A THEORY OF RELIGION'S SPECIAL PROTECTION IN AMERICAN LAW

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Abstract:

This thesis proposes a normative case for a right to religious liberty in liberal societies based on an account of religion's final (distinctive, intrinsic) value. It also sketches implications of this view for legal doctrines on religious liberty in the United States.

I proceed in four steps. Chapter 1 establishes that any theory of religious liberty will be informed by an account of the value of religion (i.e., of what, if anything, makes it protection-worthy in the first place). Exploring the growing academic consensus against having any distinctive protection for religion, the chapter shows that this consensus presupposes that religion is just one among many ways to shape personal (and communal) identity. But several major theories built on this idea are problematic, which suggests that religious activity actually does offer a value unavailable in other identity-shaping activities—one that might warrant distinctive protection for religion after all.

Before exploring that possibility, chapter 2 steps back to answer a deeper objection to religious liberty: that there is no fair way to define this right, because we cannot fashion a coherent social concept of "religion" in the first place. Drawing on sociology and analytic jurisprudence, I argue that we can and should develop a theory of religion based on the *central* or *focal case* of the *internal religious perspective*: the perspective that religious practitioners have of the reasons for their behavior that can best make sense of religious practice as a whole.

That perspective, Chapter 3 contends, will affirm a final value distinctive to religious activity: namely, the pursuit of harmony with what one perceives to be the ultimate ground of reality. I sketch the outlines of this value, which resonates with a wide range of both Eastern and Western religious traditions and offers a touchstone for both an adequate social concept of religion and a political theory of religion's special protection.

The rest of chapter 3 and all of chapter 4 explore practical implications for the scope of certain legal doctrines on American religious liberty.

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Conclusion

Introduction

An age-old problem for liberal regimes is how to balance the state's prerogatives against citizens' religious freedom (or any other basic liberty) when the two conflict. Indeed, our new era of COVID-19 has given that question renewed urgency in the United States, with American religious activity shutting down on a wide scale. Public worship, including forms that are required weekly for some Americans (such as Jews or Catholics), has been prohibited all over the country by political leaders and religious superiors. Many people are dying alone in hospitals without access to the ministrations of their clergy or other spiritual support, which they might consider crucial to their preparation for the next life. Religion in America has been entirely relegated to the private sphere, for one of the few reasons that would seem to justify such widespread restrictions: the urgent protection of public health and order.

Of course, religion is not the only activity cramped by the urgency of containing COVID. And yet, even the rules that limit public activity across the board sometimes make exceptions for distinctly *religious* activity. Consider, for example, some states' policy of exempting worship services from bans on public gathering,[1] or other state policies that exempt houses of worship from shutting their doors—allowing some to remain open for individuals to visit and pray.[2] In other words, even in a time of restriction on movement that finds close analogues only in times of war and widespread disease, some leaders across America seem to think that that there's

[1] Americans United for Separation of Church and State, "Religious Services Shouldn't Be Excluded from Bans on Large Gatherings to Protect Public Health from Coronavirus," News release (May 5, 2020), https://www.au.org/media/press-releases/religious-services-shouldnt-be-excluded-from-bans-on-large-gatherings-to (accessed May 15, 2020).
[2] Madeline Holcombe and Stephanie Gallman, "Here's a look at what states are exempting religious gatherings from stay at home orders," *CNN*, April 2, 2020, https://www.cnn.com/2020/04/02/us/stay-at-home-order-religious-exemptions-states-coronavirus/index.html (accessed May 15, 2020).

something different about religion, something that explains why it's wrong to restrict people's access to it unless absolutely necessary.[3]

This dissertation's chief goal is to tease out that premise: to show why our laws are right to acknowledge that religion has an importance distinct in kind from other forms of personal fulfillment. Making that case, as we'll see in the chapters to come, means rethinking the narrative about religion that has been steadily unfolding in mainstream political and legal theory over the last decade. On that view, religion has no special value or importance, because its value lies chiefly in its power to shape who we are—our sense of personal meaning and place in the world, which religion helps us live out through membership in a particular community or the profession of a particular set of beliefs. But religion is not the only source of personal or communal identity construction, and so from this perspective of religion's importance it becomes hard, if not impossible, to see why any special treatment for it in American law and policy (or the law and policy of any liberal society) is justified.

