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Thoughts on the Architecture of Freedom of Religion and Freedom of Speech

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THOUGHTS ON THE ARCHITECTURE OF FREEDOM OF RELIGION AND FREEDOM OF SPEECH

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INTRODUCTION

A. The Setting

This symposium was convened to explore the rights of businesses and employees to invoke freedom of religion or freedom of expression to resist certain forms of state regulation. The most immediate occasions for that discussion, at least for my purposes, are cases such as *303 Creative LLC v. Elenis*, in which the Supreme Court upheld the right of a website designer to refuse to design a wedding website for a same-sex couple.[1] These sorts of cases, which pit the religious or expressive rights of conscientious believers against the equality rights of others, have proliferated in recent years.

I have three main, intertwined, goals in this Essay. One is to zoom out and offer some thoughts about the general architecture of freedom of religion—specifically the question of religion-based exemptions—and freedom of speech, and their relation to each other.

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This paper incorporates sections of some of my unpublished talks, including Perry Dane, Weaponization, Polarization, and the Structure of Religious Exemptions (June 30, 2023) (unpublished manuscript), https://ssrn.com/abstract=4475855 [https://perma.cc/AU9H-GZQB]; and Perry Dane, The Anomalous Free Speech Clause (Aug. 19, 2022) (unpublished manuscript), https://ssrn.com/abstract=4189016 [https://perma.cc/C9YX-H8JW].

I am grateful to Richard W. Garnett for his helpful comments on an earlier draft of this paper.

1 143 S. Ct. 2298, 2321–22 (2023). This paper does not try to grapple with the other pieces of the symposium's charge, to make sense of the government employee cases such as *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), that sit at the confluence of freedom of speech, freedom of religion, and Establishment Clause concerns.

Another is to explore how that architecture has been warped, partly by the imperatives of litigation, but also by the effects of our current state of national polarization. A third is to say something about the mutual responsibility that should—even in a polarized age—set the terms for honest, good faith, mutual, normative encounter.

Along the way, I also want to stake out a position about legal scholarship. This Essay suggests that some of the legal challenges that businesses might raise against certain forms of government regulation are in principle impossible to adjudicate, though judges in our system of law will need to hand a verdict to one side or the other. That might not seem like a helpful contribution. But legal scholars are not put on earth just to solve legal disputes or unravel doctrinal puzzles. Part of their job is to identify contradiction and even intractability.[2]

Moreover, if we take the relationship between religion and state to involve a genuinely mutual encounter, in which each side makes normative claims but also has potential normative responsibilities, then scholars in the field might want to speak at times in something approaching a theological or at least sociological register. That is not something that judges can or should do. It is also intellectually risky and fraught for anyone looking at a religious tradition from the outside. But, in this Essay at least, I find it necessary, humbly and tentatively, to challenge believers to help make their own sense of the structural difficulties that I will be trying to describe.

B. The Time We Live In

This Essay will get both doctrinal and theoretical and, as noted, even theological. But lurking in its background and central to its analysis is our current state of radical polarization.

Polarization is not just disagreement. It is a state of extraordinary division, in which the two great opposing "teams" often act like magnetic poles, aligning what might otherwise be scattershot differences into mere instances of a larger battle over ideology and identity.[3] As a variety of commentators have convincingly pointed out,

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2 I made a similar point in Perry Dane, Christmas (Jan. 15, 2015) (unpublished manuscript), https://ssrn.com/abstract=947613 [https://perma.cc/V84Z-XWUM].

3 *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008); LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018).

As one commentator laments,

> The list of controversies is endless, but the parties to them are remarkably constant and durable. Individually, these fights sometimes touch on genuinely vital questions. Yet seen together they appear as a vast sociopolitical psychosis. They are all one fight, and the fight is the point. This is the sense in which we are living through a war of cultures, not of ideologies or interests. It is about us and

for example, political identity is increasingly driving religious beliefs rather than the other way around.[4] And as a Americans have polarized, they have also lost much of the social trust that might ordinarily bind

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> them—competing identities, opposing teams, contending antipathies, contempt as far as the eye can see. Each party knows the other is the country's biggest problem, and the latest outrage is just more evidence (as if we needed it).

Yuval Levin, *How to Curb the Culture War*, COMMENT, Spring 2022, https://comment.org/how-to-curb-the-culture-war/ [https://perma.cc/AG2P-6KBG].

For helpful social-scientific research on our current state of polarization, see, for example, Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15 (Nathaniel Persily ed., 2015); PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC (2014). For discussions of more specific studies of how partisan divides have invaded traditionally less political spheres, see, for example, Rui Wang, Sagarika Suresh Thimmanayakanapalya & Yotam Ophir, *The Growing Partisan Politicization of Non-Political Online Spaces: A Mixed-Method Analysis of News App Reviews on Google Play Between 2009 and 2022*, NEW MEDIA & SOC'Y: ONLINEFIRST (Mar. 26, 2024), https://doi.org/10.1177/14614448241237765 [https://perma.cc/D5NX-RBC5]; Bill Carter, *Republicans Like Golf, Democrats Prefer Cartoons, TV Research Suggests*, N.Y. TIMES: MEDIA DECODER (Oct. 11, 2012, 7:42 PM), https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2012/10/11/republicans-like-golf-democrats-prefer-cartoons-tv-research-suggests/ [https://perma.cc/8DXJ-U6YT].

To be fair, the full story is more complicated and arguably less dire. For an analysis that suggests that most Americans are not nearly as polarized as the usual narrative would have it, see YANNA KRUPNIKOV & JOHN BARRY RYAN, THE OTHER DIVIDE: POLARIZATION AND DISENGAGEMENT IN AMERICAN POLITICS (2022). *See also* JAMES FALLOWS & DEBORAH FALLOWS, OUR TOWNS: A 100,000-MILE JOURNEY INTO THE HEART OF AMERICA (2018) (reporting on the authors' visits to towns across America whose residents try to transcend their political differences to fashion practical solutions to their common challenges). Distinct sources of hope are emerging in a variety of projects that encourage civil conversation across ideological divides. Examples include the Braver Angels organization, *see* BRAVER ANGELS (last visited Aug. 14, 2024) https://braverangels.org/ [https://perma.cc/EC8V-TWTM], and StoryCorps's "One Small Step" project, *see* ONE SMALL STEP (last visited Aug. 14, 2024) https://takeonesmallstep.org/ [https://perma.cc/G4WP-S3CM], both of which facilitate conversations across ideological divides that try to foster mutual respect and understanding without aiming to change anyone's political commitments as such.

