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DIVERSE PERSPECTIVES AND THE RELIGION CLAUSES: AN EXAMINATION OF JUSTIFICATIONS AND QUALIFYING BELIEFS

*Kent Greenawalt**

I. INTRODUCTION

Some of the most complex questions about constitutional provisions governing religion concern the status of various kinds of convictions. Put most simply, how do undoubted religious convictions compare with convictions that appear to have little to do with religion, with convictions that derive from negative answers to religious questions, and with convictions that seem to be on some borderline of what may count as religion? In this Essay, I focus on two kinds of questions about this range of convictions.[1]

Part I of the Essay explores justifications underlying the religion clauses of federal and state constitutions. It asks how explicitly religious justifications may stand when citizens and officials explain and justify principles of religious liberty. Part II of the Essay inquires whether certain kinds of beliefs that are not traditionally religious either count as religious for constitutional purposes or must be accorded treatment equal to that given religious beliefs. A principle of government nonsponsorship of religious positions figures prominently in both sections of the Essay.

People disagree sharply about sound justifications for the Free Exercise and Establishment Clauses of the United States Constitution

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1 My present interest in both topics was triggered by an illuminating set of papers delivered at a Symposium on Religion and the Constitution. *See Religion Symposium*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996). I concentrate my discussion on those papers.

and for similar provisions in state constitutions. Are the best justifications themselves religious? Do they, instead, depend on other perspectives about the meaning of life? Or do they rest on reasons that can be detached from competing visions about how people should live? Do public officials and citizens need to decide just which justifications are most powerful or may they support and interpret the religion clauses without resolving the comparative strength of justifications? Formulating this last question differently: Do practical consequences depend on a determination of which justifications are most sound? The answer depends largely on whether the justifications have what I call "differential carry-through" for interpretations and applications of the constitutional language. The initial part of this Essay looks at these related questions.

Part II of the Essay addresses the constitutional standing of forms of belief that are not religious in the ordinary sense, but have a connection to beliefs that are traditionally religious. One issue concerns the classification of atheism and agnosticism under the religion clauses. Do these count as religious because they answer religious questions, or for some other reason? If atheism and agnosticism are not religious for constitutional purposes, are atheists and agnostics without free exercise rights? Or, to take a question that could have practical significance if the day arrived when the dominant group in a locality was no longer religious, might government officials actually sponsor atheism or agnosticism?

A related issue involves claims of conscience that do not derive from ordinary religious convictions or answers to religious questions. Are such claims "religious" for religion clause purposes? If they are not, does it follow that the government may treat them differently from religious claims of conscience? Or does some doctrine of equality, drawn from the First Amendment or the Equal Protection Clause, require equal treatment?

In answering these questions about atheism, agnosticism, and nonreligious conscience, I resist broad expansion of what counts as religious, but claim that norms of equality often require similar treatment of religious and nonreligious claims.

II. JUSTIFICATIONS FOR THE RELIGION CLAUSES

My treatment of underlying justifications begins with an explanation of why competing justifications for legal norms often have different practical implications, that is, differential carry-through. I then briefly describe some claimed justifications for the religion clauses, and analyze what makes a justification of this sort sound. I suggest

that the requisites of soundness may be different for private citizens and for officials acting in a public capacity. I explore a possible paradox—that public officials might not be able to rely on what are intrinsically the most powerful justifications—and inquire whether this paradox has disturbing practical implications. I conclude that it does not, because of the overriding principle that government should not sponsor religion.

I make six major claims. First, given our country's history and dominant present beliefs, religious justifications for the religious clauses cannot be dismissed as unconvincing, inappropriate, or intrinsically less important than other justifications. Second, so long as many citizens are religious believers, most beliefs about religious justifications can be transposed into nonreligious justifications. Thus, no one can reasonably conclude that some widely accepted religious justification is very strong and that every nonreligious justification is very weak. Third, because many competing justifications of the religion clauses yield a principle that governments should not sponsor religion, these justifications have little "differential carry-through" for how the clauses should be applied. Fourth, the principle of nonsponsorship bars religious justifications from being offered in official government communications. Fifth, because of nonsponsorship and its practical effects, the paradox of officials possibly being denied the strongest justifications for the religion clauses is not troubling. Sixth, and finally, judges and other officials need not resolve what is really the best set of justifications for having free exercise and nonestablishment provisions in constitutions.

A. Justifications and Applications: The Typical "Carry Through"

Beliefs about justifications often affect the application of legal norms, as a familiar illustration involving the Free Speech and Free Press Clauses shows.

If a person thinks that the fundamental ground for free expression is that speech and writing contribute to the search for truth, he may conclude that the Constitution protects categories of communication that have this effect, including informational commercial speech.[2] If, instead, someone thinks free speech is justified as the personal expression of individual sentiments, he may view commercial

2 Within any given category, it might be relevant what potential the particular publications have to contribute to significant truth; but part of the truth justification may be that no state official should decide whether particular publications are likely to promote truth.

speech as without protection.[3] The implications of the two basic justifications may be reversed for harsh invective in personal interactions. Because such "hate speech" expresses feelings powerfully but contributes little to society's search for understanding, it might fare better under a "personal expression" approach to free speech than a "contribution to truth" approach. In this manner, particular justifications carry through to how constitutional norms are interpreted and applied.

The basic point survives variations in the source and number of justifications. As to source: suppose a Supreme Court Justice relies on justifications as perceived by the founders, or justifications as now understood by most citizens, rather than on justifications she finds intrinsically most compelling. Nevertheless, the justifications with which she begins will affect her opinions about appropriate applications.[4]

The fundamental point about carry through also survives greater complexity about justifications. Suppose a Justice thinks free speech is supported by multiple valid justifications. She will then consider how far those justifications apply to various categories of expression,[5] assessing the comparative strength of various justifications. The underlying exercise of relating justifications to interpretation and application remains the same.

A crucial thesis of this Essay is that in this respect justifications for the religion clauses may be substantially atypical. Perhaps different and even opposed justifications may not carry through in the distinctive ways I have illustrated for free speech.

I now look at some of the common justifications for the religion clauses. We need to have these in mind to consider what makes justifications sound and how justifications carry through.

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3 *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

4 That is, the relation between justification and implementation is similar whether the inquiry about justification is broadly normative (what really are the best reasons?), historical (what did legislators or people *then* believe?), sociological (what do people now believe?), or some combination of these. I believe all these matters appropriately may count in interpretation. One can perhaps imagine a "specific practice" originalism that focuses only on practices that were once accepted and does not give any weight to perceived underlying justifications. If such a position is not incomprehensible, it is very foolish. In this Essay, I mainly discuss the connection between "best reasons" justifications and applications of norms, but I assume that the connection between historically and sociologically derived justifications of norms and the applications of those norms is similar.

5 I make this effort in KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989) and KENT GREENAWALT, FIGHTING WORDS (1995).

B. Some Basic Justifications for Religious Liberty

Members of a society have various reasons to constitutionalize principles of religious free exercise and nonestablishment. We may categorize these reasons as those that flow from religious perspectives, those that flow from overarching nonreligious views, and those that do not rest on any particular religious or other overarching view.

In my initial presentation, I assume that the reasons I discuss justify both the Free Exercise and Establishment Clauses of the Federal Constitution, and I use the term "religious liberty" loosely to cover the protections of both clauses.[6] The term "reasons" here includes any grounds for religious liberty, whether these are based on reasoning in some ordinary sense or on perceived divine inspiration. I comment briefly on claimed intrinsic problems with particular justifications and on the mutual compatibility or incompatibility of different justifications.

1. Justifications That Flow from Religious Belief

Many religious persons conceive religious understanding and devotion to be the crown of human existence. For those who believe that eternal salvation depends on acceptance in this life of religious truth, its overwhelming importance is obvious. But even those who doubt a correlation of such simplicity often think religion lies at the center of a well-lived life. As John Garvey has suggested,[7] a believer may think that valid religious faith must be voluntary, not coerced. With confidence in the strength of religious truth, and perhaps with faith that God's revelation is progressive, she will favor open discourse and free practice concerning religion. She will take obligations to God as overriding any conflicting duties to the state or fellow citizens. She will fear that the religious realm will be sullied by the control or heavy influence of secular government, and will worry that religious involvement in running governments will corrupt the spirit. Such a religious believer might value constitutional norms of free exercise and nonestablishment for determining relations between the state and religious institutions and ideas.

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6 In reality, some reasons for free religious exercise might be thought to permit an established state religion or religions.

7 This brief summary draws substantially from John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283–86 (1996). *See also* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996); Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35 (1998) (doubting that a religious justification for liberty will support privileges for mistaken views).

2. Justifications from Nonreligious Overarching Views

Someone might support religious liberty because she accepts some nonreligious overarching view of life.[8] Among such views are the ideas that human happiness or freedom of choice is the most important human value. Although some versions of these ideas can be compatible with religious views,[9] if someone genuinely believes that happiness or autonomy (in the sense of unconstrained choice) is *the* most valuable aspect of human existence, the highest good, his perspective opposes most religious conceptions.[10]

3. Justifications That Do Not Rest on Religious or Other Overarching Views

Some justifications for constitutional protection of religious liberty do not depend on religious premises or other overarching views about human good. They rest, instead, on considerations that almost everyone would regard as relevant. The most notable such justification, based on political analysis and history, is that destructive conflict,

8 One kind of nonreligious view is explicitly antireligious. Someone who regards religion as foolish superstition and believes that freedom is the best way for people to learn this crucial truth of human life might also support religious liberty, including a rule of nonestablishment.

9 A justification for religious liberty based on happiness or autonomy might be understood in a somewhat modest way. A proponent might say, "I am not talking about ultimate human good. I am concerned with the relations between a state and its citizens, and what the state should understand as the good of its citizens. The state should aim for happiness (or autonomy)." Such a view could plausibly arise out of religious beliefs themselves—that is, a full theory from a religious perspective might assign secular government this role. Even if secular political theory was the basis on which to conclude that the state should aim for happiness or autonomy, that view could be compatible in its practical implications with religious views that assigned the government no responsibility for religious truth.

