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## Religion Is Special Enough

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RELIGION IS SPECIAL ENOUGH

*Christopher C. Lund\**

*In ways almost beyond counting, our legal system treats religion differently, subjecting it both to certain protections and certain disabilities. Developing the specifics of those protections and disabilities, along with more general theories tying the specifics together and justifying them collectively, has long been the usual stuff of debate among courts and commentators.*

*Those debates still continue. But in recent years, increasingly people have asked a slightly different question—whether religion should be singled out for special treatment at all, in any context, for any purpose. Across the board, but especially in the context of religious exemptions from generally applicable laws, many have come to doubt religion’s distinctiveness. And traditional defenses of religion’s distinctiveness have been rejected as unpersuasive or religiously partisan.*

*This Article offers a defense of our legal tradition and its special treatment of religion. Religious freedom can be justified on religion-neutral grounds; it serves the same kinds of values as other rights (like freedom of speech). And while religion as a category may not perfectly correspond to the underlying values that religious freedom serves, that kind of mismatch happens commonly with other rights and is probably inevitable. Ultimately, religious liberty makes sense as one important liberty within the pantheon of human freedoms. Religion may not be uniquely special, but it is special enough.*

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### INTRODUCTION

AMERICAN law treats religion as special. The First Amendment singles religion out as a constitutional matter, and so too do countless statutes, administrative regulations, and more informal government practices. For a long time, the distinctive treatment of religion went untested and sometimes unnoticed. America inherited a constitutional text and tradition of religious liberty, and people are always slow to reconsider what they have long taken for granted.

Virtually every case involving the Religion Clauses carries with it questions about religion's distinctiveness. With the Free Exercise Clause, the persistently recurring issue has been whether the government should provide religious exemptions from generally applicable laws. But why should the Native American Church have some special right to use peyote in its religious rituals when doing so would ordinarily violate the drug laws?<sup>1</sup> With the Establishment Clause, the issues are more varied, but religion's distinctiveness is still a common theme. If a city hall can display a flag, why not a cross?<sup>2</sup> If the public schools can teach evolu-

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<sup>1</sup> See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990) (rejecting the claim that the Native American Church is constitutionally entitled to such an exemption).

<sup>2</sup> See *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (explaining that "[t]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall" (alteration in original) (citations and internal quotation marks omitted)).

tion, why not creationism?<sup>3</sup> If Congress can bail Chrysler out of bankruptcy, why not a Catholic diocese?<sup>4</sup>

Such questions now stand front and center in conversations about the meaning of the Religion Clauses. Five years ago, for example, the Court considered whether churches have a special constitutional immunity from employment claims brought by their clergy—the so-called ministerial exception.<sup>5</sup> Twenty years earlier, in *Employment Division v. Smith*, the Court had said that the First Amendment generally did not require religious exemptions from generally applicable laws.<sup>6</sup> And so naturally the Solicitor General argued, following *Smith*, that religious groups were not entitled to any exemptions beyond those available to nonreligious groups. But the Court unanimously rejected that position, calling it “extraordinary” and “amazing” at oral argument,<sup>7</sup> and then dismissing it in the subsequent opinion as “remarkable” and “hard to square with the text of the First Amendment . . . which gives special solicitude to the rights of religious organizations.”<sup>8</sup> This term, in *Trinity Lutheran Church of Columbia v. Pauley*, the Supreme Court will decide the fate of a Missouri program that gives money to schools to resurface their playgrounds but categorically excludes religious schools from participation.<sup>9</sup> Singling out religion that way may be constitutionally forbidden, constitutionally required, or neither required nor forbidden. But no matter how the Court resolves the case, religion’s distinctiveness is precisely the question the Court must decide.

This debate rages not only in the courts but in the academy as well. Among academics, the debate has taken a turn—a turn reflecting in-

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<sup>3</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (rejecting Louisiana’s Creationism Act that required public schools to teach creationism alongside evolution); cf. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005) (requiring that public schools not teach intelligent design).

<sup>4</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840 (1995) (noting that “a tax levied for the direct support of a church or group of churches . . . would run contrary to Establishment Clause concerns dating from the earliest days of the Republic”).

<sup>5</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

<sup>6</sup> See *Smith*, 494 U.S. at 879 (“[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).’”).

<sup>7</sup> Transcript of Oral Argument at 28, 37, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-553).

<sup>8</sup> *Hosanna-Tabor*, 565 U.S. at 173.

<sup>9</sup> 788 F.3d 779, 781 (8th Cir. 2015), cert. granted, 136 S. Ct. 891 (2016).

creased skepticism of religion's distinctiveness. In recent years, some of the most distinguished voices in legal scholarship—scholars like Ronald Dworkin, Christopher Eisgruber, Lawrence Sager, Brian Leiter, and Micah Schwartzman—have suggested that the law should abandon special treatment of religion altogether.<sup>10</sup> Much of the work has been directed at religious exemptions, which have been seen as undeservedly privileging religious commitments—a kind of discrimination against those whose fundamental commitments are nonreligious in nature.<sup>11</sup> These scholars have been joined by academics outside the legal academy who have come to the same conclusion, whether in political science reviews, philosophy journals, or other academic fora.<sup>12</sup> As Kent Greenawalt has put it, “whether and why religion should be treated as special” has become the “daunting challenge” of our age.<sup>13</sup>

Sometimes academic debates are only of interest to academics, but not so here. Last year, taking note of the controversy, Justice Samuel Alito openly wondered about the future of special protections for religion:

There's an anomaly about our current situation . . . . While a great many people believe very strongly that there are rights that government must respect, our understanding of the source of those

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<sup>10</sup> See Ronald Dworkin, *Religion Without God* 137 (2013); Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 52 (2007); Brian Leiter, *Why Tolerate Religion?* 7 (2013); Micah Schwartzman, *What if Religion Is Not Special?*, 79 *U. Chi. L. Rev.* 1351, 1427 (2012).

<sup>11</sup> To be sure, there has long been a trickle of folks expressing doubt that religion is special. For some of the best early examples, see Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 *U. Ark. Little Rock L.J.* 555, 572 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 *U. Pitt. L. Rev.* 75, 78 (1990); William P. Marshall, *What Is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 *Ind. L.J.* 193, 193 (2000).

<sup>12</sup> Just the titles of the following pieces convey the extraordinary amount of attention given to this issue. See, e.g., Sonu Bedi, *Debate: What is so Special About Religion? The Dilemma of the Religious Exemption*, 15 *J. Pol. Phil.* 235 (2007); Gemma Cornelissen, *Belief-Based Exemptions: Are Religious Beliefs Special?*, 25 *Ratio Juris* 85 (2012); Anthony Ellis, *What Is Special About Religion?*, 25 *Law & Phil.* 219 (2006); see also Kenneth Einar Himma, *What's So Damn Special About Religion, Anyway?*, 33 *Law & Phil.* 525, 526 (2014) (reviewing Brian Leiter, *Why Tolerate Religion?* (2012)); Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 *U. Ill. L. Rev.* 571; Schwartzman, *supra* note 10.

<sup>13</sup> Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 *San Diego L. Rev.* 1131, 1138 (2010).

rights has been obscured. That we understand that they come from our creator has become obscure, and it's questionable as to whether they'll be able to endure without their historical roots.<sup>14</sup>

This theme pervades the literature. Religious freedom makes sense in a religious world. But if society becomes increasingly secular, religious exemptions will become vestigial remnants of a bygone era, indefensible and eventually incomprehensible.<sup>15</sup>

This Article proceeds in five Parts. Part I addresses some commonly asserted arguments as to why religion should be thought special, ultimately finding them insufficient. *Quid pro quo* arguments, which conceptualize the Religion Clauses as counterweights to each other, offer pragmatic reasons for religious toleration. But they presume the thing that needs to be proved—namely that religion is sufficiently distinctive in some regard. Similarly, religious arguments for religious liberty may work for religious audiences. But because their value depends on contestable religious premises, they will not even work for all religious believers and have little hope of persuading nonreligious audiences.

Part II offers an affirmative account in defense of religious liberty. It emphasizes certain features of religion: its importance to individuals, its chronic misuse by government, the value of religious liberty to ethnic and cultural minorities, and the civil peace that freedom of religion has brought to the Western world. It defends the fact that religion as a category seems both underinclusive and overinclusive with respect to all of these values, pointing out that such mismatch is practically inevitable and that other constitutional rights (like freedom of speech) suffer from precisely the same failing.

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<sup>14</sup> Maria Wiering, U.S. Needs Founding Fathers' Religious Liberty Vision, Alito Tells MD Lawyers, *Cath. Rev.* (Oct. 31, 2014), <http://www.catholicreview.org/article/news/local-news/u-s-needs-founding-fathers-religious-liberty-vision-alito-tells-md-lawyers> [<https://perma.cc/NF5D-KP6Z>].

<sup>15</sup> Despairing of this situation, Steven Smith sees only two ways forward: We “resist the constraints of secular discourse, and . . . defend [religion] . . . in some contemporary version of the traditional theological terms,” or we conclude “there simply is no good justification for treating religion as a special legal category.” Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 *Harv. L. Rev.* 1869, 1884 (2009) (reviewing Kent Greenawalt, *Religion and the Constitution* (2008)); see also Note, *Wagering on Religious Liberty*, 116 *Harv. L. Rev.* 946, 946 (2003) (“The old justifications for religious liberty no longer have the force that they once did, and our current discourse has yet to find a plausible way of defending religious liberty in terms that convey the same conviction.” (quoting Friedrich A. Hayek, *The Constitution of Liberty* 1 (1960)) (internal quotation marks omitted)).

Part III turns to the argument that the law should abandon protections for religion in favor of protections for some larger secular category that happens to include religion without being limited to it—such as the category of moral conscience or the more amorphous category of deep-and-valuable human commitments. For reasons that Part III explains, though obstacles will have to be overcome, moral conscience is indeed worth protecting. Yet moral conscience and religion end up being quite different categories—neither of which subsumes the other. Thus, for reasons that Part III also explains, protections for moral conscience should supplement, rather than supplant, protections for religion. Similarly, the notion that we protect all deep-and-valuable human commitments is quite appealing. But in the context of a written constitution that relies so heavily on categorization, the way to protect deep-and-valuable human commitments is by naming particular deep-and-valuable human commitments—and, on almost any account, that would have to include religion.

Part IV turns to the specific subject of religious exemptions, unpacking the reasons why protections for religion as a category in general end up justifying religious exemptions in particular. And Part V offers some brief thoughts in conclusion.

For too long, the debate over whether religion is special has proceeded in a strange vacuum, as if religion were the only right protected by the Constitution. When one considers the incredible variety of constitutional rights, and the incredible breadth of those rights, the arguments that religious liberty amounts to religious favoritism become less convincing. Religious liberty is an important liberty within the pantheon of liberties. Religion may not be uniquely special, but it is special. It is special enough.

### I. SOME FALSE STARTS

Over the years, innumerable arguments have been advanced to justify singling out the category of religion for distinctive treatment. We start with two that have pride of place in the literature.

*A. Quid Pro Quo Arguments*

The First Amendment singles out religion in two ways: It protects the free exercise of religion, and it forbids the establishment of religion.<sup>16</sup> The former gives special protection to religion; the latter imposes special disabilities on religion.<sup>17</sup> Quid pro quo arguments defend the Constitution's special treatment of religion by stressing the internal equilibrium established by the two provisions. Together the two balance each other out, like equal weights on a seesaw.

Such arguments are understandably popular, especially in a polarized culture where one side sees special importance in the Free Exercise Clause, and the other side sees special importance in the Establishment Clause.<sup>18</sup> Together the Religion Clauses can function as a kind of a bargain, with each side having something to lose if religion is not special.<sup>19</sup> And in the face of increasing skepticism about religious exemptions, supporters of the Free Exercise Clause have been particularly reliant on quid pro quo arguments. Those who doubt the worth of the Free Exercise Clause often believe deeply in the Establishment Clause (just as

<sup>16</sup> Even this simple statement is not entirely right. As some commentators have noted, the word "religion" is only used once in the First Amendment, which suggests a unity of purpose between the Free Exercise and Establishment Clauses. See Stephen L. Carter, Reflections on the Separation of Church and State, 44 *Ariz. L. Rev.* 293, 311 (2002) (arguing that "the First Amendment contains only one religion clause, not two").