4 For two especially perceptive accounts, built in part on personal encounters with the phenomenon, see, for example, TIM ALBERTA, THE KINGDOM, THE POWER, AND THE GLORY: AMERICAN EVANGELICALS IN AN AGE OF EXTREMISM (2023); SARAH MCCAMMON, THE EXVANGELICALS: LOVING, LIVING, AND LEAVING THE WHITE EVANGELICAL CHURCH (2024).

To be sure, as I note at the end of this Section, the magnetic poles I describe in text do not sweep in everyone. But it takes a certain sort of bravery to resist their force.

For a helpful description of the subtle dynamics of American evangelicals' relation to politics, contrasting it to the relationship between politics and religion among Canadian evangelicals, see LYDIA BEAN, THE POLITICS OF EVANGELICAL IDENTITY: LOCAL CHURCHES AND PARTISAN DIVIDES IN THE UNITED STATES AND CANADA (2014). For a general sociological analysis that qualifies some of the more extreme descriptions of American religious polarization, at least as of more than ten years ago, see ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US (2010).

together even competing ideological camps.[5] And they have come to dislike each other as much as they disagree.[6] Moreover, much as we might each sympathize more with one side in the culture wars rather than the other, neither is faultless.[7]

With respect to controversies such as those at the center of this paper, political tribalism amplifies the perceived stakes for both sides and transforms what might otherwise be ordinary legal disputes into perceived apocalyptic threats. Thus, the supporters of same-sex couples seeking goods and services see the claims of those who refuse to serve them as efforts to undo the hard-won victory of a right to same-sex marriage itself. And the other side sees claims to equal treatment in the commercial marketplace as brutal, unremitting efforts to quash the last corner of dissent against a prevailing sexual ideology. Each side's grievance is the mirror image of the other, and even the rhetoric they employ is remarkably symmetric.[8] Indeed, identity might

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5 *See* KEVIN VALLIER, TRUST IN A POLARIZED AGE (2020); Kevin Vallier, *US Social Trust Has Fallen 23 Points Since 1964*, KEVIN VALLIER: RECONCILED (Nov. 30, 2020), https://www.kevinvallier.com/reconciled/new-finding-us-social-trust-has-fallen-23-points-since-1964/ [https://perma.cc/4DUW-FFW7].

6 *See* PEW RSCH. CTR., *supra* note 3, at 7, 33–35.

7 *See* SUSAN NEIMAN, LEFT IS NOT WOKE (2023).

8 One marked rhetorical sign of that symmetry, apparent from the beginning of the sequences of cases in which wedding vendors and others claimed a religious exemption from laws that might have required them to provide services to same-sex marriages, was the use—by both sides in those debates—of the image of "weaponization." *See* Perry Dane, *Masterpiece Cakeshop and the Costs of Weaponization*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS.: BERKLEY F. (July 2, 2018) [hereinafter Dane, *Weaponization*], https://berkleycenter.georgetown.edu/responses/masterpiece-cakeshop-and-the-costs-of-weaponization [https://perma.cc/H4JU-LDEY]; Perry Dane, *When Secular Laws and Religious Convictions Collide*, MARGINALIA (Mar. 12, 2021), https://themarginaliareview.com/when-secular-laws-and-religious-convictions-collide/ [https://perma.cc/TXA5-WM7L]. The wedding vendors and their allies argued that the state and supporters of same-sex marriage were "weaponizing" antidiscrimination laws in a vicious effort to extirpate every holdout from the new national consensus. *See, e.g.*, Matthew Kacsmaryk, *The Inequality Act: Weaponizing Same-Sex Marriage*, PUB. DISCOURSE (Sept. 4, 2015), https://www.thepublicdiscourse.com/2015/09/15612/ [https://perma.cc/WMS6-SGCY] ("The Equality Act seeks to weaponize *Obergefell*, moving with lightning speed from a contentious five-to-four victory on same-sex marriage to a nationwide rule that 'sexual orientation' and 'gender identity' are privileged classes that give no quarter to Americans who continue to believe and seek to *exercise* their millennia-old religious belief that marriage and sexual relations are reserved to the union of one man and one woman."); Robert Barnes, *Supreme Court Will Hear Another Clash Pitting Religious Rights Against Laws Protecting LGBTQ People from Discrimination*, WASH. POST (Feb. 22, 2022, 5:54 PM), https://www.washingtonpost.com/politics/2022/02/22/supreme-court-same-sex-weddings/ [https://perma.cc/F23E-LTY8] ("'Colorado has weaponized its law to silence speech it disagrees with, to compel speech it approves of, and to punish anyone who dares to dissent,' said Kristen Waggoner, general counsel of Alliance Defending Freedom . . . ."). Meanwhile, the other side argued, invoking the same trope, that opponents of same-sex marriage, were "weaponizing" claims

arguably be said not only to amplify and reconfigure grievances but, at least sometimes, to produce those grievances in the first place. As the philosopher Susan Neiman has written with respect to so-called "woke" ideology, but which might just as easily be said about some instances of "antiwoke" attacks, "[i]t begins with concern for marginalized persons, and ends by reducing each to the prism of her marginalization."[9]

These same magnetic poles can also realign both legal and political views, shrinking the space for nuance or compromise. They can shatter old alliances, such as those that once united a wide swath of "conservatives" and "liberals" on questions of religious liberty.

Our state of polarization and tribalism, and the subsuming of belief by identity, are not all-encompassing. Life continues to go on despite the storms that have shaken our common life. And some places in that common life have managed to shelter themselves from the larger storm. Nevertheless, our national divisions have had an outsized influence on politics, broad religious and secular movements, and the texture of legal disputes.

