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# SETTING OUR FEET: THE FOUNDATIONS OF RELIGIOUS AND CONSCIENCE PROTECTIONS

Hanna Torlinė\*

## INTRODUCTION

In an article published in 2017 titled *The Equivalence of Religion and Conscience*, Lucien J. Dhooge argues that “religion and conscience are moral equivalents that require equal legal treatment.”<sup>1</sup> In the end, Dhooge concludes that the law should treat religion and conscience as though they are the same. While Dhooge reins in his conclusion just a bit—by noting that we “should proceed with caution in order to address potential negative consequences”<sup>2</sup>—he reaches his conclusion without considering the important, and notably *different*, foundations that underlie the justifications for religious and conscience protections. Dhooge’s conclusion that conscience and religion are “moral equivalents” *might be right*. After all, it is a normative (and complicated) claim. Thus, it’s possible that Dhooge’s conclusion does not miss the mark. But instead of accounting for the wind, setting his feet, knocking the arrow, and taking a calculated shot, Dhooge runs straight for the bullseye, arrow in hand. The result may be desirable, but it also may have been forced.

This Note does not attempt to claim that religion and conscience are *not* moral equivalents, that they are *not* equally important, or that they do *not* require equal legal treatment. Nor does it attempt to claim the converse. Simply put, it argues that a consideration of the different foundations underlying conscience protections and religious protections should give pause to anyone arguing that the two are equivalent. This Note concludes that the rationales behind protecting religion and conscience are different enough to merit consideration in the debate. For if religion and conscience are treated as equivalents under the law, they will be treated *as though they are the same*. When litigants bring religion or conscience cases to the courts, they will be

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\* Candidate for Juris Doctor, Notre Dame Law School, 2020; B.S., Mathematics, B.A., Political Science, Benedictine College, 2017. I would like to thank Professor Gerard V. Bradley for his guidance and feedback throughout this process, as well as Professor Richard W. Garnett for his comments. Of course, many thanks are due to the editors of the *Notre Dame Law Review* for the countless hours spent editing this Note. All errors are my own.

1 Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J.L. ETHICS & PUB. POL’Y 253, 253 (2017).

2 *Id.*

judged *in the same way*. The two will be subject to the same exceptions, the same tests, and the same qualifications. Again, this might be the best result; it might even be the bullseye. But it is also possible that religion and conscience should both be protected *within their separate* (though in some respects, similar) *spheres*. Such an arrangement might better protect religion *and* better protect conscience. Whether conscience should be protected in its own right is an entirely separate question, and one that this Note does not take up. Additionally, if it is decided that conscience *should* be protected on its own merits, this Note will not point to the line where conscience protections should be drawn and compare it to the line marking religious protections. Instead, very simply, this Note argues that the two lines are not measuring the same thing.

Part I of this Note will define three forms of conscience—one that is found only within the context of religion, and two that are found entirely apart from it—and will explain why the secular claims to “conscience” stem from different rights than those supporting religious liberty. Part II will argue that the Founders understood conscience to be intrinsically tied to religion, and it will discuss the role that this conception of conscience played in the early drafts of the Free Exercise Clause of the United States Constitution and in the enacted versions of state constitutions. Part III will progress through a timeline of the Supreme Court’s understanding of the word religion, beginning with the early Court, moving through the conscientious objector cases after World War II, and ending with the Court’s current jurisprudence. Finally, Part IV will argue that the Free Exercise Clause was not intended to incorporate the same protections of conscience which Dhooge argues it should be used to protect today.

## I. DEFINITIONS

### A. Religion

Before proceeding to define conscience, it is first necessary to provide a workable definition of religion. In part, defining religion is the entire crux of this Note, as it concludes that the Supreme Court has defined religion too broadly by drawing the borders of the word around an entirely separate concept: secular conscience. For the purposes of this Note, the definition of “religion” will “adhere[ ] to traditional traits . . . especially the existence of and belief in a supreme being.”<sup>3</sup> This conception of religion encompasses belief systems which include “three components: (1) belief in a deity; (2) with duties in this life; and (3) a future state of rewards and punishments.”<sup>4</sup> While this Note will utilize this definition of religion moving forward, it is not premised on the supposition that this is the correct definition of religion as it is used in the First Amendment. Rather, defining religion in this way simply

<sup>3</sup> *Id.* at 258.

<sup>4</sup> Lee J. Strang, *The Original Meaning of “Religion” in the First Amendment: A Test Case of Originalism’s Utilization of Corpus Linguistics*, 2017 BYU L. REV. 1683, 1687 (2017).

helps to differentiate between the concepts of religion and certain types of conscience.

While the Supreme Court traditionally defined religion as necessitating a belief in a higher being, the Court later broadened its definition to include even agnostic belief systems where

the adherent's words and deeds were motivated by a devotion to goodness and virtue for their own sake . . . as long as such [a] belief system was sincere, meaningful, and occupied a place in the life of the possessor parallel to that occupied by belief in God in the life of a religious adherent.<sup>5</sup>

For now, it is enough to recognize that these two definitions differ from one another and to know that this Note, when talking about “religion,” will be referring to the former definition.

### B. Conscience

Moving now to conscience, Dhooge primarily discusses two types of conscience in *The Equivalence of Religion and Conscience*. These two—“traditional” and “individual”—are the ones most relevant to the Free Exercise Clause. Briefly, this Note will also discuss a third type of conscience: “learned” conscience. The “learned” definition of conscience has not been embraced by legal scholars or judges, so its intricacies are not as important for the purposes of this Note.

The first type of conscience will be called “traditional.” In its simplest form, it claims that “God gave us our conscience.”<sup>6</sup> Thus, traditional conscience is intrinsically linked to a claim of *authority*. Since this traditional conscience is understood as a projection of God’s will into human hearts, many Christians, and undoubtedly those of other theistic religions, believe that following one’s conscience is even more important than following the commands of human authority or of an individual’s autonomous desires. Those who adhere to the traditional view believe that “[m]oral conscience, present at the heart of the person, enjoins him at the appropriate moment to do good and to avoid evil.”<sup>7</sup> This type of conscience was the “battle cry of the Protestant Reformation,”<sup>8</sup> which professed that “God alone is Lord of the conscience.”<sup>9</sup> And *Gaudium et Spes* outlined traditional conscience when it explained that “[i]n the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. . . . [A]

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5 Dhooge, *supra* note 1, at 259 (citing *United States v. Seeger*, 380 U.S. 163, 166 (1965)).

6 Lynne Lee, *How to Hear God—Through Our Conscience*, A CLOSER WALK WITH GOD (Dec. 11, 2006), <http://acloserwalkwithgod.blogspot.com/2006/12/how-to-hear-god-through-our-conscience.html>.