<sup>17</sup> See Micah Schwartzman, Conscience, Speech, and Money, 97 *Va. L. Rev.* 317, 338 (2011) ("[T]here is a balance between the two Religion Clauses: religion is specially disabled under the Establishment Clause, and it is specially protected under the Free Exercise Clause.").

<sup>18</sup> See, e.g., Alan Brownstein, The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously, 32 *Cardozo L. Rev.* 1701, 1719 (2011) ("In return for keeping religion out of politics and government, politics and government are barred from interfering with religion. . . . We can insist that both clauses be enforced . . . or we can repudiate a rigorous understanding of both clauses. . . . [T]he Religion Clauses stand and fall together."); Michael W. McConnell, The Problem of Singling Out Religion, 50 *DePaul L. Rev.* 1, 9–10 (2000) ("Government may subsidize or promote any number of ideas, institutions, and activities—such as Planned Parenthood, the 'Got Milk?' campaign, Mexican Independence Day, or controversial art exhibits—however, it may not similarly subsidize or promote religion. . . . If singling out religion were constitutionally problematic, this difference in treatment would be difficult to explain.").

<sup>19</sup> It was not always this way. See Douglas Laycock, Church Autonomy Revisited, 7 *Geo. J.L. & Pub. Pol'y* 253, 265 (2009) ("The Free Exercise Clause and the Establishment Clause were not a negotiated compromise between two opposing factions. They were the single demand of the dissenting evangelical churches, with the support of some of the deist rationalists such as Madison.").

those who doubt the worth of the Establishment Clause often believe deeply in the Free Exercise Clause), and it is harder to defend the idea that religion should be treated specially only for purposes of limiting its influence.

Quid pro quo arguments help to ensure even-handedness through intellectual consistency, which is no doubt a good thing.<sup>20</sup> But they never fully satisfy because they never really answer the question of why religion should be thought special. They work by assuming that religion is special for one purpose (say, for Establishment Clause purposes) and then seeking to establish that religion must then also be special for some other purpose (say, for Free Exercise Clause purposes). But in this way, quid pro quo arguments assume the very thing that needs proving—that religion was indeed special in the first place.

One can see the same thing a different way. Quid pro quo arguments see the Free Exercise Clause and the Establishment Clause as essentially balancing each other out. But that implies that neither of the two Religion Clauses would be justified without the other—after all, a seesaw does not work when all the weight is on one side. Yet this conclusion feels wrong. The Free Exercise Clause and the Establishment Clause often push in the same direction, and I would much rather have either clause than none at all.<sup>21</sup> Some countries, like England, for example,

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<sup>20</sup> Alan Brownstein has put this well:

When people ask about the singling out and privileging of religion for accommodation purposes, I always point out that when I defend Establishment Clause principles I receive similar questions about the unfair singling out of religion for discriminatory treatment. When people ask about the singling out and discriminatory treatment of religion under Establishment Clause requirements, I always point out that when I defend free exercise rights and religious accommodations, I receive similar questions about the unfair singling out and privileging of religion. . . . [People] are more willing to accept broader and more demanding free exercise rights (or discretionary legislative accommodations) and more serious Establishment Clause constraints on subsidies and displays when they are tied together as a constitutional package than they would be willing to accept if the operation of either clause is discussed in isolation, standing alone.

Brownstein, *supra* note 18, at 1720–21.

<sup>21</sup> The Establishment Clause certainly protects Free Exercise values. See *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (“Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.”). And the Free Exercise Clause protects Establishment Clause values because the religious pluralism thus enabled acts as a bulwark against religious establishment. See *The Federalist No. 10*, at 84 (James Madison) (Clinton Rossiter ed., 1961) (“A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dis-

seem to have gotten along fine with a Free Exercise Clause but no Establishment Clause. Yet the quid pro quo position takes that to be the least defensible option.

Quid pro quo arguments go astray in other ways as well. Such arguments are predicated on one side paying the quid and the other side paying the quo. The slightly uncomfortable presupposition here is that religious people are on one side of our society, and nonreligious people are on the other.<sup>22</sup> But there is an even bigger problem here. Two years ago, in its ministerial-exception case, the Supreme Court held that ministers cannot bring employment-based claims against their churches. Ten years before that, the Court had upheld a decision by the state of Washington to deny a college scholarship to Joshua Davey because Davey was going to use the money to prepare for the ministry. Both cases rely on religion being special. The Free Exercise Clause means that ministers cannot bring suit against their churches; the Establishment Clause means that the state has a special interest in not funding ministerial education. But think about this from Joshua Davey's perspective. Because religion is special, he will not receive state money to help become a minister. And because religion is special, he will not have employment protections when he does become a minister. Joshua Davey pays both the quid and the quo.<sup>23</sup>

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persed over the entire face of it must secure the national councils against any danger from that source.”).

On the other side, there are times when the two Clauses push in opposite directions. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“While the two Clauses express complementary values, they often exert conflicting pressures.”); *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension.”).

<sup>22</sup> Of course, it greatly oversimplifies things to say that the Free Exercise Clause is for religious people and the Establishment Clause is for nonreligious people. Believers bring Establishment Clause claims. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (challenge to school-sponsored prayer brought by Mormon and Catholic families). And, though this happens less frequently, nonbelievers bring Free Exercise claims. See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (claims made by an atheist inmate to form an atheist study group).

<sup>23</sup> Others have rightly pointed to other incongruities between quid and quo that weaken the force of quid pro quo arguments. See, e.g., Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. Chi. L. Rev. Dialogue 71, 74 n.18 (2013) (“[A]nother [criticism of the quid pro quo argument] is that the purported tradeoff doesn't really balance, because the majority religions that are constrained by the Establishment Clause are not the same as the minority religions that are protected by the Free Exercise Clause.”).

And just as there is no necessary connection between who is paying the quid and who is paying the quo, there is no necessary equality between the amount of the quid and the amount of the quo. In a sentence that nicely captures the force of the quid pro quo argument, Jane Rutherford says that “the Establishment Clause is the price religious individuals pay for their free exercise exemptions.”<sup>24</sup> But why should *that* be the price? And *what* exactly is that price? In other words, how much of an Establishment Clause will free exercise exemptions buy? Are they enough to purchase an Establishment Clause that forbids coercion? One that also forbids endorsement? One that even makes religious arguments inadmissible in public policy? On the flipside, how many religious exemptions are any of these Establishment Clauses worth? There can be no answer to such questions. There can be no answer to such questions because (again) quid pro quo arguments provide no answer to the question of *why* religion is special. And without an answer to the *why* question, we are rudderless in answering derivative questions about *when* and *how much*. For all these reasons, if we want a fully satisfying theory as to why religion is special, we must look elsewhere.

### *B. Religious Arguments for Religious Liberty*

Another traditional set of arguments for religious liberty come from a different place. One can argue for religious liberty in religious terms; religious liberty might be valuable because religion is valuable. John Garvey lays out the claim straightforwardly:

The best reasons for protecting religious freedom rest on the assumption that religion is a good thing. . . . [This] is the most convincing explanation for why our society adopted the right to religious freedom in the first place . . . [and it is] also the reason why many, perhaps most, religious believers claim the right to freedom today. It enables them to perform their religious duties, and to avoid religious sanctions. It allows them to pursue the truth, as God gives them to know the truth.<sup>25</sup>

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<sup>24</sup> Jane Rutherford, Religion, Rationality, and Special Treatment, 9 Wm. & Mary Bill Rts. J. 303, 350–51 (2001).

<sup>25</sup> John H. Garvey, What Are Freedoms for? 49, 57 (1996); see also E. Gregory Wallace, Justifying Religious Freedom: The Western Tradition, 114 Penn St. L. Rev. 485, 491 (2009) (“Religion requires special constitutional treatment precisely because it involves something transcendent, objective, normative, and exclusive. To sustain a vigorous commitment to reli-

Others have made similar arguments. “[T]he Free Exercise Clause really makes no sense,” Michael Paulsen argues, “[e]xcept on these essentially religious premises about the reality and priority of God.”<sup>26</sup> Greg Sisk says this insight “in retrospect seems so obvious that it is remarkable that no one ha[s] said it before or at least said it so plainly.”<sup>27</sup>

Such arguments certainly have historical resonance. “The Religion then of every man must be left to the conviction and conscience of every man,” Madison wrote, because “[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”<sup>28</sup> It is because we have religious duties, Nicholas Wolterstorff argues, that we come to need rights of religious exercise.<sup>29</sup> So when a society no longer believes in those duties, it no longer has much reason to hold on to those rights. “If God does not exist, or if we no longer are willing to grant as our background premise for interpreting and applying the Religion Clauses the assumption that God exists,” Michael Paulsen concludes, “religious liberty as a rule makes less and less and less sense.”<sup>30</sup>

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gious freedom, we must revisit and recover the original religious justifications for religious freedom.”).

<sup>26</sup> Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 *Pepp. L. Rev.* 1159, 1185 (2013).

<sup>27</sup> Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion’s Sake*, 47 *Drake L. Rev.* 45, 45 (1998).

<sup>28</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, § 1 (1785), *reprinted in* 5 *The Founders’ Constitution* 82 (Philip Kurland & Ralph Lerner, eds., 1987).

<sup>29</sup> Nicholas Wolterstorff convincingly explains the logical path of this argument, which he attributes to the Framers generally (and not just to Madison):

All of [the Framers] would have been of the view that we are so related to God that we have a duty to worship God; worshipping God is not a moral option. I would guess, indeed, that those who speak of the right to worship God believe that we have the right because we have the duty; why else, in their way of thinking, would we have the right? . . . Furthermore, it is by virtue of nothing more and nothing less than one’s being a human being that one has the duty, and hence the right, to worship God; consequently the right is, as they say, a *natural* right. And since there is nothing one can do to get out from under the duty—nothing one can do to shed one’s humanity—there is also nothing one can do to surrender the consequent right.

Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise*, Drawn from *American History*, 36 *Wake Forest L. Rev.* 535, 541 (2001).

<sup>30</sup> Paulsen, *supra* note 26, at 1187. This is where both defenders of free exercise and their adversaries sometimes meet; it is why Michael Paulsen’s review of Brian Leiter’s book can conclude that Leiter is “half right,” as both of them believe “[t]here is no convincing secular-liberal argument for religious liberty.” Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 *Mich. L. Rev.* 1043, 1043 (2014).

Religious arguments for religious liberty run into difficulty from a number of directions. The most obvious is worth stating first: Religious justifications may play well to religious people, but they have little chance of persuading nonreligious audiences. Frankly they tend to alienate those most in need of persuasion; many nonreligious people already think of religious freedom as a partisan, self-serving demand, and such arguments may only confirm their doubts.<sup>31</sup>

But religious arguments for religious liberty also run into difficulty from inside religious faiths. Each religious tradition may naturally think of itself as special, but there is no necessary reason for one faith to conceive of the others as special.<sup>32</sup> And, from this perspective, it is not so clear what we should do with mistaken religious beliefs.<sup>33</sup> After all, if we accommodate religions because we believe them true, we have little reason to accommodate religions we deem false. Of course, one could hedge a bit; one could say that God will allow a certain margin of error to the earnestly mistaken. Michael Paulsen goes this direction when he says we should extend toleration to “anything that *plausibly could be thought* the true command of God.”<sup>34</sup>

Such a standard is obviously unworkable, but what makes it unworkable gets us to the core of the problem. Religious arguments for religious liberty are still, inevitably, *religious* arguments, which can only be ar-

<sup>31</sup> See Douglas Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313, 316 (1996) (“To those who do not share the relevant religious belief, ‘because my religion says so,’ or ‘because the Founders’ religion said so,’ is even less persuasive than ‘because the Constitution says so.’”).

