

**RELIGION AS A SPECIAL CATEGORY IN LAW AND POLICY:
RELIGIOUS EXEMPTIONS AND FIRST FREEDOMS**

A Dissertation

by

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ABSTRACT

Advocates of religious exemptions and religious priority often stake their case on the belief that religion occupies a special political category discrete from other ethical frameworks. Yet there remains a significant gap in the literature regarding the conceptual status of religion among moral systems within a liberal democratic state. Surprisingly, little work has been done in justifying why religion, as opposed to other ethical frameworks, should be seen as distinctive or prioritized. What is it about religion that would demand this level of protection? What conception of religion are we to use when thinking about how to order society? What, if anything, makes religion different from a legal perspective? Although many scholars have addressed related issues, most contributions have glossed over the logically prior question of how we are to understand religion theoretically. On the other hand, those who deny religious distinctiveness and priority have done little to systematically justify their dismissal.

In order to fill this gap, I extract both from politics and from academic literature on liberal democratic theory the assumptions that underlie these debates, focusing on theoretical accounts of what exactly religion is from a political perspective. I find that there are insufficient grounds for demanding categorically distinctive or priority treatment for religion on the level of politics. Arguments for such treatment are often circular and fail to accomplish their original aim of justifying why one subset of the population merits privilege. I do not argue that ethical exemptions themselves are always inappropriate but rather that religious believers cannot be granted such exemptions to the

absolute exclusion of nonreligious citizens. In examining public rhetoric and constitutional history of the United States, I show that the priority placed on religion often results from a misunderstanding of the relationships between religious liberty and both national history and contemporary political practice. Finally, undertaking a case study from contemporary liberal theory, I show that there are other theoretical resources for defending religion without resorting to an arbitrary category.

DEDICATION

To Bethany

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CHAPTER I

INTRODUCTION: RELIGION AS A POLITICAL CATEGORY

MOTIVATION

In January of 2011, I taught my first collegiate course. My upper-level course Constitutional Rights and Liberties had thirty students, and I was eager to share with them my excitement for the law. After a few days of introduction, our first substantive area of discussion was the Free Exercise Clause. Eager to spark a fascination with the material in the students' minds from the beginning, I began by asking a lot of big idea questions familiar to this area of jurisprudence, hoping to preview the complexity of these issues, questions like: What counts as a religion? What protections belong to religion as a result of the Free Exercise Clause? Does the Free Exercise Clause mean that religious believers should receive special exemptions from laws? And why are we talking specifically about religious exemptions; what makes religion different from other types of ethical beliefs?

When I heard myself ask the last question, I was struck by the fact that I actually did not have much to say in response. I had long considered myself an advocate of legal perspectives that give special status to religion, such as those in the tradition of *Sherbert v. Verner*¹ and *Wisconsin v. Yoder*,² but I had never once stopped to think about *why* religious groups might be fundamentally different in a way that demands this atypical treatment. It simply seemed obvious to me at the time. Religion is sacred. We have a

¹ 374 U.S. 398 (1963).

² 406 U.S. 205 (1972).

long tradition of respecting religious beliefs. Of course religion is a unique phenomenon on a number of levels. But it troubled me that I could not give an explanation as to why these factors demanded this privileged political status.

As a student of the intersection of law and political theory, it occurred to me to turn to the theoretical literature. I expected that this field, naturally, would have already produced a theoretical defense of religion's special status. Surely theorists had by now employed their conceptual tools in response to the needs of the legal community. But upon looking through this material, I found no satisfactory answer and hardly any answers at all. After several months of considering the significance of this lacuna and imagining how I might answer the question myself, I came to the conclusion that there might not be such an explanation, even considering for the first time the possibility that religion ought not to be treated differently.

The absence of an adequate theoretical discussion of religious specialness was especially surprising to me given how visible questions about religious exemptions have been, especially in the United States. Yet the nature of legal discussions in particular frames the religious issue in a way that can obscure the deeper theoretical point. The legal debate has focused on the question of whether or not the framers of the Constitution, either by intention or implicit assumption, allowed for the possibility of justifying exemptions in crafting the First Amendment, or on the other hand, whether there were resources grounded in the US legal tradition for creating these privileges. While some involved in these discussions might at times suggest that religious groups ought not to receive special status, they are frequently constrained by the context of law

and must make their claims within the bounds of judicial history and precedent, making it difficult to focus purely on the conceptual, normative question.³

It occurred to me that there exists the possibility that, since these are essentially two distinct questions, one might arrive at the conclusion that religious exemptions are mandated by US jurisprudence or the text of the US founding document but also that they are not normatively desirable. Under this reading, an interest group would have essentially written itself a privilege into the fabric of the institution back when the culture was far more homogeneous. Religious interests might possess an unfair advantage, then, when this paradigm is applied to the present day, after the further separation of social spheres often considered the byproduct of modernization that further extracted religion from the majority of political considerations.⁴ This concern is reflected in Justice John Paul Stevens's concurrence in the exemptions case *City of Boerne v. Flores*⁵: "...[T]he statute [granting religious exemptions] has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." Such a discriminatory arrangement, even using "discriminatory" in the least pejorative way possible, demands rigorous theoretical justification.

³ See Chapter IV.

⁴ See the literature on religious fundamentalism as a global phenomenon created as a reaction to modernization, such as: Torkle Brekke, *Fundamentalism: Prophecy and Protest in an Age of Globalization* (New York: Cambridge University Press, 2012), 265; Steve Bruce, *Fundamentalism* (Cambridge, UK: Polity Press, 2008), 40; Michael Emerson and David Hartman, "The Rise of Religious Fundamentalism," *Annual Review of Sociology* 32(2006): 127-144; Peter Herriot, *Religious Fundamentalism: Global, Local and Personal* (New York: Routledge, 2009); George Marsden, *Fundamentalism and American Culture* (New York: Oxford University Press, 2006), Introduction; Malise Ruthven, *Fundamentalism: The Search for Meaning* (New York: Oxford University Press, 2004).

⁵ 521 U.S. 507 (1997).

It is possible, after all, that we might find exemptions unique to religion to be morally undesirable and yet required implicitly by the US Constitution. This possibility highlights the pressing significance of the question as to the normative desirability of such a distinction. Many facets of the political world have in the past been constitutionally sanctioned and yet later considered by the nation morally offensive, often to the point of requiring constitutional amendment to correct the imbalance as in the case of slavery and women's suffrage. Thus, the debate cannot stop at constitutionality but must also address normativity.

Most exemptions debates do not usually begin with the point of asking why religion deserves special protection. They begin with the presumption that if anything deserves special status, if we are to use tools like exemptions at all to help any interest, it would of course be religion. But the answer to this forgotten theoretical question would have an extraordinary impact on how we approach, for example, the jurisprudential question of whether to grant ethical exemptions exclusively to religion. But the normative question raised in this example highlights the format that a discussion of the place of religion in the public sphere should take and highlights features of the discussion often missed when addressed from other starting points.

THE QUESTION

Advocates of religious liberty often defend its special status among liberty concerns with a great fervor. They fight for their cause with a deep-seated conviction, stemming from their connection to the religious belief itself. The conviction that goes

into protecting one's right to follow the dictates of divinity can evoke great emotion. Yet the intensity of one's convictions can obscure more technical questions, such as whether or not isolating religion to a separate sphere of political process is in fact even the best way to protect religious interests. In an attempt to approach the theoretical question objectively, I do not begin by presuming that it would even be in the best interest of advocates of religious causes to argue for special status. The occupation of a special status entails its own host of problems which could conceivably yield even more troubles in certain scenarios. Therefore, until proven otherwise, I do not discredit the possibility that the interest of religious liberty might best be addressed using the same legal channels available to advocates of any other liberty.

Personally, I do not believe either that we are purely rational beings or that we are guided purely by our rational ideas. Just as often, we use our reason to articulate a part of ourselves that we understand only on the level of passion.⁶ Therefore, the attachment to religion may very well run deeper than ideas reducible to rational premises. However, I am likewise a believer that demands for special political treatment must be translated into publicly accessible language. Whenever egalitarian ideals are threatened, the logic of formal justice must be used in argument.⁷ But while we can and must submit these political and legal claims to priority to more rigorous consideration, that does not, in my view, diminish the validity of religious attachments in themselves.

⁶ For a beautiful articulation of this position, see the opinion of the Court in *Cohen v. California*, 430 U.S. 15 (1971), which says in engaging in First Amendment expression that the emotive content may often demand just as much protection as the cognitive content of speech.

⁷ See the Chapter II section on burden of proof and the discussion of Mansbridge.

When it comes to religion in the realm of politics, I suspect that the legal and political frameworks we apply stem from an outdated viewpoint. The model used to orient religion in politics is rooted in a society, culture, and politics that no longer exist. When we apply the Free Exercise Clause from any sort of originalist understanding, for example, we are employing principles from a time in which religion played a radically different role in the United States. We are attempting to address contemporary needs with legal tools that no longer reflect our political situation. It is worth examining the model that continues to motivate discussion about religion in the contemporary context. Though my interest is not in providing a comprehensive historical account of these frameworks but rather a primarily contemporary one, some consideration of context is appropriate. I will therefore briefly examine William Penn as an exemplar of the logic of the contemporary model of religion.

Although arguments about the importance of religion are plentiful worldwide, there is a unique brand of discourse about the relationship between the state and the religious liberty of its citizens in the United States. The United States at the time of its founding was deeply rooted in the tenets of Christianity. Among canonical figures, William Penn provides a useful illustration. Penn, a seventeenth-century political leader and author, founded the colony of Pennsylvania. He was a Quaker and, as a member of an unpopular minority religious group took a great interest in theories of religious liberty. I draw attention to Penn because he provides an argument in the clearest form that I find comparable to the unarticulated logic present in many contemporary debates. While he does not explicitly address the topic of exemptions, he portrays religious

decisions as uniquely deserving of protection in the political sphere. He defines liberty of conscience in such a way that religious choices occupy a central place in terms of political priorities. He says, “First, By Liberty of Conscience, we understand not only a meer Liberty of the Mind, in believing or disbelieving this or that Principle or Doctrine, but the Exercise of our selves in a visible Way of Worship, upon our believing it to be indispensibly required at our Hands, that if we neglect it for Fear or Favour of any Mortal Man, we Sin, and incur Divine Wrath.”⁸ Religion for Penn is more than a preference; it constitutes a set of imperatives that one is compelled to follow. The mandates of religion are not optional for those adherents. They are absolutely necessary. They are requirements for how life *must* be lived. For Penn, a belief in punishment from God and a threat to one’s status in the afterlife elevates the gravity of acting upon religious principles. The weight of the mandates comes from the consequence of disobedience. Religious belief entails a price sheet of punishments. Thus, in this model, there was a clear distinction between a religious ethical choice and a nonreligious ethical choice since, unlike a nonreligious moral belief, the religious dictate makes moral choices eternal life and death situations, and thus of concern to the state.

Penn’s position exhibits what I take to be the underlying logic of even contemporary claims to religious priority within a pluralist society, that religious mandates are categorically distinct. I presume that the weight of metaphysical significance is imbued to all religious beliefs, irrespective of the actual metaphysical content of the belief. Yet if we treat religion as a broad grouping of beliefs, extending

⁸ From “The Great Case of Liberty of Conscience” [1670], in *The Political Writings of William Penn*, ed. Andrew Murphy (Indianapolis, IN: Liberty Fund, Inc., 2002), 85-86.

beyond merely the Christian tradition, a number of ethical frameworks will be included under the category that do not fit this clear model of afterlife punishment from a judge. William Herbrechtsmeier, for example, uses the case of Buddhism to argue that “belief in and reverence for superhuman beings cannot be understood as the chief distinguishing characteristic of religious phenomena.”⁹ Besides, many of the instances in which religion is invoked in these issues do not constitute the critical point between admission or rejection from paradise, and it is not self-evident why a non-critical obstacle to religious virtue is any different from, for example, an obstacle to an atheist's achievement of some natural, non-religious virtue.¹⁰

The challenge of making a category like “religion” clear in a political context is vast and complex. I hope to contribute toward resolving some of the ambiguity surrounding religion as a political category through a process of triangulation, contributing to the case against religious distinctiveness on several dimensions. Penn's model, or rather something quite like it, has persisted in the fabric of how we understand religion. At the very least, we continue to apply, even if unintentionally, an overly simplistic, and likely historically obsolete, model to complex contemporary issues.¹¹ Treating religion as a self-contained, reified political category that inherently demands particularized treatment is an unnecessary and potentially costly political move. Perhaps

⁹ William Herbrechtsmeier, “Buddhism and the Definition of Religion: One More Time,” *Journal for the Scientific Study of Religion* 32.1(1993): 1-18, 1.

¹⁰ Even some advocates of religious distinctiveness agree that cost cannot be the standard used in granting exemptions, as it would allow too many nonreligious claims to qualify. See Sonu Bedi, “Debate: What Is So Special about Religion? The Dilemma of the Religious Exemption,” *Journal of Political Philosophy* 15.2(2007): 235-249, 243-244.

¹¹ My claim here is analogous to Elisabeth Ellis's argument that property rights as commonly employed are relics of a past age. “Citizenship and Property Rights: A New Look at Social Contract Theory,” *Journal of Politics* 68.3(2006): 544-555.

religious priority might have been useful in a certain context, for example in a culturally homogeneous society where the overwhelmingly dominant ethical framework is constituted by religion. But it does not meet the needs of a modern pluralist society.

What is interesting to me as a student of political theory is that there is so much faith put into a concept for which countless pages of political texts have failed notably to produce even a mildly satisfying explanation. I see my project first and foremost as a suggestion that current modes of addressing these topics are completely inadequate. I hope to spark further conversation on the topic and to encourage scholars of religion and legal-political thought to think more carefully about how we make arguments, and if nothing else to call for an increase in the quality of such arguments.

CHAPTER SUMMARY AND SCOPE OF THE PRESENT PROJECT

This project will analyze the way the political category gets used in liberal democratic theory and politics. I will argue that religion is often not a useful category in the sphere of politics and that it can be extremely misleading. I argue that religion is best handled under the same law and policies as other groups. Although we need not ignore the ways in which religion in practice often appears different from other citizen qualities, these differences are insufficient to justify special treatment. If a system is failing to address religious interests, then the proper response would be to change that system, rather than to demand special treatment within the old, broken system.

My goal in this project is to bring some clarity to the discussion by making it clear what the implications of these arguments are and noting systematic trends in their

construction. Part of the challenge is that this issue is largely missed by political theory literature in particular. As such, there is very little literature directly addressing it. In practice, the two sides of this debate are speaking past each other. There are those who think the political category of religion is special, and there are those who do not. They begin with their respective starting assumptions and proceed accordingly. But the problem is that there is no systematic engagement with these basic foundations. Those presuming religion's specialness take this fact for granted to the point that their arguments are foreign to detractors, and those denying its specialness fail to direct their arguments at the concerns raised by religious advocates. The primary goal of this project is to focus our attention on this fundamental question of why religion. I then hope to provide a framework upon which future discussion can be built by clearly articulating where the project of defending religious specialness fails, rather than uncritically embracing it or prejudicially dismissing it.

Perhaps two authors come closest to actively engaging this question as I have articulated it. Sonu Bedi, whom I will address extensively in Chapter II, nobly sets forth the project but then falls victim to presuming religious distinctiveness before he proves it. Brian Leiter¹² directly explores these issues and denies religious distinctiveness, but I find that Leiter, while he frames the question appropriately, does not do an adequate job of addressing the arguments as they arise in practice. He turns directly to the theoretical canon, focusing on extensions of Kantian and Millian arguments, and asks what it might say about religious distinctiveness. He begins with the question and immediately

¹² Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).

proceeds to explore how one might hypothetically attempt to justify such a status and finds that such a project would fail. I prefer, on the other hand, to address the concerns of those “on the ground” who are actively making such arguments in a political context. Therefore, significant work remains in drawing attention to this issue and, most importantly, in attempting to shape the contours of how the discussion should take place.¹³

For the sake of keeping this project within a manageable scope, I limit myself to discussions that take place within liberal democratic theory. For one thing, the arguments that I consider, regardless of whatever theoretical system they embed themselves within, tend to assert these arguments as if in a self-contained universe. The arguments about the status of religion are unique in that they demand to be applied in all times and at all places.

Upon laying out this foundation and then exploring the demands made by advocates of the political category, however, I argue that religion does not inherently demand special treatment within a liberal democratic system. There is nothing about religion or religious beliefs or religious citizens that make them items of greater concern to the state than their nonreligious counterparts. I claim that invocations of religion as a political category exploit the ambiguity that surrounds the issue.

This project does not engage in an explicit discussion of “what counts” as a religion. This is because, while intimately related, the questions of classification and of

¹³ Note also that a work such as, for example, Charles Taylor’s *A Secular Age* (Cambridge, MA: The Belknap Press of Harvard University, 2007) does not occupy a central place in this work because he approaches the issue from more of a communitarian approach than a liberal democratic one. Ideas centered around community do not comport with the vision of liberal democracy propounded here. See the discussion of Finnis in Chapter III under the section “Theoretical Arguments for Priority.”

normative implications are completely distinct. What matters most for the purposes of this discussion is the question of what occupying a position in that category means for those involved. Once a state has determined who counts, what next?

There are numerous other ways of going about this project, and many important parts of a project aimed at dismantling, or at least challenging, religious distinctiveness are beyond the scope of this project. One could examine, for example, the harsh treatment of religion in the public sphere, especially in the Rawlsian tradition. One could examine the debate in the context of religious establishment. One could focus more on a comparative context, and examine the numerous other instances in other liberal democracies where these same issues are being raised. One could, of course look at traditions outside of liberal democracy. However, I have distilled this project into the following pieces of this puzzle, which I believe are sufficient to highlight the needs of the literature, address some systemic obstacles, and suggest possible directions for future work.

The first two substantive chapters address two overlapping but technically separate arguments for special treatment: religious distinctiveness and religious priority. Some scholars or politicians make arguments that imply both as the two are not mutually exclusive, but they each represent a discrete line of logic. Chapter II addresses arguments for religious distinctiveness, that the political category of religion represents a discrete set of beliefs that are markedly distinguishable from nonreligious beliefs. Regardless of whether or not religion is somehow more important, these arguments focus on religion's uniqueness, claiming that the particular needs of religion demand

particularized forms of treatment.¹⁴ I focus in this chapter at demands for religious exemptions, as the theory can be most clearly distilled from this discussion. I argue that this position amounts to one subgroup of a population demanding additional benefits from the state, and that this demand must be justified accordingly. Instead, I find that arguments for religious distinctiveness tend to rely on circular logic and presume from the beginning that religion is inherently unique. Religion, then, has not passed the bar to fully distinguish itself from other forms of belief.

Chapter III, then, considers claims of religious priority, that religious liberty in itself is of greater interest to the state than other forms of liberty and than other rights guaranteed to citizens. I approach this question by focusing on the claims that religion is the “first freedom,” a favorite rhetorical move in the United States and among US presidents in particular. I examine the origin of the phrase and parse its possible theoretical implications based on its uses. I then argue that the phrase “first freedom” wildly exploits ambiguities in the way that political discussion takes place so as to gain leverage. I suggest that the phrase misconstrues the priorities of the state and consequently does more harm than good.

Chapter IV considers US constitutional law surrounding the Free Exercise Clause and in particular the debate surrounding religious exemptions. While there are many works that trace this debate, most of them focus on questions of interpretation of the

¹⁴ Sandra Day O’Connor, for example, provides an interesting case study illustrating this assumption that religion demands distinctive, though not priority, treatment. In establishment cases, she promotes an endorsement standard, wherein the government crosses constitutional lines by either “endorsement or disapproval of religion,” requiring it to remain neutral on the subject (concurrency in *Lynch v. Donnelly*, 465 U.S. 668 (1984); see also her concurrence in *Wallace v. Jaffree*, 472 U.S. 38 (1984)). And yet, in her concurrences *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), she argues for special exemptions for religious believers.

document of the Constitution, whereas our interests in this project are purely normative and less tied to contingent national histories. To that end, I extract the way the US Supreme Court has answered the question of “why religion?” across time so as to provide a case study of how one governmental body has expressed a view about the substance of the political category of religion. I construct different accounts of this category implied by the Court by focusing on three “moments” or stages of interpretation of the clause: early Court interactions with free exercise in which the Court refused to grant special status to religion, the advent of exemptions and deference to religion in the Warren and Burger Courts, and the return to the current non-exemptions standard.

After challenging the legitimacy of religion’s special status in Chapters II and III and showing the varying practical implementations of such a category in Chapter IV, I will turn to the question of how religion can be protected without granting it special status. In Chapter V, I argue that religion can still be protected by working within the system. I take one particular strand of theory within liberal democratic thought as a case study. Transformative political liberalism rejects the idea of special status for religion, but it also allows the state to use its “non-coercive” powers, such as withholding tax breaks, to target illiberal religious beliefs for the purpose of changing them. I argue against this logic from within the political liberal framework, demonstrating that it is possible to counter such an attack on religious liberty without resorting to an inegalitarian special political category. The transformative political liberals fail to maintain their status as *political* liberals while introducing the transformative element.

Finally, Chapter VI briefly concludes by surveying two current or recent issues, one national and one local, in which the political category of religion is often invoked in a way that belies the lack of understanding of either the category or of the system in general: demands for religious exemptions from the Patient Protection and Affordable Care Act and from a university allocation of student fees toward a campus LGBT center. These examples illustrate how, in practice, use of religion as a political category often stems from misunderstanding both the project of politics and the nature of religion in contrast to other beliefs around.

CHAPTER II
RELIGIOUS DISTINCTIVENESS:
EXEMPTIONS AND THE POLITICAL CATEGORY

INTRODUCTION

In 1996, homeowners in the Fan, a well-to-do neighborhood of Richmond, Virginia, asked city officials to investigate the operations of a soup kitchen run by the local Stuart Circle Parish. The group alleged that the program violated a 1991 city ordinance that restricts how often soup kitchens in residential areas can run and how many can attend. Religious leaders from around the city rose in protest, sparking bills sponsored by members of the city council to keep the government from interfering with these and other religious practitioners in the use of land as part of an exercise of their religion. The leader of the meal ministry, Patti Russell, said in defense of the massive response from the religious community, “We’re not just a bunch of mindless do-gooders. We feel this is something that churches are impelled to do—to care for people who need help.”¹⁵ On behalf of the actions of the homeowners to call for the policy’s enforcement, David Johannas, the man who lodged the complaint asked, “In a country that is supposed to be a free country, why is it that religious groups get more freedom than other groups?”¹⁶

The debate sparked in this instance illustrates a question of general theoretical

¹⁵ Jan Cienski, “Soup Kitchen Issue Spurs Religious Freedom Debate,” *The Freelance Star*, 4 February 1998.

¹⁶ *Ibid.*

significance: should liberal democracies treat religious groups differently from other groups by virtue of their being religious? In other words, do citizen actions motivated by religious belief occupy a discrete category of actions, demanding unique treatment by the state? Many have argued that the term “religion” ought to invoke differential political treatment, a perspective I will refer to as a “discrete” category of religion. This question has taken on heightened salience in countries that include guarantees of religious freedom in their institutional charters. In the United States, for example, some have read the text and historical jurisprudence of the Free Exercise Clause of the First Amendment of the Constitution as guaranteeing unique protections to religious practitioners. In liberal democracies around the world, requests have been made for religious exemptions from public safety regulations, conventional work schedules, antidiscrimination laws in hiring practices, military service, work uniforms, vaccination requirements, narcotics regulations, mandatory school attendance, and numerous other policies, often while invoking arguments similar to those raised by the Richmond residents. Approaches incorporating a discrete political category are distinct from multicultural approaches in that they portray religious moral choices as unique on an ethical level in ways that are relevant to laws. But what is it about some moral choices that categorically demand distinctive political treatment?

I find that attempts to justify the distinctiveness of religion have failed thus far when it comes to exemptions from otherwise generally applicable laws. Moreover, they must fail, I propose, in the absence of any possible categorical justification. The most appropriate response is to treat all moral frameworks equally, on an ethical basis that

uses normativity, the presence of a moral dilemma, rather than religion as the standard. We can justify normativity, but not the category of religion, as a legitimate basis for exemption from the law.

The project here is to evaluate and ultimately to challenge the merits of this putative political category. The first section will highlight the tendency of work employing the category to overlook central issues. Focusing specifically on religious exemptions, I suggest that arguments for religious distinctiveness are insufficient to justify preferential, or even deleterious, treatment. The second section responds to concerns from advocates of the discrete concept, particularly aiming to demonstrate the legitimacy of treating all ethical categories on the same grounds for the purpose of moral exemptions. I argue that from a specifically political perspective, religious and nonreligious frameworks have more in common where it matters for state consideration than they have differences. These similarities justify using the same process of granting exemptions to both under the broader banner of ethical, rather than specifically religious, exemptions.

While this is by no means the first piece to argue that religion should not be treated distinctively,¹⁷ I approach the subject by looking for systematic errors in current arguments for this discrete conception, thereby enhancing the debate surrounding

¹⁷ ¹⁷ See: Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007); Corey Brettschneider, "A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights," *Political Theory* 38.2 (2010): 187-213. These authors tend to spend more time fleshing out how a system functions without segregating religion rather than focusing on the question of *why* religion should not be elevated. Again, Leiter is one other exception when it comes to considering this issue, but as discussed in Chapter I, his work is less useful for this project as he takes more theoretical approach than the applied approach employed here.

religious exemptions. Currently, advocates of the discrete view, which would place religious interests into their own category of legal issues, ignore central questions that must be addressed before accomplishing the ambitious goal that they pursue. This absence weakens the pull their arguments have on those who do not take the priority of religion for granted. Opponents of the discrete view, on the other hand, tend to take the inappropriateness of special treatment of religion as an article of faith instead of directly addressing the concerns of the former group. The scholarly discussion of the topic has progressed in two opposite directions rather than moving forward as one dialectic. I attempt to lay out the grounds on which argumentation must proceed, in an effort to bridge the gap in communication between the two perspectives in the hopes of increasing communication across the groups. Many of these arguments can be applied to cultural exemptions as well, and many scholars bundle religious and cultural exemptions together. But in this piece I evaluate a type of argument that prioritizes the ethical dimension unique to religious beliefs, as such arguments are distinct in their line of reasoning and quite common in public discourse.

I direct the discussion toward the single question of what, if anything, makes religion special in political considerations. To that end, I am not addressing whether or not exemptions are generally speaking an appropriate or prudent means of protecting the interests of citizens. Rather, I am considering the question in the context of a system, specifically a liberal democracy, that has already elected to use exemptions as a means to ensure that the laws do not inadvertently and unnecessarily bar citizens from achieving fulfillment. Though I will return to technical questions later, I suggest that we would do

better to begin by asking if the project of elevating religion in terms of priority is worth pursuing in the first place. The question in this specific form circumvents many disciplinary ways of investigating the uniqueness of religion and hones in on those features that might demand that religion be treated as a distinct *political* category, rather than as a distinct moral, philosophical, personal, sociological, historical or empirical category.¹⁸ I conclude that religious claims must be evaluated by the same standard as all other ethical beliefs and that religious believers must justify request for unique treatment through the same arguments available to everyone else. Ultimately, embracing language that applies to all citizens signals a willingness to speak the language of justice that applies to all.