7 CATECHISM OF THE CATHOLIC CHURCH § 1777 (2d ed. 2000) (footnote omitted).

8 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1490 (1990).

9 *Id.* at 1490. This phrase later became a part of the Calvinist Creed. *Id.* at 1490 n.417.

law written by God; to obey it is the very dignity of man; according to it he will be judged.”<sup>10</sup>

Those who adhere to the traditional view of conscience ascribe its foundations to God. Because conscience comes from God, and because a person’s *greatest good* (attaining salvation) depends upon following divine instructions, people must be allowed to follow their consciences. Or, at least, so goes the argument in favor of protecting traditional conscience. For divine instructions—to the believer—carry more authority than the commands of the state or even the desires of the individual himself. Thus, if one believes that the individual has a right, or even a duty, to place God in the *highest* seat of authority, and also believes that conscience is a manifestation of God’s commands, it follows that the state must respect conscience. Even if the state does not recognize the existence of a supreme being, if its citizens (from whom the state derives its power) believe they owe a higher duty to God, the state’s proper role requires it to respect this primary place of God.<sup>11</sup> Such was the view of the Founders, which will be discussed in the next Part.

A second type of conscience will be called “learned.” The learned conscience may be attributed to a few different sources. One claim is that learned conscience is “genetically determined, with its subject probably learned or imprinted as part of a culture.”<sup>12</sup> A person’s learned conscience forms as community standards are imposed upon that person throughout his or her life. Those community standards “teach” the conscience appropriate behavior and values. The psychologist Sigmund Freud spoke of this “learned” conscience when he argued that conscience originated through the sense of guilt we feel upon acting against social norms, which embed

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10 SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD [GAUDIUM ET SPES] § 16 (1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html).

11 *But see* Bruce Ledewitz, *The Vietnam Draft Cases and the Pro-Religion Equality Project*, 43 U. BALT. L. REV. 1, 68–69 (2014) (“Michael Paulsen argues that religious exemptions are only coherent when they are understood to rest on the claim that ‘true religious obligation is more important than civil *obligation*.’ And by true religious obligations, Paulsen means the assumption that God exists and that God’s commands are made known to the believer. For Paulsen, religion in the exemption context must be theistic. While I believe that Paulsen’s account fails as an actual description of government granted religious exemptions from the law . . . I agree with him that for the believer, the commands of God are superior to those of the state. That is true by definition, but . . . [t]he believer does not need the state’s permission to obey God rather than man. The believer is going to be willing to suffer almost any fate, and certainly any fate an American government would impose, rather than disobey God.” (emphasis in original) (footnotes omitted) (quoting Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013))).

12 DUCO A. SCHREUDER, VISION AND VISUAL PERCEPTION 55 (2014).

themselves in individuals through external disapproval of aggression.<sup>13</sup> Similarly, Charles Darwin argued that conscience evolved

from the “greater duration of impression of social instincts” in the struggle for survival. In such a view, behavior destructive to a person’s society . . . is bad or “evil.” Thus, conscience . . . [is] experienced as guilt and shame in differing ways from society to society, and person to person.<sup>14</sup>

If the law were to protect such a view of conscience, that protection would not be derived from the same duty-based theory that supports protecting “traditional” conscience. For, if conscience is a person’s individual, learned response to a community interaction, and if society is responsible for imprinting such a conscience into someone’s mind, then how can a person’s duty to her conscience be distinguished from her duty to society—in other words, to follow the law? Certainly, the state is simply a more formal representation of society’s views and values. Thus, the state’s actions (laws) are often the formalization of a collective, societal conscience. And since the pulls of an individual’s conscience are neither the product of individual choice nor the imprint of the will of God, there is no higher authority to which the state should submit. This is not to say that there are no *other* justifications for protecting learned conscience. But duty is not one of them, and neither Dhooge nor the Supreme Court have offered alternatives. Thus the merits—or demerits—of its protection will be left for other scholarship.

Finally, the most popular conception of conscience, at least as it is used today, will be called “individual.” Dhooge describes this type of conscience when he identifies its two main features: belief and response.<sup>15</sup> He writes that “[b]elief refers to individual notions of right and wrong, which in turn influence decision-making and judgments.”<sup>16</sup> One scholar describes individual conscience as “defined by the individual, therefore reflecting subjective concepts chosen by the individual alone.”<sup>17</sup> This conscience does not necessarily come from *God*, nor is it imposed upon an individual by society. It is instead the result of the individual’s own moral judgments.

Dhooge points to the right in which such a freedom of individual conscience might be grounded: “Decisions and judgments based upon such evaluations create a moral consciousness for each individual and provide him or her with a sense of self. This ‘moral consciousness’ and ‘sense of self’ are entitled to respect by others as an affirmation of individual autonomy and personhood.”<sup>18</sup> His argument claims that individual conscience is entitled to

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13 See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 82–90 (James Strachey ed. & trans., 2017) (1930); ERICH FROMM, *GREATNESS AND LIMITATIONS OF FREUD’S THOUGHT* 126–27 (1980).

14 Leon L. Combs, *Conscience*, *LIVING THEOLOGY* (Apr. 2010), <http://livingtheology.com/Conscience.html>.

15 Dhooge, *supra* note 1, at 266.

16 *Id.*

17 Laura S. Underkuffler, *Individual Conscience and the Law*, 42 *DEPAUL L. REV.* 93, 93 (1992).

18 Dhooge, *supra* note 1, at 266–67 (footnote omitted).

protection because of the importance and primacy of *individual autonomy*. Maybe so, but this argument does not sound in the same vein as the duty-based argument for traditional conscience. Such a duty-based argument *could* be made for individual conscience, which might be similar to that for protecting “traditional” conscience. The right to individual conscience might stem from a duty owed to something higher than the state; but, unlike in the case of traditional conscience, that duty would be owed not to God, but to *oneself*. Thus, in order to argue for *its* protection, this argument must claim that a person’s duty to his or her *self* occupies a higher place in his or her life than that person’s duty to the *state*. If so, this is a hierarchy that the state should protect, just as it protects the religiously motivated hierarchy that recognizes God as above the self and the state.<sup>19</sup> But this is only the case if we can first justify the hierarchy that places the individual above the state. Neither this Note nor Dhooge’s article attempts to do so.