<sup>32</sup> See, e.g., John D. Inazu, The Freedom of the Church (New Revised Standard Version), 21 J. Contemp. Legal Issues 335, 365 (2013) (“[The] theological anchor [of Christian arguments for religious freedom] is an ontological claim about the reality of Jesus Christ embodied in the church on earth, which presumes nothing about the special nature of ‘religion.’”).

<sup>33</sup> As Larry Alexander put it:

Religious believers do not view compliance with *imagined* duties as a good. Rather, they view compliance with *actual* duties as a good. . . . [Religious justifications therefore] seek freedom from man’s laws only for those following God’s laws—those laws that God has actually laid down, not those that someone might believe He has laid down.

Larry Alexander, Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions, 47 Drake L. Rev. 35, 40 (1998).

<sup>34</sup> Paulsen, *supra* note 26, at 1169 (emphasis added). Paul Horwitz goes a slightly different direction in saying that we should tolerate religions because they *might* be true. See Paul Horwitz, The Agnostic Age: Law, Religion, and the Constitution xix (2011); see also Paul Horwitz, Permeable Sovereignty and Religious Liberty, 49 Tulsa L. Rev. 235, 238 n.25 (2013) (agreeing with reviewers “who have said [his book] is most vulnerable to uncertainty or attack at the point of implementation of its general theory or approach in specific cases”).

gued about in religious terms. God might be tolerant of false religions, or God might see a number of religions as true. Or God might be totally and truculently inflexible. One cannot answer such questions without some theory of God and God's will for mankind. Religious arguments for religious liberty both begin and end in theology; there is no other way to have them.

This is not to discount the value of religious arguments for religious liberty. Religious communities will continue to debate the merits of religious toleration, and a case needs to be made there, too. Some religious people, suffice it to say, do not believe in religious liberty for all. "If Calvin ever wrote anything in favour of religious liberty," some have mused, "it was a typographical error."<sup>35</sup> For understandable reasons, secular audiences usually do not see the debates over religious liberty happening within religious communities. But such debates are important, even if they stay entirely within the relevant religious community. And although religious arguments for religious liberty are easy to criticize from the outside, they are impossible to definitively reject. If a religious believer derives her views of religious toleration from what she believes about God, then disputing her view amounts to saying she is wrong about God. Those debates must be left to other people. Such issues are, as the popular saying goes, beyond the scope of this Article.

## II. RELIGION IS SPECIAL ENOUGH

The question then is whether religion's specialness can be defended within a secular paradigm—whether there are sufficient religion-neutral reasons to support religious liberty. Certainly there is something intuitive about this. People often support religious exemptions without supporting the religious belief or practice underlying them. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court unanimously protected the use of hoasca in a Brazilian group's religious rituals.<sup>36</sup> But presumably no one on the Court uses hoasca or thinks it efficacious in worship.

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<sup>35</sup> Wallace, *supra* note 25, at 542 (quoting Roland H. Bainton, Introduction to Concerning Heretics: Whether They Are to Be Persecuted and How They Are to Be Treated: A Collection of the Opinions of Learned Men Both Ancient and Modern 74 (Sebastian Castellio ed., Roland H. Bainton trans., 1935)).

<sup>36</sup> 546 U.S. 418, 422–23 (2006). For a detailed examination of *Gonzales*, see Richard W. Garnett & Joshua D. Dunlap, Taking Accommodation Seriously: Religious Freedom and the *O Centro* Case, 2005–2006 *Cato Sup. Ct. Rev.* 257.

Yet instincts are not explanations, and we should investigate the matter a bit more. In an early piece that has stood the test of time, Douglas Laycock defends religious liberty as grounded in a conjunction of three secular propositions:

First, in history that was recent to the American Founders, governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States. . . .

. . . Second, beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for. . . .

. . . Third, beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government.<sup>37</sup>

The literature is rich with similar arguments. All kinds of secular justifications have been pressed for religious liberty. Some of them focus on the benefits flowing to the people involved. Religious liberty preserves individual identity,<sup>38</sup> enables rich associational life,<sup>39</sup> enables

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<sup>37</sup> Laycock, *supra* note 31, at 317 (footnotes omitted).

<sup>38</sup> See, e.g., Cornelissen, *supra* note 12, at 92–95 (“[A]re religious beliefs centrally important to people’s identities? Clearly, for some people they are.”); see also Eisgruber & Sager, *supra* note 10, at 125–26 (discussing the relationship between religion and identity); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 *J. Contemp. Legal Issues* 275, 275 (1996) (same); William P. Marshall, *Truth and the Religion Clauses*, 43 *DePaul L. Rev.* 243, 247–48 (1994) (same). The connections between religion and identity are a deep theme of the work of Tom Berg, Alan Brownstein, and Dan Conkle. See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 *Nw. J.L. & Soc. Pol’y* 206, 213–15 (2010); Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 *U. St. Thomas L.J.* 504, 516–17 (2003); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *Nw. U. L. Rev.* 1113, 1161–92 (1988).

<sup>39</sup> See, e.g., Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 *St. John’s J. Legal Comment.* 515, 532 (2007) (“An ‘institutional’ approach to the Religion Clauses might proceed from a claim that the values that the First Amendment is today understood to embody and protect—and, we might usefully refer to this cluster of goods and values as ‘religious freedom’—are well served by a civil-society landscape that is thick with churches . . . .”); see also Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 *Notre Dame L. Rev.* 949, 951–52 (2004) (discussing the mediating role of religious associations in society).

obedience to perceived divine commands,<sup>40</sup> protects conscience,<sup>41</sup> and shields minorities from majoritarian control.<sup>42</sup> Others focus on benefits flowing to society at large. Religious liberty reduces civil strife,<sup>43</sup> buffers the power of the state,<sup>44</sup> and encourages civic virtue.<sup>45</sup> Still others focus on the state, grounding religious liberty primarily in distrust of government on the particular topic of religion.<sup>46</sup>

Having said all this, one thing should be obvious. The most plausible theories of religious liberty will involve multiple values; they will be pluralistic rather than monistic, federal rather than unitary. If religious liberty is justified, it is justified for many overlapping reasons. We will probably not find a single justification for freedom of religion, any more than we will find a single justification for freedom of speech, or for criminal punishment, or for a host of other legal practices.

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<sup>40</sup> See, e.g., Gedicks, *supra* note 11, at 562 (“Disobeying God subjects believers to divine punishment in the life hereafter; nonbelievers do not fear such punishments because they do not believe in an extra-temporal existence beyond this life.”); see also Cornelissen, *supra* note 12, at 95–99 (discussing this argument); Schwartzman, *supra* note 10, at 1365–67 (same).

<sup>41</sup> See, e.g., Bedi, *supra* note 12, at 244 (“[R]eligious practices are importantly normative or ethical.”); see also Paul Bou-Habib, *A Theory of Religious Accommodation*, 23 *J. Applied Phil.* 109, 117–21 (2006) (same); Schwartzman, *supra* note 10, at 1373–74 (discussing this argument).

<sup>42</sup> See, e.g., Marshall, *supra* note 38, at 246 (“[R]eligious minorities [might] require special protections from majoritarian discrimination and illegitimate government regulation because of their relative political powerlessness and their histories of persecution.”); see also Rutherford, *supra* note 24, at 340–43 (offering a similar argument). For a strong account of this concern by someone who sees religion as justifiably distinctive, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 *Wash. U. L.Q.* 919, 921 (2004).

<sup>43</sup> See, e.g., Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 *U. Pa. L. Rev.* 149, 207 (1991) (“[T]he civil strife rationale suggests that religious freedom is important in preventing conflict over religious issues.”); see also Garvey, *supra* note 38, at 280 (discussing this argument); Gedicks, *supra* note 11, at 563–66 (same); Marshall, *supra* note 38, at 248–49 (same).

<sup>44</sup> See, e.g., Marshall, *supra* note 11, at 204 (“Intermediate communities such as those fostered by religion provide a valuable buffer between the state and the individual.”); Rutherford, *supra* note 24, at 332 (“One reason to carve out a special role for religion is to help divide power among various factions.”).

<sup>45</sup> See, e.g., Rutherford, *supra* note 24, at 343–44 (“[R]eligion often offers communitarian values that emphasize spirituality, nurturing, and social justice in contrast to the market values that tend to be individual, selfish, and materialistic.”); see also Marshall, *supra* note 38, at 245 (arguing similarly).

<sup>46</sup> See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 *U. Chi. L. Rev.* 115, 136 (1992) (“The Religion Clauses were born of distrust of government in matters of religion, based on experience.”); see also Laycock, *supra* note 31, at 317–18 (arguing similarly).

A piece could be written examining each of these values, and many pieces have done exactly that. In fact, even critics of religious exemptions offer these kinds of arguments—and it is, in fact, the critics that merit the most attention, for their criticisms all end in precisely the same way. After surveying the varied arguments for distinctive treatment of religion, skeptics conclude that none of these rationales sufficiently mark out religion as a distinctive category. “Religion,” they point out, is both underinclusive and overinclusive with respect to each of these values. There is thus a mismatch, the critics note, between the right and the values that the right purports to serve.

One sees this argument over and over again in the literature. Take, for example, the first rationale in our list—the argument that religious liberty might help us avoid the kinds of civil strife that would otherwise arise from governmental interference in religious matters. Gemma Cornelissen points out how this rationale is underinclusive: A lot of things cause civil strife, not just religious conflict.<sup>47</sup> Frederick Gedicks points out how this rationale is overinclusive: We could probably crush tiny religions without any risk of civil strife.<sup>48</sup> The category of “religion” is both underinclusive and overinclusive to the value of reducing civil strife.

Or take the argument that religious liberty is valuable because it enables religious believers to follow what they perceive to be divine commands. This rationale is overinclusive: Much of religion has nothing to do with divine commands. Some religions, like Buddhism, do not have a concept of divine commands (or even, maybe, a concept of the divine). And this rationale is simultaneously underinclusive: Believers may suffer intense psychic harm at being unable to follow what they perceive of as God’s commands, but nonbelievers too face psychic harm if they cannot follow their consciences.<sup>49</sup> Most of the various attacks of religious exemptions share this same basic structure. There is no good reason to single out religious commitments for special protection because

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<sup>47</sup> See, e.g., Cornelissen, *supra* note 12, at 89 (“[C]ivil strife is not necessarily more likely nor more significant when the source of disagreement is religious . . .”); see also Ellis, *supra* note 12, at 222–23 (arguing similarly).

<sup>48</sup> See, e.g., Gedicks, *supra* note 11, at 564 (“One major difficulty with this argument is that it provides no justification for protecting marginal religious groups which government could easily suppress without any threat to social order.”); see also Garvey, *supra* note 38, at 281 (“If a group is sufficiently small the government can simply stamp it out without running the risk of civil war.”).

<sup>49</sup> See Gedicks, *supra* note 11, at 562.

each possible rationale justifies protecting something somewhat less or something somewhat more.<sup>50</sup>

But all these criticisms suffer from the same problem. And that problem is simply this: Every constitutional right is this way. Every right is overinclusive and underinclusive with respect to the values that it purports to serve; every right involves some degree of mismatch between the right and its underlying values. Values do not map on to rights in some one-to-one relationship. Values are widely shared notions applicable to many domains; if a value only applied within the scope of one particular right, it would not be something we would recognize as a value.

A single example unpacks all of these points pretty clearly. Take freedom of speech. One perceived rationale for freedom of speech is its importance in enabling a well-functioning democracy.<sup>51</sup> But freedom of speech is not the only thing that helps enable democratic decision making. Free elections help too. And not all speech contributes to the democratic nature of our republic. The Court protects pornography as speech, and there are reasons the Court does so, but it is hardly because of pornography's outsized contributions to democratic discourse.<sup>52</sup> To put it more strongly, it is a fool's errand to go searching for possible values that religion and only religion serves. That is not the way to think about any constitutional right and not the way to think about religion.<sup>53</sup>

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<sup>50</sup> Consider, for example, one piece by William Marshall that illustrates the phenomenon. See Marshall, *supra* note 11, at 204 (“Pluralism’s attributes, however, do not inhere exclusively within the domain of religious groups.”); *id.* at 205 (“Conscience, as well, is not a uniquely religious concern.”); *id.* (“[R]eligion is not a unique aspect of self-identity.”); *id.* at 204 (“All of these rationales, however, . . . serve to equate [religion] with [its] secular counterpart rather than distinguish [it].”).