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of religious freedom to fundamentally undo the hard-won victory in *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See, e.g.*, ANDREW L. SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM (2022); Dale Carpenter, *The Clash of "Religious Freedom" and Civil Rights in Indiana*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 30, 2015, 1:57 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-clash-of-religious-freedom-and-civil-rights-in-indiana/ [https://perma.cc/G2NB-97SU] ("The newly energized effort to push mini-RFRAs like Indiana's is almost entirely a reaction to the gay-rights movement, including but not limited to the increasing acceptance and reality of same-sex marriage. One need only listen to the kinds of examples that RFRA supporters cite as 'burdens' on religion to know that RFRAs nowadays are directed at validating and legitimizing antigay discrimination. What started out as a shield for minority religious practitioners like Native Americans and the Amish is in danger of being *weaponized* into a sword against civil rights." (emphasis added)); Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/ [https://perma.cc/94WG-KHXZ]. Both sides exaggerated. But regardless, the effect was to turn what might have been a routine if difficult consideration of religious rights and state interests into a fraught battleground in the culture wars. *See* Dane, *Weaponization*, *supra*. It might therefore not be much of a surprise that determined efforts to articulate a middle ground, such as suggested by Andy Koppelman, have gained less traction than they might otherwise deserve. *See* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT (2020). The trope of "weaponization" obviously has broader significance that is worth considerably more study in its own right. For one thing, it might be helpful to try to define with more normative rigor exactly what might constitute the "weaponization" of a legal or other argument or instrumentality.

9 NEIMAN, *supra* note 7, at 5.

C. *On Zoom*

In the light of that background, and also because that is my bent, this paper zooms out. It tries to give a holistic account of the structure of freedom of religion and freedom of speech, and their relation to each other. The paper describes a set of important but delicate analytic assumptions and distinctions that have traditionally structured these doctrines. It also tries to explain how those assumptions and distinctions have been coming under increasing pressure. Some of that pressure is mundane, the effect of lawyers and judges navigating the relationship between distinct doctrinal categories. But much of it—the more important and concerning part—is precisely due to the distorting effects of our current polarized age.

I. ON RELIGIOUS EXEMPTIONS

When a business or an employee resists state regulation, such as a civil rights law that requires equal treatment for same-sex couples trying to buy goods or services related to their upcoming wedding, that resistance might take legal form as either a claim about freedom of religion or freedom of expression. *303 Creative LLC v. Elenis* was litigated and decided in freedom of speech terms.[10] But I want to begin elsewhere, with freedom of religion. More specifically, I want to begin this structural overview by considering one piece of religious freedom—claims for religion-based exemptions from a state regulation that requires religious believers to do something that their religion forbids or forbids them to do something that their religion requires. Such claims can take several forms.[11] So, even more particularly, I want for now to focus on the most paradigmatic category, in which the conflict between secular law and religious conviction is direct and unmitigated. In 1990, in *Employment Division v. Smith*,[12] the Supreme Court held, against almost three decades of precedent since *Sherbert v. Verner*,[13] that the First Amendment's Free Exercise Clause did not support a prima facie claim for a religion-based exemption in those paradigmatic cases.[14] As a practical matter, this was not the end of the story: Congress enacted the Religious Freedom Restoration Act, which more or less revived exemption claims against federal laws, some states enacted their own similar acts, and the Court has recognized

10 143 S. Ct. 2298, 2321–22 (2023).

11 *See* Perry Dane, *Scopes of Religious Exemption: A Normative Map*, *in* RELIGIOUS EXEMPTIONS 138, 138–64 (Kevin Vallier & Michael Weber eds., 2018).

12 494 U.S. 872 (1990).

13 374 U.S. 398 (1963).

14 *Smith*, 494 U.S. at 878–79.

apparent exceptions to *Smith*.[15] For my purposes, however, *Smith* is interesting because of Justice Scalia's argument, writing for the majority, that religion-based exemptions are a "constitutional anomaly."[16] Unlike other constitutional rights, they allow a select group of persons, adhering to a specific set of religious convictions, to claim immunity from any law at all, rendering them, in the words of the Court's similar holding in the nineteenth-century case of *Reynolds v. United States*, "a law unto [themselves]."[17]

I have argued elsewhere that in one important sense, Justice Scalia was right. Religion-based exemptions, at least of the core paradigmatic sort, *are* constitutionally anomalous.[18] But that does not mean that they are constitutionally illegitimate, at least as long as we are willing to understand them as the product of an existential encounter between the state and the religious nomos and recognize in them as a jurisdictional openness to deferring to that religious nomos in at least some cases.[19]

The doctrinal upshot of all this is that claims to religion-based exemptions, both the paradigmatic ones and some other types, possess certain distinct, and unique, structural features. I want to focus here on two of those structural features.

First, unlike most other claims of constitutional or civil rights, claims for religion-based exemptions require, as already noted, that the claimant profess a certain set of commitments—specifically, that the claimant's religion either (a) forbids (or close to it) something that the secular law requires or (b) requires something that the secular law forbids.[20] Those commitments must be genuine and sincere.[21]

Second, in considering whatever state interests might stand in opposition to the claim, the weight of those interests is not measured in toto, but at the margin. For example, in *Wisconsin v. Yoder*, the relevant question was not whether the state had a compelling interest in compulsory education.[22] It was instead whether the state had a compelling interest in applying its compulsory education laws to the

15 *See* Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2120–22 (2023).

16 *Smith*, 494 U.S. at 886.

17 98 U.S. 145, 167 (1879).

18 *See* Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1722–32 [hereinafter Dane, *"Omalous" Autonomy*].

19 *See* Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 69–71 (2016); Perry Dane, *Constitutional Law and Religion*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 119 (Dennis Patterson ed., 2d ed. 2010).

20 *See* Dane, *"Omalous" Autonomy*, *supra* note 18, at 1730–31.

21 *Id.* at 1731.

22 *See* 406 U.S. 205, 236 (1972).

insular Amish community whose faith did not allow them to send their children to school past the eighth grade.[23]

The effect of these two important structural features of religious-exemption claims is, in effect, to reduce the maneuvering room of both sides to the controversy. Not any opposition to a law can ground a claim for a religious exemption. And not any government interest in enforcing that law—even an interest that is compelling overall—suffices to defeat that claim for exemption.

Consider, however, how these two features of the analytic structure of religion-based exemptions have played out in the debates over wedding vendors and the like.

