³ Where

²⁹⁵ *Supra* II.

²⁹⁶ Koppelman, *supra* note 104, at 1907; PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURT’S TORTUOUS TREATMENT OF RELIGION* 150-151 (Catholic University of America Press 2006); Shiffrin, *supra* note 244, at 56; WITHAM, *supra* note 20, at 188-189; KNIGHTS, *supra* note 104, at 8.

²⁹⁷ Koppelman, *supra* note 104, at 1907; Raday, *supra* note 297, at 2776; WITHAM, *supra* note 20, at 190; KNIGHTS, *supra* note 104, at 8; Jane Wills et al., *Religion at Work: the Role of Faith-based Organizations in the London Living Wage Campaign*, 2009(2) CAMBRIDGE JOURNAL OF REGIONS, ECONOMY AND SOCIETY 443, 453-454 (conducting sociological survey of role of faith organizations in immigrant lives and labor in London and finding that “Faith thus acted as ‘psychological ballast’ for many workers, helping them to acclimatize to their new situation and to face the challenges they encountered at work.”).

²⁹⁸ Koppelman, *supra* note 104, at 1907; Raday, *supra* note 297, at 2776.

²⁹⁹ Shiffrin, *supra* note 244, at 57; WITHAM, *supra* note 20, at 189.

³⁰⁰ Shiffrin, *supra* note 244, at 57-58; KOSMIN & KEYSAR, *supra* note 20, at 9.

³⁰¹ E.g., Marshall, *supra* note 4, at 205-207 (refuting the argument that religion is innately distinctively from non-religions as a justification for special treatment of religion under the law).

³⁰² C.f., Yang, *supra* note 129, at 143-145 (Noting how some fore-sighted Taoist priests recognized that gaining a larger flock through egalitarianism – i.e., moving away from direct monetary compensation in exchange of ritual services and abolishing admission fees – is more important than short-term monetary income. This makes economic sense since the voluntary donations from such larger flock is arguably going to be larger than the forfeited short-term monetary income).

³⁰³ Cao, *supra* note 281, at 192-195; Fenggang Yang & Dedong Wei, *The Bailin Buddhist Temple: Thriving Under Communism*, in *STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES* 63, 65 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005); Chan, *supra* note 2, at 338. See Hall, *supra* note 289, at 397-398 (noting how the social status and

the funding model depends on a few wealthy donors making large donations rather than small donations for regular attendees, the charisma of the religious leaders and the attractiveness of the religious practices/doctrines vis-à-vis those donors become more important for growth and expansion.³⁰⁴ On a broader level, there is a disturbing materialistic tendency that pervades many large religious organizations in China these days³⁰⁵ given that revenue-generating religious activities that appeal to adherents, including the hosting of operas, fortune telling, incense burning, healing services, and others, are an important source of wealth.³⁰⁶ Where tourism is relied on as an income-generating activity, it is no surprise that religious persons have to devote time and attention to attending to the needs of tourists, from performing religious services on demand to manning shops and admission booths.³⁰⁷ Enhancing the impact of money on religious competition will only aggravate such pressures.

economic resources of professionals render them valuable constituents of a religious organization). *See also* Borchert, *supra* note 56, at 102-103 (“[Long-term viability of Buddhism in Xishuangbanna] depends upon the Dai-lue people having enough surplus to support monks who can do relatively little work to support themselves. Tourism is an important way to produce this surplus, and a number of monks are quite open to the development of tourist infrastructure, as long as they can have a hand in its development.”).

³⁰⁴ Yang & Wei, *supra* note 303, at 65.

³⁰⁵ Shaolin Temple, a famous Chinese Buddhist temple of historical pedigree, was embroiled in a recent controversy regarding an expansion into Australia that involved a golf course, a four-star hotel and martial arts school in conjunction with premises oriented toward meditation and worship. Perhaps the most disturbing aspect is when the head of the temple – who is also a member of the People’s Congress – compared Shaolin Temple with Disneyland in defending what he conceived as a mere cultural export that incidentally involved collaboration with commercial enterprises: *see Shaolinshi jiangzai aozhou jian fenshi fengbo* 少林寺将在澳洲建分寺风波 [Saga of Branch Expansion in Australia by Shaolin Temple], LIANHE ZAobao, Mar. 5, 2015; *Shaolinshi aozhou gai fenshi jian sixing fandian, gaoer fuqiuchang reyi* 少林寺澳洲開分寺建四星飯店、高爾夫球場惹議 [Controversy of Shaolin Temple Opening Branch in Australia and Building Four-Star Hotel, Golf Course], LIBERTY TIMES, Mar. 1, 2015.

³⁰⁶ Chau, *supra* note 122, at 252-253 (discussing the activities of a successful Chinese temple that include divine blessing, opera performances, and magical curative spring water); Yang, *supra* note 129, at 125-139 (discussing the various strategies adopted by the Taoist temples in Shanghai, such as learning and modifying rituals to meet the taste of patrons, providing personalized services to cultivate “clients’ loyalty” and innovative fortune-telling products that skirt the regulatory prohibition of superstitious activities).

³⁰⁷ Tarocco, *supra* note 43, at 249; Borchert, *supra* note 56, at 104-105.

An issue related to the role of money in religious competition is the initial distribution of wealth. To a large extent, this is less problematic in China. The potentially problematic issue of how the superior financial resources of certain religious organizations are attributed to state preference during the colonial rule that otherwise plagued many former colonies³⁰⁸ is, in cruel irony, negated by the Cultural Revolution that resulted in the confiscation and destruction of almost all religious property.³⁰⁹ All religious organizations emerging from the ordeal essentially started with a clean slate for financial resources. Indeed, full-fledged economic competition only resumed after a considerable time lag. During the initial post-Cultural Revolution period, economic competition was essentially political competition with the state as the dominant supplier of all major economic resources.³¹⁰ This brought about side effects, such as religious organizations adhering more to the dictate of the state organs than the preferences of the adherents³¹¹ and an arguably excessive emphasis on networking (which is the Chinese manifestation of rent-seeking).³¹² More typical economic activities by religious organizations only took hold in the

³⁰⁸ Tong Chee Kiong, *Religious Trends and Issues in Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE 28, 34-35 (Lai Ah Eng ed., Institute of Southeast Asian studies 2008); PRINCE SORIE CONTEH, TRADITIONALISTS, MUSLIMS, AND CHRISTIANS IN AFRICA 94 (Cambria Press 2009).

³⁰⁹ Liu, Scharffs & Hollan, *supra* note 16, at 251; Yang, *supra* note 16, at 100.

³¹⁰ Yang, *supra* note 129, at 117-121; Yang & Wei, *supra* note 303, at 65-66. For discussions of the market reform in China, see Zhongguo jingji tizhi gaige 30 nian huigu yu zhanwang 中国经济体制改革 30 年回顾与展望 [30 YEARS OF ECONOMIC REFORM IN CHINA: REFLECTING AND LOOKING AHEAD] 36-42 (Wei liqun ed., People's Publishing 2008); Zhongguo jingji tizhi gaige 30 nian yanjiu 中国经济体制改革 30 年研究 [RESEARCH ON THE 30 YEARS OF CHINA'S ECONOMIC SYSTEM REFORM] 59-64 (Liu Shucheng & Wu Taichang eds., Economy & Management Publishing 2008).

³¹¹ See Yang, *supra* note 129, at 119 (noting how Taoist temples in 1980s Shanghai are constrained by the regulatory authorities from performing rituals that the adherents really wanted).

³¹² *Id.*, at 120.

1990s upon the consolidation of market reforms that both reduced state funding for religious organizations and increased the wealth of adherents.³¹³

However, two possible problems remain in relation to initial wealth distribution: first, the wealth disparity arising from unequal economic development in China's economic reform, and second, the influx of foreign funds. The impact of foreign funds will be examined in greater detail in the next section. For wealth disparity, the success of China's economic reform since the 1980s that is widely acknowledged as generating three decades of impressive economic growth is marred by the massive wealth disparity between the rural and urban and between the coastal regions and the western-central regions.³¹⁴ This wealth disparity persists despite recent concerted efforts by the state to invest and otherwise economically develop the rural and/or western-central regions.³¹⁵ This wealth disparity is unsurprisingly translated to religious organizations³¹⁶ and can pose severe disadvantages to religions and religious organizations that are currently based in the poorer parts of the country.³¹⁷ This can be a particular concern for religions associated with ethnic minorities that typically inhabit these poorer regions. Indeed, a sociological field study has documented how attempts by Tibetan Buddhists to increase their religious presence at a religious sacred site in

³¹³ *Id.*, at 120-123. See also KOESEL, *supra* note 114, at 67-72 (observing how the state remains able to wield considerable influence over religious organization even after market liberalization through the provisions of state subsidies and other material benefits).

³¹⁴ Jongsung Kim, *Income Inequality in China*, 24(2) THE JOURNAL OF EAST ASIAN AFFAIRS 29, 33-35 (2010); Albert Keidel, *Chinese Regional Inequalities in Income and Well-Being*, 55(1) REVIEW OF INCOME AND WEALTH 538, 542 (2009).

³¹⁵ Kim, *supra* note 34, at 46-47.

³¹⁶ For example, Wenzhou, a prosperous coastal city in Southeast China, was among the first region to "get rich" during the reform era. The emerging class of affluent Christian businessman draws on their financial resources and social influence to enhance the influence of Christianity, both locally in terms of church construction and development and nationally in terms of notionally Christian charitable activities: Cao, *supra* note 281, at 187-188 & 192-199.

³¹⁷ See also William-Jan Verhoeven, Wim Jansen & Jos Dessen, *Losers in Market Transition, The Unemployed, the Retired, and the Disabled*, 25(1) EUROPEAN SOCIOLOGICAL REVIEW 103, 107 (2009) (noting how the rural population generally have lower income growth as compared to urban dwellers during market transition).

Sichuan province that is shared with Han Buddhism was hampered by insufficient funds to construct their own monastery³¹⁸ The emerging social fault lines of class and ethnicity in China could do without adding religion into the mix.

In this regard, the current affirmative action policies of China for religions of ethnic minorities are an important interim policy that should be retained. Affirmative action for socio-economically disadvantaged religions is not without controversy, the most salient being that unfair state advantage is given to these religions.³¹⁹ Putting aside the argument that affirmative action in favor of traditionally disadvantaged minority groups actually promotes substantial equality,³²⁰ affirmative action in China can be conceived from Law & Religious Market perspective as reducing the impact of wealth disparity on religious competition. The direct provision of financial resources can be crucial to help these religious organizations obtain the necessary resources for basic operation, especially where the prices of these resources (e.g., land and manpower) may be elevated simply by the consumption of those resources by wealthy religious organizations from

³¹⁸ Kang, *supra* note 124, at 239.