<sup>51</sup> “[A]mong the most prominent and widely accepted theories of the First Amendment are those that explain the Free Speech Clause as either a catalyst for or a protection of democracy itself.” Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 *Nw. U. L. Rev.* 1303, 1303 (2009).

<sup>52</sup> See Lillian R. BeVier, *Where Is the Center of Democracy? A Reply to Professor Neuborne*, 93 *Nw. U. L. Rev.* 1075, 1079 (1999) (“The belief that pornography is ‘democracy-enhancing’ is most certainly not what drives the Court’s jurisprudence in this area.”).

<sup>53</sup> Kent Greenawalt put it well years ago in the context of free speech: “Anyone who supposes that the protection of the First Amendment can be reduced to one justification or to one all-purpose test of coverage is either deluded or willing to sacrifice a great deal in the interests of theoretical neatness and actual or apparent simplicity of administration.” Kent Greenawalt, *Speech, Crime, and the Uses of Language* 340 (1989).

So many have spent so much time trying to find a single characteristic (or set of characteristics) that can cleanly and perfectly separate (all) religious commitments from (all) nonreligious commitments and can justify giving special protection to the religious commitments but not to the secular ones.<sup>54</sup> Maybe it can be done;<sup>55</sup> maybe it cannot.<sup>56</sup> But it does not need to be done. Distinctive protections for speech can be justified by reference to values not distinctive to speech. Distinctive protections for religion can be justified by reference to values not distinctive to religion.

We must get away from speaking in such absolutist tones. Categories need not be clean; heightened protections can be justified on the basis of mere proportions and tendencies. Freedom of speech, strictly speaking, may be neither a necessary nor sufficient condition for the flourishing of democracy; perhaps all that we can really say is that it helps. But that is enough, and it is enough for freedom of religion as well.

Like other rights, freedom of religion serves a large set of overlapping values in a messy, imprecise kind of way. But to really see the values that the Supreme Court sees in freedom of religion, one must encounter them the way the Court has. After all, the Supreme Court does not arrive at its legal doctrines through abstract thought alone; it comes to its doctrines through the lived experience of having to resolve particular legal disputes. And, more than anything else, it is that lived experience—the

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<sup>54</sup> See Leiter, *supra* note 10, at 26–27 (“If there is a special reason to tolerate religion it has to be because there are features of religion that warrant toleration . . . that *all and only* religious beliefs have . . . [or] that other beliefs have . . . but which in these other cases possession of the features would not warrant principled toleration.”); Himma, *supra* note 12, at 526 (explaining that we must first “identify those properties common to all and only religion that constitute something as a religion” and then “determine whether those properties, either singly or jointly, have the kind of moral value that requires, as a matter of morality, legal tolerance of religion”) (emphasis omitted).

<sup>55</sup> Brian Leiter sees religious commitments as distinctive in several respects, most crucially in that they make categorical demands on action and are insulated from evidence. See Leiter, *supra* note 10, at 33–34. Assuming those two characteristics do distinguish religious commitments from others, Leiter seems plainly right that they would not justify distinctive protections for religious exercise.

<sup>56</sup> Andrew Koppelman points to literature suggesting that the category of religion cannot easily be distinguished from secular categories because religion originally developed as a kind of secular category. See Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 *San Diego L. Rev.* 961, 975 (2010) (arguing that the term “religion” is simply “an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal”).

Supreme Court's cases themselves—that most clearly illustrates the values served by religious freedom.

Remember, for example, *Wisconsin v. Yoder*, the case about the conflict between the Amish's way of life and Wisconsin's law that children attend public school until the age of sixteen.<sup>57</sup> Or take *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the case about a change in federal land policy that cut off Native American access to their sacred sites.<sup>58</sup> Both cases illustrate the powerful communal elements within religions, as well as the discrete-and-insular status that so many religious minorities share.

When one thinks of conscience, one remembers *Thomas v. Review Board of the Indiana Employment Security Division*<sup>59</sup>—the case involving the Jehovah's Witness who, because he was a pacifist, refused to work making tank turrets.<sup>60</sup> When one thinks of civic strife, one remembers *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and how the ministerial exception arose in part from the Court working backwards from the idea that this country would never force the Catholic Church to abandon its male-only priesthood, in part because doing so would rip the country apart.<sup>61</sup> When one thinks of governmental mistrust, one thinks about *Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>62</sup>—the case involving the Santeria practice of sacrificing animals in its religious rituals—and how the audience applauded when a city councilman spoke positively about Cuba's unapologetic persecution of Santeria practitioners.<sup>63</sup> Perhaps the best way to understand the Supreme Court's often vigorous protection of religious liberty—for, say, the unanimity in the Court's recent decisions letting Christian Spiritists use

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<sup>57</sup> See 406 U.S. 205, 234 (1972) (ruling for the religious claim).

<sup>58</sup> See 485 U.S. 439, 441–42 (1988) (ruling against the religious claim).

<sup>59</sup> See 450 U.S. 707, 710 (1981).

<sup>60</sup> And one cannot help but remember the thousands of Jehovah's Witnesses who for similar reasons spent World War II in prison. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 29 (“The Jehovah's Witnesses did not give up their conscientious objection to wartime alternative service, and five thousand of them spent part of World War II in federal prison.”).

<sup>61</sup> See 565 U.S. 171, 188–89 (2012).

<sup>62</sup> See 508 U.S. 520 (1993).

<sup>63</sup> The Court concluded that “[t]he minutes and taped excerpts . . . evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice.” *Id.* at 541.

hoasca<sup>64</sup> and letting Muslims grow beards in prison<sup>65</sup>—is through the cases.

### III. FOLDING RELIGION INTO OTHER CATEGORIES

But the critics have another solid argument that requires addressing. If the best arguments for religious liberty are secular ones, it naturally suggests that the category of protection should be secular as well. Why not then push the category out so as to go beyond religion, but in such a way that it still includes religion?

This idea is worth contemplating, but it becomes harder than it first appears. Several fine scholars have written some wonderful recent pieces working with the Establishment Clause in this way, trying to broaden it out into a sensible, workable, religion-neutral principle. Nelson Tebbe has worked with the endorsement cases, suggesting that the government be barred not only from endorsing religious propositions but also from endorsing certain kinds of secular propositions as well.<sup>66</sup> Micah Schwartzman has worked with the funding cases, suggesting that the government's inability to fund religious projects should extend to certain kinds of secular projects.<sup>67</sup> Lawrence Sager has worked with the church-autonomy cases, particularly *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, suggesting that the government should be restricted when it intervenes in the internal affairs of secular organizations just as it is restricted when it intervenes in the internal affairs of churches.<sup>68</sup> All of these pieces are insightful. But they also all run into the same problems.

Nelson Tebbe, for example, would bar the government from endorsing propositions that impair “full and equal citizenship in a free society.”<sup>69</sup> But the best examples of his principle are the religious endorsement cases. Tebbe's other examples—like Congress passing a resolution that “America is a white nation,” or an official city campaign to “vote Democrat”—are usually hypotheticals, sometimes fanciful ones. They

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<sup>64</sup> See *Gonzales*, 546 U.S. at 423.

<sup>65</sup> See *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>66</sup> See Nelson Tebbe, *Government Nonendorsement*, 98 Minn. L. Rev. 648, 650 (2013).

<sup>67</sup> See Schwartzman, *supra* note 10, at 1422.

<sup>68</sup> See Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in *The Rise of Corporate Religious Liberty* 77, 100–01 (Schwartzman et al. eds., 2016).

<sup>69</sup> See Tebbe, *supra* note 66, at 651.

are unlikely to arise and, frankly, if they did arise, they would run into some doctrinal problems.<sup>70</sup> Micah Schwartzman would replace the current ban on government funding of religious speech with a ban on funding whenever “the government has no legitimate interest in promoting that speech.”<sup>71</sup> But Schwartzman does not give many concrete examples of the other things the government cannot fund.

These projects are a success in one sense. We can work to fold religion into a larger secular category. But the new secular category seems amorphous, ill-defined, and not much larger than the category of religion from which we started. All of this seems almost like a gerrymander designed to keep the fruits of the modern Establishment Clause without having to add too much. One starts these pieces thinking they might demonstrate that religion is not really special. But one ends them thinking they have shown almost the opposite. Religion may not be *uniquely* special. But it is a member of a very small set of special things. Or it is a very large part of a special category that cannot be easily described. Either way, we just cannot seem to get far enough away from the feeling that religion is a remarkably important and distinctive human commitment.

The foregoing deals with arguments on the Establishment Clause side of things. But this piece is most concerned with issues of free exercise and religious exemptions. And here one candidate in particular has emerged as a replacement for the category of religion—conscience.

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<sup>70</sup> Nelson Tebbe, for example, reasonably suggests that the Constitution should prohibit government from making the claim that “America is a white nation,” just as it forbids the statement that “America is a Christian nation.” *Id.* at 649–51. But the doctrinal complication here is *Allen v. Wright*, 468 U.S. 737 (1984), which held that racial stigmatization is not actionable unless someone is “personally denied equal treatment.” *Id.* at 755 (quoting *Heckler v. Matthews*, 465 U.S. 728, 739–40 (1984)). In turn, *Allen* formed the basis of an even clearer example, *United States v. Hays*, 515 U.S. 737 (1995), which held that only citizens who live in a racially gerrymandered district have standing to complain about it. The harm to such plaintiffs was a “representational harm[]”; their voting power had been affected; they had “been denied equal treatment.” *Id.* at 744–45. A plaintiff living outside the district might be able to allege *stigmatic* harm, but “that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve” and would have no suit. *Id.* at 745.

<sup>71</sup> Schwartzman, *supra* note 17, at 354 (arguing that “taxpayers [should] have an effective right against compelled support of private or government speech only when the government has no legitimate interest in promoting that speech”).

Over the years, critics of religious exemptions have often suggested conscience as an alternative to religion.<sup>72</sup>

Here, however, we must avoid confusion. Conscience is a loaded term, with people often meaning very different things by it.<sup>73</sup> Not only have scholars not settled on any single definition of conscience, they have had trouble even settling on an agreed-upon *typology* of conscience. Kent Greenawalt,<sup>74</sup> Nathan Chapman,<sup>75</sup> and Andrew Koppelman,<sup>76</sup> for example, have all put forth different conceptual frameworks for understanding the various meanings that “conscience” can take.

However, at the risk of oversimplification, one can array conceptions of conscience along a kind of spectrum, from the narrowest to the broadest. Narrower conceptions conceive of conscience strictly in terms of moral duty,<sup>77</sup> while broader conceptions talk more generally about

<sup>72</sup> Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 *San Diego L. Rev.* 993, 995–96 (2010); Schwartzman, *supra* note 10, at 1394. Even some who have ultimately rejected protections for conscience consider it a better category than religion. See Leiter, *supra* note 10, at 94 (preferring conscience but fearing that protections for conscience would “amount to a legalization of anarchy!”).

<sup>73</sup> See Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 *U. Ill. L. Rev.* 1457, 1461 (arguing that, as a consequence, conscience has been “a conceptual muddle”); Kent Greenawalt, *The Significance of Conscience*, 47 *San Diego L. Rev.* 901, 901 (2010) (“Conscience . . . has changed its meanings over time and takes on subtly different meanings in different contexts.”) (emphasis omitted); Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *Legal Theory* 215, 225 (2009) (“‘[C]onscience’ has been a protean notion with different meanings for different people.”); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 *Cardozo L. Rev.* 1389, 1394–95 (2012) (fearing that although “the idea of conscience is not a difficult one to grasp . . . [i]t may be impossible to establish a singular and comprehensive definition of conscience”).

