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The Priority of God: A Theory of Religious Liberty

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I. INTRODUCTION

Religious freedom only makes entire sense as a social and constitutional arrangement on the supposition that God exists (or very likely exists); that God makes claims on the loyalty and conduct of human beings; and that such claims, rightly perceived and understood, are prior to, and superior to, the claims of any human authority. Simply put: God's commands—God's will, God's purposes—rightfully trump man's. Freedom of religion, understood as a human legal right, is government's recognition of the priority and superiority of God's true commands over anything the state or anyone else requires or forbids.

That is the essence of religious liberty, understood as a natural law right. So understood, it is not a right that human authorities *confer* on those whom they rule—a dispensation. That would be, subtly and ironically, inconsistent with the very liberty the state purports to confer. It would be an assertion, at some level, of the priority and supremacy *of the state* and *not* God: the state, in its beneficence, grants the exercise of religion—the strivings of individuals and groups to discern and fulfill their duties to God, in good faith, as they understand them—a certain amount of leeway. But the nature and extent of such freedom is, on such a view, ultimately for the state to judge.

The state-conferred-dispensation view, which I think is the dominant view today, is not really religious *liberty*, in the sense of freedom of religious exercise from ultimate state control. It is a cipher, shadow, or parody of religious liberty. At bottom, what justifies religious liberty—the only thing that makes it at all sensible as a liberty distinct from other liberties—is some shared sense that *true religious obligation is more important than civil obligation* and that, consequently, civil society must recognize this truth. Religious liberty is the legal duty of civil society to defer to the plausibly true free exercise of genuine religious faith.

That is the only conception that can fully justify the idea of constitutional protection of "free exercise" of religion—protection of freedom of religious conduct in opposition to the state's typical commands. The same premises support a related aspect of religious freedom (embodied in the Establishment Clause of the First Amendment): Because God's commands, rightly perceived, trump the state's commands, it makes no sense to say that the state can determine what God's commands are and whether an individual or group has rightly perceived them. The state may not in this respect, or any other, set itself up as the arbiter of religious truth and enforce its determinations as law. The state is incompetent to determine authoritatively what God does or does not command. At least, that must be the operating premise if the right of religious freedom is not to be a chimera. And even if that premise must give way in clear, or extreme, cases—because

surely there are some claims individuals make about God's commands that are simply intolerably and irredeemably false—a strong presumption of state incompetence needs to be the starting point for any coherent system of religious freedom from state control or interference.[1] Thus, it is incompatible with religious liberty for the state to "establish" an official religion or in any fashion prescribe, and then coerce, religious exercise.

Significantly, this is not because we deny the possibility that religious truth exists. Rather, the underlying theory of why we protect religious liberty is that such a thing as religious truth *does* exist. We value freedom *for religion* because we rightly prioritize true religion over the state's commands. We simply recognize the possibility of human error, and especially of governmental error, in matters of religion and so we do not trust the state to tell us the proper way to know, worship, and serve God. We value *freedom* for religion precisely because, if society gets these things wrong (as experience tells us it is quite likely to do), such errors, where backed by the power of the state, will tend to endanger religious truth. Error likes to stamp out truth if it has power to do so. And error is probable. Moreover, even if it were the case that society or the state *did* know religious truth, we would rightly question, on theological as well as practical grounds, the value and propriety of coercion in matters of religious conviction. True faith does not result from coercion—or so we are inclined to believe, often as a matter of religious faith itself.

Thus we protect the free exercise of religion for all (or as many as possible) and prohibit the establishment of any—not because of skepticism about the possibility of religious truth but because of the conviction that religious truth is a possibility and because of an agreement that such truth is more important than anything else. We are skeptical not about truth, but about human perceptions of it and especially about state authority to discern or prescribe it.

My thesis is that this is, in its essence, the theory underlying and justifying the Religion Clauses of the First Amendment and that they should be read, understood, and applied in this light. The First Amendment's religious liberty provisions make no sense except on the supposition that God exists—that such a thing as religious truth exists and that the commands of true religious faith are *real* and *superior* to the commands of civil society. The framing generation, I submit, generally shared the supposition that God exists and generally shared this understanding of what religious liberty is

1. *See infra* notes 43–45 and accompanying text.

for. They disagreed, widely and not always cheerfully, about the nature and character of God, the manner and content of God's revelation, and resulting human obligations and right conduct. But that is part of why that generation came to agree on the idea of religious freedom.[2]

The language of the Religion Clauses appears to reflect such an understanding—that is, the First Amendment's terms seem to reflect quite well the essentially religious premises underlying any serious commitment to the idea of religious liberty. The Free Exercise Clause is properly understood as conferring broad substantive immunity from government laws or regulations that would operate to prohibit sincere religious belief and exercise. As long as a claimed religious practice is truly *religious*, not pretextual, and has any plausible claim to religious truth—that is, as long as the claimed religious right is not contrary to the clear, universal moral command of God, resulting in serious harms outside the truly consenting, sincerely confessing community of faith—the state's rule must yield in the specific instance.[3] The Establishment Clause is properly understood as barring government from compelling religious belief or exercise or punishing failure to adhere to a state-prescribed religious orthodoxy. It protects the free *non-exercise* of religion, just as the Free Exercise Clause protects its free exercise.[4] The two clauses protect the same central liberty, from two slightly different directions: the Establishment Clause forbids government prescription of religious exercise; the Free Exercise Clause forbids government proscription of religious exercise.[5]

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2. *See infra* notes 50–51 and accompanying text.

3. *See infra* notes 42–45 and accompanying text.

4. *See infra* notes 157–58 and accompanying text.

5. This position (and in some respects even the verbal formulation) is one I have advanced before in other writing. *See* Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1609–10, 1611–25 (1997) [hereinafter *Making Sense of Religious Freedom*] (reviewing JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996)) (comprehensively discussing, primarily, the meaning of the Free Exercise Clause); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993) [hereinafter Paulsen, Lemon *is Dead*] (discussing, primarily, the meaning of the Establishment Clause and defending the proposition that the clause prohibits government coercion to engage in religious exercise, worship, affirmation, or direct support of a religious institution); *see also* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995) [hereinafter Paulsen, *A RFRA Runs Through It*] (discussing the question of what "interests" of a state should prevail over legitimate claims to the free exercise of religion); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) [hereinafter Paulsen, *Equal Protection Approach*] (asserting view that the Establishment Clause is properly understood as equally protecting the freedom *not* to exercise religion). In this essay, I build on ideas presented in these articles and refine and modify some of them. In doing so, I have sometimes taken the liberty of closely paraphrasing formulations I have used before. I have endeavored not to overburden the text with too many direct quotation marks and at the same time not to depart greatly from prior formulations of propositions except where I really do intend a refinement (or repudiation). The result is a certain amount of borderline-self-plagiarism, for which I hereby apologize—and which

I began by saying that religious liberty only makes *entire* sense on the basis of these essentially religious premises about the existence of God and the priority of God's commands. It is possible to craft a narrower, more crabbed conception of religious liberty on different, more-or-less "secular" premises. But such conceptions, while in some respects more intuitively appealing to the modern liberal mind, have less explanatory power both in terms of *why* we would have—why the framing generation would have insisted upon—a specific First Amendment protection for the free exercise of religion and in terms of what that provision actually says. Secular theories of religious liberty are weaker theories and harder to defend on principle.[6]

But there are such possible theories and one of the first inquiries in seeking a full understanding of the Religion Clauses is to sketch the range of possible societal stances toward religious liberty and to identify and locate the conception that the First Amendment seems best to match. Part II of this essay identifies four general stances toward religious freedom, gridded by different views as to whether they proceed from the premise that religious truth exists and different views as to whether one should be tolerant or intolerant of individual (and group) departures from society's general answer to this question.[7] Part III stakes the claim that the First Amendment Religion Clauses fit into the general stance of strong toleration of individual claims to religious free exercise because of a belief in the reality and possibility of religious truth and liberal skepticism about the capacity of the state to identify and prescribe such truth. The model for understanding the Religion Clauses of the First Amendment, then, is "Freedom *For* Religion"—protection of religious freedom because of the belief that religion is intrinsically important and that knowledge and worship of God, and obedience to God's commands and expectations, is in principle more important than anything government or society might say. Part IV discusses

this general footnote hopefully mitigates to the extent necessary by attributing the original sources in which some of these ideas were first presented.

6. For extended discussion of this point, see Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1162–63.

7. *See infra* Part II. In the course of that discussion, I also briefly consider the position of radical agnosticism, a variation that purports not to know (and sometimes claims it is not possible to know) whether or not religious truth exists. I believe that this position tends to collapse either into a position that *credits* the possibility of religious truth and concedes its (theoretical) priority over the commands of the State or (more often, perhaps) into a position of such complete radical skepticism of religious claims as to amount to disbelief and thus unwillingness to grant religious conduct priority over society's usual commands. Agnosticism thus tends to tip into either my second or third categories described below. *See infra* note 9.

how this model might help illumine understanding of the language of the First Amendment's Free Exercise Clause and Establishment Clause, and guide its faithful application. In particular, it helps explain why the First Amendment, properly construed, protects only the free exercise of *religion* and not analogous claims of secular conscience and conduct, no matter how similar in form or sympathetic; why it protects such free exercise even from facially neutral laws; and why and how religious premises may help identify the *bounds*, or limits, of cognizable claims of freedom—immunity from state authority—for religion.

II. FOUR STANCES TOWARD RELIGIOUS FREEDOM

There are fundamentally four types of stances a society, and its governmental system, can adopt with respect to the relationship between state authority and religious exercise. The first two proceed from a society's general understanding that *religious truth exists*, but fork off in different directions depending on views about the role of the state in defining and enforcing religious truth. The first view thinks the state can know what religious truth is and should enforce it; the second thinks the state is not competent to judge such matters and should tolerate, even embrace, private freedom to decide and act on views that may differ from a society's general view of what religious truth is.

The third and fourth stances proceed from a society's general view that religious truth does *not* exist, but take different positions as to what stance the state should take with respect to persons or groups who nonetheless believe in religious truth. The third view tolerates beliefs and to some extent conduct at variance with the non-religious general views of society; the fourth view tends to regard most any religious conduct at variance with society's laws as unjustified and unacceptable.

The four stances usefully can be arranged in a crudely chronological fashion from a "pre-liberal" stance of religious *intolerance* (because of a belief in religious truth), to a "liberal" stance of religious *tolerance* (because of a belief in religious truth), to a "modern" stance of religious *tolerance* (despite a disbelief in religious truth), and finally to a "post-modern" stance of religious *intolerance* (because of a disbelief in religious truth). The labels are imperfect[8] and the lines between categories often blurred. But, painting

8. In prior writing, I have sometimes used the term "liberal" to describe what I here dub "modern." Both labels are imperfect. My intention here is to distinguish between classical liberal understandings of the reasons for protecting religious liberty that were dominant in the eighteenth and at least early nineteenth centuries—views influenced by intellectual currents formed by the Reformation, Renaissance, Great Awakening, and Enlightenment but that ultimately accept the reality of God and the priority of God's commands over man's law—and later, twentieth century

with a broad brush, the different categories correspond generally to real differences in paradigms of the relationship between religious and state authority.[9]

"modern" understandings of the reasons for religious liberty that purport to depend less (or not at all) on whether or not God exists and makes true commands that bind human conscience and conduct.

9. *See infra* Part IV.A.1–4. What about a stance of societal religious *agnosticism*? Is there a possible fifth category, in which society (or the State) is completely agnostic about religious truth and derives its approach to religious freedom from such thoroughgoing agnosticism? On such a view, a society might embrace religious freedom because it *does not know* whether or not there is such a thing as religious truth, and (therefore) agrees to provide religious freedom to those who assert that there is such a truth and seek to live in accordance with such premises: after all, such persons may be right. (But they also might not be right.)

This stance resembles, in different ways, the second and third stances toward religious freedom identified in the text. Like the second strategy, it doubts government's epistemological ability to discern religious truth. But not merely because it distrusts government: agnosticism doubts that there is such a thing as religious truth. Like the third category, it is willing, in theory, to grant at least some degree of religious freedom to religious adherents notwithstanding doubts that God exists—doubts that religious conviction corresponds to anything real. A posture of agnosticism thus straddles, to some degree, the two middle positions, embracing aspects of both. It agrees with the idea of religious liberty, not because of belief in God and not despite belief in God but because of uncertainty, lack of knowledge, or inherent failure of knowledge. A society's belief, or disbelief, in God, is, on this view, *irrelevant*.

The key question is whether agnosticism is an unnecessary fifth wheel to my nice two-by-two grid, or a genuinely independent fifth point of a pentagon. My sense is that agnosticism tends to collapse, analytically, into one or another of the existing categories and thus may fairly be treated as a variant of one or the other such categories. Agnosticism in matters of religion (for individuals, certainly, and presumably for a society that is so described) is never, except in pure theory, a position of complete equipoise between belief and disbelief. It leans—in one direction or another.

For example, if a society's agnosticism tilts slightly in the direction of *accepting the possibility that religious truth exists*—and crediting that possibility so far as to concede that if religious truth exists, that truth should prevail over any contrary commands of society—it is essentially indistinguishable from my second category described below: we should grant broad religious freedom to act in ways different from usual secular authority; and we should deny secular authority power to prescribe any particular view. (The State should be, *officially*, "agnostic.") If, on the other hand, a society's general religious agnosticism or skepticism tilts in the opposite direction of *doubting that religious truth exists*, its stance toward religious freedom will more closely resemble my third category: it will tend to tolerate religious exercise, to a degree, but doubt whether the claims of religion should defeat the claims of society over individual and group conduct. Even more so, such a view doubts that religious claims should ever be preferred over analogous, secular ethical claims. In these respects, the stance of agnosticism very closely resembles the third stance I describe—the "modern" view. It is simply a less-certain-that-God-does-not-exist subcategory within that third category and analytically indistinguishable from it. (This is in fact the direction in which I think most positions of agnosticism tend to lean, and fall. But that is an empirical question about which I am . . . agnostic.)

Of course, to describe a society as "agnostic" is in some sense as artificial as it is to describe a society's stance as proceeding from a view that God exists or does not exist. These are analytic categories—constructs—far more than descriptions of sociological fact. (Societies comprise a mixture of views.) From the standpoint of thinking about *why* and *to what degree or in what ways* a society might protect religious liberty, it is useful to think in terms of such analytic constructs. My point here is that it is unclear that the category of religious agnosticism is a usefully distinct analytic

A. Religious Intolerance *out of Religious Conviction: The "Pre-Liberal" Stance*

The first possibility is that a society believes that *religious truth exists* and that society and the (religious) state *know what that truth is and therefore should not tolerate contrary positions*. The logic behind such a position is that if one is fully convinced both that God exists and that one knows precisely what God commands, requires, or expects (and if there is broad agreement within society on these points), toleration of dissent is toleration of grave, destructive, and fundamental moral error—harmful both to the individuals concerned and society at large. To allow dissenting conduct, or even dissenting expression, is (on this view) inconsistent with the premise that religious truth exists and we know of what that truth consists. Why tolerate error on these most fundamental of things? More than that, the conduct and stance of the state and of society as a whole should reflect the known, agreed understanding of God's will.

The consequence of such a "pre-liberal" view is that there is no room for freedom of religious exercise at variance with the commands of the state. There is not, and should not be, any "free exercise" of religion in this strong sense. Nor, even, should religious dissent be tolerated. Furthermore, it makes entire sense to prescribe by law what religious beliefs should be official, conform all state policy to such beliefs, and prescribe their observance. The pre-liberal view logically embraces, in short, an "established" religion, prescribed by the state and enforced upon all subjects or citizens of the state. Its hallmarks are state prescription and state coercion in matters of religion.

One readily recognizes in this stance the views that led to religious conflicts and wars in Europe, the Middle East, and elsewhere for centuries. These views formed part of the European history against which the quintessentially American view of religious liberty was reacting, and from which many European-Americans were fleeing in the century preceding American independence.[10] One can also recognize in this stance the views

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category for thinking about why and how a society might constitutionally protect religious freedom. Recognizing and respecting the possibility of a contrary view, I nonetheless will treat agnosticism not as a separate category but will fold it into the discussion of my second and third categories of societal stances toward religious freedom.

I am indebted to comments from, and conversations with, John Nagle and Robert Delahunty for helping me clarify my thinking on this point.

10. Of course, as soon as religious dissenters fleeing oppressive pre-liberal, state-religion European regimes reached America, some of them replicated the pre-liberal pattern in their new communities. This led religious dissenters in the American colonies to flee pre-liberal, state-religion *American* regimes. This history, too, formed part of the American experience leading to an eventual reaction against such arrangements. For excellent historical treatments, see JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL (2012); THOMAS J. CURRY, THE FIRST

that form various radical Islamist movements even today, and some fundamentalist strands of other religions.[11] The pre-liberal view obviously is not dead; it persists in many areas of the globe and in certain religious communities.[12] It proceeds from a sincere conviction of religious truth, and it insists, as a result of that conviction, that falsity—all that does not conform to the religious truth so identified—be defeated, repudiated, extirpated, overcome, or killed.

This view believes in what I would call "The Priority of God" and shares that belief with the liberal stance that I discuss next: God's requirements and expectations are more important than any contrary human commands. The difference is that the pre-liberal view believes that society, and the state, reliably know what God's requirements and expectations are and that it is proper for the state to impose those commands as its human commands, enforce conformity to them, and obliterate (to the extent possible) dissent.