³¹⁹ For example, Singapore academic Jaclyn Ling-Chien Neo opined that “Singapore privileges Islam over other religions”: Jaclyn Ling-Chien Neo, *The Protection of Minorities and the Constitution: A Judicious Balance?*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 234, 247 (Li-ann Thio & Kevin YL Tan eds., Routledge-Cavendish 2009). Muslims in Singapore are a minority at around 15% of the population and are significantly underrepresented in socio-economic indicators such as university degrees and private property residence: SINGAPORE DEPARTMENT OF STATISTICS, *CENSUS OF POPULATION 2010 STATISTICAL RELEASE 1: DEMOGRAPHIC CHARACTERISTICS, EDUCATION, LANGUAGE AND RELIGION* 16, 159-160 (2011). They as a community received various forms of special financial and non-pecuniary assistances from the government: *see* Li-Ann Thio, *Control, Co-optation and Co-operation: Managing Religious Harmony in Singapore’s Multi-ethnic, Quasi-Secular State*, 33 *HASTINGS CONST. L.Q.* 197, 214-219 (2006).

³²⁰ VINCENT D. ROUGEAU, *CHRISTIANS IN THE AMERICAN EMPIRE: FAITH AND CITIZENSHIP IN THE NEW WORLD ORDER* 101-109 (Oxford University Press 2008); Balázs Schanda, *Freedom of religion and Minority Religions in Hungary*, in *REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE* 279, 285 & 292-293 (James T. Richardson ed., Kluwer Academic 2004); NEERA CHANDHOKE, *BEYOND SECULARISM: THE RIGHTS OF RELIGIOUS MINORITIES* 143-165 (Oxford University Press 1999). For a recent synthesis of affirmative action in general, *see* WILLIAM M. LEITER & SAMUEL LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS* (State University of New York Press 2d ed. 2011).

wealthier regions of China.³²¹ Affirmative action in terms of employment hiring and school admission can also help to increase the financial capacity of adherents to contribute to the religious organization.

Thus, this Article argues for the retention of the prohibition of religious propagation in charitable and social services and affirmative action for minority religions of ethnic minorities, at least in any initial liberalization of the religious market. The competitive advantage arising from superior religious hardware and proselytizing of charitable and social services would be particularly acute where there is large disparity in wealth, whereas affirmative action will further reduce the impact of economic disparity for socially and economically disadvantaged religious minorities.

C. The Contour of Overseas Support

The strict prohibition on foreign interference and support of religious organizations in China reflects the perceived religious imperialism by foreign missionaries cooperating with western colonists to invade and otherwise occupy China in the nineteenth and early twentieth century.³²² Although the reliance on this historical construct by the current P.R.C. government is arguably driven by more cynical political considerations of maintaining control³²³ (which is not helped by the encouragement of Chinese Christians by foreign missionaries to pray for the demise

³²¹ See also Thomas W. Foster, *Separation and Survival in Amish Society*, 17(1) SOCIOLOGICAL FOCUS 1, 4-5 (1984) (observing how the Amish religiously inspired economic model of self-sustenance is threatened by the rise in prices for land and other materials caused by the demand of those commodities from the general economy).

³²² Xiong, *supra* note 2, at 610-611; Reinstein, *supra* note 1, at 3-5.

³²³ Liu, Scharffs & Hollan, *supra* note 16, at 263-264; Potter, *supra* note 47, at 319-324.

of the Communist regime),³²⁴ the historical record in China and other colonized jurisdictions highlights the devastation to the local religions produced by foreign missionaries who enjoyed both superior financial resources and privileged treatment by the state.³²⁵

Nonetheless, the positive impacts of foreign religious organizations, persons and funding in the Chinese religious market must not be overlooked. Support from overseas has been crucial in the revival of religions in China, especially in the aftermath of the Cultural Revolution. For example, in Xishuangbanna, an autonomous prefecture of the Dai ethnicity where Theravāda Buddhism (as opposed to the Mahāyāna Buddhism practiced by the majority Han ethnicity) is commonly practiced, monks from Thailand and other Southeast Asian states were necessary to provide critical human resources for the rebuilding of temples and revival of the religion in the 1980s.³²⁶ Donations by Hong Kong Buddhist businesspeople were crucial to the revival of pre-1949 temples, especially where the flagship religious activity (a summer meditation camp) that attracted many participants was free of charge to participants.³²⁷ Even the development of religious research benefits from international exchange and externally funded collaborative research projects in China.³²⁸

Thus, a blanket prohibition on foreign support, as reflected in the current Chinese regime, unduly excludes the potentially positive contributions made by overseas religious organizations.

³²⁴ Wenger, *supra* note 116, at 174.

³²⁵ Chen, *supra* note 3, at 470.

³²⁶ Borchert, *supra* note 56, at 97.

³²⁷ Yang & Wei, *supra* note 303, at 71. See Tarocco, *supra* note 43, at 248 (noting the “remarkable revival” of the Southwestern city of Xiamen’s Buddhist community that is attributed to the substantial donations by wealthy overseas visitors from Southeast Asia and Taiwan).

³²⁸ Yang, *supra* note 147, at 32.

This is not to suggest that foreign support is not without concerns but that a distinction should be made between contributions in the form of intellectual ideas and contributions in the form of material resources. The former enriches the religious market in two important ways. First, it increases the variety of religious competitors in the religious market, which, if one subscribes to the “marketplace of ideas” justification for free speech and religious free competition,³²⁹ improves the outcome of religious competition. With more religious diversity, both externally and internally, the decision of religious choice by individuals would be more informed and, hopefully, more suited to the individual’s preference and needs.³³⁰ The competition would also compel religious organizations to constantly re-evaluate their practices and doctrines in light of the success of other religious organizations.³³¹ This can be of particular importance in China, which is witnessing a proliferation of new religious movements that are typically based on novel interpretations of existing doctrines of major world religions.³³² Although one should be skeptical of the instinctive labeling (and consequential criminalization) of “evil cults” by the Chinese government³³³ and it should be remembered that the major world religions today were all new religious movements

³²⁹ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 61-62 & 61 n.288 (2011); Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 6-9 (2008); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1054-1056 (Aspen Publishers, 5th ed., 2005); Williams & Williams, *supra* note 26, at 817-818; William P. Marshall, *Truth and Religion Clauses*, 43 DEPAUL L. REV. 243, 256 (1994).

³³⁰ KOSMIN & KEYSAR, *supra* note 20, at 4; KUAH-PEARCE KHUN ENG, STATE, SOCIETY AND RELIGIOUS ENGINEERING: TOWARDS A REFORMIST BUDDHISM IN SINGAPORE 164 (Eastern Universities Press 2003); Hylton et al., *supra* note 9, at 407.

³³¹ Peter L. Berger, *Pluralism, Protestantization, and the Voluntary Principle*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 19, 21-25 (Thomas Banchoff ed., Oxford University Press 2007); Harvey, *supra* note 195, at 68; ANDREW CHESNUT, *supra* note 9, at 151; Wilson, *supra* note 266, at 17.

³³² For example, the primitive understanding of religion in rural area has spurned sects that while purportedly of Christian inspiration would be considered heretical by most mainstream Christians : Zhu, *supra* note 7, at 477; Yang, *supra* note 16, at 105-106.

³³³ LIANG, *supra* note 142, at 122-144 (discussing the various religious sects that are currently designated cults in China).

when they began,³³⁴ proper representations of these existing major world religions would at least help to reduce “misrepresentation” and promote informed choice.³³⁵

Second, even if one is skeptical of the truth-seeking function of the religious free market due to limitations of religious truth-seeking as a universal affirmative value and/or concern about the preservation of local religions,³³⁶ foreign support would be beneficial simply from the perspective of restoration. The Cultural Revolution was destructive to the hardware and persons of religious organizations, yet it is the latter that has greatest negative legacy. The current predicament of religious organizations in China is similar to the legal profession. The legal profession – including judges, lawyers, and legal scholars – is still recovering from the decade-long disruption during the Cultural Revolution and continues to suffer from the lack of expertise, and, perhaps more importantly, the lack of professional legal and rule of law culture.³³⁷ In this regard, it is worth noting that foreign influence in the legal profession has been tolerated and even encouraged, with an increasing number of Chinese legal professionals having foreign legal training and foreign laws being commonly utilized as comparative case studies in the reform of the Chinese

³³⁴ E.g., ÉTIENNE LAMOTTE, HISTORY OF INDIAN BUDDHISM 1-12 & 88-123 (translated by Sara Webb-Boin, Peeters Press 1988) (discussing the early history of Buddhist in the context of contemporaneous social, political and religious landscape of India); G. R. HAWTING, THE IDEA OF IDOLATRY AND THE EMERGENCE OF ISLAM: FROM POLEMIC TO HISTORY 1-19 (Cambridge University Press 1999) (critically examine the relationship of early Islam with the contemporaneous religious practices of polytheisms and idolatry).

³³⁵ LIANG, *supra* note 142, at 141-144 (noting the new religious movements among Chinese rural areas that purports to be true Christianity but with teachings and practices that would be uncontroversial regarded as contrary to Christianity). See also Emily C. Dunn, “Cult,” Church, and the CCP: *Introducing Eastern Lightning*, 35(1) MODERN CHINA 96 (2009) (observing that the rise of Eastern Lightning – a purportedly Christian sect featuring a female Christ – can be at least partly attributed the shortage of trained ministers in China).

³³⁶ *Infra* II.

³³⁷ Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People’s Republic of China: A Study of Commitment and Professionalization*, 53 AMERICAN JOURNAL OF COMPARATIVE LAW 433, 452-454 (2005) ; Zhou Keyuan, *Professionalizing Legal Education in the People’s Republic of China*, 7 SINGAPORE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 159, 163-165 (2003).

legal system.³³⁸ Similar approaches will be beneficial to the religious organizations that struggle with same challenge of a lack of human and intellectual resources in both the executive and educational dimensions.