10 Religious convictions typically make the quality of choices important—not just the freedom with which they are made. The belief that true freedom consists in living in accord with God's will is a fairly common religious one, but that freedom is not the freedom of choice I have in mind here. One could imagine a religious understanding that God wishes human beings to be as unconstrained as possible, and that such freedom is the proper object of human life; but that understanding would be unusual. If the proponent of autonomy happens to believe in what has come to be called "the unencumbered self," that view of individuality is also at odds with most religious beliefs.

Ordinary happiness on earth is not the ultimate good for most religions. Religious believers often think that true happiness lies in leading a life that is good or right from the best religious perspective. On this view, a final compatibility exists between true religion and true happiness; but this happiness is not achieved by being sought for its own sake.

suffering, and resentment occur when religious groups compete for political favor and the government sticks its fingers into society's religious life. Similarly, religious groups may best perform positive functions, such as building civic virtues and forestalling tyrannical government, when they are freed of government interference.[11]

Many justifications for religious liberty that are based on religious (or other overarching) views can be transformed or transposed into parallel justifications that do not rest on such views.[12] If a large number of people in society conceive of religion as highly important, if they take religious obligations as superior to secular duties, if they suppose that political influence will corrupt the purity of their religions, building political structures that are responsive to these sentiments may show respect for these religious believers and contribute to social stability. One can reach these conclusions without making a judgment about the intrinsic merit of the religious convictions themselves. Thus, some intrinsically religious justifications for free exercise and nonestablishment may be converted into justifications whose force does not depend on a religious view.

This is a significant claim, and I need to be clear about its limits. First, I am not asserting that government should accommodate every widely held sentiment. The right response to some poisonous sentiments (such as racial prejudice) is to combat them. However, against the backdrop of the history and constitutional law of the United States, one cannot reasonably claim that our government should treat common religious convictions as pernicious excrescences on acceptable thoughts and feelings.

Second, I do not claim either that every conceivable religious justification for religious liberty can be transformed into a nonreligious justification, or that a valid transformation will typically yield a nonreligious reason of precisely the same strength as the religious justification. Perhaps the most sound religious justification is not accepted by anyone in a society. That justification could not be transformed in the way I have indicated. Widely held perceived religious justifications may be transformed even if they are, in fact, unsound. Importantly, the force of a transposed religious justification will depend significantly on the number of citizens that accept the justification and on the intensity of their feelings. If only a few people share the religious

11 *See generally* Garvey, *supra* note 7, at 281–82; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316–24 (1996); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 485 (1996).

12 *See* Laycock, *supra* note 11, at 324–26; Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 359–60 (1996).

view, accommodating their understandings may be relatively unimportant. Even if a religious conviction about religious liberty is widely held, people's personal feelings about its realization may be weaker than the reason in its religious form. For example, someone may believe that God wants all people to have religious liberty, but he may not care very much whether people of other faiths actually enjoy such liberty. His religious reason to support general religious liberty may seem comparatively weak when it is transformed into a nonreligious reason.[13]

Finally, when a reason is transposed into nonreligious form, it will not necessarily have the same practical implications as either the underlying religious reason or other nonreligious reasons.[14] If a government accommodated religious sentiments as a form of respecting the people who hold them, it might take different measures from what it would do if it accepted the sentiments as true or focused on avoiding civil strife.

Nevertheless, even when all the qualifications are in, the fact that most citizens care deeply about religion remains of major significance, providing those responsible for the design of government with a nonreligious reason to respect these religious perspectives.

C. Soundness in Justifications

What makes justifications of constitutional provisions sound? May soundness vary for officials and citizens? Standards of soundness undoubtedly include normative persuasiveness and a capacity to explain the provision being justified. I contend that cultural resonance, accessibility, and assertibility are also sometimes criteria of sound justifications, and that these requisites drive a wedge between justifications that may be sound for private citizens and those on which officials may rely.

13 It may be, however, that a government that tries to accommodate the *desire* of all individual religious persons and groups for religious liberty for themselves will end up with an approach that is identical to that it would take if it respected *convictions* about the appropriateness of general religious liberty.

14 One might ask just how far the "transposed" reasons will fit into other nonreligious reasons and how far they will be distinctive. Very roughly, I treat "respect for convictions" as a new nonreligious reason; I treat the strife avoidance and social stability that might be achieved by accommodation as aspects of other nonreligious reasons.

1. Normative Soundness

A sound justification in moral and political discourse rests on an accurate factual appraisal and good judgment about normative and metaphysical questions. A justification based on autonomy is not sound if autonomy, in the sense of unconstrained choice, is neither the ultimate human good nor a very important good that government should recognize and promote. Concerning the civil peace justification for the religion clauses, a skeptic might respond, "In the United States, as we near the year 2000, outright religious violence is not a problem. Civil peace could survive establishments of religion and serious inroads on free exercise. Therefore, our constitutional order regarding religion cannot be justified as preventing violence." An advocate of the civil peace justification might counter that more subtle forms of civil strife continue, and that were legal protections of religious freedom to disappear, outright violence might follow. The present strength of a "civil peace" justification depends on whether civil strife is a modern danger.[15]

If one focuses on legal rather than political or moral justification, the criteria of normative soundness may shift. For legal purposes, perhaps the civil peace justification need not now be persuasive in reality; it may be sufficient that people once believed it, or now believe it. An "originalist" might say that judges should accept as sound justifications those that were accepted when a constitutional provision was adopted.[16] If we evaluated an originalist's claim about the civil peace justification for the religion clauses, we would ask whether her historical assertions are well-founded and whether her originalist idea about legal interpretation is itself normatively sound.[17]

A central thesis of this Essay is that the soundness of a justification of the religion clauses (and other constitutional provisions) depends significantly on someone's political role. Whether a much broader thesis along these lines is true depends on analysis of the nature of liberal democracies in modern social conditions.[18] My empha-

15 However, a conclusion that civil strife is not a serious modern danger would leave intact a more complex argument that prevention of strife was an important and valid objective in 1789 and 1866, and that continuity in constitutional government calls for us to continue to accept some rights whose justifications have weakened over time.

16 The emphasis might be on what the "adopters" intended or on how people more generally would have understood the provisions adopted.

17 Virtually everyone now agrees that no strategy of interpretation is self-evidently correct; any strategy must be defended in terms of the political values it reflects and realizes.

18 *See, e.g.*, KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995).

sis here is narrower, on implications of the religion clauses themselves.

2. Capacity to Justify a Provision

A justification of a constitutional norm must provide a basis for the norm. An otherwise sound justification fails to justify a legal norm if it explains little of what the norm provides. Suppose some argument on behalf of religious liberty justifies free exercise but does not justify a rule of nonestablishment. A principle of free exercise does not automatically yield a principle of nonestablishment, as is shown by the many countries with freedom of religious exercise that have some form of established religion.[19] A justification offered for both religious clauses fails partially if it does not cover the Establishment Clause. More generally, no justification can be the primary one for a constitutional norm if its coverage is radically underinclusive.

Is overinclusiveness similarly fatal? Does a justification fail if it covers much more than the norm it is claimed to justify? The relationship between autonomy and the religion clauses is revealing. As John Garvey points out, claims about autonomy, standing alone, hardly explain why religion should receive special treatment.[20] A principle of maximizing autonomy covers aspects of choice that lack constitutional protection. This overinclusiveness, however, does not necessarily undermine autonomy as a justification for the religion clauses.

Suppose that an emphasis on autonomy would lead to a wide range of constitutional liberties—including, for example, sexual freedom—but that the framers of the Bill of Rights singled out religion for protection. The Constitution, on this account, would be better if it protected more freedoms than it does, but the entire treatment of religion might be justified in terms of autonomy.[21] The fact that the freedoms of the religion clauses are too truncated according to a justificatory principle does not itself tell decisively against the principle. However, if the clauses draw lines that are wrongfully discriminatory according to the principle, that presents a graver problem. To illus-

19 International human rights documents that protect religious freedom do not bar establishments of religion. *See International Covenant on Civil and Political Rights*, art. 18, U.N. GAOR, 21st Sess., Supp. No. 16, at 71, U.N. Doc. A/6316 (1966) (entered into force March 23, 1976); *Univeral Declaration of Human Rights*, art. 18, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948).

20 *See* Garvey, *supra* note 7, at 278.

21 Of course, unevenness of coverage may be a reason to suppose that the religion clauses were not adopted by people who conceived autonomy just as the argument does; if they had precisely this idea of autonomy, would they not have extended liberty more fully?

trate, if the religion clauses unambiguously treat choices for religion more favorably than choices against religion, and if this differentiation is unjust according to the principle of autonomy, that principle cannot justify all of what the religion clauses do.[22]

Another telling response can be made to objections that autonomy does not justify the religion clauses because it is overinclusive. The response is that autonomy must be considered along with other reasons for the clauses.[23] This response has broad relevance, and it covers some failures of underinclusiveness as well as overinclusiveness. Justifications for legal norms are typically multiple, not single. A failure of complete coverage by any one justification need not undermine the justification's force. A legal norm could fit perfectly the force of the entire range of sound justifications, even though it fits no single justification perfectly.[24]

I have spoken so far as if a justification does or does not fit a constitutional provision. But that is much too simple. People disagree about the parameters of constitutional norms. A justification may explain one version of a provision but not other versions.[25] A justification may fit poorly the dominant understanding of a provision, but offer an attractive competing understanding, one that might help shift the way people conceive of the provision. Were the strongest justification for the free exercise of religion to warrant only a restricted ambit for the Establishment Clause,[26] people might begin to understand nonestablishment in this minimal way.[27] When competing justifications yield different understandings of a provision's con-

22 I am assuming that protecting religious liberty is not an unjust discrimination against those asserting sexual liberty.

23 *See* Laycock, *supra* note 11, at 323–24.

24 To quantify the point, suppose a legal norm covers from 35–65 in a spectrum of practices that runs from 1 to 100. Justification *A* covers 25–60; it is both underinclusive and overinclusive. Justification *B* covers 40–85; it is similarly underinclusive and overinclusive. Justification *C* covers 35–40 and 60–100 (but not 40–60); it is also underinclusive and overinclusive. If one asks what territory is covered by at least two of the three justifications, it is exactly 35–65. If the justifications complement each other and are of roughly equal power, legislators may sensibly provide coverage when, and only when, at least two of the justifications are in play.