B. Religious Tolerance *out of Religious Conviction: The "Liberal" Stance*

The second possibility—and the one I ultimately conclude is the American constitutional stance—is that a society believes that *religious truth exists* but that society and the state do *not* reliably know what constitutes true religion, and thus cannot be trusted to get these things right. The state is "liberal" (in an Enlightenment, seventeenth and eighteenth century sense of the term) in that it embraces individual liberty on such matters. The state is neutral, or at least tolerant, but not necessarily agnostic in matters of religion.[13]

The state embraces religious liberty, on this view, not because society disbelieves in the possibility of religious truth, but *precisely because it believes* in the possibility of religious truth. Society merely disbelieves in state authority *over* religion and does not share the (naïve) intuition that whatever a majority might believe in matters of religion is therefore the

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FREEDOM: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (1965).

11. For excellent treatments of radical Islamism, see MARY HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR (2006); LAWRENCE WRIGHT, THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11 (2006); *see also* WILLIAM SHAWCROSS, JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIK MOHAMMED, 40–52 (2011).

12. *See* sources cited *supra* note 11.

13. The State, or society, might in fact be agnostic about religion, in the sense of not *knowing* whether religious truth exists, but still accepting the possibility of such truth. *See supra* note 9.

correct understanding of religion. The people share a pervasive conviction of religious truth and in the priority of God's commands over man's but, often as a result of this same conviction, they also share a pervasive distrust of state authority to prescribe religious truth. After all, if the idea is that God's commands are prior to and superior to any obligations imposed by the state—in the words of the disciple Peter, recorded in the book of Acts, "We must obey God, not men"[14]—on what reasoning can it be accepted that the state (peopled by "men" and not necessarily good ones) necessarily has the right ideas about what God commands? The very idea of state authority to prescribe what shall be orthodox in matters of religious belief and conduct is inconsistent with the premise of the priority of God and God's commands *over* those of any mere human authority.

Unless, that is, one assumes that the state always perfectly reflects the priorities of God in its decisions, actions, and requirements. Liberal societies, in their stance toward religious freedom, of course reject any such assumption. In part, that rejection is based on those societies' lived experiences and histories—they have seen governments that thought they knew religious truth, had it wrong (in the view of many), and oppressed dissenters who probably had it (more) right. America was settled in part by people fleeing such governments. In part, the rejection of state competence is based on liberal societies' theologies—their *religious* premises. There is much in Christianity, for example (and in many strands of Judaism), the overwhelmingly dominant religious stance of early America, that leads to skepticism about the necessary correctness of everything and anything the state decides and prescribes. The state may be right in its action and it may be wrong. And that observation surely extends to the state's religious views.[15]

More than that, the liberal view holds that worship of God, and obedience to God's commands, is a "natural right"—one of those fundamental rights of man that precedes the social compact and is never superseded by it.[16] Again, this flows in substantial part from religious

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14. *Acts* 5:29 (Today's English Version).

15. *See generally Acts* 5:27–29 (Today's English Version); JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 675–76 (Henry Beveridge trans., Wm. B. Eerdmans Publ'g Co. 1989) (1536) ("We are subject to the men who rule over us, but subject only in the Lord."); DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP 262–63 (R.H. Fuller & Irmgard Booth trans., Simon & Schuster 1995) (1937) ("[T]he sovereign power belongs to God and not to the State"). *Compare Romans* 13:1 (Today's English Version) ("Everyone must obey the state authorities, because no authority exists without God's permission, and the existing authorities have been put there by God."). However *Romans* 13 is properly understood concerning the relationship between Christians and the secular authority of governments, the passage certainly cannot be read as standing for the view that secular government has authority to determine religious truth.

16. *See* PA. CONST. art. 1, § 3 ("All men have a natural and indefeasible right to worship Almighty God.").

conviction about the priority of God and of God's commands. People might surrender some of their state-of-nature liberty in order to form a collective, civilized society that protects other types of rights against interference from private violence by the predatory strong at the expense of the innocent weak. But the right to worship God according to the dictates of one's own conscience is not a right that is ever justifiably surrendered to society and the state. That is because God exists and has a prior and always superior claim on human loyalty. The state acts legitimately only when it honors those prior claims of God.

Thus, the liberal stance is that, while religious truth exists, that does not mean the state can decide what it is. *Individuals*, and *private groups*, get to decide what it is, and have the right—the natural right—to act in accordance with their sincere conviction as to what that truth is. Freedom of religion, within such a society, is the collective embrace of the correctness of this proposition. It is the state's acknowledgement, in its fundamental constitution of government, that *it is not* the supreme authority in this respect; *God is*. This means that the state must yield to private religious conscience, at least in the absence of some reasonably certain demonstration that the claim of religious conviction is insincere, not really religious, or harmfully outside the bounds of anything that plausibly could be thought the true command of God—not really the true "exercise of religion" in any plausibly recognizable, legitimate sense. (I will have more to say about this below: the collective conviction that there is such a thing as religious truth establishes boundaries, in extreme cases, on the claims that may be made in the name of God or religious conviction. In the end, I believe this is the only fully convincing rationale for what Free Exercise Clause doctrine has sometimes recognized as "compelling state interest" overrides of presumptive claims for religious autonomy.[17])

Under the liberal view, because the state is not supreme, the state must yield to the legitimate free exercise of religion. And because the state is not supreme, it may not prescribe and compel adherence to, or coerce, religious observance—it must respect the *non*-exercise of any particular religion, as a corollary aspect of true religious freedom. The consequence is "dis-establishment" of religion and broad freedom for religious exercise and non-exercise—*religious freedom because society believes in God, believes in religious truth, and believes that such truth can only survive, thrive, and prevail in an atmosphere of religious liberty*.

17. *See infra* pp. 1210–11.

Such religious liberty can come in weak and in strong variations. The Lockean and early American concept of religious "toleration" is a weaker version of religious freedom than is the later, constitutional concept of "free exercise."[18] Within either variation, there are difficult instances of application on the margins—questions that I explore briefly below. But the fundamental liberal paradigm of constitutional religious liberty is that the state recognizes and protects religious liberty as a natural right, out of an essentially religious acknowledgement that God's authority categorically prevails over the state's.

C. Religious Tolerance *out of the Conviction that Religious Truth Does* Not *Exist: The "Modern" View of Rational Skepticism*

A third possible stance is religious tolerance even where society does *not* believe in the possibility or reality of religious truth or is deeply skeptical about such claims. Religious truth does not exist, in this view, but religion nonetheless should be tolerated, and its free exercise indulged or permitted, at least within reasonable bounds. I call this the "modern" view, a label that seeks to capture, however imprecisely, its somewhat "post-liberal" character, its relative recentness, and its broader twentieth century perspective of rationalism and skepticism. It is distinguishable from the liberal view in its attitude toward religion: it is a post-religious, agnostic, secularist view of reality. It succeeds to the liberal view's skepticism about government's capacity to identify truth in matters of religion, and to its skepticism about the legitimacy of government power over matters of individual liberty and choice generally. But unlike the liberal view of religious freedom, *the modern view is skeptical about religious truth claims generally, not just government power*.

On this view, we protect religious liberty not because religion is fundamentally important—not because we believe God exists and makes claims on humans that are of prior and superior obligation to those of the state; God either does not exist or does not really make such claims. Rather, we protect religious liberty because many people *continue to hold such beliefs* and it is consistent with the modern idea of individual autonomy to allow different people to believe different things, and to the extent practicable and sensible, to allow people to live and act autonomously on the basis of their different belief systems. Under this view, all sets of beliefs, religious or not, are equally tolerable. None is to be preferred by the state over any other. Freedom and individual autonomy are, in general, valuable ideals and should be furthered by state policy. This holds true with respect

18. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 1689), *available at* http://www.constitution.org/jl/tolerate.htm.

to religion the same as anything else—and not any more so. At root, there is nothing *special* about religious beliefs. The modern view scrunches up its forehead at the oddness of a phrase like "The Priority of God."

If the liberal view is, as I think, the original American constitutional view embodied in the First Amendment's Religion Clauses, the modern view is the late-twentieth century and early twenty-first century dominant American cultural understanding of religious freedom, and the one that increasingly has come to be embodied in Supreme Court decisions interpreting the Religion Clauses.[19] "Religious freedom" is not about the priority of God's claims over Man's. Religious freedom is, rather, society's and the state's gently condescending indulgence of the fact that certain benighted people continue to take the notion of religion seriously and that it is not very nice, or very important, for the state to suppress such views. To be sure, the First Amendment contains distinct religious freedom provisions that appear to have treated *religious* freedom in particular as its own kind of special right, but the modern attitude is almost one of viewing the First Amendment's protection of religion as akin to "historic preservation" of something quaint. The only way to make sense of such a constitutional provision today is to broaden it to reflect the equality of all belief systems. Belief in God is a particular form of belief and people should generally have freedom to believe what they want to believe.

This view accepts the idea of religious freedom, but without the religious premises that (at least initially) gave it life and depth. It leads, naturally, to a weaker, less robust conception of religious freedom, for the simple reason that the underlying justification for such freedom is weaker. Religious freedom, on this view, makes sense for the same reasons that society protects individual freedom and autonomy generally: it is nice, good, liberal, and tolerant. The obvious weakness here, on which I elaborate below, is that such a justification does little to support *religious* freedom specifically.[20]

Religious freedom, on this view, also makes sense, to a certain extent, as a neo-Hobbesian "truce," imposed by the state, to avoid the strife occasioned

19. Mapping this intuition onto the pattern of Supreme Court Religion Clause decisions of the past sixty years or so would be a fascinating (if exhausting) project, which I do not wish to undertake here. I leave it as an intuition, formed from a general sense of the "look" of fifty to seventy years, standing back a good distance from the painting created by the patterns of individual decisions. I invite the reader to adopt a similar perspective and see if the intuition matches with his or her own.

20. I develop this view at length in Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1600–04, building on important insights first suggested to me by a chapter in John Garvey's excellent book, WHAT ARE FREEDOMS FOR?, cited *supra* at note 5.

by religious sects competing for social and political dominance over one another, each motivated by its own competing vision of religious truth.[21] The weakness here is that such a justification is a most incomplete explanation for religious *liberty*: it at most justifies a prohibition on government *establishment* and coercion of official religious views and conduct. (Perhaps there will be no religious wars if the rules are that no sect can win the game and dominate or exterminate the others even if they win; all must be allowed to exist in freedom.) But it does not do much to justify a generous conception of the *free exercise* of religion: one could enforce religious peace by establishing none and suppressing all, too, as long as one had the resources, will, and inclination to suppress religion (rather than to protect its irritating free exercise).[22]

The practical doctrinal consequences of the "modern" posture, for First Amendment law, are as follows. First, there certainly should be no establishment of religion or anything at all *like* an establishment; indeed, to treat religious beliefs and exercise differently from *secular* beliefs and conduct begins to take on the feel of an unjustifiable establishment of religion. Why, after all, would it be at all sensible for religion to be treated preferably to anything else? Religious faith does not, from a secularist standpoint, really correspond to anything objectively real and of superior obligation. (God does not exist, at least not in the sense of traditional religions' conceptions of God.) There is thus nothing special about religious beliefs in particular, as opposed to any other set of strongly held personal beliefs. It is merely one belief set that people may hold. There's nothing wrong with that, on the modern view, but there's nothing wrong with any other such belief sets and—this is the crucial shift—it is improper to treat competing belief–sets and worldview paradigms differently. That is part of what "no establishment of religion" means—at least when viewed through modernist eyes. Non-establishment, on the modern view, tends strongly in the direction of a more thoroughgoing secular relativism.

A second, related consequence of the modern view is that the Free Exercise Clause becomes hard to accept as requiring *special* accommodation of *religion in particular* in the form of exemption, or immunity, from the usual rules of civil society. Freedom of belief is fine—if embraced across

21. *See* THOMAS HOBBES, LEVIATHAN 257–67 (Forgotten Books 2008) (1651) (noting that a Christian monarch ought to determine what constitutes the law of God, and that such matters should not be left to the separate determination of different Christian sects or of the Pope).

22. I develop this argument in earlier writing as well. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1604–09. Indeed, one might even establish religious peace by establishing official religious views and policy, and enforcing the establishment orthodoxy with ruthless efficiency and state coercive power. That actually was Thomas Hobbes's view. *See* HOBBES, *supra* note 21, at 381 (concluding that Christian sovereigns have absolute power over their subjects' religion and may "make such laws as themselves shall judge fittest").

the board with respect to all beliefs, religious or not. That value can be assimilated comfortably to the values protected in a similar fashion by broad, contemporary notions of the freedom of speech. As a rule, all speech must be treated alike, regardless of its content or viewpoint: "There is an equality of status in the field of ideas."[23]

But it is hard to justify the free *exercise* of religious beliefs that in any way seriously conflict with the usual norms of society, under the modern stance. Why tolerate religion,[24] in this strong sense of exempting religious practice from certain of the rules that govern everyone else? On the premises of the modern view, God does not *really* exist; "God" does not *really* make commands of loyalty and obedience that constrain human behavior. Religious belief is just a choice that people make, a preference like any other. To borrow Stephen Carter's memorable phrase, the modern view tends to regard "God as a hobby" some people happen to have chosen.[25] It is fine for the state to accommodate, even indulge, its citizens' hobbies, at least to some extent and if the free exercise of such hobbies does not impair anything the state otherwise thinks important. (On the other hand, if something is important enough to pass a law about, the state probably regards the activity as important enough not to permit hobby-exceptions.) But in a situation in which the state ordinarily would not feel inclined to accommodate individual's choices and hobbies as exceptions to its rules, there is no good reason to accommodate *religious* exercise. It thus becomes very hard, on this view—unacceptable really, if one accepts broadened, modern no-establishment principles—to embrace any proposition that *religious* exercise must be granted a sphere of autonomy or immunity from government regulation broader than any other set of beliefs would have in analogous circumstances. Thus, for example, a religious claim to conscientious objection from military service, on the modern view, should have no greater purchase than a wholly non-religious secular

23. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972). There are certain exceptions and variations, but this is the usual rule. For a survey, see PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 950–58 (2010) ("*A Map of the First Amendment Freedom of Speech*."). For a brief defense, see Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1919–22 (2001). Religious speech participates fully in the benefits of this general rule. The religious content of speech by private parties, or the religious identity of the speaker or speakers, is not a basis for discrimination against such speech. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995). This rule, however, is sometimes honored in the breach. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004).

24. *See* Brian Leiter, *Why Tolerate Religion*?, 25 CONST. COMMENT. 1 (2008–2009).

25. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 23–43 (1993).

conscientious objection claim. The government should grant both of them or neither of them. But it should not treat them differently.[26]

Moreover, where circumstances are *not* precisely analogous—where comparable secular claims of autonomy either do not exist or probably would be dismissed out of hand (for example, Native American religious claims to use otherwise illegal, controlled substances in religious ceremonies,[27] to unique access to federal forest lands for site-specific religious observance,[28] or to exemption from endangered species law prohibitions on Eagle Feather use[29]), it becomes hard for the modern view to rationalize accommodations of religion that impose anything other than *de minimis* costs on others, or that occasion any measurable degree of administrative inconvenience or inefficiency, including the asserted inconvenience and inefficiency of making any type of accommodation at all, let alone of sorting out genuine religious claims from spurious ones.

The overall result is a "strong" reading of the Establishment Clause's prohibition as tending to forbid any accommodation of religious exercise, let alone special accommodation for religion specifically, and a "weak" reading of the Free Exercise Clause as essentially duplicating the protections of the Free Speech Clause–freedom of belief, freedom of expression, and no discrimination based on religious views or identity—but lacking any meaningful punch of its own. Unless costless, and unless it would be granted to non-religious persons on the same terms, religious exercise need not and should not be given any immunity from the operation of the usual rules adopted by society's government.

As noted above, I think this vision is not the vision contemplated by the framing generation or embodied in the original meaning of the Religion Clauses of the First Amendment. But it is an entirely understandable and coherent vision, logical on its own terms, if one reads the Religion Clauses through "modern" eyes.[30] *If* one has the view (or if the overall society has

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26. This is the perspective adopted, in essence, by the series of cases concerning conscientious objection to the military draft. *See* Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1603, 1617–20. I address this specific issue as an important illustration of the modern perspective later in this Article. *See infra* Part IV.A.3.

27. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872 (1990).

28. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

29. *See, e.g.*, United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011).

30. The problem with adopting such a perspective is much like the problem with reading the words and phrases of the Constitution to mean things they did not mean at the time written and adopted: it is anachronistic. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 875–77 (2009). Just as the meaning of words in an authoritative written legal text must be understood in the sense, and in the context, in which they would have been understood at the time and in the place where written, the *backdrop understanding* or *perspective* one brings to reading and applying such a text should attempt to approximate as nearly as possible the views and perspectives that readers of the text would have had at the time it was written and adopted as constitutional law. *See infra* Part III.

such a view, or if the governing elites hold such a view) that religious faith is simply a subjective, idiosyncratic personal preference that does not conform to objective reality, it truly does not make much sense to accord religious exercise special treatment or accommodation. Why would one do such a thing? To the committed atheist, or even the rigorously (and perhaps doctrinaire) agnostic, granting religious exercise a special freedom from the usual rules of government is awkward, to say the least. That awkwardness then drives the modern interpreter toward a reading of the First Amendment's protection of the right to "the free exercise [of religion]" that is as ungenerous, as un-special, as possible given the language. Viewed from an agnostic perspective—the modern stance—religious freedom is an odd right, a constitutional "anomaly" to be hedged in on all sides, grudgingly acknowledged, and narrowly construed.[31] The alternative would be madness—allowing every person to be, in the words of *Reynolds v. United States*, the 1879 Supreme Court case upholding a federal statutory ban on polygamy, "a law unto himself."[32] The phrase is revealing: God does not (*really*) command a particular claimed religious observance or conduct; religious adherents make up these things for themselves. The modern stance, already incipient in the late nineteenth century, is that religious exercise is not really obedience to the law of God; it is every man claiming the right to be a law unto himself.