Following that logic, academic conversation about the grounds and scope of American religious liberty has zeroed in on *equality* as the appropriate animating principle: equality of legal treatment for religion and other sources of personal identity, as well as for majority and minority religions. A steady stream of *liberal egalitarian* accounts of religious freedom has emerged, which recommends dialing down legal protections for religion in the United States, or dialing up protection for other forms of identity construction.

With only a handful of exceptions, this narrative lacks any compelling counterpoint: we are missing a serious scholarly effort not only to explain the distinctive value of religion, but also to use that value to explain and justify religion's special treatment in American law. This

[3] Virginia Villa, "Most states have religious exemptions to COVID-19 social distancing rules," Pew Research Center, April 27, 2020, https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/ (accessed May 15, 2020).

dissertation aims to remedy that lack. It seeks to restore vigor to our scholarly conversation about religious liberty. For questions of politics are resolved through lively debate not only in courts and legislatures but on the written page, and so the ensuing chapters attempt three goals: first, to illuminate a necessary foundation for any justification of religious freedom—namely, a theory of the value of religion; second, to argue for a distinct value in religious activity that sets it apart from other forms of identity construction; and third, to draw from this account of religion's importance—an account I will call the ultimate principle view—to prescribe some basic principles for American religious liberty. The last chapter will consider implications of this account for a pressing question of U.S. religious liberty jurisprudence: namely, how should courts determine when a law has "substantially burdened" religious exercise, and so might require a religious exemption.

Before I summarize each chapter below, allow me a preliminary note on the dissertation's method. Although the legal philosopher Ronald Dworkin would most likely reject my substantive conclusions about religion's distinct value (as I reject his), his work proposes an important balance between what he calls "fit" and "justification" in legal interpretation. In deciding "hard cases," where the right interpretation of law is unclear, judges on his view must choose an interpretation that both fits their regime's existing legal precedents and—where there are multiple interpretations that fit—pick the one that *most compellingly justifies them*, as a matter of political morality.[4] The foundations and implications for a theory of religious liberty that I develop here seek a similar balance. What Dworkin thought judges should do at the retail level, in deciding a particular case, I attempt to do at a more wholesale level, in defending a view about what our religious liberty regime should be. I do not directly address purely positive-legal

[4] Ronald Dworkin, "Hard Cases," in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 86-7.

questions about the semantic content, historical understanding, or proper application of our existing positive laws (such as the First Amendment or the Religious Freedom Restoration Act). I focus rather on political (constitutional) design. I propose a set of political-moral principles that provide a basis for critiquing existing law, proposing reforms and, perhaps, filling in gaps in the existing law. But neither is my project entirely divorced from our existing legal regime. My analysis does not begin from scratch. I try to make sense of some of the more compelling features of our legal tradition on religious liberty—including some current constitutional doctrines, like the so-called ministerial exception—in a way that casts them in their best light.

As Chapter 1 shows, framing our discussion of religious liberty as a debate about equality distracts us from a deeper and more important question: what really makes religion protection-worthy in the first place? Identity construction is not the only answer, and as Chapter 1 and later Chapter 3 reveal, it's impoverished: it fails to justify some protection outcomes liberal egalitarian approaches recommend and encourages others that (at least intuitively) we should reject. Strikingly, perhaps because the identity construction view falls short in these ways, liberal egalitarian approaches are often drawn in their applications back toward the view that religion *is* specially important, for some other reason besides identity construction. So we have good reason to consider, as the rest of the dissertation does, whether, why, and how religion should require distinct legal protections than other forms of identity.