25 My argument in this section closely resembles Ronald Dworkin's claims that the power of legal justifications depends on their fit with legal materials and their soundness and that assessment of convincing justifications affects conclusions about the content of norms. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

26 That might include only a bar on a formally established church and on extreme forms of government sponsorship of religion.

27 This would be one example of how justifications often carry through to interpretations.

tent, people's judgments about which justification is strongest will influence their convictions about the provision's coverage.

3. General Persuasiveness of Justifications: Cultural Resonance and Accessibility

Disagreements about justifications of constitutional norms may concern the general persuasiveness a justification of this sort should have. Should a justification follow dominant patterns of cultural understanding? Should it be framed in reasons that will have force for most people (or would have force if they considered the problem in a fair and detached manner)?

This is an immense topic.[28] Here I suggest merely that restraints of cultural resonance and accessibility of reasons sometimes apply to political and legal justifications. The applicability of these restraints depends on the role of the person who makes and defends a judgment. Most notably, officials and citizens stand in different positions. Justifications that citizens properly rely upon may not always be available for officials.

For many choices, the intrinsic soundness of a justification is all that matters. Frances, at the age of twenty, considers whether living as an ascetic hermit is the best life for her. She recognizes quickly that almost everyone she knows regards such a life as bizarre, and doubts that she can produce reasons that would persuade friends that a choice to be a hermit is sensible. Yet she believes, based on wide reading, meditation, and other personal experiences, that she has good reasons. She thinks she possesses a valid justification, although it will not convince others.[29]

With many other subjects, a sound justification requires some cultural resonance. We do not ordinarily speak of a person as having a "moral duty" unless the duty fits with presuppositions about moral behavior within the society.[30] Claims about political duties and responsibilities, including official duties, similarly rest on assumptions that people share within a society. Even when advocates make arguments about moral and political duty that reach beyond what most people

28 I discuss many aspects of the topic in GREENAWALT, *supra* note 18.

29 The idea of having "reasons" involves having bases that other people could recognize as having force; however, as I explain in PRIVATE CONSCIENCES AND PUBLIC REASONS, *id.*, at chs. 3–4, one may believe people will recognize that force only if they have some personal experience (such as a religious conversion) that they cannot be persuaded to have on the basis of ordinary reasons.

30 However, the phrase "moral duty" is sometimes used in respect to how people ideally should regard their responsibilities. Thus, a vegetarian might say, "We all have a moral duty not to eat meat."

presently assume, they typically build heavily on cultural assumptions. The arguments gain strength from relying on premises that are very widely shared.[31]

Some theorists have argued that claims of political justification should be broadly accessible within the society, or accessible to all people who are judging reasonably. Accessibility in either of these versions differs from cultural resonance.[32] We can see this by imagining that most members of a society embrace closely similar religions based heavily on faith. These believers grant that their religious convictions cannot be supported by reasons that would persuade actual persons now outside the community of the faithful, or even reasonable people who are not yet the subject of God's special grace. A justification cast in terms of these religious convictions might not be sufficiently accessible (in the sense that matters), even though it resonates with a majority of the population. By contrast, a person might believe that a particular argument that lacks cultural resonance should persuade all reasonable people who evaluate it fairly. Thus, some defenders of "animal rights" think their arguments are rationally compelling, though so far only a minute proportion of the population has accepted them.[33]

Lawyers engaged in legal discourse usually expect claims about justifications for legal norms both to have cultural resonance and to be accessible. They are cast in a form that holds out persuasive power for any reasonable judge. Political arguments about what laws should be enacted usually have cultural resonance, or they assert grounds that should have force for everyone, or both.

Standards of cultural resonance and accessibility involve more than effective advocacy. Having justifications that satisfy one or both of those standards may often be a condition of what people can fairly demand of each other and of morally legitimate coercion.[34] As I have

31 When I say "they gain strength," I mean they really are stronger, not just that they have more appeal.

32 Not everyone agrees about this. Some people, including many postmodernists, believe that all starting points for argument are nonrational assumptions; either no perspectives are especially reasonable, or ideas of what is reasonable do no more than reflect cultural assumptions.

33 An argument cannot be accessible to actual reasonable people unless it has components whose force has some cultural resonance. Thus, a defender of animal rights will rely on strands of analysis that do have cultural resonance. The components of an argument may have cultural resonance even if the argument as a whole does not. The distinction between cultural resonance and accessibility is, thus, more complex than the text suggests.

34 A practical consequence of the claim that more than effective advocacy is involved is this: If enough individuals to make up a majority happen to have a variety of

already intimated, the standards for appropriate justifications are stricter when a judge makes a legal decision than when legislators determine what laws to adopt, and the standards for legislators are stricter than those for private citizens making personal choices.

4. Assertibility

A justification should usually be publicly assertible by the people who rely upon it. Particularly in law and politics, those who act should not conceal valid justifications. Although closely related to cultural resonance and accessibility, assertibility differs from each. In private decisions, such as the choice to become an ascetic, people properly assert, as well as rely upon, justifications that they realize have neither cultural resonance nor force for most reasonable listeners. In other circumstances, people should not assert a potential justification even though it has cultural resonance and reasonable force. The rule against viewpoint discrimination in free speech law provides an illustration. Neither executive officials nor judges can justify treating one publication more favorably than another because it represents a better point of view, even if the judgment about comparative merit would persuade all reasonable persons and is supported by cultural assumptions. The undesirability of officials asserting the potential justification is part of the reason why officials should not rely on distinctions in merit. As I shall explain, a similar conclusion about religious differences lies at the heart of this part of the Essay.

D. Religious Justifications of Constitutional Norms—Are They Appropriate?

This Section asks whether religious reasons are inherently faulty as justifications for constitutional norms of a liberal democracy. Can one dismiss such justifications as unsound without sustained argument that the religious reasons are unpersuasive?

Liberal democratic societies are pluralist with respect to religion. No religious premises are universally accepted. This reality may entail some restrictions on people's use of religious justifications. But it does not follow that people should never rely on such justifications for political institutions and constitutional norms.

We can see that religious justifications may enjoy a place if we imagine diverse but deeply religious people creating a new govern-

idiosyncratic reasons for adopting a law, none of them having either cultural resonance or general rational force, then it would be wrong for the majority to coerce the entire population.

ment. All of them agree that valid religious faith is voluntary and that religious understanding should influence every aspect of life, including the kind of government under which they should live. Realizing the religious pluralism of their political community, our social contractors agree that a liberal democracy is best. The members of each religious group endorse liberal democracy as preferable to other forms of government from their own religious point of view—preferable even to government run by members of their own religion. Perceiving that religious reasons provide their most powerful justifications, these people create a liberal democracy.[35]

At a subsequent period of social turmoil, citizens wonder whether liberal democracy should continue. A candidate for the presidency promises to introduce a different form of government if he is elected. Deeply religious citizens again take religious reasons as their strongest ones for maintaining liberal democracy. In sum, when people decide what government to have or keep, they do nothing improper in relying upon and stating religious justifications for liberal democracy.

The serious issues about religious justifications, apart from their intrinsic soundness, concern the levels at which they operate and the persons who employ them. I introduce the issue of "levels" here, saving analysis of their role for a later section.

Within a pluralist society, people need not agree on the most fundamental reasons why liberal democracy is justified. For purposes of justifying liberal democracy itself, citizens can rely on religious justifications that others do not share. But what of more specific subjects, such as the content of constitutional norms? Should people then seek generally accessible justifications, ones all reasonable persons can endorse? John Rawls proposes such an approach.[36] He suggests that support for the most basic political premises may be achieved by an overlapping consensus, grounded partly on diverse religious and other overarching views; but he also argues for a common, public reason about constitutional norms and basic issues of justice. People would have diverse views embracing a political order that is "a system of fair social cooperation between free and equal persons."[37] Within that order, constitutional issues should be resolved according to common reasons. To oversimplify somewhat, many citizens will find in their own religious perspectives the most fundamental justifications

35 I provide a more elaborate example along these lines in GREENAWALT, *supra* note 18, at 12–22.

36 *See* JOHN RAWLS, POLITICAL LIBERALISM (1993).

37 John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229 (1985).

for liberal democracy, but they should draw the main justifications for particular constitutional norms from premises shared by those who support liberal democracy for other reasons.

When one considers the levels of justification for liberal democracies, religious premises are one variety of overarching views. None of these views enjoy near unanimous support. If an autonomy justification (formulated as an overarching view) is rejected by many religious believers, relying on it is not more or less fair than believers relying on their religious views. On the other hand, a civil peace justification occupies a different position. Because nearly everyone wants to avoid violence, a justification that the political order will reduce violence is one that all can accept.[38]

Can we expect fundamental underlying justifications that are not generally accepted to "bow out," once they coalesce on some abstract principle of liberal democracy of the sort that Rawls has in mind? I have argued elsewhere that that is not a reasonable expectation,[39] because one's overarching views influence how one perceives the content of some constitutional norms and issues of justice. In the next Section, I focus on this problem in the context of the religion clauses.

E. The Paradox About Religious Justifications for the Religion Clauses, and Its Implications

1. Religious Justifications and the Religion Clauses

Is it reasonable to suppose that religious and other overarching views should not bear directly on what citizens see as the justifications for the content of the religion clauses? If such justifications should figure *only* in people's arriving at some more fundamental, shared principles,[40] religious justifications would not be the primary justifications for a citizen's acceptance of the religion clauses.

This two-level approach is not tenable. We can see its artificiality if we focus on the historical and analytical relationship between religious pluralism and fundamental liberal democratic notions of justice. Our sense of what it is to treat people as free and deserving of equal

38 However, when one gets into the comparative value of avoiding violence and achieving other values, controversial overarching views may come into play.

39 *See* GREENAWALT, *supra* note 18, at 106–20; *see also* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 144–72 (1988).