## II. THE FOUNDERS’ CONCEPTION OF CONSCIENCE

Generally present in the thought of the early Founders and in Supreme Court jurisprudence was the first of these three definitions of conscience. The Founders conceived of conscience as “either expressly or impliedly limited to religious conscience.”<sup>20</sup> Many of John Locke’s ideas on religious toleration provided the foundation for the Founders’ strong preference for religious liberty and religiously motivated conscience claims. “Locke thought that coercing people into religious beliefs was contrary to Christianity and ultimately ineffective because only freely held beliefs led to salvation.”<sup>21</sup> At

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19 Dhooge goes further by asking, “specifically, what types of belief may serve as a motivating factor for acts to be deemed those of conscience?” *Id.* at 267. Are they only those beliefs which address life’s ultimate questions? Or those which concern morality? Dhooge rejects that the “ultimate questions” aspect is necessary and ignores the morality question by stating that individual cases will show that such a distinction will be unnecessary in practice, as “claims of conscience for which legal protection is sought almost always involve moral content rather than personal predilection.” *Id.* at 268 (citing Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 908 (2010)). In sum, the idea of individual conscience involves a “conscience-based response[, which] is ‘a kind of moral imperative central to one’s integrity as a person.’” *Id.* at 269 (quoting BRIAN LEITER, *WHY TOLERATE RELIGION?* 95 (4th prtg. 2014)).

20 McConnell, *supra* note 8, at 1493.

21 Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1465 (2013) (footnote omitted). It is further important to note that in 1620, the English settlers fled to America in large part to escape religious persecution in their home country. The ensuing settlers largely followed in their footsteps, many as Protestants looking to remove themselves from the hold of the Church of England, or the Anglican Church. But scholarship regarding early American religion focuses too often on the specific religious views of the Founders or on the fact that some colonies proceeded to establish churches while ignoring the reality that America began primarily as a “religious refuge.” In fact, many of the settlers in the seventeenth century entered America “in the face of European persecution, refus[ing] to compromise passionately held [Christian] religious convictions.” *Religion and the Founding of the American Republic: America as a Religious Refuge: The Seventeenth Century, Part 1*, LIB. CONG., <https://www.loc.gov/exhibits/religion/rel01.html>.

the same time, Locke did not extend his “toleration” to nontheistic belief systems.<sup>22</sup> His belief in religious toleration was inextricably tied to his desire to attain “the salvation of [men’s] souls”<sup>23</sup>:

For there being but one Truth, one way to heaven; what hopes is there that more men would be led into it, if they had no Rule to follow but the Religion of the Court; and were put under a necessity to quit the Light of their own Reason; to oppose the Dictates of their own Consciences; and blindly to resign up themselves to the Will of their Governors, and to the Religion, which either Ignorance, Ambition, or Superstition had chanced to establish in the Countries where they were born? . . . [If this were the case,] Men would owe their eternal Happiness or Misery to the places of their Nativity.

These Considerations, to omit many others that might have been urged to the same purpose, seem unto me sufficient to conclude, that all the Power of Civil Government relates only to Mens [sic] Civil Interests; is confined to the care of the things of this World, and hath nothing to do with the World to come.<sup>24</sup>

Although Locke’s ideas were not generally accepted in England, Thomas Jefferson and James Madison built upon them, extending Locke’s religious “toleration” to the greater ideal of religious “freedom.” In the Virginia Declaration of Rights, George Mason adopted some of Madison’s language regarding religious toleration, settling on:

[R]eligion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .<sup>25</sup>

Thirteen years later, in 1789, the United States’ Bill of Rights was submitted to the states for ratification. Before its adoption in 1791, the text of the First Amendment underwent numerous changes. Some of the drafts specifically included the word *conscience* as protected equally alongside religion. But the final draft did not include the word.<sup>26</sup> Why would that be? One possibility is that the Founders meant conscience in the *traditional* sense; to them, ideas of conscience and religion were intrinsically linked. If so, then there could be no conscience without a religious basis, for, as Thomas Paine argued in *Rights of Man*, “[m]an worships not himself, but his Maker; and the liberty of conscience which he claims, is not the service of himself, but of his

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22 JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 52–53 (Mark Goldie ed., 2010).

23 *Id.* at 9.

24 *Id.* at 14–15 (footnote omitted).

25 VA. DECLARATION OF RIGHTS of 1776, art. XVI. The Virginia Declaration of Rights was drafted by George Mason but the final version was adopted in 1776 after changes were made by Robert C. Nicholas and James Madison. Library of Va., *The Virginia Declaration of Rights, June 12, 1776*, SHAPING CONSTITUTION, [http://edu.lva.virginia.gov/online\\_classroom/shaping\\_the\\_constitution/doc/declaration\\_rights](http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/declaration_rights).

26 U.S. CONST. amend. I.

God.”<sup>27</sup> Thus, for the Founders, including the free exercise of “conscience” along with the free exercise of “religion” would have been redundant.

A look at the debates in the First Congress regarding the Free Exercise Clause will show this connection between conscience and religion. Although most of the disagreement in the recorded debates in the House of Representatives was focused on the Establishment Clause, important changes were made to the Free Exercise Clause as well. In fact, Madison’s initial proposal for the Free Exercise Clause was much more expansive than what was, in time, adopted. In 1789, Madison proposed the following: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”<sup>28</sup> But when the Senate debated the religion clauses, the drafts were much shorter. Three versions were adopted and then rejected. In order, they are: “Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed”;<sup>29</sup> “Congress shall make no law establishing religion, or prohibiting the free exercise thereof”;<sup>30</sup> and “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . .”<sup>31</sup> Finally, the version proposed by a Conference Committee on which Madison served was ratified, preferring “free exercise of religion” to “rights of conscience.”<sup>32</sup>

An objection to the omission of “rights of conscience” was only voiced by the representatives of Virginia. “In Virginia, the Senate delayed ratification of the first amendment, partly on the ground that it ‘does not prohibit the rights of conscience from being violated or infringed.’”<sup>33</sup> But since neither Virginia’s own bill of rights nor the federal amendment that the state proposed included this language, the historian Leonard Levy opines that Virginia’s opposition might be better attributed to “Antifederalist political maneuvering rather than to serious substantive opposition to the language of the first amendment,”<sup>34</sup> especially considering the fact that Virginia later ratified the same amendment without complaint. Similarly, Dhooge argues that the fact that the terms “religion” and “conscience” were synonymous, or “interchangeab[le at the time of the Founding,] renders the exclusion of

27 THOMAS PAINE, *THE RIGHTS OF MAN* 78 (8th ed. 1791).

28 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834)(proposal of James Madison, June 8, 1789).

29 CTR. FOR LEGISLATIVE ARCHIVES, NAT’L ARCHIVES, CONGRESS CREATES THE BILL OF RIGHTS 30 (2015), [https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR\\_IIA.pdf](https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR_IIA.pdf).

30 *Id.* at 29 (quoting CONST. art. III).

31 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 166 (Linda Grant De Pauw ed., 1972).

32 McConnell, *supra* note 8, at 1484.

33 *Id.* at 1485 (quoting C. ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT* 145 (1964)).