As noted, I think this follows logically from the (often unstated) premise of the modern view that God does not really exist and make claims on human conduct and loyalty that have priority over the claims of state and society. If the premise is right, the conclusion is right: religious freedom really is an odd freedom to have written into the Constitution and ought to be construed as narrowly as possible. Indeed, I would state the proposition in bolder terms yet: *If God does not exist, religious freedom is a kooky enterprise, protecting delusional people's delusions and their actions predicated on such delusions, and giving those delusions priority over the general laws of society*. Who would embrace such a thing? The modern

31. *See* Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1610–15. This is the view adopted by the Supreme Court in the notable case of *Employment Division v. Smith*. *See Smith*, 494 U.S. at 886–88 (arguing that a broad Free Exercise Clause right of religious persons "to ignore generally applicable laws" would be "a constitutional anomaly" and that, consequently, recognizing such a right would be "courting anarchy"). It is perhaps ironic that this modern view was embraced so vigorously by the writer of the majority opinion in *Smith*, Justice Antonin Scalia, who is himself a devout religious believer—a Roman Catholic Christian. *See generally, e.g.*, Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997).

32. 98 U.S. 145, 167 (1879).

view, sensibly on its own terms, treats the free exercise of religion as a *problematic* liberty, to be assimilated as nearly as possible to other constitutional values (like freedom of speech), not as a sweeping, inalienable natural right.

The modern view is easy enough to understand, and actually shares some insights in common with the "liberal" view. First, even on the liberal view, some claims of autonomy, made in the name of God and religion, are simply untenable—delusional, demented, insincere, pretextual, or otherwise so outside the bounds of what plausibly may be attributed to God as not to warrant treatment as part of the genuine exercise of "religion." Even on the liberal view, then, certain claims of religious freedom *lose* to society's rules; they do not warrant First Amendment protection as truly involving the free exercise of religion. In the end, I defend this position, which generally goes under the heading of "compelling state interests" that trump otherwise valid religious claims, as implicit in the essentially religious justification for religious freedom: some claims concerning God's commands we simply can judge not to be valid and true and thus fall outside the range of constitutional protection. We tolerate some bogus or bananas claims of religious freedom as a prophylactic matter, but at some squeal point we simply reject them as implausible.

Note, however, how disturbingly similar this is (albeit at a somewhat different level) to the modern view's treatment of *all* religious beliefs, which is that *none* of them corresponds to anything true or real. The difference is that the liberal view starts from the premise that God exists and that there is such a thing as true knowledge, belief, and obedience to God's true commands. There are also some nonsense claims about God and God's commands and some of these may assume the same superficial form as genuine religious claims. This observation follows logically from the view that there is such a thing as religious truth; religious truth means that there is such a thing as untrue claims made in the name of religion. The task of a religious freedom rule in the liberal view is to protect the former, to the maximum extent, without sweeping in too much of the latter. The modern view overlaps with this view to the extent of believing that it is possible to identify some religious truth claims as nonsense. Indeed, the modern view starts from the premise that God does not exist and there is no such thing as true knowledge, belief, and obedience to God's true commands. When push comes to shove, it is *all* nonsense, and the task of a religious freedom rule is to protect as little of such nonsense as possible. The modern view thus takes one aspect of the liberal view and runs with it, but in a secular direction because of secular cultural premises.

The second insight shared by the modern view and the liberal view is skepticism about the human capacity accurately to discern God's will. For the liberal view, this skepticism translates into a thoroughgoing distrust of

government power either to prescribe religious exercise for all, or to deny free exercise of religion contrary to the usual rules. Folks get God wrong; a majority can get God wrong. And there's nothing more dangerous to the freedom to pursue and exercise true religious knowledge, worship, and obedience than the *wrong* claims of state and society that the majority, or the elites, know better what is the truth in matters of religion.

But the liberal stance's correct skepticism about *the state's* ability to discern religious truth—because it is a mere human enterprise and humans err—can subtly shade into skepticism generally about *anyone's* ability to discern religious truth, including the individual's or the church's (or other religious organization's). The modern view takes skepticism and runs with it, too. After all, if we don't trust the state because we don't trust human authority to perceive correctly the commands or will of God, why should we trust any particular human to get it right either? Skepticism yields more skepticism. If, functionally, as a matter of governance of all, we are of the view that human beings cannot be trusted to correctly perceive the will of God, why should the whole of society ever defer to an *individual's* or *minority religious community's* views in this regard? Why is the one suddenly more likely to have it right than the many? Thus, a "soft" modern view might well take the view that, even if there might be such a thing as true beliefs about God, we cannot trust any individual to discern them correctly. Thus, it makes no sense to exempt such persons (or groups) from the general rules of law adopted by the community. In practical effect, individual claims to religious freedom from government's laws really do make the religious adherent "a law unto himself." Because we cannot tell whether such adherent is correctly perceiving God's commands or not, we have no basis for excusing his conduct, even if we concede the theoretical possibility of God making actual commands.

The difference between the liberal view (religious freedom out of religious conviction) and the modern view (religious freedom notwithstanding religious disbelief) is in this respect a function of the extent of skepticism about the possibility of true religious claims generally and the "good faith" (so to speak) of religious persons. For the Believer, and for a society that consists largely of religious believers, there exists the confidence that there is such a thing as religious Truth, that this truth is Good, and that this Truth does not lead to a vast swath of absurd, society-destructive claims. There is, in short, a confidence—a faith—in the ultimate ability to separate

the wheat from the chaff (to borrow a well known religious metaphor).[33] And there is an acknowledgement that, to a certain substantial extent, the weeds must be permitted to grow along with the wheat, lest the good crop be cut down and killed with the weeds.[34]

In the modern view, the wheat and the weeds are essentially indistinguishable. There is no "good crop," really; it's all a matter of individual preferences and beliefs. When individual preferences can be accommodated in general, it's fine to do so. But when individual preferences need to be overridden, they need to be overridden. Wheat and weeds being indistinguishable, they are either permitted to grow together, or where deemed necessary by secular interests, they may both be mowed down or ploughed under.

D. Religious Intolerance *out of the Conviction that Religious Truth Does* Not *Exist: The "Post-Modern" View*

The final stance brings us full circle: religious intolerance, not because the state believes in God and wishes to establish the One True Faith and suppress all competing notions (the "pre-liberal" view), but religious intolerance because the state *disbelieves* in God and thus has no use for—and little tolerance of—religious conduct that in any way resists the supposedly more rational, sensible norms the state has adopted as the rules for governing the society in question. Once again, this "post-modern" view proceeds from and succeeds to some of the views of the preceding, "modern" perspective.[35] It simply takes that perspective to a more extreme conclusion. Just as the modern view takes the skepticism of the liberal view seriously, and runs with it—adding modern doubt about religious truth—the post-modern view takes the modern view's disbelief in God seriously, and runs with that view. Given the weakness of the conception of religious liberty justified by the modern view, the post-modern perspective simply takes the next logical step, and knocks out the last prop sustaining any serious notion of religious liberty. Given that God does not exist, the rationales for religious liberty embraced by the modern view are weak and archaic. It is better to dispense with them altogether and go straight to the last page of the story. God, if He ever existed, is dead. And gone with him is any sensible claim to religious autonomy in contravention of the usual norms of secular society.

This view holds, then, that religious truth does not exist and that it is affirmatively harmful to secular society to permit the free exercise of such

33. *Matthew* 13:24–30 (Today's English Version).

34. *See id.*

35. *See supra* Part II.C.

views. Whether or not such *beliefs* and their *expression* must be tolerated as an aspect of the freedom of speech, the state always has a legitimate interest in suppressing religiously-motivated behaviors in conflict with society's laws and rules, whatever they may be. The consequence of this view is an "establishment" of sorts, not of religion, but of secularism—a thoroughly secular state, educational establishment, cultural identity, and system of laws. The free exercise of religion never requires an exemption or immunity from any such law. There may be no "free exercise" at variance with the rules of the secular establishment.

A fair illustration of this post-modern stance toward religious freedom is present-day France. (Several other European democracies appear to represent this stance as well.) France forthrightly embraces the idea of a secular state, and reads its constitutional protections of religious liberty in this light.[36] Recently, France banned the wearing in public of the full-face veil, or burqa, by Muslim women.[37] The explicit justification for this ban is the value of secularism and community ("fraternity"): the burqa, it is said, publicly distinguishes one religious community from another, separates that community from society at large, and "hides the face" in a way offensive to French communal norms. Occasionally, state interests in security, and in prohibiting what some think is improper sexism within a religious community, are invoked as well. But the chief justification for the burqa ban remains, simply, *secularism* and society's interest in suppression of offensive expressions of a distinctive and communal religious identity.[38]

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36. *See* 1958 CONST. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.").

37. *See* Loi 2010-1192 du 11 octobre 2010 interdissant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 on Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANĆAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 1; *see also* Steven Erlanger, *France: Full-Face Veil Ban Approved*, N.Y. TIMES (Oct. 7, 2010), http://www.nytimes.com/2010/10/08/world/europe/08briefs-France.html?r=1&ref=muslim veiling.

38. I owe this illustration in part to my participation in a series of public debates in April 2011, sponsored by the Federalist Society, at Yale Law School, Brown University, and Harvard Law School, between me and distinguished French constitutional lawyer and public figure Mr. Francois-Henry Briard, concerning France's burqa ban, which took effect the week of our debates. I thank Mr. Briard for that wonderful opportunity and for a series of enlightening and provocative debates. The position I took in the debates was the same one I take here. I do not mean to disparage France's position—at least not unnecessarily—by characterizing it as one of religious intolerance. But I do disagree with it vigorously, and distinguish it sharply from what I think is the (proper) American position as reflected in the original meaning of the First Amendment to the U.S. Constitution.

This stance—one in which essentially any interest that a deliberative political majority thinks is important enough to enact into law is sufficient to prevail over a contrary claim of religious free exercise—is not one that truly values religious liberty in any serious sense of the term. It contemplates no sphere of natural right to engage in religious exercise immune from the cognizance of civil government. The extent of religious freedom is purely a function of the degree to which government chooses to grant it. Government may grant such accommodation to religions it thinks harmless to communitarian interests and deny accommodation to religions, or specific practices, it thinks harmful. And the range of what constitutes a cognizable harm to society, permitting suppression specifically of a religious practice, is extraordinarily broad: anything society disapproves of. This is religious freedom in name only—a hollow shell. It is, to use a mathematics term, the "degenerate case" of religious freedom.

Such an approach in practice resembles most closely the pre-liberal approach of religious intolerance, albeit (arguably) in less virulent form. The pre-liberal approach is one of religious intolerance, out of a conviction that religious truth exists, the state knows what that truth is, and competing visions ought not be tolerated. The religious establishment reigns, and free exercise of religion inconsistent with established orthodoxy is forbidden and punished. The post-modern approach is one of religious intolerance, out of a conviction that religious truth does *not* exist; the state embraces *that* secular orthodoxy and competing visions ought not be tolerated. The secular establishment reigns, and free exercise of religion inconsistent with established orthodoxy is—again—forbidden and punished.

Thus the circle is completed. The evolution of progressively different stances toward the notion of religious truth, and freedom to pursue it, yields a "progress" in approaches toward religious freedom that, ironically, eventually returns to where things started.

To reprise: First, religious *intolerance* out of religious conviction yields to religious *tolerance* borne of religious conviction, but coupled with distrust of government authority. The priority of God's commands over Man's leads no longer to establishment and compulsion, but instead to broader private liberty, as belief in religious truth produces a public commitment to private freedom to pursue, and act on, what one believes to be religious truth. The freedom to obey God, rather than men, is understood as a natural law right to be free from any government interference with sincere religious exercise.

Next, as society becomes more secular, religious tolerance borne of religious faith gradually yields to the religious tolerance of a less religious society, rooted less in faith in God than faith in liberty as a generic secular proposition. Religious tolerance becomes a function of secular diversity and the perceived value of personal autonomy generally, rather than religious conviction specifically. Religious freedom becomes a narrower, less favored

freedom: non-establishment is emphasized; free exercise of *religious* beliefs in particular is harder to sustain when such exercise conflicts with the norms of secular society.

Finally, the residual religious tolerance of a secular modern society yields to the religious intolerance of a secular post-modern society, bred of a different kind of collective certainty about religious propositions: because religious belief and exercise do not reflect anything real, but merely capricious (or delusional) personal preference, there is no reason for the secular state ever to yield to the exercise of religious convictions. The notion of the priority of God over men is a relic of a bygone age, a legal fiction, which, even if it were once the foundational premise of religious liberty, is no longer sustainable or sensible. Free exercise of religion, as a specially protected freedom, is an embarrassment. The priority of the secular state—of human society's law—necessarily trumps any and all mere private commitments to false beliefs in a (mythical) God.

III. FREEDOM *FOR RELIGION*: A THEORY OF RELIGIOUS LIBERTY

Which of these four stances provides the correct, or best, perspective for understanding and applying the Religion Clauses of the First Amendment? Which one has the best claim of representing faithfully (so to speak) the original public meaning of the religious freedom provisions of the U.S. Constitution—the objective linguistic meaning the words and phrases would have had, in social and political context, to a reasonably informed speaker and reader of the English language, at the time and in the place they were adopted?

That is the task of constitutional interpretation—identifying the original public meaning of the language of our written Constitution.[39] A critical

39. The task of constitutional interpretation is, as I have argued and defended elsewhere, the search for the objective, original public meaning of the authoritative written text of a constitutional provision. *See* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003) [hereinafter Kesavan & Paulsen, *Interpretive Force*]; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) [hereinafter Kesavan & Paulsen, *Is West Virginia Unconstitutional?*]. The question of whether one *likes* or *should follow and apply as law* the meaning of a constitutional provision is a different matter—a hermeneutical issue or political decision. Interpretation precedes application and is a separate enterprise. *See* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 910–12, 918–19. The question of whether to apply the original meaning of the text is, I believe, settled by the Constitution's text, at least for those who have agreed to exercise authority under the Constitution and apply it faithfully as law. *See generally id.* at 864–72.

aspect of that task is reading the language of the Constitution *in context*. To read the words of the First Amendment Religion Clauses (or any other constitutional provision) accurately and to apply them faithfully, one must understand their meaning in the social, political, and linguistic milieu in which they were written, and seek to ascertain the meaning they would have had within the community in which they were adopted. Though the provisions of the Constitution continue to *apply* today, as a consequence of the explicit or implicit political decision of today's society to continue to be bound by a written Constitution adopted (in the main) many years ago, the *meaning* of those provisions is the objective meaning they had at the time written, not the subjective or anachronistic understanding of any person or actor today, at variance with that original meaning.[40]

To read the Religion Clauses in their original sense, and in context, is an effort to faithfully recover their original meaning, not to substitute something else for it. It is a search for original linguistic meaning, not an effort to replace it with an imputed "purpose" alien to the words and usages of the time. This is an important distinction. The task of constitutional interpretation is *not* to identify, or conjure, an abstract "purpose" or "principle" "behind" (or "underlying") a constitutional provision and then *interpret and apply that purpose or principle rather than the words themselves*. That is a familiar trick of legal manipulation: reformulate the text as some abstract proposition loosely thought to flow from the text; take

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Some prominent scholars and theorists of the First Amendment Religion Clauses posit that, to be successful, any interpretation of the Religion Clauses must be one that does not require acceptance of religious premises—it must be capable of being embraced by believers, atheists, and agnostics alike. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316–17 (1996). On this view, an interpretation of the Religion Clauses fails if it requires the reader to presuppose either "that religion is a good thing [or] that faith is bad or subordinate to reason." *Id.* at 313.

With all due respect, Professor Laycock is confusing interpretation (exegesis of the meaning of the text) with the "political" decision of what to do with a text—whether and how to appropriate it for contemporary use (often called "hermeneutics"). Laycock's proposition is a political one—an argument about what kinds of interpretations are or should be politically acceptable and sustainable. But that should be irrelevant to the question of the original meaning and proper understanding—the correct *interpretation*—of constitutional language. As I have explained in previous writing, an interpretation need not be "successful" (in this political sense) to be *correct* as a matter of constitutional interpretation:

> [I]t need only be sound as a matter of straightforward, non-result driven, textual interpretation in accordance with the ordinary, common public meaning of the language employed at the time it was adopted and contemporaneous evidence of the original understanding and purpose of the provision. The political task should be to persuade those who find the resulting interpretation unacceptable as a policy matter nonetheless to accept it as a matter of constitutional law, not to contrive an interpretation to suit those who may dislike a provision's natural and intended meaning.

Paulsen, *Making Sense of Religious Freedom*, *supra* note 12, at 1613–14 n.39.

40. Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 858–59, 872–82.

that proposition and expound (or expand) upon it; then read that proposition back into the text, substituting the (reformulated) abstract principle for the actual, original linguistic meaning of the text itself, thereby changing (or shading) the meaning of the text.[41] That, to repeat, is to play tricks with the text; and that is emphatically *not* the point of seeking to understand a text's context.

The point rather, is that correctly understanding the original public meaning of a constitutional text requires reading its words in their original sense and context and avoiding anachronistic readings produced by an interpreter's unwitting tendency to read the text through later, modern (or post-modern) eyes. Original-meaning textualism requires reading texts in their original sense. That entails embracing, to a certain extent, the general worldview and premises of the time and place in which they were written and adopted as part of the Constitution, even if such a worldview and premises are not ones common to today.

Through whose eyes, then, should we read the words of the First Amendment Religion Clauses? To the extent that the First Amendment's language reflects a worldview under which religious liberty was understood as a "natural right"—a theological proposition about the origin and nature of certain rights as being bestowed by God—or an "inalienable right"—a proposition of political theory concerning absolute or categorical limitations on the power of the state with respect to rights of such description—that understanding is highly relevant to correct interpretation and application of the Religion Clauses. It does not *substitute for* the text; rather, it assists *faithful interpretation of* the text, illuminating the meaning of its words and concepts (like "free exercise," "religion," and "establishment") and helping resolve possible ambiguity.

My proposition is that the Religion Clauses of the First Amendment reflect the second of the views identified above (the one I call the "liberal" view). They reflect an essentially religious proposition about the possibility of religious truth and the priority of God's real commands over the contrary requirements of human authority. They emerged from a social, religious, and political context that regarded religious freedom, within the broad bounds of plausibly true claims about God, as a natural and inalienable right—a God-given sphere of liberty over which the state has no proper jurisdiction. The Religion Clauses reflected broad *political* recognition too, of the proposition that duties to God are superior to duties to the state and

41. *Id*. at 878–79 (describing this as "Lawyers' Tricks 101" and identifying specific practices and practitioners fitting the description).

that the state does not necessarily and reliably reflect God's will. Such a theory of the Religion Clauses, I submit, better explains the *presence* of these provisions in the Constitution than does any competing theory, and also sheds light on perennial questions about how they should be interpreted and applied. In short, understanding religious freedom under the First Amendment as an inalienable natural right of individuals and groups to act in sincere obedience to God's commands, rather than submit to man's authority, makes more coherent sense of the Religion Clauses—their text, their history, their underlying logic and structure—than does any other view.[42]

It follows that, in a contest between the dictates of faith and the usual dictates of law, *the First Amendment's very strong presumption is that it is the law that ordinarily must yield*. That was certainly the dominant, eighteenth century American view of the priority and obligations of religious faith: where in conflict, God's commands trump Man's.[43] More to the point, the dominant eighteenth century *constitutional* view was that *the state* is obliged to acknowledge the correctness, in principle, of this description of priorities: for the state, as well as for the church, God's commands trump Man's. Accordingly, the First Amendment "prefer[s] the sincere individual's claim of religious conscience to the government's claim of secular authority, absent an extraordinary showing of insincere religion or of a threat to state interests of the highest order."[44] (And, as I develop below, the "state interests" that should count as sufficient to prevail over religious liberty reflect essentially religious premises as well: they more or less track the set of extreme circumstances in which we are prepared to say, in effect, that the claim of religious obligation is *simply not a true religious claim*—that God *did not and does not* command or endorse the religious claimant's conduct.[45])

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42. As I have written elsewhere:

> [T]he religion clauses . . . entail a series of essentially religious premises: God exists; God makes claims on the loyalty of human beings; these claims sometimes require action that may conflict with government regulation; the claims of God are, for the individual believer, prior to and superior in obligation to the claims of the state; and—this is the crucial point—even from the state's perspective the claims of the state ordinarily should yield to the claims of God, as sincerely articulated by the religious believer, because the claims of God rightfully have a stronger claim on human loyalty than do the claims of the state. . . . *The law* thinks that God exists and that He makes demands (rules, duties, prohibitions) on men, and that this reality requires the state to yield.

Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1611.

43. *Acts* 5:29 (Today's English Version).

44. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1610.

45. More on this presently, in Part IV's discussion of how these general propositions about the meaning of the Religion Clauses map onto questions of interpretation of the specific phrases of those clauses. *See infra* Part IV.

Except on these essentially religious premises about the reality and priority of God, the Free Exercise Clause really makes no sense. Assume for a moment that there is no God—the stance of the third and fourth positions discussed above. Why on earth would you want to protect religious liberty? There are perhaps some "soft" reasons: other things being equal, it is nice to let people act in accordance with their (non-harmful) beliefs whenever possible, even if one thinks them silly or misguided.[46] Granting a sphere of religious freedom might lessen religious conflict and thereby promote public peace. Finally, religious belief, even if not justified as *true* belief, still might be useful to society, because religious people tend to be good people.

But as noted above (and in my other writing), these arguments do not provide a sufficient justification for affirmatively protecting the free *exercise* of *religion* in particular, and seemingly none at all for strong protection of free exercise in the form of exemption of religious conduct from the usual rules society has seen fit to adopt for its governance. If letting people act on their beliefs is, generally, a good and nice thing, it is hard to justify *religious* liberty specifically as opposed to "liberty" in general—the "free exercise" of everything. The argument is one for libertarianism, not religious freedom. After all, what's so special about religion, if it has no special claim to stating likely ultimate truth, superior in importance to anything the state requires? What's so special about religion, if religious devotion is essentially indistinguishable from anything else an individual believes, desires, or is committed to? What justifies *religious* liberty if the conflicting claim of conscience, for a religious person, is no different in principle from any other claim of non-religious conscience? Put more strongly yet: if religion is in reality delusional, or simply the projection of the individual's own views onto a "God" of some sort, why *specially protect* such delusion? Indeed, wouldn't one want to protect it *less* strongly than non-delusional secular personal philosophies or strongly held individual views about reality, society, or politics?

The indulgence of religion as a quaint and good thing quickly runs out of gas. Why would one ever allow religious claims to prevail over the rules of society that were otherwise thought good and important rules? Religious people might (generally) be good people, worthy of respect, but that justification lacks legs. Why, on such a view, would one ever allow

46. One variation of this, suggested by my designated interlocutor at the conference where this Article was presented in draft form, Professor Eugene Volokh, is that society as a whole tends to respect people who hold intense, principled commitments and that religious commitments are often of such a nature.

religious people to do things one thought were *not* good? Religious liberty thus becomes a theory of allowing religious people to act in conformity with the state's laws and rules—freedom to do things that society already thinks good and proper. Nobody needs a Free Exercise Clause for that. Presumably, the religious adherent's conduct has not, in such a situation, brought him into conflict with society's rules. A theory of religious liberty sufficient to explain the inclusion of the Free Exercise Clause in the Constitution requires some rationale for the decision to *disempower* government of its usual powers. While it is not impossible that the Framers might have written the Free Exercise Clause merely as a way of forbidding discrimination of religion and protecting the right of religious persons to act in conformity with laws to which they have no objection, this is a rather weak explanation for the provision as written. It is even harder to swallow the proposition that the Framers crafted a provision specifically concerning toleration of religion more for the sake of tolerance in general than for the sake of religion in particular.

Finally, as for the idea that religious liberty tends to preserve peace on earth and goodwill toward all, it is not clear why permitting free *exercise* of religion is the right route to such an objective. Exercise of religion—*actions* motivated by religion—is precisely the sort of thing that tends to cause friction in society. Why would one want to protect such conduct if one's goal was to keep the peace?[47] Wouldn't it make more sense to protect simply freedom of belief but not necessarily its exercise? If public peace is the justification for religious liberty, then certainly one would not wish to protect any *conduct* at variance with society's laws. Permitting free exercise of religion at variance with the norms of society simply makes no sense from a keeping-the-peace perspective. And to the extent one is concerned to keep any religion from waging war on the others, why not just have an Establishment Clause barring any winner-takes-all rewards for any religion, and then enforce neutral laws against harm to others? That would probably be enough to give one religious peace. Who needs the Free Exercise Clause? It just mucks things up by arguably permitting some obstreperous conduct. And if "free exercise" of religion were thought to embrace only things like choice of prayer books, rituals, and church structure, organization and leadership, the term seems an exceedingly poor choice of words. Why not then have used the term "freedom of worship"?

The third stance—religious tolerance notwithstanding a culture of disbelief—does not well explain, or justify, the inclusion of the Religion Clauses in our Constitution. Nor does it cohere very well with the language of the provisions themselves. It produces a relatively weak commitment to

47. *See* HOBBES, *supra* note 21, at 123 (declaring that the sovereign has the right to determine and judge what opinions and doctrines are conducive to peace, and thus should be permitted).

religious liberty in practice and rapidly collapses into the fourth stance: religious *in*tolerance in a culture of disbelief.[48] The mild justifications for religious liberty, under the third view, collapse when one leans on them with the least bit of weight. If God does not exist, or if we no longer are willing to grant as our background premise for interpreting and applying the Religion Clauses the assumption that God exists, religious liberty as a rule makes less and less and less sense.[49]

If the Religion Clauses are to make sense, they must be understood in the sense and in the social context in which they were originally written. And so we are left with the original, late-eighteenth century reasons for religious freedom. Religious freedom, in the sense of categorical protection of religious conduct from state interference, makes entire sense within an eighteenth century conception that thinks religion is categorically a good thing; that religion aims at, and left alone may well hit, something true, vital, and of the highest importance; and that, because true religion is intrinsically worth protecting for its own sake, it merits being placed beyond the reach of society's usual rules. In short, we protect the core freedom because we believe it consists of something objectively important and true, and we adopt an overbroad prophylactic rule for the sake of protecting the core freedom, even if that means putting up with a lot of pernicious "religious" weeds in order not to uproot what may end up being the good crop.[50]

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48. The phrase "culture of disbelief" was popularized by Stephen Carter's excellent book several years ago. *See* CARTER, *supra* note 25, at 23.

49. Commenting on the draft version of this paper at the Pepperdine conference where it was presented, Professor Volokh noted that the logic of my argument implies that in a "majority irreligious" nation, where a country does not believe in the notion of true religious propositions, it should not protect religious freedom. This is almost right: as a *descriptive* matter, surely, one would not expect such a society to adopt a constitutional provision generously and genuinely protecting religious freedom and, if it had earlier adopted one, one would not expect such a society to *interpret and apply* even a generously worded provision in a generous, genuinely religion-protective fashion. (Indeed, this describes many societies' religious sociology and attendant treatment of religious liberty, even where written constitutional language is quite religion-protective.) As a *normative* matter, however, I would not go so far as to say that such a society *should not* adopt a protection of religious liberty. I simply would not expect them to do so.

But all of that is, or should be, beside the point as concerns the *original meaning* of the Constitution's Religion Clauses. Even if one might not expect society today to be as favorably disposed toward religion and its exercise as it was more than two hundred years ago, that does not alter the meaning of the constitutional provision that was written and adopted more than two hundred years ago. *See generally* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 875–77, 910–14, 916–19.

50. *See supra* pp. 1176 (noting that the religious freedom rule aims to protect religious truth without sweeping in too many of the untrue claims made in the name of religion). For a religious

That this was essentially the view of religious freedom that animated the First Amendment Religion Clauses is fairly clear. The difficulty with such a proposition is not that it is contrary to historical evidence of the original meaning of the First Amendment; on the contrary, as a matter of history it is reasonably definite that the Religion Clauses reflect precisely such premises.[51] The difficulty rather is that such a position feels uncomfortable today. It does not comport with modern sense and modern sensibilities. It feels anachronistic, jarring, a relic of a bygone era. And in a sense it is: the original meaning of the Religion Clauses, as a protection of freedom specifically *for religion—for* the benefit of religion, *for* religious exercise, and *for* religious persons and groups—does not comport with modern perceptions of what makes good constitutional policy sense.

What of it? If the task of constitutional interpretation is to recover the original linguistic sense and meaning of a provision of the Constitution—a disputed proposition to be sure, but one I take as my starting point here[52]—then the fact that what is recovered offends modern sensibilities is really beside the point. It might mean that we as a society would not today adopt

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analogy, consider Jesus's "Parable of the Weeds," recorded in *Matthew* 13:24–30 (Today's English Version):

> Jesus told them another parable:
>
> The Kingdom of heaven is like this. A man sowed good seed in his field. One night, when everyone was asleep, an enemy came and sowed weeds among the wheat and went away. When the plants grew and the heads of grain began to form, then the weeds showed up. The man's servants came to him and said, Sir, it was good seed you sowed in your field; where did the weeds come from? It was some enemy who did this, he answered. Do you want us to go and pull up the weeds? they asked him. No, he answered, because as you gather the weeds you might pull up some of the wheat along with them. Let the wheat and the weeds both grow together until harvest. Then I will tell the harvest workers to pull up the weeds first, tie them in bundles and burn them, and then to gather in the wheat and put it in my barn.

51. The historical case for religious premises animating the Religion Clauses has been well made by numerous scholars. One of the leading modern legal scholars of the Religion Clauses, Professor (and former Judge) Michael McConnell, has set forth at length the religious-premises historical origins of the Religion Clauses, noting in particular the relevance of the Great Awakening and of resulting religious arguments for religious liberty to understanding the movement for explicit constitutional protection of religious liberty. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410 (1990). Additional and similar such evidence has been marshaled by numerous other scholars, regularly producing the same conclusion over the course of many years. For a sampling of some of the best treatments, see, e.g., DONALD DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); CURRY, *supra* note 10; HOWE, *supra* note 10. In this respect, history confirms intuition. As historian Mark DeWolfe Howe aptly put it: "Though it would be possible . . . that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers." HOWE, *supra* note 10, at 15.

52. For a full-throated defense of original-public-meaning-whole-text-in-context-textualism as *the* single, correct approach to interpreting the Constitution, see Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?, supra* note 30, at 857; *see also* Kesavan & Paulsen, *Interpretive Force*, *supra* note 39.

the substance of the Religion Clauses as they were written and understood in 1789. It might mean that modern society should, through some suitable authoritative act (of constitutional amendment or perhaps revolution) reject the original meaning of the First Amendment Religion Clauses as binding law for us today.[53] But it does not alter the meaning of the constitutional provisions that were in fact enacted many years ago.[54] To whatever extent those provisions continue to be considered binding as law today, it is the original sense and meaning of those provisions, not modern preferences, that controls.

IV. IMPLICATIONS FOR UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT

This view of the *reason* for religious liberty in the American constitutional system has important implications for understanding the specific provisions of the Religion Clauses. It "maps" well onto the language of the Free Exercise Clause and the Establishment Clause, helping to clarify ambiguities and resolve points of uncertainty or controversy in the constitutional language in several distinct ways.

First, it points decisively in the direction of the "pro-exemptions" view of the Free Exercise Clause, by providing a persuasive justification for adopting *the religious perspective of the religious adherent*, rather than the perspective of the indifferent government bureaucrat, in understanding what constitutes a law "prohibiting the free exercise" of religion.[55]

Second, it points strongly in the direction of deference to the *religious adherent's sincere understanding* of his religious beliefs and what constitutes a burden on his free exercise resulting from a requirement of law preventing, punishing, or penalizing religious conduct.[56]

Third, it points strongly in the direction of a relatively more narrow, specific, traditional, arguably *theistic understanding of "religion,"* as opposed to looser, modern tendencies to treat any and all belief systems comparably.[57] It does so by providing a coherent basis for understanding the

53. The decision to be bound by (or to continue to be bound by) a written constitution is a political decision, entirely separate from the question of what that written constitution means. Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 910–12, 918–19.

54. *See supra* notes 51–52.

55. *See infra* Part IV.A.1.

56. *See infra* Part IV.A.2.

57. *See infra* Part IV.A.3.

original constitutional meaning of "religion" as grounded in a concern for certain sorts of belief systems only, and for the specific and unique type of conflict posed for the religious adherent between the competing claims of God and of secular law.

Fourth, it favors *a narrow view of what might constitute sufficiently "compelling" reasons for denying a claim of freedom to engage in religious conduct* and supplies a different and ultimately more satisfying justification for such exceptions as grounded not in the ultimate supremacy of the state but in the limits of what claims plausibly may be attributed to the commands of God.[58]

Fifth and finally, it supports a straightforward reading of the Establishment Clause as a cognate provision protecting freedom for religious exercise by *prohibiting government coercion or compulsion to engage in religious exercise*, in part flowing from religious premises that true religious faith cannot result from coercion but only from free inquiry, free persuasion, and freely-formed conviction.[59] The Establishment Clause is not sensibly read, in context, as an "anti-religion" or "freedom from religion" provision designed to extirpate religious exercise, observance, or advocacy from the public civil life of the community. Rather, it is an affirmative protection of religious liberty that complements the Free Exercise Clause by categorically ousting the coercive power of the state in matters of religious exercise.

In what follows, I develop each of these points in the context of considering the specific language of the First Amendment Religion Clauses. The first four points fall under the heading of the Free Exercise Clause, the fifth point under the Establishment Clause.

A. The Free Exercise Clause as a Substantive Freedom—For Religion

1. ". . . no law prohibiting . . ."