To begin with, it is remarkable how many opponents of these claims have tried to block them categorically at the "front end," and thus avoid a straightforward, context-specific weighing of state interests. Some critics have suggested that antidiscrimination laws do not actually burden the dissenting vendors because their perception that selling a good or service would constitute "collusion" with a sinful act is misguided or incoherent.[24] Or they have tried to categorically deny religious exemptions in contexts of commercial exchange, largely by arguing that exemptions are never permissible if they appreciably harm discrete third parties.[25]

For myself, I do not find these "front-end" arguments doctrinally convincing. In particular, the categorical rejection of "collusion" claims imperialistically subjects religious forms of reasoning to secular criteria. The simple fact is that religious traditions often have their own metaphysics, their own epistemologies, and their own ideas about causation and responsibility. We take for granted the observant Jew's right to believe that mere contact between a pan and nonkosher food renders the pan itself unfit for kosher cooking, even if thoroughly scoured. The wedding photographer who refuses to contribute her services to a same-sex wedding should get the same leeway (that is not to say that her claim should prevail, only that she should not lose at the "front end"). And while the commercial context of an interaction or

23 *See id.* ("[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.").

24 *See, e.g.*, Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897 (2015). Some arguments skeptical of religion-based exemptions in certain contexts combine front-end claims about "third-party harms" and "complicity." *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2521–22 (2015).

25 *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357–59 (2014).

harm to third parties might possibly figure into a calculation of whether the government's interest is compelling in a particular case, it should not exclude entire categories of claims from triggering that calculation.[26]

And yet these arguments do stumble their way to a more fundamental concern. We should have no reason to doubt the subjective sincerity of individual wedding vendors and similar religious claimants. But we might want to worry, as I suggested at the start in more general terms, about whether their beliefs have in a sense tethered themselves to a culture war that has more to do with identity and grievance than with religious worldviews or religious traditions. I have argued here and elsewhere that religion-based exemptions are not an ordinary constitutional or civil right: they are part of a fundamental, existential, encounter between normative systems.[27] But when the commitments underlying claims to religious exemptions connect so deeply into tribal politics, that description breaks down. Put another way, the problem with some of these more recent religious claims is not that they reflect forms of reasoning that are functionally incommensurable with secular criteria, but just the opposite—that they are all too commensurable, all too understandable, all too mundane and tiresome.

But that is where the intractability that I spoke about at the start enters the picture. Even if some philosophical and political skepticism about certain religious claims is justified, there is no convincing way to translate it into terms that are consistent with our commitment to religious pluralism and the sanctity of individual conscience. Individuals in the grip of a tribal identity can still be sincere in their claimed religious commitments. An academic commentator might be entitled to argue that they are suffering from a form of false consciousness. But a judge is not.

Here, though, it might be appropriate, with respect, to ask religious believers themselves to interrogate their own motives and assumptions. Even from a religiously conservative point of view that rejects same-sex marriage or same-sex relationships, there are sound arguments for believers not to turn away same-sex couples from their businesses.[28] It is, to be sure, more than a little arrogant for an outsider

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26 *See* Perry Dane, Doctrine and Deep Structure in the Contraception Mandate Debate 6 (Aug. 5, 2013) (unpublished manuscript) https://ssrn.com/abstract=2296635 [https://perma.cc/RFE4-KULB]. I should also make clear for the sake of completeness that I find unconvincing any effort simply to treat cases such as *303 Creative* under the rubric of "commercial speech."

27 *See* Dane, *supra* note 11, at 162–63.

28 *See, e.g.*, David W. Opderbeck, *Christians Shouldn't Celebrate* 303 Creative*: A Perspective from the Missio Dei*, CANOPYF. (Oct. 17, 2023), https://canopyforum.org/2023/

to make this request, even in a spirit of diffidence and humility. But if the structure of religion-based exemptions really is built on an existential encounter between religion and state, then it should not be out of bounds to try to further that encounter by taking some normative risks. Judges, again, should be powerless even to gesture in this direction. But scholars might not be.

A strikingly similar problem arises in considering the other structural feature of claims to religion-based exemptions: the weighing of state interests at the margin rather than in toto. Consider again the problem of wedding vendors who refuse to sell their goods or services in connection with same-sex marriages. If the state's governmental interest is in affording same-sex couples the same rights in the commercial marketplace as straight couples, then the strength of that interest *at the margin* might be minimal if only a few vendors claim religious exemptions and if couples planning to get married still have a broad selection of vendors from whom they can buy goods or services.[29]

The standard response here is that the government interest in preventing discrimination cannot simply be measured at the margin because every instance of discrimination, and for that matter, even the need to avoid vendors who discriminate, creates a degree of stigma that the state has an indivisible interest in preventing.[30] Put another way, discrimination is like ritual killing—even one instance is one too many.

This response has force. And, although I have elsewhere pointed out the difficulties with psychologizing legal rights,[31] it is hard to deny that stigma causes actual harm.[32] Stigma is real, and genuinely painful.

10/17/christians-shouldnt-celebrate-303-creative-a-perspective-from-the-missio-dei/ [https://perma.cc/Y3VB-NGBY].

29 *See* KOPPELMAN, *supra* note 8, at 10.

30 *See, e.g.*, Sherry Colb, *Free Exercise in The Mirror*, 2 N.C. C.R. L. REV. 67, 78 (2022) ("Such discrimination does not merely deny a person the opportunity to buy a product, a denial for which some other willing vendor might be able to compensate. It stigmatizes a person and makes him or her feel like an outsider, an exile, a pariah.").

31 *See, e.g.*, Perry Dane, *A Tale of Two Clauses: Search and Seizure, Establishment of Religion, and Constitutional Reason*, 26 WM. & MARY BILL RTS. J. 939 (2018).