This gives us momentum for Chapter 2, which addresses a deeper objection to the dissertation's goals: what I've called the *postmodern challenge to concepts of religion*. The principle of religious liberty is arbitrary at best and unjust at worst, the argument goes, because there is no coherent and broadly compelling social concept of "religion" that could help us pick out what religious liberty should protect in the first place. Any such concept is so contingent and

specific to a particular time, place, and ideology that it would be unjust to build a legal regime around it. I respond to this view by drawing both on contemporary sociology of religion and legal theory.

That work shows us that any general theory of a social practice, organized around a concept of that practice, ought to capture and explain its most salient features; that one of the most important features of any activity is the purpose it serves for its practitioners; and that capturing this purpose requires us to begin from the *internal perspective* or point of view of those who engage in it.

But in order to have a true *theory* of any social phenomenon, we can't just catalogue every possible purpose pursued by its practitioners. That would be to provide merely a list or a chronology. To produce a true theory—to simplify, unify, and explain the behavior it studies—we have to organize our data around the point of view—the perspective on which purpose one is after—that *best explains* the existence and endurance of the social practice being explored (whether religion, law, or anything else), in a way that casts the practice in its best light. And this further evaluative step, I follow legal theorist John Finnis in arguing, requires drawing on our own judgments about which *values* are at stake in human behavior: the range of bottom-line explanations for why human beings do what they do. The kind of purpose that will best be able to explain the existence and endurance of religion, I contend, will be an objective, distinct value: what Chapter 3 will develop more specifically as a *final* value.

Of course, as Finnis notes, the descriptive work of the theorist of law or any social phenomenon is a process of what John Rawls calls "reflective equilibrium"[5]: the theorist on the one hand uses his own value judgments to identify which ones would best explain the behavior he is studying, and on the other must modify his perception of what values are centrally at stake

[5] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 18, 42-44.

in the behavior he studies according to what practitioners understand those values to be. Achieving that equilibrium gives us the "central case" of the internal perspective, around which we can then organize a broader descriptive account of it. In short, Chapter 2's interdisciplinary approach seeks to show that a proper theory of religious liberty—based on an adequate concept of *religion—can and must* work from the *central case of the practitioner's internal perspective*.

The third chapter—the dissertation's core—develops a normatively and sociologically grounded account of that perspective: what I sketch as the *ultimate principle account* of religion's final value. The question becomes: is there any such final value that gives rise to a distinct category of social behavior we call religion? Yes, on the account on I propose: uniquely on offer in religious behavior there is an intrinsic, irreducible value of *harmony* with what an individual or community understands to be the *ultimate principle (source) or ground of reality*. This account shows that a wide range of both conventional and minority religions—and under liberal regimes' increasing pluralism, a number of non-religious conscientious forms of conviction, too—can be understood as realizing this distinct final value, and so can claim the protection of a distinct religious liberty right.

What practical implications for U.S. law and policy surrounding religious freedom might arise from the ultimate principle account? Although I believe that view could yield prescriptions about the proper scope of religious liberty or conscience protections in any liberal society, Chapter 3 concludes with an approach more tailored to the U.S. legal system. I sketch some basic implications for several American legal doctrines on religious freedom and contrast them with some of the practical conclusions of liberal egalitarian approaches. I show that my account strikes a better balance between fit and justification: it can both explain some of the more widely and intuitively compelling features of the U.S. religious liberty regime, while also offering a

sound basis for critiquing, reforming, extending, and filling in gaps in existing law. Surprisingly, the view that religion does have a value distinct from identity construction turns out to better justify some results that liberal egalitarians themselves find compelling but (I argue in chapter 1) cannot adequately explain. But in other respects, my view supports a broader and more robust range of protections for religion than liberal egalitarian approaches would recommend.

The practical legal implications explored at the end of Chapter 3 are gestural, offered merely to show the potential fruit and significance of the account of religion's value proposed earlier. By contrast, Chapter 4 is narrower but deeper. It explores in greater depth my framework's implications for a single doctrinal question: how courts should determine when someone's religious exercise has been "substantially burdened." Under a federal statute and many state analogues, substantial burden analysis is the gateway to exemptions: people are entitled to an exemption from a law that "substantially burdens" their religious exercise unless the law serves a sufficiently important public interest by narrowly tailored means. Yet the meaning of "substantial burden" is unclear and undertheorized.