The Free Exercise Clause bans federal laws (and, by virtue of the Fourteenth Amendment, state and local laws) "*prohibiting*" the free exercise of religion.[60] Perhaps the central question of Free Exercise Clause interpretation is the meaning of "law prohibiting." Does it refer only to laws that, by their terms, regulate religious practice specifically? That is, is the clause one that forbids only those requirements of law that specifically target or discriminate against religious practice *because* it is religious practice?

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58. *See infra* Part IV.A.4.

59. *See infra* Part IV.B.

60. U.S. CONST. amend. I; *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the Free Exercise Clause is incorporated by the Fourteenth Amendment as a limitation on the powers of state governments).

The position that answers this question "yes" may be called the "non-discrimination rule" reading.

Or, does it, in addition, forbid the imposition of legal requirements that have the *effect* of punishing, penalizing, or preventing free religious exercise, whether government is intentionally targeting religious practice or not? That is, does the clause create (or recognize) an affirmative, substantive *right* to engage in religious exercise, free from government's usual powers to legislate through otherwise neutral laws? This may be called the "substantive right" or "exemptions" reading. In short, is the Free Exercise Clause about what government is *aiming at* with its laws (the non-discrimination rule reading) or about what it *hits* (the effects, or substantive right reading)?

The language of the Free Exercise Clause, standing alone, arguably could be read either way. How does one resolve the ambiguity? One answer is to move next to other, second-best evidence of constitutional meaning, such as historical evidence concerning probable original intention or understanding.[61] Another answer, typically employed only if neither text nor history resolves the issue, is to default to the principle that if the text does not forbid government action, there is no sufficient basis for concluding that any definite constitutional rule invalidates the action.[62] These are both legitimate next-step moves, and in the case of the Free Exercise Clause they tend to point in opposing directions. History strongly supports the pro-exemptions reading;[63] a default rule of government power of course supports the narrower, anti-discrimination-rule-only reading (the approach and conclusion of *Employment Division v. Smith*).[64]

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61. Kesavan & Paulsen, *Interpretive Force*, *supra* note 39, at 1148–83 (historical evidence provides worthy second-best evidence of original public meaning); *see also* Kesavan & Paulsen, *Is West Virginia Unconstitutional?*, *supra* note 39, at 363–95 (similar).

62. Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 878–82.

63. *See* McConnell, *supra* note 51. Though McConnell's evidence represents, in my estimation, the best treatment of the historical evidence on this issue, it should be noted that there are important competing accounts. *See* Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

64. 494 U.S. 872, 878 (1990) ("As a textual matter, we do not think the words must be given that [exemptions] meaning."). *Smith* proceeded from this observation of textual ambiguity not to history, nor straight to a default rule of government power, but to a consideration of *precedent*: "Our decisions reveal that the latter [non-discrimination] 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." *Id.* at 878–79. The *Smith* Court's treatment of precedent as uniformly supporting its interpretation is extraordinarily tendentious, bordering on dishonest, as nearly all commentators agree. *See, e.g.*, Douglas Laycock, *The Remnants of Free*

Might an understanding of the broader logic and structure of the Free Exercise Clause—the sense of the reasons for its inclusion in the First Amendment, the sense of the correct paradigm of religious liberty of the four discussed, the sense of religious liberty as a pre-constitutional natural and inalienable right—help resolve the ambiguity, tilting the conclusion decisively in one direction rather than another?

I believe so. If the Free Exercise Clause is read from a non-religious perspective, one of utter indifference to (or mild hostility toward) religious exercise and skepticism about the value of religious devotion as anything other than personal preference, then the more "natural" sense of the language might seem to be that it is a nondiscrimination rule, not a substantive immunity. If religious freedom is understood not as a natural right preceding the social compact of government but as a liberty conferred by human governmental authority under a written constitution, it is natural to read the right through the lens of governmental authority.

If, however, the Free Exercise Clause is read from a perspective that assumes that religious exercise is a natural, literally God-given, inalienable right, accorded constitutional protection because of its presumed intrinsic worth and priority over the commands of secular government, it is more natural to read "prohibiting" as referring to a law's consequences for a sincere religious believer. From the perspective that credits the possibility that there is such a thing as a God whose commands have priority, and that takes as its starting point the proposition that religious freedom is the state's recognition of the strong presumptive validity of that ordering of priorities, it makes little sense to read the Free Exercise Clause as anything other than *ousting state authority over the believer's conduct*, wherever and whenever such state authority is in genuine conflict with genuine religious obligation. To read the Free Exercise Clause not as recognizing a substantive right but as merely stating a non-discrimination rule would largely fail to serve the purposes for which the right presumably exists. Moreover, it would permit government to circumvent religious freedom seemingly at will, by the artifice of crafting its legal rules in ostensibly general, religion-neutral language. For example: "all citizens must eat pork."[65] "Everyone must be

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Exercise, 1990 SUP. CT. REV. 1; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 n.3 (1991) (remarking that *Smith*'s "use of precedent borders on fiction" even while defending its revisionist reading of the Free Exercise Clause); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Paulsen, *A RFRA Runs Through It*, *supra* note 5, at 251 n.8.

65. *See* Michael Stokes Paulsen, *Obama's Contraception Cram-Down: The Pork Precedent*, PUBLIC DISCLOSURE (Feb. 21, 2012), http://www.thepublicdisclosure.com/2012/02/4777 (citing ancient religious texts recounting emperor Antioches Epiphanes IV "neutral" command that all persons, including Jews, publicly eat pork).

available to work on all days of the week to qualify."[66] "Every employer must provide health insurance coverage for employees that includes contraception and abortion."[67]

The religious perspective of the Religion Clauses strongly suggests that the "substantive right" or "exemptions" reading is the correct one. It goes a long way in the direction of clarifying the linguistic ambiguity of the Free Exercise Clause, by indicating which general stance with respect to religious liberty is the preferred one from which to view the clause. Taken together with other evidence of original meaning, including historical evidence supporting the understanding that freedom of religious exercise was understood at the time of the framing as contemplating religion-specific exemptions from general laws,[68] it indicates that the general rule of *Employment Division v. Smith*, that neutral laws of general applicability ordinarily cannot be taken to violate the Free Exercise Clause rights of individuals and groups, is simply wrong. *Smith* makes a certain amount of sense if the "modern" stance toward religious liberty is right.[69] It makes little or no sense if the "liberal" stance is correct.[70]

2. ". . . the free exercise . . ."

It is often said, almost as a throwaway line, that, under the First Amendment Free Exercise Clause, freedom of religious belief is "absolute," but in the nature of things, freedom of religious conduct cannot be.[71] What is interesting, however, is that the Free Exercise Clause says nothing about *belief* in and of itself. It speaks solely in terms of the *exercise* of religion. Freedom of belief seems to have been assumed—so much taken for granted, perhaps, that the First Amendment does not even need to speak of it.

66. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("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 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.").

67. The issue of compelled inclusion of contraception, sterilization, and abortion drugs as "preventive health care" where employers offer health insurance coverage to employees is, as of the time of this writing, very much a live controversy. *See* Paulsen, *Obama's Contraception Cram-Down*, *supra* note 65.

68. *See* McConnell, *supra* note 51.

69. *See supra* Part II.C.

70. *See supra* Part II.B.

71. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("The [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."); Emp't Div. v. Smith, 494 U.S. 872, 877–78 (1990).

Religious belief is either not protected (which would be a rather surprising conclusion) or, more likely, subsumed within the broader category of free exercise, as an *a fortiori* case: believing is itself a religious activity, an exercise of religion. If government may not prohibit religious exercise, it surely cannot prohibit religious belief, the "lesser-included" predicate conduct, as it were.

The larger point is that the text of the First Amendment does *not* treat religious belief and conduct differently, the former absolutely protected and the other qualified or limited. It treats them alike and provides, simply, a right to their "free exercise." Whatever the scope of the Free Exercise Clause's right, whether a non-discrimination proviso or a substantive right or immunity, the thing it protects is *religious action*—activity, exercise. The Free Exercise right is a right to engage in *conduct*—conduct attributable to religious motivations or beliefs. This plain-language reading should not be at all troubling from a linguistic perspective. Moreover, it coheres particularly well with the conception of religious freedom as being specifically about protecting religion because the true commands of God are of superior obligation to the commands of human society. If one held such a conception, one would want a religious freedom provision that protected religious *exercise*, not just belief. Freedom to believe is not enough. For the believer, there must be freedom to act in accordance with belief.

By the same token, if one held the more religion-skeptical, "modern" view of the justification for religious liberty—that religion should be tolerated, along with and on the same terms as other belief systems, for general reasons of tolerating individual beliefs wherever possible, notwithstanding general disbelief in God—then one probably would want a constitutional religious freedom provision that emphasized freedom of belief, broadly conceived, but that de-emphasized freedom of action (exercise). In short, one would want a constitutional provision that really does say what more modern judicial decisions have sloppily interpreted the Free Exercise Clause to say: that freedom of belief is absolute and freedom of action in its nature is not.[72] One would also want a religious freedom provision that de-emphasized the "religious" nature of the freedom. The fact that the Free Exercise Clause is written in terms of *religious exercise* specifically, rather than belief, thus subtly tends to buttress the religious-liberty-for-the-sake-of-religion paradigm and the interpretive conclusions that follow from it.

The Free Exercise Clause says, further, that the right to religious exercise is the right to its "*free*" exercise, a word choice suggesting that legal restrictions or burdens *of any kind* on the exercise of religion are forbidden.

72. *See Cantwell*, 310 U.S. at 303–04; Emp't Div. v. Smith, 494 U.S. 872, 877–78 (1990).

For a time in the 1980s, before the decision in *Employment Division v. Smith*, the U.S. Department of Justice took the position that the word "prohibiting" in the Free Exercise Clause meant that small-ish burdens on religious exercise, not *wholly* preventing its exercise, were allowed.[73] Such a position of course gives little or no weight to the word "free" in the Free Exercise Clause. Viewed from the perspective that religious liberty exists precisely to protect the priority of religious obligation over secular authority, however, so narrow a reading of what counts as "prohibiting" the "*free* exercise" of religion becomes hard to sustain. The more natural reading of the whole text, in linguistic and historical context, is that it forbids government from imposing any punishment, penalty, or privation that operates meaningfully to impair the religious adherent's ability to comply with the dictates of faith, *as the religious adherent understands those dictates*. Moreover, whether and to what degree the ability to act consistently with one's faith is meaningfully impaired by the state's action is, similarly, a question of the religious adherent's understanding of the impact such a legal requirement has on his or her ability to act faithfully.[74]

73. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, NCJ NO. 115053, REPORT TO THE ATT'Y GEN.: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 7 (1986); *see, e.g.*, Brief for United States as Amici Curiae Supporting Respondents, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (No. 85-993).

74. This is generally in accord with pre-*Smith* doctrinal treatments. The classic case for the proposition that it is the *religious adherent's* understanding of the requirements of his faith that counts, not the state's view of what the adherent's faith requires and whether or not it is burdened by the state's action, is *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). In *Thomas*, the government had urged that the religious claimant's beliefs were not principled or consistent and, further, that they did not conform to any specific command of a given church, denomination, or sect. *Id.* at 714–15. The Court held, rightly, that this did not matter. *Id.* at 716. While the Free Exercise Clause only protects beliefs "rooted in religion" and not in purely secular or personal philosophical beliefs, the protection of religious beliefs does not "turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 713–14. Nor did it matter that other members of Thomas's faith (Jehovah's Witnesses) might not share his specific religious objection. *Id.* at 715. "Intrafaith differences of that kind are not uncommon among followers of a particular creed," the Court said, and it is not for government officials (including courts) to judge such matters of scriptural or doctrinal interpretation. *Id.* at 715–16. On the contrary, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* "We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.

3. ". . . religion . . ."

But what counts as "religion?" If the premises justifying constitutional religious liberty imply that the state generally must defer to an individual's understanding of what his faith requires of him, does that mean, further, that the Free Exercise Clause immunity extends to anything and everything an individual sincerely *calls or considers* his "religion?" Does it mean, further yet, that any and all strongly held personal beliefs—those that might resemble (in certain ways) traditional religious beliefs and that might be held with similar intensity and tenacity—must be treated as falling within the Constitution's protection for the free exercise of "religion," whether the individual considers such beliefs religious or not and irrespective of whether they fit the paradigm of the state recognizing and yielding to the presumed *a priori* priority of God?

This is the slippery slope down which the modern Supreme Court slid, a long way, in a series of cases in the 1960s and 1970s involving claims of conscientious exemption to the military draft.[75] The slide in many ways perfectly characterizes the "modern" stance toward religious freedom: there is nothing particularly distinctive about *religious* ethical claims. Thus, not only must "religion" therefore be construed broadly, but also analogous non-religious ethical claims need to be treated comparably, lest religion be preferred to non-religion. The slide also accounts, to a fair degree, for the decline of aggressive protection of the free exercise of religion in the modern era.[76]

The first case in this line was *United States v. Seeger*, decided in 1965.[77] At issue was whether Mr. Seeger satisfied the federal statutory standard for conscientious exemption from compulsory service for persons categorically opposed to war in any form, by virtue of "religious training and belief."[78] The Court counted Mr. Seeger's self-styled "religious" belief in "goodness and virtue for their own sakes, and a religious faith in a purely ethical creed," as close enough (for government purposes) to satisfy the statutory standard.[79] Seeger considered his ethical beliefs "religious"—he put quotation marks around the term in the military's registration form—and that satisfied the Court,[80] notwithstanding the statute's specific definition of religious belief as "an individual's belief in a relation to a Supreme Being

75. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

76. I have used the draft exemption cases to illustrate a similar point in prior writing. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1617–20.

77. 380 U.S. 163 (1965).

78. *Id.* at 165.

79. *Id.* at 166.

80. *Id.* at 187.

involving duties superior to those arising from any human relation" and *not* including "essentially political, sociological, or philosophical views or a merely personal moral code."[81]

The Court in *Seeger* adopted the following spin on the statutory language: "[t]he test might be stated in these words: [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 exemption comes within the statutory definition."[82] Thus, for statutory purposes (though the decision obviously had constitutional overtones as well), the Court deemed "religion" to include "*sincere and meaningful*" beliefs "*parallel*" to traditional religious theistic belief systems, as long as the believer considered such beliefs religious.[83]

Then came *Welsh v. United States*, in 1970, the next case in a law professor's perfect series of hypotheticals.[84] Mr. Welsh considered his beliefs *not* to be religious and *struck out* the word "religious" on the form.[85] But he still objected to participating in war in any form.[86] What result now? (As an aside, it is worth noting that an awful lot had happened between 1965 and 1970 in American public life and law. The Vietnam War had become substantially more unpopular; draft evasion, in various legal and illegal forms, had become common. Public draft card burning had become a notorious form of protest, addressed in a major Supreme Court decision interpreting the Free Speech Clause of the First Amendment.[87] Robert Kennedy and Martin Luther King Jr. had been assassinated in 1968. The nation had experienced severe and violent riots, including many over the Vietnam War. And a general cultural revolution against traditional values and authority was well underway.[88])

The Court in *Welsh* expanded the definition of religion to embrace non-religious beliefs.[89] A four-Justice plurality voted to repaint the statute so that

81. *Id.* at 165 (quoting 50 U.S.C. app. § 456(j) (1958)).

82. *Id.* at 176.

83. *Id.* at 166, 176.

84. 398 U.S. 333 (1970).

85. *Id.* at 337.

86. *Id.* at 343.

87. *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding constitutionality of statute forbidding destruction, including burning, of draft cards, against challenge that it violated the Free Speech Clause).

88. For an early, but still classic, social history of the period, see WILLIAM L. O'NEILL, COMING APART: AN INFORMAL HISTORY OF THE 1960'S (1969). For a classic treatment in song, see DON MCLEAN, AMERICAN PIE (United Artists 1971).

89. *Welsh*, 398 U.S. at 343–44.

"religious" meant, in effect, "either religious or non-religious," on the theory that Welsh's case was essentially indistinguishable from *Seeger* on its facts and that *Seeger* had already pretty much adopted such a position.[90] "What is necessary under Seeger," the plurality said, is that the registrant's opposition to war "stem from" "*moral, ethical, or religious beliefs about what is right and wrong* and that those beliefs be *held with the strength of* traditional religious convictions."[91] Thus, "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from . . . war," those beliefs "function as a religion in his life" and entitle him to conscientious objector status as much as someone whose views flow from religious convictions.[92] As for Welsh's explicit disclaimer that his views did not stem from religious belief, the Court held that this did not matter so much after all.[93] Mr. Welsh had simply erred in thinking that his ethical views did not count as "religious" within the meaning of the statute, at least as construed by the Court. (He apparently had not read *Seeger* carefully.[94])

Justice Harlan could not stomach such a pretense and declined to join the plurality's statutory interpretation holding.[95] Nonetheless, he provided the fifth vote in Welsh's favor, arguing that extension of draft exemption to nonreligious claimants was necessary to avoid what he thought otherwise would be a violation of the Establishment Clause.[96] Limiting the exemption "to those opposed to war in general because of theistic beliefs runs afoul" of the First Amendment, Harlan wrote.[97] Taking as his starting point the proposition that the Free Exercise Clause did not *require* exemptions for religious conduct—Harlan acknowledged that he had been a dissenter in *Sherbert v. Verner* and that he adhered to that dissenting view with respect to the Court's Free Exercise Clause doctrine at the time[98]—he concluded that government, "having chosen to exempt, . . . cannot draw the line between

90. *See id.*

91. *Id.* at 339–40 (emphasis added).