40 This is roughly the import of an "original position" analysis combined with the justifications that would lead people to accept the implications of that analysis as reflective of justice. *See* RAWLS, *supra* note 36; JOHN RAWLS, A THEORY OF JUSTICE (1972). I should mention that Rawls does allow overarching views to give subsidiary support to positions arrived at without direct reliance on them.

respect is largely informed by our ideas of how members of diverse religious views should regard each other. Notions of religious freedom and equality are often used by analogy to determine how liberal democracies should resolve other problems. A person can hardly think about what liberal democracy entails, about what treating people as political equals involves, without having a definite sense about many aspects of religious liberty. In short, we are hard pressed to conceive of religious perspectives influencing people's basic notions of political justice without these perspectives bearing directly on people's notions about the treatment of religious diversity.

A related reason supports the conclusion that we should not expect people to restrict the operation of religious justifications to some meta-level that stands above all specific constitutional norms. People committed to a religious perspective will be disinclined to leave the state's treatment of religion to be decided on grounds removed from their religious perspective. We can imagine people agreeing to various political dispositions that fit uncomfortably with their specific religious views, on the basis that achieving a consensus in a diverse society warrants reliance on shared nonreligious grounds.[41] But people will not agree to a treatment of religious affairs that is out of line with their fundamental religious perspectives.[42] They will, understandably, consider questions of religious liberty in light of their religious perspectives.[43]

In summary, when individuals are asked whether and why the religion clauses are justified, we should expect citizens for whom religion has overriding importance to ask whether the norms established by those clauses fit with their religious perspectives. Further, if they regard their deeply felt religious justifications as strongly supporting the constitutional treatment of religion, they will not regard other justifications as more important. In light of these conclusions, we need to consider the soundness of religious justifications in comparison with other justifications for the religious clauses.

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41 I am assuming, of course, that their religious perspectives lead them to accept such an approach.

42 A group that is a small minority but believes a theocracy of its own religious leaders is the best form of government, whenever it can be achieved, may well agree to political principles of liberal democracy as the best for it in present conditions. But this "agreement" may constitute a prudential judgment from its own religious perspective, rather than genuine agreement about fundamental political principles.

43 One possibility I do not discuss is that religious ideas would be brought directly to bear on some aspects of religious liberty, while other aspects, say the issue of establishment, would be decided according to shared principles.

If we ask what *really* are the most powerful reasons for having religious liberty, we cannot expect agreement. A devoutly religious person who takes her religious commitments as overriding will not suppose that other justifications, however forceful, are more significant than her religious reasons. She can, with John Garvey,[44] evaluate the strength of other justifications; but even if she thinks they hold up, she will not find them to be more compelling than her religious justifications. A person who rejects religious premises will not believe religious justifications are intrinsically sound, because she will regard their basic premises as irremediably flawed by mistaken belief. Similarly, a person who accepts one set of religious premises will not think radically competing religious premises are sound.[45] For many conclusions drawn from religious premises, ultimate soundness will depend on the truth of the religious premises.[46] People of sharply divergent views about religion will not agree about those premises.

Most religious justifications for free exercise and nonestablishment are not accessible to all citizens, because the religious premises are not accessible in the way that counts. However, many of these justifications have cultural resonance, dating back to a time long before the Constitution was adopted. Evangelical Protestants were highly instrumental in the movement toward greater religious freedom and disestablishment, and John Locke's influential argument for religious tolerance was itself rooted firmly in a perspective about religious truth. A large proportion of the American people remains seriously religious, and their religious perspectives bear appropriately on their views about relations between government and religion.

2. Limits on Official Justifications

I turn now to the question of *who* employs a justification for the religion clauses. A special problem exists regarding official justifications for the clauses. Most modern justifications, including religious justifications, conceive of a religious liberty that is fuller than freedom from coercion of religious practice and the absence of a formally established church. The justifications suggest that government should

44 *See* Garvey, *supra* note 7, at 278–82.

45 We should definitely not suppose that all religious justifications will look essentially similar, given the tremendous diversity of religious understanding. Of course, a modern Baptist conception may not look too different from a modern Presbyterian conception.

46 People who do not accept premises advanced by others may also argue that, even if the premises are granted, they do not yield conclusions that are claimed.

not promote and sponsor particular religious ideas.[47] For a devout believer, say a Baptist, this conclusion follows from the nature of religious truth and human understanding of that truth. Nonsponsorship by government is a desirable principle for every society. Thus, the Baptist religious perspective itself yields the conclusion that the government should not promote a Baptist conception, or any other. An individual Baptist may accept free exercise and nonestablishment mainly because she accepts the Baptist conception; but a central principle of the religion clauses is that the government should not sponsor the Baptist conception. This creates a paradox about justification.

The principle of nonsponsorship affects what official government organs can say about justifications. If Supreme Court Justices in an opinion explicitly rely on the Baptist conception for the religion clauses, as they might rely on the truth discovery justification for free speech, they are endorsing and promoting the Baptist religious view, exactly what the religion clauses forbid.[48] Official organs must rely on justifications that do not take a stand on religious issues, such as the civil peace justification, avoid the question of justification altogether, or say something vague, such as, "The religious clauses are justified because most citizens believe they are justified, for diverse reasons." Government may not assert a direct religious justification.

This exclusion of official religious justifications reaches other constitutional norms. A court can no more invoke "the Baptist conception" to justify a ban on cruel and unusual punishment than to justify the religious clauses. Official justifications in religious terms are out.

Just what counts as official justifications is itself a complicated question. Government officers sometimes speak as officials but not in a formal way. These occasions range from addresses at public school graduations to individual explanations before legislative assemblies about positions on proposed constitutional amendments. Precisely what justifications various officials (and politically active citizens)[49] should employ in various contexts is debatable.[50] The critical point here is that in many formats, including statutes, administrative regula-

47 I assume that official government organs may not sponsor explicitly atheist views. Part II of this Essay addresses that and related topics.

48 *Some* religious justifications, especially those that take a narrow view of impermissible establishments, may accept government sponsorship of some religious ideas.

49 Some private persons, such as presidents of major corporations and universities, have great visibility and may address a broad public about subjects such as whether the religion clauses should be amended to allow public school prayer.

50 *See* GREENAWALT, *supra* note 18.

tions, and judicial opinions, government officials may not assert direct religious justifications.

The bar on the government's relying on religious justifications creates a paradox, or a potential paradox. If the most powerful justifications for the religion clauses happen to be religious, and the clauses are best understood to preclude official organs from using religious justifications, officials may not have available the strongest justifications for these (and perhaps other) constitutional norms.

This paradox arising from official nonassertibility generates two possible practical problems. The more extreme problem would exist if no nonreligious justification were very persuasive.[51] A kind of vicious circle could exist. Officials would have to rely publicly on nonreligious justifications, but none of these would give powerful support to the norms of the religion clauses. Abandoning the clauses, or sharply curtailing their scope, would be a mistake because the clauses are backed by intrinsically sound religious justifications that a majority of the citizenry, and most officials in their private capacities, accept. Should the officials silently rely on these religious justifications while announcing nonreligious justifications they recognize as inadequate? Or should they disregard the intrinsically sound justifications they cannot use publicly? This would be a troubling dilemma.

The second practical problem would be more subtle. Let us assume that nonreligious justifications can adequately explain the basic features of the religion clauses. People would not need to turn to religious justifications to understand why having the religion clauses is a good thing in a pluralist society. However, as to certain subjects, different justifications would yield different interpretations and applications of the two clauses. If the religious justifications are really strongest and they yield somewhat different interpretations and applications than do the nonreligious justifications, should public officials who recognize the power of the religious justifications silently rely on them and interpret accordingly, or should they rely on the justifications they can openly state, and interpret according to them? Again, public officials would face a dilemma.

51 *See* Garvey, *supra* note 7, at 278–82.

3. The Paradox Arising From Official Nonassertibility Does Not Raise Serious Practical Problems

a. The Plurality of Sound Justifications If Typical Religious Justifications Are Sound

Our first dilemma would arise if the only justifications strongly supporting the religion clauses were religious, leaving government organs without sound justifications they could actually assert. This dilemma does not exist in our society now, because widely shared religious justifications are not uniquely sound.[52] The reason is the phenomenon of transposition or transformation I have already mentioned.

Let us suppose that a set of religious reasons—including the intrinsic validity of some religious beliefs and practices, the desirability of freedom with respect to the search for religious truth, and the primacy of religious obligations over secular obligations—provides a justification for free exercise and nonestablishment that is not only sound, but more powerful than any other justification. In a society that has many citizens who accept this set of reasons and the religious perspectives that underlie them, their holding of these convictions, by itself, affords a basis for the religion clauses. The religious justifications are converted, through the desirability of respecting widespread attitudes toward religious liberty, into justifications that have force for people who themselves reject (or are agnostic about) the underlying religious premises. The worry that *only* directly religious justifications will explain the religion clauses is misplaced in this society at this time. Reference to typical attitudes of citizens toward religion gives officials some strong nonreligious justifications, whatever may be the strength of still other nonreligious justifications (such as the civil peace argument).

The less extreme worry that religious justifications might have a different carry-through from other justifications may appear more troubling. However, this worry is met if different justifications coalesce behind a common principle that itself can be employed to reach decisions.

In fact, very different underlying justifications for the religion clauses support the principle of nonsponsorship. If an issue arises over sponsorship in one form or another, officials can employ the principle of nonsponsorship to resolve the issue. They do not need to

52 Nothing I say rebuts the logical possibility that there is some religious justification now unperceived or perceived only by a few people that is really much stronger than any other justification. What I say in the text would not cover that justification.

decide which particular justification for nonsponsorship is strongest if they are fairly sure that the range of justifications that support nonsponsorship is stronger than justifications that support some very different approaches to religious liberty.[53] Any of the justifications for nonsponsorship carries through in the sense that it supports a principle of nonsponsorship, which then yields more discrete doctrines and applications. But each justification merges with competitors that also support a similar version of nonsponsorship, failing to produce distinctive doctrines and results.[54]

Religion clause interpretation, of course, is not limited to issues of sponsorship. One crucial problem is whether exemptions from otherwise valid laws should be afforded to religious claimants. Perhaps for that problem, the comparative strength of religious and other justifications of the religion clauses might matter; and the power of various justifications could affect just who is to receive an exemption if some religious exemptions are called for.[55] Different justifications might have distinctive carry-through on this set of issues, if not about sponsorship. Thus, a justification that rests on the real value of religion might conceivably support granting exemptions, and also support limiting exemptions to religious believers, rather than extending them to other claimants of conscience.[56] Other justifications might suggest different results.