In comparison, the negative effects of foreign support are more pronounced for the material aspects. As per the above discussion on the undesirability of certain manifestations of economic competitiveness in religious competition, the superior financial resources of foreign religious organizations is problematic from the perspective of distorting the marketplace of ideas and the issue of initial distribution. Indeed, the problem of wealth disparity is even more pronounced between the still-developing economy of China and the developed economies from which this foreign religious support typically originates.³³⁹ This disparity of global wealth translates to disproportionate religious competitiveness. Economically less-developed countries have a higher “trade deficit” in the form of a higher ratio of received foreign religious workers vs. those sent abroad.³⁴⁰ It is no surprise that the U.S. is and is likely to continue to be the dominant exporter of religion in terms of persons, funds and materials³⁴¹ and that the religion exported is primarily Christianity.³⁴² The relative wealth of foreigners working/living/visiting in China can bring

³³⁸ For example, during the drafting of the Government Procurement Law, a special overseas study mission was commissioned to study the government procurement regime in U.S., Australia and Korea: WANG BING ET AL., *Zhonghua renmin gonghe guo zhengfu caigou fa shiyi* 中华人民共和国政府采购法释义 [EXPLANATION OF PEOPLE'S REPUBLIC OF CHINA GOVERNMENT PROCUREMENT LAW] 303-312 (Zhu Shaoping ed., China Price Publishing 2002).

³³⁹ See Homera & Uzzellaa, *supra* note 60, at 258 (observing how local religious groups during the transition of Russia from Soviet era “felt under-funded and ‘un-competitive’ in comparison with the larger financial resources” of foreign missionaries that brought along highly valuable and sorely needed commodities).

³⁴⁰ Wuthnow & Offutt, *supra* note 25, at 217.

³⁴¹ *Id.*, at 213.

³⁴² *Id.* Notably, the Christianity exported tends to be conservative in both the moral and political dimension: James K. Wellman, Jr. & Matthew Keyes, *Portable Politics and Durable Religion: The Moral Worldviews of American Evangelical Missionaries*, 68(4) *SOCIOLOGY OF RELIGION* 383, 385-386 & 389-391 (2007) (observing from an interview study of evangelical missionaries that they very often strengthened their moral and political positions and

ancillary benefits to religions associated with such groups, such as when commercial developers in residential projects deployed financial resources and political influence to assist the construction of Catholic and Protestant churches nearby to attract foreign expatriates who pay substantially higher rent than local Chinese³⁴³ or when economic revenues from religious tourists visiting from overseas Chinese communities facilitated local government support of the restoration and expansion of religious premises of Buddhists, Taoists and Chinese folk religions.³⁴⁴

Of course, the distinction between intellectual and material aspects of foreign religious support is not always easy to make. Intellectual aspects of a religion often require a material transmission vehicle, such as a religious professional or physical media. Nonetheless, the impossibility of drawing a bright-line distinction between intellectual and material aspects should not distract from the fact that it is still possible to recognize forms of religious support that are clearly more intellectual than material (such as sending religious professionals to lead/educate on religious matters or importing proselytizing books and pamphlets) and support that is more material than intellectual (such as funds for the construction of religious hardware or provisions for economically needed social services).

In concrete legal terms, this Article argues that the current restrictive controls on the exchanges of personal (both foreign religious professionals coming into China and Chinese individuals going abroad for religious education) and media materials should be abolished. These exchanges are predominantly on the generally beneficial intellectual level. There are also currently

believed those positions are applicable universally even as if – or perhaps because – of their exposure to foreign societies during their overseas missions).

³⁴³ KOESEL, *supra* note 114, at 96-97.

³⁴⁴ Kang, *supra* note 124, at 243-245; Yang, *supra* note 16, at 105.

restrictive controls on foreign donations, which this Article is – perhaps a bit surprisingly, given the distinction between intellectual and material aspects of foreign support – in favor of abolishing. Although the material aspect of foreign religious support can be normatively problematic, it is not categorically different from the issue arising from internal wealth disparity. General limitations on the role of money in religious competitions would be preferable to any regulations that specifically single out foreign religious organizations. Thus, the retention of policies such as the prohibition of religious content in charitable/social services and affirmative action for socially and economically disadvantaged religious minorities would be sufficient to address harmful aspects of foreign religious support.

VI. RELIGION, POLITICAL PARTICIPATION AND DEMOCRATIC REFORM

The above discussion of the gradual liberalization of the Chinese religious market is applicable even without a radical change in the current governing regime. The current ruling party could, for pragmatic reasons, allow for a less regulated religious market where religious adherents and religious organizations have greater freedom to conduct their affairs and to grow and expand. Indeed, the gradual but unmistakable trend in the Chinese regime on religion since the Cultural Revolution is increased liberalization.³⁴⁵ This liberalization is driven by pragmatic considerations of how the use of state coercion would be counterproductive by driving religious adherents to an antagonistic position³⁴⁶ and that religion can be co-opted to support more pressing state policy

³⁴⁵ Chen, *supra* note 3, at 468.

³⁴⁶ Liu, Scharffs & Hollan, *supra* note 16, at 254; XIE, *supra* note 7, at 82-83. *See also* Li et al., *supra* note 1, at 79-80 (Chinese human rights lawyers defending Falun Gong practitioners similarly alluding to the counterproductive nature of suppression).

objectives (e.g., social stability and national unity).³⁴⁷ Certain liberalization has also been inevitable. For example, the economic dimension of religious competition was enhanced simply by virtue of the market reform in the 1980s that transformed the prior situation in which the state was the dominant supplier of all major economic resources for all entities (including religious organizations) to the current situation where private entities now possess substantial financial resources that religious organizations can – and often must – vie for through the solicitation of donations and/or income-generating religious activities.³⁴⁸ Similarly, the globalization of China’s economic market has already introduced foreign religions into the Chinese religious market, whether through foreign expatriates who serve as conduits for the importation of their religious faiths³⁴⁹ or Chinese nationals who adopt new religions while abroad for study and/or work.³⁵⁰ Further liberalization to enhance the vibrancy and influence of religions in people’s lives is plausibly in the interest of the ruling party, such the increasingly influential view that healthy mainstream religions are an effective counter-measure against cults³⁵¹ or that religions could be important to cultivate morality in the population.³⁵²

³⁴⁷ Chau, *supra* note 122, at 240. See Potter, *supra* note 47, at 319-324 (discussing the evolution of CCP’s policy on religion). See KOESEL, *supra* note 114, at 161-175 (a comparative analysis of collaborations between authoritarian state and religion in Russia and China).

³⁴⁸ Yang, *supra* note 129, at 120-123; Potter, *supra* note 47, at 336-337.

³⁴⁹ ZHOU, *supra* note 44, at 152; Chan, *supra* note 2, at 336.

³⁵⁰ Chan, *supra* note 2, at 336; Chen, *supra* note 3, at 470-471.

³⁵¹ Yang, *supra* note 147, at 35. See Du Cuijian, *Fuli zhongjiao pi xiejiao shi genben zhidao* [Restoring Proper Religion is the Fundamental Solution to Countering Evil Cults], LIANHE ZAobao (Sing.), June 10, 2014 (a China-based academic repeating this viewpoint in the context of Eastern Lighting Cult). See also Fengang Yang, *Religion in China Under Communism: A Shortage Economy Explanation*, 52(1) JOURNAL OF CHURCH AND STATE 3, 17-21 & 32 (2010) (arguing from the religious market perspective that heavy state regulatory control over religions have induced the search for alternate spiritual practices among Chinese population, and that increase in supply via deregulation is the normative and applied solution in China).

³⁵² Chen, *supra* note 3, at 472; Panyue, *Women yingyou zenyangde zongjiaoguan 我们应有怎样的宗教观* [What is the Kind of View of Religion We Should Have], SHENZHEN SPECIAL ZONE DAILY, Dec. 16, 2001, at A16.

Nonetheless, one important dimension of religious competition – political competition – that is severely curtailed in the current regime is unlikely to be significantly liberalized without substantial change to the political regime in China. The dominant theme of restrictions under the Chinese regime is driven largely by the unsurprising desire of the authoritarian regime to maintain political control, especially in light of the long Chinese history of major uprisings associated with or driven by religion³⁵³ and the contemporaneous close association of separatist movements with religions.³⁵⁴ Thus, the discussion about normative considerations in the context of enlarging the role of political competition in religious competition must occur in the hypothetical context of democratization – if and when that becomes a reality.

A. The Danger of High-Stakes Political and Religious Competition in Democratization

From the perspective of religious competition, political competitiveness can help a religion in three related ways.³⁵⁵ First, politically influential religious organizations are more likely to obtain state funding and other resources to enhance their economic competitiveness or even dispense with the need for economic activities.³⁵⁶ Second, politically influential religious organizations may

³⁵³ Cox, *supra* note 1, at 317; XIE, *supra* note 7, at 80; Cheung, *supra* note 1, at 13-17; Chen, *supra* note 3, at 467; Potter, *supra* note 47, at 317.

³⁵⁴ Raphael Israeli, *Islam in China*, 6(2) POLITICS AND RELIGION JOURNAL 251, 261-263 (2012); Davis, *supra* note 166, at 17-20.

³⁵⁵ See Chen, *supra* note 12, at 214-229.

³⁵⁶ KOESEL, *supra* note 114, at 22-23. For example, the Ultraorthodox Judaism in Israel has been successful to obtain state's financial subsidies to fund full-time study of religious study (Yeshiva) to the exclusion of economic productive activity: Eli Berman, *Sect, Subsidy, and Sacrifice: An Economist's View of Ultra-Orthodox Jews*, 115(3) THE QUARTERLY JOURNAL OF ECONOMICS 905, 916 (2000); Ephraim Tabory, *The Influence of Liberal Judaism on Israeli Religious Life*, 5(1) ISRAEL STUDIES 183 (2000).

lobby for legislation that conforms to their religious doctrines³⁵⁷ or legislative exemptions from generally applicable laws,³⁵⁸ both of which lower the cost of compliance for their religious adherents and enhance the attractiveness of these religions vis-à-vis other religions. Third, politically influential religious organizations may exercise their political power to weaken their religious rivals, from the denial of funding to rivals³⁵⁹ to criminalization of the rival's religious practice³⁶⁰ (including religious propagation)³⁶¹ and/or the rival religion itself.³⁶²

³⁵⁷ For example, Sunday closing laws help religions whose religious rest days fall on Sunday “enforce the rules of their ‘club’, such that “repealing the [Sunday closing] laws causes a reduction in religious participation along both the giving and going margins”: Jonathan Gruber & Daniel M. Hungerman, *The Church Versus the Mall: What Happens when Religion Faces Increased Secular Competition*, THE QUARTERLY JOURNAL OF ECONOMICS, May 2008, 831, at 838-840 & 852 (2008).

³⁵⁸ For example, in the United States “large, institutional Christian churches” are the primary beneficiaries from the religious exemptions enacted by Congress in the past two decades: Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 242 (2007); Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, National Desk (Sect 1).