34 *Id.* (citing LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 86–89 (1986)).

conscience from the Free Exercise Clause and the reasons, thereof, of lesser importance.”<sup>35</sup>

Further discussions of conscience by the Founders support the proposition that conscience and religion were seen as interchangeable (and thus that the Founders conceived of conscience in the *traditional* sense). James Madison, when lending support for the Bill of Rights, claimed that, despite the absence of the word “conscience” in the text, the Free Exercise Clause meant “that Congress should not . . . compel men to worship God in any manner contrary to their *conscience*.”<sup>36</sup> So we must ask: What exactly did Madison *mean* by conscience? To begin, Madison’s comments regarding the disestablishment of religion in Virginia in 1785 might be of some help. Madison supported the disestablishment, stating that “[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”<sup>37</sup> Madison’s desire to prohibit government infringement on religion and conscience is illuminated by a statement he made at the Virginia Ratifying Convention. There, Madison stated that “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.”<sup>38</sup> Essentially, Madison believed that religion occupied a place beyond the reach of the government. A place, in other words, *above* its reach.

Samuel Adams’s words, too, are helpful in understanding the Founders’ conceptions of religion and conscience. Adams delivered his famous “On American Independence” speech in Philadelphia just one day before the Declaration of Independence was signed: “[F]reedom of thought and the right of private judgement in matters of conscience, driven from every other corner of the earth, direct their course to this happy country as their last asylum. Let us cherish the noble guests and shelter them under the wings of a universal toleration.”<sup>39</sup>

Undoubtedly, Adams’s speech glitters with language of toleration and freedom of *conscience*. But just as undoubtedly, Adams’s use of the word “conscience” was tied to a *traditional* view of conscience, which had a religious connotation. The very next line of Adams’s speech implores the United States to “[b]e . . . the seat of unbounded religious freedom.”<sup>40</sup> And the speech includes an explanation of *why* religious toleration is necessary. Adams explains that the reformers in England “lopped off indeed some of the branches of popery, but they left the root and stock when they left us

35 Dhooge, *supra* note 1, at 278.

36 1 ANNALS OF CONG. 730 (1789) (Joseph Gales ed., 1834) (emphasis added).

37 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901).

38 *General Defense of the Constitution*, [12 June] 1788, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0077> (last visited Oct. 21, 2019).

39 Samuel Adams, *On American Independence*, in 1 MEMORABLE AMERICAN SPEECHES 69, 89 (John Vance Cheney ed., 1907).

40 *Id.*

under the domination of human systems and decisions, usurping the infallibility which can be attributed to revelation alone.”<sup>41</sup> He argues that independence was necessary because the British government had “dethroned one usurper only to raise up another; they refused allegiance to the pope only to place the civil magistrate in the throne of Christ, vested with authority to enact laws and inflict penalties in his kingdom.”<sup>42</sup> Here Adams, like Madison, makes a claim that the highest authority is found in the commands of God. Such commands must be followed above all others, even those of the state.

Such a view of God’s authority was shared by most of the Founding generation: “Religious freedom, as understood by the Founders, could . . . be seen as the most important right, because it is founded on the highest *duty* of the individual: the duty that he owes the Creator to worship Him according to the dictates of his own conscience . . . .”<sup>43</sup> Thus, the guarantee of the First Amendment to protect the free exercise of religion was intended by the Founders to protect the duty that a person might owe or believe he owes to a higher power.

The same reasoning protected a person’s right to traditional conscience, since throughout the early history of America, “the vast preponderance of references to ‘liberty of conscience’ . . . were either expressly or impliedly limited to *religious* conscience.”<sup>44</sup> James Madison “used the terms ‘free exercise of religion’ and ‘liberty of conscience’ interchangeably when explaining the meaning of the first amendment.”<sup>45</sup> Samuel Adams linked “matters of conscience” to “religious freedom.” And even Dhooge admits that, at the time of the Founding, “‘religion’ and ‘conscience’ were interchangeable”<sup>46</sup> terms. And because conscience was so intrinsically tied to religion—as conscience was something that was given to people by God as a sign of His will for their lives—“[t]he primary argument for religious freedom . . . was the inviolability of conscience.”<sup>47</sup> It is from this early understanding of conscience and religion that the Supreme Court began to work on defining (and expanding) the term itself.

### III. THE SUPREME COURT’S UNFOLDING UNDERSTANDING OF “RELIGION”

This Part will track the Supreme Court’s definitions of both conscience and religion throughout different time periods of America’s history, and it will explain how this progression has brought us to the working definitions that exist today. The focus is primarily on cases the Court decided regarding

41 *Id.* at 88–89.

42 *Id.* at 89.

43 David Upham, *The Primacy of Property Rights and the American Founding*, FOUND. ECON. EDUC. (Feb. 1, 1998) (emphasis added), <https://fee.org/articles/the-primacy-of-property-rights-and-the-american-founding/>.

44 McConnell, *supra* note 8, at 1493 (emphasis added).

45 *Id.* at 1494.

46 Dhooge, *supra* note 1, at 278.

47 *Id.*

the Free Exercise Clause, as these cases most clearly address the different conceptions of conscience as they are discussed in this Note. The general theme throughout the Supreme Court's decisions and its definition of religion (and inclusion or exclusion of conscience) is "expansion." In each new era, religion is more expansively and broadly defined.

### A. *Early Cases*

In early Supreme Court cases, "traditional traits"<sup>48</sup> were used to define religion. In particular, religion was intrinsically linked to belief in the existence of a divine or supreme being. Prior to the ratification of the Constitution, "[t]here was no recorded controversy . . . in which the right of 'conscience' was invoked on behalf of beliefs of a political, social, philosophical, economic, or secular moral origin."<sup>49</sup> The same notions extended throughout early Supreme Court cases, as it was commonly recognized that religion would not include beliefs attributed to a person's secular (here, "individual" or "learned") conscience; it was supposed that those beliefs stemmed from the individual or that individual's society and community, but not from God.

Early Supreme Court jurisprudence adopted the view that religion was intrinsically tied to belief in a creator or higher power. In 1890, the Court said that religion "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."<sup>50</sup>

### B. *Conscience with Respect to Military Service during the Vietnam Era*

During the era following the first two World Wars and into the Vietnam War, the Supreme Court, for the first time in its history, "extended religious exemptions to persons with essentially secular claims of conscience."<sup>51</sup> It is possible that the Court's jurisprudence in these cases serves only as an oft-studied exception for the Court, but its decisions undoubtedly illuminate our relevant inquiries. Three cases will be discussed in this Section, all of which deal with war-time conscientious objectors: *United States v. Seeger*,<sup>52</sup> *Welsh v. United States*,<sup>53</sup> and *Gillette v. United States*.<sup>54</sup>

In 1958, Congress had broadened the Universal Military Training and Service Act to allow a draft exemption to anyone who, "by reason of [their] religious training and belief, [is] conscientiously opposed to participation in

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48 *Id.* at 258.