32 Important language in the legislative history of the Civil Rights Act of 1964 highlighted this point with respect to racial discrimination:

> The primary purpose of [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents . . . ; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

S. REP. NO. 88-872, at 16 (1964). Justice Goldberg quoted this language in his concurring opinion in *Heart of Atlanta Motel v. United States*, emphasizing that the "primary purpose" of

But it is not an entirely independent variable. The feeling of stigma cannot be fully separated from our common cultural (and for that matter legal) construction of what it is that each of us as an individual might legitimately feel as stigmatizing.[33] Nevertheless, intractability enters the picture again. Observers of the conflict might in good conscience, though with deep humility, ask certain classes of persons, who are the objects of certain forms of discrimination, under certain circumstances, to reconsider or reimagine what is genuinely at stake for them. But it is hard to see any completely satisfactory way that *legal doctrine* could translate this worry about cultural construction in a time of polarization into cognizable legal arguments without compromising our respect for equal rights and norms of nondiscrimination that extend to our LGBTQ neighbors.

The religious convictions of the dissenting religious adherent and the stigma felt by the person who is the victim of discrimination are mirror images of each other. Both are real. Yet both are also arguably—in part—the product of larger cultural and political forces beyond the individual. Both raise the stakes of what might otherwise be smaller and more mediatable disputes. And both subsume those individual disputes into the larger magnetic field of our national polarities. In that sense, they are both influenced by, and help shape, the texture of more global disputes. The symmetry is again remarkable though not surprising.

At the end of the day, this condition does not only introduce unwelcome difficulties. It also disserves both the cause of religious liberty and the cause of nondiscrimination. Indeed, even when one side or the other prevails in court, that only exacerbates the problem. And, as I have emphasized throughout by repeatedly invoking the specter of intractability, the best solution, even if we think we can grasp one isolated corner of it intuitively, might in its full dimensions be out of reach.

II. FREEDOM OF EXPRESSION

As noted, *303 Creative* was ultimately litigated and decided as a question of freedom of speech rather than freedom of religion. That

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the Act was "the vindication of human dignity and not mere economics." 379 U.S. 241, 291, 291–92 (1964) (Goldberg, J., concurring).

33 *See generally* THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA (Stephen C. Ainlay et al. eds., 1986).

I also leave to one side the normative question of whether we are right to treat a refusal to provide goods or services for a same-sex marriage the same as discrimination on account of race or even the same as discrimination on account of sexual orientation in other contexts. *See generally* KOPPELMAN, *supra* note 8.

reconfigures the sort of deeper structural concerns that I have already tried to identify, but it does not eliminate them.

Claims to religious exemptions and claims to freedom of expression stand in a certain sort of hydraulic relation to each other. On the one hand, arguments for religious exemptions have an important inherent limitation: they require, as I've discussed, that the claimant hold specific religious commitments at odds with the effect of the law from which the claimant seeks an exemption.[34] To put it another way, because they are claims for *exemptions*, they leave the underlying law intact. This is one reason that many judges and commentators are suspicious of the very idea of religious exemptions. Why should only observant Jews and Seventh-day Adventists have the right not to work on Saturday? Why should only the Amish and folks with similar beliefs have the right to keep their kids out of school?

A right to freedom of expression, however, along with most other individual rights, is general. It does not depend on the existence of certain underlying commitments or on their sincerity. Thus, for example, in a recent student free speech case, the Supreme Court upheld the right of a student not on campus to post the following message on Snapchat: "Fuck school fuck softball fuck cheer fuck everything."[35] But it did not require that the student have an underlying commitment that motivated that outburst or even that the student really meant what she said. And it would have upheld the right of any other student under the same circumstances to say the same thing. Indeed, our free speech doctrine protects even some knowingly false speech.[36]

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34 This is not always true, however. For a discussion of the sorts of exemptions that might be recognized more broadly, independent of specific religious commitments, see Dane, *supra* note 11, at 160 (discussing "analogy of dignity").

35 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021).

36 To be sure, the courts have recognized exceptions from free speech protections for some categories of knowingly false speech. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (acknowledging a "traditional categorical exception[] for defamation" while also emphasizing how the Court has narrowed its scope); Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 638 (1985) (applying First Amendment exception for "false, deceptive, or misleading" commercial speech). But the Supreme Court has explicitly refused to infer from these instances a general principle that knowingly false speech is without any First Amendment protection. United States v. Alvarez, 567 U.S. 709, 718–19 (2012) (plurality opinion) (rejecting "a general rule" that knowingly false statements "are beyond constitutional protection" and stressing that the "Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection"); *id.* at 732 (Breyer, J., concurring in judgment) (proposing that certain "false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas" but nevertheless arguing that such regulation of speech can "nonetheless threaten speech-related harms" and should therefore be subject to "intermediate scrutiny").

Now, to be honest, the Court's opinion in *303 Creative* is not clear on this important feature of free speech law. The Court suggests in several places that it is upholding Lorie Smith's specific right to refuse to express herself in a way that is "inconsistent with" or "contrary to" or would "defy" her own "commitments," "beliefs," or "conscience."[37] I will have to return to this puzzle later. But if the Court had treated this case the way it treats most other freedom of expression cases, it should have been enough for the Court to say, as it does at a couple of points, that the State may not "compel speech [that] Ms. Smith does not wish to provide."[38]

In any event, though, freedom of speech claims, even correctly understood, are subject to a different constraint. At the heart of any regime of religion-based exemptions is the realization that anything—anything at all—can be religious. Conduct that the rest of us find religiously meaningless can give rise to a claim for a religious exemption if it occasions, *for a specific claimant*, a conflict between religious duty and secular law. That is not to say that all religious behavior merits an exemption. But it does merit cognizance. Even opponents of religious exemptions generally agree that anything at all can be religious;[39] their argument is just that entertaining claims to such exemptions is unfair or opens the door to anarchy.[40]

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37 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308, 2317, 2318, 2321 (2023). I am not including instances when the Court simply quoted the language in prior cases.

38 *Id.* at 2313, 2308.

39 *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 888 (1990) ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .").

40 *Id.* at 888 ("If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. . . . Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." (emphasis omitted) (citation omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (plurality opinion)); Christopher L. Eisgruber & Lawrence G. Sager, *Protecting Without Favoring Religiously Motivated Conduct*, NEXUS: J. OP., 1997 at 103, 106 ("Many perfectly sound, even-handed laws will impose incidental burdens on some religious practices. The breadth and variety of religious belief make such collisions inevitable; but this does not offer a reason for depriving ourselves of the capacity to govern.").