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53 *See* Laycock, *supra* note 11, at 315–16.

54 I am assuming here that the particular version of nonsponsorship does not vary with the underlying justification.

55 On this subject, see *supra* Part III.

56 In the summer of 1997, I attended a conference discussing John Locke's defense of tolerance and the competing views of some of his contemporaries. A participant pointed out that different theories about why governments should tolerate diverse religious beliefs could lead to different consequences for the extent of religious exercise. He suggested that: (1) if one thought only that religious truth was none of the government's business, one might accept government interference with religious conscience whenever secular interests are involved; (2) if one thought only that the government should not coerce individuals about religious belief, one also would accept a rather limited protection of religious exercise; (3) if one thought government was incompetent in religious matters, one might support a somewhat wider scope for religious liberty; (4) if one thought religious conscience was inviolable and very important to individuals, one might want robust protection of religious conscience, including government accommodation to religious liberty even when moderate secular interests are involved.

I thought these comments were instructive about how various theories underlying religious liberty could carry through to different visions of the scope of religious liberty, with variant implications for religious exemptions from secular laws. However, the differences in theory on which the participant focused are not the ones on which I have concentrated in this Essay. I have assumed that any complete theory

We should notice, however, that the principle of nonsponsorship affects the problem of exemptions in two important ways. Even for religion clause issues that are not directly about sponsorship, courts cannot offer explicitly religious arguments. Thus, the nonassertibility by officials of religious justifications requires that they not be "carried through" as the publicly stated reasons for a court's position about exemptions.[57] If courts should not rely openly on a religious justification for the clauses to support exemptions limited to believers, they should not rely covertly. Although they can take account of how religion figures in people's lives, they should try to settle issues about exemptions without relying on the truth or falsity, value or disvalue, of religion.

The second effect of nonsponsorship would be to bar a classification for exemptions that would involve implicit endorsement. Such an endorsement might be claimed to be involved if religious believers are favored. Thus, the principle of nonsponsorship could itself constitute a reason not to favor religious claimants over all others.[58]

F. Conclusions About Justifications

I have argued that for most purposes we need not resolve which religion clause justifications are really the strongest, and we should not expect, or even seek, agreement about that. Justifications that are diametrically opposed in basic premises may prove to be complementary in their practical implications. I have definitely not shown that

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(religious or not) about religious liberty needs to include the importance people attach to religious liberty. That should be sufficient to yield a strong argument for robust protection, including exemptions from some valid laws, whether or not one believes that religious conscience is really inviolable in some special sense. Thus, I do not believe the conference observations, broadly accurate as they were, undermine the main thrust of my discussion, although they do show that one needs to be cautious about concluding that different theories will have similar carry through.

57 A court might, however, say that wide acceptance of a religious justification by citizens affects how the issue should be viewed.

58 There are various responses to this gambit: namely that (1) since exemption compensates for state-imposed disadvantage, it does not approve religion; (2) it is enough for exemption that people care deeply about religion—exemption implies no state approval; (3) if some sacrifice is made in the principle of nonsponsorship, that may be justified to warrant other religious clause objectives. Notice that this third possibility raises a critical issue about the status of nonsponsorship: is it the overarching principle of the religion clauses or one among other values to be achieved? Briefly, the main answer to each of these responses is that the government does not sacrifice religious clause values if exemptions are extended to similarly situated nonreligious claimants. A failure of extension thereby constitutes a kind of implicit approval of religion, if there are significant numbers of similarly situated nonreligious claimants.

the issue of the comparative soundness of various justifications will never have practical importance because of differential carry-through. Therefore, I have not shown that officials will never face the dilemma of whether they should silently rely on nonassertible justifications. However, I have shown that many religious justifications for religious liberty will coalesce with other justifications to support a principle of nonsponsorship for the religion clauses. I have shown that this fundamental principle drastically reduces any differential carry-through of the various justifications for the religion clauses that support nonsponsorship.

III. Atheism, Agnosticism, and Secular Conscience Under the Religion Clauses

This second part of my Essay turns from various justifications for the religion clauses to a more detailed treatment of different claims under those clauses. How to treat claims of conscience that do not arise from ordinary religious conviction has been a perplexing topic since the Vietnam War. The issue was then sharply posed when a young man, who sought exemption from the military draft as a conscientious objector, said he was nonreligious. In *Welsh v. United States*,[59] four Justices declared that the statutory language, granting the exemption to those whose objection to fighting was based on "religious training and belief," included claimants like Welsh. Four other Justices took Congress's words referring to religion in their natural and intended sense. Three of these Justices said that Congress could exempt religious pacifists and decline to exempt Welsh;[60] Justice Harlan concluded that drawing a line between religious and nonreligious conscientious objectors was unconstitutional.[61] With the draft's end, issues about conscientious objection to military service have receded in significance. But since military personnel committed to a tour of duty may be relieved if they have become conscientious objectors,[62] the issues have not disappeared. Issues about nonreligious conscience can also arise in other contexts.

A second problem I address in this part of the Essay is the classification of atheism and agnosticism. Are these religious? If they do not count as religious for constitutional purposes, do we face disturbing implications for the free exercise rights of atheists and agnostics and

59 398 U.S. 333 (1970).

60 *Id.* at 367–74 (White, J., dissenting).

61 *Id.* at 344–67 (Harlan, J., dissenting)

62 *See* 32 C.F.R. § 75.4 (1997).

for the permissibility of the government promoting atheism or agnosticism?

My discussion first examines how negative answers to religious questions should be classified and then turns to claims of conscience that do not rest on answers to religious questions. I take a constrained view of what counts as religious, but argue that constitutional norms of equality should often require similar treatment of religious and nonreligious assertions.

I offer these specific claims: "Religion" under the religion clauses does not cover all assertions about religious truth. However, the "free exercise of religion" includes some freedoms for people who are not religious. Further, about many subjects, the two religion clauses together, reinforced by the Equal Protection Clause, call for equal treatment of all assertions of religious truth and falsity. Thus, government speech supporting negative assertions about religion is more restricted than government speech about nonreligious subjects. In the rare instances when claims of conscience are genuinely based on negative answers to religious questions, these claims should be treated like similar claims based on religious conviction. Finally, about some subjects, the religion clauses should be understood to require equal treatment between those with religious claims of conscience and those whose claims do not rest on answers to religious questions.

This part of my Essay largely responds to a recent article by Douglas Laycock that offers decisive answers to these problems of constitutional classification.[63] Although Laycock's "bottom line" on most questions of equal treatment is appealing, he oversimplifies the conceptual possibilities. By mistakenly treating as religious both atheism and agnosticism as well as claims of conscience not based on religion in the ordinary sense,[64] he fails to leave open interpretive distinctions that courts should be able to make. One of my objectives is to highlight alternatives that may become submerged if one is not careful.

The practical significance of my treatment of these questions depends in part on the entire panoply of religious clause doctrines that

63 *See* Laycock, *supra* note 11.

64 By referring to religion in the ordinary sense, I do not mean to imply that determining the borders of religion is easy, but I do not tackle that problem here. *See* Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, *in* LAW AND RELIGION: THE OBLIGATION OF CITIZENSHIP AND THE DEMANDS OF FAITH (Nancy Rosenblum ed., forthcoming 1999); Kent Greenawalt, *Religion as a Constitutional Concept*, 72 CAL. L. REV. 753 (1984) [hereinafter Greenawalt, *Constitutional Concept*].

courts employ. In particular, the rule of *Employment Division v. Smith*[65] that religious claimants usually have no special constitutional claim to be exempt from the application of neutral laws of general application reduces the occasions when it will matter crucially whether someone's reasons for acting are religious. Nevertheless, the Court has left standing two pockets of free exercise exemptions, and it is permissive about legislative exemptions cast in terms of religious belief and practice. Moreover, state courts remain free to give free exercise provisions in state constitutions a broader scope than the crabbed approach that now dominates Supreme Court jurisprudence.[66] I do not outline just when the questions of classification I discuss will be critical, but I here use examples that are presently relevant under the Supreme Court's approach to the federal religion clauses.

A. Atheism, Agnosticism, and the Religion Clauses

1. Distinguishing Atheist and Agnostic Beliefs and Reasons for Action from Most Nonreligious Reasons for Action

Atheism and agnosticism are negative answers to religious questions. In standard usage, atheism is disbelief in the existence of God. Agnosticism is strong doubt about the existence of God. An atheist or agnostic may belong to a religious group that does not assert the existence of God[67] or may even participate actively in some theist religion. (Numbers of atheists and agnostics occupy pews of traditional Christian churches and Jewish synagogues.) When I talk, without qualification, about atheists, I mean people who do not believe in God or gods *and* who reject all common forms of religion. When I talk, without qualification, about agnostics, I mean people who are skeptical about all claims of religious truth and about the value of religious exercise and who do not participate in any common form of religion.[68]

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65 494 U.S. 872 (1990). In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court held invalid, at least in state and local applications, a federal statute designed to undo the rule of *Smith*, 494 U.S. at 872.

66 My own objections to *Employment Division v. Smith*, 494 U.S. at 872, are summarized in Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 11–18 (1998).

67 *See* David Tracy, *Kenesis, Sunyata, and Trinity: A Dialogue with Maseo Abe*, *in* THE EMPTYING GOD: A BUDDHIST-JEWISH-CHRISTIAN CONVERSATION 135 (John B. Cobb, Jr. & Christopher Ives eds., 1990).