92. *Id.* at 340.

93. *Id.* at 341.

94. The attempt to distinguish *Seeger*, the plurality wrote, "fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs." *Id.* Because "very few registrants are fully aware of the broad scope of the word 'religious' as used in [the statute]," it followed that "a registrant's statement that his beliefs are nonreligious is a highly unreliable guide" to whether they are religious or not. *Id.*

95. *See id.* at 344 (Harlan, J., concurring).

96. *Id.* at 357–58.

97. *Id.* at 345.

98. *Id.* at 356 (citing his dissent in *Sherbert v. Verner*, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting)). *Sherbert* held that the Free Exercise Clause forbids government from conditioning a benefit (in that case, unemployment compensation benefits) on conduct inconsistent with an individual's exercise of her sincerely-held religious beliefs, absent demonstrated threat to interests of the highest order. *Sherbert*, 374 U.S. at 409–10.

theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."[99] Even if the statute could be construed to embrace "non-theistic religions," it still "draws the line between religious and nonreligious" and, that "in my view offends the Establishment Clause."[100]

This had been the thrust of the arguments in the lower courts, in both Seeger's and Welsh's cases—that protecting religious conscientious objections (and specifically theistic beliefs) but not protecting non-religious conscientious objections was illegitimate and unconstitutional. Behind this, of course, was the modern, skeptical view of the nature of religious belief and the resulting modern stance toward religious freedom: toleration, in so far as practical, of beliefs of all kinds, irrespective of their provenance. Non-religious belief systems needed to be treated the same as religious belief systems, as a basic principle of religious freedom, because, as the Second Circuit put it in *Seeger*, "today, a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands."[101]

Harlan could not swallow the plurality's cramming of the modern stance on "religion" into the *statutory* language.[102] But he swallowed it whole as constitutional reasoning.[103] On that ground, he joined in engrafting onto the statute a provision for conscientious exemption of non-religious individuals.[104] For Harlan, constitutional religious liberty not only did *not* require exemption of individuals from laws that conflicted with their good-faith understanding of God's prior and superior commands, it *forbade* exemption of religion specifically in preference to non-religious beliefs.[105] Religious freedom, in short, meant that religion and non-religion had to be treated the same way.[106] The plurality had come to this conclusion in the guise of statutory construction; Harlan's opinion embraced the same result explicitly as constitutional law.

Seeger and *Welsh*, though in form statutory decisions, amounted to a minor revolution in the *constitutional* treatment of religion. As I have put it

99. *Welsh*, 398 U.S. at 356 (Harlan, J., concurring).
100. *Id*. at 357.
101. United States v. Seeger, 326 F.2d 846, 853 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).
102. *Welsh*, 398 U.S. at 354 (Harlan, J., concurring).
103. *Id*. at 357–58.
104. *Id*. at 358.
105. *See id*.
106. *See id*. at 361 ("To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral.").

elsewhere, "their one-two punch has cast a long shadow over the Court's religion clause jurisprudence."[107] The logic of their holdings is that any serious accommodation of religious conscience constitutionally must embrace analogous claims of non-religious conscience.[108]

The third case in the draft exemption trilogy, *Gillette v. United States*, was decided in 1971, the year after *Welsh*.[109] Two rather different claimants argued for a right to *selective* conscientious objection—a moral objection not to all wars but only to certain "unjust" ones.[110] The statute did not extend so far, but only protected those who opposed participation in war in any form.[111] One of the two claimants was a clearly religious Roman Catholic who adhered to Catholic "just war" doctrine, which explicitly differentiates a Christian's conscientious moral duty in different types of war situations.[112] The other was a *Seeger-Welsh*-style non-religious ethical objector to the Vietnam War in particular as an unjust war.[113] To the modern perspective, of course, the situations appeared identical. And the one thing that seemed clear from the outset in *Gillette*, given *Seeger* and *Welsh*, was that *the two claims would be resolved the same way*.

The Court rejected both claims.[114] This was not very surprising: given increased opposition to the Vietnam War, and to the draft, accommodation of essentially *all* claims to conscientious objection to the draft came to be seen by the Court as intolerable.[115] In the political and social context, and given the premises of *Seeger* and *Welsh*, it would in effect mean the evisceration of the draft. The power to conscript for military service in an increasingly unpopular war would be subject to the individual veto of the putative draftee, a result desired by none of the justices (save Justice Douglas, in lone and perpetual dissent over anything involving the

107. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1618.

108. The Court has not been perfectly consistent on this point. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("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."); *cf.* Cutter v. Wilkinson, 544 U.S. 709, 710 (2005) ("[R]eligious accommodations need not 'come packaged with benefits to secular entities.'" (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987))).

109. 401 U.S. 437 (1971).

110. *Id.* at 439, 441.

111. *Id.* at 443.

112. *Id.* at 441.

113. *Id.* at 439.

114. *Id.* at 463.

115. *See supra* note 88 and accompanying text.

government's power with respect to the Vietnam War).[116] Under such circumstances, protection of all individual claims of conscience became too much weight for the Free Exercise Clause to bear. And so the Court beat a hasty retreat from the aggressive protection of religious (and non-religious) conscience.

The Court's discussion is revealing. To protect just-war conscientious objection, for religious and non-religious persons alike, would embrace "[a] virtually limitless variety of beliefs."[117] Ordinary "dissent from policy" might "appear as the concrete basis of an objection that has roots as well in conscience and religion."[118] Sorting the two would be nearly impossible. "Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events."[119] The claim is "ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole."[120]

Accommodating such "ultimately subjective" claims of conscience was especially unconscionable given the diversity of religious and secular claims of morality: "[o]urs is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions."[121] To grant all such claims was to the Court unthinkable—impractical and extreme—but to grant some but not others was just as unthinkable, for different reasons: it could produce "religious discrimination."[122] "[A] claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear," the Court added, citing

116. *Gillette*, 401 U.S. at 463 (Douglas, J., dissenting). Justice Douglas, of course, had dissented vehemently and regularly from the claimed authority of the Executive Branch to wage the Vietnam War at all, in cases presenting the issue—and in cases not presenting the issue, but involving individual acts of protest and resistance. *See* Mitchell v. United States, 386 U.S. 972 (1967) (Douglas, J., dissenting) (majority denying certiorari for a draft challenge); Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (Douglas, J.) (lifting stay of injunction against use of armed force in Cambodia); Massachusetts v. Laird, 400 U.S. 886 (1970) (Douglas, J., dissenting from denial of leave to file complaint) (collecting Douglas's other opinions asserting the unconstitutionality of the Vietnam War); United States v. O'Brien, 391 U.S. 367, 389 (1968) (Douglas, J., dissenting) (dissenting from decision upholding conviction for draft card burning against First Amendment free speech challenge, asserting that question of Vietnam War's constitutionality was a question that needed to be resolved).

117. *Gillette*, 401 U.S. at 455.

118. *Id*.

119. *Id*. at 456.

120. *Id*.

121. *Id*. at 457.

122. *Id*. (noting the danger of "unintended religious discrimination").

the Establishment Clause and recent decisions made under it.[123] "While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory."[124]

The Free Exercise Clause never fully recovered from the cumulative effect of the draft exemption cases. The pro-exemptions view made a brief comeback the next year, in *Wisconsin v. Yoder*, upholding the right of Amish communities to discontinue formal schooling past the eighth grade.[125] But *Yoder* soon came to be regarded as the exceptional case, with further exemptions on Free Exercise Clause grounds largely limited in Supreme Court cases, to claims involving unemployment compensation, until even that string was broken in *Employment Division v. Smith*.[126]

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123. *Id.*

124. *Id.* at 458. One can hear distinct echoes of *Gillette* in the Court's decision and opinion in *Employment Division v. Smith*, two decades later:

> Any society adopting such a system [of requiring individual religious exemptions from laws of general applicability] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

494 U.S. 872, 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

Justice Douglas's dissent in *Gillette* shared the premises of the majority that accommodating religion necessarily meant accommodating a virtually limitless number and diversity of secular claims for religious conscientious exemption. *See Gillette*, 401 U.S. at 463 (Douglas, J., dissenting). He simply would have granted exemption to all, rather than withholding it from all: "Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense." *Id.* at 466. The two situations, for Douglas, had to be treated the same way. The exemption statute, as written, "is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples." *Id.* at 468. Government, he argued, had to be neutral between religious belief and other belief. *Id.* at 468–69.

125. 406 U.S. 205 (1972).

126. *Sherbert v. Verner* is the leading modern case for the broad view of the Free Exercise Clause as requiring exemptions for religion from laws of general applicability. 374 U.S. 398 (1963). *Sherbert* held that a state could not condition eligibility for unemployment compensation, as applied to a Saturday Sabbath observer, on being available for work six days a week (including Saturday). *Id.* at 410. Free Exercise Clause claims for religious-specific exemption from nominally neutral unemployment compensation rules were similarly upheld in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), and Frazee v. Ill. Dep't of Emp't Sec. Dep't, 489 U.S. 829 (1989). Even that string ended with *Employment Division v. Smith*, which rejected a claim for unemployment compensation for a person who was unemployed by virtue of religious conduct in conflict with state criminal drug-use rule. 494 U.S. 490 (1990).

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court unanimously held that the Free Exercise Clause requires that churches' decisions with respect to the hiring and firing of ministers be exempt from facially neutral employment

The essential problem—a problem that continues to bedevil religious freedom today—is that to define "religion" within the meaning of the Constitution (or federal statutes) as embracing essentially any strongly-held comprehensive personal or community belief system is to drain the term of meaning. Doing so wrenches the word "religion" from its original constitutional and social context and gives it a new, ahistorical modern meaning more in harmony with the modern stance toward religious freedom as protecting freedom and personal beliefs, generally. The result, ultimately, is not to bring all personal beliefs *up* to the level of protection accorded genuine exercise of religious faith, but to bring truly religious beliefs *down* to the level of protection accorded all personal beliefs—which is, to put them at the mercy of popular will. Ironically, "defining" (if that is the right word) "religion" so broadly as to include most everything under the sun ends up reading the Free Exercise Clause out of the Constitution, at least insofar as it is thought an affirmative, substantive individual liberty.

The correct answer depends, I submit, on the correct paradigm. We protect religious liberty on the premise that God is real and that the true priorities *of God* trump the ordinary commands of man. We do not protect secular conscience, generally, in the same way, because the nature of the conflict between an individual's own personal ethical views and the requirements of the state *is not the same thing*. The nature of religious obligation is intrinsically different from philosophical or moral belief systems that involve no conception of a transcendent Creator, God. The believer understands himself to be under the superior authority of God. The ethical humanist, secularist, or atheist does not; he does not believe in God. Rather, he is subject to the moral commands he discerns for himself. (In a very real sense, the atheist is "God" for himself, the only ultimate authority over his own conscience. He really is, in *Smith*'s words, "a law unto himself."[127]) To assume that these situations are the same, to treat them as rough equivalents, is to deny the most basic premise on which American

discrimination laws: "[T]he Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission through its appointments." *Id*. at 697. The Court noted that, as in *Smith*, the statute at issue was neutral and generally applicable, but distinguished *Smith* on its facts: "It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id*. at 707.

127. Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

religious freedom rests and to render the protection specifically of the free exercise *of religion* linguistically (as well as theologically) unintelligible.

The word "religion," in the original sense of the term employed by the Constitution (and still in common usage today), necessarily involves some sort of conception of *God* (or gods) and the obligations of man and restrictions on conduct thought to flow from rightful devotion to the prior and superior claims of God. It is, necessarily, "something more than just the projection of an individual's inner sense of self, value, ethics, or morals, or of a social, political, or moral philosophy that involves no such transcendent reality or creative force."[128]

As I have written elsewhere, there is probably no better operational definition of "religion" in this constitutional sense than the one supplied by the original Virginia Declaration of Rights and employed by James Madison in his *Memorial and Remonstrance Against Religious Assessments*: religion is "the duty which we owe to our Creator, and the manner of discharging it."[129] (This is not direct "legislative history" of the meaning of the First Amendment. But it is good contemporaneous evidence of common public usage of the term "religion" at or about the time the Constitution was adopted.[130]) The statutory military draft-exemption definition, before the Supreme Court got hold of it, was remarkably similar to that early definition: "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[131]

That statutory definition, in turn, can trace its origins to the outstanding dissenting opinion of Chief Justice Hughes in *United States v. Macintosh*, which the statute fairly copies.[132] Indeed, Hughes's opinion in *Macintosh* is an eloquent defense of American religious freedom as fundamentally rooted in the priority of an individual's duties to God. Hughes was dissenting from the majority's holding that an applicant for naturalized citizenship could be rejected for refusal on religious grounds to promise in advance to bear arms in defense of the United States:

> Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of

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128. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1621–22.

129. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 64 (1947) (quoting in the appendix the Virginia Declaration of Rights).

130. *See* Kesavan & Paulsen, *Interpretive Force*, *supra* note 39, at 1144–48, 1156–59 (noting how contemporaneous documentary evidence can provide important evidence of word usage, and sometimes even serve as a "concordance" of constitutional meaning).

131. *See* United States v. Seeger, 380 U.S. 163, 165 (quoting 50 U.S.C. app. § 456(j) (1958)).

132. United States v. Macintosh, 283 U.S. 605, 627–35 (1931) (Hughes, J., dissenting).

> duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. . . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power.[133]

The original, *religious* understanding of the word "religion" as meaning what traditionally would have been understood to be embraced by the word "religion" in 1789, obviously possesses a strong textual and contextual claim to represent the original meaning of the term. The only problem with such an understanding—if it really is a problem—is that it does not fit well with modern sensibilities, which are better reflected by the decisions in *Seeger* and *Welsh*.[134] But those decisions make hash of the word "religion" and they make hash of the reasons why the Constitution distinctively protects the free *exercise* of religion. They also, unwittingly, end up narrowing the sphere of

133. *Id*. at 633–34.
134. *See supra* pp. 1196–1200

religious liberty, not broadening it (as *Gillette* and, eventually, *Smith* show).[135] As un-modern, archaic, and ungenerous as it may strike modern sensibilities, the word "religion" in the Religion Clauses simply does not bear the modern interpretations that have been forced upon it. "Religion" is adherence and devotion to the priority *of God*. *Seeger* and *Welsh*—and one-half of *Gillette*—are wrong.

4. The Problem of Exceptional Harm: Implied Exceptions and What Might Justify Them

A consequence of all this is that the Free Exercise Clause, within its sphere (of actually *religious* exercise), presumptively confers a substantive freedom from government regulation, for religious conduct—an immunity from the usual rules of society. But can the Free Exercise Clause really mean so much?[136] What of the problem of exceptional harm—the situation where religious conduct imposes essentially intolerable harms on others, or grave dangers of such harms? Would we really permit Abraham to commit human sacrifice of his son, Isaac, out of perceived obedience to God and excuse the murder of a child from criminal liability on the basis of the Free Exercise Clause?[137]

Judicial doctrine prior to *Employment Division v. Smith*, and still for certain claims even after *Smith* as well as under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA),[138] traditionally has handled this problem with a

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135. *See supra* pp. 1200–1204.

136. This is the form of the question posed by Stephen Pepper, in his insightful article on the Free Exercise Clause several years ago. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299.

137. *See Genesis* 22 (Today's English Version). Abraham, of course, did not sacrifice Isaac, but was apparently prepared to do so in obedience to God's command. *Genesis* 22:1–10 (Today's English Version). This was good enough for God (or what God wanted in the first place), and Isaac was spared. *Genesis* 22:11–19 (Today's English Version).

138. Emp't Div. v. Smith, 494 U.S. 872, 877–78 (1990). *Smith* preserved the compelling interest standard for free exercise claims involving challenges to denials of exemption claims where the law or rule in question provides individualized accommodation or application in other respects. *See id*. at 884. *Smith* also preserved where a free exercise claim is made in combination with some other plausible constitutional claims, such as a substantive due process "parental freedom" claim or a free speech claims. *See id*. at 881–82. Whether these exceptions to *Smith*'s rule make any principled sense can be (and has been) doubted. *See* Paulsen, *A RFRA Runs Through It*, *supra* note 5, at 251 n.8 (collecting commentary to this effect). The Religious Freedom Restoration Act (RFRA) adopts the compelling interest standard for all applications of federal law. 42 U.S.C. § 2000bb (2006); *see generally* Paulsen, *A RFRA Runs Through It*, supra note 5. The RFRA applies that same standard to state law, but the Supreme Court held that Congress lacked power to prescribe such a rule, in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress responded with the Religious Land Use and Institutionalized Persons Act, (RLUIPA), which provides for application of the compelling interest standard in challenges to state laws in certain prescribed areas falling within Congress's power to

"compelling state interest" escape hatch: a sufficiently compelling, or "paramount" state interest "of the highest order and . . . not otherwise served" trumps even sincere claims to religious exercise.[139] As a matter of the constitutional text, the problem remains that there is no compelling-interest override written into the Free Exercise Clause; it is all judicial interpolation. How can such an exception be justified as proper constitutional interpretation? (And does this not tend to suggest that the broad reading of the Free Exercise Clause, which would necessitate such an implied exception, is wrong in the first place?) Further, as a matter of the underlying theory explaining the Religion Clauses as rooted in the idea of the priority of God's commands over man's and the disability of the state to judge to the contrary, *why should* "compelling *state* interests"—as determined by the state, according to some nonreligious moral or political metric—suddenly trump religious claims? If one grants the premise that we protect religious liberty because what is at stake are truly *God's* commands or expectations, and that these *really do* prevail over man's moral law at variance with God's commands, why shouldn't Abraham win, in principle? After all, the Biblical account states that God really *did* command Abraham to kill his son, and only repented once it was clear that Abraham had passed the test of absolute loyalty to God and indeed was prepared to carry out God's horrific command.[140]

In short, does not the concession to compelling, overriding interests contradict the initial premise on which, as I have argued, religious freedom rests?