Lately, to be sure, this important agreement about the potentially unlimited scope of possibly religious conduct has come under stress. For example, some of the opposition to corporate religious rights in cases such as *Burwell v. Hobby Lobby Stores, Inc.*, seemed to deny that religious life could, definitionally speaking, take the form of organized for-profit activity. *See* 573 U.S. 682, 751–57 (2014) (Ginsburg, J., dissenting). Or consider these

The domain of free speech is entirely different. Not everything is speech. Even taking into account the doctrine of expressive conduct, the right to freedom of speech is limited to those behaviors that our law and society conventionally understand to be forms of expression. As the Court put it in *Spence v. Washington*, the message should be "understood by those who viewed it."[41] Burning a draft card or a flag might be expressive.[42] Sleeping in a park might not be.[43] That is why so much of the controversy around the wedding vendor and similar cases, when framed in free-speech terms, centers on whether the conduct at issue—whether designing a website or baking a cake or photographing a wedding—counts (which is to say, is conventionally understood) as expressive. And that is why, though the parties to the litigation in *303 Creative* stipulated that Ms. Smith's web design business was indeed expressive, the Court was careful to emphasize that "there are no doubt innumerable [other] goods and services that no one could argue implicate [the free speech clause of] the First Amendment."[44]

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excerpts from a blog post by Eric Segall on the *Masterpiece Cakeshop* case. "As to [the baker Jack Phillips's] religion claims," Segall writes,

> [N]othing in Colorado law prevents Mr. Phillips from praying, worshiping, attending church, or engaging in any religious ceremony or ritual that he deems necessary to exercise his religion.
>
> . . . .
>
> Selling products to customers does not, in the ordinary sense, implicate religious exercise.
>
> . . . .
>
> . . . Colorado's anti-discrimination statute has nothing to do with faith, not even a little bit.

Eric Segall, *Faith, Wedding Cakes, and the Rule of Law*, DORF ON LAW (Sept. 25, 2017), http://www.dorfonlaw.org/2017/09/faith-wedding-cakes-and-rule-of-law.html [https://perma.cc/V2VB-MXTZ]. There are powerful arguments against Jack Phillips' claim to a religious exemption, especially that the state's compelling interest should override Phillips's religious norms. But Segall seems not even to want to reach that question. He wants to limit, not only the scope of *winning* religious claims, but the sort of behavior that is *cognizable* as religious to begin with. Specifically, he wants to limit cognizable religious behavior to that narrow set of practices that our dominant religious traditions would conventionally understand to be religious, to wit "praying, worshiping, attending church," or the like. *Id.* But that would illegitimately subsume all religions to the normative imaginations of certain specific religions.

41 418 U.S. 405, 411, 410–11 (1974).

42 *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 375 (1968); Texas v. Johnson, 491 U.S. 397, 405 (1989); United States v. Eichman, 496 U.S. 310, 320 (1990); Richland Bookmart, Inc. v. Knox Cnty., 555 F.3d 512, 521 (6th Cir. 2009).

43 Uptown Tent City Organizers v. City of Chi. Dep't of Admin. Hearings, No. 17 CV 4518, 2018 WL 2709431, at *10 (N.D. Ill. June 5, 2018).

44 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2315, 2312 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728 (2018)).

One corollary and consequence of this hydraulic relationship between religion-based exemptions and freedom of speech is that, once the scope of religion-based exemptions is narrowed, there is some practical pressure on litigants and judges to broaden the outer envelope of behaviors that are conventionally understood as expressive so that it accommodates the conduct in question. And, again, our current state of polarization helps amplify the electric charge of a wider variety of behaviors to the point that characterizing them as expressive is convincing.

I want to come at the problem from a different angle, however. I have here and elsewhere described religion-based exemptions as the product of an existential encounter between religion and the state.[45] But why do we defend freedom of speech? This vital question has no single answer. Yet part of the story centers on the benefit to a thriving community of permitting and even nurturing the clash of competing *propositions*.

John Stuart Mill famously put it this way:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[46]

Many critics have argued that this defense of free speech, which eventually morphed into our own idea of a "marketplace of ideas," is overly optimistic about the power of truth to prevail in a robust war of ideas.[47] But it might be helpful to situate Mill's position in the context of an earlier variation on the theme, in John Milton's argument against the licensing of publications.[48] Milton's argument, though in some

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45 *See* Dane, *supra* note 11, at 162–63.

46 JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY AND OTHER ESSAYS 1, 21 (John Gray ed., 1991).

47 *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997); Kenneth J. Barnes, *A Dissenting Statement*, *in* YALE COLL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 37, 40–41 (1974); *cf.* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–141 (1989) (carefully assessing the strengths and weaknesses of the "truth-discovery" justification for freedom of speech, and concluding that despite the legitimate challenges to the truth-discovery argument, it "is neither incoherent nor evidently fallacious," which warrants "continued reliance on the justification in our culture," *id.* at 131, 141).

48 I have found especially useful here Vincent Blasi's work making sense of Milton to the modern ear. *See* Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica, *the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273.

respects similar to Mill's, has less to do with the marketplace of ideas than with the schoolhouse of the soul.

Milton, in the throes of the passion of the Protestant Reformation, argued that a properly formed conscience should resolutely not rest on mere authority. To the contrary, he denounced what he called the "the forced and outward union of cold and neutral and inwardly divided minds."[49] "Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition."[50] Indeed, a proper conscience could only be formed through the friction produced by the confrontation with heresy.

> I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. . . . [T]hat which purifies us is trial, and trial is by what is contrary.[51]

It is thus a *religious* duty to seek out vigorous debate and challenges to one's settled views. As Vincent Blasi points out, Milton's argument was not only epistemological—that truth was most likely to arise out of disputation. He was also trying to cultivate a certain sort of character, free and unafraid, engaged in dialectic and reaching its own conclusions.[52]

Milton, more than Mill, connects freedom of expression to freedom of religion. But what they have in common is an emphasis on the *listener* as much or more than the speaker. Or to put it more precisely, both Milton and Mill seem less interested in defending the expressive rights of individuals than in emphasizing the importance of allowing *propositions* to enter robustly and on equal terms into our collective discourse and thus both challenge and refine the beliefs and conscience of the entire community.[53]

In this model, freedom of speech and freedom of religion both implicate the centrality of the human conscience. But differently. If religious liberty protects the output of the machinery of conscience,

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49 JOHN MILTON, AREOPAGITICA (1644), *reprinted in* AREOPAGITICA AND OTHER WRITINGS 98, 131 (William Poole ed., 2014).