68 Douglas Laycock describes himself as "agnostic about matters of religion" and says, "None of the claims of the world's religions seem to me either plausible or falsifiable." *Laycock, supra* note 11, at 353. I do not doubt that Professor Laycock is an agnostic; but someone is also an agnostic who says: "Some religious claims are moder-

Nonreligious reasons for action are reasons that are not significantly connected to religious beliefs and practices. Most such reasons do not flow from answers to religious questions, whether these answers are positive or negative.[69] To take a trivial example, few people in modern society would say that their choice of a house, restaurant, or spouse is determined by their religion. Of course, a person's religion may restrict alternatives or influence choice without becoming the main determinant of his actions. Orthodox Jews may limit themselves to kosher restaurants, but their religion may not help them choose among kosher restaurants.[70] Religious influence is often less clear cut than setting limits. People may prefer to marry someone with religious views similar to theirs; but their religion does not help them decide *which* persons with like views to marry, and they may choose spouses with dissimilar views if other attractions are powerful. A woman's religious perspective may affect the personal qualities she has sought in a husband and bear on the time she spends with family, although she considers neither choice to be religious. The connections between religious involvement and choices in life are varied and subtle. When I say that reasons for action are not religious, I mean that the connection of religion to choice does not exist at all or that the person making the choice perceives the connection as weak.[71]

2. Negative Answers to Religious Questions—The Extreme Alternatives

How should "negative answers" be regarded under the religion clauses? A dichotomy that makes everything turn on whether negative answers are "religious" has some initial appeal. I present this dichotomy and some arguments in its favor before rejecting it.

Douglas Laycock suggests that "[t]he only way to avoid [preferring "one set of answers to religious questions over other answers to the same questions"] is to recognize that for constitutional purposes,

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ately plausible but not persuasive; some crucial religious claims are falsifiable but our evidence for and against them is radically inconclusive."

69 If atheism and agnosticism do not count as religions, then motivations that flow from atheism or agnosticism will be nonreligious, but they will differ from most nonreligious reasons in deriving from answers to religious questions.

70 The choice to marry would be similar if someone would not consider anyone outside the faith.

71 It is arguable whether the chooser's perception or a more objective appraisal should control. For many purposes, the latter might be more important; but the law should rarely go beyond a person's sincere understanding of his own motivation as religious or not. In any event, my central point here is that most people have a great many nonreligious reasons for action.

any answer to religious questions is religion."[72] Suppose that atheism and agnosticism are not religious. It follows, the argument goes, that the exercise of atheism is not protected as the free exercise of religion. It also follows that if religious believers have constitutional rights, or statutory rights framed in terms of religious exercise, to exemption from ordinary legal requirements, atheists have no such rights for behavior that flows from their atheism.[73] Further, a comparison of religion clause law with free speech law reveals a startling conclusion about government communication.[74] The religion clauses bar the government from sponsoring religious views and from preferring one set of religious views to another. The rules are different for other domains of human understanding. In many forums, government officials can present some ethical, political, and historical ideas as valid and can reject competing views. In public schools and elsewhere, government employees tell citizens that racial equality is good, that Nazism and Communism are bad.[75] If atheism and agnosticism are not religions, then they fall into the category of nonreligious views the government can promote. On the other hand, if atheism and agnosticism are religions, they are subject to the same rules as other religious views and sources of motivation. They have equal status as the basis for exemptions, and they cannot be taught by the government.

If interpretive options were limited to the stark alternatives Laycock presents, the choice would be difficult. In a country in which religious believers have always predominated heavily over nonbelievers, the idea that public schools can teach atheism but not theism seems bizarre. The idea that atheists and agnostics have no rights of religious exercise is disturbing. On the other hand, the claim that atheism and agnosticism are religions fits uncomfortably with an ap-

72 Laycock, *supra* note 11, at 329.

73 *See id.* at 330–31. It is logically possible for Congress to adopt, and for the courts to acknowledge its adopting, a narrower or broader concept of religion than is attributed to the constitutional clauses. I assume here that the sense of religion in most relevant legislation is the same as under the religion clauses.

74 *See id.* at 330.

75 Some scholars argue that the government should be neutral between ideas of the good life, but this view goes far beyond existing constitutional principles, and even it would not bar teaching about matters of justice. For suggestions that the Free Speech and Free Press Clauses may place limits on government speech, see MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

proach to interpretation that gives weight to original understanding;[76] it strains the textual language;[77] and it is at odds with much of the Court's opinion in *Wisconsin v. Yoder*,[78] which strongly indicates that a free exercise claim (made by Amish) to be exempt from school attendance requirements (beyond the eighth grade) is valid only for those who are religious believers in the ordinary sense.

3. A More Satisfactory Approach

The interpretive options are richer than these stark alternatives, and the most desirable approach differs from each. In this Section I examine forced religious practice, discuss government teaching of atheism, and consider very briefly exemptions from ordinary legal requirements based on atheist convictions.

a. Free Exercise Rights of Atheists

We may start with the uncontroversial point that atheists have some free exercise rights, whether or not atheism is a religion. The free exercise of religion includes refusing to perform religious acts as well as performing religious acts. Suppose that a state allowed people to attend any worship services they chose, but also required them to spend one hour each week participating in a Roman Catholic Mass. The requirement would deny the free exercise of religion, as well as violating the Establishment Clause. Neither an Orthodox Jew nor an atheist is allowed the free exercise of religion if she is compelled to go to Mass. Many countries and international human rights documents, as well as the constitutions of some of our states, protect religious exercise without guaranteeing nonestablishment.[79]

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76 Laycock suggests that although the Founders may not have considered atheism a religion, they were aware that the "principal antagonists in religious conflict varied from time to time and place to place." Laycock, *supra* note 11, at 333. Laycock urges that the term religion should be read to cover the major modern conflict between believers and nonbelievers.

77 Laycock has an interesting discussion of the linguistic problem, including the characterization of humanism as religious in the first *Humanist Manifesto* (1933), a characterization dropped in *Humanist Manifesto II* (1973). *See id.* at 328–30.

78 406 U.S. 205 (1972).

79 *See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 9(1)213 U.N.T.S. 221, 230; JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 261 (2d ed. 1996) (nine states lack establishment clauses); Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361 (1992); sources cited *supra* note 19.

Coerced participation in an alien religion would violate those guarantees, whether or not the person coerced has any religious convictions of her own. Succinctly, part of a right to free exercise is a right not to participate in religion in a way to which one objects, whether or not one is religious.[80] Free speech principles are closely analogous; part of a right to free speech is a right not to speak, and in most settings the exercise of the right not to speak is independent of one's reasons for not speaking.[81]

If atheists have a right not to be coerced into religious participation, does it follow that atheists have free exercise rights to exemptions for behavior that flows from atheism that parallel the rights of traditional believers to exemption? Not necessarily. Consider the claim in *Wisconsin v. Yoder*.[82] Compulsory school was at odds with the religious beliefs and practices of the Amish parents; they were entitled to an exemption for their children. Suppose compulsory school beyond a certain age was at odds with someone's atheism. Since compulsory school is itself not a religious practice or religious principle, forcing atheist children to go to school does not directly interfere with religious exercise, if atheism is not religious. Unless atheism is a religion, atheists might not have free exercise rights that are equal in all respects with those of religious believers.

b. Equality in Official Instruction

The key to the exemption issue lies in concerns of equality. Because the force of these concerns reveals itself most clearly in relation to the establishment issue of official instruction, I address that issue before returning to free exercise exemptions.

Would official teaching of atheism (or agnosticism) constitute an establishment of religion? If atheism does not constitute a religion, Establishment Clause language alone does not appear to make teaching atheism unconstitutional. But a sensible view of the whole Constitution yields the judgment that teaching atheism is unconstitutional.

80 Therefore, it cannot be argued that the atheist (lacking religious convictions) has only an Establishment Clause objection to forced participation in a Mass, whereas the religious Jew has *both* a free exercise and establishment objection to her participation.

81 Laycock seems to imply that forced participation in religious ceremonies would violate the Free Speech Clause, *see* Laycock, *supra* note 11, at 330, and I think that conclusion is correct. Whether forced observance, without active participation, would violate the Free Speech Clause is more doubtful. I assume that compelling ordinary citizens to observe ceremonies whose significance is dominantly religious would violate their free exercise rights.

82 406 U.S. 205 (1972).

Even if atheism is not a religion, atheism differs from typical nonreligious topics of discourse. The questions that atheism answers concern religion. If the government cannot make positive assertions about religious truth, it would be unfair to allow it to make negative assertions. Of course, unfairness does not always entail unconstitutionality; but three convenient avenues can lead to a conclusion that the state may not teach atheism. The simplest approach is to say that teaching the truth of atheism denies the free exercise of religion of believers by discriminating against them. A second approach is to read the religion clauses together (or the Establishment Clause)[83] as barring the government from taking positions on religious questions. The third, closely related, approach is to regard the topic as one of equal protection (including equal protection as read back into the Fifth Amendment Due Process Clause).[84] Equal protection would require that negative assertions about religion be treated like positive ones.

Conceptually, the latter two approaches are preferable to the first. Not every government sponsorship of one religion violates the free exercise of members of other religions.[85] If this conclusion is granted, not every sponsorship of atheism constitutes a denial of free exercise of believers. An "equality" approach, based on reading the original religion clauses together or the Equal Protection Clause, or both, does not raise this difficulty. Every government sponsorship of the truth of atheism, like every sponsorship of positive religious views,[86] can be treated as forbidden.

c. Exemptions Based on Atheist Convictions?

Once we recognize the merit of the equality approach for the problem of government sponsorship, we see easily how that approach

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83 Formulations of the threefold establishment test of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), suggest that aiding *or inhibiting* religion may constitute an establishment. Teaching atheism would inhibit religion.

84 *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). One might also conceive of the content of the religion clauses as being influenced by the Equal Protection Clause.

85 I assume here that countries with weak establishments could provide full free exercise rights to citizens. That proposition may be disputed—that is, someone might argue that a weak establishment itself involves a mild violation of free exercise.

86 I here pass over the problem that various practices in the United States, for example, "In God We Trust" on coins, "under God" in the Pledge of Allegiance, do involve mild endorsement of positive religious views. The modern Supreme Court has never acknowledged that something is both a serious sponsorship and constitutionally permitted.

applies to the problem of exemptions. That problem can be formulated as follows: "Would granting an exemption for action derived from religious belief and refusing the exemption for action derived from atheist belief deny the atheist equal protection (or a right to equal treatment gleaned from the religion clauses together)?" When the issue is so formulated, we can be open to the possibility that not all kinds of exemptions should be treated in the same way.[87] To focus on this issue we need a sense of what it means for actions to be based on atheist and agnostic beliefs.