THE BURDEN OF PROOF

To begin, we must ask what we would expect of a successful attempt to distinguish religion as a special category and clearly articulate the aims of such a project. On the one hand, specific national histories might have traditionally chosen to elevate religious claims to a higher level of protection, as legal scholars like Michael McConnell (1990; 1992) claim that the US Constitution has done.¹⁹ But there remains still the burden of theoretical justification for why such treatment might be required by or even appropriate to liberal democracies generally. For a liberal democracy, the default position must automatically be one of consistent treatment across individuals. Thus, it

¹⁸ “Political” meaning having features relevant for judicial or legislative consideration, and more so salient in political considerations to the point of being dispositive.

¹⁹ Michael W. McConnell, “Origins and Historical Understandings of the Free Exercise of Religion,” *Harvard Law Review* 103(1990): 1409–1517; “Accommodation of Religion: An Update and a Response to Critics,” *George Washington Law Review* 60(1992): 685–742.

would be incumbent upon advocates of categorically distinct treatment to specify the features that demand heightened distinctive treatment from the state. Jane Mansbridge argues that such a rule generally governs the process of delegitimizing special treatment given to one group over another. She says:

Once the set of reasons sustaining the wall [conceptually separating the two groups] has come under attack, the burden of proof falls on the defender of the wall. The defender must adduce reasons for treating the two categories differently that will stand up under scrutiny. In the logic of formal justice, equality has a privileged position as default. It seeps in automatically once the reasons for different treatment have been shown wanting.²⁰

If the group demanding special treatment cannot justify such privilege through publicly accessible reasons, then the privilege is discredited and the arbitrary lines must be erased.²¹

Mansbridge makes this argument based on her study of activist groups that challenge a dominant group's social hegemony. Such groups challenge the status quo of asymmetrical treatment by calling attention to the inequalities. When the subjugated group can make a convincing case for why the distinctions in treatment are unjustified, the dominant group often experiences not only a sense of outrage at the accusation of

²⁰ Jane Mansbridge, "Cracking Through Hegemonic Ideology: The Logic of Formal Justice," *Social Justice Research* 18.3(2005): 335-347, 337.

²¹ Although in the case of religion this protection has been extended to groups beyond simply the dominant Christian group, as will be evidenced by Bedi's arguments below, this could be seen as the result of a previous challenge to the hegemony of Christianity within the realm of religion, a challenge that resulted in the sphere being expanded to include other religions as well in the telling of whose religion counts. The challenge to the hegemony of religion more broadly, then, could be spun in Mansbridge's terms as a second counter-hegemonic movement.

injustice but also a reluctant sense of duty to move toward balanced treatment.²²

Organized activists often posit the theories that “everyday activists” then implement in practical daily activities. She offers as an example the efficacy of the idea of a “male chauvinist.” Armed with this conceptual tool, ordinary women became empowered to challenge the status quo, often their position in the household in relation to their husbands, once they were exposed to arguments rooted in language that calls for equality. The women she interviewed reported experiencing success at reaching men by using the phrase. Thus, she argues, the logic of formal justice provides a basis for demanding egalitarian treatment.

Returning to the case of religion, then, while some may point to this position as arbitrarily placing the burden of proof upon religious claimants, the request is analogous to claiming a greater share of public resources. A request for an exemption demands at least additional attention from the courts and frequently accommodation in the form of modified or altogether unique regulation of the claimant’s activity compared to other citizens. Consequently, such a demand would have to be justified by a corresponding difference in situation, appropriate to the level of distinct treatment requested. To claim that religion merits across-the-board higher access to ethical exemptions requires the establishment of altogether discrete category, at least conceptually speaking, even if in practice lines may bleed into each other. Such a category must include specifications of which features qualify a claim for such treatment, so as to create a test to distinguish legitimate and illegitimate claims.

²² *Ibid.*, 339.

For purposes of illustration, consider this placement of the burden of proof in light of the case presented above with the soup kitchen. To address concerns that religious groups have “more freedom”, the question that must be answered in this particular case is as follows: if the city has determined that those motivated simply by their ethical belief in providing for the poor should not be allowed to operate in this venue, why should religious groups be immune from the restriction? Considered outside the context of this dispute, it is hard to accept that most groups driven to meet the needs of the indigent by running soup kitchens could be labeled “mindless do-gooders”. Similar acts of service are more commonly viewed at least as public spirited if not even demonstrative of public virtue. These groups that, as widely considered, perform a noble public function are expected to adjust the locations of their establishments according to zoning restrictions, as it is presumed that they can fulfill said function in a variety of locations. Religious groups, likewise, are typically not compelled by their religion to perform the duties of feeding the poor *exclusively* within the doors of their sacred buildings, and they are not barred from conducting these activities in any zone-appropriate location. Some essence unique to religious ethical beliefs must demand the unique attention. Abstracting from this case, we might approach the theoretical project from the perspective of justifying to those citizens not acting in a religious capacity what it is about religion per se that makes it special on political grounds. With this approach laid out as the foundation upon which to begin the inquiry, I will now consider how various attempts to establish a separate category for religious exemptions have proceeded.

ARGUMENTS FOR THE POLITICAL DISTINCTIVENESS OF RELIGION

The Primordial View: Categorical Distinction

Among the few theorists to focus directly on this question is Sonu Bedi. He opens a recent piece saying, “Too often we assume that religion is special.”²³ He promises to take up the “neglected inquiry” in the form of “why, at the most basic level, does a particular religious group even deserve a simple exemption from a facially neutral law but *not* a mere preference or a voluntary association.” Bedi is especially concerned with distinguishing “the Jew from the Rotarian, the Christian from the Democrat, or the Sikh from the mere hat-wearer.” He considers four common alternatives to creating a separate category of religion that might serve to distinguish which central practices merit protection, such allowing for exemptions on the basis of: a respect for diversity in the form of non-mainstream beliefs; deference to beliefs that are a part of longstanding traditions; consideration of the cost that would face religious claimants if not exempted; and a general framework normativity that considers the religious belief as it would any other non-religious ethical belief. He ultimately finds that none of these serves the end of sufficiently protecting those practices he considers most deserving of protection without also admitting for qualification too many superfluous practices based on a mere weak preference. The impracticality of these alternatives, Bedi argues, requires us to take what he calls a “primordial” view of religion. He concludes from the failure of alternative justifications that “the only way to effectively justify this exemption is to treat the

²³ Bedi, “Debate: What Is So Special about Religion?” 235.

affiliation or practice as non-voluntary, as anything but contestable or fluid.’²⁴ He says that a primordial view of religion must take the belief to be prior and essential. While he acknowledges that much of contemporary theory has moved in the opposite direction of treating religion as primordial and toward viewing it as a matter of choice, he makes what one might consider a rather practical conclusion, that it is impossible to protect these central practices any other way.

The most problematic part of Bedi’s approach, which is also representative of many policy discussions surrounding the question, is that the search into why we should consider religion special is built upon the presupposition that religion is special. He responds that we must conceptualize religion in this way, even if it may not fit perfectly onto either our experience or idea of the phenomenon, because such conceptualization is necessary to give religion the protection it deserves. But this has done nothing toward addressing the question as he himself framed it. He has done nothing to establish why we *should* treat a group differently. He frames his project as an answer to the question of why religion should merit this protection, but he instead answers his “why” with a “how”, offering a mechanism for how we might distinguish them as opposed to a clear articulation of why we should bother to distinguish them in the first place. Instead of offering a full justification of why religion should be treated differently, his work addresses the practical question of identifying which practices would merit the protection, assuming that the need for protection has been established. Note here the conflation of the two issues of normative justifiability and practicality of its

²⁴ *Ibid.*, 236.

implementation. While proposing to treat the first issue, it seems that Bedi is instead primarily troubled by the application problem of proliferation. If grants of protection expand beyond religious groups, it may be impossible to draw the line anywhere short of granting an exemption for so many activities that the system cannot function.

Much of the time he is preoccupied with how to distinguish religion from those practices we are least likely to want to protect, such as vague preferences. Although this is relevant for addressing the proliferation problem, the question as he sets it up demands another type of test as the focus. The standard that should be used consistently throughout such an argument, the true test case for the project he has in mind, should be distinguishing a religious claim from another citizen requesting the same exemption but motivated by ethical principles that might otherwise be considered generally praiseworthy by society but that are not based in religion. Thus, rather than comparing Sikhs and members of a club dedicated to advocacy of wearing hats, the best case test scenario would be a circumstance like our opening scenario, a case in which the end of feeding the hungry has already been established as an important social value.

An underlying fault of this approach is that he starts from the wrong point of reference, ignoring the appropriate direction for a burden of proof for a group demanding more goods of the state than other groups. He presumes that we can all agree that if we want to apply exemptions to anything, we would apply them to religions. In his final rejection of viewing religion as a voluntary association, he concludes, “Put simply, religion cannot both be ‘special’ and like any other voluntary association.”²⁵ The

²⁵ *Ibid*, 247..

question Bedi is actually addressing is different than the question that he set out to answer, at least as he expressed it. It appears that he is primarily interested in addressing the proliferation problem, protecting too many groups for the exemptions project to be sustainable, what Courtois calls the Pandora's Box problem.²⁶ Leiter observes of arguments for religious exemptions generally: "Notice, of course, that there is no principled reason for expanding exemptions this way; the proposal is motivated entirely by...practical and epistemic worries."²⁷ This critique, when applied to Bedi, highlights how his entire approach sidesteps the substantive theoretical issues, leaving the discussion of practical considerations theoretically unsound.

Rather than claiming to discover what makes religion more deserving, he might have formulated his project as: assuming that we know we want to protect religion, is there any broader category we might use that would still guarantee protection for religious groups without getting into the perennial exemptions complication of proliferation? But his failure to recognize the difference between his stated target and his actual final destination represents an endemic problem for theoretical work on this topic, which tends to consider the needs of religious exemptions in a vacuum separate from nonreligious ethical beliefs.²⁸

²⁶ Stéphane Courtois, "Conscientious Conviction and Subjective Preference: On What Grounds Should Religious Practices Be Accommodated?" *Philosophical Papers* 40.1(2011): 27-53, 43

²⁷ Leiter, *Why Tolerate Religion*, 97.

²⁸ Many treatments of the subject touch on issues that directly parallel comparable nonreligious beliefs but fail to move beyond the narrow framework of religion or adequately justify a consideration of religious liberty as a discrete category from other dimensions of liberty. For example: Kent Greenawalt, *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988), 198-200 addressing appropriateness of religious category indeterminate and dependent upon one's personal convictions; H.N. Hirsch, "Let Them Eat Incidentals: RFRA, the Rehnquist Court, and Freedom of Religion," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy Rosenblum (Princeton, NJ: Princeton University Press, 2000): 280-293; Douglas Laycock, "Church

Although most arguments for the categorical distinctiveness of religion attempt to benefit religion, the same category can be used to the detriment of religious claims. Some theorists make the same mistake of reifying the idea of religion into a political category but to the opposite end of scholars like Bedi. Yossi Nehushtan, for example, uses the category of religion actually to create a barrier that would inhibit religion from gaining access to state distribution of exemptions.²⁹ His approach appropriates the category of religion to create an antireligious bias, though using the same conceptual mechanism as Bedi in isolating “unique” features of religion.

Nehushtan closely identifies religion with intolerance. He does not condemn religious beliefs themselves, however, but rather *acts* of intolerance. He suggests dealing out retribution for intolerance according to the “principle of proportionality,” whereby response is in kind and matches the degree of wrong done. Perhaps one of the most surprising features of his theory, however, is the range of actions that he would put under the banner of intolerance. He explains, “Intolerance can take the form of condemning another, insulting him, undermining his values, making him feel uncomfortable or unwelcome, avoiding his presence, discriminating against him, refusing to assist him, restricting his speech or behavior, and so on.”³⁰ No intolerant action, he suggests, could ever be the recipient of an exemption.

The way Nehushtan has defined intolerance, any religion that makes a definitive

Autonomy Revisited,” *Georgetown Journal of Law and Public Policy* 7(2009): 253-278; Michael W. McConnell, “Believers as Equal Citizens,” in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy Rosenblum (Princeton, NJ: Princeton University Press, 2000): 90-110; Frank S. Ravitch, *Masters of Illusion: The Supreme Court and the Religion Clauses* (New York: New York University Press, 2007), see especially Chapter 7.

²⁹ Yossi Nehushtan, “Religious Conscientious Exemptions,” *Law and Philosophy* 30(2010): 143-166.

³⁰ *Ibid.*, 158.

statement of values risks the label of intolerant. Any statement of belief that challenges another's belief system risks at least "undermining his values" and "making him feel uncomfortable". He has defined the idea so broadly as to label even any challenge to the status quo as an act of intolerance. It is not clear under Nehushtan's system how one could advocate change or promote a belief that is not shared universally without incurring the ire of the state. The effect would chill religious expression, and likely many other forms of expression along with it. This definition is drastically overbroad, as becomes more significant as he progresses through his argument.

The most problematic part of his analysis for religious adherents comes in his extrapolation from observed instances of intolerance to a distinct political category. He justifies this additional focus on religion on the basis of empirical findings. He says, "Scholars do not dispute the strong and unique empirical links between religious orientation and prejudice or intolerance", accompanied by a string of citations to psychology literature. On the basis of mere unspecified correlation, he has categorically included all religious among the intolerant.

This connection is surprising considering that he admits that the fit is "not necessarily compelling. Yet it is a relevant, presumably weighty justification that should be included within the balance of reasons."³¹ Yet on this weak evidence, he suggests that the mere presence of religion ought to decrease one's candidacy for ethical exemptions, if not categorically excluding one. He calls the latter strict exclusion the "broad thesis" and the weaker form, in which the presence of religion merely increases the scrutiny

³¹ *Ibid.*, 161.

placed on an exemption request, the “weak thesis”. He admits, likely given his admittedly weak justification, that there is no determinative argument for the broad thesis, but that he is inclined toward the position nonetheless.

Though Nehushtan’s categorization of religion may be based on weak connections, it provides an important illustration that the presumed category of religion can just as easily work against the aims of religious adherents. The presumption of categorical distinctiveness should not be presumed to be an absolute good in political contexts. It can just as readily be employed in other areas, when evaluated alongside other state interests, to burden religious claims. Thus, the challenge posed by Nehushtan ought to underscore the significance of key theoretical grounding of the political construct. Categorical distinctiveness cannot be assumed exclusively to provide for protections. In certain cases, a broadly construed ethical basis for exemptions that evaluates religion on the same grounds as other ethical frameworks can actually be construed as a mean between the prioritizing and the deliberate undermining of religious interests, rather than as an attack on religious interests in itself.

Religion as the Model: Distinct but Porous

While Bedi and Nehushtan promote an impermeable boundary of religion, other approaches continue to promote the priority of religious over nonreligious approaches but allow for certain nonreligious ethical claims to qualify inasmuch as they correspond to religion. Martha Nussbaum worries about the complication that ensues from labeling

religion one among many ethical frameworks.³² She posits that describing religion as a strong ethical commitment makes it impossible to prioritize religious practices over nonreligious practices. Where Bedi focuses on several possible nonreligious contenders, Nussbaum specifically addresses normativity, sharing his suspicion that it represents the best possible alternative to making religion a category. She, too, ultimately decides that it does an insufficient job of weeding out trivial claims, instead falling back on giving religious observers protection as the default position. But this betrays the same bias, as it is only necessary to adopt this category if you are assuming from the beginning that religious practices are those most deserving of protection among ethical beliefs.

In her *reductio ad absurdum* employed against normativity, she asks:

What about the idea that religious requirements are experienced as obligatory and nonoptional?... It fails to include people who don't experience their religion this way, a serious problem when we include religions that have no structure of authority and no textual source. Buddhism, Reform Judaism, Unitarianism, and quite a few other religions have no category of the nonoptional: everything is to be judged by the conscience of the individual.³³

The critique of normativity amounts, however, to an observation that a moral dilemma cannot be considered adequate because of its failure to include groups that do not fit the traditional groupings of religious adherents. Yet she fails to address the theoretical question of why these groups would need a category of special protection if they have

³² Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 167-174.

³³ *Ibid.*, 167-168.

not demonstrated a moral dilemma. In the individual assessments which she later admits must be admitted, it is clear that adherence to one authoritative doctrine or sacred text is not the *sine qua non* of receiving an exemption. Thus, the Buddhist ultimately would receive protection under normativity *if*, in fact, a moral dilemma called for one. She dismisses the moral quandary as irrelevant precisely because using it would not map onto traditional religious categories, which is not a per se dismissal of its usefulness. She adds concerns similar to Bedi's regarding the potential of normativity to protect "trivial" attachments, with similar results. This reasoning, for her, leaves the subject matter as the last viable standard left standing.

Unlike Bedi, however, Nussbaum admits that certain nonreligious claims might be brought under the banner of religious protection, inasmuch as they exhibit the same traits that make religion worthy of protection in the first place. Her preference, for example, in defending the 1965 decision *United States v. Seeger*³⁴ over its 1970 successor *Welsh v. United States*³⁵ illustrates her aversion to claiming that the two ethical enterprises of religious and nonreligious living are comparable. In *Seeger*, the US held that conscientious objectors to war might qualify for exemption from mandated combat duty if they can demonstrate the following: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the..." Under this model, others might be candidates for moral exemption *by virtue* of their fitting the model provided by religion. The model at least succeeds in expanding protection to unorthodox religious beliefs and a select few

³⁴ 380 U.S. 163 (1965).

³⁵ 398 U.S. 333 (1970).

nonreligious ethical beliefs deemed sufficiently “religion-like”. Under the *Seeger* precedent, however, the extension is restrained such that it does not allow for general ethical objections. It was *Welsh*, then, that expanded the protections beyond exclusively religious terms to include “essentially political, sociological, or philosophical views or a merely personal moral code” that can demonstrate ethical significance.

Nussbaum finds fault with *Welsh* for its perceived watering down of the distinctiveness of religious concerns and its flattening of the category of exemptions. Nussbaum takes for granted that religious actions occupy a place of priority in terms of the state’s attention. She remains deeply concerned to maintain the dichotomy between higher level and lower level actions as distinguished by their relation to transcendent ends. Although her category may have a somewhat permeable boundary, she still relies on promoting two distinct forms of treatment for actions according to the religiousness of their aims.

This trend is especially common among those who use the language of preserving religion as a “basic good”. Koppelman argues that replacing religion as the determinative factor with conscience would lead to too underinclusive a system of exemptions, as not all practices and actions that ought to be protected under the bounds of religion would be captured by the notions of duty implied by the idea of conscience.³⁶ People may engage in religious activity for a number of reasons, he suggests. He cites, for example, habit, adherence to custom, curiosity about religious truth, and religious enthusiasm as alternative motives for religious worship that often take the place of the

³⁶ Andrew Koppelman, “Is It Fair to Give Religion Special Treatment?” *University of Illinois Law Review* (2006): 571-603, 571.

duty or fear of divine consequences implied by notions of conscience. On this account, he suggests, religion ought to be seen as a broader category, one defensible in no way other than categorizing it as distinct from other human goods. He selects as his referent an objective idea of the value of religion, rather than allowing individuals to determine what should be most binding as they could care about literally anything. Like Nussbaum, he allows for a broad array of beliefs to be potentially included under the broad category of religion as attempts to deal with the most fundamental questions. He also directly challenges the legacy of *Welsh* for conceding the priority of religion, preferring *Seeger's* approach.

This move is common in promoters of the distinctive view of religion, demonstrating a willingness to expand the category beyond just religious groups to include some nonreligious groups, but with the insistence that the newly created broader group remain under the banner of religion. Such arguments demand that nonreligious claims demonstrate consistency with religion. They will accept as functionally equivalent neither religion restating itself in nonreligious terms, nor an emphasis on finding the underlying commonalities shared by both categories. Exemplars of this particular trend account for deep affinities between the logic of religious and nonreligious perspectives by maintaining the distinctive category of religion and expanding membership to select nonreligious beliefs and practices.

This approach fails to acknowledge the gray area as a challenge to the claimed distinctiveness of religion. It attempts to solve the problem by subsuming the anomalies into one category or other rather than recognizing that acknowledging that a continuum-

like gradation poses a theoretical challenge to the dichotomy. Even within the bounds of specifically religious claims for exemptions, there are those that are more or less appropriate candidates for such exemptions. Both Nussbaum and Koppelman ignore the ways in which nonreligious and even antireligious perspectives can be inherently engaged in the same project as religion. These perspectives are fully self-sustaining and need not be framed in religious terms to deserve state attention.

Implications for the Discussion

There is systematically insufficient evidence and argumentation within the current literature to justify placing religion in a category of its own for the purpose of exemptions. The literature arguing for distinctiveness within liberal democracy is consistently hasty in its urge to reify the concept of religion either into a talisman that immediately merits special protections or even occasionally as a bullseye to draw particular punishments. Arguments for the distinctiveness of religion have chronic problems of underestimating the complexity of this question and mislocating its source. While there may be a range of possible arguments for the distinctiveness of religion, they are rarely articulated. The object of the proceeding critiques is to redirect the focus of the discussion to terms that do not smuggle in presumptions that religion is in fact different in political kind and deserving of distinctive treatment. The tendency represented by the examples above, even employed to an array of ends, suggests a consistent lesson. Confidence in the claim that religion occupies a discrete political category inhibits theorists from making progress in convincing those to whom the

conceptual differences are not self-evident. Theoretical work is repeatedly hindered by these mistakes. There exists an impulse to create this political category called “religion”, but the literature making this argument has done little to get at what exactly it is that we are trying to protect when we invoke the category. Reifying it into a strict construct avoids articulating the substance of religion. The fear seems to be that disassembling the box and describing its constituent parts would too easily allow others to identify with the pieces and claim that perhaps it is not so unique after all. But the failure to engage the question on these terms leads to no progress in fleshing out our understanding of this vague, elusive, and perhaps even chimerical concept.

IN DEFENSE OF NORMATIVITY AS THE DEFAULT MECHANISM FOR EXEMPTIONS

The Alternative

Inasmuch as the project of defending religious exemptions qua religious claims has failed thus far, normativity, which requires treating religious beliefs by the same standards as other ethical beliefs, becomes the de facto standard for determining all ethical exemptions. Normativity uses as a standard of evaluating qualification for an ethical exemption norms that are obligatory and experienced as binding on the individual. What matters is that the individual experiences a moral dilemma and would be forced to choose between following the binding dictates of the moral prescriptions and complying with state policy. Normativity also requires potentially universalizable reasons. As observed, objections to normativity frequently revolve around both the

desire to ensure protection for a grouping of practices considered ‘most deserving’ of protection, and the accompanying fear that normativity would trigger the proliferation problem. But, as demonstrated above, questions of practical implementation are separate from questions of desirability, and the two must be handled separately.

I would confirm the fears of the aforementioned theorists: normativity does run the risk of the proliferation problem. Yet I would respond by suggesting that if in fact normativity proves too inclusive to be functional, if no line could be drawn that would allow for a sustainable number of exemptions to the law, then the project of exemptions would best be abandoned on grounds of practicality, rather than preserved through weak and inequalitarian categorical distinctions. If the field has failed to supply a justification of the distinctiveness of religion as evidenced in Part II, then the tendency to reject normativity on practical implementation grounds suggests that a scholar has predetermined to privilege religion even in the absence of a theoretical defense.

While I am not concerned here to establish the practicality of the issue, it suffices for this project to argue that the legitimate threat of the proliferation problem does not justify falling back on makeshift categories that only serve to protect groups favored by particular scholars. If we cannot solve the puzzle of desirability, that is to say, if we cannot establish that religious groups are uniquely deserving of political privilege, then there remains no reason to reject the approach of normativity in a society that has already agreed upon the use of exemptions as a tool. Part III will attempt to demonstrate the potential for comparability of religious and nonreligious worldviews in terms of concerns of the state, and show how general approaches based on normativity or liberty

of conscience are appropriate mechanisms for granting exemptions. I am also not concerned at the present moment to establish the best particular version of normative exemptions; I am interested in promoting normativity generally, inasmuch as it represents the alternative to the discrete conception of religion by promoting consistent application. Part III will particularly respond to those who argue for the distinctiveness of religion on the grounds that normativity cannot account for differences between religious and nonreligious beliefs, building their case on the alleged insufficiencies of broadly ethical frameworks.

On the Comparability of the Experience and Function of Ethical Beliefs

Some have argued that concepts like liberty of conscience are insufficient protect religion when applied by the same approaches used for nonreligious beliefs. Seglow, for example, in assessing various theoretical arguments for religious exemptions, finds that the liberty of conscience approach, as advocated by theorists like Gutmann,³⁷ conflates processes of belief that in fact are not comparable enough to fall under the same umbrella. Seglow says:

In particular, religious duties are not (or not in the first instance) owed to other people, but rather seem to be a mixture of duties owed to a supreme being and, possibly, duties owed to oneself, the latter insofar as people labour under a duty to be a good Christian, good Muslim and so on. Non-religious duties, by contrast, are owed to other people, or at least other living things which inhabit the earth. I

³⁷ Amy Gutmann, *Identity in Democracy* (Princeton, NJ: Princeton University Press, 2003).

suggest that this makes it harder for non-believers to appreciate their binding force.³⁸

Seglow argues that non-religious people cannot always understand the nature of the binding force of religious duties, although at times a measure of overlap of understanding may lead one to falsely conclude that the shared understanding is sufficient. But this argument fails, in my view, both to disestablish the continuity between religious and nonreligious ethical duties and to delegitimize liberty of conscience as an adequate category for religious protection.

I take issue with setting the standard for establishing the similarity or difference of religious and nonreligious commitments on the basis of how similar or different the *experience* of following those beliefs *feels*. First, Seglow's logic assumes that experiencing ethical commitments as more or less binding can in fact imply a difference in kind rather than a mere difference of degree. Even if religious duties were more likely to fall on the far end of Seglow's presumed spectrum of binding feeling, this would not be evidence enough that they should be categorically separated, thereby universally excluding access. Secondly, even using his spectrum, a nonreligious person may experience a moral impulse that is binding in the same way that a religious person experiences, despite his unfounded assertion to the contrary. Removed of the support from his assertion of degree of feeling, the putative difference of direction of one's duties either toward others or towards divinity would do little on its own to establish the

³⁸ Jay Seglow, "Theories of Religious Exemptions," in *Diversity in Europe: Dilemmas of Differential Treatment in Theory and Practice*, eds. Gideon Calder and Emanuela Ceva (London: Routledge, 2010): 52-64, 58.

distinctiveness of religion to the degree required by this discussion.

The feature of “degree of binding” that Seglow wants to capture may be better accounted for as representing the degree of strength attached to these convictions. If duties are experienced as more binding, this will likely increase the weight accorded to them when they undergo tests of sincerity and centrality, which are seen by many advocates of exemptions as important parts of the granting of exemptions, among other tests.³⁹ It is possible that the difference in how binding duties feel may be empirically higher in religious citizens. But using a liberty of conscience approach that employs these tests would still manage to protect religious actors, while directing that protection specifically to those who exhibit the salient feature Seglow associates with religion. This approach has the added benefits both of screening out insincere religious observers, who might not experience their duties as binding, and of including those nonreligious duties that do occupy a similar place in the actor’s ethical framework. Even if one were to respond that the original considerations of religious exemptions already have a mechanism for evaluating the intensity of commitment, putting the religious and nonreligious commitments on the same scale has the advantage of removing an unnecessary step and selecting for evaluation specifically those features that are most relevant.