50 *Id.* at 127 (footnote omitted).

51 *Id.* at 111.

52 Blasi, *supra* note 48, at 298–303.

53 For a more contemporary expression of a similar argument, see T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 528–29 (1979) ("Although 'freedom of expression' seems to refer to a right of participants not to be prevented from expressing themselves, theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders." *Id.* at 528).

freedom of speech, in Milton's understanding, is a religious requirement for refining the input to that same machine. To be sure, Milton applied this vision of vigorous, free debate to politics and not merely religion. And we have expanded our commitment to free expression even further to all corners of our discourse. But that same distinction between the input and the output of conscience can help explain some of the central doctrines of free-speech law. For example, allowing time, place, and manner requirements centers the freedom of propositions to enter the realm of discourse rather than the preferences of speakers about how that is to be accomplished. By contrast, in the context of religious rights, where the focus is on behavior rather than propositions, the believer is entitled to argue that the time, place, or manner of religiously significant acts are entirely indispensable.

What should we do then with the wedding vendor cases? How does Lorie Smith's refusal to provide a commercial service inject a proposition into the competitive arena of public discourse, especially given her right to speak separately on the question of same-sex marriage and even disclaim any apparent endorsed that might otherwise be conveyed by the service that she is providing? Ms. Smith argued that obeying the civil rights law she was resisting would contradict her principled convictions. [54] But striking down the law in her case did not enhance her ability to speak her mind, which she has in any event; it simply grants her the additional privilege to refuse to serve a given set of customers who seek her services. Put another way, though the comparison is far from perfect, the state law that would effectively forbid Ms. Smith from providing services related to a same-sex marriage was arguably something like a time, place, or manner requirement that still left Ms. Smith with "ample alternative channels for communication." [55]

There are several plausible answers to this challenge. One is that American free-speech doctrine has grown beyond the bounds set by Milton and Mill. It is arguably now concerned with liberty,[56] liberal

54 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2309 (2023).

55 Hill v. Colorado, 530 U.S. 703, 726, 725–26 (2000). To be sure, the standard doctrinal test requires that such time, place, or manner restrictions be content neutral. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1473 (2022); R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992). But, although Ms. Smith's expressive conduct might have contained some specific "content," the civil rights statute that she was resisting was arguably unconcerned with why she refused to provide her services for same-sex marriages or what message she meant to convey by doing so. *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (distinguishing R.A.V. and holding that civil rights laws are examples of "permissible content-neutral regulation of conduct").

56 *See* BAKER, *supra* note 47.

democratic process,[57] basic human dignity and equality,[58] autonomy,[59] self-realization,[60] and other goals at least as much as it is with the robustness of propositional exchange.

This is not the place to try to think through a comprehensive account of contemporary free speech theory and doctrine. Suffice it to say that I find many of these claims about the values animating the Free Speech Clause underinclusive or even overinclusive with respect to the specific protected activities of speech and expressive conduct.[61] But be that as it may, a more focused response to the puzzle is that the wedding-vendor cases fall into the distinct category of disputes concerning the right against compelled speech or the right not to speak.

To be sure, focusing directly on that doctrinal category begs a host of questions and might create at least as many problems as it solves.[62] As one commentator has put it, the Supreme Court's compelled-speech jurisprudence "has grown increasingly complex . . . [and] become so incoherent, imprecise, and unstable that it affords courts significant flexibility to adopt, discard, stretch, or contract rules at their pleasure."[63] Indeed, the Court has been especially inconsistent on whether the opportunity to disavow or disclaim can in fact neutralize an objection to what might fairly be characterized as a form of compelled speech.[64]

Nevertheless, I propose that it might be illuminating and conceptually generative to go down this road. And I suggest doing so by looking again to first principles—in this instance first principles of

57 *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Greenawalt, *supra* note 47, at 145–46; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

58 *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–1009 (1978); Greenawalt, *supra* note 47, at 152–53.

59 *See* Baker, *supra* note 58, at 990–1009; Greenawalt, *supra* note 47, at 143—45, 150–52; David A.J. Richards, *Autonomy in Law*, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 246 (John Christman ed., 1989); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–71 (1991). *But see* Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1998) (challenging the autonomy defense of free speech, especially against certain specific forms of regulation).

60 *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982); Thomas I. Emerson, *Toward a General Theory of The First Amendment*, 72 YALE L.J. 877, 878–881 (1963).

61 *Cf.* Greenawalt, *supra* note 47, at 120–25 (distinguishing between justifications for free speech and both broader principles of liberty and special protections for other activities).

62 *Cf.* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148 (2006) ("The harm in compelled speech remains elusive, at least for me.").

63 David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 843 (2022).

64 *See, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006).

a mite more recent vintage found in the modern roots of compelled speech doctrine—and comparing them directly to the model of propositional exchange found in Milton and Mill.

The standard story is well known. In 1940, in *Minersville School District v. Gobitis*,[65] the Supreme Court rejected free exercise and free speech challenges by Jehovah's Witnesses to their State's compulsory flag salute in public school.[66] Almost three years later, in *West Virginia State Board of Education v. Barnette*,[67] the Court reversed course. It also cast its consideration of the underlying question in more distinctly free speech terms, holding that no student, presumably whatever his or her beliefs, could be compelled to recite the pledge.[68] The compelled speech doctrine was thus inscribed, and the court did not revisit the question of religious exemptions for another twenty years.[69]

Beneath the surface of that standard story, however, are *Barnette*'s stubborn religious undertones. Justice Murphy, concurring, and Justice Frankfurter, in dissent, continued to dwell on the free-exercise questions addressed in *Gobitis*. More importantly, *Barnette* ended up hinging on a deep religious anthropological insight. Let me explain.