<sup>74</sup> See Greenawalt, *supra* note 73, at 906–07 (considering, as possible definitions, “(1) an overarching inclination, (2) an inclination without moral content but one that reflects a person’s accepted identity, (3) a perceived personal moral obligation that does not apply to others, or (4) a perceived general moral obligation”).

<sup>75</sup> See Chapman, *supra* note 73, at 1474–78 (considering, as possible definitions of conscience, (1) “nonnegotiable . . . commands” (2) searches for “life’s ultimate concern,” (3) “comprehensive philosophies,” and (4) “freedom of thought generally”).

<sup>76</sup> See Andrew Koppelman, *Defending American Religious Neutrality* 136–44 (2013) (considering possibilities of conscience from Aquinas, Locke, Michael McConnell, and Michael Sandel).

<sup>77</sup> This would be Kent Greenawalt’s idea of “a perceived personal moral obligation.” Greenawalt, *supra* note 73, at 906–07. Or Nathan Chapman’s idea of “nonnegotiable . . . commands.” Chapman, *supra* note 73, at 1475. Or the view of conscience Andrew Koppelman attributes to Michael Sandel. See Koppelman, *supra* note 76, at 140 (“persons bound by moral duties they cannot renounce”). For another good description, see Thomas E. Hill, Jr., *Four Conceptions of Conscience*, in *Integrity and Conscience* 13, 14 (Ian Shapiro & Robert Adams eds., 1998) (“[The] capacity . . . to sense or immediately discern that what he

what gives human lives meaning or purpose.<sup>78</sup> We will consider these in turn. First, taking conscience in the narrower sense of moral conscience, we will explore whether protections for religion should be discarded in favor of protections for moral conscience. Second, taking conscience in a broader sense, we will explore whether protections for religion should be discarded in favor of protecting something else—something, perhaps, like the category of deep human commitments.<sup>79</sup>

### A. Religion and Moral Conscience

In discussing the relationship between religion and moral conscience, we have a natural place to begin. The Supreme Court came face to face with this issue in two well-known Vietnam-era military draft cases, *United States v. Seeger*<sup>80</sup> and *Welsh v. United States*,<sup>81</sup> decided five years apart. *Seeger* and *Welsh* each involved a statutory scheme that exempted people from the draft if they could pledge both that they were conscientiously opposed to war and that their opposition was due to their “religious training and belief.”<sup>82</sup> That last phrase tripped up both *Seeger* and *Welsh*. *Seeger* and *Welsh* objected to the war but denied being religious, and *Welsh* was particularly insistent regarding that issue. Although both ultimately signed the pledge, *Seeger* put quotation marks around the word religious, and *Welsh* crossed the word out.<sup>83</sup> The story

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or she has done, is doing, or is about to do (or not do) is wrong, bad, and worthy of disapproval.”).

<sup>78</sup> Jocelyn Maclure and Charles Taylor, for example, speak in terms of “meaning-giving . . . commitments.” Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* 12 (2011) (internal quotation marks omitted); cf. Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* 19 (2008) (“I shall argue that the argument for religious liberty . . . begins from a special respect for the faculty in human beings with which they search for life’s ultimate meaning.”).

<sup>79</sup> “Deep commitments” is a key phrase in the work of Christopher Eisgruber and Lawrence Sager. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1255 (1994) (arguing that religious exemptions “privilege[] religious commitments over other deep commitments that persons have”); see also Andrew Koppelman, “Religion” As a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 *San Diego L. Rev.* 1079, 1082 n.17 (2014) (“Eisgruber and Sager use that term [‘deep commitments’] repeatedly to describe the claims that should be treated equally with religious ones.”).

<sup>80</sup> 380 U.S. 163, 165 (1965).

<sup>81</sup> 398 U.S. 333, 335 (1970).

<sup>82</sup> See *id.* at 336–37 (describing the form that both *Welsh* and *Seeger* had to fill out).

<sup>83</sup> See *id.* at 337 (“*Seeger* could sign only after striking the words ‘training and’ and putting quotation marks around the word ‘religious.’ *Welsh* could sign only after striking the

ends happily: The Court exempted Seeger and Welsh from the draft. But the story also ends curiously: It was by construing their objections as religious in nature, and thus deeming Seeger and Welsh to fall within the statute's already existing contours, that the Court found a way to protect them.<sup>84</sup>

*Seeger* and *Welsh* are helpful because they illustrate several things at once. To start, they illustrate pretty well why moral conscience is worth accommodating. Freedom of moral conscience, it turns out, serves many of the same values served by freedom of religion—among other things, it can serve to ameliorate psychological distress, reduce civil strife, and preserve individual identity.<sup>85</sup> This is not to claim that freedom of moral conscience and freedom of religion serve exactly the same values in exactly the same ways. Religion and moral conscience are different things. They will be backed by different values, or maybe the same values in different respects and to different degrees. But the whole point of *Seeger* and *Welsh*—the reason why the objectors' claims resonated so heavily with the Court then and with us now—lies in how they so vividly illustrate the deep linkages between religion and moral conscience.

Of course, the category of moral conscience itself runs into issues—precisely the same issues, in fact, that we discussed earlier in the context of the category of religion. All the modern attacks on religion as a category can also be turned right around and deployed against moral conscience. After all, the argument would go, why should moral conscience be singled out for special legal treatment? I might value my family as deeply as Seeger and Welsh valued their moral consciences. Why should I have to go off to war when they do not? Viewed this way, the category of moral conscience can seem just as parochial and indefensible as the category of religion. But this attack on moral conscience is not persuasive for precisely the same reasons why it was not persuasive as regards religion—namely that this kind of overinclusion and underinclusion is commonplace with rights and practically unavoidable.<sup>86</sup>

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words 'my religious training and.'). Similarly, where the form asked them whether they believed in a Supreme Being, Seeger refused to answer and Welsh checked the "no" box. See *Seeger*, 380 U.S. at 166; *Welsh v. United States*, 404 F.2d 1078, 1080 (9th Cir. 1968), rev'd, 398 U.S. 333 (1970). This drove the Court's remark that "Welsh was far more insistent and explicit than Seeger in denying that his views were religious." *Welsh*, 398 U.S. at 341.

<sup>84</sup> See *Seeger*, 380 U.S. at 187–88; *Welsh*, 398 U.S. at 342–44.

<sup>85</sup> See supra notes 38–46 (unpacking the rationales for freedom of religion).

<sup>86</sup> See supra notes 47–53 and accompanying text (unpacking these points).

Although we should protect both religion and moral conscience, still we must appreciate the two as different things. Neither is a subset of the other. *Seeger* and *Welsh* treated moral conscience as a subset of religion, which was a conceptual mistake, although perhaps defensible in practical terms. More often one sees the opposite mistake—thinking of religion as a subset of moral conscience. This, too, is not quite right. Most religious behavior has little to do with morality as morality is usually conceived. People choose to get married in a church, or they send their kids to religious school, or they go into the ministry.<sup>87</sup> Some people may do those things out of a sense of moral obligation. But for most people, speaking of those things as moral obligations would be clumsy and jarring. Andrew Koppelman points to a study asking ordinary people why they attend church—they talk about the importance of communicating with God, worshipping in a communal setting, and taking the sacraments. Obligation, moral or otherwise, is at the very bottom of the list; only six percent even list “the Church requires that I attend” as a motivating factor.<sup>88</sup>

And, to be frank, disastrous consequences are waiting if judges trap themselves into thinking of religion strictly in terms of moral duty. The Connecticut Supreme Court once denied a construction permit to a Buddhist group, reasoning that the building of a temple could not be religious exercise because no tenet of Buddhism required it.<sup>89</sup> That kind of

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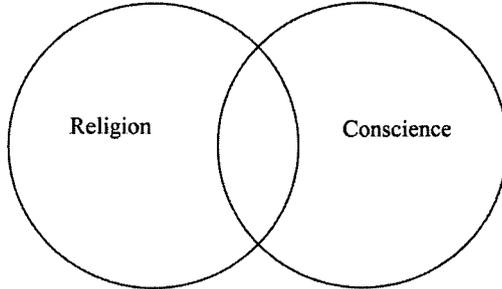
<sup>87</sup> Douglas Laycock provides some examples. Courts have said that the process of becoming a minister and the act of praying are not the exercise of religion because they are voluntary rather than compulsory. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *Fordham L. Rev.* 883, 893 nn.36–37 (1994) (citing *Brandon v. Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980) (prayer case) and *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989) (ministry case)).

<sup>88</sup> See Koppelman, *supra* note 23, at 76 (drawing from Jim Castelli & Joseph Gremillion, *The Emerging Parish: The Notre Dame Study of Catholic Life Since Vatican II* 132 tbl.11 (1987)); cf. Laycock, *supra* note 87, at 893 (“This is a thoroughly secular view of religion—it views God as the great schoolmarm who lays down certain rules, and it defines religion as obeying those rules.”).

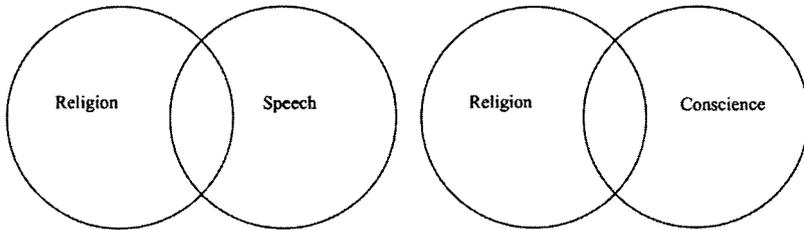
<sup>89</sup> See *Cambodian Buddhist Soc’y v. Planning & Zoning Comm’n*, 941 A.2d 868, 888 (Conn. 2008) (explaining that “building and owning a church is a desirable accessory of worship, not a fundamental tenet of the [c]ongregation’s religious beliefs” (alteration in original)). But see Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 *U.C. Davis L. Rev.* 755, 755–56 (1999) (“The right to assemble for worship is at the very core of religious liberty. In every major religious tradition—Christian, Jewish, Muslim, Buddhist, Hindu, whatever—communities of believers assemble together, at least for shared rituals and usually for other activities as well.”).

mistake is lamentable and almost laughable, but that is what comes from thinking of religion as a subset of moral conscience.<sup>90</sup>

Religion and moral conscience are not nested categories. Instead, they are overlapping but distinct, like circles in a Venn diagram:



This clarifies things a bit, but it also provides a helpful analogy, for religion and speech have the same type of relationship.



Our understanding of the interplay between religion and conscience can benefit from the analogy to speech. Religion and speech are both constitutionally protected. Religious speech falls into the overlap, but it does not receive any more protection as a consequence. In fact, to give religious speech more protection than nonreligious speech would violate the Free Speech Clause; it would be a prohibited form of content dis-

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<sup>90</sup> The Supreme Court has never made this mistake. It has always insisted that religious exercise is what is protected, compulsory or not. In *Employment Division, Department of Human Resources of Oregon v. Smith*, for example, the Supreme Court did not ask whether the use of peyote was religiously required of the Native American Church plaintiffs. That was irrelevant. What was relevant was that the use of peyote was part of a religious practice. See 494 U.S. 872, 877 (1990) (describing the exercise of religion as involving “acts or abstentions . . . [that] are engaged in for religious reasons”); *id.* at 893 (O’Connor, J., concurring in the judgment) (“conduct motivated by sincere religious belief”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (asking whether a practice was “rooted in religious belief”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“following the precepts of [one’s] religion”).

crimination.<sup>91</sup> This is the way that religion and conscience should work together. Both should be protected. And religious conscience should be protected, but it should receive no more protection than secular conscience. That would be discrimination within the protected category of conscience, akin to recognizing conscience claims by vegetarians but not by vegans.