³⁵⁹ For example, Protestant missionaries sought to end the “Peace Policy” (a late nineteenth century U.S. government initiative that include state funding for religious organizations “civilizing” Native American) after Catholics ended up with the bulk of the funding: PHILLIP E. HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN THE FREEDOM OF CONSCIENCE IN AMERICA 66 (Altamira Press 2004); JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: VOLUME II FROM “HIGHER LAW” TO “SECTARIAN SCRUPLES” 35-36 (Princeton University Press 2004).

³⁶⁰ For example, the now infamous city ordinances banning “ritual slaughter” in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) specifically targeted the Santeria religion, a unpopular minority religion in the jurisdiction. More recent examples include state constitutional amendments explicitly prohibits consideration of “international law or Sharia Law” in state courts: Jess Bravin, *Oklahoma Shariah Ban Halted*, WALL ST. J., Nov. 9, 2010, at A16.

³⁶¹ For example, in the Indian state of Arunachal Pradesh, legal restrictions are placed on missionary activities by and conversions to “non-indigenous religions” in the Indian state of Arunachal Pradesh that essentially restrict the Christian minority without hindering the religious propagation activities of the Hindu majority: Neufeldt, *supra* note 278, at 399. *See also* KOESEL, *supra* note 114, at 39-42 (discussing registration requirements that are targeted at foreign religions and new religious movements).

³⁶² For example, while the criminalization of Yiguandao (a Chinese religious sect) as an evil cult in Taiwan between 1950s to 1980s was largely driven by political considerations of the then authoritarian government, several Buddhist organizations were actively encouraging and supporting the continued designation of Yiguandao as a cult: KUO, *supra* note 124, at 75-76. *See also* KATZ, *supra* note 47, at 29 (observing how Buddhist monks and Christian activists are supportive of the government initiatives to suppress “superstitious activities” of local Chinese folk religions during the Nationalist regime in mainland China).

The potential to translate political competitiveness into religious advantages raises the stakes of both political competition and religious competition. Political competition is now imbued with a sacred dimension of safeguarding and advancing one's religion, aggravating the absolute non-compromising and discriminatory tendency of religiously inspired politics.³⁶³ Conversely, the importance of numerical superiority in political influence means that the decrease in membership from any losses in religious competition would be compounded by the simultaneous reduction in political influence, intensifying the perception of existential threat and hostility toward rival religions.³⁶⁴ One can expect a more hostile and vicious competition between the different religious organizations under such high-stakes political and religious competition.

This situation is of particular concern during the initial phase of democratization, when basic mutual trust among the different constituencies of the newly democratic polity is crucial for the many political compromises regarding the basic political order that must be navigated and resolved. Suspicion that politically influential religious organizations would attempt to utilize the newly available capacity to translate political dominance into the religious suppression of other religions can quickly unravel the fragile democratic order, as unfortunately evidenced by Egypt,³⁶⁵

³⁶³ Feldman, *supra* note 247, at 281; Eric Barendt, *Free Speech and Religion: Secular and Religious Perspectives on Truth*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 23, 31 (András Sajó ed., Eleven International Publishing 2007); Gey, *supra* note 245, at 1024; Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1421 (2003).

³⁶⁴ Chen, *supra* note 12, at 233. *See also* Wellman & Keyes, *supra* note 342, at 398 (discussing the theoretical prediction of how intergroup conflicts in a pluralistic polity will often strengthened the identity, solidity, resources mobilization and membership retention of the groups involved in the conflict).

³⁶⁵ Marylyn Tadros, *The Not-so-Silent Minority: The Case of Egypt's Coptic Minority in Post-Arab Uprising Egypt*, in MULTICULTURALISM AND DEMOCRACY IN NORTH AFRICA 203, 210-217 (Moha Ennaji ed., Routledge 2014); SHADI HAMID, TEMPTATIONS OF POWER 140-189 (Oxford University Press 2014).

Libya,³⁶⁶ and post-Communist Russia.³⁶⁷ Indeed, the only story that bears resemblance to the success of the Arab Spring – Tunisia³⁶⁸ – is built on the rather unusual and fortuitous moderate approach of the otherwise Islamist Al-Nahda party that, despite a strong political position, sought compromise and coalition with other secular parties in the constitution formation process.³⁶⁹

The magnitude and risk of the harmful effects posed by high-stakes political and religious competition depends on two factors. The first factor is the degree of religious plurality in the jurisdiction. Plurality was envisaged by James Madison as mitigating any adverse consequences that might otherwise arise from political factions and competition based on religious differences.³⁷⁰ If the religious landscape in a polity is such that no single religion can command dominant political virtue due to the diversity and widespread distribution of religious adherents, then capacity and the incentive to translate political power into religious competitiveness are severely reduced. In

³⁶⁶ Karim Mezran & Eric Knecht, *Actors and Factors in Libya's Revolution*, in *POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS* 81, 93-97 (Justin O. Frosini & Francesco Biagi eds., Routledge 2015) (discussing the fractious politics post-revolution between the nationalistic National Forces Alliance and the Islamic oriented Muslim Brotherhood's Justice and Construction Party that derailed the fledging legitimacy and efficacy of the legislative body). *See also* CHRISTOPHER S. CHIVVIS & JEFFREY MARTINI, *LIBYA AFTER QADDAFI* 35-52 (Rand 2014) (discussing the state building challenges of Libya).

³⁶⁷ KOESEL, *supra* note 114, at 36-42 & 144-147 (discussing how the dominant Orthodox Church now enjoys a privileged legal status in Russia and the ironic noticeable regression of religious liberty amidst the transition to democracy).

³⁶⁸ There are commentators who expressed greater reservation of Al-Nahda and provide a much grimmer assessment of the democratic transition – or lack thereof – in Tunisia: Khedija Arfaoui, *Women's Empowerment: The Case of Tunisia in the Arab Spring*, in *MULTICULTURALISM AND DEMOCRACY IN NORTH AFRICA* 159, 169-171 (Moha Ennaji ed., Routledge 2014).

³⁶⁹ Duncan Pickard, *Al-Nahda: Moderation and Compromise in Tunisia's Constitutional Bargain*, in *POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS* 4, 27-31 (Justin O. Frosini & Francesco Biagi eds., Routledge 2015) (discussing the possible pragmatic/strategic reasons together with the Islamist party's ideological commitment to democratic ideals as explanations); HAMID, *supra* note 365, at 190-205 (discussion the pragmatic compromise and moderate policy positions undertaken by the Islamist party – including the appreciation on the importance of securing freedom at the onset and leaving the actual push for Islamization to the future democratic maneuvers).

³⁷⁰ Koppelman, *supra* note 104, at 1880; Shiffrin, *supra* note 244, at 29; Bette Novit Evans, *The Constitutions of Religious Pluralism in the United States*, in *RELIGION AND DEMOCRACY IN THE UNITED STATES: DANGER OF OPPORTUNITY?* 114, 122-125 (Alan Wolfe & Ira Katznelson eds., Princeton University Press 2010).

this regard, it should be noted that the absence of a dominant Christian denomination in the U.S. is, contrary to the views of many scholars,³⁷¹ not a good example to verify Madison's prediction because religious pluralism in the U.S. during the founding era was limited.³⁷² In practice, there are more than sufficient similarities among the various Protestant denominations to facilitate concerted political/legal exclusion and discrimination against non-Protestant minority groups³⁷³ under the banner of non-sectarian neutrality.³⁷⁴ It should also be noted that religious plurality is not simply about the number of religions within a jurisdiction³⁷⁵ but also about the relatively even distribution of religious membership. A polity cannot be properly considered religiously pluralistic – at least in the context of assessing the risks of high-stakes political and religious competition – if there is one religion that possesses the overwhelming majority of the population as its members, even if the remaining minority adheres to a fascinating diversity of religious faiths.

The second factor is the prevailing worldview among the population. Independent of plurality, high-stakes political and religious competition is more problematic when the prevailing

³⁷¹ John C. Green, *Religious Diversity and American Democracy: A View From the Polls*, in RELIGION AND DEMOCRACY IN THE UNITED STATES: DANGER OF OPPORTUNITY? 46, 80 (Alan Wolfe & Ira Katznelson eds., Princeton University Press 2010); Koppelman, *supra* note 104, at 1838 n.26; ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 44-45 (Westview Press 4th ed. 2010); ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES 130 (John Hopkins University Press 1999).

³⁷² HUTCHISON, *supra* note 104, at 20-21; HAMMOND ET AL., *supra* note 359, at 46-50.

³⁷³ Feldman, *supra* note 247, at 304; Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 48 (2000); William Cobern, *The Competing Influence of Secularism and Religion on Science Education in a Secular Society*, in SECULARISM & SCIENCE IN THE 21ST CENTURY 89, 89 & 91 (Ariela Keysar & Barry A. Kosmin eds., ISSSC 2008); Robertson, *supra* note 247, at 35; Shiffrin, *supra* note 244, at 70; HUTCHISON, *supra* note 104, at 59-83.

³⁷⁴ Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 N.Y.U. J. L. & LIBERTY 267, 284-285 (2008); Shiffrin, *supra* note 244, at 41-42; Michael W. McConnell, *Why is Religious Liberty the 'First Freedom'?*, 21 CARDOZO L. REV. 1243, 1264 (2000).

³⁷⁵ See also Bush, *supra* note 9, at 321 (noting the distinction between pluralism and diversity, and arguing that have religions with different characteristics – diversity – is better than have many religions of similar characteristics – pluralism – in the context of offering meaningful religious choices in the religious market).

worldview is exclusive and comprehensive. There is a pressing need to co-opt political power to enforce one's worldview if the worldview is exclusive and does not accept any other worldview as legitimate.³⁷⁶ Similarly, where the worldview is comprehensive, there will be more laws and policies that will be deemed in conflict with the worldview and thus a greater need to resort to political influence to resolve these conflicts in favor of the worldview.³⁷⁷ This dynamic can be seen in the tension between science and religion. Religions with comprehensive and exclusive outlooks tend to be more hostile toward science.³⁷⁸ For these religions, the ability of science and secular reasoning to provide an alternative account of the world renders them dangerous threats to such exclusive claims to the whole truth.³⁷⁹ The expansive domain claim by these religions aggravates matters by immensely increasing the grounds on which science and secular reasoning may be perceived as intruding. By contrast, religions that are privatized have a much smaller arena in which science and secular reasons are seen as intruding, whereas religions that are non-exclusive are not theologically challenged by the existence of alternative explanations of the world.³⁸⁰

³⁷⁶ Litonjua, *supra* note 29, at 314-315; Toft, *supra* note 28, at 100.

³⁷⁷ John H. Evans, *Epistemological and Moral Conflict Between Religion and Science*, 50(4) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 707, 713 & 721-723 (2011); Litonjua, *supra* note 29, at 327-329.