49 McConnell, *supra* note 8, at 1494.

50 *Davis v. Beason*, 133 U.S. 333, 342 (1890).

51 McConnell, *supra* note 8, at 1491 n.420.

52 380 U.S. 163 (1965).

53 398 U.S. 333 (1970).

54 401 U.S. 437 (1971).

war in any form.”<sup>55</sup> The statute specifically defined religious training and belief as “an individual’s belief in a relation to a Supreme Being involving *duties superior to those arising from any human relation*, but [did] not include essentially political, sociological or philosophical views or a merely personal moral code.”<sup>56</sup> The Supreme Court first considered a challenge to this statute in *Seeger* and came to a unanimous decision, authored by Justice Clark, that nontheistic belief systems fell within the statutory definition of religion.<sup>57</sup>

In 1965, the Court in *Seeger* defined religion more broadly than it ever had before. First, it stated that the term “God” included not only what might be considered the “orthodox God,” but also “the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent.’”<sup>58</sup> The Court quoted the philosopher and theologian Paul Tillich, who essentially argues that it is not possible to derive meaning from meaninglessness. In a passage quoted by the Court, Tillich writes that there exists such a state where “the God of both religious and theological language disappears,” but still a higher meaning (and thus, he argues, religion) is found in “the seriousness of that doubt in which meaning within meaninglessness is affirmed.”<sup>59</sup> Thus, taking cues from Tillich, the Court reasoned that even if a man might not attribute his beliefs to a particular religion or even describe them as *religious* at all, they are religious in nature if he derives from those beliefs some sort of *meaning*.

The Court then stated that the appropriate test to apply when determining whether a particular belief falls within the protections of the exemption statute “is [to ask] whether a given belief that is sincere and meaningful occupies a place in the life of its possessor *parallel* to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”<sup>60</sup> This test asks whether the meaning that the belief in question affirms is *as meaningful* as one’s belief in the orthodox God might be. Bear in mind that, despite its broad definition of God, the Court still maintained that “in the forum of conscience, duty to moral power higher than the State has always been maintained.”<sup>61</sup>

Thus, although the *Seeger* Court focused on the importance, or *meaningfulness*, of one’s sincerely held belief (whether traditionally characterized as religious or not), Justice Douglas in his concurrence still felt the need to note that none of the claimants professed to be “an avowedly irreligious person

55 *Ledewitz, supra* note 11, at 47 (first alteration in original) (quoting Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

56 *Id.* (emphasis added) (quoting Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

57 *United States v. Seeger*, 380 U.S. 163 (1965).

58 *Id.* at 174 (citation omitted).

59 *Id.* at 180 (internal quotation marks omitted) (quoting 2 PAUL TILlich, *SYSTEMATIC THEOLOGY* 12 (1957)).

60 *Id.* at 165–66 (emphasis added).

61 *Id.* at 170 (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, J., dissenting)).

or . . . an atheist.”<sup>62</sup> But why was this distinction necessary to make? Does it imply that the result might have been different if a claimant had insisted that he was a staunch atheist? Perhaps if one of the claimants had in fact called his beliefs nonreligious, it might be more accurate to say that *Seeger* “eroded any distinction between religious and nonreligious claims to conscientious objection,”<sup>63</sup> as Professor Kent Greenawalt so claimed. But as it stands, the Supreme Court in *Seeger*, at the very least, avoided *stating* that it was doing any such thing. Instead, the Court found meaning in the claimant’s beliefs, and thus attributed that *meaning* to a broadly defined “God.” In other words, it found that the claimant’s beliefs *were in fact religious*, whether the claimant himself recognized them as such or not.

The following case, *Welsh v. United States*, came five years after *Seeger* and dealt with the same statute. However, in 1967, an important change was made to the Military Selective Service Act: Congress deleted the words “Supreme Being” from the conscientious objector statute after the Supreme Court’s opinion in *Seeger* was released.<sup>64</sup> It was with this new language—and the seeming assent of Congress to the Court’s prior decision—that *Welsh* was considered.

In a plurality opinion authored by Justice Black, the Court in *Welsh* reached the same conclusion that it had in *Seeger*, while at the same time failing to reaffirm its prior reasoning. Under the facts of the case, *Welsh* had altered the draft exemption application by striking the words “my religious training and” from the form, and stating that it was an open question whether or not he believed in a Supreme Being.<sup>65</sup> Although not compelled by religious belief, *Welsh* “believed that killing in war was wrong, unethical, and immoral, and [his] conscience [ ] forbade [him] to take part in such an evil practice.”<sup>66</sup> The plurality seized this opportunity to take a substantive move forward in the Court’s jurisprudence.

Instead of claiming, as the Court did in *Seeger*, that the claimant’s beliefs *were* religious and involved some belief in meaning and thus “God,” Justice Black rather said that:

What is necessary under *Seeger* for a registrant’s conscientious objection to all war to be “religious” within the meaning of [the Universal Military Training and Service Act] is that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.<sup>67</sup>

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62 *Id.* at 193 (Douglas, J., concurring).

63 Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 909 (2010).

64 See Ledewitz, *supra* note 11, at 50–51 (“This change did not figure directly in the Court’s next case, *Welsh*, but on the other hand, the statutory change must have been viewed by some of the Justices as supportive of the general approach in *Seeger*, an approach upon which the *Welsh* plurality relied to an overwhelming degree.”).

65 *Welsh v. United States*, 398 U.S. 333, 335–37 (1970) (plurality opinion).

66 *Id.* at 337.

67 *Id.* at 339–40.

By finding it necessary to separate “moral, ethical, *or* religious beliefs,” Justice Black was essentially saying that these types of beliefs are distinct, and that beliefs which are *not* religious but are moral or ethical should be protected as well. Again, this reasoning is not the same as that in *Seeger*, which affirmed that only religious beliefs should be protected, even while it broadened what religion itself encompassed.

The plurality in *Welsh* went even further by stating that nonreligious belief systems might occupy “a place parallel to that filled by . . . God”<sup>68</sup> in individual persons. If this is the case, the plurality argued, they should be afforded the same protection.<sup>69</sup> But again, here the Court did not attempt to say that secular conscience is the same as religion. Instead, it said that secular conscience is entitled to protection if it occupies “a place parallel to that filled by . . . God”<sup>70</sup> in people of faith, and such conscience claims could be based even on “history and sociology.”<sup>71</sup> It thus said that secular conscience claims are as important as religious claims and extended the protections of the statute to entirely nonreligious claims.<sup>72</sup>

It is necessary to note Justice Harlan’s concurrence in *Welsh*, in which he stated that the Court in *Seeger*—of which he was a part—had “‘embrac[ed] a secular definition of religion’ that conflicted with Congress’ language and intent.”<sup>73</sup> While Justice Harlan argued that the Court could not simply rewrite the statute against Congress’s intentions, he said that Congress had violated the Establishment Clause by allowing conscientious objection based on religion but disallowing the same objection based on “secular beliefs.”<sup>74</sup> Further, he argued that Congress had violated the Establishment Clause by preferring “theistic or nontheistic religious beliefs on the one hand,” over

68 *Id.* at 340 (omission in original).