It is worth remembering that what are called nonreligious reasons here frequently would apply even to the religious citizenry, any time they act in an area about which their particular religious tradition is silent or leaves room for interpretation. Thus, the

³⁹ See Courtois, “Conscientious Objection,” for a discussion of these tests.

mindless do-gooders from the initial example could easily be religious in their normal lives, but perhaps, for example, from a tradition that does not directly emphasize obligations to the poor and social justice. But even though this religious citizen does not act in that moment out of the dictates of religious commandments, there is no reason that the same degree of intensity, a religious-like fervor, could not be experienced in relation to other felt ethical or moral commitments.

Many would also consider religious frameworks inherently distinct by virtue of their content. On a facial comparison, their substance indeed appears quite different. Consider the particularity of a moral choice informed by a relationship with a supernatural being, or a belief in a horrific afterlife for the unfaithful as determined by choices made in this life. The calculus of moral decision making under these restraints would differ drastically from one not so constrained. These specific types of content might suggest vast gaps between certain types of religious and nonreligious frameworks, perhaps enough to consider separate category. This is a classic position articulated by theorists like William Penn in early American defenses of religious liberty,⁴⁰ though still echoed in the logic of religious freedom as not only historically but also logically prior or “first”.⁴¹

Focusing on these admittedly fundamental distinctions distracts, however, from a central commonality between religious and nonreligious perspectives that appears in the *function* that these wildly different beliefs ultimately serve for the citizen. From the perspective of the state under a normativity approach, the object of these exemptions

⁴⁰ See William Penn, “The Great Case of Liberty of Conscience,” 82. Also see Chapter I of this project.

⁴¹ For a discussion of these echoes, see Chapter III.

should be the ethical frameworks held by the liberal citizens rather than the substance of the content. What matters for the purpose of state consideration of its citizens is the place a belief holds in the believer's ethical system. What matters is that citizens rely on the belief, be it of a religious or an ethical but nonreligious nature, to orient their lives. To distinguish religion on the basis of the nature of its content is to undermine severely the rational processes of nonreligious perspectives and the similarity of the role these determinations occupy in their lives, which amounts to a defense the *Welsh* approach discussed above.

That they may be further distinguished according to theistic or nontheistic approaches is a fact secondary to the similarity that they share in this fundamental role. It becomes relevant again here to consider the example of a religious person acting outside the bounds of his specific tradition. Apart from how intensely they may feel about an issue, there is a basic comparability in the act of moral reasoning performed. In our opening case, for example, the ethical issue is the importance placed on providing for the needy in one's moral code. It matters most that both the "mindless do-gooder" and the citizen "impelled" by religious mandate perceive a binding duty to provide for the needy. Different beliefs may have led to the point of consideration, but from a political perspective, the conclusions are equally worthy of protection. While the two approaches may indeed yield drastically different views on morality and ethics, at least for the purpose of exemptions, it has not been demonstrated why the religious content ought to provide an altogether different material for political consideration.

On the Appropriateness of Instrumental Difference

The best case argument *for* disparate political treatment of religion is actually instrumental, performed on an individual rather than categorical basis. Justifying differential treatment on an instrumental account does not accord religion additional weight *per se*, but merely argues that in order to secure the same protections that motivate a state's interest in granting exemptions at all, religious adherents are sufficiently different that they often must be treated specially. This approach is common to those arguing with a particularly egalitarian emphasis, such as Bou-Habib, Boucher, Courtois, Mahoney, McGann, and Quong,⁴² although its application does not depend upon such a perspective.⁴³ The purpose of exemptions policies, on this view, is that of mitigating unnecessary incidental burdens that create casualties in the pursuit of consistency and order. This is determined on the basis of individual needs, however, rather than by virtue of exhibiting religious claims.⁴⁴ The goal of exemptions is to bring all to an equal playing field, insofar as burdens are incidentally created by the state. While at times religion may receive “special” treatment, it is only a result of any additional burdens incurred by *particular* moral beliefs clashing with state interests.

⁴² Paul Bou-Habib, “A Theory of Religious Accommodation,” *Journal of Applied Philosophy* 23.1(2010): 109-126; François Boucher, “Les Fondements Egalitaristes des Pratiques d’Accommodement de la Diversité Religieuse,” *Revue Philosophique de Louvain* 109.4(2011): 671-695; Courtois, “Conscientious Conviction; Jon Mahoney, “A Democratic Equality Approach to Religious Exemptions,” *Journal of Social Philosophy* 42.3(2011): 305-320; Michael McGann, “Equal Treatment and Exemptions: Cultural Commitments and Expensive Tastes,” *Social Theory and Practice* 38.1(2012): 1-32; Jonathan Quong, “Cultural Exemptions, Expensive Tastes, and Equal Opportunities,” *Journal of Applied Philosophy* 23.1(2006): 55-73.

⁴³ I am inclined, for example, to lean toward what Mahoney calls a framework of “liberal neutrality”, promoting religious liberty by scaling back the purview of state activity, rather than relying on an egalitarian defense.

⁴⁴ While this system may have a focus on individual claimants, it also can incorporate consideration of others affected by the belief, such as children of the religious adherent.

Such treatment would be available to any nonreligious citizens comparably situated, on a case-by-case rather than categorical basis. Thus, while the state may have pragmatic reasons for singling out religious adherents for special treatment, the justification for these and any exemptions refers only to the normativity and not to the religious nature of a given exemption-requiring belief.⁴⁵

CONCLUSION

The concept of religion is not the appropriate tool to use when it comes to granting exemptions from generally applicable laws. As it stands, the presumption that religious belief merits special treatment remains under-theorized. Yet the discrete concept of religion holds sway not only in the scholarly literature but also among large segments of the public and politicians. In the United States, for example, Congress nearly unanimously⁴⁶ passed the 1993 Religious Freedom Restoration Act in an attempt to secure religious exemptions both nationally and at every state level, as Chapter IV will explore in detail. Although the language in the RFRA is not framed explicitly in terms of excluding nonreligious groups, suggesting that a court may invoke the logic of a case like *Seeger* and allow other perspectives to access this protection, it continues the recurring emphasis on the state's interest in protecting religious practitioners and

⁴⁵ For illustration purposes, we might understand this section in light of John Rawls's difference principle, that inequalities must benefit the least well-off in society. See his *Political Liberalism* (New York: Columbia University Press, 1993), especially §1 of the first lecture. The fact that exemptions are still an allowable tool, available to the state to employ at its discretion gives the state resources with which to employ the difference principle. It can make the decision to allow citizens experiencing a conflict of the state to receive an exemption in order to allow them to participate more fully in life as a citizen, although this remains discretionary and is not *required* as religion does not demand exemption. Using exemptions in this way allows the state to communicate to its citizens that it recognizes that the necessity of creating universalizable laws may not always lead to maximum citizen wellbeing.

⁴⁶ Unanimously in the House of Representatives and 97-3 in the Senate.

expanding those protections to others only insofar as they can conform to the mold of religion. Yet, in spite of the pervasiveness of preference for religion, there remains little in the way of explaining just what it is about religion that we are protecting, and why the language of religion is most appropriate.

Given that they are essentially requesting more of a good than what is being distributed to others, defenders of religious practices would do best to protect these ends by arguing on instrumental grounds that a greater need exists in certain areas of law for religious practitioners to receive special treatment, but only to the end of allowing them to achieve the same goals as everyone else and by means to that end available to everyone as well. Thus, all actions and beliefs, whether religious or nonreligious, can be evaluated by the same standards of ethical treatment.

If anything, the *Welsh* model ought to be applied to all religious guarantees and vice versa, though going a step further to avoid the language of religion altogether. As Mansbridge argues, absent a clear justification for distinctive treatment, the default must be equality for religious and nonreligious ethical beliefs. Although the respect that a society has for religion is frequently cited in legislative circles as sufficient impetus to justify distinctive treatment,⁴⁷ religious observers would do the most to preserve their protections by embedding them in sound theoretical arguments rather than depending on public opinion that fluctuates over time. To guarantee protections over the long term, the tendency to use the concept of religion as a simple proxy for whatever underlying value

⁴⁷ Lanie Freedman Ross and Timothy J. Aspinwall, "Religious Exemptions to the Immunization Statutes: Balancing Public Health and Religious Freedom," *The Journal of Law, Medicine, and Ethics* 25.2&3(1997): 202-209.

we are most attempting to protect must end, thereby restoring equality as the overriding value.

CHAPTER III

RELIGIOUS PRIORITY: AMERICAN RHETORIC AND FIRST FREEDOMS

INTRODUCTION

In Chapter II, I focused on claims regarding the distinctiveness of religion, as commonly applied to the subject of exemptions. Arguments for religious distinctiveness are frequently paired with arguments for religious priority. However, neither requires the other to craft a complete argument; it is possible to claim either one without the other. For example, as discussed above, an argument like Bedi's for religious distinctiveness does not require the state to rank the interests of religious citizens above those of nonreligious citizens; it argues only that we recognize the needs of religious believers as categorically distinct.

Likewise, there is another brand of argument focused specifically on arguing that protecting the interests of religious believers is the primary obligation of the state. They do not necessarily focus on trying to demonstrate that religion is fundamentally different from every other type of interest but nonetheless call for its privilege. This chapter examines the tendency to invoke religious superiority, paying particular attention to attempts to label religion as the "first freedom", which is especially common in US political rhetoric.⁴⁸ Whereas in the first chapter I focused on theoretical defenses of

⁴⁸ While the focus of this chapter is in some ways broader in that not everyone invoking this phrase is arguing from a context of liberal democratic theory, my interest remains primarily with those who make arguments that have application in a liberal democratic context. There are numerous communitarian or republican arguments for invoking religious priority, for example. Or, for further illustration, I am clearly avoiding arguments rooted in theocracy. My scope, therefore, is limited to those positions that can apply to liberal democracy; see the analysis of Proposition (3) in Part II of this chapter for more on this point.

religious distinctiveness, in the case of religious priority I will focus on claims made in American political discourse. As alluded to in the introduction, these claims spring most frequently from a discourse influenced by a particular historical development. I am particularly interested in the *way* the category of religion is used as a strategic grab for political power. I will ultimately argue that the “first freedom” concept, when intended to invoke religious priority, is an inappropriate and misleading political tool.

Motivating Concerns and Outline

During the 2012 vice presidential debate, moderator Martha Raddatz asked the two candidates, incumbent Vice President Joe Biden and Congressman Paul Ryan, both Catholics, to talk about the relationship between their faith and their political positions on the issue of abortion. After stating that his personal position was pro-life, Ryan indicated that Governor Mitt Romney’s presidential administration would likewise promote pro-life policies. He continued:

What troubles me more is how this administration has handled all of these issues. Look at what they’re doing through “Obamacare” with respect to assaulting the religious liberties of this country. They’re infringing upon our first freedom, the freedom of religion, by infringing on Catholic charities, Catholic churches, Catholic hospitals. Our church should not have to sue our federal government to maintain their religious liberties.⁴⁹

⁴⁹ Paul Ryan, “2012 Vice Presidential Debate,” Washington, D.C., National Public Radio, 11 October 2012, <http://www.npr.org>.

In the debate, Ryan placed a careful, deliberate stress on the phrase “first freedom” in his answer, underscoring the conceptual foundation of his policy position. Both Ryan and his presidential running mate Romney invoked the phrase repeatedly in their 2012 campaign. The idea behind the phrase, however, is not unique to the conservative movement. As will be discussed in the coming sections, the phrase has appeared in speeches by previous presidents and many vocal advocates of religious liberty in the public sphere, yet its significance remains ambiguous. Designating any freedom as the “first freedom” could imply any one of the following claims, or any combination of them:

Proposition (1), sequential: It refers merely to sequence, the fact that an idea appears first in a given list. In this case, the religion clauses together appear first among all guarantees in the Bill of Rights.

Proposition (2), historical: It invokes priority placed on a concept by a tradition. In this case, it may refer to the high valuing of religious liberty specific to US history.

Proposition (3), conceptual: It suggests a theoretical priority of one interest over others. In this case, religion by its very nature is of primary significance among state concerns.

The phrase as applied to religion is frequently used in a manner that overlaps more than one of these propositions, with no attempt to distinguish or to clarify the sense in which the term is used. Yet the ideas communicated by each sense of the term differ radically

from each other. To further complicate issues, the status of religious liberty as the “first” freedom has long faced challenges from other freedoms vying for the position.

This chapter unpacks the different implications of this concept and ultimately argues that its usage asserts the priority of religious interests without adequate theoretical foundation. In Part I, I trace the development of attempts to establish what constitutes the first freedom in US political and legal rhetoric. This section will illustrate that the phrase “first freedom” has not always implied conceptual priority and that it has not always applied to religion, challenging the self-evident status of this claim with respect to either Proposition (2) or (3). In Part II, I will respond to each proposition and argue that none of them makes a sufficient case for religion as the first freedom with any meaningful policy implications. In particular, I will suggest that attempts to appropriate the American tradition to support such claims prove problematic and that arguments about the political priority of religious interests misconstrue the significance of religion in relation to other ethical beliefs. The case for the theoretical priority of religion benefits from the ambiguity of its multiple potential meanings to promote particular interests. I conclude that the phrase “first freedom,” as currently employed, is misleading in public discourse and relies on faulty implicit assumptions. I suggest that the phrase as currently applied to religion should be abandoned.

PART I: HISTORY OF THE “FIRST FREEDOM” LABEL

Origins

On 6 January, 1941, President Franklin D. Roosevelt gave his State of the Union address to the 77th Congress. The world was engaged in early stages of World War II. Though the attack on Pearl Harbor that would not draw the United States into the war for another ten months, the tension in the country stemming from world events was palpable. In response, Roosevelt gave his famous “Four Freedoms” speech, detailing the US plan for foreign policy. He painted a vision of a world characterized by “four essential human freedoms”:

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.⁵⁰

⁵⁰ Franklin D. Roosevelt, “State of the Union Address (Four Freedoms),” speech, Charlottesville, VA, the Miller Center at the University of Virginia, 6 January 1941, <http://millercenter.org/president/speeches/detail/3320>.

Although there was no implication of any rank ordering of those freedoms, to suggest for example that the second was any more important than the third or fourth, the ordering became iconic, and the number of each freedom was often used in popular culture as a tag of sorts. For example, it became commonplace to discuss the role of teachers in supporting the “first freedom,” free speech, by helping students to express themselves. In such an exhortation to teachers, Professor E.B. Dike even refers to the interrelatedness of the “first” and “fourth” freedoms, the latter freedom from fear, and how they mutually support each other.⁵¹

The actual phrase “first freedom” as a stand-alone concept was popularized widely by a 1946 volume by Morris Ernst, a lawyer, co-founder of the American Civil Liberties Union, and high profile advocate for journalists’ rights.⁵² He wrote a book entitled *The First Freedom*,⁵³ detailing the right to expression in the form of the printed word, followed by an authorized second volume of the same title by Bryce Rucker in 1968.⁵⁴ Freedom of the press represents for Ernst the most typical expression of the freedom of speech. Written just a few years later, it does not even bother with a reference to the “Four Freedoms” speech, reflecting how quickly the phrase became a part of the US lexicon.

The designation of speech as the “first freedom” was not universally employed, however. Though the phrase commonly referred to Roosevelt’s speech, there were

⁵¹ E.B. Dike, “The First Freedom and Its Implications for Teachers and Learners,” *College English* 6.1(1944): 34-38.

⁵² Norman Rosenberg, “The ‘Popular First Amendment’ and Classical Hollywood, 1930-1960: Film Noir and ‘Speech Theory for the Millions,’” in *Freeing the First Amendment: Critical Perspectives on Freedom of Expression*, eds. David S. Allen and Robert Jensen (New York: New York University Press, 1995), 160.

⁵³ Morris L. Ernst, *The First Freedom*, (New York: Macmillan, 1946).

⁵⁴ Bryce W. Rucker, *The First Freedom* (Carbondale, IL: Southern Illinois University Press, 1968).

occasional references to the Establishment Clause for its sequential ordering. Many have suggested that issues of establishment and religious liberty, the latter represented by the Free Exercise Clause, are highly interrelated. Due to these two dimensions, religion is often referred to as “a coin with two sides,”⁵⁵ as Clinton among others has referred to it. However, they are also “frequently in tension”⁵⁶ and are most commonly addressed separately. In the first decade after its introduction, the phrase was occasionally reappropriated from its use as associated with Roosevelt and imbued with this religious connotation. In such cases, authors would often make explicit reference to the sequential ordering of the guarantees of the First Amendment. Note, though, that even in this context the phrase is used primarily as a part of challenges to strong separationist claims made regarding the establishment clause. For instance, Wilfrid Parsons⁵⁷ in 1948 and Milton Konvitz⁵⁸ in 1949 invoked the “first freedom” phrase to challenge the highly separationist decision of *Everson v. Board of Education*⁵⁹ decision of 1947. This use of the phrase did not catch on to the same degree of popularity as its use in reference to free speech, however, especially since the “Four Freedoms” ideals were publicly enshrined throughout the rest of the 1940s in various institutional capacities.

⁵⁵ Bill Clinton, “Religious Liberty in America,” speech, Vienna, VA, *U.S. Society & Values* 2.1(12 July 1995): 5-9.

⁵⁶ *Locke v. Davey*, 540 U.S. 712 (2004).

⁵⁷ Wilfrid Parsons, *The First Freedom: Considerations on Church and State in the United States* (New York: Declan X. McMullen Co., Inc, 1948).

⁵⁸ Milton R. Konvitz, “Separation of Church and State: The First Freedom,” *Law and Contemporary Problems* 14.1(1949): 44-60.

⁵⁹ 330 U.S. 1. (1947). In upholding the constitutionality of a New Jersey school district covering the cost of transportation for students to parochial schools, *Everson* actually set out highly separationist rhetoric. Both the court majority and the dissenting voices called for a wide gap between religious and state actors. This case introduced Jefferson’s phrase “wall of separation between church and state” to US case law.

It is important to notice, however, that in this first decade, the use of the phrase could easily support this flexible usage because in either sense it was clearly associated in such instances with sequential ordering, with respect either to the Bill of Rights or the First Freedom Speech. There is no explicit reference and very little, if any, subtle implication of the phrase referring to logical priority. Unlike in its present day usage, it was merely used as an epithet without placing heavy conceptual significance on the fact of its being “first.” The designation “first”, at this time and within the specific contexts to which it typically applied, can be understood as merely reflecting the fact that whatever freedom it was used to referred to appeared first sequentially on some list, whether the Bill of Rights or the “Four Freedoms” speech. Note that no advocates of religious liberty seized upon Roosevelt's phrase “the second freedom” as a rallying cry.

Other Applications

Over time, some authors began to replace free speech with whatever dimension of liberty they thought made possible all others. “First” became a label for whichever freedom was the *sine qua non* of liberty within a state, that which is logically prior to the existence of any other. In consideration of the plight of blacks in the nineteenth century, Kolchin identified the emancipation as the “first freedom.”⁶⁰ It makes no sense to speak of the right to express one's opinions if one is excluded from the political sphere entirely. Without recognition as a full political being, rather than three fifths of one but without any political standing, one has no ground from which to invoke any other freedom. Thus,

⁶⁰ Peter Kolchin, *First Freedom: The Responses of Alabama's Blacks to Emancipation and Reconstruction* (Westport, CT: Greenwood Press, 1972).

in terms of logical priority, Kolchin argued that the freedom from slavery and inclusion in the political system together represent the first freedom.

Using the same logic to radically different ends, Charlton Heston once argued, before the National Press Club in 1997, in defense of the National Rifle Association that the Second Amendment was, in fact, “more essential” than the First Amendment:

It is time [young Americans] found out that the politically correct doctrine of today has misled them. And that when they reach legal age, if they do not break our laws, they have a right to choose to own a gun—a handgun, a long gun, a small gun, a large gun, a black gun, a purple gun, a pretty gun, an ugly gun—and to use that gun to defend themselves and their loved ones or to engage in any lawful purpose they desire without apology or explanation to anyone, ever. This is their first freedom.⁶¹

Following the same rhetorical format as Kolchin, Heston implies that religion and speech are meaningless if one’s safety is threatened. A protected platform is a prerequisite for speech. Therefore, in terms of pure conceptual priority, the right to bear arms must precede the others. However, in important contrast to modern usage of the phrase, and in opposition to its use as applied to the Establishment Clause, the implication here was one of clear intent: “first” exclusively refers to the conceptual priority of the subject. No alternate senses of the phrase obscure the idea communicated by its employment.

⁶¹ Peter Manseau, "Is Religious Freedom Really Primary?" web, Campaign Stops: Strong Opinions on the 2012 Election, *New York Times*, 26 October 2012.

A comparable phenomenon appears in early- to mid-twentieth century American jurisprudence in the form of the preferred freedoms doctrine. Edward White observes:

The preferred position cases decided by the Supreme Court, beginning in 1937, reveal intuitions by several Justices, with Brandeis, that First Amendment rights were in a different category from other constitutional liberties and deserved greater constitutional protection than police power analysis afforded them. Those Justices intuitively concluded that the reason for this enhanced protection for First Amendment rights lay not only in the close connections between free speech and democratic theory, but in the enhanced significance of democratic theory itself as a defining aspirational feature of American civilization.”⁶²

This idea of “preferred freedoms”, that certain ideas demand special attention by the state, seeped into other areas of law and influenced the development of heightened scrutiny.⁶³ Legal theorists like Meiklejohn⁶⁴ continued this tradition of placing freedom in the sense of self-expression at the center of democratic society. As conflicts over speech topics like hate speech rose in the public awareness and sparked national discussions about the place of free speech in society, speech became more and more of a

⁶² G. Edward White, “The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America,” *Michigan Law Review* 95.2(1996): 299-392, 329.

⁶³ By default, US laws are evaluated under a rational basis test, which is deferential to the state and requires proof that a policy reasonably achieves a legitimate, non-arbitrary interest. In certain cases, however, the court raises the level of scrutiny and places the burden of proof on the state, requiring that it do more to prove the essentialness of its course of action. Bill of Rights guarantees, for example, typically receive a strict scrutiny treatment. See also: Howard Gillman, “Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence,” *Political Research Quarterly* 47.3(1994): 623-653.

⁶⁴ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper and Row, 1948).

central issue. In the wake of the public conversation, speech came to be viewed as “indispensable to the functioning of democratic politics.”⁶⁵

The preferred freedom doctrine treated religion as a subset of speech, included under the broader category of related First Amendment guarantees. Religion was considered one value among many that citizens have a right to express, fulfilling a similar role within democratic society as expressions of political belief or social activism.⁶⁶ Religion becomes, like other instances of speech, part of the discussion about the ideal nature of a society. It is the discussion writ-large about society that drew the attention of the preferred freedoms advocates, not religion specifically.

US Presidents and “First Freedom” Rhetoric

Although, as discussed, the phrase “first freedom” has been attached to a number of different rights over past decades, attempts to identify the singular, central freedom and uses of the phrase itself have shifted almost exclusively toward religious liberty. Journalist Peter Manseau has indicated that the last few presidents have all employed this rhetorical ploy to similar effect. After alluding to comments made by Obama on the subject (to be discussed in the next section), Manseau observes, “Hardly the first president to make such a declaration, Mr. Obama was just putting his own spin on a statement that now seems practically a requirement of the office.”⁶⁷ However, in reality, the implication of the use of this concept varies significantly from one president to the

⁶⁵ White, “The First Amendment Comes of Age,” 342.

⁶⁶ See also Reinhart Koselleck’s discussion of the resurgence of emancipation theory in the 1960s. “The Limits of Emancipation: A Conceptual-Historical Sketch,” in *The Practice of Conceptual History*, eds. Reinhart Koselleck and Todd Presner (Stanford, CA: Stanford University Press, 2002), 254.

⁶⁷ Manseau, “Is Religious Freedom Really Primary?”

next, especially when one considers the different senses which I represent with the aforementioned sequential, historical, and conceptual propositions, that may be implied by the concept.

In 1995, Bill Clinton gave a speech in defense of the recently passed Religious Freedom Restoration Act, part of which would soon be deemed unconstitutional by the Supreme Court in 1997. “Religious freedom is literally our first freedom. It is the first thing mentioned in the Bill of Rights.”⁶⁸ He relies explicitly on the sequential Proposition (1), relying on the simple fact of its presence to suggest its importance without trying to elevate it. He later states, “The First Amendment keeps us all on common ground. We are allowed to believe and worship as we choose without the government telling any of us what we can and cannot do.” Clinton employs the concept to create a perceived neutrality, where one is neither forced toward nor prohibited from engaging in religious activity.

Clinton’s successor to the office, however, invoked the “first freedom” concept in a decidedly different way. In a speech to the American Jewish Committee, George W. Bush said, “It is not an accident that freedom of religion is one of the central freedoms in our Bill of Rights. It is the first freedom of the human soul—the right to speak the words that God places in our mouths.”⁶⁹ His remarks reflect his administration’s general tendency toward the conceptual Proposition (3).

⁶⁸ Clinton, “Religious Liberty in America.”

⁶⁹ George W. Bush, “Remarks by the President to the American Jewish Committee,” speech, Washington D.C., the White House, 3 May 2001, georgewbush-whitehouse.archives.gov.

This emphasis most clearly appears in a major undertaking of the final years of the Bush administration. In 2007 before an executive assembly of the Southern Baptist Convention, Attorney General Alberto Gonzales unveiled the administration's First Freedom Project. The project entailed a number of provisions, including a Department-of-Justice-wide Religious Freedom Task Force, regular public education events to inform religious leaders of their rights and how to address violations, distribution of information, and even a website: firstfreedom.gov.

In explaining the rationale behind the project to the gathering of Southern Baptist leaders, Gonzales stated:

When we talk about religious freedom, we often refer to it as the First Freedom. It is a fundamental part of our Nation's history, and one of our core principles. In the First Amendment to the Constitution, at the top of the Bill of Rights, the Founders declared that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Before free speech, before freedom of the press, before all of these other crucial rights, we put freedom of religion.⁷⁰

Note here the emphasis on sequence as in Proposition (1), but also the clear interpretation of this fact as evidence of support for the conceptual priority of Proposition (3). Gonzales explained further:

⁷⁰ Alberto R. Gonzales, "Prepared Remarks of Attorney General Alberto R. Gonzales at the Meeting of the Executive Committee of the Southern Baptist Convention," speech, Nashville, TN, Department of Justice, 20 February 2007, <http://www.justice.gov/>.