³⁷⁸ ADAM FRANK, THE CONSTANT FIRE: BEYOND THE SCIENCE VS. RELIGION DEBATE 44-45 (University of California Press 2009) (in the context of the debate over evolution and Intelligent Design). See John H. Evans, *Epistemological and Moral Conflict Between Religion and Science*, 50(4) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 707, 708-713 & 721-724 (2011) (conducting an empirical survey of U.S. population that find that while individuals professing religious faith does not differ with non-religious and among the different faiths in terms of scientific knowledge, religious adherents – especially those of conservative orientation – tend to reject otherwise established scientific findings which contradict their religious teachings).

³⁷⁹ Ragnar Fjelland, *Science Without God*, in SACRED SCIENCE? 87, 97-98 (Simen Andersen Øyen, Tone Lund-Olsen & Nora Sørensen Vaage eds., Wageningen Academic 2012).

³⁸⁰ See also JOHN HICK, THE NEW FRONTIER OF RELIGION AND SCIENCE: RELIGIOUS EXPERIENCE, NEUROSCIENCE AND THE TRANSCENDENT 135 (Palgrave Macmillan 2006) (observing that the issue of internal tensions and contradictions is much less pronounced for Buddhism and Hinduism).

B. *Normative Considerations of China*

As discussed above in III.A., precise statistics on religious adherents in China remain elusive. Nonetheless, some broad trends can be discerned. Among religious adherents, Buddhism and Chinese folk religions appear to be the majority, though a firm minority remains among the general population. The Buddhism and Chinese folk religions, as practiced in China, demonstrate non-exclusive and non-comprehensive outlooks.³⁸¹ In such a religious landscape, the risks of high-stakes political and religious competition will be limited.

There are two complications regarding the Chinese religious landscape. The first complication is the clear majority of the population that professes no religious belief/affiliation. Although some broad, though not completely accurate, generalizations can be made regarding worldview on the basis of the professed religious beliefs/affiliation,³⁸² the diversity among those professing no religious belief/affiliation is likely to be large enough to prevent any effective generalization. Using the criteria of exclusivity and comprehensiveness of worldview, the spectrum of worldviews for Chinese non-believers includes the exclusive and comprehensive militant Marxist atheists, the exclusive but non-comprehensive pure atheists,³⁸³ and the non-exclusive, non-comprehensive agonistics. The Cultural Revolution is perhaps an extreme example of the devastating political dynamics arising from the political dominance of militant Marxist

³⁸¹ PEW RESEARCH CENTER, *supra* note 51, at 34-36; XIE, *supra* note 7, at 73; Chau, *supra* note 122, at 244 & 259.

³⁸² In the context of the Judeo-Christian faiths in the U.S., sociological surveys have found that the conservative/liberal orientation of the underlying theology is a better prediction on moral value attitudes than religion or denomination family: John H. Evans, *Worldviews or Social Groups as the Source of Moral Value Attitudes: Implications for the Culture Wars Thesis*, 12(3) SOCIOLOGICAL FORUM 371, 375-376 (1997); Michael O. Emerson, *Through Tinted Glasses: Religion, Worldviews, and Abortion Attitudes*, 35(1) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 41, 42-43 (1996).

³⁸³ Pure atheists are categorized as exclusive and non-comprehensive because, beyond the steadfast commitment that religions are false, there is little consensus as to normative values and policy positions.

atheists. In contrast, the significant improvement in religious freedom after the Cultural Revolution can be conceived as a change of the dominant political ideology into a less-exclusive (no longer strongly insisting on the exclusivity of atheistic beliefs among the population) if still comprehensive worldview. If the estimations by some scholars that the majority of those who profess no religious belief/affiliations are not real atheists but are more agnostic in nature,³⁸⁴ then this would bode well for the democratization process, especially because there are hardly any legal strategies/rules available to restrict irreligious participation in politics.

The second complication is the dominance of certain religions at the local/regional level, notwithstanding the overall pluralistic religious landscape on the national stage. This is particularly true for the religions associated with ethnic minorities, which managed to constitute a majority in certain parts of China.³⁸⁵ Indeed, the practice of the Chinese government has been to draw political/administrative boundaries to create autonomous regions for the respective ethnic minorities such that these minorities are the majority within the political/administrative boundaries.³⁸⁶ A religious organization can command overwhelming influence at the village/county level, prompting explicit prohibition of religious interference in that context.³⁸⁷ The

³⁸⁴ E.g., Wenzel-Teuber, *supra* note 54, at 30 (noting the proportion of ‘pure atheists’ may only be 16%); Yang, *supra* note 351, at 19-20 (discussing a study by Chinese researchers that revealed “even a majority of Communist Party and government mid-level officials believe in some form of these superstitions”).

³⁸⁵ Israeli, *supra* note 354, at 251-252.

³⁸⁶ Art. 4, XIAN FA [Constitution] (2004) (P.R.C.). For example, in Tibet Autonomous Region, the Tibetan ethnic minority made up 90% of the population, while the Hui ethnic minority made up 35% of the population in Ningxia Hui Autonomous Region: National Bureau of Statistics of the People’s Republic of China, *Release of Major Figures in the 2010 Provincial Population Census*, available at <http://www.stats.gov.cn/tjsj/tjgb/rkpcgb/dfrkpcgb/> (last visited Apr. 23, 2015). For discussion of the structures and politics of the ethnic regional autonomy system in China, see Sautman, *supra* note 110, at 58-62; Liu & Alatan, *supra* note 145, at 141-145.

³⁸⁷ *Supra* III.D.3. See also YANG HUILIN, CHINA, CHRISTIANITY, AND THE QUESTION OF CULTURE 38-39 (Baylor University Press 2014) (Yang, who supervised a state-supported field study on religious landscape in China, observed that “in a certain village in Beijing’s outskirts, all the villagers, including the village chief and the secretary of the party branch, have been baptized and have become Christians. The village church is, in fact, the most important venue

lack of plurality combined with the dominance of an exclusive and comprehensive worldview in some instances³⁸⁸ would be potentially problematic during democratization, though the exact magnitude of the risk would be dependent on the level of federalism. The risks would be somewhat mitigated if China retained the current highly centralized political institution in which power – including the power to allocate resources – remains largely in the hands of the central government.³⁸⁹ The risk would be more severe in the likely scenario in which the democratization process divests power from the central government in favor of the local government.³⁹⁰

C. The Dilemma of Instituting Political Competition Restrictions in Democratic Transitions

It is commonly observed that regardless of the merits of the political participation and/or public involvement of religions, it is not possible to confine religion entirely to the private realm.³⁹¹ Nonetheless, there are various legal mechanisms to restrict the political activities of religious organizations and consequently to reduce the impact of political competitiveness in religious

and the highest institution of power, and all matters, big and small, can be decided only with the participation of clergymen.”).

³⁸⁸ See Israeli, *supra* note 354, at 264-265 (discussing the various sects of Islam in China, and their corresponding worldview and conceived relationship with the dominant Chinese culture).

³⁸⁹ Malesky, Abrami & Zheng *supra* note 210, at 409-411; Michel Okensnberg, *China's Political System: Challenges of the Twenty-first Century*, 45 THE CHINA JOURNAL 21, 21-25 (2001).

³⁹⁰ See Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L.J. 671 (2014) (discussing the decentralization of Chinese governance structure in terms of fiscal and regulatory authority); Xiao Li, *Legal and Economic Development with Sui Generis Chinese Characteristics: A Systems Theorist's Perspective*, 39 BROOK. J. INT'L L. 159, 195-198 (2014) (observing the Chinese adopted reform path of “strong central control in combination with the gradual deregulation to local governments provides a suitable strategy to achieve the adaptive efficiency of the whole system”).

³⁹¹ Richard Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 MISS. L.J. 453, 497 (2009); Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEM. L. REV. 973, 984 (2009); Feldman, *supra* note 247, at 286; Wicks, *supra* note 265, at 413; JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 36 (Lexington Books 2002); GARRY, *supra* note 296, at 44; STEPHEN L. CARTER, GOD'S NAME IN VAIN 159-160 (Basic Books 2000).

competition.³⁹² The most obvious example is the U.S. Establishment Clause, which, by theoretically removing the ability of selected religious organizations to utilize state machinery to advance their religious interests and causes, was originally conceived to prevent the majority religious faction from translating its political dominance into perpetual religious dominance.³⁹³ Another example from the U.S. is the first prong of the infamous test in *Lemon v Kurtzman* that prohibits government actions from being motivated by religious purposes.³⁹⁴ Tax exemptions for religious organizations may also be conditioned on the prohibition of political campaigning, lobbying activities and other political activities.³⁹⁵ More drastic measures can include the direct prohibition of religious leaders/organizations' participation in the electoral process, such as advocating for particular political party or candidate.³⁹⁶

Beyond these legal restrictions, it is worth mentioning the rather common discourse among academics who, in the course of advocating greater political/public participation of religions, nevertheless place some restrictions/limitations on such participation. For example, Paul Horwitz suggested “general rules of ‘etiquette’” that might help channel and improve political dialogue about and stemming from religious premises” and “simply exercise the right not to participate dialogue when it involves religious issues” to address possible “uncharitable and far less

³⁹² See Chen, *supra* note 12, at 232.

³⁹³ William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1050 (2005).

³⁹⁴ *Lemon v Kurtzman*, 403 U.S. 602 (1971).

³⁹⁵ E.g., §501(c)(3), Internal Revenue Code (U.S.). See Joel E. Davidson, *Religion in Politics and the Income Tax Exemption*, 42(2) FORDHAM L. REV. 397 (1973) (arguing for a more restrictive limitations on the political activities of religious organizations).

³⁹⁶ E.g., Singapore: Tey Tsun Hang, *Excluding Religion from Politics and Enforcing Religious Harmony – Singapore-Style*, 2008 SING. J. LEGAL STUD. (Sing.) 118, 124-125 (2008); Michael Hill, *The Rehabilitation and Regulation of Religion in Singapore*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 343, 356 (James T. Richardson ed., Kluwer Academic 2004).

productive conversation” arising from his “uninhibited, robust and wide-open” approach toward religious participation in public and political debate and process.³⁹⁷ Elizabeth Wicks envisaged an approach in which legislators “should bear in mind they are making decisions for the whole society, including those members who take radically different views on religion and its role in private decisions”³⁹⁸ and “should strive to draw upon both reason and [religious] faith when making decisions [on fundamental issues to life, death and reproduction]”³⁹⁹ Julia Stronks argued for broad protection of religion in which religious exercise may only be prohibited by the compelling interest of the state interpreted narrowly and carefully⁴⁰⁰ and equal treatment of religion, which includes not favoring a belief system such as secularism⁴⁰¹ but similarly notes that religious institutions have the “responsibility” of respecting the state’s exercise of its responsibilities in the appropriate sphere, including “not interfer[ing] improperly in society’s other autonomous spheres, such as economics, science, and art.”⁴⁰² A. James Reichley generally hoped for greater involvement of religious bodies in the public and political process,⁴⁰³ but he also hoped that religious bodies will exercise self-restraint on both the type of issues and the level of involvement.⁴⁰⁴ Daniel O. Conkle argued that even religious fundamentalists’ voices should not be excluded from the public

³⁹⁷ Horwitz, *supra* note 391, at 1030-1031.