69 *Id.* at 340 (“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God.’” (omission in original)).

70 *Id.* (omission in original).

71 Dhooge, *supra* note 1, at 259.

72 It is perhaps helpful in considering these three conscientious objector cases to look back to a statement made in 1789 by Thomas Scott, a Representative of Pennsylvania, who, when discussing a constitutional exception for those “religiously scrupulous [of bearing arms],” stated:

There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretenses to get excused from bearing arms.

1 ANNALS OF CONG. 767 (1789) (Joseph Gales ed., 1834).

73 Ledewitz, *supra* note 11, at 53–54 (alteration in original) (citing *Welsh*, 398 U.S. at 353 (Harlan, J., concurring)).

74 *Welsh*, 398 U.S. at 356 (Harlan, J., concurring).

“secular beliefs on the other.”<sup>75</sup> While the latter argument may hold more weight, the former would seem to imply that the Free Exercise Clause *itself* violates the Establishment Clause. Although the Court has noted that there may be a limited “room for play in the joints” between the two clauses,<sup>76</sup> surely it is not reasonable to read either so that the two are entirely at odds.<sup>77</sup>

Tangentially, only one year after *Welsh*, the Supreme Court decided *Gillette*, in which the first claimant, Gillette, argued that he objected to the Vietnam War “based on a humanist approach to religion,” and the second claimant, Negre, argued that the Catholic “just war” theory prevented him from participating in the war.<sup>78</sup> Both of these claimants held out their beliefs as *religious* in nature, and the Court did not dispute this, although Justice Douglas contested whether humanism might be fairly construed as “religious.”<sup>79</sup> But the majority of the Court, and Justice Douglas, except in passing, did not decide whether the claimants’ beliefs were religious in nature.<sup>80</sup> The Court took for granted that they were religious because the claimants said so. Thus, although sometimes analyzed in detail,<sup>81</sup> any discussion of the “fit” of humanism into religion in *Gillette* is merely dicta.

### C. *The Supreme Court’s Definition of Conscience Today*

After the Supreme Court’s decisions in these three conscientious objector cases, some have argued that they represent an *exception* to the Supreme Court’s jurisprudence regarding religion throughout the 1960s and 1970s.<sup>82</sup> It is notable that, after *Welsh*, it seemed as though the Court would not require a person’s stated belief system to be “religious” in nature because secular claims of conscience based on science, history, politics, or moral phi-

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75 *Id.*

76 *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)); see *Davey*, 540 U.S. at 719 (“[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”).

77 *Gillette v. United States*, 401 U.S. 437, 465–66 (Douglas, J., dissenting) (“It is true that the First Amendment speaks of the free exercise of religion, not of the free exercise of conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied First Amendment right of ‘conscience’ is certainly as high as the ‘right of association’ . . .”). But see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012) (“We have said that [the Free Exercise Clause and the Establishment Clause] ‘often exert conflicting pressures,’ . . . and that there can be ‘internal tension . . . between the Establishment Clause and the Free Exercise Clause.’” (citing *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion))).

78 *Gillette v. United States*, 401 U.S. 437, 439–41 (1971).

79 Speaking largely of *Welsh*’s reasons for objection to the draft, Justice Douglas wrote that “[c]onscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense.” *Id.* at 466 (Douglas, J., dissenting).

80 *Id.* at 440, 475.

81 See Ledewitz, *supra* note 11, at 55.

82 See *id.* at 47.

losophy were sufficiently *close* to religion to be protected—even under a statute that expressly mentions religion as the only basis for protection. But only one year after *Gillette* was decided and two after *Welsh*, in 1972, the Supreme Court decided *Wisconsin v. Yoder*.<sup>83</sup> In *Yoder*, the Court wrote that “[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”<sup>84</sup> Did this put the nail in the coffin for any attempt to equate religion and conscience in the law? The distinction between religion and secular belief was elaborated upon by Justice Brennan—who had concurred in *Welsh*—in a 1983 dissenting opinion, as he wrote that “in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.”<sup>85</sup> Notice that Justice Brennan focused on *religiously* motivated claims of conscience. Perhaps the Court’s return to a principled distinction between religion and secular conscience was an available route only because *Welsh* was decided by a plurality of the Court. But, needless to say, the language of *Yoder* seems to directly contradict the plurality’s language in *Welsh*. It is with this understanding that we move to a discussion of the Court’s current conception of the relationship between conscience and religion.

In this discussion, we must consider the rhetoric present in the Court’s major decisions regarding not only conscience but also personal sovereignty, as personal sovereignty is often touted as the theoretical basis for liberty of conscience.<sup>86</sup> The famous *Casey* mystery passage, written in 1992, states that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>87</sup> Such a definition of liberty has been echoed by the Court in the years following *Casey*.<sup>88</sup> But other statements made by the Court have taken the position that religious and secular beliefs—even those dictated by sincere personal convictions—are still not similar enough to enjoy the *same* protections under the Constitution. In *Hosanna-Tabor*, a 2012 decision, the Court wrote the following:

83 406 U.S. 205 (1972).

84 *Id.* at 215–16

85 *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting).

86 See generally Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445 (1983).

87 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). The mystery passage was famously written by Justice Kennedy in *Casey*, a case reaffirming *Roe v. Wade*, 410 U.S. 113 (1973).

88 See, for example, *Lawrence v. Texas*, 539 U.S. 558, 574, 578–79 (2003), where the Court, citing *Casey*’s mystery passage, struck down a sodomy law in Texas based in part on the individual’s ability to act in accord with his conscience.

According to the EEOC and [plaintiff], religious organizations could successfully defend against employment discrimination claims . . . by invoking the constitutional right to freedom of association—a right “implicit” in the First Amendment. The EEOC and [plaintiff] thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and [plaintiff]’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.<sup>89</sup>

Thus, the majority in *Hosanna-Tabor* affirmed that there is something *unique* about religion.<sup>90</sup> Justice Alito’s concurring opinion in the case is even more relevant, as he wrote:

Throughout our Nation’s history, religious bodies have been the preeminent example of private associations that have “act[ed] as critical buffers between the individual and the power of the State.” . . . To safeguard . . . crucial [religious] autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.<sup>91</sup>

Similarly, in another case, decided in 1993, almost twenty years prior, Justice Souter reiterated the grounding on which the Free Exercise Clause was based. He wrote that “[t]he extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God.”<sup>92</sup> On the other hand, a more recent Supreme Case, decided in mid-2018, briefly discussed the “confluence of speech and free exercise principles.”<sup>93</sup> In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Colorado baker, Jack Phillips, claimed that his religious beliefs did not permit him to make a custom wedding cake for a

89 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (internal citations omitted).