You know, and I know, that this great Nation of ours is the most diverse and tolerant in the history of the world. We have an unrestrained confidence in the promise of man, strengthened by our trust in a higher power. Our Founders were men of faith. They understood that, even before their time, this land was settled by pilgrims seeking religious freedom. They understood the importance of a government that respected and protected the “First Freedom.” As James Madison wrote in his Memorial and Remonstrance Against Religious Assessments: “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”⁷¹

This is an interesting interpretation of this passage of Madison’s, especially since Madison was arguing in that instance for removing religious presence from aspects of public government.⁷² Gonzales, however, points to the negative right indicated here as evidence of a corresponding positive right of heightened interest by the state. Critics have charged that although this religious liberties division claims to protect the interests of all religious groups, as expressed in Gonzales’s remarks, it has in fact primarily directed its attentions to Christian groups, especially fundamentalists.⁷³ This speech was widely circulated by religious groups online as evidence of the Bush administration’s support for religious interests.

⁷¹ *Ibid.*

⁷² For further discussion of Madison, see the follow-up to the discussion of Proposition (3) in Part II of this chapter.

⁷³ Jeremy Leaming, “First Freedom FRAUD: Bush Administration’s Religious Liberty Project Draws Fire from Civil Liberties and Civil Rights Leaders,” *Church & State* 60.4(2007): 4-6.

In the years since the launch of this project, however, there has been little to no visible activity resulting from the First Freedom Project.⁷⁴ The project appears to have subsided in subsequent years. The Special Counsel for Religious Discrimination, an employee of the Civil Rights Division of the Department of Justice and a regular newsletter detailing the Civil Rights Division's advocacy for religious interests appear to be the only remaining public products of the former Attorney General's promise. Consolidation of efforts appears to be a strong statement even for what occurred. While the project may not have resulted in a substantial change for the structure of the Department of Justice or the face of religious liberty in government affairs, the project and the publicity served as a powerful public statement of the Bush administration's position on the priority of religious interests, adding to the charged atmosphere that would manifest most clearly in the last election cycle.

The 2012 Election

In most recent history, the phrase was employed to great lengths as a central theme of the Romney campaign for the 2012 election. Mitt Romney made repeated use of the phrase on the campaign trail. On 3 February, 2012, he wrote an op-ed for the *Washington Examiner* entitled "President Obama Versus Religious Liberty," in which he stated:

⁷⁴ The project has received almost no media attention since its inception, and the www.firstfreedom.gov website reports no regular activity separate from the Civil Rights Division as a whole. Despite what one might expect from Gonzales's speech, the project has not served to visibly raise the status of religion in the public sphere.

Religious liberty is at the heart of the American experiment. As a nation founded in part by religious dissenters, we enshrined it as the first freedom in our Bill of Rights...James Madison put the moral principle behind the amendment succinctly: "Conscience is the most sacred of all property." And accompanying the moral principle came the social principle that only religious liberty could ensure tranquility in a new land composed of men and women of differing faiths...religious liberty and freedom of conscience flow from the common conviction that it is freedom not coercion that exalts the individuals, just as it raises up the nation.⁷⁵

The next day, in his victory speech in Nevada after the state primary, he listed a number of alleged failures of the Obama presidency followed by his alternative strategy. Among these he noted, in response to the controversy over the Patient Protection and Affordable Care Act,⁷⁶ "President Obama orders religious organizations to violate their conscience; I will defend religious liberty and overturn regulations that trample on our first freedom."⁷⁷

On May 12, 2012, Romney gave the graduation speech at Liberty University, in which he stated:

The protection of religious freedom has also become a matter of debate. It strikes me as odd that the free exercise of religious faith is sometimes treated as a problem, something America is stuck with instead of blessed with. Perhaps

⁷⁵ Mitt Romney, "President Obama Versus Religious Liberty," *Washington Examiner*, web, 3 February 2012, www.washingtonexaminer.com.

⁷⁶ See Chapter VI for more discussion surrounding this controversy.

⁷⁷ Mitt Romney, "Victory Speech after 2012 Nevada Primary," speech, Reno, NV, Fox News, 4 February 2012, <http://foxnewsinsider.com>.

religious conscience upsets the designs of those who feel that the highest wisdom and authority comes from government. But from the beginning, this nation trusted in God, not man. Religious liberty is the first freedom in our Constitution.⁷⁸

In the last sentence of this passage in particular, there is a strong stress placed on the connection between the historical priority of religious liberty and the sequential placement of the guarantee. Its location at the *beginning* of the document is stressed. While he values religion as central for other reasons, here he cites the authority of the framers of the Constitution for support, offering as evidence their location of this claim.

In October 2012, closer to the election, the Romney campaign produced an advertisement starring Ryan, targeted explicitly at the Catholic network, stated:

In America, we consider religious liberty our first freedom. That's because there is no constitutional guarantee more precious than our right to the free exercise of religion. As Catholics,⁷⁹ we see our faith as more than an individual right. We see it as a vital part of our community. We celebrate the unique role our church plays in caring for Americans of all faiths, or of no faith at all. Catholic charities and hospitals offer services that hold our society together. But president Obama has

⁷⁸ Mitt Romney, "Commencement Address at Liberty University," speech, Lynchburg, VA, CNN, 12 May 2012, <http://religion.blogs.cnn.com>.

⁷⁹ See the statement released by the United States Council of Catholic Bishops for the Church's official statement about the priority of religion. "Our First, Most Cherished Liberty: A Statement on Religious Liberty," 12 April 2012, www.USCCB.org/.

attacked these essential institutions since virtually the first moment he took office.⁸⁰

The advertisement glosses over the fact that all of the examples he cites are related to state funding of religious institutions, which is more of an establishment issue. He concludes that these represent a violation of individual rights, a move supported on expansion of religious liberty as a “God-given” community, rather than individual, right. And as mentioned, Paul Ryan made a very public invocation of the phrase in the vice presidential debate.

In spite of the fact that the Romney campaign portrayed Obama’s actions as brutally damaging to the interests of religious liberty, Obama’s own statements in fact express a similar sympathy. While they may not agree on implementation, the two share the view that religion takes a special priority among state concerns. At the Iftar Dinner, a celebration of Ramadan, at the White House on 10 August, 2012, Obama began his remarks to guests stating:

Of all the freedoms we cherish as Americans, of all the rights that we hold sacred, foremost among them is freedom of religion, the right to worship as we choose. It’s enshrined in the First Amendment of our Constitution—the law of the land, always and forever. It beats in our heart—in the soul of the people who know that our liberty and our equality is endowed by our Creator. And it runs

⁸⁰ Paul Ryan, “Our First Freedom,” Mitt Romney YouTube Channel, 13 October 2012, <http://www.youtube.com>.

through the history of this house, a place where Americans of many faiths can come together and celebrate their holiest of days—and that includes Ramadan.⁸¹ In this context, Obama actually seems to make an appeal exclusively to Proposition (2) regarding centrality to the tradition, without resting strongly on conceptual superiority against other concerns. On the one hand, in this instance his comments may come across as weaker than Romney's, as he is not referring to a direct conflict of interest over state policy. However, he is speaking in the wake of a number of hostilities perpetrated on Muslim Americans. He is reassuring the Muslim community that the government stands beside it and pledges protection. He is also far more inclusive in terms of which religions he specifically addresses. Romney, on the other hand, tended to follow such comments with references exclusively to the Christian community. Yet the language Obama uses suggests a conceptual similarity in its emphasis on religious liberty as the highest priority.

PART II: ANALYSIS

Arguments about the prioritizing of religious liberty are significant for the fact that they would potentially place the interests of a certain type of citizen at the forefront of state attention. This attention might be leveraged to garner greater shares of social goods, special exemptions, and a host of other privileges. But most importantly from theoretical and especially rhetorical perspectives, the debates about prioritization have the potential to signal to citizens with other pressing needs that their interests are less

⁸¹ Barack Obama, "Remarks by the President at Iftar Dinner," speech, Washington, D.C., Office of the Press Secretary, 10 August 2012, <http://www.whitehouse.gov>.

significant in the eyes of the state.⁸² We turn now to consider the implications of each of the propositions.

The Sequential Proposition (1)

The sequential Proposition (1) points to the position of the religious guarantees as first in the Bill of Rights as evidence of their heightened significance. However, a guarantee's position within an unranked, non-ordinal sequence alone cannot have any significant rhetorical impact *on its own*. If a particular liberty were ranked first alphabetically, perhaps the right to "arms", for example, we would not take that fact as any indication of its philosophical priority. Likewise, it would be meaningless to state with any pride that the right to "petition the government for a redress of grievances" appears sixth in line. It would function as an epithet, an identifying marker with no substantive significance and only rhetorical flourish. The Bill of Rights, for example, has not been understood to list rights in order of their priority. Referring to religious liberty as our "first freedom" by virtue of the fact that the religion clauses appear first in the Bill of Rights would be insignificant in terms of meaning if it did not suggest historical and/or conceptual priority in addition.

We have witnessed above an example of numerical designations serving purely as epithets. Shortly after Roosevelt's speech, the majority of uses of the "first freedom" or "fourth freedom" were references to the ordering in the speech. They serve simply as

⁸² Ultimately, it might best be argued that such discussions of prioritizations of liberty are ultimately false dilemmas. Consider Ronald Dworkin's argument for unity of value, that the idea of values competing with each other and existing in tension is simply an artifact of our attempt to stratify and typologize. Debates about which is more important, for example, liberty or equality, is simply not a legitimate question. *Justice for Hedgehogs* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011).

nicknames, serve identification and allusion purposes only. With a few exceptions like Clinton's speech above, the context in which the phrase is used the majority of the time in contemporary US politics belies such an intention.

Furthermore, the original placement of the religion clauses at the beginning of the Bill of Rights was not by intention. Madison originally wanted the guarantee built into Article I, Section 9 of the Constitution, rather than in a separate list, as McConnell points out.⁸³ In the original proposed ordering, what we now know as the "First Amendment" was third of the list of twelve. Preceding it were an article specifying how many constituents a member of the House could represent and another, which later became the Twenty-Seventh Amendment, stating that changes in compensation could not go into effect until the session after their enactment. The "First Amendment" moved up to its current position only after the first two failed ratification, shortening the list from twelve to ten and moving each guarantee up the list by two spots. The states had no influence on the ordering of the guarantees beyond the denial of their ratification. Thus, Proposition (1) cannot constitute the entirety of its significance given the typical context of its use, and referring to its position so as to ambiguously imply a ranked ordering is all the more misleading.

The Historical Proposition (2)

Proposition (2) makes a historical appeal to tradition, arguing in this case that religion should be given priority because traditionally it has been given such a privileged

⁸³ McConnell, "Believers as Equal Citizens," 1243.

status in this country. While stating that a liberty has held prominence in the past would indeed strike a chord with a significant portion of a US audience, it is neither uncontested nor clear what the implications of that would be. Religious liberty is not explicitly given priority over other interests in the Constitution; therefore, its priority must use a much more extensive claim about historical context in order to hold weight.

While tradition may in fact hold substantial weight in political argumentation, it is a less direct argument than it appears on its face. Arguments from tradition rely on an ongoing consensus about both what constitutes the tradition and the importance of following the tradition. It is a claim that has embedded in it a number of other implied claims about what a political legacy means for the contemporary era. Proposition (2) makes at least the following set of assumptions, that: (a) the United States has traditionally held a certain value, (b) the value continues to be relevant to contemporary politics, and (c) application of the value would require a particular set of present-day policy outcomes.

Recent scholarship challenges common beliefs about just what the early values of the American republic were. This work complicates the translation of these traditional values into the contemporary prioritization of religion in the sense implied by the phrase “first freedom.” Anthony Gill demonstrates, relying heavily on an analysis of early US history, that respect for individual liberties of the sort suggested by the phrase varies drastically according to the interests of legislators rather than according to ideology. He observes, “[P]oliticians take into account their own political survival (i.e., the ability to get reelected or stave off a coup), the need to raise government revenue, and the ability

to grow the economy when writing laws pertaining to religious freedom.”⁸⁴ He bases this claim on a comparative analysis of several regions, but his exploration of the colonies and early states yield the same results: when political interests are threatened by powerful enough forces, religious freedom remains high. Without these pressures, religious liberty appears severely limited. The expression of value for religion may not translate into practical respect for religious interests that lack a strong voice in or influence over society. Minority religious groups in the early United States did not experience the full benefits of religious liberty until they crossed a threshold of power. Political interests and threats to those interests, he finds, serve as superior predictors of the degree of religious liberty than a region’s ideological stance toward the status of politically disadvantaged religious minorities. In spite of any ideological declaration of respect for minority religious beliefs, we see in practice that the conferral of respect for specific religious groups and practices in fact was more of a recognition of the ability of those groups to cause trouble if their demands were denied. Power dynamics explain religious liberty better than a deep-seated respect for religion.

Likewise, David Sehat challenges two interpretations of US history common in the public sphere: (a) as conservatives tend to argue, that the early republic placed high value on individual religious liberty in apposition to politically dominant religious interests, and (b) as liberals tend to argue, that the early republic placed high value on

⁸⁴ Anthony Gill, *The Political Origins of Religious Liberty* (New York: Cambridge University Press, 2008), 9. This project is especially interesting for its unique application of a rational choice model to the historical development of religious liberty. By paying particular attention to the flow of interests, he is able to track consistencies in the direction of growth such as those suggested in this passage. He challenges ideational and structural accounts of the development of religious liberty. See Chapter IV for an analysis of these issues in the United States in the twentieth century.

religious neutrality of the state toward religion.⁸⁵ His findings complement Gill's as he demonstrates that throughout more than the first half of US national history, minority religious positions were consistently oppressed and that the majority religion of a region was often used to isolate the less powerful. Those who expressed unpopular religious positions, and especially those found guilty of the charge of "blasphemy" against the religious views of the majority, were frequently jailed for their dissent. Contemporary audiences tend to read their own biases into early American discussions of freedom, going in either direction, regarding the significance of guarantees of religious liberty. In practice, he confirms, those who possessed the full freedom to practice their religion were those with clout substantial enough to infiltrate the majority position.

These works suggest that that the implication of the United States' historically high value placed on religion is at best indeterminate with respect to the policies in defense of which it is often invoked. Even if the legitimacy of the theoretical value placed on religious liberty could be considered, the darker practice of religious liberty in US history challenges attempts to bring the past to bear on present circumstances as often invoked by such projects.

Perhaps most importantly, in particular regarding attempts to combine Propositions (1) and (2), those who would point to the First Amendment as evidence of the traditional weight of religious liberty among the priority of the framers ignore a crucial issue: incorporation. As explicitly written, the First Amendment only applies to the federal government: "Congress shall make no law respecting an establishment of

⁸⁵ David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011).

religion, or prohibiting the free exercise thereof...” It was not until the mid-twentieth century, 1947 and 1940 respectively, that the Establishment Clause or the Free Exercise Clause became binding on the states. The Bill of Rights was originally a guarantee that certain issues would be left to the states, a compromise with the Antifederalists. But to say that the federal government could not establish a national religion in no way implied that the state governments could not establish an official state religion. Massachusetts, the last state government to disestablish its state church, did not do so until 1833.

Correspondingly, the Free Exercise Clause conferred no such individual protection of belief in the way commonly understood today. Whatever the perspective on religious liberty at the time, the First Amendment was not enforcing religious freedom in the sense that the phrase would convey in a contemporary usage. Clearly, a high value was placed on religion in some sense in the early American republic, but equating the relationship between the United States and its first citizens in regards to religious liberty with its relationship to its current citizens grossly conflates historical contexts.

Part of the consideration at play involves what to make of the tradition for the modern era. Religion was clearly a central priority for many of the founders. But what does that imply for the modern era? What are we to make of that? Which of the possible policy consequences could that suggest? Ultimately, this chapter deals with a question of how we are to understand ourselves in relation to the past and what the past means for us today. Even if we accept that tradition and custom are acceptable means of justification within a liberal democratic theory, it is exceptionally unclear as to what those values would mean in the politics of the present. What the past means for us today is by no

means answerable by simply positing that at some point in the past our forbearers held a certain value.

The Conceptual Proposition (3)

Proposition (3) implies that there is something inherent in religion that makes it central to the interests of the state, irrespective either of its priority having been codified or of its central value to the tradition. It posits that religion per se is of heightened importance.

There are multiple ways to argue for the priority of religion. Theocratic theories of state, for example, provide the most obvious instances of explicit elevation of religion. Additionally, republican or communitarian theories provide a possible base from which one might argue that the state has a particular, vested interest in promoting religion within a society and privileging the interests of the religious over others. Whenever the collective interest has the potential to trump individuals, there exists the potential for advocating religion as a crucial binding agent for society. It can moor society with the morals it teaches. It can create a base for culture. It can serve many functions that would be useful to a state actor interested in actively steering the ship of the state and the people within it. I do not mean to claim that religion has no value beyond instrumentality, but rather that it has the potential to fit neatly within a number of political-theoretical frameworks. I argue, however, that elevation of religious interests cannot fit neatly with a liberal democratic framework. The interests of religious groups cannot be front and center without transgressing the liberal democratic ideal.

To be clear, some have argued that liberal democracies need not necessarily eschew religion altogether. Speaking specifically to a subset of such theories, namely political liberalism, Cécile Laborde argues that “political liberalism, as a theory of justice, is *inconclusive* about the public place of religion.”⁸⁶ She suggests that it is possible for a state to be either mildly separationist or even mildly accommodationist (having a mild degree of establishment) without necessarily violating the values of liberty and equality for any of its citizens. As long as a state is not aggressively separationist or militantly established, and as long as the state adequately respects religious freedom, there is a range of possible dispositions toward religion that still might ensure that a political theory remain within the ambit of political liberalism (or more broadly, liberal democracy).

My case does not hinge upon the success of Laborde’s claim.⁸⁷ But her contribution is important for the following reason: even if there existed a liberal democratic state that was only mildly religious and fit Laborde’s prescription, she would still not consider that state to be authorized by the principles of liberal democracy to confer privileges upon its religious citizens. The mildly established state would be

⁸⁶ Cécile Laborde, “Political Liberalism and Religion: On Separation and Establishment,” *Journal of Political Philosophy*, early view online, viewed 24 July 2011, 1. See also Cécile Laborde, “Secular Philosophy and Muslim Headscarves in Schools,” *Journal of Political Philosophy* 13(2005): 305–329. For a contrasting position, see Amy Gutmann, “Religion and State in the United States: A Defense of Two-Way Protection,” in Nancy L. Rosenblum, ed., *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, NJ: Princeton University Press, 2000).

⁸⁷ Although ultimately I find her argument weak, given that my strongly content-free version of liberal democracy would disagree with even a non-privileging endorsement, following the market place of ideas approach instead.

justified in promoting religion broadly,⁸⁸ perhaps engaging in mild, non-coercive public religious exercises, and in acknowledging the relationship between the church and the state. But it would never be allowed to promote religion in any way that deprived nonbelievers of benefits or that decreased opportunities.⁸⁹

So even if one were able to justify a religious institution that was also a liberal democracy, it would still not justify the rhetoric employed by advocates of Proposition (3) to claim that the interests of religious citizens were more important to the state than those of nonreligious citizens. Thus, in order for Proposition (3) successfully to achieve its aim of defending religious priority, it would have to refer to a theoretical foundation other than liberal democracy, one that allows for the explicit privileging of a particular set of interests such as religious interests.

If one were to intend the latter position, however, then using the phrase “first freedom” would be an inappropriate or at least misleading means of doing so. The way that the phrase “first freedom” is used in the present day US context tends to imply particularly individual rights, following a particularly liberal democratic framework.

⁸⁸ Such a liberal democratic, mildly religious state could promote either its particular state religion or religion in general, but it could not do so to the exclusion of the nonreligious or of religions other than the state religion.

⁸⁹ Just as it would not be allowed to deprive individuals of benefits, it would also not be able to deprive them of the right to participate as citizens, including, for example, gays in the military (as in the US dispute over the Don’t Ask Don’t Tell policy) or Sikhs as members of the Royal Canadian Mounted Police (see the 1990 dispute over Baltej Singh Dhillon’s challenge exclusion). Note, however, that these policies are at times argued the basis of otherwise legitimate state interests, such as the safety and wellbeing of members of the military or the military’s interest in uniformity. See the discussion in Chapter II under the section “On the Appropriateness of Instrumental Difference” for more on how exemptions might be a legitimate means of protecting this right. However, again, given the need for a balance of interests, the right to participate does not *automatically* in itself necessitate exemptions. For a strong statement about the right of civic participation, see especially Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (Los Angeles: University of California Press, 1984); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It* (Cambridge, MA: Harvard University Press, 1996).

Consider Justice Clark’s opinion in *School District of Abington Township v. Schempp*, which ended daily, ritual reading of the Bible in public schools, which stated, “While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.”⁹⁰ Although the Court has become increasingly sympathetic to religion in decades since, this perspective of Free Exercise as an individual as opposed to group right endures in current legal precedent, contrary to the perspective expressed above by Ryan. This echoes a theme in US jurisprudence referring to rights as primarily conferred on an individual basis, regardless of whatever the state of values may have been at the beginning of the United States government. Thus, when we observe the phrase “first freedom” employed in American public discourse to imply the conceptual Proposition (3), it tends to do so in a way that is highly problematic and that also severely exploits the ambiguity inherent in the phrase.

Theoretical Arguments for Priority

In this section I will examine arguments for the uniqueness of the substance of religion. I focus on two authors in particular, John Finnis and Michael McConnell, because, although neither of them would be considered liberal democratic theorists, they both make freestanding normative arguments that tend to suggest the priority of religion without linking it to a specific theory. By making such arguments detached from any theoretical framework which they might hold in other contexts, they make the clear

⁹⁰ 374 U.S. 203 (1963).

suggestion that religion deserves priority irrespective of the theoretical foundation. They make their arguments in such a way that they might apply even with a conventional, explicitly liberal democratic framework, and both invoke the historical authority of the Founders, in particular Madison. Accordingly, these approaches could challenge the claim I made in the preceding section about the inconsistency of the phrase “first freedom” with liberal democracy.

Michael McConnell makes the case both for religious priority⁹¹ and exemptions in his different works.⁹² He defends the former in his article “Religion and Constitutional Rights: Why Is Religious Liberty the ‘First Freedom?’”⁹³ He builds his defense on a combination of Propositions (2) and (3), as he hopes to defend it “both in chronological and logical priority.”⁹⁴ He points to arguments made by early American thinkers, locating in their work what he considers arguments for religious priority. He says:

Madison’s view of the grounding of religious freedom... was not a deduction from the personal autonomy of the individual, but an inference from the sovereignty of God and the duty of human beings to obey God as they understand Him. Religious exercise, under this view, is an inalienable right because it follows from the duties owed to God by His creatures. Indeed, religion is defined in the Virginia Declaration of Rights as “the duty which we owe to our Creator.” Men have no

⁹¹ Michael W. McConnell, “Religion and Constitutional Rights: Why Is Religious Liberty the ‘First Freedom?’” *Cardozo Law Review* 21(2000): 1243-1265.

⁹² Michael W. McConnell, “Accommodation of Religion,” *Supreme Court Review* (1986): 1–59; “Origins and Historical Understandings of the Free Exercise of Religion,” *Harvard Law Review* 103(1990): 1409–1517; “Accommodation of Religion: An Update and a Response to Critics,” *George Washington Law Review* 60(1992): 685–742.

⁹³ McConnell, “Religion and Constitutional Rights.”

⁹⁴ *Ibid.*, 1244.

right to consent to civil government that would stand in the way of their duties of the Universal Sovereign.⁹⁵

In his exclusion of other ethical frameworks, he implies the uniqueness of arguments inspired by relation to divinity. He suggests here with this invocation that the content of such beliefs, by virtue of their coming from God, is inherently superior by virtue of its source. Yet employing Madison's statement in an attempt to elevate religious *over* nonreligious interests drastically takes the ideas out of their context.

Similarly, in his article "Does Free Exercise of Religion Deserve Constitutional Mention?" Finnis defends the importance of maintaining religion as a discrete guarantee in a liberal democracy.⁹⁶ He identifies the hypothesis he considers "lethal to religion": "that religion is just one deep and passionate commitment amongst others."⁹⁷ He attempts to distinguish religion from mere preference or "expressions of distaste or disapproval."⁹⁸ He argues, "Religion deserves constitutional mention, not because it is a passionate or deep commitment, but because it is the practical expression of, or response to, truths about human society, about the persons who are a political community's members, and about the world in which any such community must take its place and find its way and means."⁹⁹ While he does not use the explicit language of first freedom, his rationale repeatedly labels religion the most beneficial of all ethical frameworks and

⁹⁵ *Ibid.*, 1246.

⁹⁶ See John Finnis, "Does Free Exercise of Religion Deserve Constitutional Mention?" *American Journal of Jurisprudence* 54(2009): 41-66, 65. Though Finnis does not fully endorse here the liberal democratic approach, he frames his response so as to apply even to liberal democracies and particularly to the US Constitution.

⁹⁷ *Ibid.*, 44.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 56.

therefore of greatest interest to the state in terms of protection, functionally creating the same effect. Interestingly enough, however, Finnis does not advocate religious exemptions as a means of applying the priority placed on religion, as do many proponents of multiculturalism and religion in particular. He takes the approach not of carving out accommodations on an individual basis but of directing the entire machinery of the state toward the interests of the religious. Because he believes the content of religion to be of great significance, he argues that its priority demands an explicit place in constitutional documents in order to codify its place of privilege.

In contrast to Finnis, some like Bedi¹⁰⁰ argue that religion is so unique in its features that the needs of religious citizens cannot adequately be addressed without special categorization. This approach emphasizes the distinctiveness of religion without explicitly demanding priority status. One could easily hold both positions, that religion is prior *and* that it demands unique treatment, but the two positions do not necessarily go together. Read broadly, one might extract from Finnis's argument the milder claim, similar to Bedi's, that religion, if not of greater importance, is at least a special enough case to demand distinctive consideration, though the tone of the piece strongly suggests otherwise.

Again, whatever Finnis's larger framework, he is explicitly inserting himself into a discussion that at least includes liberal democratic theory in engaging the question of whether religion is distinctive in some crucial way. He says further, "Much more clearly than 'thought' and 'conscience,' the term 'religion' connotes activities which extend

¹⁰⁰ Bedi, "Debate: What Is So Special About Religion?" See Chapter II of this project.

from the individual to the associative and social, and from the private to the public.”¹⁰¹ If this is the case, then it is functionally indistinguishable from culture. Religion would not itself be a distinctive value but would be subsumed under multiculturalist approaches to respecting diversity. But this claim of Finnis’s also violates the principles of liberal democracy, to which he implies that his arguments may be applied. For the state to make a declaration that a particular set of ideas constitutes the best life for its citizens, produces the best version of community, would be to allow the state to declare what shall be considered orthodox.¹⁰² It would require the state to violate the principles of the market place of ideas by declaring which ways of life are superior, which beliefs most valuable, rather than allowing the public to do so.

He ignores the following point made by Madison in the Memorial: “Because finally, ‘the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience’ is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us.” Madison actually emphasizes the parity of claims of conscience with natural reason, which counteracts an interpretation based on an imbalance. Likewise, he says in the same document, “Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” All rights here seem to be guaranteed by

¹⁰¹ Finnis, “Does Free Exercise of Religion Deserve Constitutional Mention,” 61.