If it sounds dramatic to suggest that moral conscience should be protected, just hold on, for I will say something even more dramatic—that we may not need any change in law here at all. There is, I submit, a surprisingly solid argument that secular conscience is already protected both by the Free Exercise Clause and by statutes like the Religious Freedom Restoration Act (“RFRA”). This will seem oxymoronic to some, but the logic is pretty straightforward. *Seeger* and *Welsh* interpreted the concept of religion broadly, in a way that included deep-rooted secular moral views. *Seeger* and *Welsh* did so, of course, in the context of one particular statute. But these are constitutional-avoidance cases; the Court expansively interpreted the idea of religion to cover *Seeger* and *Welsh* because it saw genuine constitutional issues in not doing so.<sup>92</sup> *Seeger* and *Welsh* thus together suggest that when the law gives an exemption to religious conscientious objectors, secular conscientious objectors with analogous claims must be exempted too.

And this holds even if one thinks *Seeger* and *Welsh* were mistaken. After all, *Seeger* and *Welsh* were settled law at the time Congress passed RFRA, and legislation presumptively carries forward prior judicial constructions of relevant terms.<sup>93</sup> Of course, we should not forget the cases

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<sup>91</sup> See *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 652–53 (1981); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (Scalia, J., plurality opinion) (“Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination).”).

<sup>92</sup> In his concurrence, Justice Harlan accused the Court of pushing the canon of constitutional avoidance too far. *Welsh*, 398 U.S. at 354 (Harlan, J., concurring in the result) (“I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere.”).

<sup>93</sup> See *United States v. Wells*, 519 U.S. 482, 495 (1997) (“[W]e presume that Congress expects its statutes to be read in conformity with this Court’s precedents . . . .”); 2B *Sutherland Statutory Construction* § 50:3 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2012) (“Courts infer also that a federal statute or rule incorporates the established common law meaning of terms unless the statute or rule otherwise dictates.”).

where the Court suggested secular conscientious objection was *not* protected by the Free Exercise Clause. In *Frazee v. Illinois Department of Employment Security* and *Thomas v. Review Board of the Indiana Employment Security Division*, for instance, the Court said that “[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,”<sup>94</sup> and *Frazee* went on to say that “[p]urely secular views do not suffice.”<sup>95</sup> In *Wisconsin v. Yoder*, the Court protected the Amish but suggested Thoreau was not protected.<sup>96</sup> Undoubtedly *Frazee/Thomas/Yoder* and *Seeger/Welsh* sit in tension with each other, although that tension may have a pretty simple explanation. Chief Justice Burger wrote *Thomas* and *Yoder*, and Justice White wrote *Frazee*—and both of them had dissented in *Welsh*.

Yet one side probably has the better of the legal arguments here. The statements in *Frazee*, *Thomas*, and *Yoder* may be striking, but they are also classic dicta. It is unnecessary, in giving person *X* an exemption, to opine why person *Y* may not deserve an exemption. But the statements in *Seeger* and *Welsh* protecting secular conscientious objection go straight to the holdings of those cases.

Putting aside the Free Exercise Clause and RFRA, there are other doctrinal possibilities for protecting moral conscience. The Court could protect moral conscience as a kind of unenumerated right. Although the Court here has always been fearful of line-drawing problems,<sup>97</sup> conscience may well have the kinds of ties to American history and tradition that the Court has always demanded from unenumerated rights.<sup>98</sup>

Even so, it is more likely that exemptions for moral conscience will grow in a slower and more organic fashion. The most natural first step is

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<sup>94</sup> *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 833 (1989) (quoting *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713 (1981)); *Thomas*, 450 U.S. at 713.

<sup>95</sup> *Frazee*, 489 U.S. at 833.

<sup>96</sup> 406 U.S. 205, 216 (1972) (“Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”).

<sup>97</sup> See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand the concept of [unenumerated rights through substantive due process] because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. . . . [So we must] exercise the utmost care whenever we are asked to break new ground.”). For more on the various connections between conscience and American law, see Schwartzman, *supra* note 17, at 359–71 (discussing the interplay of speech and conscience in parts of the American constitutional tradition).

<sup>98</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (arguing that unenumerated rights must be “objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” (internal quotation marks omitted)).

not some compelling interest test for moral conscience. After all, religious exemptions did not begin with the compelling interest test of *Sherbert v. Verner* and *Yoder*. They began with narrowly targeted statutory exemptions. Protections for conscience could begin that way too, and in time evolve into more general protections (like some sort of compelling interest test). Perhaps this has already begun.<sup>99</sup>

Some worry that exemptions for moral conscience will be unworkable. This fear is understandable, but I do not share it—this is precisely how religious exemptions seemed to the Supreme Court in the nineteenth century. The Court took decades to build up its jurisprudence of religious liberty. Through the slow accumulation of wisdom that comes through case-by-case adjudication, our judicial system worked out various kinks—the problems of insincere claims, indirect or otherwise insubstantial burdens, claims that coincide with secular self-interest, and compelling government interests. Those difficulties, and maybe others, will have to be worked out if moral conscience is going to work as a category. But this is a task worth pursuing.

One thing tending to make exemptions for moral conscience workable is that there probably will not be many of them. Secular conscience is, in a sense, the tail of the dog. In the history of America up to this point, claims of conscience have almost exclusively been religious ones, and for understandable reasons. Douglas Laycock puts it well: “[Nonbelievers] do not draw their morality from ancient books written in a radically different culture that lived with radically different technology and had a radically different understanding of the world; they do not obey an omnipotent, omniscient God whose commands may be beyond human understanding.”<sup>100</sup>

One could question this. One could wonder if the real reason that secular conscience claims have not flooded the courts is that secular conscience is unprotected. After all, no one brings suit when there is no chance of winning. There is something to this argument, but it faces some problems. For one thing, Americans are regarded as being famously litigious, bringing suit even without much chance of success. But more importantly, again, are *Seeger* and *Welsh*—for forty years, we

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<sup>99</sup> See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 *Emory L.J.* 121, 139–54 (2012) (collecting statutory protections for conscience in various contexts and arguing that they collectively suggest a constitutional right not to kill).

<sup>100</sup> Douglas Laycock, *The Religious Exemption Debate*, 11 *Rutgers J.L. & Religion* 139, 171 (2009).

have had Supreme Court precedents making claims of secular conscience cognizable under the Religion Clauses. And although few such claims have been made, when they have been brought before courts, they have sometimes met with success. One high-profile case was decided shortly after *Hobby Lobby v. Burwell*. In this case—*March for Life v. Burwell*—a secular anti-abortion group, March for Life, sought an exemption from the contraceptive mandate, and a federal district court gave it to them.<sup>101</sup> The case has been controversial, but mostly because religious exemptions in the same context are controversial (i.e., *Hobby Lobby*) and because the district judge gave March for Life the total religious exemption applicable to churches (i.e., where employees end up without coverage for the disputed contraceptives) rather than the partial religious exemption applicable to religious non-profits (i.e., where employees end up with contraceptive coverage from insurers or third-party administrators).<sup>102</sup>

Religious people with conscience claims should be treated the same as nonreligious people with conscience claims. But in so many cases, there are no analogous nonreligious concerns. One sees this a little in *March for Life* itself. Many religious organizations have moral objections to the contraceptive mandate, but apparently only one nonreligious organization has the same objections. Yet one sees it even more clearly in the usual run of free exercise cases. Many religious people have conscientious objections to blood transfusions,<sup>103</sup> to having their pictures on their drivers' licenses,<sup>104</sup> or to being clean-shaven.<sup>105</sup> One has to work hard to imagine nonreligious people who have moral objections to those things.

And at this point, we need to ask ourselves: What exactly are we complaining about? Unfairness to hypothetical people is hypothetical unfairness; secular conscientious objectors are not devalued by exemptions for religious conscience unless there are comparable claims of secular conscience that are being denied. If that is happening, I do not know about it. Andrew Koppelman seems entirely right to me when he laments “[t]his obsession with these improbable marginal cases” of secu-

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<sup>101</sup> See 128 F. Supp. 3d 116, 120 (D.D.C. 2015).

<sup>102</sup> *Id.* at 121, 133–34.

<sup>103</sup> See *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 143 (Kan. Ct. App. 2011).

<sup>104</sup> See *Jensen v. Quaring*, 472 U.S. 478, 478 (1985), *aff'g* without opinion *Quaring v. Peterson*, 728 F.2d 1121, 1123 (8th Cir. 1984).

<sup>105</sup> See *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

lar conscience.<sup>106</sup> It is just not clear that there is any problem here that needs solving.

Religion and moral conscience overlap and serve overlapping values. But they are also separate and require separate protections. Protections for moral conscience will in no way remove the needs for protections of religion or the reasons why we have those protections.

### *B. Religion and Other Deep Commitments*

This debate over religion and conscience gets replicated in a variety of ways, with all kinds of commitments taking the place of conscience.<sup>107</sup> Consider, for example, how Gemma Cornelissen explores the relationship between religion and identity:

So are religious beliefs centrally important to people's identities? Clearly for some people they are. However, religious beliefs are not centrally important for everyone, not even for all followers of religion. Further, there are other aspects of identity, also giving rise to beliefs, which may be more important for many people, such as gender, culture or ethnicity.<sup>108</sup>

All these points are undeniably true. Religion is an important source of identity for religious people, but not for everyone. And if identity is a reason for protecting religion, why not protect identity itself? At the most general level, the question becomes this: Religious commitments may be worthy and valuable commitments, but why should they be singled out for special treatment when human beings make all kinds of worthy and valuable commitments?

This idea—that religion is special but that other things might be special too—pervades the literature. William Marshall, for example, points out that “bonds of ethnicity, interpersonal relationships, and social and political relationships as well as religion may be, and are, integral to an individual’s self-identity.”<sup>109</sup> Anthony Ellis points out that there is

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<sup>106</sup> See Koppelman, *supra* note 23, at 79.

<sup>107</sup> Alternatively, one could use the term “conscience” in a broad way so as to include those kinds of commitments—in this, conscience would be expanded beyond the idea of moral conscience. See Maclure & Taylor, *supra* note 78, at 12 (referring to conscience as the category of “core or meaning-giving beliefs and commitments”).

<sup>108</sup> Cornelissen, *supra* note 12, at 94 (footnote and citations omitted).

<sup>109</sup> See William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 320–21 (1991) (footnotes omitted).

no specific guarantee [in the Constitution] of the right to dance, or play sports, or do science; yet these activities play a tremendously important role in the lives of many citizens—considerably more important, in some cases, than does religion in the lives of many who benefit from the “free exercise” clause of the First Amendment.<sup>110</sup>

The literature on this point goes on and on: Why does the Constitution protect the free exercise of religion when it does not protect gardening,<sup>111</sup> or being a Green Bay Packers fan,<sup>112</sup> or pigeon breeding?<sup>113</sup>

Religious believers may think some of these analogies a little insulting, but the converse is equally true: All of this seems somewhat dismissive of other parts of our constitutional tradition. Our constitutional tradition does not protect pigeon breeding, but it does protect a wide variety of deep human commitments. Some of the rights derive plainly from the text, but much of the Court’s work has come in developing rights found implicit in the text,<sup>114</sup> or even outside the text.<sup>115</sup> And charged with fleshing out the details, lower courts have naturally gone further, taking the trunks of Supreme Court opinions and adding boughs, branches, sprigs, and twigs.

We have reached the point now where virtually everything important to human beings connects back to the Constitution, with or without a constitutional text. The Constitution says nothing about marriage or family. But the Court has developed all kinds of constitutional rights on the

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<sup>110</sup> Ellis, *supra* note 12, at 219.

<sup>111</sup> See Steven D. Smith, *The Rise and Decline of American Religious Freedom* 169 (2014) (“[C]hurches and the profoundly devout might want to retain a constitutional right specially designed for themselves . . . [but] gardeners might be pleased to support a constitutional amendment singling out a ‘freedom to garden.’”).

<sup>112</sup> See Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 *Notre Dame L. Rev.* 1597, 1601–02 (1997) (reviewing John H. Garvey, *What Are Freedoms For?* (1996)) (arguing that, from a secular perspective, there is no good reason why we should have “constitutional freedom of religious exercise but not a constitutional freedom to be a supporter of the Green Bay Packers”).