90 One scholar explains how this “special” treatment given to religion differs from the Court’s treatment of religion during the draft era. See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 43–44 (1996) (explaining how, although the *text* of the Free Exercise Clause “seems to favor choices *for* religion over choices *against* religion,” the Court “avoid[ed] this textual limitation [during the draft era by defining] ‘religion’ very broadly—so broadly that even disbelief is a kind of religion”). Regarding whether religion is “special,” see Christopher C. Lund, *Religion is Special Enough*, 103 *VIRGINIA L. REV.* 481 (2017).

91 *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)).

92 *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in the judgment).

93 *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

gay marriage ceremony—a “marriage[ ] the State of Colorado itself did not recognize at that time.”<sup>94</sup> The 7–2 majority Supreme Court opinion stated that “[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.”<sup>95</sup> But the Court then clarified that *because* this exception would be limited and “well understood in our constitutional order as an exercise of religion, [it was] an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.”<sup>96</sup> However, this relied on the premise that the exception would need to be “confined” in some respect so that it would not result in a “community-wide stigma inconsistent with the history and dynamics of civil rights laws.”<sup>97</sup>

The Court’s ultimate decision in favor of Phillips in *Masterpiece Cakeshop* was largely limited to and based upon the hostile treatment he received from the Colorado Commission during the unfolding of his case. It noted that in three previous cases, the Colorado Commission had permitted bakers to refuse to bake cakes which violated their *nonreligious* consciences.<sup>98</sup> But the Court’s discussion of the case still very clearly separated the *language* of conscience—which it used to describe *nonreligious* decisions and beliefs—and religion, which it used to describe Phillips’s beliefs that depend on a duty that he believes is owed to a being higher than the State. This distinction is what the Court used to assure that such an exception would be limited. And the use of such a discussion prompts the conclusion that the Court’s draft-era cases may in fact have been an exception to its general inclination to distinguish between religion and individual conscience.

#### IV. SHOULD WE EQUATE RELIGION AND CONSCIENCE?

Under the general conception of conscience today—that of individual conscience—“conscience grants freedom from coercion regarding beliefs and actions that violate an individual’s principles.”<sup>99</sup> And, as Dhooge explained in his recent article:

The exercise of conscience is simply different from the exercise of religion. Religious belief[s] . . . involve some degree of surrender of individual autonomy based upon their shared nature. Conscience-based beliefs and responses are expressions of autonomy exercising a universal faculty possessed by all and drawing upon each individual’s pool of moral knowledge.<sup>100</sup>

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94 *Id.* at 1723.

95 *Id.* at 1727.

96 *Id.*

97 *Id.*

98 *See id.* at 1730.

99 Dhooge, *supra* note 1, at 279; *see also* OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS IN COOPERATION WITH THE INT’L BAR ASS’N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE 521–630 (2003).

100 Dhooge, *supra* note 1, at 280 (footnotes omitted).

Thus, the basis for protecting the exercise of religion—at least as understood by the Founders—is different from the basis for protecting the exercise of individual, secular conscience. And although Dhooge recognizes that this may be true, he nevertheless concludes that religion and conscience demand moral equivalence and thereby should be protected the same under the law.<sup>101</sup>

Primarily, Dhooge argues their equivalence because “[p]rotection of communal religious beliefs and acts without protection of their individualized and nonreligious equivalents is unfair.”<sup>102</sup> He believes that “protection of religion and conscience constitutes respect for personhood owed to individuals by their governments. If religion and conscience are central to individual identity, it follows that governmentally-compelled violations infringe upon personhood.”<sup>103</sup> In making his assessment, Dhooge is correct. For *if* religion and conscience should both be protected because they are central to individual identity, then it would follow that they could be protected together under a personhood claim.

But this is precisely where Dhooge misses the mark. For the Founders did not include the free exercise of religion as a protected right because of concerns of *personhood*. Rather, they included it because of concerns of *duty*, and the obligation of the individual to discharge this duty *freely* and without coercion.<sup>104</sup> In fact, duty to a creator and the ability to follow one’s religious convictions may be the opposite of individual personhood and autonomy, for the directions one is following flow from something other than oneself.<sup>105</sup> A respect for the *higher* duty one owes to God was the basis for the Free Exer-

101 *See id.* at 280–81.

102 *Id.* at 280.

103 *Id.* at 281 (footnote omitted).

104 McConnell, *supra* note 8, at 1496–97 (“Not until the second third of the nineteenth century did the notion that the opinions of individuals have precedence over the decisions of civil society gain currency in American thought. In 1789, most would have agreed with Locke that ‘the private judgment [here ‘individual conscience’] of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.” Religious convictions were of a different order. Conflicts arising from religious convictions were conceived not as a clash between the judgment of the individual and of the state, but as a conflict between earthly and spiritual sovereigns. The believer was not seen as the instigator of the conflict; the believer was simply caught between the inconsistent demands of two rightful authorities, through no fault of his own. . . . Not only were the spiritual and earthly authorities envisioned as independent, but in the nature of things the spiritual authorities had a superior claim. ‘[O]bedience is due in the first place to God, and afterwards to the laws’ according to Locke.” (second alteration in original) (quoting 6 JOHN LOCKE, *A Letter Concerning Toleration*, in THE WORKS OF JOHN LOCKE 1, 43 (photo reprint. 1963) (London, 1823) (1689))).

105 *See id.* at 1497 (“Far from being based on the ‘respect for the person as an independent source of value,’ the free exercise of religion is set apart from mere exercise of human judgment by the fact that the ‘source of value’ is prior and superior to both the individual and the civil society. The freedom of religion is unalienable because it is a duty to God and not a privilege of the individual.” (quoting DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 142 (1986))).

cise Clause. It is possible that the same conclusion could be drawn regarding the free exercise of one's conscience; if a person's conscience holds a higher claim to his or her actions because the duty to *oneself* is higher than the duty to society, the foundation may be the same. But this is simply a question of *ought*. *Ought* the duty we owe to ourselves be placed higher than the duties we owe to one another? Or might we protect individual, secular conscience claims for different reasons?

If individual conscience should be protected because of a concern for *duty*, then it might be fair to ground the right in the Free Exercise Clause. But if, rather, conscience should be protected out of respect for individual *personhood*, then the argument for its protection might be better grounded elsewhere in the Constitution. For example, if forcing someone to go against the dictates of their secular conscience involves an action, then such an act might be better characterized as expressive conduct, since its suppression involves the suppression of an individual's ideas.<sup>106</sup> Such a value is closer linked to the First Amendment's protection of speech—and thereby expression—than the protections of religion. Here, one might argue that the reasons the state protects speech or expression and the reasons it would want to protect individual conscience are closely aligned.