³⁹⁸ Wicks, *supra* note 265, at, 431.

³⁹⁹ *Id.*, at 437.

⁴⁰⁰ STRONKS, *supra* note 391, at 144-145 (this would, in her view, requires the state to also prove the least restrictive means available is employed).

⁴⁰¹ *Id.*, at 145-146.

⁴⁰² *Id.*, at 142 (The state role will be “limiting the ability of one institution to interfere with another, and by protecting health, safety, order, and other compelling interests of society.”).

⁴⁰³ REICHLEY, *supra* note 104, at 359-365.

⁴⁰⁴ *Id.*, at 359-361 (“The larger society must hope that the churches and other religious groups will express their positions on issues of this kind with due regard for the rights of citizens who do not share their convictions and for the continued viability of democratic processes.”).

discourse⁴⁰⁵ on the premise that the fundamentalists did not actually have the political power to dominate and control the discourse⁴⁰⁶ and the discourse requires humility and tolerance.⁴⁰⁷

In the context of China, Zhibin Xie argued that the current restrictions in China that restrict religion to the private sphere should be lifted.⁴⁰⁸ He laudably recognized that certain religions are in a better position than others to participate in the political process and/or public debate and proposed limitations such as the requirement for the translation of religious arguments to “publicly accessible reasons” when political choice is involved⁴⁰⁹ and that religious organizations that have the potential to become dominant political forces should ensure that the aim of public/political involvement is “not to gain political leadership”⁴¹⁰ and to demonstrate “respect for the interests of other religious organizations.”⁴¹¹

Despite the proliferation of these well-meaning and normatively unobjectionable norms, little, if anything, has been articulated about who will administer these norms and how such norms

⁴⁰⁵ Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337, 367-368 (1995-1996) (“But fundamentalists certainly can play a “speaking” role in the search for truth. Fundamentalists, as listeners, may be unwilling to entertain non-fundamentalist positions, but that does not mean that their fundamentalist claims have no value in a discursive exchange with non-fundamentalists. To the contrary, non-fundamentalists should listen to fundamentalist claims, attempting to understand the premises on which they are based and to appreciate the truth they might contain.”).

⁴⁰⁶ Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337, 367-368 (1995-1996) (“Although I have argued that fundamentalism frustrates a dialogic search for truth, this occurs only to the extent that fundamentalists actually control the discourse or make the decisions that the discourse is designed to inform. Such control or such decision making, in my view, would indeed be problematic. In the public domain, for example, it would be problematic if fundamentalists had the strength of numbers and the political power to themselves determine our laws and policies.”).

⁴⁰⁷ Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337, 368 (1995-1996) (“In the world of multi-lingual discourse that I have imagined, humility and tolerance would be exceedingly important.”).

⁴⁰⁸ XIE, *supra* note 7, at 94-103.

⁴⁰⁹ *Id.*, at 114-155 (“publicly accessible reasons” is distinguished from “secular reasons,” and must be accessible to citizens from either other religious traditions or nonreligious traditions).

⁴¹⁰ *Id.*, at 104.

⁴¹¹ *Id.*, at 127.

will be enforced against those who violate them. Public backlash and disapproval of violations provide very limited restraints where there is no shortage of incentives for violation, whether in terms of religious organizations consolidating their hold on their target audiences of adherents with extreme/fundamentalist religious views⁴¹² or political actors operating in regions where there is a local dominance of religious organizations/adherents with extreme religious views.⁴¹³ The use of “soft-constitutional norms” to resolve religious tension arising from offensive religious speech in multi-religious Singapore, while lauded by Li-ann Thio as an example of the superiority of such norms over the restrictive nature of legal sanctions,⁴¹⁴ is only achieved in the backdrop of legal provisions that grant the government broad discretionary power to manage religious harmony.⁴¹⁵ Thus, unless these norms are legally or otherwise enforceable with sufficient sanctions to compel the modification of behavior, the norms will remain idealistic exhortations that do not place real restrictions on the political/public activities of religious organizations/adherents.

⁴¹² For example, the widespread unanimous public and political condemnation of Westboro Baptist Church and the Quran-burning antics of the Florida Pastor Terry Jones in the United States could not and did not deter those actions in the absence of any accompanying legal sanctions: Russell Adams, *Tensions Still on Boil in Mosque Fight*, WALL ST. J., Sep. 13, 2010, at A5; Jess Bravin & Brent Kendall, *Supreme Court Wades into Funeral Protests*, WALL ST. J., Mar. 9, 2010, at A2. See also David Smith, *Christian Militias Take Bloody revenge on Muslims in Central African Republic*, THE GUARDIAN, Mar. 10, 2014, available at <http://www.theguardian.com/world/2014/mar/10/central-african-republic-christian-militias-revenge> (last visited Apr. 23, 2015) (calls for peace and reconciliation from the international society did little to dissuade Christian militias from revenge attacks on the Muslims civilian population in the Central Africa Republic).

⁴¹³ Given the incentive to stimulate one’s voters turn-out and the informational asymmetry where one’s voters are more aware of changes to one’s political platform, a political candidate is likely to be more extreme in his religious positions if his/her audience is particularly defined by religion: Edward L. Glaser et al., *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, THE QUARTERLY JOURNAL OF ECONOMICS, Nov. 2005, 1283, at 1287 & 1321-1322 (2005). See also Meir Hatina, *On the Margins of Consensus: The Call to Separate Religion and State in Modern Egypt*, 36(1) MIDDLE EASTERN STUDIES 35, 60-63 (2000).

⁴¹⁴ Li-Ann Thio, *Relational Constitutionalism and the Management of Religious Disputes: the Singapore ‘Secularism with a Soul’ Model*, OXFORD JOURNAL OF LAW AND RELIGION 1, 19-21 (2012); Thio, *supra* note 167, at 504-505.

⁴¹⁵ Chen, *supra* note 264, at 82.

The key issue is how these legal rules, or legally backed norms, arise in the first place. It can be expected that the dominant religious organization and/or coalition will be likely to resist any attempt to limit its political power. One possible scenario, as evidenced by the U.S. experience, is that the restrictions were not originally intended to apply – at least to the full extent – to the dominant religious organizations and/or coalition. This would help to explain the purported self-imposed constraints on religious activities in the democratic U.S. Given the predominance of Protestantism – notwithstanding its internal diversity – in the founding era of the U.S.,⁴¹⁶ it is not surprising that the Establishment Clause was meant to resolve the tensions of interests among the various Protestant sects and the strands of deism in early America⁴¹⁷ without intending to prevent the de facto establishment of Protestant Christianity in the U.S. in the coming centuries.⁴¹⁸ It also helped that this official prohibition was consistent with the prevailing theological worldview of the polity.⁴¹⁹

⁴¹⁶ HUTCHISON, *supra* note 104, at 20-21; HAMMOND ET AL., *supra* note 359, at 46-50.

⁴¹⁷ HUTCHISON, *supra* note 104, at 20-21 (noting that while the “types of diversity that existed in British-colonial America are certainly not to be slighted ... [with its] ‘mosaic of Christian faiths’ and ‘a terrific jumble of religious practices’ ... the European component of colonial society had been well over 95 percent Protestant.”). There was also strong presence of deisms among the Enlightenment intellectuals influential in the drafting of the Constitutions: Robertson, *supra* note 247, at 34.

⁴¹⁸ William Cobern, *The Competing Influence of Secularism and Religion on Science Education in a Secular Society*, in SECULARISM & SCIENCE IN THE 21ST CENTURY 89, 89 & 91 (Ariela Keysar & Barry A. Kosmin eds., ISSSC 2008); Shiffrin, *supra* note 244, at 70; HUTCHISON, *supra* note 104, at 59-83; Robertson, *supra* note 247, at 35. Established churches – inevitably of Protestant denomination – persisted for several years: Patrick M. Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 479 (2004); Robertson, *supra* note 247, at 35. There is also the related argument from the historical perspective that the Establishment Clause was not intended to be applied to the states where the practice of established churches continued for several years after independence: Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 999-1000 (2004).

⁴¹⁹ Koppelman, *supra* note 104, at 1849-1893; William Cobern, *The Competing Influence of Secularism and Religion on Science Education in a Secular Society*, in SECULARISM & SCIENCE IN THE 21ST CENTURY 89, 90 (Ariela Keysar & Barry A. Kosmin eds., ISSSC 2008; Esenberg, *supra* note 265, at 42; GARRY, *supra* note 296, at 91; SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 75-76 (University of North Carolina Press 2002); Mark DeWolfe Howe, *Church and State in the United States*, 64 HARV. L. REV. 170, 172 (1950).

The bane of the conservative Religious Right - the “wall of separation” metaphor used by courts to enforce the Establishment Clause against state funding and/or endorsement of Christianity⁴²⁰ – was, in fact, initially to justify the dismissal of the unpopular Mormon polygamous claim under Free Exercise⁴²¹ and then to deny state funding to Catholic schools without disturbing the de facto establishment of Protestantism in public schools.⁴²² Similarly, the primary targeted entities driving the enactment and amendment of section 501(c) of the Internal Revenue Code that was judicially interpreted to restrict political activities for tax-exempt organizations in the 1930s and 1950s were actually not political activities by religious organizations.⁴²³ Thus, for the U.S., the higher power that enforces these restrictions is the court, which itself is reflective of the general population’s sentiment while being somewhat ahead of the curve on the issue.⁴²⁴ Given that these restrictions are increasingly attracting critiques of religious liberty violation in certain quarters of the population⁴²⁵ and that various religious organizations

⁴²⁰ See Robertson, *supra* note 247, at 36 (“The ‘Wall of Separation’ put an end to a de facto support for orthodox Protestantism as an established religion.”).

⁴²¹ REICHLEY, *supra* note 104, at 119-120.

⁴²² E.g., *Everson v. Board of Education*, 330 U.S. 1 (1947). See Kevin M. Schultz, “*Favoritism Cannot Be Tolerated*”: *Challenging Protestantism in America's Public Schools and Promoting the Neutral State*, 59 (3) AMERICAN QUARTERLY 565, 574 (2007) (observing that till the 1950s, the advocacy for the doctrine of separation of church and state was driven by anti-Catholic motivation).