Justice Frankfurter's dissent argued that that the flag salute requirement merely obliged the physical mouthing of certain words. "Law," he wrote, "is concerned with external behavior and not with the inner life of man."[70]

> Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.[71]

Justice Frankfurter was arguing, in effect, that the Witnesses could separate themselves from whatever content the mere rote mouthing of the flag salute conveyed by speaking out in their own words against it. Notice here the echo of the argument in the modern cases that the state could compel website designers, bakers, or the like to provide a commercial product as long as it did not limit their right to advocate against same-sex marriage on their own time.

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65 310 U.S. 586 (1940).
66 *Id.* at 598.
67 319 U.S. 624 (1943).
68 *Id.* at 642.
69 *See* Sherbert v. Verner, 374 U.S. 398 (1963).
70 *Barnette*, 319 U.S. at 655 (Frankfurter, J., dissenting).
71 *Id.* at 664.

Justice Jackson's majority opinion, however, refused to see the flag salute in those disenchanted terms. The most famous passage in the opinion, though framed in secular free speech terms, markedly employed the language of religion: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to *confess* by word or act their *faith* therein."[72]

Earlier in his opinion, Justice Jackson explained how demonstrative acts can amount to a form of speech.

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.[73]

Then in a footnote, he extended that anthropological account to demonstrative refusals to act: "Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. . . . The Quakers . . . suffered punishment rather than uncover their heads in deference to any civil authority."[74]

The point is that no merely verbal disclaimer by the Witnesses could really bracket or negate the symbolic and ritual significance of taking part in the flag salute.

In sum, *Barnette* understands a certain dual character to the Jehovah's Witnesses' refusal to salute the flag, which by extension might also describe the contemporary wedding vendor's refusal to provide goods or services for a same-sex wedding. On the one hand, the refusal constitutes what I earlier called an *output* of the machinery of conscience. The legal claim supporting it is not a plea for a religion-based exemption, doctrinally speaking, but it is structurally related to such claims. That might help make sense of the Court's otherwise mysterious emphasis on protecting Ms. Smith's refusal to defy her beliefs, commitments, or conscience, rather than simply (as in a more

72 *Id.* at 642 (majority opinion) (emphasis added).

73 *Id.* at 632.

74 *Id.* at 633 n.13.

typical free speech case) her right to express herself as she wishes. And to the degree that the right asserted involves the output of conscience, that might also support—even in a case framed in freedom of speech rather than freedom of religion terms—the Court's willingness to stretch the outer bounds of the sort of behavior that can conventionally be understood as expressive.

But that also brings us back to the challenge posed earlier. In a polarized age, when religion risks losing its soul to tribal loyalty, do religious folk have some duty to interrogate their willingness to act out their beliefs and commitments to the detriment of others (and to be fair, the same or similar question should be asked of folks on the other side of these disputes)?

Meanwhile, on the other hand, *Barnette* also appreciates the Jehovah's Witnesses' refusal to salute the flag as part of the *input* to conscience. One of Justice Jackson's insights in *Barnette* is that what I have called "propositional exchange" is not limited to straightforward factual or normative claims; it can have a symbolic or affective dimension. Thus, for example, in the school speech case I mentioned earlier,[75] the student's use of vulgarity in her Snapchat post was not a mere ornament; it was central to the content of her message.[76]

Silence is more complicated, of course. For one thing, mere inaction is not necessarily protected speech, which is why it mattered to the Court in *303 Creative* that setting up a website would have, at least according to the parties' stipulation, itself been a form of expressive conduct.[77]

More to my own point, though, silence merits special respect, and possibly special protection, when it can be understood in genuinely ritual terms, as an expressive act that might not pronounce a proposition in the ordinary sense but does affect a symbolic "short cut from mind to mind."[78] Rituals of that sort, however, require gravitas and conviction. They should, to use Robert Cover's words, be embedded in a paideia, rather than simply play out a drama that is essentially "imperial."[79] Nor should they merely lob a missile in the culture wars.

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75 *See supra* note 35 and accompanying text.

76 *See generally* CHRISTOPHER M. FAIRMAN, FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES (2009).

77 *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318–20 (2023).

78 *Barnette*, 319 U.S. at 632.

79 *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 13 (1983).

It is therefore worth asking about Ms. Smith's gravitas and conviction.[80] This is—again—not necessarily a question that a judge could answer or even that any legal doctrine could fully capture.[81] But the rest of us are entitled to ask the question, and to ask similar questions of the other side in such disputes. More important, we should expect all the parties, in good conscience, to ask such questions of themselves. If these cases are really instances of a deep and important normative encounter, then all the parties to the encounter need to interrogate how much their own deeply held principles can accommodate the needs and principles of the others with whom they share a common life.[82]

Polarization is our current state. It need not be our fate. At the end of the day, perhaps, a bit more reverent silence all around would do us all a lot of good.

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80 *Cf.* Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/X9N7-FKGC] (reporting, among other things, that Ms. Smith's "website six months prior to the lawsuit being filed in 2016 does not include any of the Christian messaging that it did shortly afterward and today"); David Post, *Further Thoughts on Standing and the* 303 Creative v Elenis *Case*, REASON: The VOLOKH CONSPIRACY (Mar. 29, 2024, 11:58 AM), https://reason.com/volokh/2024/03/29/further-thoughts-on-standing-and-the-303-creative-v-elenis-case/ [https://perma.cc/RQ67-KXN3] (noting that, several years on, Ms. Smith has still not unveiled her wedding website service and arguing that "[t]his is a 100% made-up case, a Con Law I exam hypothetical masquerading as an actual, concrete dispute").

81 *But cf.*, Post, *supra* note 80 (arguing that a proper standing analysis would have kept Ms. Smith's "100% made-up case" out of court).

82 As I put it in a different context,

> No normative world stands in isolation, especially in moments of crisis. . . . The lesson here is that if the existential encounter between [normative worlds] must be played out on a field defined by both theological and legal categories, it is no less true that the urgency of the encounter can reshape those categories and the long-held assumptions that might have supported them.

Perry Dane, *Encounters on Shifting Ground*, IMMANENT FRAME (Mar. 13, 2019), https://tif.ssrc.org/2019/03/13/encounters-on-shifting-ground/ [https://perma.cc/E3XK-6M7A].