Upon close examination of reasons for action that do not derive from ordinary religious beliefs, we discover that comparatively few claims to perform acts actually derive from atheism or agnosticism. This examination helps us to a determination about atheist and agnostic claims and lays the groundwork for analysis of the more common and more important circumstance of claims to exemption that do not derive from answers to religious questions.

B. Nonreligious Reasons for Action and Exemptions for Atheists

Various nonreligious convictions may underlie claims to be exempted from ordinary laws. I shall employ two examples.

A young man, without reference to religious questions, concludes that all wars are wrongful and that it would be gravely immoral for him to fight in them. Here is what Elliott Welsh said about military service:

> I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.[88]

My second example is imaginary. A mother places great value on family life and feels that she "cannot" work on Saturday, the main day for shared family activities. Notice that the mother might be a religious person who remarks, "I care a lot about my family. Parents need to be with children if children are to feel loved and to develop in a healthy way. This is not really a religious matter. I just feel it is ex-

87 In contrast, an approach under which atheism and agnosticism are religions requires equal treatment automatically.

88 Welsh v. United States, 398 U.S. 333, 342 (1970) (plurality opinion) (citations omitted).

tremely important to be with my children."[89] If pressed hard enough, she might see that her religious values connect somehow to her concern for family, but she does not perceive the connection as strong. Should the mother be treated like those who believe God commands that they not work on the Sabbath?

A person with nonreligious reasons might qualify for the same treatment as someone with typical religious reasons because the reasons connect strongly (enough) to atheism and agnosticism and thus depend on answers to religious questions. Just how do claims based on nonreligious reasons relate to claims based on atheism and agnosticism? When someone bases a claim to act on atheism, his reasons relate closely to his atheist beliefs. Claims based on the kinds of nonreligious reasons offered by Welsh and my hypothetical mother do not ordinarily depend on answers to religious questions.

Suppose an atheist offers the nonreligious reasons of Welsh's statement. Of course, none of the atheist's reasons will rest on positive religious convictions; but a simple exclusion of religious reasons does not turn every reason the atheist offers into an atheist reason. Recall the religious mother's reasons to be with her family. The fact that her religious beliefs excluded all atheist reasons hardly made all her positive reasons religious in nature. The reverse is true for the atheist. His nonreligious reasons do not automatically become atheist reasons. The fact that a traditional religious belief or atheism excludes some reasons for action does not mean that all remaining reasons become either positively religious or atheist. Once we grasp this point, we realize that claims for exemption from ordinary laws that are based closely on atheism and agnosticism are rare.[90]

This conclusion is clearest for agnosticism—a position of skepticism about religious questions. An agnostic says, in essence, "I am uncertain whether God exists or religion has any intrinsic value, so I am going to live without answers to these questions." Any claim for an exemption requires some positive belief that a legally required act is

89 This arrival at a conviction largely separate from religious belief seems much more likely for an insistence on shared family time than an insistence on pacificism. If a religious person becomes a pacifist, his religious beliefs and practices will almost certainly figure significantly in his arrival at that position.

90 *See* Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10–11 ("[U]nbelief entails no obligations and no observances. Unbelief may be coupled with various sorts of moral conviction . . . . But these convictions must necessarily be derived from some source other than unbelief itself . . . . ").

forbidden or that a legally forbidden or penalized act is required.[91] The Amish claimants in *Yoder* believed that their children should stay away from school; Ms. Sherbert, who was declared ineligible for unemployment compensation, believed she should not work on Saturday.[92] Agnosticism by itself can hardly lead to beliefs like those of the Amish and Sherbert. If we think of claims for exemption as arising in respect to laws that forbid, penalize, or require actions for standard secular reasons, agnosticism cannot itself provide any reasons, much less powerful reasons, for an exemption. All agnosticism can do is exclude some reasons.[93] Agnostics will need beliefs other than skepticism about answers to religious questions to generate positive reasons to be exempted.[94]

Although disbelief in God, atheism, could more easily lead to a claim to engage in particular action, coming up with a realistic modern example of a claim for exemption is not easy. If the law prohibited an action that involved an offense to religion, such as blasphemy, an atheist might have a conviction, based on his atheism, that he should engage in the act. But this kind of law is, by modern lights, violative of the Establishment Clause and the Free Speech Clause, and perhaps the Free Exercise Clause. Therefore, atheists do not need an exemption.[95]

In our pluralist religious society, in which nonreligious values are a central aspect of public culture, most ordinary laws (such as compulsory school attendance laws) are justified on grounds that unite people of a wide range of religious beliefs. Nothing about atheism per se

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91 The claim might be instead that an act is religiously favored or disfavored (rather than required or forbidden), or that a law encourages or discourages it (rather than requiring or forbidding it).

92 *See* Sherbert v. Verner, 374 U.S. 398, 399 (1963).

93 What I have said is not accurate about proclaiming agnostic beliefs and reading agnostic (and other) literature. Agnosticism could provide a reason for these acts; but any law forbidding those acts would directly violate the Free Speech and Free Press Clauses, and perhaps the religion clauses, for all persons. Agnostics would not need an exemption from a law that would validly apply to others.

94 I put aside here the possibility that some overall philosophy includes agnosticism along with other elements. Such a philosophy might be a cohesive whole with agnosticism as a central element. This would be an analogue for agnosticism of how Marxism relates to atheism. What I say about that would be relevant if such an agnostic philosophy existed; however, I am not aware of any such approach. One might think of some Unitarian-Universalist groups as a kind of religion for agnostics. When I speak of agnostics here, I mean individual, detached agnostics. For them, it is hard to see how agnosticism could provide a reason for an exemption from a valid secular law.

95 *See supra* note 93. A law directly forbidding defenses of atheism or the reading of atheist books would be unconstitutional. No exemption would be needed.

is at odds with such laws. Perhaps an atheist might make a complicated argument that his atheism leads him to insist on a day off other than Sunday, because of the religious origin of laws and customary practices of closing on Sunday. Such an atheist would be an antireligious analogue of Sherbert, whose religion forbade Saturday work.

Apart from the highly unusual case in which atheist belief would directly underlie a strong claim for exemption from a valid secular law, an atheist might connect his atheist beliefs to a claim for exemption in a different way.[96] Atheism might be a component of some overarching view of life that leads to a claim of conscience. For example, atheism is an important aspect of Marxist Communism. Marx and his orthodox followers have believed that atheism was significantly tied to other aspects of his philosophy. A communist who thought all wars were between competing capitalists might base a claim to be a conscientious objector on Marxism. Thus, atheism could function as a component in a philosophy of life that might lead to claims of exemption like those that religious believers could make. But most claims for exemptions by atheists will lack this strong a connection to atheism. Hence, a connection to atheism or agnosticism is not a sufficient basis to afford most claims by nonbelievers the same treatment as claims by traditionally religious persons.[97]

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96 I have already shown why an atheist's exclusion of religious reasons does not entail that all the positive reasons on which the atheist relies are atheist reasons. *See supra* notes 90–94 and accompanying text.

97 One might resist this conclusion by building on suggestions made by Douglas Laycock about conscientious objectors. *See* Laycock, *supra* note 11, at 335. He posits a number of claims of conscientious objection made by believers and/or practitioners of traditional religions in which the connection between religious belief or practice and the objection to military service is not strong. He assumes that neither administrative officials nor courts will look too closely at how a religious belief relates to the objection (although the statutory language requires that the objection be *based* on a religious belief and practice). If officials think the claimant is sincere about his objection and his religious beliefs, he will qualify. Indeed, "[v]ariations in the content and derivation of religious beliefs cannot be the basis for differences in legal treatment." *Id.* Someone might contend that a similar approach is appropriate for the relation between atheism and agnosticism and objections by nonreligious people. This argument would be ingenious but faulty. (On first reading, I thought Laycock was making this argument, but on subsequent readings I have concluded that his position is more complex, drawing *both* from the strength of the beliefs *and* their sources. *See id.* at 335–36.)

One problem concerns agnosticism. Whatever may be said about atheism and conscientious objection, it will typically be hard to find any positive connection between conscientious objection and agnostic views.

Even for atheists the argument is unpersuasive. If Laycock is correct that in instances of sincere religious belief and sincere conscientious objection no one would worry too much about the strength of connection, this result is partly because the

What about claims that *are* closely tied to atheism or agnosticism? For areas, if any exist, in which other nonreligious claims may fare worse than religious claims, what of atheist claims? The constitutional principle of nonsponsorship of religion suggests that moral convictions closely connected to atheism or agnosticism should be treated like moral convictions similarly related to religious beliefs. But I remind the reader that this conclusion has little practical significance, because very few claims to exemption from valid laws will connect closely to atheism, and probably none will connect closely to agnosticism. This reality raises a question about administration of constitu-

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connection is strong in the vast majority of instances. Most religious conscientious objectors have objections powerfully connected to their religions. Most atheists who are conscientious objectors do not have objections so strongly connected to their atheism.

A more crucial difficulty is that Laycock's examples are drawn from an area of law in which, according to Supreme Court decisions, the *connection* between religious belief (in the usual sense) and sincere objection is actually irrelevant. Under *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion), any genuine conscientious objection *counts as religious*. As long as an objector is deeply opposed to fighting in any war, it does not matter whether his objection is based on standard religious belief and practice. If he is a sincere objector, he qualifies as religious under the plurality's reading of the statute. Claims about (ordinary) religious belief may still be relevant in a sense; if he lies about his religion, he is probably lying about being a conscientious objector. But the strength of connection between any sincere religious beliefs and the conscientious objection is legally insignificant. A fuller test of Laycock's assumption about connection turns on examining an area in which the connection of religion to the underlying claim remains important.

We may consider the religious mother who does not want to work on Saturday because she needs or wants to spend time with her family, or religious people who want to withdraw children from school after the eighth grade. Constitutional law, as it stands, appears to require that both claims be based on religious belief and practice. In both circumstances, we would expect courts to inquire about the connection between religious belief and the claim. Does the mother's insistence that she not work on Saturday relate to her religious understanding? Does the parents' strong desire to withdraw their children from school derive from the parents' religion? A court would not in either instance simply assume that a sincere religious belief of some sort plus a sincere strong wish for an exemption necessarily amounted to a religious claim for an exemption.