⁴²³ Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and ... Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 67-72 (2007) (the legislative objectives were to prevent wealthy donors from receiving tax deductions on advancement of personal interests and political advantages arising from private foundations).

⁴²⁴ Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 167-183 (2012); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 4-17 (Oxford University Press 2006). See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-680 (1993) (discussing the inevitable dialogue between the courts and the various actors in the polity).

⁴²⁵ E.g., Anita Y. Woudenberg, *Propagating a Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality*, 7 FIRST AMEND. L. REV. 307 (2009) (criticizing the Lemon test); Kevin Pybas, *Religious Groups in Free Society*, 86 U. DET. MERCY L. REV. 685, 708 (2009) (wall of separation infringes religious liberty in modern welfare state); Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and ... Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41 (2007) (arguing against application of section 501(c)(3) on religious organizations).

have been actively mobilized in the political arena to become prominent political players seeking to shape law and policies in accordance with their religious values⁴²⁶ in the context of dramatically increased religious plurality,⁴²⁷ it is arguably doubtful that similar restrictions on the political participation of religious organizations would be instituted in the modern U.S. polity.⁴²⁸ Indeed, given the heightened awareness of the importance of political participation in the modern welfare state (as compared to the much more limited government in the eighteenth-century U.S.)⁴²⁹ and the increased salience of religious identity fortified by increased religious plurality (including in forms of atheism and other irreligious worldviews) within and across the polity,⁴³⁰ it is highly

⁴²⁶ For a discussion of political mobilization by religious organizations in the US, see FOWLER ET AL., *supra* note 371, at 119-167; James L. Guth et al., *A Distant Thunder?: Religious Mobilization in the 2000 Elections*, in INTEREST GROUP POLITICS 161 (Burdett A. Loomis & Allan J. Cigler eds., CQ Press 2002); James L. Guth et al., *Getting the Spirit?: Religious and Partisan Mobilization in the 2004 Elections*, in INTEREST GROUP POLITICS 157 (Allan J. Cigler & Burdett A. Loomis eds., CQ Press 2007); John C. Green & Nathan S. Bigelow, *The Christian Right Goes to Washington: Social Movement Resources and the Legislative Process*, in THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 189 (Paul S. Herrnson et al. eds., 2nd ed. CQ Press 2005).

⁴²⁷ HUTCHISON, *supra* note 104, at 24-27; Stein, *supra* note 373, at 41-54; Feldman, *supra* note 247, at 295. See also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 61 (130th ed. 2010).

⁴²⁸ See Julia L. Ernst, *Rethinking the Validity of State Religions: Is Antiestablishmentarianism a Fundamental Prerequisite for the Protection of Religious Rights Under International Human Rights Law?*, 34 N. ILL. U. L. REV. 333, 384-388 (2014) (arguing for the abolishment of state religions as a principle of international law while acknowledging that people who hold religious beliefs remained free to influence government policies and/or become members of government); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1617-1623 (1993). See also David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 805 (2012) (the Establishment Clause is a relatively rarity in the world, with the separation of church and separation appearing in 1/3 of the current constitutions around the world).

⁴²⁹ Esenberg, *supra* note 265, at 52-53; Michel Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religion Revival?*, 30 CARDOZO L. REV. 2333, 2359 (2009).

⁴³⁰ JOHN C. BLAKEMAN, THE BIBLE IN THE PARK: RELIGIOUS EXPRESSION, PUBLIC FORUMS, AND FEDERAL DISTRICT COURTS 87 (University of Akron Press 2005); Feldman, *supra* note 247, at 285; June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 495-496 (2007); Matthias Mahlmann, *Free Speech and the Rights of Religion*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 41, 60 (András Sajó ed., Eleven International Publishing 2007); Eskridge, *supra* note 393, at 1050; Koppelman, *supra* note 104, at 1916.

doubtful whether consensus on “mutual disarmament” in the political sphere can be reached in any polity.⁴³¹

The second scenario is where there is an overriding political power, typically of authoritarian or semi-democratic nature, that imposes these restrictions to maintain political control by eliminating possible sources of opposition mobilization.⁴³² This is essentially the case in China, where restrictions on political activities of religious organizations are largely driven by considerations of political control. The problem – if one adopts the view that political competition between religions is normatively undesirable in this particular context – is that such restrictions would inevitably weaken during democratization. Where democratization is not effected radically via revolution but the ruling party gradually allows for increasingly open and free democratic election – such as in the case of Taiwan – then the ruling power will be compelled to co-opt and accommodate religious organizations to garner the necessary popular support at the polls.⁴³³ This need to be more sensitive toward popular sentiment, in turn, provide incentives and avenues for religious organizations to project their voices and advance their interests in the political process.⁴³⁴ In these circumstances, the close intertwining of religion and politics would render any restrictions

⁴³¹ *C.f.*, Ernst, *supra* note 428, at 384-385 (noting the recent disestablishment of state religions in Bolivia, Nepal, Bhutan and Sweden).

⁴³² For example, for criticisms of Singapore’s restrictions of religion and politics, *see* Thio, *supra* note 319, at 233; Tey, *supra* note 396, at 124-125. In the context of pre-democratized Taiwan, *see* YE YONGWEN, Taiwan zhongjiao guanxi 台湾政教关系 [CHURCH-STATE RELATIONSHIP IN TAIWAN] 243-246 (Fengyun Luntan Publishing 2001).

⁴³³ The legalization of Yiguan Dao – a Chinese religious sect that was previously sanctioned – benefited hugely from the support to the ruling party by the faith in the then emerging competitive electoral politics: YE, *supra* note 432, at 221-225.

⁴³⁴ *Id.*, at 258-269.

on the political activities of religious organizations highly unlikely, even if individual religious organizations could elect to maintain strict neutrality among political parties.⁴³⁵

In contrast, where democratization is effected through a drastic and revolutionary process, such as in the case of Egypt⁴³⁶ and Libya,⁴³⁷ then insofar as religious organizations are substantial contributors to the overthrow of the prior regime that typically oppresses these religious organizations, it is not surprising that such religious organizations would desire to maintain their newfound political power to, at the very least, safeguard their position in the new regime.⁴³⁸ Alternatively, a previously dormant majority religion may seek to take advantage of these newly available avenues of political influence by offering much-needed popular support to advance its interests – whether material resources, restrictions of religious competitors and/or other competitive advantages – via state apparatuses.⁴³⁹ The new regime, whether because of the desire to “reward” the said religious organization or to secure its continued support or because it is dominated by the said religious organization, will not be in a position to place any legal restrictions

⁴³⁵ *E.g.*, KUO, *supra* note 124, at 28 (noting the strict neutrality by the Ciji that never endorses any political candidates and requires any of its members to resign from all Ciji posts and not mention any affiliation with Ciji if they chose to run for office).

⁴³⁶ Tadros, *supra* note 365, at 210-217; HAMID, *supra* note 365, at 140-166; GILBERT ACHCAR, *THE PEOPLE WANT: A RADICAL EXPLORATION OF THE ARAB UPRISING* 148-155 (University of California Press 2013).

⁴³⁷ Mezran & Knecht, *supra* note 366, at 85-92.

⁴³⁸ *See* HAMID, *supra* note 365, at 140-166 (discussing how the illiberal approach undertaken by the Muslim Brotherhood in post-revolution Egypt is driven by a perceived existential fear of losing the gains they made after the Arab Spring).

⁴³⁹ For a discussion of how the Orthodox Church developed and utilized its political leverage in post-Communist Russia to influence the enactment of legislations/regulations and other arrangements that clamped down on foreign religious competitors, *see* KOESEL, *supra* note 114, at 36-42 & 144-147. The Russian experience is arguably instructive of the perils of religious involvement in politics that is particularly salient in circumstances of limited religious plurality. The capture of the state by the Orthodox Church took place in the context of a state formation process that largely ignored religious organizations (because of the lack of active religious participation in the initial regime transition) and a resulting constitution that had an establishment-style requirement of the separation of church and state: KOESEL, *supra* note 114, at 34-35; art. 14, The Constitution of Russia (“The Russian Federation shall be a secular state. No religion may be established as the State religion or as obligatory.//Religious associations shall be separate from the State and shall be equal before the law.”).

on the political activities of religious organizations. It is telling that it took a military coup to reverse the trend of Islamization that threatened the unfortunate exclusion of other religious minorities in post-Arab Spring Egypt.⁴⁴⁰

This is, in fact, the dilemma of restricting the political activities of religious organizations. Religious organizations that are theologically compatible with political activities and that possess considerable political resources have both the incentives and resources to resist any attempt to reduce the projection of their political competitiveness. In contrast, reducing the impact of political competition on religious competition will benefit religious organizations that are either theologically averse toward political activities or lack political clout due to a numerical minority and/or a disadvantaged socio-economic profile. These religious organizations lack either the ideological motives or resources to effect the necessary legal changes to curb religious political activities. Without an authoritarian power to keep tabs on the political influence of religious organizations or a religious homogeneity that overwhelming permeates the state institution such that ostensible political participation is not needed, such restrictions are unlikely to materialize in democracy.

In the context of China, the main difficulty for any meaningful normative argument and factual prediction about the political dimension of religious competition is the great uncertainty regarding when and how democratic reform will manifest in China. The current demographic and religious worldview of the population, as argued above in VI.A., normatively welcome more

⁴⁴⁰ Nathan J. Brown, *Egypt: A Constitutional Court in an Unconstitutional Setting*, in *POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA* 33, 46-47 (Justin O. Frosini & Francesco Biagi ed., Routledge 2015); Tadros, *supra* note 365, at 210-217.

political participation by religious organizations and religious adherents, with the risks of localized religious dominance mitigated by the current centralized governance structure and substantial majority of irreligious people. However, if the democratization process is revolutionary or abrupt in nature, then the likely breakup of the nation during the political turmoil – whether formally, as in the Soviet Union’s experience,⁴⁴¹ or in the form of de facto regional independence in Libya⁴⁴² and Afghanistan⁴⁴³ – would aggravate the risks of undesirable high-stakes political competition among religions arising from localized religious dominance manifesting in conjunction with longstanding ethnic tensions. Similarly, if the democratization process took place during – or perhaps because of – a different religious landscape that was dominated by a majority religion with a comprehensive and exclusive worldview,⁴⁴⁴ restrictions to limit religious involvement in the political arena – whether in terms of outcome (e.g., the state may not give preferential aid to a particular religion) or process (e.g., religious organizations/leaders may not advocate for a particular political candidate) can be normatively desirable. Leaving aside the foolhardy task of predicting the manner and timing of the downfall (democratically or otherwise) of a currently stable authoritarian regime,⁴⁴⁵ the key takeaway from the analysis in this section is that in precisely

⁴⁴¹ See EDWARD W. WALKER, *DISSOLUTION: SOVEREIGNTY AND THE BREAKUP OF THE SOVIET UNION* 137-172 (Rowan & Littlefield Publishers 2003) (detailing the events that led to the dissolution of the Soviet Union in 1991).