The problem is a serious one, but one capable of being answered both in terms of the constitutional text and the underlying priority-of-God religious premises of the Religion Clauses. Consider for a moment the types of things that lie at the core of what are generally thought to be "compelling" interests. Set to one side the fact that *governments* tend to regard *everything* they do—all official policies and rules—as compelling, a view that, if credited, would render the Free Exercise Clause essentially meaningless.[141]

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regulate interstate commerce and to attach conditions to the receipt of federal expenditures. 42 U.S.C. § 2000cc (2006).

139. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[I]n this highly sensitive area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of religious liberty].").

140. *See supra* note 137 and accompanying text.

141. *See generally* Paulsen, *A RFRA Runs Through It*, *supra* note 5, at 250–51.

Paradigmatic compelling interests include: protection of human life from such grave harms as murder; rape; robbery; theft; slavery; infanticide; abortion; oppression; violent attacks from others of all kinds; falsity, perjury, or fraud to the injury of another and, arguably, some other kinds of very serious threats or injury to life, liberty, or even property of another. (Conduct posing a sufficiently serious *threat* or *likelihood* of such injuries is also, typically, regarded as presenting compelling justification for overriding religious liberty.) Typically excluded from such lists are purported harms of an individual to himself or herself as a consequence of sincere religious conviction. By extension, harms purely internal to a religious community, i.e. those harms that do not involve injury to non-consenting third parties outside the community; purported harms to third parties that are either relatively minor or that involve injuries to new, non-common law, non-natural "rights" (For example, statutory rights creating affirmative benefits or broad freedom from others' actions extending beyond traditional baseline conceptions of private rights.)[142]; and general, diffuse, non-cataclysmic social and political costs of accommodating religious conduct at variance from society's usual rules, including both the costs of accommodation and the administrative inconvenience inherent in carrying out a requirement of religious accommodation, are not "harms" sufficient to displace genuine free exercise claims. All of these are less than truly compelling interests, though the lines concededly are often difficult to draw.[143] Purported injuries or harm to children, of many (but not all) kinds, tend to be regarded as compelling, because of problems of consent. But parents' usual right to choose how best to care for, educate, and promote the well-being of their children—including the right to choose the religious upbringing of their children—usually should lead to children being treated as members of the religious community of their parents.[144]

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142. This choice of baselines makes sense. The sphere of constitutional religious liberty should not contract just because the asserted powers of the secular state (including the power to create new legal rights or interests) expand.

143. For an excellent, classic discussion of the full range of problems and competing interests occasioned by claims of religious freedom, see Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595 (1999).

144. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). *See generally* Paulsen, *Scouts, Families, and Schools*, *supra* note 23, at 1939–47. This creates extraordinarily difficult problems with regard to issues of medical care of children, where a religious community's rules differ dramatically from society's, both the religious and human stakes are high, and the life of a child may hang in the balance. Examples include certain Jehovah's Witness beliefs against blood transfusions and Christian Scientist beliefs favoring spiritual to medical treatment of physical illness in many circumstances. *See, e.g.*, Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995), *certiorari denied* 516 U.S. 1092 (1996) (upholding damages award for wrongful death of child, against Christian Science parents and practitioners); Walker v. Superior Court, 763 P.2d 852 (Cal. 1988) (upholding criminal conviction for manslaughter and felony child neglect of Christian Science

These limitations—the lines drawn by perceived compelling interests—are as much intuitive as anything. Yet the intuitions are often valid. In modern times, these intuitions appear to reflect, and track reasonably closely, the generally libertarian stance of philosopher John Stuart Mill's *On Liberty*.[145] But because people's intuitions in this regard differ, and are often a function of their own personal religious beliefs or empathy for religious conviction generally, they can feel highly subjective. And as a society changes from a liberal religious society to a modern (or post-modern) irreligious society, intuitions shift too as to what are sufficiently compelling interests to trump religious exercise. Society's interests are ratcheted up in public estimation, and religious free exercise is less readily indulged as a prior and superior value. Assertions of important state interests in new policies or programs readily supplant space formerly reserved for free religious exercise. The result is that the scope of free exercise becomes unanchored, tied more to current notions of correct social policy than to any fixed, determinate original meaning of the Free Exercise Clause. And, there is still the problem that the First Amendment text says nothing at all about compelling interest exceptions, the philosophy of John Stuart Mill, or anything else of this nature.

I would like to suggest three possible ways to understand "compelling interest" exceptions to, or overrides of, free exercise claims, that harmonize better with the text of the First Amendment and with the religious premises of the Religion Clauses. Each is consistent with the others; indeed, they tend mutually to reinforce one another. Significantly, each of these arguments tends to limit, quite strictly, the types of things that can be claimed as compelling interests. At the same time, these ways of re-formulating compelling interest redirect the inquiry away from *the state* and its claimed interests and toward what plausibly can be claimed in the name of free exercise *of religion*.

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parents for failing to seek medical treatment for ten-year-old daughter with acute meningitis). *See also* Application of the President and Directors of Georgetown College, Inc. 331 F.2d 1000 (D.C. Cir. 1964), *rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir. 1964), *certiorari denied* 377 U.S. 978 (1964) (ordering involuntary blood transfusion over religious objection of adult member of Jehovah's Witness faith); Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319 (Ill. App. Ct. 1986) (rejecting wrongful death action against Christian Science practitioners with respect to adult member). *See generally* Geraldine Koeneke Russell, *Jehovah's Witnesses and the Refusal of Blood Transfusions: A Balance of Interests*, 33 CATH. LAW. 361 (1990); John Alan Cohan, *Judicial Enforcement of Lifesaving Treatment for Unwilling Patients*, 39 CREIGHTON L. REV. 849, 860–81 (2006) (reviewing cases where parents and minors have refused life saving treatment based on religious beliefs).

145. JOHN STUART MILL, ON LIBERTY (Simon & Brown 2012) (1869).

First, one could understand compelling-interest overrides as exceptions implied out of the very strictest *necessity*. They are not stated in the text—a problem, to be sure—but they are arguably implicit in it as a background, structural principle embedded in the Constitution generally and against which the natural right of freedom for religious exercise should be read, understood, and limited.[146] This is an imperfect textual argument, but not a ridiculous one. Significantly, it supports a limitation on "compelling interest" exceptions to the text's stated rule *only* for interests that are *genuinely compelling*—and not just for anything and everything government officials wish to do. The fact that the text does not explicitly set forth such exceptions should operate as a check against their too-frequent or too-easy invocation. *The presumption runs, strongly, against any such implied exception*. A compelling interest, to be read into the text as an implied exception, has to be, truly, compelling, "paramount," of "the highest order."[147] This, I submit, accords with the nature of the Free Exercise Clause as an affirmative natural right, protecting the (general) supremacy of free religious exercise over state power.

A second way of re-thinking "compelling state interest" is that it is perhaps wrong in the first place to view the issue in terms of the *state's* interests as trumping a claim otherwise authorized by the text of the Free Exercise Clause. The very formulation subtly implies ultimate state supremacy, rather than the priority of God. Rather, the phrase may be better thought an imprecise, inartful way of saying that *the conduct at question is simply outside the domain of what "the free exercise of religion" embraces, as a matter of the original public meaning of the term itself.* The term "free exercise thereof" may itself entail a limitation in its scope to conduct that does not seriously injure *others outside* the religious community and that does not result in imposition of massive costs on society at large or on specific individuals. Just as, for example, "*the freedom of* speech" includes both more and less than everything that fits the category of "speech,"[148] so

146. I have suggested elsewhere that the Constitution's structure and logic supports a principle of "necessity" as a rule of construction, and perhaps a freestanding substantive rule, counseling against readings of rights and powers that threaten to destroy the essential enterprise of constitutional government, or work truly massive harm on individuals or society, and that this, more than explicit textual command, is the best explanation of many "compelling interest" tests in current constitutional doctrine. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1281–82 (2004); *see also* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 721–26 (2004) (noting significance of President Lincoln's use of such an interpretive premise to justify his construction of presidential war and emergency powers under certain circumstances).

147. *See supra* note 139 and accompanying text.

148. Some "speech" is categorically excluded from "the freedom of" speech as a matter of the original meaning of the phrase taken as a whole, in historical context. And, on the other side, certain expressive conduct, most expressive association, and the freedom *not* to engage in compelled

too with religious freedom "*the free exercise thereof*" simply might not include, as a matter of original meaning, conduct imposing such grave harms on others, outside the relevant religious community. The right to "the free exercise thereof" may well be thought of as entailing some kind of a jurisdictional principle that, while preventing the state from importing its rules into the sphere of religious autonomy also prevents the religious adherent from exporting his rule into the sphere of society outside of the religious community, by imposing severe externalities.[149]

The third way to re-understand "compelling interest" may be the most radical: one could understand limitations on religious liberty claims as resulting from precisely the religious justification for religious liberty. If the purpose of and underlying justification for religious liberty is to promote *true* religious exercise—true obedience to true commands of God—then such a liberty in principle (and practically by definition) *excludes conduct one can confidently say proceeds from views outside the realm of conceivably correct views about what God requires or commands*.

On this explanation, a religiously based claim to immunity from the usual rules of society fails if the conduct claimed to flow from religious duty *violates the clear, universal moral command of God*. In other words, the religious adherent's claim that God's command to him is prior to, and superior to, society's command, is one that we are prepared to say, however reluctantly, is simply *objectively wrong*. The freedom claimed is simply *not* one that fairly and plausibly can be attributed to a true command of God. For example, we can confidently say, as a matter of universal religious and moral truth, that God (by whatever name called) did not command al Qaeda members to commit mass murder. Such a religious claim is simply false, whether or not (and I think it not) it is a plausibly correct explication of Islam itself and whether or not it is sincerely believed. The extreme, murderous claims of radical Islamism are simply false claims about God, and are constitutionally unprotected *for that reason*.

In the end, this is the most persuasive—but also surely the most dangerous, if misapplied—argument for overriding claims to religious

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expression, are all part of "the freedom of" speech, though they extend beyond literal speech. *See* Paulsen, *Scouts, Families, and Schools*, *supra* note 23, at 1921; *see also* PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES, *supra* note 23, at 950–58 (setting forth a "map" of "the freedom of speech" under the Free Speech Clause).

149. This idea that the Free Exercise Clause sets forth something of a "jurisdictional" principle was first suggested by a former professor of mine, Professor Perry Dane, in a brilliant student note. Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

liberty on the ground that denying such claims is necessary to prevent exceptional harm. My suggestion here is surprising and unfamiliar, in part because our modern era recoils at the idea of describing any claimed religious belief as "wrong." But I submit that this is not because we think such beliefs as al Qaeda's might be *right*; rather, it is because our era doubts that *any* claimed religious belief is "right." We rapidly default to a type of relativism that forbids making any kind of distinctions among claims made in the name of religion. It is presumptuous and unacceptable, to modern understandings, to treat any religious belief or exercise as categorically or even presumptively more right or wrong than any other. It is thus hard for those holding the modern conception to fathom an approach that would justify overriding free exercise claims premised on the view that some free exercise claims are simply untenable as claims about God's true commands.[150]

But is mine really so presumptuous a view? Are there not some things that are objectively wrong? And do not our intuitions in this regard ultimately flow from received cultural understandings of what God truly does or does not command? To be sure, we should be careful about making such claims—claims of the objective falsity of an asserted religious belief. The proposition, pressed too far, contains the seeds of destruction of the principle of religious liberty. Past a certain point, quickly reached, the business of judging the truth or validity of religious beliefs destroys religious liberty. We rightly ask: on what principle, consistent with the premises of religious liberty, can government engage in such enterprise at all?[151]

But up to a point, the inquiry is practically unavoidable. All views of the Free Exercise Clause require some initial inquiry into the sincerity of the believer's purported claim and whether the state action in question imposes a cognizable burden on something that qualifies as religious practice. All views, at least to that extent, judge the validity of a claimed right to exercise religion.

Think for a moment about what ultimately lies beneath the intuition that certain claims of religious freedom simply cannot be honored. At bottom, I

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150. The attitude is of a piece with that which produced the extension of the meaning of "religion" to include non-religious ethical beliefs or principles, discussed above.

151. It has long been held that government may not evaluate the truth or validity of a religious belief. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86–88 (1944) (stating that "[h]eresy trials are foreign to our Constitution" and holding that truth or falsity of religious beliefs cannot be submitted to jury determination); *cf.* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (finding that courts are not competent to adjudicate "controversies over religious doctrine and practice"); Watson v. Jones, 80 U.S. 679, 728 (1871) ("The law knows no heresy . . . .").

submit, it is one of four thoughts. First, one might think that there is *not really a God* who makes claims on humans. That is, the claimants' claims are simply not real; the claimant is delusional. (That view of course entails a denial of the core premise justifying religious liberty.) Second, one might think that the religious claim *is not sincerely believed by the claimant*, but a mere pretext or sham—the claimant is lying. (This inquiry is permitted under essentially all approaches, at least as a threshold inquiry.) Third, one might think that the particular religious belief asserted, even if sincerely held, is *simply not true*—that, even accepting that God exists and imposes duties on humans, the believer simply has it wrong. God exists, yes, but God did *not* command *that*. For example, God did not command al Qaeda to kill innocents. The claim is simply incompatible with what we know and believe about what God might actually command. (This is the position I am advancing.)

Finally, there is a fourth possible intuition: that even if one accepts God, agrees that God makes demands on human behavior, and agrees that in theory God might make commands that (from a human standpoint) seem unreasonable, unbelievable, and even immoral, we should *still* reject certain religious freedom claims on the ground that what God (purportedly) has commanded is simply a terrible, awful thing. That is, granting arguendo the possibility that God might truly command something horrible, *man should, in this respect at least, reject God's supposed will*. This is a seemingly paradoxical position, but not a nonsensical one. It simply adopts an overwhelming presumption in favor of the morality, consistency, and integrity of God with respect to perceived universal moral commands. While it acknowledges on theological grounds the (theoretical) possibility of God-prescribed exceptions to, new revelations of, or departures from what were believed to have been God's universal moral commands, it refuses to accept such claims as valid claims to the free exercise of religion where, from a human perspective, they would work great human harms of the types discussed above.[152]

152. It may sound strangely incongruent with traditional western understandings of God to say that human beings *should* reject what they believe are the true but morally horrible commands of God—and that the constitutional protection of free exercise of religion likewise ought not extend to obedience to such commands. Yet this is sometimes the operative intuition, both at the level of the individual believer and at the level of a society that respects and seeks to honor religious belief to the maximum degree. For example, even devout religious believers sometimes may doubt—and probably should doubt—the propriety of following the perceived commands of God in certain circumstances. First, they may doubt, (probably rightly) the correctness of their perceptions *that God has in fact commanded* or required some morally dubious course of conduct. Second, they

A slight variation might be the position that, while God might in theory command humans to do something terrible and contrary to the believed character of God, a truly extraordinary burden of proof rests on someone making such a claim. Society should not accept its validity unless that practically insurmountable burden is satisfied. (Show *us* the burning bush that spoke to you a command to murder, rape, pillage, steal, or wage genocidal war and then we will consider your free exercise claim.)[153]

In the end, it is a sound intuition that there are some situations in which a claimed right to religious exercise must fail. But it is important to be clear on *why* that should be so, in order to know *when* such an override to the presumed right of religious free exercise is proper. It would not be consistent with the premises of the Free Exercise Clause, and religious liberty, simply to say that there is no God who makes claims on individuals' conduct. The whole point of religious freedom is to protect the right and ability of persons to act in conformity with true commands of God. But it *is* consistent with the premises of the Free Exercise Clause to say that it excludes fraudulent, feigned claims of religious liberty. In such cases, there is *no true command of God to be obeyed*. Likewise, it is consistent with the premises of the Free Exercise Clause to say that a claim, made in the name of religion, is invalid if it contradicts the apparently clear, universal moral command of God. In such a case, as in the case of an insincere or pretext claim, there is *no true command of God to be obeyed*. There are some things that we can and should confidently say God thinks are always and everywhere wrong (or at least we should so presume). Claims to engage in such conduct are simply beyond the ambit of the text's protection of the free exercise of religion.

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might doubt *the moral propriety of obeying* even what they are fully convinced is the command of God. (The latter situation might well lead the religious adherent to question the correctness of his perception that God has in fact commanded the conduct in serious moral conflict with the believer's prior understandings or intuitions about God's nature and character.) A believer thus might well make the moral choice (whether rightly or wrongly) to act in deliberate disobedience to the perceived command of God. (Religious believers obviously act in disobedience to the believed true commands of God all the time, for reasons including moral weakness and lack of faith—in a word, "sin"—but that is a different matter.) From a theological perspective, it also may be appropriate for one to argue with God when God is thought to have commanded something unreasonable or morally intolerable. Consider the account in *Genesis* 18:22, where Abraham is reported negotiating with God to save Sodom, if Abraham can find fifty innocent people in the City. God agrees, and Abraham proceeds to bargain God down to forty-five, forty, thirty, twenty, and finally ten. The deal is struck at ten, but Sodom still loses. *See Genesis* 18:22–33 (Today's English Version).).