Alternatively, a person's right to *liberty* might more accurately encompass individual conscience than does that person's right to the free exercise of religion. Again, quoted from a 1992 Supreme Court decision: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>107</sup> Undoubtedly, this phrase invokes the idea of conscience as it is used today—in a secular, individual sense. A person's individual conscience helps her to determine "meaning" and *her concept* of "the mystery of human life."<sup>108</sup> But instead of claiming that the compulsion of these beliefs could not then comprise a true faith in God, or a true submission to a higher power, the Court argues that compelling the state's concept of existence, meaning, or the universe upon an individual would not allow

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106 Professor Weil argues that this might be the conception that Justice Stevens held regarding conscience when writing his opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 347 (2017). He then connects this idea to that of John Stuart Mill, who wrote in *On Liberty*:

[T]he appropriate region of human liberty . . . comprises, first, the inward domain of consciousness; demanding liberty of conscience . . . . The liberty of expressing and publishing opinions may seem to fall under a different principle . . . but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.

*Id.* (alterations in original) (quoting JOHN STUART MILL, *ON LIBERTY* 82–83 (David Bromwich & George Kateb eds., Yale University Press 2003) (1859)).

107 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

108 *Id.*

these beliefs to “define the attributes of personhood.”<sup>109</sup> This argument sounds in *liberty*, and it implies that conscience might be better protected out of a concern for such liberty.

But by instead choosing—during the draft era—to equate freedom of conscience with freedom of religion, the Supreme Court has confused the reasonings behind the protection of both. Still, the Court has not explicitly equated the two. Surely, many questions would arise were the Court to conflate conscience with religion and say that the two are equivalent. To this point, Dhooge discusses some potential problems:

Deeming religion and conscience as identical fails to provide adequate guidance to courts confronted with issues of application and potential limitations in any given case. More fundamentally, this overlap fails to “give liberty of conscience any independent role to play in our scheme of ordered liberties.” To this order of thought, conscience and its exercise are protected because they are similar to religion and religiously-motivated actions. Surely conscience is deserving of protection on account of its own merit. Furthermore, protection of religion and religious acts without protection of their nonreligious equivalents would be unfair.<sup>110</sup>

Regarding the first part of Dhooge’s statement, this author agrees. But while the last part of Dhooge’s argument might be *right*, his choice to protect conscience by equating it with religion stands out in particular. He says that “protection of religion and religious acts without protection of their nonreligious equivalents would be unfair.”<sup>111</sup> Here, Dhooge’s conclusion would result in finding that the explicit language of the First Amendment itself is “unfair.” Maybe so. For the First Amendment makes no mention of a non-religious counterpart to religion. And the Founders did not understand a secular notion of conscience to be included in *religion*. But Dhooge fails to explicitly address this point. Instead, he states that “conscience is deserving of protection on account of its own merit.”<sup>112</sup> Again—maybe so. But at the very least, conscience should be protected because of the right from which it stems—possibly, the right to individual autonomy, or “personhood.” If a protection for this basic right stems from the Constitution, it might be found in the First Amendment’s protection of free speech or in what the Court has routinely meant by “liberty” when discussing the Fourteenth Amendment.<sup>113</sup>

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109 *Id.*

110 Dhooge, *supra* note 1, at 268 (quoting Chapman, *supra* note 20, at 1477) (footnotes omitted).

111 *Id.*

112 *Id.*

113 Professor Weil has made an argument that the freedom of conscience might be protected under the Privileges and Immunities Clause of the Constitution. See Weil, *supra* note 101, at 368–70 (2017) (“[P]rivileges and immunities do not need to be expressed in the wording of the Constitution to be recognized as such. Isn’t the freedom of conscience a privilege and immunity as well? Surging from an original repression in the final wording of the First Amendment to the Constitution, freedom of conscience has come back in contemporary jurisprudence above explicitly enumerated constitutional rights as a kind of absolute right that trumps the formal expression of First Amendment liberties in the name

Or it might be true that if the Constitution does not protect conscience, it *should*. But “conscience” protections should not be arbitrarily attached to religious protections simply because the attributes of secular conscience mean that it holds a similar place in a person’s life as that held by religion. The Free Exercise Clause did not protect religion because people feel guilt or as though they have misrepresented their own “personhood” or have been robbed of their *individual* “sovereignty” when forced to violate their religious beliefs. Instead, the First Amendment protected religion out of respect for *God’s* sovereignty. The Founders believed that sincerely religious people should be allowed to act in accord with the duties they held outside of themselves: their duties to the state, and their higher duties to God.

### CONCLUSION

This Note does not opine on whether or not conscience should receive protection under the law. It is worth noting that individual liberties and rights are not confined to those listed in the Bill of Rights.<sup>114</sup> While entrenching particular liberties was important to the Founders in order to safeguard the rights of the people, the Bill of Rights was not meant to be exhaustive. Instead, the people were assured that they still held rights and liberties outside of those expressly mentioned. Freedom of conscience might be one of them. But the protection of this freedom would be founded on different principles than the protection of the freedom of religion. The duty-based argument underlying the freedom of religion likely does not extend to the freedom of conscience. And contrary to Dhooge’s claims, we should not protect two distinct rights as if they are the same simply because we believe that one is just as important as the other.

As a society, we may want to protect the free exercise of both religion and conscience. But equating conscience directly with religion is a dangerous *method* to employ even if the result is desirable, as it threatens to weaken both rights by pulling on the limits of either one or the other.<sup>115</sup> Instead of roughly equating religion and conscience and treating them as though they are the same under the law, we must consider and respect the different foundations underlying the protections of each. What to do with this understanding moving forward is left for further scholarship. But in order to have a

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of a higher liberty. Finding a space for this right in constitutional interpretation would increase the Constitution’s ability to guarantee other rights, give a direction to the jurisprudence on religion, and emphasize its place in the meaning and purposes of the American Republic since its founding.”)

114 See, e.g., U.S. CONST. amend. IX.

115 Professor McConnell contends that “if the exercise of religion extends to ‘everything and anything,’ the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight. To protect everything is to protect nothing.” McConnell, *supra* note 8, at 1493 (quoting Richards, *supra* note 100, at 141); see also Steven D. Smith, *The Case of the Exemption Claimants: Religion, Conscience, and Identity* (San Diego Legal Studies, Paper No. 18-345, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3171176](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171176).

fruitful conversation regarding the merits of “equating” religion and conscience, these foundational differences must be taken into account. Just as the archer must set his feet before taking his calculated shot, so too must we consider these foundations before rushing forward with a conclusion.