⁴⁴² Mezran & Knecht, *supra* note 366, at 97-99; CHIVVIS & MARTINI, *supra* note 366, at 13-29.

⁴⁴³ Thomas Rutting, *Afghanistan Between Democratization and Civil War: Post-2014 Scenarios*, in *AFGHANISTAN, PAKISTAN AND STRATEGIC CHANGE: ADJUSTING WESTERN REGIONAL POLICY* 171, 174-181 (Joachim Krause & Charles King Mallory, IV eds., Routledge 2014).

⁴⁴⁴ See ZHOU, *supra* note 44, at 147-149 & 155-159 (critically discussing the predictions by some scholars that the growth of Christianity in China will spur democratization).

⁴⁴⁵ See JACK F. MATLOCK, JR., *AUTOPSY ON AN EMPIRE* 694 (Random House 1995) (observing how entrenched political systems across history persisted for significant durations despite unambiguous problems in their economic and social institutions).

the latter two scenarios where limitations on the political activities of religions are arguably normatively desirable, such limitations are extremely unlikely to be enacted and implemented.

VII. CONCLUSION

Religion – with its appeal to sources beyond easy human comprehension and allusion to supernatural forces trumping human endeavors – has always been a difficult subject matter for law. Yet, even if we may never fully understand or verify the nature and extent of divine intervention, human beings remain responsive to law, even for religious matters. Law, with its capacity to set the rules of competition between religions, retains a substantial, and at times decisive, influence as to the identity and characteristics of the resulting winners in the religious market. This case study application of China not only highlights how Law & Religious Market perspective can generate a more nuanced factual appreciation of the actual regulatory framework of religion but also the important normative implications for how the otherwise much-needed reform should not be guided by traditional instinctive rejections of restrictions imposed on certain religious organizations and/or religious practices. The solution for bad law – whether in the religious market or conventional market – is almost certainly not the absence of law itself⁴⁴⁶ but better law.

⁴⁴⁶ See Jianlin Chen & Jiongzhe Cui, *Property Rights Arrangement in Emerging Natural Resources: A Case Study of China's Nationalization of Wind and Sunlight*, 27 COLUM. J. ASIAN L. 81, 121-125 (2013) (making a similar argument in the context of property rights arrangement for emerging natural resources).

EPILOGUE:

ANTITRUST LAW, MARKET FAILURE, AND RELIGIOUS MARKET

The Law & Religious Market perspective presented in this dissertation is the combined intellectual fruit from the disciplines of economics, sociology and law. By interpreting the sociological findings on the changing fortunes of the different religions in a particular society through the economic assumption of individual actors making utility maximization choices, the religious economic model facilitates a better understanding of the religious phenomenon. The insights on how religious competition determines the winners and losers in the religious market have in turn put a spotlight on the role of law in shaping religious competition. The resulting normative implications for legal discourse are twofold. First, as argued in Chapter Four, neutrality is not an option. The inquiry must confront the difficult but necessary question as to the characteristics of religion that the law should foster. Second, as illustrated in the case study of China in Chapter Five, legal restrictions of specific religious practices may positively contribute to religious competition as a whole, especially in the context of a transitional religious market.

Moving forward, this fruitful application of the market analysis to law & religion almost invariably points to possible further research into insights that can be drawn from the existing rich literature in antitrust law. After all, the intersecting dynamic between law and competition in the economic sphere is precisely the focal issue of antitrust law (*aka* competition law). A comparative examination on the intellectual development and doctrinal evolution of antitrust law can generate insightful analogies when formulating and accessing laws designed to facilitate optimal religious competition. At the very least, the antitrust law experience can provide a framework that flags out the basic issues which should be considered in any formulation of regulation on religious competition.

The starting point of antitrust law literature is the goal(s) of antitrust law. Echoing the normative thrusts of this dissertation, antitrust law literature has long recognized the importance of articulating that antitrust law should facilitate normatively ideal competition, and acutely appreciated how the choice among the different normative ideals can have contrasting doctrinal implications. The ideal competition may be one where there is sufficient plurality among market players to safeguard an individual consumer's choice, and the consequent emphasis on preserving diversity in the market. Alternatively, the ideal competitive market can be conceived as one which promote overall welfare, with further complications arising from whether the welfare calculus should be restricted to consumers' (more scrutiny on the price paid for and/or benefits received by consumers) or include producers' (more focus on production efficiency).¹ Furthermore, the normatively ideal market to be fostered by antitrust law may include public interests objectives that are beyond competition. For example, the goal of facilitating market integration – as in the case of European Union – may dictate striking down horizontal market-sharing agreements that might otherwise have limited anticompetitive effect.² In the religious market context, the ambiguities of the otherwise attractive notion of “religious free competition” explicated in Chapter One and Chapter Two must similarly be addressed before any further assessment on the appropriate legal regime.

¹ Laura Parret, *Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy*, 6(2) EUROPEAN COMPETITION JOURNAL 339 (2010); DORIS HILDEBRAND, *THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES* 95-186 (3rd ed. Kluwer Law International 2009); MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 1-38 (Cambridge University Press 2004). For an edited collection discussing the various perspective, see generally *THE GOALS OF COMPETITION LAW* (Daniel Zimmer ed., Edward Elgar 2012).

² DAMIEN GERADIN, ANNE LAYNE-FARRAR & NICOLAS PETIT, *EU COMPETITION LAW AND ECONOMICS* 24-26 (Oxford University Press 2012).

The articulation of the normatively ideal religious market brings forth the next salient issue as to what market failures might justify legal intervention – just as market failures is an important theme in both antitrust and general economic literature.³ There are certain market failures that are contingent of the underlying normative ideal market, and is largely apparent once the normative ideal market is properly articulated.⁴ For example, if the ideal religious market is one where religions with the best spiritual and doctrinal claims emerge as winners, then it might be necessary and desirable for law to counteract distortions posed by religions which are militarily, economically and/or politically competitive but are otherwise deficient in its theological outlook.

On the other hand, some market failures – such as problems posed by externality – are *per se* independent from the underlying normative market conception.⁵ The State may justifiably intervene where there are excessive conduct of practices that generate costs borne by others, or – on the flip side – encourage practices that generate benefits enjoyed by others. In the context of religion, this is partially captured by the current framing of the dominant legal issue as to whether restrictions to specific religious practices can be sufficiently justified by public interests.⁶ Nonetheless, the Law & Religious Market perspective – drawing from the economic literature – would advocate a more systematic assessment as to the negative externality associated with

³ See STEVEN G. MEDEMA, *THE HESITANT HAND: TAMING SELF-INTEREST IN THE HISTORY OF ECONOMIC IDEAS* 54-74 (Princeton University Press 2009) (discussing the intellectual developments relating to market failures).

⁴ The antitrust law literature focuses on the reasons that made a commercial firm dominant in the market, and the consequential policy implications: see FEDERICO ETRO, *COMPETITION, INNOVATION, AND ANTITRUST: A THEORY OF MARKET LEADERS AND ITS POLICY IMPLICATIONS* (Springer 2007). *C.f.*, *THE ABOLITION OF ANTITRUST* (Gary Hull ed., Transactions Publishers 2005) (arguing for the abolishment of the antitrust law regime on the basis that commercial firms that achieve large market shares primarily because of their ability to provide attractive value to consumers/customers).

⁵ *E.g.*, SUZANNE KINGSTON, *GREENING EU COMPETITION LAW AND POLICY* 9-40 (Cambridge University Press 2012) (discussing how environmental protection may plausibly fit into the different normative theories of competition law).

⁶ Chap 4.

religious practices as compared to the current ad hoc evaluation of the impact of generally applicable law on specific religious practices. In addition, positive externality should also be included in the analysis, which may support state subsidies or other forms of encouragement in those religious practices.

As a final preliminary remark, the adaptive application of antitrust law perspectives and the general economic literature on market to religion – the human activity that is arguably the least driven by monetary and material considerations – can in turn enrich the understanding of markets in general. The conceptualization of the religious phenomenon as a market dynamic premised on individual choices compels the full appreciation of the nuances and complexity of the human decision-making process. This avoids the common misunderstanding of the economic assumption of rationality as perfectly informed decisions that maximized the monetary profit – a misunderstanding that has at times even plagued scholars working in the discipline.⁷ This is highly relevant for effective economic analysis in the conventional commercial market context given that consumer decisions on material consumption can take into account deeper ethical and other non-materialistic concerns.⁸ Indeed, from my personal experience in teaching the Economic Analysis of Law course to law students, the reading materials and class discussions on this Law & Religious

⁷ For an example of such mistaken application, see Graeme Lang et al., *Temples and the Religious Economy*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 149, 150 (Fenggang Yang & Joseph B. Tamney eds., Brill 2005) ([wrongly] understanding the “religious economy paradigm” as requiring religious leaders to consciously adapt religious practices to meet perceived local preferences and engaging in such market adaptation only because of revenue pressures).

⁸ C.B. Bhattacharya & SAnkar Sen, *Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives*, 47(1) CALIFORNIA MANAGEMENT REVIEW 9, 9-10 (2004); Eleonora Curlo, *Marketing Strategy, Product Safety, and Ethical Factors in Consumer Choice*, 21(1) JOURNAL OF BUSINESS ETHICS 37, 40 (1999); R. W. D. Turner, *Vegan Diet And Health*, THE BRITISH MEDICAL JOURNAL, Mar. 3 1979, at 613. See Chapter 4.II.A. For an edited collection that explores the role of morality and other conscientious values in economic activities and the consequential modifications to conventional economic models and business theory, see generally MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., Princeton University Press 2008).

Market topic often presents a rather torturous intellectual journey for the students, but of which a successful navigation provides much clarity in the understanding of conventional Law & Economic topics (i.e., contract, torts, property, criminal law, civil procedure).

As observed in Chapter 4.IV, religion is probably last bastion where the appreciation that the design of the rules of competition (i.e., law) has a substantial and often decisive influence on the emerging winner has yet to be firmly incorporated. This is ultimately as unfortunate for our understanding of religion as it is for our understanding of other aspects of human behaviors. The Law & Religious Market perspective presented in this dissertation hopefully makes some contributions on both account.