<sup>113</sup> See Ellis, *supra* note 12, at 238–39 (“Is there anything that should be especially favored and burdened in the way that ‘religion’ is in our constitution? Not, presumably, subjectively important beliefs merely as such. All sorts of things are subjectively important to people, . . . hobbies such as pigeon breeding, for instance . . .”).

<sup>114</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”).

<sup>115</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

topic—the right of two people to get married,<sup>116</sup> to have children or not,<sup>117</sup> to keep custody of them absent abuse or neglect,<sup>118</sup> to raise them as one sees fit,<sup>119</sup> and to keep them in the same household.<sup>120</sup> Laurence Tribe calls this the “dark matter” of our Constitution, and he has written an eloquent book explaining how “[s]o much of what nearly everyone understands to be part of our Constitution is nowhere to be found in its text.”<sup>121</sup> If the Free Exercise Clause were the only provision in the Constitution, then defending it would be an ordeal. That really would be singling out religion. But the Free Exercise Clause is not the only provision in the Constitution.

This point is worth pressing because so many pieces take this criticism to be decisive. In their very first article on the topic—an article that presaged a series of fine pieces and a very fine book—Christopher Eisgruber and Lawrence Sager offer an offhand sentence that almost perfectly summarizes their conceptual starting place, their thesis, and where they go wrong. “An important theme of this essay,” they say, “is that religion does not exhaust the commitments and passions that move human beings in deep and valuable ways.”<sup>122</sup> This sentence is maddening.<sup>123</sup> It is not maddening because it is wrong. It is maddening because it is right. Of course religious commitments are not the only important commitments human beings have! What person, what religious person even, would disagree? But dig up this statement and see the corrosive premise underneath—for religion to deserve constitutional protection, it must be the only thing that moves human beings in deep and valuable ways. This is what is false. Religion does not have to be unique in order to deserve distinctive treatment.

Lurking here unspoken in the dark is a sort of constitutional nihilism. If our goal is to capture all the deep and valuable ways in which human

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<sup>116</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (gay couples); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (interracial couples); cf. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (couples with a spouse incarcerated).

<sup>117</sup> See *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942) (children); *Griswold*, 381 U.S. at 485 (not).

<sup>118</sup> See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>119</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>120</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 505–06 (1977).

<sup>121</sup> Laurence H. Tribe, *The Invisible Constitution* 210 (2008).

<sup>122</sup> See Eisgruber & Sager, *supra* note 79, at 1245 n.dd.

<sup>123</sup> Such claims, however, are not uncommon. See, e.g., Cornelissen, *supra* note 12, at 90 (“Not every intensely felt belief is religious.”).

beings are moved, every right will be underinclusive toward that end. Every right becomes as objectionable as the free exercise of religion. Take the freedoms associated with human sexuality—the right to contraceptives, the right of adults to have consensual sex in the home, and so on. Such freedoms do nothing for asexual persons—people who do not experience sexual attraction.<sup>124</sup> Should they be opposed on that basis? If I can find one person who finds bowling as moving, as spiritual, and as existentially fulfilling as you find your marriage, have I undermined the constitutional case for marriage? The Civil Rights Act of 1964 offered no protections for age, disability, or sexual orientation. Should it have been opposed on those grounds?

It is tempting to try to imagine the perfect Constitution, one devoid of cultural or historical contingencies. Here freedom of religion might be hard to justify, because of its clear ties to cultural and historical circumstance. And there indeed may come a time when the Free Exercise Clause becomes as obsolete as the Third Amendment. If we all become atheists, or if we all become Muslims or Christians with precisely the same theological outlook, there may be no need for religious liberty. But most of our constitutional categories are the product of this kind of cultural and historical circumstance. We developed our Bill of Rights out of the abuses of George III; what we borrowed from the English Bill of Rights came of the abuses of James II.<sup>125</sup>

In the context of a written constitution, the way to protect all deep-and-valuable human commitments is by naming certain specific deep-and-valuable commitments. There is no other way. We start with the ones we know, and we keep an open mind about the rest. Religion is not the only deep-and-valuable human commitment. But it is one of them, and that is enough. And this sentiment, of course, is not revolutionary. In fact, it just returns us to where we started fifty years ago, when the Court first considered the case for and against religious exemptions. *Sherbert v. Verner* involved a Seventh-Day Adventist denied unemployment compensation because her religious convictions forbidding labor on her Sabbath (Saturday) did not amount to “good cause” for turning down

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<sup>124</sup> See Elizabeth F. Emens, *Compulsory Sexuality*, 66 *Stan. L. Rev.* 303, 306 (2014) (“Asexuality has thus far received no attention in the legal literature. The Article therefore presents a careful examination of the emergence of asexuality as a conceptual and cultural phenomenon.”).

<sup>125</sup> See English Bill of Rights, 1 *W. & M.*, 2d sess., c. 2, 16 Dec. 1689.

work in the eyes of the South Carolina Supreme Court.<sup>126</sup> *Sherbert* did not imply that religion was *the only* good cause for turning down work; *Sherbert* implied only that religion was *a* good cause—one of many conceivable good causes.<sup>127</sup> Religious exemptions began in the United States as a particularized kind of hardship exemption, and that is what they are today.

#### IV. RELIGION AND RELIGIOUS EXEMPTIONS

This brings us to the last issue considered here—the issue of exemptions. Religion may deserve some kind of special treatment, but exemptions from generally applicable laws seem an extreme form for religious liberty to take.

There are a couple of preliminary points to make here. The first is that, here too, religion is not as special as it seems. Justice Scalia famously called religious exemptions a “constitutional anomaly”;<sup>128</sup> he claimed that the Court did not make exemptions to generally applicable laws for speech.<sup>129</sup> But Justice Scalia had forgotten about *Hustler Magazine, Inc. v. Falwell*<sup>130</sup> and a score of other cases.<sup>131</sup> When put in situations where exceptions from generally applicable laws are necessary to

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<sup>126</sup> 374 U.S. at 401.

<sup>127</sup> See *id.* at 400 n.3 (noting that, under South Carolina’s statutory scheme, unemployed workers were not disqualified from benefits if they had “good cause” for failing to apply or accept suitable work).

<sup>128</sup> See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 (1990) (“[A] private right to ignore generally applicable laws . . . is a constitutional anomaly.”). Seven years later, Justice Kennedy repeated the charge. See *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) (calling “a constitutional right to ignore neutral laws of general applicability” an “anomaly in the law”).

<sup>129</sup> *Smith*, 494 U.S. at 886 n.3 (“[G]enerally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment.”).

<sup>130</sup> 485 U.S. 46, 56 (1988).

<sup>131</sup> See *Brown v. Socialist Workers ‘74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982); *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967); *NAACP v. Button*, 371 U.S. 415, 428 (1963); cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (denying the Jaycees an exemption from state antidiscrimination law, but only because the state’s interest was deemed sufficiently compelling). Douglas Laycock pointed this out first and went over many of the cases in detail. See Laycock, *supra* note 60, at 18–21. A few other cases can be found in Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 *Ind. L.J.* 77, 94 n.63 (2000).

protect speech, the Court makes them—and it has been making them for fifty years now.<sup>132</sup>

Speech is the best example because there the Court's jurisprudence is pretty robust. But speech too is not special, or at least not entirely special. Abortion rights also involve exemptions, at least on occasion. Women who have abortions cannot be sued by their male partners for emotional distress.<sup>133</sup> Such claims would end up acting as a kind of spousal-consent requirement, which the Court held unconstitutional forty years ago.<sup>134</sup> Abortion clinics have sometimes been given immunity from generally applicable tort law; women who regret their abortions cannot sue the clinics in wrongful-death actions premised on an alleged lack of informed consent.<sup>135</sup> As with speech, rarely does the right to abortion necessitate exemptions from generally applicable laws. But it happens when the situation calls for it.

This point should not be pushed too far. Religious exemptions are different than speech exemptions and abortion exemptions—maybe in kind, certainly in degree. Other rights occasionally involve exemptions, but exemptions are the central issue with free exercise. Yet this turns out to be mostly a matter of *mutatis mutandis*—exemptions make sense for

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<sup>132</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958).

<sup>133</sup> In hearing such a case, Judge Posner put it well: “[W]e do not see how, as a matter of either legal logic or common sense, the constitutional right of a woman to have an abortion without interference from the man who impregnated her can coexist with a constitutional right of the man to interfere.” *Coe v. County of Cook*, 162 F.3d 491, 494 (7th Cir. 1998). Apparently, the earliest case presenting this fact pattern was *Przybyla v. Przybyla*, which dismissed an ex-husband's intentional infliction of emotional distress claims against his former wife for having an abortion. 275 N.W.2d 112, 115 (Wis. Ct. App. 1978) (“We hold that the intentional exercise by a woman and her physician of her right to terminate her pregnancy as protected by the United States Constitution, cannot constitute conduct that is so extreme and outrageous that it meets the [requirement for intentional infliction of emotional distress].”).

<sup>134</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (holding spousal notification unconstitutional); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding spousal consent unconstitutional).

<sup>135</sup> See, e.g., *Doe v. Planned Parenthood/Chi. Area*, 956 N.E.2d 564, 567 (Ill. App. Ct. 2011) (dismissing various claims against an abortion clinic, including wrongful death, negligent infliction of emotional distress, and alleged violations of the Illinois Consumer Fraud and Deceptive Business Act); *Acuna v. Turkish*, 930 A.2d 416, 418 (N.J. 2007) (dismissing wrongful death, survival, and emotional distress claims).

religious exercise because of a number of things particular to religion, religious freedom, and modern government.<sup>136</sup>

Religious exemptions have a logic of their own, but that logic may be most clearly seen from a historical perspective, because history makes clear the difficulty of maintaining genuine religious pluralism any other way. Religious freedom did not start with religious exemptions. The Peace of Westphalia in 1648, which ended the Thirty Years' War between Protestants and Catholics, was not primarily about religious liberty—it was primarily about ending the bloodshed caused by the religious fragmentation sparked by the Reformation.<sup>137</sup> People had died and killed for their faiths in ways and in numbers that undermined the basic stability of society. The Peace of Westphalia was about peace, first and foremost. To restore that peace, the subsequent regime of *cuius regio eius religio* (“whose realm, his religion”) worked largely through geographical separation. Catholics and Protestants lived together mostly by living apart; each group got its own separate lands, and those who found themselves on the wrong side of the line had to leave, hide, convert, or face the consequences.<sup>138</sup>

This worked for a while, as state churches sought to maintain religious uniformity with coercive means across Western Europe. But eventually, this too became unsatisfactory. Too many people either found themselves or put themselves on the wrong side of the relevant geographical lines. There were too many non-Anglicans in Anglican Britain, too many Protestants in Catholic France and Spain, and too many Lutherans, Calvinists, and Catholics in the wrong parts of what we would now call Germany. They would not convert, they did not leave, and they either chose not to hide or could not do so well enough.<sup>139</sup>

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<sup>136</sup> See, e.g., *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 17 (2000) (referring to “*mutatis mutandis*” as “[a]ll necessary changes having been made” (quoting Black’s Law Dictionary 1039 (7th ed. 1999))).

<sup>137</sup> See Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies [Treaty of Westphalia], Oct. 24, 1648, [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp) [<https://perma.cc/7BEL-9LP3>].

<sup>138</sup> For more on the functioning of the Peace of Westphalia, see Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* 61–62 (2003). See also Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *Fordham L. Rev.* 769, 790 (2006) (noting how “the Westphalian Peace [still] had the liberal virtue of preserving at least some space for some reasonable differences of opinion on public issues while avoiding civil war”).