A society's stance on religious freedom might validly take a similar view: that even assuming that some act in theory might have been commanded by God, obedience to a morally horrible "divine command" nonetheless should *not* be treated as constitutionally protected conduct—not because society's rules should trump God's but because of legitimate doubt that such a horrible command really could be a true directive of God.

153. I owe this alternative formulation to a thoughtful conversation with my colleague, Professor Teresa Collett.

But we should reach this conclusion not because of any claim that the state is supreme—that its compelling interests prevail over God's commands. Rather, it is because we accept the idea of the priority of God's true commands that we should reject claims that we know to be contrary to God's clear, universal moral commands.

What sorts of things are included in that description? There will still be arguments over what falls in this category and what does not. There will still be close cases, difficult cases, and uncertain lines. That problem exists under any approach that takes Free Exercise seriously. If the text of the Constitution requires those applying it faithfully to engage in that sometimes difficult process, that is what must be done. The approach I have suggested does not pretend to eliminate this problem, but would simply resolve more contested issues in favor of religious claimants—relocating the line-drawing inquiry to a different range on the continuum of possible claims. The arguments will be somewhat different arguments, and somewhat different cases will be the difficult cases, for somewhat different reasons, than under pre-*Smith* "compelling interest" jurisprudence. In the main, the type of conduct that will fail of constitutional protection is of the type specifically and consistently prohibited by the moral codes of the Judeo-Christian tradition, in things like the Ten Commandments and comparable New Testament moral codes, and their counterparts in Islam and most other theistic and even polytheistic religions.[154] To a surprising degree, these common moral prohibitions track the "compelling interest" libertarian exclusions noted above (although with certain differences with respect to prohibitions on sexual conduct, which depart from at least modern-day libertarian sensibilities). Thus, the debates over what conduct cannot plausibly be attributed to God's commands might end up looking considerably like debates over what conduct falls outside the bounds of libertarian toleration: conduct inflicting serious injury upon non-consenting third-parties (murder, rape, robbery, fraud, slavery, abortion, aggressive war, genocide, or other grave harm to others who are not part of the religious community.) In such cases, the state's interests prevail over the religious claimant's not because the state says so, and not because John Stuart Mill might have thought so, but *because God thinks so*.[155]

154. *See, e.g.*, *Exodus* 20:13–17 (Today's English Version); *Romans* 1:18–32 (Today's English Version); 1 *Corinthians* 5:11, 6:9–10 (Today's English Version).

155. I do not wish to engage in a systematic consideration of every conceivable claim to religious freedom in conflict with secular law, or even to address how every Free Exercise Clause decision of the Supreme Court should have been decided. But I depart from that policy, to an extent, simply to

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The Free Exercise Clause is thus best understood as a sweeping protection of freedom to engage in religious conduct, even when at odds with the usual commands of civil government. Understood as protecting the priority of God's commands over man's, the Free Exercise Clause means that religious conduct is presumptively immune from the usual authority of the state. It means that religious conduct and only religious conduct—conduct rooted in the believer's understanding of the commands or expectations of God, and not a mere personal moral or ethical philosophy or analogous secular belief system—is, to the extent of the Free Exercise Clause's constitutional immunity from government's power, affirmatively preferred to non-religious conduct. And it means that the limitations on religious freedom are, likewise, better understood as flowing from essentially religious limits on what plausibly can be credited as a true command or requirement of God, not merely from ad hoc evaluation of the importance of asserted secular interests of civil government.

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note that, under the view I have sketched here, several of the Supreme Court's decisions are certainly wrong and many more are at least questionable. *E.g.*, Emp't Div. v. Smith, 494 U.S. 872 (1990) (no showing of pretext or universally wrongful conduct posing grave injury to private rights of non-consenting third parties); Hernandez v. Comm'r, 490 U.S. 680 (1989); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Bowen v. Roy, 476 U.S. 693 (1986) (wrong in part; questionable in part); Goldman v. Weinberger, 475 U.S. 503 (1986); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (wrong on disregarded free exercise claim even if right on addressed free speech ground); Gillette v. United States, 401 U.S. 437 (1971) (wrong as to religious claimant); Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (outrageously wrong holding that the Free Exercise Clause does not forbid government from compelling public affirmation contrary to religious conviction); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (dubious pre-incorporation case: questionable whether non-vaccination on religious grounds injures non-consenting third parties by wrongful conduct external to the religious community); Reynolds v. United States, 98 U.S. 145 (1879) (no showing of pretext or universally wrongful conduct posing grave injury to private rights of non-consenting third parties). In each of these cases, the religious adherent's claims were neither insincere nor discredited as obviously contrary to clear, universal moral commands of God, nor such as demonstrably to work serious injury to the baseline or natural rights of non-consenting third parties, outside the relevant religious community. In addition, *Locke v. Davey*, 540 U.S. 712 (2004), is wrong even on the narrow view of free exercise as invalidating only laws that single out religious conduct for discriminatory treatment.

I have discussed some of these cases at length in other writing addressing the Free Exercise Clause issues presented therein. *See* Paulsen, *A RFRA Runs Through It*, *supra* note 5, at 265–68 (discussing *United States v. Lee*, *Bowen v. Roy*, *Hernandez v. Commissioner*, *Goldman v. Weinberger*, *O'Lone v. Estate of Shabazz*, and *Lyng v. Northwest Indian Cemetery Protective Association*); Paulsen, *Equal Protection Approach, supra* note 5, at 362–68 (discussing *Bob Jones University v. United States*,461 U.S. 574 (1983)).

B. The Establishment Clause as a Protection of Freedom—For Religion

What about the Establishment Clause? How does it fit within this understanding of religious freedom? Does it fit at all? Does it not lean rather *against* the idea of special protection of religious conduct, and thus the strong pro-exemptions reading of the Free Exercise Clause, by forbidding government from "favoring" religion?

These questions have altogether straightforward answers, but those answers have eluded modern courts and commentators. Blinded by the modern paradigm, and seemingly indifferent to how anachronistic it is as a mode of understanding the Religion Clauses of the First Amendment (proposed and adopted in the late eighteenth century), modern would-be interpreters of the Establishment Clause have sought to transform it from a cognate protection *of religious liberty* into a *limitation on religion*. On this reading, the Establishment Clause checks religion's ability to play a role in public life and balances government's (including courts') constitutional duty to accommodate free exercise with a requirement of secular neutrality toward religion. The Establishment Clause comes first, textually, and on this view of it constrains both the Free Exercise Clause and the Free Speech Clause, which follow. Religion should be excluded from the public square; religious arguments and advocacy should be excluded from public discourse; religious motivations should invalidate laws reflecting such motivation or inspiration; religious speakers and groups should not be accorded equal access to public forums for expression or public benefits to which they would otherwise be entitled; and religious free exercise should never be specially accommodated, in the form of specifically religious exemption from laws of otherwise general applicability.[156]

Under the original conception of religious liberty embodied in the religion clauses, each of these conclusions is wrong—indeed, 180 degrees wrong; they state exactly the opposite of the original meaning of the First Amendment. If religious liberty exists for the benefit of religion—as a freedom *for* religion, protecting it from government—it becomes utterly implausible to read the Establishment Clause as some sort of anti-religion counterweight to the Free Exercise Clause—a freedom *from* religion. It is also implausible as a simple textual matter to read the First Amendment as

156. For accounts (and criticism) of such views, as applied in various issue-specific contexts and discussing specific cases, see Michael Stokes Paulsen, *A Funny Things Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on 'Equal Access' for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 653–68 (1996); Paulsen, Lemon *is Dead*, *supra* note 5, at 800–19.

deliberately embracing self-contradictory principles.[157] Rather, the Establishment Clause can be seen in its natural, and original, sense as a protection of religious liberty motivated by the second of the paradigms discussed in Part II, above: it embodies the view that religious truth exists but that *the secular state has no proper role in prescribing religious orthodoxy or compelling religious observance*. The Establishment Clause is not a freedom-from-religion provision. It is a freedom-of-religion-from-government provision. It specifically dis-empowers the state in matters of religious exercise. As such, it is of a piece with the conception of religious liberty as reflecting the view that God's commands have priority over the state's; it embraces a corollary proposition, that the state is not competent to decide for individuals what is true religion and what God's commands are.

This too reflects religious premises, widely subscribed to in religious, post-Great Awakening (yet still Enlightenment-influenced) America—the America that existed at the time of the framing of the Religion Clauses—that genuine religious faith does not come from coercion, but from free inquiry and free persuasion; that religious truth prospers best in an atmosphere of liberty; and that religious truth does not require government coercion to prosper, but instead can be impeded by such coercion. Such notions are not in any sense a retreat from belief in the priority of God and God's commands. On the contrary, they are an *application* of that belief: the priority of God, taken seriously, means the consistent disavowal of state authority in matters of religion.

The Establishment Clause, then, is a provision that prohibits government from compelling or requiring persons to engage in religious exercise against their will. It "imposes a disability on the exercise of government power in such a manner as to compel religious belief or exercise or to punish failure to adhere to a state-prescribed religious orthodoxy."[158] As I have explained (at much greater length) elsewhere, the Establishment Clause protects the free *non*-exercise of religion in the same breath that the Free Exercise Clause

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157. *See* Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1613–14 n.9 (collecting arguments and authorities); *see also* Paulsen, Lemon *is Dead*, *supra* note 5, at 801–02. The Supreme Court persists in embracing a limited version of this odd Religion-Clauses-as-self-contradiction position in dicta noting a supposed "tension" between the Free Exercise Clause and the Establishment Clause and the need to find some room for "play in the joints" between competing principles. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 132 S. Ct. 694, 702 (2012); Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005); *Locke*, 540 U.S. at 718–19.

158. Paulsen, *Making Sense of Religious Freedom*, *supra* note 5, at 1610. I have advanced the following as a statement of the rule of law supplied by the Establishment Clause:

> Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of religious exercise, worship, expression or affirmation, nor may it require individuals to attend or give their direct and personal financial support to a church or religious body or ministry.

Paulsen, Lemon *is Dead*, *supra* note 5, at 43.

protects the free exercise of religion.[159] The clauses work in parallel, and operate in a similar fashion, protecting a single value of freedom for religion, but from two directions. The Establishment Clause forbids government *prescription* of religious exercise; the Free Exercise Clause forbids government *proscription* of religious exercise. They are not at all contradictory or even in tension. Rather, they are two sides of the same coin.[160]

It follows that the Establishment Clause certainly does not require the exclusion of religious speakers, groups, and persons, from public forums and public benefits. It follows that the Establishment Clause is not so much concerned with government "endorsement" of religion as with actual coercion of religious exercise.[161] Endorsement without coercion is simply government speech, which may be troubling and irritating at times, but in principle poses no different problem for government speech about religion than for government speech on any other topic. And it follows, most significantly, that the Establishment Clause neither disfavors accommodation of genuine religious exercise, leans against the exemptions reading of the Free Exercise Clause as an affirmative substantive right, nor requires that religious and non-religious conscientious claims be treated alike. A reading of the Establishment Clause that emasculates the Free Exercise Clause—and the core idea that religious liberty exists specifically to protect religion—is simply not faithful to the original, core conception of religious liberty under the First Amendment.

V. CONCLUSION

The view I have sketched here is in some ways radical. It represents a major departure, in its basic conception, from most accounts of constitutional religious freedom in America today. Further, it contemplates a fairly radical revision of current First Amendment doctrine. In another sense, however, the view I have sketched here is merely restorative. Its radicalism (if it really can be called that) lies in its return to original principles—a return to a lost, or at least neglected, account of the real reason

159. Paulsen, *Equal Protection Approach*, *supra* note 5, at 313–14; *see also* Paulsen, Lemon *is Dead*, *supra* note 5, at 800–08.

160. *See supra* note 158.

161. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). For a lighthearted take on the issue of government "endorsement" of religion through speech or symbols, see Michael Stokes Paulsen, *Is St. Paul Unconstitutional?*, 23 CONST. COMMENT. 1 (2006).

for religious liberty, as understood at the time of the formation of the Constitution. To the extent we have wandered far from those original principles and reasons; to the extent that our world today looks and feels very different from the more religiously serious world in which the Religion Clauses of the First Amendment were incubated and hatched; to the extent that our now long-familiar modern doctrinal constructs and paradigms ignore or slight those original reasons for, and original meanings of, freedom for religion; and to the extent returning to those original views would produce sometimes surprising conclusions and results, the constitutional view I have sketched here *will* appear radical. The challenge I offer is to return to this lost world, on the ground that it is the correct way of understanding religious liberty under the original meaning of the Constitution's Religion Clauses, and that such meaning must be regarded as controlling for us today for as long as we are governed by a written Constitution that contains those provisions.

In his insightful commentary on this paper in draft form, when I presented it at the "Conflicting Claims" conference sponsored by Pepperdine University School of Law in February 2012, Professor Eugene Volokh cut me to the quick—or so I felt, at first—with the seemingly devastating objection (or insult) that my proposed reinterpretation of the Religion Clauses, under which good faith claims of religious liberty very often but not always defeat application of society's laws to particular religious conduct, transformed the Free Exercise Clause into a "Super-*Lochner*" doctrine. My reading, Volokh charged, like the discredited *Lochner* doctrine of "substantive due process," would license courts to strike down the application of society's laws whenever they impair specified claims of "liberty." [162]

Professor Volokh's objection has some persuasive force—and considerable rhetorical power. It is essentially the objection that Justice Scalia made to a strong reading of the Free Exercise Clause at the conclusion

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162. The doctrine of "substantive due process," while intellectually discredited, keeps coming back—like a bad penny. Its first cataclysmic appearance to invalidate a major legislative act was in the Supreme Court's monstrous opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), though the doctrine is most closely associated with the case of *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court decisively repudiated the *Lochner* approach, which reigned for nearly forty years in the early-twentieth century, in a series of cases in the mid-twentieth century, only to return to the doctrine in a different form in the last third of the twentieth century. *See* PAULSEN ET AL., *supra* note 23, at 1515–47. For an excellent grand tour of the rise, fall, rise, fall, and rise of this generally discredited doctrine, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

Professor Volokh's "Super-*Lochner*" quip had special bite for me because I have been a consistent and sometimes vehement critic of the doctrine. *See, e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007–25 (2003); *see also* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 30, at 895–97.

of his majority opinion in *Employment Division v. Smith*,[163] and that may well have been the driving psychological intuition underlying the entire *Smith* opinion.

But I wonder. As I replied at the conference: What if there *really were* a "Substantive Due Process Clause" in the Constitution? What if the Constitution actually said something like this: "Government may make no law prohibiting economic freedom." As undesirable as Professor Volokh (and I) might think such a constitutional provision, if it were really there in the Constitution, it presumably would be the duty of judges and political officials (and law professors) to apply and follow it faithfully, irrespective of their views as to its desirability. The task of faithful constitutional interpretation would be to seek to discern and correctly apply the original public linguistic meaning of such an Economic Substantive Due Process Clause. And if the proper performance of that task produced something resembling a *Lochner* doctrine—even a "Super-*Lochner*" doctrine—so be it.

And so I chose, and still choose, to embrace Professor Volokh's insult-insight rather than deny it: The Free Exercise Clause *is*, within the sphere of its objects, a Super-*Lochner* doctrine. If the account I have given here is correct, the Free Exercise Clause in fact says something akin to my hypothetical Economic Substantive Due Process clause. It does not say that government may "make no law prohibiting economic freedom," but it does say that government shall "make no law . . . prohibiting the free exercise" of *religion*. Interpreting and applying such a provision may be very much like interpreting my imagined Economic Substantive Due Process Clause. Accordingly, taken seriously on its own terms, the Free Exercise Clause may well entail a "Super-*Lochner*" doctrine of a sort. It is a Super-*Lochner* Clause limited to specific kinds of claims of individual liberty. The objects the right embraces, and the limitations on its scope, are ones specific to that text. It does not operate to invalidate a law in its entirety, but merely to prevent its application to specific individual or group religious conduct. But it does trump, more than occasionally, the usual powers of government. It is like *Lochner* in that respect, to be sure.

But it is unlike *Lochner* in that, unlike the hypothetical Economic Substantive Due Process Clause, there really is a Free Exercise Clause of the First Amendment. That clause, understood in historical-social and linguistic context, takes as its starting point the premise that individual claims to freely

163. *See* Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) ("It is . . . horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

exercise the requirements or duties of their religious faith really should and do, in principle, have priority over the competing commands of the state. The Free Exercise Clause is thus best read to bar application of laws that operate so as to prohibit the free exercise of religion. It generally excludes—exempts—good-faith (pun intended) religious conduct from the ambit of secular government's authority, subject to defeasance only in the most clear and extreme circumstances in which the claimed right can be said not to have a good-faith basis in anything that can be plausibly attributed to the commands of God. The First Amendment Religion Clauses, in short, are a constitutional trump on what would otherwise be regarded as the proper authority of the state, flowing from a natural law understanding of the priority of God's true claims on human conduct over any competing obligation imposed by Man.