¹⁰² See the discussion of state orthodoxy in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in Chapter V.

a similar provision against government invasion. These principles are actually perhaps better accounted for by some of Finnis' stated ideological nemeses. In discussing the inspiration for his piece, Finnis targets a recent volume by Christopher Eisgruber and Lawrence Sager that directly argues that religion is no more valuable than other forms of belief.¹⁰³ Though this position does not demote religion since all beliefs are held in high regard, it does demote religion from a position of privilege to a status on par with all other forms of ethical belief. Eisgruber and Sager argue for a principle they call "equal liberty" which does not segregate liberty by substantive area but instead provides principles that can govern all applications. Those who would make arguments about religious priority in a way that can successfully extend to liberal democracy, or be self-evident and applicable across systems as they most commonly appear to make arguments must actually be more explicit about engaging the beliefs of such systems, rather than presuming their principles to be readily translatable.

CONCLUSION: BELIEF AND RECONSTRUCTING THE AMERICAN ORIGIN NARRATIVE

From where does this impulse to assume the self-evident priority of religion stem? What is it about religious beliefs that distinguishes them from other values? Perhaps part of the confusion stems from the fact that people forget that religious belief is not the only type of belief protected by the state. Historically, religion has been the source of a significant amount of turmoil, and many have been oppressed on the grounds of

¹⁰³ Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007).

religious belief. Even within the United States, members of minority religions have long experienced severe forms of discrimination on the basis of their belief.¹⁰⁴ As is part of the common narrative, many settlers who came to the United States came in search of religious freedom due to the historical oppression in their homelands. Moments in time such as the Spanish Inquisition or the political mistreatment of Catholics in the British Isles, for example, are permanently etched into the memory of the collective American conscience. Thus, the fact that many who participated in the construction of the early American republic were explicitly motivated by a desire to ensure religious protection has become emblematic of the purpose of government for many Americans. The narrative has also been passed down through a land that has placed a high priority on the centrality of religion to society, increasing the prevalence of arguments for elevated status in the present day.

It may be defensible to argue that religious liberty ranked highly among the priorities of the founders, though the exact form of religious liberty may not match exactly the form it commonly takes today in public discourse. But this sequencing of priorities could also be explained as a response primed by the religious oppression familiar to or experienced by many settlers in Europe during the sixteenth through eighteenth centuries, with the sequence reflecting germaneness rather than absolute conceptual priority. Political thinkers acting in the wake of such chaos might very well be highly interested in shaping the state so as to avoid a similar situation. They may very

¹⁰⁴ See Sehat, *The Myth of American Religious Freedom*.

well have placed religion at the forefront of their concerns. However, it does not necessarily follow that this stands as an argument for the priority of religion at all time.

There are grounds for portraying the liberty as we see it applied to religious groups as consistent with its application elsewhere. As is highlighted by the liberty of conscience theorists such as John Locke, there are innumerable dimensions on which the state cannot force belief. A liberal democratic state could not force a citizen to declare a faith in Jesus Christ or Mohammed. But also note that no matter which party is in power, it cannot demand declarations of faith in the party platforms. The state could not force citizens to sign a radically populist statement that they believe that the rich do not deserve what they have and are obligated to give everything to the poor, whether by choice or forced through taxation. Neither can it force a radically capitalist declaration that the poor are worthless because they have proven themselves weak, thereby disavowing any facets of a welfare state. Liberty of conscience is the backdrop for religious liberty. The essence of liberty of conscience is that it protects the individual from the intrusion of the state into the citadel of the mind. The state is expected to respect the ideas belonging to each individual. Belief is in general entirely protected, with the possible exception of those minimal conditions required for a society to function, which include at least the barest form of toleration and respect for the rules of operating in a plural system.¹⁰⁵

It is not self-evident why the interests of religious believers would be any *more* deserving of attention by the state than any other form of belief. The obligation of the

¹⁰⁵ Although, see Chapter V for further discussion of the controversy surrounding this claim.

state to avoid imposing on belief directly is not unique to religion. Unless otherwise justified, all citizens have equal moral grounding. To operate otherwise, without sufficient justification, generates an inegalitarian system.

Another reason for the unique attention placed on religion may be a product of the textual structure of the US Constitution. As the oldest functioning written constitution, the US document has had the longest history of case law stemming from it. As it is also among the shortest of such documents, small phrases or clauses are often the ground for numerous cases. Justices are constantly called on to provide guidelines for applying guarantees that may consist of only a few words to a few cases. In order to invoke judicial review, the justices must invoke a specific portion of the Constitution that is alleged to be in conflict with a state law, and often the justices will point to a specific clause. Thus, in spite of those statements that frequently refer to a measure of unity among the clauses, in practice we have relatively distinct lines of cases addressing the guarantees of free exercise, establishment,¹⁰⁶ speech, press,¹⁰⁷ assembly, and petition. Yet in contrast, consider again the preferred freedoms approach. It treats the individual First Amendment guarantees as united by their treatment of expression. Though discrete areas of law have arisen to address the needs unique to each area of application, there are ultimately no fundamental distinctions among them in that their purpose is to prevent the state from restricting belief from imposing it upon its citizens. One could imagine another phrasing of the text employing the preferred freedoms model that read:

¹⁰⁶ Free exercise and establishment principles are often labeled two sides of the same coin, and as such many cases invoke both. Yet there are also numerous cases that clearly fall under only one or the other.

¹⁰⁷ Press is also commonly lumped with speech, although cases such as *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Court debated whether to grant unique protections to members of the press and declined, show that it at least has the potential to raise its own concerns.

“Congress shall respect the liberty of its citizens, as, for example, in the cases of religious exercise, speech, press...”

But whatever the origin of this impulse, in practice we observe advocates of religious priority consistently exploiting the ambiguity surrounding the phrase “first freedom” to elide the fact that they do not have a clear, straightforward argument for their case. While there is clearly room for a theoretical argument for religious priority, these are not the types of arguments that get invoked in practice. If there were any hope for such an argument within a liberal democratic framework, paying direct attention to the type of argument employed in public discourse would be a crucial first step.

CHAPTER IV

LAW AND RELIGION: FREE EXERCISE IN U.S. JURISPRUDENCE

INTRODUCTION

In the preceding chapters, I have argued that the issues of religious distinctiveness and religious priority have remained severely underdeveloped. Arguments invoking such privilege have been employed carelessly in political discourse in a way that obscures productive discussion, and academic literature has largely ignored this particular dimension of analysis. Courts, however, are often obligated to weigh in on these issues, as, for example, when determining how to interpret the Free Exercise Clause.

But the US Supreme Court in particular finds itself in unique positions precisely because the justices are not released to engage in full normative debate over the issues. They are at least bound to justify their interpretations in some form of interpretive framework and expressing a way of relating to the document of the Constitution. Considering that the status of the political category of religion is itself mired and confused, and given the additional challenging factor that the Court faces in mooring its positions in the Constitution and its history of jurisprudence, there is a need to assess systematically US free exercise jurisprudence in terms of its relation to religion as a political category.

This chapter presents an assessment of how the United States judiciary has addressed this question in practice, bound as it is by its founding document and barred

from a free normative debate over such a category. Its purpose is to put the larger theoretical debate discussed thus far into relief by exploring how a set of key decision-makers respond to the question. The story of the Court's evolution on free exercise issues is already extensively documented in the legal literature.¹⁰⁸ Since these cases have all been deeply analyzed along numerous other dimensions, this chapter will contribute a crucially missing layer, which has been brought to light by the preceding chapters, by focusing on questions such as: Does the Court make use of religion as a political category to assign special treatment? How does the US court's position on the issue over time stand in relation to the framework I have set up? What does the court think religion as a concept is? Does the court treat religion as a category of belief separate from other forms? In what ways? What justifications are used? What features of a religious ethical framework are highlighted as distinct? These issues are most relevant in the debate over whether or not the Free Exercise Clause mandates that the state carve out exemptions for religious believers. But again, I will not be so much concerned with answering the interpretive question of whether or not exemptions are a necessary extension of the clause. My aim here is one of classifying how the Court has given weight to religion as a political category at different times, for the purpose of understanding the Court's place within the larger theoretical discussion addressed in the preceding chapters.

¹⁰⁸ See, e.g.: Philip Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60(1992): 915-948; McConnell, "Origins and Historical Understandings" and "Accommodation of Religion"; Vincent Phillip Muñoz, "The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress." *Harvard Journal of Law & Public Policy* 31.3(2008): 1083-1120; Steven C. Seeger, "Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act," *Michigan Law Review* 95.5(1997): 1472-151; Ellis M. West, "The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription," *Journal of Law and Religion* 10.2(1993): 367-401; *Symposium: Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case On the Free Exercise of Religion and How It Changed History*, a special issue of the *Cardozo Law Review* 32(2011).

In order to accomplish this task, I will consider three “moments” or phases of the Court’s relationship to the category of religion. First, I will focus on the earliest free exercise cases, dominated by the belief-action dichotomy, which influence nearly a century of precedent. Second, I will address the thickening of the Free Exercise Clause, shifting interpretation of it to require governments to carve out exemptions for religious believers as a result of an understanding of religion as deserving of unique protections. And third, I will examine the Supreme Court’s reversal of this policy and a return to a belief-action distinction approach to free exercise.¹⁰⁹ I have not attempted to be comprehensive in my analysis, but rather to focus on those cases which I have found to provide the most leverage in highlighting those features most directly related to my interest in religion as a political category.

EARLY INTERPRETATIONS OF RELIGION: 1878-1963

The US Supreme Court did not deal with a Free Exercise Clause case until nearly a century after the First Amendment's passage. Thus, there existed no authoritative statement on how the nation understood the status of religion and the extent of religious protections in the Constitution until the 1878 case *Reynolds v. United States*.¹¹⁰

In 1862, the Morrill Anti-Bigamy Act created a federal ban on multiple marriages, which directly affected the Mormon church through its practice of polygamy. The Mormon church set up a test case to challenge the constitutionality of the statute under

¹⁰⁹ These three sections are divided essentially by the eras *before*, *during*, and *after* the Court interpreted the Free Exercise Clause to require religious exemptions, which is a common way of designating periods in this literature.

¹¹⁰ 98 U.S. 145 (1878).

the First Amendment and arranged for George Reynolds, a secretary to Brigham Young, to go to court over the issue.¹¹¹ This case represented the first time the court had to consider the question: “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.”¹¹² The Mormon church, however, ultimately lost the case at all levels of the federal courts.

Reynolds asked that the jury be given instructions to excuse him of guilt if the defendant can be proven to have acted under the requirements of his religious belief. Reynolds was essentially asking the Court to view the guarantee of religious protection to excuse the individual from punishment under any law that conflicted with a religious motivation. The trial court denied this request and, in response to Reynolds’s invocation of religious motivation, held that:

...there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing a crime—did not excuse him; but the law inexorably in such case implies the criminal intent.¹¹³

The trial court here declared that if a law exists banning a particular activity, then the choice to engage in the banned activity infuses the decision with a criminal intent that overrides any other religious element, however dominant it may have been in the

¹¹¹ Leonard J. Arrington and Davis Bitton, *The Mormon Experience: A History of the Latter-Day Saints* (Chicago: University of Illinois Press, 1992), 180.

¹¹² *Reynolds v. United States*.

¹¹³ As cited in the Supreme Court majority opinion.

decision. The law, then, defines the acceptable contours of citizen activity; constitutional rights do not constitute an absolute sphere of protection around the citizen. The appropriate space for religion exists between the heavy lines drawn by the law.

The Supreme Court, in turn, employed a similar approach, invoking the support of James Madison and Thomas Jefferson about the appropriate range of legislative power: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." This divide over time became known as the belief-action distinction, which is reminiscent of classic works such as Locke's *Letter Concerning Toleration*¹¹⁴ that tended to relegate the appropriate domain of belief to one's private thoughts. Under this approach, any time citizens' religious beliefs lead them to engage in actions that the state chooses to regulate, the state need only demonstrate the presence of some legitimate interest in order to justify the burden it places on the believers. As long as the state's interest is limited to regulating that activity, the strength of the stated interest need only be demonstrated to a relatively low degree.

The Court continued, "The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only." The state, then, is given freedom to consider its own needs without limiting its regulations to avoid trampling upon individual rights of citizens. There would still, of course, be one natural check: that the representatives making laws would have the interests of their constituents in mind when

¹¹⁴ John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003).

crafting or voting on legislation, at least to the point of pursuing reelection. There is not, however, a constitutionally mandated requirement that the state absolutely must seek to avoid unintentionally restricting religious belief in the pursuit of an appropriate interest.

The Court then turns to the question of what interest in particular the state has in regulating the activity of polygamy. The opinion states:

From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity...An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

The opinion here, then, is intimately tied to the perceived danger that polygamy would have on the fabric of society. The primary interest motivating the law is the preservation of social order; thus, the burden placed upon religious observers is only accidental in nature. It is not the intended purpose of the state to restrict religion per se. The broader state interests trump any incidental inconvenience to religious adherents. The Court invoked what they considered to be an original intent logic, saying, “The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in

the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.” By their assessment of this concept, the nature of religious guarantees at the time of the framing of the First Amendment would suggest a general order to states not to single out specific religious groups, but not necessarily grant any privileges or available remedies unique to religion. Clearly this is a minimal view of the category of religion. It is basically a nonissue. The Court cannot target a specific belief qua religious belief through legislation. So, for example, polygamy could not be banned exclusively when engaged in by those acting upon their convictions as members of the Mormon faith; if polygamy is to be banned, it must be banned for all citizens regardless of motivation. But this grants no additional protection to religion than is already given to expression generally in the Constitution by the First Amendment as a whole.

The Court thus far has clearly addressed a first question regarding the state's obligation under the clause to craft its legislation so as to avoid any incidental burden to religious belief. But the Court acknowledges that another question remains unanswered at this point: if the law itself cannot be invalidated on account of the incidental burden to religion, then does the clause demand that religious believers be individually exempted from compliance with the law? The Court assesses the fallout from such a policy as such: “If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and

opinions, they may with practices.” In a famous phrase that would reappear throughout later religion legislation, “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.” Here the Court switches (whether for illustration or as a separate but corroborating argument) to a pragmatic position, arguing that the cost of such an interpretation would render the policy meaningless.

What is religion according to this case? In terms of what actually receives protection, religion is purely private, opinions held in the mind. In one sense, religion in this scenario is considered equal with all other beliefs. So religion is certainly not seen as special here. But at the same time, this is because rights of conscience have very little sway beyond certain establishment guarantees, such as not requiring public officials to ascribe to a particular set of doctrines.

It was conflicts like these over distinctiveness that over time inspired the rise of a discussion of religious priority. Legislation is okay if it touches only upon actions “in violation of social duties or subversive of good order.” The amendment provided protection against legislating opinion. It is safe to say that for more than a century, the right protected by the Free Exercise Clause was not actually one of the exercise but of belief. Note the irony of this phrase: one common interpretation of “exercise” implies conduct or practice. Exercise is an explicitly different point from belief, and yet the guarantee is read almost explicitly to the contrary. Common religious practices were

clearly insulated from state intervention by the political power of the majority that practiced them, but that protection did not stem from a constitutional right.

The Morrill Anti-Bigamy Act at issue in *Reynolds* was very explicit that it only withheld political rights from those actively engaged in polygamy. Subsequent laws, however, amended this act and expanded its scope. The Edmunds Act of 1882 and the Edmunds-Tucker Act of 1887 added statutes that required oaths disavowing polygamy before voting, for example. The latter added that a voter must promise that he “will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes.”¹¹⁵ Technically, even this provision would not necessarily become an unconstitutional regulation of belief any more than the original act did. These cases occur, after all, long before the days where abstract advocacy of an activity, as opposed to a direct order to perpetrate it, becomes an explicitly protected form of speech, as it firmly is at least by the currently ruling standard of *Brandenburg v. Ohio*.¹¹⁶

However, in practice, this amendment was used to exclude large numbers of Mormons from voting, and numerous Mormons who never engaged in the practice were affected by the law. Mormons were: disqualified from serving on juries, excluded from public office, barred from voting, denied the protection of inheritance laws, and thwarted in immigration and the path to citizenship, in addition to being the subject of an

¹¹⁵ §24, Edmunds-Tucker Act of 3 March, 1887. See William MacDonald, ed. *Select Statutes and Other Documents Illustrative of the History of the United States 1861-1898* (New York: Macmillan, 1903).

¹¹⁶ 395 U.S. 444 (1969).

infamous extermination order by the governor of Missouri.¹¹⁷

A similar law at the state level was challenged in the 1890 case *Davis v. Beason*.¹¹⁸ Samuel Davis and several conspirators attempted to become election officials, which required them to swear an oath disavowing any involvement in or promotion of polygamy. Part of the criminal code for the territory of Idaho read:

No person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persona to become bigamists or polygamists or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this territory.¹¹⁹

Davis was convicted not for the act of polygamy but for his membership in an organization that advocates such activity. He challenged this deprivation of his rights. The position held by the court in *Davis* is largely an extension of *Reynolds*, pointing to the need to remove sources of activity harmful to society.

Where this approach becomes interesting for our purposes is in the elaboration on the issue of religion. The court says, "To call their advocacy a tenet of religion is to

¹¹⁷ For a recounting of the Mormon extermination order issued by the governor of Missouri Daniel Dunklin, see Edwin B. Firmage, "Free Exercise of Religion in Nineteenth Century America: The Mormon Cases," *Journal of Law and Religion* 7.2(1989): 281-313, 299.

¹¹⁸ 133 U.S. 333 (1890).

¹¹⁹ §501, Rev.Stats.Idaho, as cited in *Davis v. Beason*.

offend the common sense of mankind. If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases.” Here the court is explicitly commenting on the nature of what is appropriate content of religion. Not only is religion as a political category not given special weight at this point, but only certain ideas are given even the bare protection of the belief-action distinction declared in *Reynolds*. Certain ideas, generated by a group commonly identified as a “religion,” are labeled offensive to the very idea of religion.

This position adds clarity to another point made earlier in *Reynolds*, where the Court acknowledged: “The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.” The language surrounding this passage gives little confirmation as to the intended direction of this application. The previous passage from *Davis*, however, suggests a similar intellectual milieu, one in which what counts as a religion is limited to those beliefs dominant among the citizenry at the time. These beliefs bear the seal of public approval and therefore legitimacy.

The Court in *Davis* continues, “The term ‘religion’ has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.” Religion here has been defined, even more directly than in *Reynolds*, as no more than opinion,

and perhaps only a subset within that. *Reynolds* declared that belief was beyond the reach of the law. But here in *Davis*, the Court has refused to even acknowledge certain ideas as meriting this basic protection. Only those ideas deemed within the bounds of acceptable religion, that is to say conducive to public order and the state, are protected against state intrusion to root them out. Even taking into account that general advocacy not directed at anyone specific or at a specific moment was treated at the time as a form of conduct rather than pure speech, it becomes unclear what work the Free Exercise Clause is accomplishing as a reference separate from speech, as its discrete substantive guarantee is minimal.¹²⁰

The ambiguity of the clause increases in *Davis* with statements such as the following:

With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

¹²⁰ Firmage makes a similar point: “The free speech clause of the first amendment fully protects the freedom of belief. Thus, unless the free exercise clause protects at least some practices that are offensive to the majority, that provision is devoid of any practical content. Yet, the *Reynolds* decision forecloses such an application of the first amendment.” Firmage, “Free Exercise of Religion,” 289. However, he makes the argument in a contemporary polygamy policy context; I am arguing that even under the approach to speech, religion, and expression appropriate at the time, the content of the Free Exercise Clause seems to dwindle rapidly as jurisprudence on the text develops, especially as I focus on the contribution of *Davis* here. My claim becomes all the more clear in the next case discussed, *Holy Trinity v. United States*.

These statements seem to be almost a redundancy. What does it mean to say that religion is protected as long as it is within the bounds of the law? There is such an absolute deference to the law as proving the presence of a state interest. Whatever has managed to triumph in the political process inherently defines the boundaries of acceptable belief. Religious belief must exist entirely within the realm of what the law has left untouched.

I do not mean to suggest that it is impossible to include a religious guarantee without implying a discrete category. As I suggest in Chapter III, one reading of the First Amendment sequence of rights or any similar list of guarantees would be that it offers a set of examples, aiming at the larger concept of expression. I would argue that explicit guarantees of religious liberty are appropriate without, as I have argued, suggesting the appropriateness of a special category. But the Court at this moment in history seems caught between these two positions. It seems to legitimately believe that it is preserving a discrete right to religion, and repeatedly insists upon its complete respect for religion without actually filling that right with any substance.

The underlying motivation behind this ambiguity becomes much clearer with a decision handed down just two years later in *Church of the Holy Trinity v. United States*.¹²¹ A church was convicted of violating the Alien Contract Labor Law of 1885 when it attempted to hire an English minister from the Church of England. The law restricted Americans from bringing over citizens of other countries for the purpose of employment. The Court, however, decided that this could not have been meant to apply to the case of preventing a church from hiring a minister, based on the nature of the

¹²¹ 143 U.S. 457 (1892).

relationship of the framers to religion.

There is little discussion of either of the religion clauses. Rather, the Court uses a strong original intent interpretation of Congress's presumed intention in passing the law. The court famously holds that although the case at hand may fall within the letter of the law, the spirit of the law was not intended to apply to a situation like that of hiring a minister. The Court justifies excluding this case from the intended scope of the law on the grounds of the implied significance of religion for the nation. He explains that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.” The concept of religion is narrowed further and further as the religion of this specific people. Religion is intimately tied to cultural expression. Protections of “religion” refer to the religion of the American people.

Perhaps the most iconic line from this case comes from the following passage on the relationship of the nation to the Christian religion:

These [public statements displaying a connection to religion], and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that *this is a Christian nation*.¹²² In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?

¹²² Emphasis added.

In this opinion, the religion clauses are read as being statements about the nation's relationship to Christianity specifically. This underlying logic seems to explain the awkward relationship to “religion” evoked by *Reynolds* and *Davis*: whatever the explicit logic used, they were never meant to apply to the religion of the individual, but rather to religion as it was deemed appropriate by the majority.¹²³ The idea of reading laws as presuming built-in “common sense” exemptions was not original to this case. The Court in *Holy Trinity* cited a case treating not religion but rather the operation of the post office stating, “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character.”¹²⁴ Clearly in its current application, however, the Court uses this logic, when matched with the logic discussed above, as means to further cement the ad hoc dominance of the majority religion.

Furthermore, this originalist reading had the impact of limiting the scope of religious exercise to Christian exercise. It is important to remember this fact, that for many decades, the right to “religious exercise” had nothing to do with what that phrase means to us in a modern setting. The only thing protected was the power of adherents of

¹²³ Contrast this statement with the passage cited from *Abington v. Schempp* in Chapter III regarding the ability of the majority to use the machinery of the state to engage in religious exercises.

¹²⁴ *United States v. Kirby*, 74 U.S. 482 (1868). In this case, the Court considered an Act of Congress of 3 March, 1825 stating, “That if any person shall knowingly and willfully obstruct or retard the passage of the mail or of any driver or carrier or of any horse or carriage carrying the same, he shall, upon conviction, for every such offense pay a fine not exceeding one hundred dollars.” The police had detained a mail carrier on charges of murder. The Court decided that the police were not guilty of obstructing the mail based on the logic cited above.

mainstream Christianity to practice their religion. It would make more sense for a modern audience to refer to the Free Exercise Clause's guarantee of the right to practice the Christian religion.¹²⁵

The Court in *Holy Trinity* concludes with the observation: “Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community.” This return to the language of the term “religion,” which might appear more general to a modern audience, after the previous discussion highlights the fact that religion here serves a very narrow purpose.

The Free Exercise Clause underwent a significant expansion when *Cantwell v. Connecticut*¹²⁶ incorporated it in 1940, deciding that states, in addition to Congress, were barred from “prohibiting the free exercise thereof.” Though many have since referred to *Cantwell* as creating a “valid secular policy” test, the logic is essentially that of *Reynolds*, with the exception that we finally begin to see in its application more victories by individual claimants. Thus, the *Reynolds* approach to free exercise rights dominated until the arrival of the Warren Court. Action or conduct was considered wholly subject to regulation, and while belief was nominally protected, loose connections between belief and social order could occasionally justify suppression, especially in the early years of free exercise jurisprudence.

¹²⁵ For a discussion of how the Court systematically favored Christian religious claimants, even well into the twentieth century, see Stephen Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (New York: NYU Press, 1997).

¹²⁶ 310 U.S. 296 (1940).

THE ERA OF EXEMPTIONS AND A THICK CATEGORY: 1963-1990

The Warren Court, which lasted from 1953 until 1969, oversaw a series of radical transformations of the rights guaranteed by the Constitutional amendments.¹²⁷ Guarantees which once implied a mild or moderate level of protection were expanded significantly. Many clauses transitioned from granting negative rights to citizens, requiring that the government not intrude upon their liberty to act in certain ways, to positive rights, requiring the government to play a more active role in securing the citizen's access to a right rather than merely staying out of the way. For example, the Sixth Amendment's right to counsel originally meant only that courts could not bar defendants in criminal prosecutions from bringing whatever legal counsel they could acquire into the trial with them. It was not until *Gideon v. Wainwright*¹²⁸ in 1963 that the Court ruled that in all criminal trials the government must provide a lawyer to those who cannot afford their own. Likewise, *Miranda v. Arizona*,¹²⁹ the case which gave us the famous "Miranda rights," transformed the Fifth Amendment's guarantee against self-incrimination from meaning simply that defendants cannot be forced to testify against themselves during a trial to requiring that police forces take special precautions to inform the defendants of their right to remain silent and to extend this protection even to the pre-trial stage of arrest. Additionally, in 1954, the Court in *Brown v. Board of Education (I)*¹³⁰ rejected the *Plessy v. Ferguson*¹³¹ interpretation of the Fourteenth

¹²⁷ See Mark Tushnet, ed, *The Warren Court in Historical and Political Perspective* (Charlottesville, VA: University Press of Virginia, 1993), especially Chapter 1.

¹²⁸ 372 U.S. 335 (1963).

¹²⁹ 384 U.S. 436 (1966).

¹³⁰ 347 U.S. 483 (1954).

¹³¹ 163 U.S. 537 (1896).

Amendment's "equal protection of the laws" as permitting "separate but equal" treatment in the area of education.¹³²

The category of religion underwent a comparable transformation in Free Exercise Clause jurisprudence in the case of *Sherbert v. Verner*.¹³³ Adell Sherbert was a practicing member of the Seventh-Day Adventist Church and therefore did not believe in working on the Saturday Sabbath. Her employer began requiring all employees to work on Saturdays, and though Sherbert continued to come to work Monday through Friday, she never started coming in on Saturdays. When she was eventually fired, she found that the state of South Carolina would not give her unemployment benefits, as she was considered to have become unemployed by rejecting available work. She sued for the benefits, and when the case reached the Supreme Court, it found in her favor by considerably reworking its interpretation of the Free Exercise Clause.

Although the Court is still highly interested in potential damage to state interests and public order,¹³⁴ it also demonstrates in this case, which is deemed less threatening, a heightened interest in the pain caused to the individual claimants:

Here, not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the

¹³² For further discussion of this particular transformation, see Judith A. Baer, *Equality Under the Constitution* (Ithaca, NY: Cornell University Press, 1983), 80-81; 113-118.