<sup>139</sup> Steven Smith once put it succinctly: “The *cuius regio eius religio* approach proved to be an untenable solution; not all subjects could be induced to accept the religion of the

The Peace of Westphalia hinged on the elimination of religious pluralism. But when religious pluralism became irreversible in practice, the promised peace threatened to evaporate. Of course, rulers might care not a fig about religious dissenters. But nevertheless, they knew that crushing dissenters might tear at the social fabric, endanger foreign relations, and drain the public fisc. A primitive form of religious toleration was a possible solution, as exemplified by France's Edict of Nantes in 1598 and England's Toleration Act in 1688.<sup>140</sup> Religious minorities, or at least those thought less threatening, could practice their religions openly. But this was just religious toleration; it was not religious liberty. It was simply an acknowledgment that the costs of state-imposed religious uniformity sometimes exceeded the benefits.

This kind of religious toleration was thin, and there was much backsliding, but it paved the way for religious exemptions.<sup>141</sup> Toleration made sense because of the high costs of religious persecution. But if religious groups needed religious exemptions, and were willing to suffer persecution without them, then a state that refused exemptions would have to engage in the very persecution that tolerance was meant to avoid. Tolerance led to exemptions because the benefits of tolerance could not be realized without exemptions.<sup>142</sup>

This story could be told in many ways, but take the case of Jews in England. Shortly after the English Civil War in the mid-seventeenth century, Jews were allowed to return to England after almost four centuries of legal expulsion. But on any realistic account of the matter, Jews would not be able to live in England if they could not meet together for worship, hold property, or sue or testify in court. This meant exempting Jews from the ban on religious assemblies,<sup>143</sup> from having to include the

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prince." Steven D. Smith, *The Plight of the Secular Paradigm*, 88 *Notre Dame L. Rev.* 1409, 1436 (2013).

<sup>140</sup> For an overview of the Edict of Nantes, the Toleration Act, and subsequent developments in England and France, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. Rev.* 1385, 1401–14 (providing this history as backdrop to church-state relations in the American colonies).

<sup>141</sup> The Edict of Nantes, for example, was revoked in 1685 by the Edict of Fontainebleau. See Hills, *supra* note 138, at 790 (noting how "Louis XIV repealed the Edict of Nantes and expelled his Huguenot population in an effort to obtain religious uniformity in his population").

<sup>142</sup> For a similar account of the overarching history, see Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 *U. Detroit Mercy L. Rev.* 407, 407–11 (2011).

<sup>143</sup> Religious assemblies—apart from those of the Church of England—of more than five people were banned under the Conventicle Act of 1664. When a number of Jewish leaders

phrase “on the true faith of a Christian” when swearing the Oath of Abjuration (which was required in order to register land title),<sup>144</sup> and from having to swear on the New Testament in order to sue or testify in court.<sup>145</sup> Initially, exemptions were informal and post hoc, largely to handle exigencies. But eventually, Parliament began thinking about religious dissenters on the front end. In 1753, when Parliament codified its rules on legal marriage officially to require that couples be married in Anglican churches in accordance with Anglican canons, it ex ante exempted Jews and Quakers.<sup>146</sup>

These exemptions—being exemptions from specifically *religious* requirements—have an air of obviousness about them. Jews obviously could not be expected to swear Christian oaths or to attend Christian worship, because to tolerate Jews was precisely to tolerate that they were not Christian. But that is probably more important to us now than it was to them then. Governments at that time saw religious requirements as important for secular reasons. Religious exemptions from religious requirements could threaten the state’s legitimate interests as much religious exemptions from other kinds of requirements. So the former naturally led to the latter. Quakers started off asking for exemptions from church taxes and religious oaths, but they ended up, at least in some places, getting exemptions from the draft. Douglas Laycock puts the central point well:

Religious exemptions from regulation naturally followed the new commitment to toleration because toleration was illusory without them. It did little good to refrain from prosecuting Quakers for identifying as Quakers, only to prosecute them instead for performing the religious obligations of Quakers.<sup>147</sup>

All this should ring true for modern readers, who fully appreciate how woodenly formalistic the status/conduct distinction can be. We take it almost for granted that you do not tolerate a group of people if you fail

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were later indicted, the Crown stepped in to stop the proceedings. See Cecil Roth, *A History of the Jews in England 170–71, 180–81* (1946).

<sup>144</sup> This happened in 1723. See David S. Katz, *The Jews in the History of England: 1485–1850*, at 238 (1994).

<sup>145</sup> *Robeley v. Langston* (1667) 84 Eng. Rep. 196 (KB).

<sup>146</sup> The history of legal marriage in England is well covered in *R (Hodkin) v. Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77, [6]–[8], [10], [13] (appeal taken from EWHC).

<sup>147</sup> Laycock, *supra* note 142, at 410.

to tolerate the things that make them a group.<sup>148</sup> This may not be true as a matter of formal logic, but it is a practical reality.<sup>149</sup>

Religious exemptions are not new; they have been around for centuries. The debate over the compelling interest test is relatively new, but that is a separate issue. Now of course the historical practice was mixed; religious exemptions were often denied and for a variety of reasons. But we are fundamentally in the same place now as we were at the Founding—sometimes religious exemptions make sense, and sometimes they do not.

What has changed is the scale of the problem. In the eighteenth century, Protestant denominations dominated. Religious controversies centered on narrow issues of belief and doctrine—issues so narrow, in fact, that modern audiences have trouble even understanding what the fuss was about. Government did much less; the federal government did almost nothing that might even inadvertently affect religion. So the issue of religious exemptions rarely came up. Fast-forward two centuries, and every part of that has changed: The number of religious denominations has grown; the differences between religious groups have widened; the variety of religious practices has greatly increased; and the changes on the other side of the ledger have been even more dramatic—our modern twenty-first-century regulatory state bears almost no resemblance to America in 1787.<sup>150</sup>

This is simultaneously the argument for exemptions and the argument against them. The more conflicts there are between legal obligation and religious faith, the more need there is for a system of accommodation and the more that system of accommodation can seem unworkable. *Employment Division v. Smith* took the latter side of this debate.<sup>151</sup> Congress

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<sup>148</sup> See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . .”).

<sup>149</sup> See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”).

<sup>150</sup> See Horwitz, *supra* note 34, at xiv.

<sup>151</sup> See 494 U.S. 872, 888 (1990) (“Any society adopting such a [compelling interest test] would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.” (citation and internal quotation marks omitted)).

and state legislatures took the former, ameliorating *Smith* with a set of supplemental rules—RFRA,<sup>152</sup> the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),<sup>153</sup> and state RFRAs.<sup>154</sup> But in many places, formal neutrality remains both the floor and the ceiling.

Formal neutrality is worse than it sounds when it comes to religion. *Smith* has sometimes been thought of as *Washington v. Davis*<sup>155</sup> applied to religious liberty. The analogy is true in a way; it can help students learning the doctrine. But the analogy misses something important: *Washington v. Davis* is bad for racial minorities, but *Employment Division v. Smith* is bad for religious minorities in a different way.

Formal neutrality works poorly in the racial context because the races start in unequal places—dramatically unequal places. But if the races started from the same position, formal neutrality would work decently well as a constitutional rule. This is because people of different races tend to want the same things. They want good jobs; they want to get into good colleges. This is what sets up the familiar claim of unfairness in the affirmative-action cases.<sup>156</sup> But people of different religions want such different things that formally neutral rules cannot ever be anticipated to have neutral effects. A ban on peyote means nothing to Catholics or Jews. But it means everything to members of the Native American Church.

It is also fatuous to compare *Smith*’s conception of neutrality with the speech rules of content and viewpoint neutrality. Most regulations of speech end up directing speech into certain channels. They prohibit speech in certain places, or at certain times, or in certain ways. But they leave other opportunities for speech open. Maybe you cannot protest abortion in front of the doctor’s house<sup>157</sup> or in front of the clin-

<sup>152</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)).

<sup>153</sup> Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc (2012)).

<sup>154</sup> For an examination of state RFRAs, see Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010).

<sup>155</sup> 426 U.S. 229 (1976). For a thoughtful critique of *Davis*, see Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 317–28 (1987).

<sup>156</sup> See *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (U.S. June 23, 2016); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013); *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

<sup>157</sup> See *Frisby v. Schultz*, 487 U.S. 474, 474–77 (1988).

ic.<sup>158</sup> You may have to keep your protests relatively quiet,<sup>159</sup> you will not be able to trespass or block entrances,<sup>160</sup> and there will be limits on your being able to deceive people.<sup>161</sup> But there still are innumerable ways for you to protest abortion and to try and convince your fellow citizens not to do it. Yet in the context of Free Exercise, “alternative channels” for the exercise of the right do not matter in the same way. It is one thing if a warden tells a prisoner that he does not need books in his cell because he can read them in the prison library. It is an entirely different thing if a warden tells a Jewish inmate that he does not need a Kosher meal because he can wear a yarmulke. The latter does not even make sense.

### CONCLUSION

Critics may see this piece as a failure on the grounds that it has not convincingly demonstrated its core claim—that religion really is special enough. After all, to truly prove such a claim, one would need some generalized theory about what makes things special *enough*—about when, in general, attributes of human beings are sufficiently distinctive to warrant distinctive constitutional treatment. Such a theory would then be tested by its ability to yield consistent results across the full range of human concerns.

But if this piece ends disappointingly, so too do the many criticisms of religion’s specialness, for they too offer no generalizable theory about when things are special. They criticize religion for being insufficiently special; they point out the mismatch between the category of religion and some of the values that freedom of religion serves. But such criticisms could be made of virtually every constitutional right (and often are). And if no generalized theory is possible, then neither side in this debate will ever have a knockout punch. Maybe that is how things must be.

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<sup>158</sup> See *McCullen v. Coakley*, 134 S. Ct. 2518, 2525, 2541 (2014) (remanded for further proceedings).

<sup>159</sup> See *Kovacs v. Cooper*, 336 U.S. 77, 78, 89 (1949).

<sup>160</sup> See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 286 (1993).

<sup>161</sup> The issue here, which is still ongoing, centers on organizations that offer pregnancy counseling but do not refer clients for abortions. Cities have passed ordinances requiring such organizations to so inform clients. See *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 233–44 (2d Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 186 (4th Cir. 2013); *O’Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 807–08, 814 (D. Md. 2011).

This brings to mind a final Supreme Court case that is central to this issue, yet almost never discussed—*Walz v. Tax Commission*.<sup>162</sup> *Walz* is so valuable because it presents the whole debate over religion’s specialness in miniature. At issue in *Walz* were property-tax exemptions given by New York City. New York exempted property used for religious purposes from tax. But it also exempted property used for a variety of other purposes—charitable purposes, educational purposes, scientific purposes, literary purposes, and so on.<sup>163</sup> *Walz* ended up rejecting the Establishment Clause claim, and the concurring opinions of Justice Brennan and Justice Harlan did so largely on the basis of those other exemptions.<sup>164</sup>

The modern debate over religion’s specialness, in a way, mirrors the debate in *Walz*. The distinctive protections for religion in *Walz* were part and parcel of a system that protected a wide variety of important human activities. So it is with the Constitution. The Constitution protects religious freedom alongside a number of other freedoms—the right to speak freely, to own a gun, to have an abortion, to enter into contracts, to hold property, to marry the person of one’s choice, to be treated equally on the basis of a variety of characteristics, and to be given due process. When one considers the variety of constitutional rights, and the breadth of those rights, the arguments that religious liberty amounts to a kind of religious favoritism become less convincing. Religious liberty is an important liberty within the pantheon of liberties. Religion may not be uniquely special, but it does not have to be. Religion is special enough.

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<sup>162</sup> See 397 U.S. 664 (1970).

<sup>163</sup> *Id.* at 687–88 (Brennan, J., concurring) (“New York exempts real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes.” (internal quotation marks omitted)).

<sup>164</sup> *Id.* at 687 (stressing that “a range of other private, nonprofit organizations” are exempted); *id.* at 696 (Harlan, J., concurring) (similar); see also *Tex. Monthly v. Bullock*, 489 U.S. 1, 12 (1989) (plurality opinion) (“The breadth of New York’s property tax exemption [in *Walz*] was essential to our holding that it was not aimed at establishing, sponsoring, or supporting religion.” (internal quotation marks omitted)).

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