Laycock implies that for a court to inquire about the connection between a religious belief and claim to exemption would be unconstitutional. *See* Laycock, *supra* note 11, at 331. As long as a court limits itself to the religious understanding of claimants themselves, not asking what the correct view of a particular religion is, some inquiries of this sort are acceptable. They have been required under the Religious Freedom Restoration Act (RFRA), which accords an exemption only when a law imposes a substantial burden on the exercise of religion. Not every heavy burden felt by someone who happens to be a religious believer is a substantial burden on his religious exercise. (The Supreme Court's invalidation of most (all?) of RFRA has nothing to do with the appropriateness of this requirement.)

tional principles. If otherwise similar atheist claims seem extremely unlikely, may a legislature granting an exemption, or a court establishing a constitutional exemption, restrict the privilege to religious believers in a way that forecloses judicial examination of the possibility of similar atheist claims? The principle of nonsponsorship should be regarded as central enough to sustain a constitutional claim for equal treatment, even if the likelihood of an atheism claim arising seems remote. That is, courts should not dismiss without examination atheist claims that are parallel to religious claims.

C. Reasons That Are Not Based on Answers to Religious Questions and Nonreligious Conscience

What is the constitutional status of nonreligious reasons that do not arise from answers to religious questions or from participation in a religion?[98] The crucial problem concerns nonreligious claims to exemptions.

The constitutional place of nonreligious ideas themselves is straightforward. Claims of truth that do not concern religious subjects are, in the domain of the First Amendment, outside the religion clauses. As I have said, officials of the government may take positions on many political, moral, economic, historical, scientific, and other questions. Treating these subjects without reference to religion is sometimes at odds with the way many religious believers conceive of the subjects—they see religious understanding as affecting the whole range of human concerns. For some believers, nonreligious (secular) treatment of moral and other issues may implicitly diminish the significance of religion. But this diminishment by disregard is the unavoidable, acceptable consequence of the government's not taking positions about religious questions. The government, in schools and elsewhere, may offer nonreligious reasons for racial justice, even though some citizens fervently believe that the most vital reasons concern God's plan for humanity or the implications of God's message to human beings.

Whether deeply felt claims of conscience that are not based on religious convictions in the ordinary sense should receive exemptions is a much more difficult issue. That issue was raised by Welsh's conscientious objector claim and by our hypothetical mother's nonreligious claim not to work on Saturday.

How should constitutional law treat the conscientious objector whose moral and political analysis leads him to strong pacifist convic-

98 One might have a religious claim based on religious activity that did not depend on one's answers to religious questions.

tions and the mother who values family so strongly she refuses to work on Saturday? As I have mentioned, nonreligious beliefs such as the mother's could exist for a religious person as well as an atheist or agnostic.

Without doubt, a legislature may choose to exempt claims that are not based on answers to religious questions; it may accord equal treatment to religious and nonreligious claimants. The plurality in *Welsh* read the Selective Service Act to have this effect.[99] Even had the three dissenters in *Welsh* won the day—limiting the statute to its straightforward linguistic coverage of ordinary religious believers—Congress could have chosen to extend the exemption to nonreligious claimants like Welsh. The crucial issues are whether: (1) for legislatively created exemptions, legislatures *must*, constitutionally, treat nonreligious claimants as they treat religious claimants?; (2) for exemptions by constitutional right, nonreligious claimants must be given privileges equal to those of believers?

One possible ground for granting such claims to similar treatment is that the place of the underlying reasons in the lives of the claimants makes the reasons religious. Another ground is that, although not religious, these reasons should be treated equally with religious ones. The first approach raises the question of the borders of religion for legal purposes; the second approach concerns equality between religion and nonreligion.

Under a "borders" approach, some have concluded that any claim of sufficient power qualifies as religious because of its importance to the claimant. All claims of this strength have to be treated like claims derived from traditional religion. Otherwise there would be impermissible discrimination among religious approaches. The "ultimate concern" approach taken to the conscientious objector statute in *Welsh* and the earlier case of *United States v. Seeger*[100] is like this. Beliefs that occupy the same position in someone's life as typical religious beliefs occupy in the believer's life count as religious. This position could be constitutionalized across the board.[101]

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99 *See* 398 U.S. 333 (1970) (plurality opinion).

100 380 U.S. 163 (1965).

101 *See, e.g.*, Laycock, *supra* note 11, at 336. Laycock talks of the "nonatheist's belief in transcendent moral obligations" that serve "the same functions in his life" as "moral beliefs and sources of derivation serve for atheists." *See also* Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713 (1999); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995).

The consequence of this approach would be that what counts as religious for the purpose of free exercise exemptions would depend on conscientious belief or strength of feeling. An atheist's or agnostic's "family life" objection to work on Saturday would be religious if her feelings about such work were as strong and unshakeable as those of a religious believer who thought God does not want persons to work on the Sabbath.[102]

We should not suppose that treating deep claims of conscience as religious will eliminate all problems of defining religiousness. Saying what amounts to a conscientious objection to military service is not too difficult; it is much harder to discern what constitutes a compelling enough belief to qualify for other sorts of exemptions. How powerful must an objection to Saturday work be in order for someone to be exempted from a requirement that she be open to accepting Saturday work if she is to be eligible for unemployment compensation?[103]

An approach that focuses on the power and quality of moral conviction formally treats traditionally religious and other analogous objections equally, but it leaves open the possibility that for some subjects only traditional religious believers will actually have claims that are strong enough to qualify for an exemption. A Sabbatarian may think she should refuse work on Saturday, however dire the economic consequences. Few "family time" objectors to Saturday work believe that their being with children on that day is more important

102 An interesting implication is that a religious believer (in the ordinary sense) could have a claim strong enough to qualify as religious, even if the claim did not connect significantly to his religious beliefs. The "ultimate concern" argument, as typically put, usually compares the moral convictions of the nontheist to the central concerns of the religious believer. The implicit assumption is that the crucial convictions of the believer will be tied to his religion; for him there will be no ultimate concern not related to his religion. But people care deeply about many different things. Some religions may have relatively little bearing on some aspects of moral life. Some adherents of more comprehensive religions do not actually make the connections between religious views and moral choices that one might expect. (For example, many Christians in the United States may treat most family responsibilities as a separate moral domain, not related to their religious belief and practice, although ministers and others who think deeply about Christianity believe it bears significantly on how we should treat members of our families.) In a society in which so much moral discourse is not religious, we must acknowledge that some believers will have moral convictions they perceive as separate from their religion that will be as strong as the deep moral convictions of nonbelievers. The logic of the position that the deepest moral convictions of nonbelievers can qualify as religious leads to the conclusion that some moral convictions of believers that are not connected to their religious beliefs might also qualify as religious.

103 I discuss this problem briefly in Greenawalt, *Constitutional Concept*, *supra* note 64, at 754–55.

than providing adequate food and shelter. To generalize the point, it is difficult to imagine nontheists having objections to Saturday work as unconditional as those who believe God has set Saturday apart as a day of rest.[104]

A different conceptual approach assumes that conscientious claims that are not based on religious reasons do not qualify *as religious* under the Constitution. The Constitution may give government clear authorization to afford some religious claims favorable treatment; but the question remains whether distinctions between religious claims and otherwise similar nonreligious claims are acceptable. As Michael Perry points out, some international documents afford the same freedom for nonreligious conscience as religious conscience.[105] One might reasonably conclude that such equivalent treatment not only is desirable, but that under our religion clauses and the Equal Protection Clause, it is constitutionally required.

Analysis would not necessarily yield an identical conclusion for all kinds of exemptions. The argument for equal treatment is very strong for conscientious objection to military service. We know that significant numbers of people who are not religious are conscientious objectors to military service and that an individualized screening process permits a careful judgment about each applicant. In these circumstances, a preference for a religious claimant should be regarded as an establishment of religion or a denial of equal protection (by classifying on this religious basis). This is the position Justice Harlan reached in *Welsh*.[106]

On the other hand, it is not so easy to conceptualize a nonreligious objection to schooling or Saturday work that is quite like one that might be based on religious understanding. The law may appropriately require that religious belief or practice be a condition for a valid claim to exemption from such rules, instead of providing for individual assessment of the strength of other claims. An approach that does not conflate religion and conscience is more sound in terms of constitutional language, and it also allows a nuanced evaluation of constitutional claims for equality.

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104 Even if the Sabbatarian admits that work is all right for emergencies, such as saving lives, her belief will be more nearly unconditional than that any nontheist would be likely to have. By "nontheists" here, I refer to nontheists who do not belong to traditional religions. A person who is a practicing Orthodox Jew and believes that refraining from work on Saturday is a crucial, uncompromisable element of religious practice might not believe in the existence of God.

105 *See* Perry, *supra* note 19, at 432–33.

106 *See* Welsh v. United States, 398 U.S. 333, 362–64 (1970) (plurality opinion).

D. Conclusions About Atheism, Agnosticism, and Nonreligious Claims of Conscience

Should atheism and agnosticism be regarded as religious, or treated equally with religions? Should nonreligious claims of conscience be treated like religious ones? For these issues, I have urged a direct focus on issues of equality rather than an artificial account of what is religious.

I have suggested that atheism and agnosticism should not be regarded as religious, but I have argued that considerations of equality require treatment equal to that of religions in virtually all respects. Official teaching of atheism and agnosticism is unconstitutional. Rarely will claims of conscience to be free of the requirements of valid secular laws arise directly from atheist and agnosticist convictions; but in the rare instances when such claims do arise, they should be treated similarly to religious claims of conscience. In most instances, if not all, this equal treatment should be regarded as constitutionally required.

How government should treat claims of conscience that are not based on answers to religious questions poses a more difficult question. I have rejected an "ultimate concern" approach that regards all deeply held claims of conscience as religious; but I have suggested that at least when claims of nonreligious conscience are common and can be feasibly assessed by a screening process, constitutional considerations of equality require equal treatment.