¹³³ 374 U.S. 398 (1963).

¹³⁴ "The conduct or actions so regulated [in cases like *Reynolds* and *Davis*] have invariably posed some substantial threat to public safety, peace or order."

other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

The Court rules that in order to justify the dilemma in which the state places Sherbert, the state would have to carve out exemptions specifically for her, and by association for others like her.

The Court continues by raising the stakes of what the state must prove in order to be compliant:

If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ."

The Court does not engage in language that would seem to change explicitly the nature of the category of religion, but the direction in which the category is applied represents a substantial shift. Traditionally, the focus is placed on the state's interest in passing a policy. But here, the scrutiny is directed toward the incidental burden. The Court ruled that the state had to justify not only its general interest in its unemployment benefit policy but also its interest specifically in excluding this claimant. Thus, the *Sherbert* test applied strict scrutiny to even incidental burdens on religious practice, requiring a demonstration of a compelling state interest in the policy effecting the burden and that

the least restrictive means possible was used.

While the Warren Court engaged in numerous massive expansions of constitutional liberties, the Burger Court of 1969 to 1986 undercut a number of its expansions.¹³⁵ For example, the Warren Court produced a highly liberal obscenity standard that allowed for an enormous range of speech to qualify for free speech protection, as put forth in *Roth v. United States*¹³⁶ and expanded further by *Jacobellis v. Ohio*¹³⁷ and *Memoirs v. Massachusetts*.¹³⁸ The Burger Court, however issued a more restrained test in *Miller v. California*.¹³⁹ This test changed obscenity law from consistent national standards of what constitutes obscenity to community-specific standards, thereby allowing communities greater discretion in prohibiting offensive speech. It also switched from allowing any trace of artistic, scientific, or political value anywhere in the work to invoke protection to requiring the predominant theme of the entire work to display such themes as a precondition of protection. Likewise, the Burger Court undercut the Warren Court's declaration in *Mapp v. Ohio*¹⁴⁰ that evidence obtained in violation of the Fourth Amendment could not be used in trials by declaring in *Leon v. Gates*¹⁴¹ that this exclusionary rule was merely a judicially created remedy and not a necessary corollary of search and seizure rights. Thus, the Burger Court frequently scaled back some of the dramatic expansions of the Warren Court.

¹³⁵ See Charles M. Lamb and Stephen C. Halpern, eds., *The Burger Court: Political and Judicial Profiles* (Chicago: University of Illinois Press, 1991), especially Chapter I.

¹³⁶ 354 U.S. 476 (1957).

¹³⁷ 378 U.S. 184 (1964).

¹³⁸ 383 U.S. 413 (1966).

¹³⁹ 413 U.S. 15 (1973).

¹⁴⁰ 367 U.S. 643 (1961).

¹⁴¹ 468 U.S. 897 (1984).

In the case of religious liberties, however, the Burger Court's brand of conservatism remained highly sympathetic. Among the most notable of the Burger Court's statements of religious liberty is the case *Wisconsin v. Yoder*.¹⁴² The state of Wisconsin required that children attend school until age sixteen. The Amish communities in the state, however, believed that traditional models of education instill values counter to their own religious beliefs, such as self-reliance, competition, and pride. As such, the state educational institutions run the risk of destroying the Amish religion, which is intimately tied to a seclusive way of life. Several families refused to send their children to school and challenged their subsequent charges under Free Exercise Grounds.¹⁴³ The Court sided with the Amish families, using the *Sherbert* test to demand a special exemption to mandatory school attendance in the case of the Amish religion.¹⁴⁴

In evaluating those claims, we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.

¹⁴² 406 U.S. 205 (1972).

¹⁴³ For an in-depth discussion of the Amish challenge to the state's education policy and the state's attempt to strike a balance, see Shawn Francis Peters, *The Yoder Case: Religious Freedom, Education, and Parental Rights* (Lawrence, KS: University Press of Kansas, 2003).

¹⁴⁴ Note that there is a dispute in *Employment Division v. Smith*, discussed below, between Justices Scalia and O'Connor about whether or not this case extended the *Sherbert* test to a criminal charge. Scalia argues that such an extension never occurred, while O'Connor maintains that it occurred here.

Contrast this with the expansion taking place under the Warren Court in the *Seeger* and *Welsh* cases; the Burger Court seems to imply a scaling back of this concept. They want to emphasize that religion is absolutely distinct from other forms of ethical belief. They continue:

Although a determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal, rather than religious, and such belief does not rise to the demands of the Religion Clauses.

It matters to the Court that these beliefs of the Amish were rooted in the Bible. These liberties are reserved specifically to those of religious persuasion. Religion, then, under the Burger Court's interpretation, clearly occupies a discrete category, a type of guarantee altogether different from other forms of expression listed in the First Amendment. Without ever getting into what, the Court authoritatively delimits the sphere of these guarantees uniquely to religion.¹⁴⁵

¹⁴⁵ For a discussion of the status of nonbelievers in relation to free exercise claims, see Nelson Tebbe, “Nonbelievers,” *Virginia Law Review* 97(2011): 1111-1180. Also Norman Dorsen, “The Religion Clauses and Nonbelievers,” *William and Mary Law Review* 27(1986): 863-873.

But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the State to control, even under regulations of general applicability... This case, therefore, does not become easier because respondents were convicted for their “actions” in refusing to send their children to the public high school; in this context, belief and action cannot be neatly confined in logic-tight compartments.

This is a very different interpretation from early era of Free Exercise interpretation.

There are certain dimensions of conduct that might actually need to be protected. The belief-action dichotomy in its early era largely left conduct completely open to regulation by the state with few exceptions (such as the hiring exemption granted to Christian ministers), and as I have argued perhaps even part of belief might be subject to some interest of the state if “advocacy” is involved. Here, in contrast, belief is strictly protected, and there is the clear statement that legislatures may not have total access to conduct.

Most importantly, perhaps, the Court further underscores the degree to which it has transitioned from a focus on general state interest to the marginal interest involving the one additional person. The Court in *Yoder* states, “...nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.” Whereas Wisconsin had countered by focusing on the fact that it has a compelling interest in providing a certain level of education for its youths, the Court forces them to

pass this strict standard of the *Sherbert* test as applied to the difference between a formal, state education between the ages of fourteen and sixteen and the “vocational” style education afforded by the Amish experience across the same delimited time span.¹⁴⁶

As a point of contrast, consider a case from the realm of free speech: In *United States v. O’Brien*¹⁴⁷ in 1968, the Court dealt with a question of whether enforcement of a portion of the Selective Service Act, which forbade the burning of draft cards, ran afoul of the First Amendment when it was applied against men who publicly burned their draft cards in protest of Vietnam. The Court held that the burden of proof placed on the state depended entirely upon its interest: if the interest was strictly in regulating the noncommunicative aspect of the speech act, or the conduct alone, then the Court would be held to a less stringent standard, whereas if the state was found to be interested in regulating the ideas expressed,¹⁴⁸ then it would have to satisfy the strictest scrutiny. The Court identified a number of interests the state had in such a regulation that had nothing to do with suppressing dissent, such as: it serves as proof of a man’s having registered; it facilitates communication between the citizens and the state; it provides valuable information about keeping the draft board aware of one’s location; and it helps prevent manipulation and forgery of these documents, which in a pre-digital era were a crucial

¹⁴⁶ This case should perhaps be contrasted, though, with *Goldman v. Weinberger*, 475 U.S. 503 (1986), where the Court ruled that the Free Exercise Clause did not give a Jewish man in the military the right to wear a yarmulke on account of the special interests at play with the military and national security, although by anything close to the *Yoder* level of scrutiny toward the marginal state interest it seems difficult to justify such an exclusion.

¹⁴⁷ 391 U.S. 367 (1968).

¹⁴⁸ As the Court ruled to be the case in *Texas v. Johnson*, 491 U.S. 397 (1989), the famous flag burning case in which Texas’ flag desecration law was ruled to be targeting the ideas expressed by the act of burning a flag, rather than purely in the conduct. *Johnson* used the line drawn in *O’Brien*, but ruled that the facts merited the stricter standard.

means of maintaining order. The Court disagreed with O'Brien that the *purpose* of Congress in passing the relevant 1965 amendment to the Selective Service Act that covered draft card burning was to inhibit speech and therefore applied the less stringent standard to the federal law and upheld the conviction. In contrast to *Sherbert* and *Yoder*, however, the Court does not ask the government to justify itself in relation to its incidental burden on O'Brien specifically. It is enough to prove a general interest. This is a severe contrast from the emphasis placed upon case specific justifications, especially as demonstrated in *Yoder*. Thus, as this contrast highlights, religion is treated as a unique form of expression, requiring even more exacting exemptions than forms of speech or press.¹⁴⁹

In the cases examined in Part I of this chapter, the Court makes it abundantly clear that religion must be within the bounds of both the law and public order generally to gain "protection," and perhaps even to merit the label "religion." Religion must follow the contours of the law. In this second major wave of cases, however, the law must in part adjust its contours in order to fit the space cut out by religion. Although the law need not entirely be constructed around every religion providing that its motivation is still secular, it must still make ad hoc adjustments around those religions burdened.

The significance of the introduction of religious exemptions to Free Exercise Clause jurisprudence, for the purposes of this project, is that it represents an inversion of the roles of religion and state in relating to each other. Although the language regarding the status of religion does not change drastically, the change in use represents a

¹⁴⁹ Consider that the Burger Court declined to create such an analogous exemption for the press in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

fundamental transformation. Free exercise has been transformed, similar to many other rights in the Warren Court, and sustained in this unique instance, by the Burger Court, from a negative right to a positive right requiring a far more active role for the government in ensuring access to constitutional guarantees. The political category of religion reached its thickest point during the Warren and Burger eras.

A REINSTATEMENT OF THE BELIEF-ACTION DISTINCTION: 1990-PRESENT

The era of mandated exemptions was not nearly as expansive as it could have been. There was not the eruption of exemptions demands that one might expect from the strong language of the Court in the *Sherbert-Yoder* line of cases. Early in the Rehnquist era, the Court reversed course on the place of exemptions. In *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁵⁰ several men brought an exercise claim similar to that in *Sherbert*. The men were fired from their jobs in a private drug rehabilitation center for ingesting the cactus-derived hallucinogen peyote as part of a religious ceremony of the Native American Church, as they were both long-time members. Similar to *Sherbert*, they were denied unemployment benefits by the state of Oregon. They challenged their denial of benefits, invoking the same logic applied in previous exemptions cases. The Court, however, denied the claim. A five person majority held that the *Sherbert* precedent was not meant to apply to cases involving criminal acts, and that it consequently was likely only ever useful in an extremely

¹⁵⁰ 494 U.S. 872 (1990).

narrow domain of cases.¹⁵¹ They effectively gutted the precedent and implemented a standard inspired by the rhetoric of *Reynolds*.

Smith invokes the belief-action distinction model. It highlights that conduct may be regulated, although it may not be regulated exclusively when it is engaged in for religious purposes. This, Scalia's opinion of the Court suggests, has always been the case. He claims that the present case, though, differs:

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)... Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

¹⁵¹ Even O'Connor, who argued vociferously about the decision to undermine the *Sherbert* test, in her concurrence agreed that Oregon *had* met the difficult burden imposed upon it by the First Amendment, as it has a compelling interest in regulating the use of narcotics. Despite disagreement as to how the standard applied to these specific facts at hand, O'Connor largely shares the logic of the three dissenters, who join with her in the part of her opinion related to the appropriate precedent to apply. Thus, although the actual outcome of the case was 6-3 in favor of the state's right to deny benefits, the Court was actually split 5-4 over the question of whether or not to apply *Sherbert*.

This essentially returns the Court to the *Reynolds* standard.¹⁵² Law dictates the sphere within which religion is free to act; the existence of a criminal regulation implies the inappropriateness of the conduct. It also connects the exemptions interpretation to the *Reynolds* concern about allowing every man “to become a law unto himself.” In lieu of the *Sherbert* prongs, *Smith* allowed that a law that is neutral and of general applicability can satisfy the requirements of the First Amendment.

As is true of Scalia’s interpretive approach generally, this position reflects a high level of faith in the democratic process, in opposition to entrusting the judiciary with the protection of rights, as a means of validly expressing state interest, as is aptly expressed in his dissent in the recent Defense of Marriage Act case *United States v. Windsor*.¹⁵³ The *Smith* opinion makes the trust in this process explicit, whereas the relationship in *Reynolds* could be inferred from the relationship of the various parts of the argument. The concurrence and dissent in *Smith*, however, rejoin that one cannot always assume that because there is a law against something that it is therefore inherently so inimical to the state that there could be no interest in preserving free exercise rights in that area.¹⁵⁴

¹⁵² As mentioned previously, the narrative that I use to reconstruct the development of Free Exercise Clause cases is common, in which *Sherbert* challenges the tradition of *Reynolds* and *Smith* in turn challenges *Sherbert* and returns back to *Reynolds*. While this is clearly the dominant narrative in the legal field, it is at least worth noting formidable detractors. See Marci A. Hamilton, “*Employment Division v. Smith* at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse,” *Cardozo Law Review* 32.5(2011): 1671-1699. She acknowledges that this story is so prevalent that it is “treated by many within and outside the field as obvious truth” (1671-1672). But she argues that *Smith* is actually far more consistent with tradition than the dominant narrative would admit and that the dominant narrative relies too heavily on the *Sherbert-Yoder* tradition to the exclusion of a significant number of other cases. I side with the dominant narrative, however, as Hamilton’s account overplays the continuity of the case law across multiple courts.

¹⁵³ 570 U.S. ___ (2013).

¹⁵⁴ Elizabeth Harmer-Dionne has even argued that the belief-action distinction of *Smith*, when applied back to the original problem of polygamy, actually has the potential to change beliefs, putting it in danger of violating its own principles. “Once a Peculiar People: Cognitive Dissonance and the Suppression of

But beyond this debate about precedent, there is almost no discussion of religion as a category. Most of the significance of this decision in relation to our category of interest actually lies in what it rejects.

In another case that appeared shortly thereafter, *Church of Lukumi Babalu Aye v. City of Hialeah*,¹⁵⁵ the Court had an opportunity that, it argued, demonstrated the ability of the *Smith* standard to provide some weight to free exercise protections. The city council of Hialeah, Florida enacted health code regulations of the slaughter of animals. As evidenced by records of the city council meetings, many participants indicated that the motivation for the regulation was to shut down the ritual sacrifice of animals taking place in a Santeria church.¹⁵⁶ The ordinances were struck down on account of the clear statements of intent and the fact that while facially neutral in that they did not mention the religion by name, there were enough exceptions written into the text that the law effectively applied only to the Santeria church, thereby violating general applicability. This case, then, provides an illustration of the function of the Free Exercise Clause for those who ascribe to it a minimal role. It is important to notice, of course, that this form of protection is akin to the other protections of expression like free speech and does not categorically afford religion any special status.

US religious communities were highly incensed at the Court's decision to remove the special protection afforded by *Sherbert*, so much so that in 1993 Congress

Mormon Polygamy as a Case Study Negating the Belief-Action Distinction," *Stanford Law Review* 50.4(1998): 1295-1347.

¹⁵⁵ 508 U.S. 520 (1993).

¹⁵⁶ Many explicitly stated their own religious motivations for doing so. The admissibility of intent into such considerations creates a point of contention between Kennedy's opinion of the Court and Scalia's concurrence.

passed the Religious Freedom Restoration Act. The Act demanded that the Court re-implement the compelling interest standard of *Sherbert* and *Yoder*. It passed unanimously in the House of Representatives and 97-3 in the Senate. But the Court ruled in *City of Boerne v. Flores*¹⁵⁷ that Congress violated separation of powers in telling the Court how to interpret the Constitution. It therefore struck down the portions of the act that related to the Supreme Court. Congress is free to determine how federal proceedings will take place, and the Court has upheld the applicability of the RFRA in applying compelling interest to religious claimants with regards to federal laws in *Gonzales v. O Centro Espirita Beneficenteuniao do Vegetal* in 2006.¹⁵⁸ But it cannot use the judiciary as a tool to force all states to implement a similar policy. With this series of events, the Court left it to the states to thicken the political category of religion; it ruled that the Free Exercise Clause itself does little more than protect religions from direct targeting, although this in itself does carry some substance as evidenced by *Lukumi*. The category of religion, then, remains thin on a national, constitutional scale. It does not give additional protections to religion that are not afforded to other groups, as was clearly the case in the *Sherbert-Yoder* era. It leaves the addressing of incidental burdens to the political process and sets a minimal threshold of the belief-action distinction, allowing case-by-case decisions to afford additional protections.

¹⁵⁷ 521 U.S. 507 (1997).

¹⁵⁸ 546 U.S. 418 (2006).

CHAPTER V

**ON TRANSFORMATIVE POLITICAL LIBERALISM'S MODEL OF
RELIGIOUS LIBERTY: A POLITICAL THEORY CASE STUDY OF
DEFENDING RELIGIOUS INTERESTS WITHOUT A PRIVILEGED
CATEGORY**

INTRODUCTION

In response to the arguments that I have put forward in this project, particularly in Chapters II and III, claiming that religion does not occupy a special political category apart from other belief systems, advocates of religious priority might fear that religious interests would be automatically wide open to attack from the state. Without a customized means of protection, what is to stop the state from excessively burdening religion?

I have argued that religion is not inherently any more susceptible to the possibility of incidental cost than any other belief, of the sort that is unintended by policy but a result nonetheless. As discussed in previous chapters, exemptions exist as one tool, among others, that the state has at its disposal to counter the possibility of an excessive incidental burden upon ethical beliefs. I would also argue here, however, that there are already extensive conceptual resources that can be used to protect religion from intentional attack from within the liberal democratic framework without resorting to this special status.

In this chapter I offer a political theory case study to demonstrate that it is still possible to advocate for religious interests without resorting to the special category. I show that it is possible to defend the religious believer using generalizable conceptual tools that are already employed to protect the beliefs of all citizens. To this end, I examine the case of transformative political liberalism's model of religious liberty. The transformative political liberals make a similar argument to mine concerning the special status of religion, considering it an unjustified reification of the category.¹⁵⁹ However, they go a step further than I do in arguing that it is therefore open to direct attack. According to this model, the state has a stake in the beliefs of its citizens and therefore in using its non-coercive powers to transform their beliefs and shape illiberal beliefs into those more beneficial to the liberal state.

I make two claims in this chapter. First, I argue that the transformative political liberals fail to maintain their status as *political* liberals while introducing a transformative element to state activity. And second, I argue that, when it comes to maintaining the project of political liberalism, any transformation of citizens that does occur in a liberal state should be evaluated by whether or not the state was actively targeting the beliefs of its citizens, rather than the less stringent standard of whether or not it used coercive means.

¹⁵⁹ Consider, for example, Corey Brettschneider, "A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights," *Political Theory* 38.2(2010): 187-213, 188.

Motivating Concerns

In the canonical tradition, liberal theorists pursue a form of statecraft that takes individuals as a starting point or unit of analysis. Society, and ultimately the state, is made up of a mass of individuals with particular interests. A priority of the liberal theorist, then, is to cultivate citizens who are capable of self-direction, who understand their own interests. This individualism manifests itself in terms such as, for example, a Kantian sense of majority, the Millian sense of understanding, articulating and maximizing one's personal utility, or a Lockean sense of reasoning.¹⁶⁰ In modern examples of such discourse, this may appear in terms of self-determination, free speech, or the marketplace of ideas.

Rawls famously labeled this form of liberalism a “comprehensive” one, as it provides a thick picture of what that moral and rational being should look like.¹⁶¹ In response to the challenges of pluralism, Rawls pursued a project that avoided predetermining the substance of citizens’ souls. As one of the most significant theorists of the twentieth century, Rawls has become a touchstone by which others, both friend and foe, orient themselves. The degree to which he is successful in accomplishing this project is contested. But one of Rawls’ great contributions is the articulation of the

¹⁶⁰ Immanuel Kant, “An Answer to the Question: What Is Enlightenment?” in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996); John Stuart Mill, *Utilitarianism*, ed. George Sher (Indianapolis, IN: Hackett Publishing Company Inc., 2001); John Locke. *Of the Conduct of the Understanding*, eds. Ruth W. Grant and Nathan Tarcov (Indianapolis, IN: Hackett Publishing Company, Inc., 1996).

¹⁶¹ John Rawls, “Justice as Fairness: Political not Metaphysical,” *Philosophy and Public Affairs* 14(Summer 1985): 223-252; *Political Liberalism* (New York: Columbia University Press, 1993); *Justice as Fairness: a Restatement* (Cambridge, MA: The Belknap Press of Harvard University Press, 2001). My interest in this project is specifically with the transformative liberals. My interest is not in what ways or to what degree they get Rawls right but rather in the degree to which they achieve the project they set out to accomplish. They find the inspiration for their project in Rawls, but I argue they can be taken on their own terms given their particular interests.

project of pursuing a system that is “political not metaphysical,” the expression of the idea that one might imagine a state that minimizes the substantive content that defines its citizens.

In *either* the comprehensive or the political form of liberalism, however, there is the underlying assumption that at the core of the citizen lies the capacity for independence and that this capacity must be treated as central to the project of politics. Liberalism represents, at least on its face, a trust in the potential of the individuals to know their interests. It desires citizens who can articulate and pursue their own interests, to varying levels of success.

Yet no matter how much faith one has in individuals, there remains some point at which the system as a whole takes on collective interests. There exists at the same time an intractable tension between a state’s interest in protecting the space of its individual members with the fact that a state's essential function remains monopolizing force and ensuring order. Clashes between these two interests are inevitable, as reflected by the perpetual struggle between collectivist and individualist approaches to political theory.

Balancing these interests is complicated. In order to overrule the rights of the individuals, the state must assert an interest that is more important in the instance. Even if slightly amorphous and hard to pin down, concepts like public safety and preservation of order allow for at least an ideal yardstick by which to judge the ability of the state to intervene. For the clearest cases, at the very least, the state can justify its position in stopping massive riots or trespassers on a number of publicly accessible grounds. Room for debate may exist over how to assess and defend the scope of the state's interest in a

particular clash, or over the appropriateness of ethical exemptions to generalizable attempts to maintain order, as a means to further allow for said space. But at least the general contours of the discussion are clear, relatively speaking, when it comes to state regulation of action: the state tolerates individual citizen action to the point where it begins to infringe upon the safety and wellbeing of the citizenry at large.¹⁶²

In the case of public safety, then, the scope of the debate is *relatively* clear, even if the outcomes of specific clashes between individuals and states remain contestable. The scope becomes extremely obtuse, however, when it comes to articulating the ability of the state to regulate beliefs, the source, or perhaps a product, of that liberal space. Most forms of liberalism at least purport to aspire to maximizing this space for citizen independence and self-articulation or discovery of thought. Although the relationship of liberal states to illiberal beliefs has long been disputed, there remains at the very least a strain of resistance in liberal thought to a state's outright, forceful imposition of a system of belief or values upon its citizens.¹⁶³

¹⁶² As illustrated by concepts such as the harm principle of John Stuart Mill, a classic comprehensive liberal. See his *On Liberty* (Indianapolis, IN: Hackett Publishing Company, 1978). Though, of course, the circular challenge again becomes, who gets to define what that interest is or where the line gets drawn. But this formulation, I suggest, at least represents what the state is attempting to accomplish, as often expressed explicitly in constitutional law as a balance between state interests and citizen rights. For a classic, explicit expression of this position, see Justice Blackmun's opinion of the court in *Roe v. Wade*, 410 U.S. 13 (1973).

¹⁶³ Even Thomas Hobbes, as an oft-alleged "protoliberal", strikes something of a balance here. Though he demands an absolute transfer of power to the state and promotes a form of religion that is continuous with the interests of the state, there is still an acknowledgement of a small realm of a private sphere. Of the comprehensive liberals discussed above, Hobbes' version of individualism comes closest to Locke's, though Hobbes's reason is perhaps more instrumentally rational, calculated to achieve the satisfaction of passions. Where we find an analogue of this strain of liberalism in Hobbes is in his position that the content of the passions is irrelevant and that what matters is the shared experience of trying to fill some desire. The use of our reason matters more than the object of its focus. *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, 1991).

In some sense, liberalism likes to imagine itself as leaving the citadel of the mind untouched. It aims at the chimerical ground of “neutrality” with respect to expression, opinion, and belief. Some criticisms of liberalism, such as found in the feminist approach among others, may be seen as challenging that vision, calling for more intervention in the area of illiberal beliefs, leaving open a critical debate concerning just how far the state is able to go in promoting the values that underpin it. The question remains: how much, if at all, may the state assert itself when it comes to intervening, to any degree, in the minds of its people?

Scholars such as Mark Button have argued that even the earlier, comprehensive liberalism had a transformative element to it: the state had an interest in shaping its citizens into the type of individuals capable of running a popular government.¹⁶⁴ While liberal theorists such as Hobbes and Locke begin with individual citizens coming together to create a contract to further their interests, Button argues that there is also a crucially and frequently forgotten dimension of their work whereby the contract, in turn, shapes the citizens. The state has to ensure the character of the people is such that the political society will endure. The scope of this interest is far smaller than in the case of communitarian or collectivist theories. Nonetheless, the degree to which comprehensive

¹⁶⁴ Mark Button, *Contract, Culture, and Citizenship: Transformative Liberalism from Hobbes to Rawls* (University Park, PA: The Pennsylvania State University Press, 2008). Although the majority of the work focuses on the canonical comprehensive liberals, Chapter V titled “John Rawls, Public Reason, and Transformative Liberalism Today” does address what he calls the traditional “transformative ethos” in contemporary liberalism. However, he largely treats Rawls as a great among contemporary liberals without taking seriously his attempt to distance himself from traditional liberalism. For Button, all of liberalism is equally transformative. In contrast, for those in the category I will focus on are obsessed with maintaining their position as political *as opposed to* comprehensive liberals while still maintaining the possibility of transformation, a project at I which, I argue, they fail.

forms of liberalism allow the states to take an interest in the thoughts, habits, and character of its citizens is significant.

The pairing of liberalism's respect for the individual with the state's interest in shaping them is not wholly inconsistent. For the comprehensive liberal theory to work, citizens must exhibit certain qualities. But the perpetual tension over balancing the interests of states and individuals plays out accordingly, maximizing individual liberty and minimizing state involvement while recognizing the necessity of some significant threshold of the latter. The rest of this chapter, then, will focus on the question of to what degree transformation is appropriate to *political* liberalism. If political liberalism has at least attempted to remove the metaphysical element of comprehensive liberalism, is the state unequivocally prohibited from attempting to alter its citizens?

TRANSFORMATIVE POLITICAL LIBERALISM

One case in particular in recent United States legal history serves as a touchstone of this question as it relates to our interest in religious liberty and has inspired responses invoking a move toward the transformative ideal. In 1988, several religiously conservative, fundamentalist Christian families in Tennessee requested the right to remove their children from a certain portion of the educational material required by their schools, as they believed it provided too many examples of religious traditions outside of their own belief system in a way that would prove harmful to their children's development. They argued that the excessive exposure to alternative religious traditions would damage their rights to the free exercise of religion and stunt their children's

religious development. The case made its way to the US Court of Appeals for the Sixth Circuit under the name *Mozert v. Hawkins*.¹⁶⁵

The *Mozert* case arrived on the legal scene at a critical juncture in the development of US free exercise jurisprudence. The case occurred at the end of an era of court imposed religious accommodation. In *Sherbert v. Verner*,¹⁶⁶ the court suggested an openness on the Supreme Court to interpreting the Free Exercise Clause as requiring exemptions for religious practitioners.¹⁶⁷ But *Mozert* arrived just two years before the Court effectively reversed this trend in *Employment Division v. Smith*,¹⁶⁸ and the *Mozert* decision reflects the growing resistance to and impending demise of the religious exemptions project.

The *Mozert* petitioners were denied their claims and told they had to send their children through the school's educational program in its entirety. As Judge Lively wrote for the court, a burden is only considered unconstitutional when it consists of “compulsion either to do an act that violated the plaintiff's religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.” Merely requiring exposure to the belief could not be considered sufficient evidence of a violation of free exercise. A number of theorists saw in this case, however, the need for further theoretical underpinning, sparking the

¹⁶⁵ *Mozert v. Hawkins City Board of Education*, 827 F.2d 1058 (1987).

¹⁶⁶ 374 U.S. 398 (1963).

¹⁶⁷ While the case examples addressed in this piece stem from US case law, the principles and debates surrounding them are of general theoretical interest, appealing to liberal theory beyond the specific cultural/legal history that precedes them.

¹⁶⁸ 494 U.S. 872 (1990).

response of several pieces giving additional justification to the court's decision. *Why* is the state justified in overriding the mother's concern about her child's education?

In framing his response to the *Mozert* case, Stephen Macedo says, "The basic question of principle is, Do families have a moral right to opt out of reasonable measures designed to educate children toward very basic liberal virtues because those measures make it harder for parents to pass along their particular religious beliefs? Surely not. To acknowledge the legitimacy of the fundamentalist complaint as a matter of basic principle would overthrow reasonable efforts to inculcate core liberal values."¹⁶⁹ Macedo argues that giving religious fundamentalists a means of insulating their children from the influence of a reasonable pluralism would counteract the goals of liberalism. A liberal civic education cannot avoid favoring certain religious traditions over others, as those that are already most consistent with liberal values will inherently require less of the attention of the state.

The burdens and intended alterations to such religious traditions are not peripheral consequences of state activity but central components of the purpose of the state. "Assimilation is an inescapable and legitimate object of liberal policy: it all depends on the justifiability of the values toward which institutions assimilate and the reasonableness of the means. Liberal diversity is diversity shaped and managed by political institutions."¹⁷⁰ On these grounds, he dismisses the parents' concern that the very fact of exposure could be detrimental to religious education. The state may not

¹⁶⁹ Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of *God v. John Rawls*?" *Ethics* 105(April 1995): 468-496, 485.

¹⁷⁰ *Ibid.*, 470.

proclaim the priority of one particular religion, but it can, in fact, promote the vision that no single religion has priority politically.

Central to Macedo's approach is his deliberate identification with a political over a comprehensive liberalism. The former seeks only to manage pluralism, rather than to instill a fundamental appreciation of the values held by others. Although Macedo distances himself from the stronger, comprehensive version of liberalism, he also criticizes theorists who attempt to construct an extreme opposite to comprehensive liberalism by arguing that liberalism stands for nothing. He rejects the portrayal of the system of thought as a vacuum meant entirely to promote the liberty of its people. He says that liberalism *does* stand for something, a basic value system regarding the value and political weight of individual citizens.

The demands made, to such ends, by political liberalism on its citizens are minimal, he contends, and do not place a special burden on religion. "Political liberalism asks of fundamentalists only what it asks of others, including proponents of secular ideals, such as Dewey's humanism: to put reasonably contestable comprehensive ideals to one side in the political realm and to focus on values such as peace and freedom that can be shared by reasonable people."¹⁷¹ In this sense, the burdens placed on religious practitioners are not radically different from those placed on others. All are asked to respect the political process and those who participate in it by the same standards.

¹⁷¹ *Ibid.*, 480.

And yet, Macedo fully acknowledges that, in terms of the consequent burden resulting from this requirement, his system inevitably places a stronger burden on those who would instill a particular religious vision that involves exclusion and avoidance even of the mere knowledge of the beliefs and practices of other groups, despite being universally consistent in its application. However, "...we must remember that the source of the apparent 'unfairness,' the cause of the 'disparate impact' here, is a reasonable attempt to inculcate core liberal values. The state is within the limits of its rightful authority. The bedrock liberal insistence on toleration is a constraint on the range of religious practices that can be tolerated. It is hard to see how schools could fulfill the core liberal civic mission of inculcating toleration and other basic civic virtues without running afoul of complaints about 'exposure to diversity.'"¹⁷² If this exposure is necessary for the inculcation of these virtues, then no fundamental right can allow one to be exempt from the educational lesson. On this basis, Macedo affirms the court's denial of the request for exemption on religious grounds. Macedo argues that every institution and state practice has an educative function, and that political liberals "are prepared fully and openly to justify the transformative institutions and practices they support, and that is sufficient."¹⁷³ For Macedo, this forced encounter with material that the religious practitioners deem counter to the very core of their beliefs is part of the necessary reminder that the state must send to its citizens of the cost each member of society must take on, that of tolerating opposing beliefs, in order to secure the pluralism that makes their peaceful existence possible. It is only by suffering this cost that they are kept free

¹⁷² *Ibid.*, 485.

¹⁷³ *Ibid.*, 495.

from even more intrusive measures sanctioned by other theories of state. And in fact, this function is central to the liberal state. He states elsewhere that “a liberal constitutional order is a pervasively educative order.”¹⁷⁴ The function of transformation ultimately becomes an all encompassing purpose of the state.

Explicitly inspired by Macedo’s approach, Brettschneider takes Macedo’s transformative ideals a step further, arguing for a more active, albeit still prudent, transformative role for the state. He is also particularly concerned to respond to arguments about religious freedom that place religious doctrine into a “static” category beyond the reach of state concern and active involvement. He says, “I argue that any robust conception of religious freedom will find itself at odds with some existing religious beliefs and that defenders of religious freedom should favor a role for the state in seeking to change some religious beliefs.”¹⁷⁵ He advocates a vision of transformative liberalism mediated by the following provisions: (1) the state is only to seek to transform “those beliefs that are fundamentally at odds with the shared reasons for rights”; and (2) the state should only ever “pursue transformation through its expressive, rather than its coercive, capacities.”¹⁷⁶

Brettschneider further limits the scope of this transformative endeavor, saying “it is not the belief in the superiority of one’s religion per se that transformation should

¹⁷⁴ Stephen Macedo, “Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism,” *Political Theory* 26.1(1998): 56-80, 56-57.

¹⁷⁵ Corey Brettschneider, “A Transformative Theory of Religious Freedom,” 188.

¹⁷⁶ For further articulation of Brettschneider’s vision of state involvement, see: “The Politics of the Personal: A Liberal Approach,” *American Political Science Review* 101.1(2007): 19-31; “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion,” *Perspectives on Politics* 8.4(2010): 1005- 1019; *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton, NJ: Princeton University Press, 2012).

target...Rather, it is those beliefs, religious and otherwise, that are openly hostile to or implausibly consistent with the values of equal citizenship that the state should seek to transform.”¹⁷⁷ Brettschneider tries to distance himself from theorists like Okin whom he considers to be more excessively transformative in her liberalism. He wants to portray his project as one that can withstand concerns about over-involvement of the state in the personal affairs of its people.¹⁷⁸ He considers Okin’s work in particular to transgress the line of the private. In contrast, he turns to Macedo for inspiration in crafting a theory that allows for the state to engage in purifying transformation while still maximizing respect for individual privacy.

Brettschneider seeks to establish his project as minimally invasive, infringing exclusively upon those aspects of religious identity that pose a direct threat, rather than holistically reforming the belief of these citizens. He observes, “The standard of legitimacy thus may require the transformation of identity, but it does not demand the replacement of one identity with another. Again, the model here is not all-or-nothing but dialectical.”¹⁷⁹ The state in this scenario only treats those beliefs deemed antithetical to the necessary functions of the state. On this view, a “static” vision of religious liberty would confound a central function of the state in moving the attentions of citizens in directions more favorable to liberalism. At one point, Brettschneider admits to his system’s being “quasi-coercive”, although he again wants to maintain the distinctiveness

¹⁷⁷ Brettschneider, “A Transformative Theory,” 195.

¹⁷⁸ See for example: *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999).

¹⁷⁹ Brettschneider, “A Transformative Theory,” 200.

of his project from, we might presume, the comprehensive liberals who Macedo says have no qualms about directly shaping citizens into ideal inhabitants of their polity.

To maintain the vision of this presumably noninvasive form of transformation, Brettschneider even affirms the right of citizens to actively defy attempts by the government to transform them. He says, “I therefore stress...there exists a right for groups or individuals to resist transformation. This exit option is the complement to my claim that the state should limit its pursuit of transformation to reasoning and financial inducement.”¹⁸⁰ He concludes, however, that nothing about religion erects a metaphorical wall that shields religious private values from any and all intrusions on the basis of public values.¹⁸¹

In a direct critique of Brettschneider’s position, Jeff Spinner-Halev challenges a number of the core assumptions of the former’s stronger version of transformative political liberalism. He suggests in its stead a modified version, less expansive even than Macedo’s original articulation, in which transformation is even less targeted at reshaping but rather more directed at protecting the rights of others. He says, “The indirect route of transformation that I support is only likely to happen when the government is clear that its policies and funds support equal citizenship.”¹⁸² This indirect transformation can only occur when justified by a corresponding claim from other citizens. For example, he uses this logic to argue that that divesting Catholic Charities of state funding given the refusal to allow gays to adopt is an appropriate use of transformation. Such funding would

¹⁸⁰ *Ibid.*, 206.

¹⁸¹ *Ibid.*, 207.

¹⁸² Jeff Spinner-Halev, “A Restrained View of Transformation,” *Political Theory* 39.6(2011): 777-784, 782. See also Brettschneider’s response: “Free and Equal Citizenship and Non-profit Status: A Reply to Spinner-Halev,” *Political Theory* 39.6(2011): 785-792.

involve the state in distributing goods which certain demographics have no chance even of requesting, which would deprive them of equal liberty.

He disagrees, however, with Brettschneider's approval of using features like tax-exempt status as a means of creating incentives that have the effect of transforming religious groups through economic motivation, as will be revisited below. He suggests, rightfully so I would claim, that there are alternative purposes of tax-exempt status other than merely existing as a tool for a state sponsored transformative agenda realized through selective tax breaks. He counters, "One important argument for non-profit status is to encourage and support a rich associational life, and one that can shift with people's views and preferences."¹⁸³ Spinner-Halev's opposing statement of purpose highlights the degree to which Brettschneider's work has infused a considerable number of additional elements of state activity with tinges of active transformation, even beyond what may be a minimally appropriate ascription. He proposes, in contrast, a more restrained view where the state limits its transformative involvement to direct intervention on behalf of others whose rights of equal citizenship would be violated by the activity, rather than expanding the involvement to any illiberal statement regardless of whether it intrudes upon another or not. The *Mozert* case, then, provides a perfect example for him. The refusal to give an exemption can be justified, in addition to the state's interest in ensuring that the claimant's daughter can function in a pluralist society, on the grounds of the state's right to teach equal respect for all citizens at least within the political sphere. The state can justify incorporating citizens of all religious beliefs in its education

¹⁸³ Spinner-Halev, "A Restrained View of Transformation," 778.

as an acknowledgement of their protected place in the society and its politics, without having to invoke the justification that it is forcing students to accept the moral validity of the religious beliefs.

CHALLENGING THE TRANSFORMATIVE IDEAL

I argue that the transformative political liberals utterly fail at their project of making liberalism transformative *while* remaining on the political side of the political/comprehensive divide. Although the version they defend may seem milder than others, it places the liberal state in conflict with one of its central values, protecting the product (e.g., actions, decisions) of whatever version of independence it seeks for them (individualism, autonomy, reason, etc.). I propose that the litmus test be whether or not a state is actively targeting the beliefs of its citizens. Macedo is right that the state fundamentally transforms citizens as a natural consequence of its regular activity.¹⁸⁴ However, the fact that transformation occurs incidentally is unavoidable and does not constitute a sanctioning of the state to actively and deliberately pursue this effect. Liberalism can pursue transformation, but it cannot do so while maintaining that degree of neutrality that is at the heart of the project of political liberalism.¹⁸⁵

We must be clear on the fact that when we engage in transformation, the impact of our activity is not limited to the specific acts. The second we imbue one act with the

¹⁸⁴ Consider, for example, Rousseau's statement on how deeply the state itself fundamentally alters and affects its inhabitants from Book I, Chapter VIII of the *Social Contract*: "The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked." G.D.H. Cole, trans., *The Social Contract and Discourses* (Clinton, MA: The Colonial Press Inc., 1950), 18.

¹⁸⁵ To any extent one might argue that Rawls himself permits or encourages active transformation, I would suggest he accordingly fails at his own project of being political rather than metaphysical.

purpose of transformation, all activities are suddenly co-opted under that same mission. Every action by the state has become targeted at its citizens. This is violating the underlying principle of individualism that motivates liberalism. I do not imagine, in contrast, that the state should pursue as an alternative an abstract form of neutrality. A pure neutrality is impossible within a liberal democratic framework, because the system at least minimally imports assumptions and values about citizens having a role in the formation of politics.¹⁸⁶ The priority placed on public safety and public health and the general respect for the individual citizen's right to a maximum level of self-determination are themselves clear non-neutral values. The spirit of the project of neutrality, however, is directed to this task of minimizing state intervention in the realm of ideas to the extent possible while still maintaining the structure (safety, health, order, etc.) necessary for citizens to exercise that determination. The fact that the precise character of that structure, or where exactly that line is to be drawn, remains intractably contestable does not negate the fact that this is the aim of liberal politics.

Transformative political liberalism rejects, as does comprehensive liberalism generally, outright imposition and force-feeding of beliefs by the state.¹⁸⁷ But it

¹⁸⁶ See Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99.4(1989): 883-905. Kymlicka points out that while liberal neutrality has intractable problems and cannot be achieved to the dogmatic extent to which it is praised by many liberals, as an abstract goal it is still preferable to communitarian rankings of the value of different visions of the good life (See in particular 899-905). We do share a position that the *intended project* of neutrality, the balance that it aims to achieve remains central, maximizing deference to individuals in determining their conception of the good life to the extent that this is possible. However, he is ultimately more pessimistic about many of the particulars of this project and ultimately gives much more discretion to the state and a more expansive role than I do. I dispute his inference that the intractable challenges, such as prioritizing particular languages for state purposes or respecting the needs of minority groups, require the heightened role of state intervention that he imputes to them.

¹⁸⁷ I use the term belief more broadly here, including positions on the world including but not limited to the religious.

represents a significant statement about directing the state's attention toward certain beliefs held by its citizens. Even acknowledging that it advocates only a minimal role for the state's involvement in beliefs, the fact that it allows the state to turn its attention to the minds of its people at all signals a strong departure from minimalist ideals.

Liberalism cannot be expanded to include the possibility of transformation and simultaneously avoid moving outside the bounds of its core values. I seek primarily to suggest that the move played by the transformative political liberals has implications far greater than acknowledged, to the detriment of their project.

If we justify the actions taken by the state in *Mozert* in relation to their taking part in an attempt at "transformation," then there is no way to avoid infusing everything done by the state with transformative potential. Transformative political liberals must abandon the claim to a middle way between comprehensive and non-transformative political liberalism. While their application of such tools may be minimal in relation to clearer examples of comprehensive liberalism, they are nonetheless the tools of comprehensive liberalism being employed, even if they are used in a blunted or muted fashion. While perhaps less readily identifiable as comprehensive, they are nonetheless operating under the same fundamental assumptions from which they attempt to distance themselves. As a point of contrast to illustrate the distinctiveness of the transformative approach, consider the belief-action distinction from US Supreme Court jurisprudence, perhaps one of the clearest and most important articulations of the ideal of a nonexistent role for the state in concerning itself with the beliefs of its citizens. In *United States v. Reynolds*, the Court said that although the state "cannot interfere with mere religious

beliefs and opinions, they may with practices.”¹⁸⁸ In *Cantwell v. Connecticut*, the court reiterated that the Free Exercise Clause “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.”¹⁸⁹ This principle assumes as foundational that the state is barred from invading the minds of its citizens with an interest in reshaping the raw materials of their potentially illiberal beliefs. Even if transformative liberalism avoids the direct targeting that was of immediate interest in the framing of the First Amendment, the violation of ideals remains in the fact that transformative liberalism opens up what even the belief-action distinction takes for granted as closed off to state concern, the citadel of the human mind. The belief-action distinction states that conduct can be regulated when it serves, for example, a “valid secular policy” as in *Cantwell*, but that beliefs are off limits as targets of state activity. But here, the state can make not only the conduct but the belief itself a target of the state.

The comparison above is especially useful in locating the transformative liberals along the particular dimension of degree of permitted state interest in citizens’ beliefs, because on this end the belief-action approach is considered among the least accommodating within the US tradition. Its logic was invoked repeatedly in *Smith*’s famous gutting of the *Sherbert-Yoder* line of cases that promoted mandatory accommodations for religious practitioners.¹⁹⁰ Even in its least accommodating articulation of free exercise, the US court at least took for granted the inviolability of

¹⁸⁸ 98 U.S. 145 (1878).

¹⁸⁹ 310 U.S. 296 (1940).

¹⁹⁰ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

belief and the immunity of belief from state attention. The comparison highlights the degree to which the transformative project is unique in relation to certain articulations of liberalism.

The belief-action distinction has been met with numerous critics of its own, many arguing that the state cannot pretend that limiting attention to actions can remove the state of any responsibility it might incur from the concurrent burden placed on beliefs.¹⁹¹ But what makes it an interesting contrast for our purposes is how it highlights the unique function of transformative liberalism. Both the belief-action distinction approach and transformative liberalism position themselves against the pro-exemptions argument made in cases like *Sherbert* and *Wisconsin v. Yoder*. They both pursue a consistency of application across individuals. But the former has explicitly defined itself in reference to a complete lack of concern for the beliefs of the citizens. I reiterate this point to highlight the significance of transformative liberalism's attention to belief, illustrating the centrality of this feature to the transformative political liberal project. What makes it of interest for our purposes is that it has allowed the state to turn its eyes to the inner thoughts of the people. It has opened for consideration what holds the status of near sacredness for a number of other articulations of liberalism.

As evidenced by this critique, transformative liberalism, even in the weaker form proffered by Macedo, cannot ignore the potentially necessary extensions and even radical implications of its transformation. Even reducing this role to as minimalist a role as possible does not negate the fact that what has been allowed places this brand of

¹⁹¹ The belief-action approach admittedly has its own challenges to contend with. Consider, for example, Elizabeth Harmer-Dionne, "Once a Peculiar People."

liberalism into a category completely separate from those that bar such interaction altogether.

The attempt to make the influence indirect cannot overcome the fact that transformative liberalism gives the state a stake in the beliefs of its citizens, religious or otherwise. Macedo even admits, "...it must be allowed that political liberalism may not be the best ideal along every conceivable dimension."¹⁹² Macedo's position infuses a spirit of fallibilism into the state's relationship with value statements, which should provide all the more reason that the state should not attempt to persuade its people that the tradeoffs it has chosen are the most appropriate. If the means and ends of political liberalism are themselves subject to legitimate dispute, then the state can only be portrayed as inherently biased in favor of an uncritically conservative project of promoting its current manifestation over and above potentially beneficial transformations.

Spinner-Halev makes what I consider a dramatic step forward in promoting a more appropriate vision of state activity, with Brettschneider representing the opposite extreme along the continuum. But I would take Spinner-Halev's project even a step further away from Macedo and all the more so from Brettschneider, to say that even indirect transformation is an inappropriate goal, under any circumstance. Transformation, given the crucial transition that it enables of reimagining citizens as intellectual objects to be reshaped in the image dreamed up by the state, should not be included among the functions of the state.

¹⁹² Macedo, "Liberal Civic Education," 492.

Rather than indirect transformation, I argue that only “incidental” transformation should be acceptable to political liberalism, that is, transformation that was in no way envisioned as an end of state activity.¹⁹³ For state-caused transformation to be acceptable, it must have been nowhere on the state’s radar as an additional motivation to engage in the action that led to the transformation. As discussed later, there is room for debate as to whether it might be considered in the case where the state wants to avoid this potential harm, but it should certainly not enter into considerations where the possibility of transformation adds to the attractiveness of any particular option. A liberal state, as acknowledged by all transformative theorists, should hope to minimize opportunities that require it to stipulate to citizens what they ought to be. I think it fair to say that all of the aforementioned theories would accept as a starting place the *preference* that the state not need to interfere at all in citizen beliefs, given their preference for increasing the space for pluralism and thus diversity. Intrusion, then, should be justified only if the threat proves substantial enough to necessitate a state response.¹⁹⁴

Liberalism has to walk the balance of protecting the individual space to thrive and develop while at the same time creating an orderly, self-sustaining society. Yet the transformative vision is problematic because it accomplishes this end only by crossing

¹⁹³ See the following section for a discussion of this issue with regards to state education.

¹⁹⁴ Note that this approach does not negate hate crime legislation. See the Court’s reasoning in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). It argues that hate crime legislation is not justified by distaste for the *belief* that other races are lesser and deserving of aggression but rather by the increased effect on the communities of racially motivated aggression. Such acts have the observed tendency of increasing division and hostility between racial communities, leading to escalation and additional acts of violence, much more so than results from non-racial aggression. The difference in the harm done justifies the increased penalties, not a statement of belief. Compare this case with *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992), which struck down hate *speech* legislation that was motivated by distaste for the message, according to the Court.

the line beyond which it no longer allows individual intellectual breathing space. In particular cases such as *Mozert* my perspective and the transformative perspective may agree on the appropriate outcome: *Mozert* loses the case. However, the difference in theoretical justifications has an enormous impact on other cases. As I argue, the logic of transformation categorically opens up all activities of government to be weapons of the state, leading to the state taking up an active agenda of targeting its own people and massive campaigns undermining individualism.

To invoke an assumption imported from *West Virginia State Board of Education v. Barnette*, a case cited frequently as critical in the *Mozert* opinion but curiously absent from the transformative conversation, Justice Jackson held in his opinion of the court, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...or force citizens to confess by word or act their faith therein.”¹⁹⁵ Any shaping that happens should be done through the effects of the incentives we put in place. But this should be a secondary effect, rather than the result of actively structuring said incentives in such a way that they will encourage citizen formation in a particular way. Admittedly, state actions will inevitably create some degree of influence. Creating tax structures, spending money in one area rather than another, focusing scarce attention, staff, and resources on some problems rather than on others can very possibly affect how the citizenry understands itself and the values it prioritizes, if by no other reason than the priming of those beliefs and bringing them to the forefront of the minds of the citizens.

¹⁹⁵ 319 U.S. 624 (1943).

I propose, in lieu of Brettschneider's coercive/expressive distinction which amounts to a direct/indirect divide where both are still targeting individuals, an evaluation tool based on active/inactive transformation. This approach is analagous to the belief-action distinction, but it makes explicit the fact that it is the stance of the state towards citizens' beliefs that matters, directly shutting down the possibility of transformative motivations. If the transformation occurs as the consequential product of normal state enforcement of liberal ideals, that is, not as a result of active attempts to manipulate citizen beliefs, then the transformation is appropriate. Whereas Spinner-Halev's focus on "indirect" transformation sets the onus of evaluation upon the impact on the citizens, I propose to base the evaluation upon the intention and activities of the state.

The state should not make the potential influence of these actions the tools with which it structures society. This would be tempting and immediately possible, yes. But I argue that there is no way to introduce this function of the state without radically augmenting the active role of the state. Even directed toward benevolent ends, this allows for such extreme participation and oversight by the state that it goes beyond the bounds of what lies at the heart of liberalism. Citizens would inevitably become targets of the state in the pursuit of creating a society where liberal values are held dogmatically by each individual member of the society.

I argue that, to maintain the status of political liberalism, actions that exclude people socially should be dealt with on the social sphere, and that only when we can indicate a measure of political violation can we call in the state. The grievance must be

framed in terms of alienation and exclusion from either goods and services distributed by the state or the ability to participate and be heard. Apart from such a showing, political force and influence cannot be brought in to address a situation that does not result in such direct deprivation by a citizen. Outside of this realm, the state has no justifiable interest in further interference with citizen belief systems. In *Mozert*, the state is justified in forcing the students to attend this portion of the educational curriculum by its more general interest in creating an educated citizenry. As long as the school is merely trying to expose the student to a variety of lifestyles for the purpose of awareness of activities in the society around them, then activity of the state can be articulated in terms that have no need for reference to transformation of the belief that motivates the distaste for this piece of knowledge. Likewise, public accommodation laws can still be justified in the sense that they are exclusively motivated by a concern with the public sphere and making equal access to public facilities available to all. As long as additional regulations are not introduced with the purpose of targeting beliefs, then the state is free to fulfill its function of administration and keeping society running smoothly.

The greatest problem with transformative political liberalism is that it opens the door for every action to be transformative and immediately becomes all-encompassing.¹⁹⁶ Using the terms of transformative liberalism, we could redescribe a number of state actions in terms of the state shaping its people. There is no clear reason to consider actions in the field of education to be transformative, but not in granting tax-exempt status, for example. Consider the case of *Bob Jones University v. United States*,

¹⁹⁶ As evidenced by Macedo, “Transformative Constitutionalism.”

in which the government removed the tax-exempt status of a private university for its prohibition of interracial dating.¹⁹⁷ Brettschneider in particular applauds this decision as an example of the state using its power to actively transform an illiberal body, without of course resorting to force.

However, there should be a safe space allowed, as Spinner-Halev suggests, that allows for a space for free association. Tax exempt status exists as a means to promote individual or community-specific pursuits in life.¹⁹⁸ To allow for people to create the sort of life that they want; to promote values and lifestyles that they find beneficial to themselves and/or society at large. Conflict should arise only when it comes to active subsidizing through means like state funding of programs, for example. Even the principle of public accommodation has its limits here. Even if an illiberal university were to exclude certain demographics of the citizenry, as long as they are fulfilling this expressive mission, their activity should be immune from state interference. They are promoting a way of life, a vision for how they think the world should operate. There may potentially be other benefits of which an illiberal institution might be deprived, as mentioned, but these must all be framed in relation to the interest of allowing the general citizenry to have equal access to and availability of a government provided good or

¹⁹⁷ 461 U.S. 574 (1983).

¹⁹⁸ While tax-exempt status to non-profit organizations may be equated in with active subsidizing in the form of granting funds in certain contexts, they are extremely different in terms of their purpose. See, for example, the U.S. case law on the freedom of association, in both intimate and expressive forms, as a state motivation for granting rights for an example of a logic that applies to tax-exempt status, e.g.: *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *New York State Club Association v. City of New York*, 487 U.S. 1 (1988); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Such rights are available to all groups, regardless of whether the state approves of the message or not. In contrast, the state has far more discretion when it comes to giving its seal of approval in the form of giving funds.

service. It cannot be justified merely on the basis of a presumed right to be included or for the sake of receiving validation from the offending group.

To label the action of removing tax exempt status as a form of state action aimed at changing the way the people inside the institution think about it is to take a broad step. The problem with Brettschneider's perspective is that he ties the receipt of tax-exempt status to the satisfaction of a list of liberal values kept by the state, at the top of which is the requirement that organizations not hold any belief considered intolerant. This removes a significant amount of freedom of expression and drastically impinges the ability of certain members of the state to benefit from the state subsidization of associational life due to their disqualified beliefs. Here it becomes evident that the label assigned to actions in the case of *Mozert* matters; when translated onto other scenarios, it would call for increased action, regulation, and participation by the state, to the point of stepping beyond mere enforcement or protection of citizens from other illiberal citizens.

Framing this activity of education as the state actively involved in transforming its people ignores the fact that nearly every action would take on this increased significance. Suddenly the budget is not just about providing for the general welfare of the citizenry in an egalitarian manner. Suddenly the budget becomes an act of strategically placing resources in such a way that they become tools for articulating the state's paradigm of citizen formation.

IMPLICATIONS FOR EDUCATION THEORY

My concern for the moment lies in articulating the contours of liberalism. Yet, though I am more concerned within the bounds of this project about the values of liberalism than the specifics of education, a few words on the subject are necessary and appropriate, at least to suggest the realm within which debates over education theory may take place under this approach. Theories concerning the goals of the state in the education of its people in particular must be embedded in a larger theory of what the purpose and sphere of influence of the state is.

My incidentally transformative view of liberalism suggests that exposure to such material should be justified along the lines of exposure to the practical operations of society. In order to facilitate a peaceful order, knowledge about the practices and even beliefs of other groups may hopefully increase the likelihood of smooth interaction across groups. The distinction is key, though, that the effect of transformation is entirely secondary and should not be included in the calculus of state activity.¹⁹⁹ The justification of the decision in *Mozert*, then, should not at all concern itself with the desire to impose or, more importantly, to root out certain values present in the populace. Any impact on values should be incidental and secondary, not the aim of state interaction.

As my interest is particularly in the appropriate form of state involvement in education, I underscore that this form of education very well may not be the best form of education overall, for the whole person. Rather, I argue that, *if* we take a view of the state as wanting to avoid imposing itself upon the will of the people, then state education

¹⁹⁹ Contrast my approach with one that creates a strong role for the state in shaping citizens, for example: Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1999).

must limit itself in a way that mirrors the attempt of the state to avoid promoting a particular vision of its citizens. The state may take as its model religious studies programs, including the variety at issue in *Mozert* which is taken for granted as an acceptable model by all versions of transformative theorists discussed. In *Mozert*, for example, and in state sponsored university departments, attempts to systematically study religion are made without an attempt, at least in theory, to propagate a particular view as to the superiority of any one religion. Assuming that any statement concerning the highest ends of human activity can have profound impacts on the temporal, and conceivably even the eternal, wellbeing of those participating in the study, one might argue that this system of education fails the students for its inability to yield them directly applicable lessons on the subject matter. But theology is not the subject matter of religious studies; rather, the structures of religion as social phenomena are. Comparably, a system of education embracing only incidental transformation may appropriately educate students on how to function within a pluralist society, without mandating any particular brand, be it of political liberalism or otherwise. There exists, then, a model of education whereby the state can see itself as justified in mandating exposure without requiring an interest in rooting out the belief which causes the opposition in the first place.

Many argue that any attempt at exposure may be seen as normalizing and therefore inherently transformative. Consider, for example, debates over whether deliberately to insert into elementary curriculum stories and historical examples of racial minorities or GLBT characters and families. Yet if we fear that mere exposure to ideas

will lead to perceptions of state approbation of a practice, discussions of the institution of slavery would similarly have to be expunged from the instructional record. In order to instill the skill of navigation through a social and political system, there must be a basic level of understanding of the actors within the system. It is possible to deny parents' rights to insulate their children from certain material without resorting to the transformative ideal.

Although this idea may run contrary to the expectations of many regarding the function of education, I argue that a state education in keeping with the values of political liberalism must focus on instructing students in operation of the mechanics of the state, teach them how to work through a pluralist system, *rather* than focus on instilling values in them. If we are going to have a pluralist state, then students must be aware of the fact of pluralism and understand how to function within such a system. While a private education may quite deliberately focus on providing a transformative education, the state cannot do so without declaring what shall be orthodox. But this fact need not destroy the possibility of the education itself serving a transformative function for the student. In this model, the instructor becomes the equipper, providing students with the tools they will need to form opinions of their own and into engage in an independent journey. Instructors can point students to the questions, discuss the surrounding debate, analyze arguments on all sides, and model this process of deep critical thinking *without* having a preordained conclusion in mind for them. It remains completely possible to have a vibrant form of education where students are guided

toward introspection and self-development *without* the state manipulating the system to its own benefit.

Language instruction could still be justified on the grounds of operation within the state. I do not believe that my project can settle the question of whether or not it is appropriate for language groups to isolate themselves. The legitimacy of such an arrangement would still be debatable within my framework based on whether or not one considers this central to the needs of the state. As regards the inculcation of patriotism, however, I am not sure that this would be considered central to the state in the way that I have framed the issue. If the political liberal state can be expected to trust its citizens with freedom of speech, which they may abuse, then it is not clear to me that the state cannot also be expected to entrust the fostering of attachment to the state to the people. The market place of ideas approach must be respected. Consider Justice Oliver Wendell Holmes's seminal opinion in dissent of *Gitlow v. New York*²⁰⁰: "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Such values require the possibility that the citizens might want to change the nature of the state. While not all patriotic events need to be banned from a school and celebrations might be appropriate, what matters here as elsewhere is the stance of the state toward the students: the state interest cannot be in shaping them into patriotic automatons for the purpose of its own self-perpetuation.

²⁰⁰ 268 U.S. 652 (1925)

Upon the conclusion of this discussion, one might pose once again the original exemption question from *Mozert*, though in new terms: Why, since so much effort has been poured into maximizing the liberty and freedom to choose of the individuals, might they not choose not to expose themselves to certain material? Insofar as the state has an interest at all in educating the youth and requiring that they be exposed to a decade's worth of knowledge and skills, the state is accordingly justified in requiring attendance to state sponsored education. The state has a legitimate interest in ensuring that its citizens are capable operators of the machinery of the state, without forcibly inculcating citizens with the values that underlie said machinery.

As I do not attempt to fully articulate that logic in this project, there may still be room for debate concerning the possibility of requesting an exemption from certain material. I am only concerned to establish that the state justification for either granting or denying said exemption ought not to be an interest in shaping the beliefs of the citizen, illustrated clearly here as that would in this case require the direct challenging of a religious belief. I seek merely to suggest that the state should avoid the use of such rhetoric in the justification of its actions. It is the self-understanding of the state as regards the purpose of its activity, of any and every variety, that matters most here.

CONCLUSION

A belief-action distinction should represent the minimal starting place for a limitation upon state activity. The state should, at the very least, limit itself to regulating actions and forego concern for the beliefs of its citizens. Beyond that, the state may

choose to regulate less overall. With this as the baseline, there is still room for debate as to where to draw the line practically. But my primary concern is to argue that political liberalism cannot successfully stretch itself beyond what is necessary to achieve its end of the preservation of order within society. A political liberal state education cannot consistently have any form of indoctrination at the core of its interests. Allowing even minor approaches to transformation represents a shift of theoretical categories with few limits on the potential scope of activity that would immediately be framed and redirected in terms of state interest. A non-transformative political liberalism allows for further respect of the independent thought of the citizenry without abandoning the interests of the state.

This chapter has demonstrated in one theory case study, then, that it is entirely possible to build a case for respecting religious beliefs without resorting to a special category. The aim is to demonstrate that the special category is not the *only way* to protect religious interests, that there are tools available for defense within the liberal democratic tradition. Demands for religious priority, then, often misunderstand the political landscape and the nature of the resources available to religious adherents. In the concluding chapter, I will turn to concrete examples of how such demands are often rooted in fundamental misunderstandings of the facts at hand.

CHAPTER VI

CONCLUSION: RELIGION AND DEMOCRATIC PROCESS

INTRODUCTION

The problem surrounding arguments for the political specialness of religion is one of perspective. The problems arise when one begins with the assumption that religion is unique before consideration of politics even takes place, rather than considering first how religion fits into the larger system and relates to other parts. In the former case, religion is recognized as something of value without reference to any other group within the system and accordingly translated into a special category. Especially in the applied context, these arguments tend to revolve around a misunderstanding about how law works. Beyond the significant challenges posed to the creation of regular law and policy, this approach also presumes without critical reflection that a special category is indeed the best form of protection for religion, whereas the isolated identification has the potential to harm religion in the long run. Religion fits best into liberal democratic theory when approached broadly from a system-wide perspective, from which it becomes apparent that the citizen acting out of religious belief has more in common with a citizen acting out of nonreligious ethical belief than is often suggested.

As has been demonstrated in previous chapters, advocates of religious distinctiveness often misunderstand the nature of religion. However, the lack of understanding regarding conceptual categories is just as often paired with a complete misunderstanding regarding the policy area under consideration. In the case of

exemptions, for example, in practice there is often a complete lack of understanding about the implications of the demands made regarding religion.

In the conclusion, I offer two recent examples, one national and one local, of how the limited perspective of religious priority leads to chaotic messes of political arguments. First, I consider demands for religious exemptions in response to the Patient Protection and Affordable Care Act. Secondly, I examine a proposed Texas A&M University policy, which functions as a perfect microcosm of the same issues that appear on the national scale writ small.

While both of these events ultimately share the same deep-seated theoretical issues that characterize all of the examples used throughout this project, the two examples in this concluding chapter illustrate the practical challenges that commonly plague demands for religious exemptions. Beyond complications stemming from normative issues raised by these demands, uncritical beliefs in religious priority often lead religious claimants to make demands that would not be sustainable in practice even if a government entity desired to implement them. The idea of religious uniqueness leads to demands that are not functional in practice.

While these examples can easily be explained away as arguments for religious distinctiveness done poorly, I suggest that, in practice, their positions represent the type of logic typically employed in the public sphere when demanding distinctive treatment.

A NATIONAL EXAMPLE: EXEMPTIONS FROM HEALTH CARE REQUIREMENTS

The Green family of Oklahoma started, privately owns, and continues to run two highly successful business chains: the arts and crafts store Hobby Lobby and the Christian bookstore Mardel. As a devout Christian family, the Greens attempt to run their businesses under the influence of their faith. The Tenth Circuit Court observes that the family engages in the exercise of religion in the following ways, among others: “Their beliefs are exercised through the businesses in numerous, concrete, and public ways. They make chaplains available to employees, give millions from profits to fund ministries, and buy hundreds of religious ads every Christmas and Easter. They monitor merchandise and avoid allowing their property to support activities they believe to be immoral.”²⁰¹ There are thus pervasive and well-established attempts to ensure that the business reflects the religious values of the owners and operators of the establishments.

In the wake of the Patient Protection and Affordable Care Act of 2010, however, the companies are required to provide their employees with specific types of health care: “employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg-13; 29 U.S.C. § 1185d.”²⁰² The Green family was concerned that among those preventative services they were now required to cover are drugs that they consider to induce abortions, and their religious beliefs prevent them from contributing to what

²⁰¹ *Hobby Lobby Stores v. Sebelius*, Appellants’ Motion for Injunction Pending Appeal, 10th Cir. 12-6294 (2012).

²⁰² *Hobby Lobby Stores v. Sebelius*, Court’s Response to Motion for Injunction Pending Appeal, 10th Cir. 12-6294 (2012).

they consider the taking of a life. The court notes, “The FDA has approved twenty such methods, ranging from oral contraceptives to surgical sterilization. Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg. The remaining methods function by preventing fertilization.”²⁰³ This legislation, they argue, would require them to violate their religion, as failure to comply could result in their incurring millions of dollars a day in punitive fines. Thus, in their capacity as leaders and owners of the companies Hobby Lobby and Mardel, the Greens are currently engaged in the process of suing the federal government over its application of the PPACA, citing the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993.²⁰⁴ On 27 June, 2013, the Tenth Circuit Court of Appeals granted the Greens an injunction from the enormous fees that would be incurred by the family as they continue with their suit.²⁰⁵

The court also used language that was strongly indicative of support for the case's future. The court stated:

Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United*,²⁰⁶ where the Supreme Court has recognized a First Amendment right of for-profit corporations to express

²⁰³ *Ibid.*

²⁰⁴ It is important to remember, the RFRA still stands with respect to federal proceedings. *Boerne v. Flores* primarily targeted those portions of the law that attempted to tell the Supreme Court how to interpret the First Amendment, demanding that it be read under the *Sherbert v. Verner* interpretation rather than the *Employment Division v. Smith* interpretation.

²⁰⁵ Kristen Wyatt, “Hobby Lobby Won’t Have to Pay Millions in Fines as It Challenges Obamacare Birth Control Mandate,” web, Huffington Post, 27 June 2013, www.huffingtonpost.com.

²⁰⁶ 558 U.S. 310 (2010).

themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.²⁰⁷

The majority of this court believes that under the *Citizens United* standard, the Green family businesses ought to be able to invoke other forms of First Amendment protections such as free exercise rights, although the minority opinions, Briscoe's in particular, remain skeptical about this application.

I would argue, however, that, by the normative framework established in the preceding chapters, i.e. irrespective of appropriate precedent, a nationally established health standard in a specific case like this ought to trump free exercise of this sort. We have to think of the type of beliefs that could be placed into a similar class. For example, one has to consider the full range of procedures that would have to be exemptible. Jehovah's witnesses, for example, do not believe in blood transfusions. Scientologists object to the use of pharmacological substances, and Christian Scientists reject medicine altogether in favor of prayer.²⁰⁸ While the focus of the debate has centered around the drugs that many Christians in particular believe end a life, many such as Catholics are also officially against contraception altogether. These are good examples because they are things that many people, though clearly not all, would consider essential to some standard of health care. To allow all of them would both undermine the adopted standard of health by preventing access for employees of the exempted and also by risking the

²⁰⁷ *Hobby Lobby Stores v. Sebelius*, Court's Response to Motion for Injunction Pending Appeal, 12-6294 (10th Cir. 2012).

²⁰⁸ Even if one engaged in a debate about the status of these beliefs as "religions," they would still count under the approach established by this project as a strong ethical system.

proliferation problem familiar from Chapter II.

To the extent that you can mandate any standard of health at all, you have to preserve it. By its nature, a minimum health care standard is something to which a government thinks its citizens ought to have access. Accordingly, it is difficult to pull it apart piece by piece. Whatever has been put into it is at least conceptually the state's standard of what services should be readily available to everyone. Rather than demanding exemptions in this case, then, the appropriate course of action for those who do not wish to pay for specific portions of a health care plan would be to persuade the nation through democratic deliberation that a standard of care ought not to include drugs they consider abortion-inducing.

Obviously I am not relying on an objective standard of health care so much as a procedural one, which itself leaves room for a host of normative challenges. However, I rely on the fact that it is through the procedure of the democratic process that a nation ultimately determines what constitutes a national standard of health and wellbeing, however high or low that standard may be. The issue upon which I am directing my attention here is not a normative one about what should or should not be counted as health care but about how we make those decisions.

The Court has already ruled constitutional Congress's ability to establish a minimal level of health care when it upheld challenges to the PPACA.²⁰⁹ Therefore, by the framework I have suggested, we can conclude that the appropriate arena for such a discussion would be in the public sphere and by representatives in the legislature. I argue

²⁰⁹ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

that health does not lend itself to carving out exceptions, unlike conscientious objection to participating in warfare, for example. While this example leaves considerable room for debate regarding application of current precedent and normative standards of health, the next example provides a clearer case where the request made would be barely functional, if functional at all, were it granted.

A LOCAL EXAMPLE: EXEMPTIONS FROM UNIVERSITY STUDENT FEES

The second example demonstrates the same phenomenon as the health care example but on a smaller, local scale. In March of 2013, a member of the Texas A&M Student Senate finance committee introduced The GLBT Funding Opt-Out Bill, which was described in the document's summary text as, "A bill requesting that students who object to funding the GLBT Resource Center through their student fees and tuition for religious reasons be allowed to opt out from funding same." The legislation read as follows:

Whereas(1): Texas A&M University is a public institution, and as such, has an obligation to spend students' money in ways that reflect the values of the students who pay that money; and,

Whereas(2): Many students disagree with the use of student fee and tuition money to pay for a Gay, Lesbian, Bisexual, and Transgendered (GLBT) Resource Center for religious reasons; and,

Whereas(3): While it can be argued that the GLBT Resource Center is a worthy use of funds in order to provide a welcoming environment for vulnerable

populations at Texas A&M, it is reasonable for students to object to a use of their own money that is in direct opposition to their own religious values; and,

Whereas(4): Students should be informed as well as possible about how their money is used.

Therefore let it be Enacted(1):

That the Texas A&M Student Government Association shall support allowing students who object, for religious purposes, to the use of their student fees and tuition to fund this center to opt out of paying an amount equal to their share of the Center's funding from their fee and tuition bills...²¹⁰

This version yields one immediate problem: such a policy would be blatantly unconstitutional if implemented. The bill in this form violates the First Amendment principle of viewpoint neutrality. Public universities are classified as limited public forums, meaning they are allowed certain restrictions in areas designated for speech, such as limiting access to students, and they can have certain control over content as far as designating or restricting topics. They cannot, however, treat specific viewpoints differently. For policies that affect speech in a limited public forum, a state must prove that its regulation is both a reasonable means to achieve its aim and a viewpoint neutral policy.²¹¹ The latter prong bars the state from singling out one particular belief, whether to benefit or to harm it.

²¹⁰ The Student Senate set up a page on their official website that contained the full text of both versions of the bill, the official declaration of the Student Body President's veto, and a link to video footage of the floor debate. However, they have since removed the version of the bill as it was originally submitted from their website. This text was taken from the version of the bill posted as a PDF to this same website before its removal. <http://senate.tamu.edu/node/1029>.

²¹¹ See *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010).

The problem here lies in its giving a special protection to only one religious belief: the potential to control the assignation of one's fees in accordance with religious beliefs applies only to those whose religion would condemn both the embracing of LGBTQ status and also contributing resources to those who do identify as such. No other religious belief is allowed to designate its fees accordingly. This constitutes singling out a single belief for protection and thus violates viewpoint neutrality.

The mistake was recognized, and a new version of the bill listing four additional sponsors left the finance committee the night before the vote. The new version, re-titled the Religious Funding Exemption Bill, displayed the following broader language:

Whereas (1): Texas A&M University is a public institution, and as such, has an obligation to spend students' money in ways that does not infringe upon their religious conscience; and,

Whereas (2): Many students disagree with the use of student fee and tuition money to pay for a number of services funded through those fees, for religious reasons; and,

Whereas (3): While it can be argued that many services are a worthy use of funds in order to provide an opportunity for academic success at Texas A&M, it is reasonable for students to object to a use of their own money that they feel violates their religious conscience; and,

Whereas (4): Students should be informed as well as possible about how their money is used; and,

Whereas (5): The broad varieties of religious views expressed by students are

equally important, and the variety of services they disagree with should be treated with equal importance.

Therefore Let it be Enacted (1):

That the Texas A&M Student Senate shall support the current standing process allowing students who object, for religious and moral purposes, to the use of their student fees and tuition to fund various services to opt out of paying an amount equal to their share of the service funding from their fee and tuition money, at the time of paying said bills; and,

Let it be Further Enacted (2):

That students are provided an electronic outlet to communicate their religious disagreements at the time of paying tuition and fees, with specific instructions on the process and a clear link to the proper office provided, as to make the process more publicized so that an opt out may be requested in person; and,

Let it be Further Enacted (3):

That, after students have expressed a disagreement, that the University issue a reply in a timely fashion notifying the student whether or not his/her disagreement is deemed valid; and,

Let it be Further Enacted (4):

That, if the disagreement is deemed valid, a refund equivalent to the amount in question be provided in a timely and efficient manner to the students, with no additional financial burden placed on the students...

Note that, among the significant changes to the bill, the language specifying only

religious exemptions was expanded to include the phrase “and moral” to the first enactment point, allowing non-religious ethical beliefs to qualify as well. This change displays a similar logic to *Welsh*²¹² where coverage is expanded to include nonreligious ethical beliefs. This move was sufficient to convince any senators initially put off by the blatantly discriminatory language of the previous version, and the bill passed the senate 35-28 and went to the student body president for a vote.

Unfortunately for their cause, the sponsors staked the majority of their case in floor discussion on the existence of the “current standing process,” having allegedly discovered an under-publicized process to receive an exemption.²¹³ It was determined shortly after the vote, however, that this process did not actually exist.²¹⁴ The student body president pointed to this revelation as justification of his vetoing the bill. The student body president and the speaker of the Student Senate subsequently issued a joint statement requesting that this issue be put to rest for the sake of the health of the campus. This technicality allowed the campus to avoid the deeper discussion about accommodation due to religious belief and the issue of exemptions.

What is perhaps more interesting is the greater social dynamic at play. The student senate possesses only one power, that of publicity. It serves primarily as the voice of the collective student body. All other effects that it has stem from its ability to speak on behalf of its constituents. Any bills that pass in the Student Senate have only the affect of making their way to the university administration as recommendations, as

²¹² Refer to the discussion of this case in Chapter II.

²¹³ Refer to the video footage of the floor debate linked at <http://senate.tamu.edu/node/1029>.

²¹⁴ John Claybrook, “An Open Letter from Texas A&M Student Body President, John L. Claybrook,” Student Government Association, Texas A&M University, 5 April, 2013, <http://senate.tamu.edu/node/1029>.

evidenced by the boilerplate fifth enactment point, omitted above, resolving that a copy of the bill be sent to the university president, CFO, system chancellor, and others. The student senate has no formal power.

Even if it had passed the student senate, the bill had almost no possibility of effecting any change as a result of the how poorly conceived the bill was. The policy recommendations betray a complete lack of understanding of the challenge of implementing the type of exemption policy they suggest. It is extremely difficult to enforce these types of mechanisms. Who becomes responsible for assessing the validity of the requests? Cases like *Cantwell* mandate that the power to determine whether or not a religious belief qualifies for a protection cannot rest upon the mere discretion of a single bureaucrat. Restrictions such as this one can make it extremely difficult to implement exemptions policies, as the distribution of exemptions must undergo a process more rigorous than simply delegating to an employee. As is the challenge with all manner of exemptions policies, it is difficult, practically speaking, to assess requirements like sincerity. Expanding such a protection to other beliefs could also significantly increase the number of beliefs that qualify for exemptions.

Consider the range of other university programs that could be objected to under religious belief: Pacifists might object to funding anything connected with the university's military programs. Religions that promote a highly traditional, conservative role for women might object to perceived preaching of empowerment by a women's resource center. Those who abstain from eating meat out of respect for the animals might withhold their share of the funding from a cafeteria. University art galleries often display

works of art that would offend the religious or moral sensibilities of many.

Once again, the way to change such a program would be through a democratic process. Students could lobby for the university administration to invoke its privilege not to invest its funds in this way. Indeed, the Texas A&M Student Senate passed such a resolution two years before the more recent incident that attempted something similar, asking the university to divert some of the funds it invests in the GLBT Resource Center toward a "traditional family values center." Although this attempt failed, it represents the appropriate means of changing state funding for university administration programs. The fact that the democratic process failed does not make an exemptions policy any more necessary or appropriate. Upon the failure of changing the entire system, individual exemptions do not become any more fitting of a remedy. This is not to say that all rights should be left to the democratic process rather than protected by judicial enforcement of constitutional rights. Expression, belief, speech, and association, to name a few, still grant protections that reach religious citizens. But when it comes to making laws and policies that affect all citizens regardless of their brand of belief, religious citizens must speak within the framework of democracy just like everyone else. They must make a convincing case to the public regarding how to allocate state resources.

Universities are, of course, not obligated to provide LGBTQ resource centers. Consider that Texas A&M was infamously involved in a suit over its refusal to recognize a student organization formed by gay students, the Fifth Circuit Court of Appeals decision *Gay Student Services v. Texas A&M University*.²¹⁵ This case focused

²¹⁵ 737 F. 2d 1317 (1984).

primarily on the recognition of student organizations, which is in fact quite a different strand of precedent from extensions of the university itself, such as student affairs programs and academic departments. In fact, the opinion in *Gay Student Services* repeatedly emphasized that it did not extend itself to cases focused on official university programs. While universities cannot choose the student groups they recognize based on message content, they *do* have discretion over which programs to create. They have vast discretion over the services that they choose to provide for their students.

But by attending the university and paying tuition and fees, students are unavoidably investing in the larger mission and message of the university. For practical purposes, the university cannot afford to have every action undertaken by its various offices subject to sanction in the form of losing funding due to a punitive withdrawal of funds on religious or ethical grounds. Consequences for a politically unpopular decision could be immediate and highly destructive. There may already be similar pressure from state legislatures, and adding this level of variability to the financial structure would create enormous instability. At most, some state programs allow students to have a more significant voice in how their fees that are designated for student life spending will be assigned, as for example in bringing speakers or concerts to campus for student enrichment and entertainment. However, these programs do not typically allow students to designate how their fees will be assigned in reference to parts of the university's organizational chart that are under the broad category of student services.

The authors of this bill did not understand that they were asking for a radical overhaul of the financial system. They also did not realize that even if this overhaul were

enacted, it would likely not allow for the specific type of exemption that they demand: the assurance that their individual contributions do not make their way to the objectionable program. The example of funding highlights an issue underlying all exemptions policies: their appropriateness is contingent upon context.

CONCLUSION

The appropriateness of exemptions is always sensitive to the policy area in question. My main observation is that the presence of religion does not resolve the incongruence between exemptions and numerous issue areas. Religion does not transcend the conventional rules of policymaking. Note, for example, that individuals are not granted tax-exempt status on account of a religious belief that objects to either the state or contributing to it.

The same problem emerges here as has occurred repeatedly: people treat the category of religion as a talismanic invocation that will bring about whatever policy outcome they desire. These arguments often fall apart on a very practical level. Little thought is given to enforcement. The situations of the sort discussed above activate the latent impulse to isolate religion as separate. At the very least, it reveals the assumption, familiar from Chapter II, that if we are going to protect anything, we of course would want to protect religious beliefs. There is a dire need for political theory that situates the needs of individuals in relation to others.

In Chapter VI of his *Considerations on Representative Government*, John Stuart Mill discusses the dangers of one of the potential defects of a representative government:

“the disposition to prefer a man’s selfish interests to those which he shares with other people,”²¹⁶ which is especially exacerbated by the acquisition of power. As citizens entrusted with the democratic process, we must be careful not to use that influence to institute unnecessary privileges to specific groups, as many attempt to do with the political category of religion.

²¹⁶ John Stuart Mill, *Considerations on Representative Government* (Charleston, SC: BiblioBazaar, 2007), 95.

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