To fashion a "substantial burden" test, I draw on two distinctive features of religion articulated in Chapter 3—its *fragility* and *architectonic* role. Building on those features, I attempt to offer a taxonomy of several different kinds of substantial burdens that a law might impose. I contrast that approach with answers one might draw from Cécile Laborde's liberal egalitarian analysis of "disproportionate burdens." Thus the dissertation concludes by reinforcing, in several concrete and practical ways, what it argues from the outset: that different opinions about the proper scope of religious liberty can always be traced, ultimately, to disagreements about the nature and value of religion.

Scholarly conversations about the meaning and importance of religion, and about the right scope for religious freedom under liberal pluralism, have long run on parallel tracks. Yet this dissertation aims at a rare intersection of them: it tries to uncover the proper contours of religious liberty in a paradigm case of liberal democracy by first attempting to *re*cover an account of religion as a unique human and public value. What I believe finally links these two discussions is the insight, defended in the central third chapter, that the final value of religion is both (a) the core of the best normative case for religious liberty rights, and (b) the most satisfying explanation of religion as an enduring social phenomenon.

Chapter 1: The Liberal Egalitarian Challenge

1. *Introduction*

Is there a sound basis in normative political theory for what legal scholar Kathleen Brady has called "the distinctiveness of religion in American law"?[6] To be sure, simply as a matter of positive law, the right to religious liberty remains enshrined in the U.S. Constitution and in federal and state statutory laws, such as the Religious Freedom Restoration Act (RFRA), or the Religious Land Use and Institutionalized Persons Act (RLUIPA). And it will surely remain the subject of controversial cases at the Supreme Court for years to come. But a growing number of scholars, as I will explain below, are encouraging significant changes in how we understand the scope and purpose of that right. And their arguments focus on questions of justification, rather than originalist, textualist, or other purportedly non-normative approaches to interpretation of the Constitution and statutes. On these scholars' view, American religious freedom (and religious freedom in liberal pluralist states more broadly) can no longer be justified as a distinct right of protection for *religion*. As a matter of fairness, the First Amendment's protection of "the free exercise of religion" *should* cover a broad concept of "conscience," one that would treat religious and other interests equally by covering any deep or meaningful human commitments.[7]

Other scholars propose that a just regime would subsume protection of religious freedom entirely under other basic rights and liberties in liberal constitutions, such as the freedoms of conscience, speech, and association.[8] On this view, in other words, religious citizens or

[6] Kathleen Brady, *The Distinctiveness of Religion in American Law* (New York: Cambridge University Press, 2015).
[7] See, generally Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007). For a similar theory applied to Canadian law, see Charles Taylor and Jocelyn Maclure, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011).
[8] See, generally Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017).

institutions should no longer be entitled to bring religious liberty claims as such before courts, but should instead be required to present their concerns in the language of these other rights.

In short, much of mainstream political and legal theory is shrinking from liberalism's longstanding view that it is just to make religion "special" under our Constitution, our case law, and our statutes.[9] They oppose special treatment of religion on egalitarian grounds. While liberal egalitarian theorists (as they have come to be called) might disagree about this or that practical implication of their approach, it seems clear that a legal system would look quite different from ours if it gave their view full effect. For example, as we will see, if we accepted the premises of their opposition to special treatment of religion, it is hard to see how we might justify such longstanding features of U.S. religious freedom policy and jurisprudence as the principle of church autonomy (which allows churches and comparable religious organizations to conduct their internal affairs without state interference).

The task of this first chapter, though, is not primarily to explain the legal and policy implications of this emerging challenge to religion's special protection, although I do consider some of those implications more fully in parts II and III. It is first and foremost to establish one of this dissertation's most basic points: that any effort to give a political theory of religious liberty must begin from an account of the value (or interest) that such a right is grounded in and protects. As philosopher James Griffin puts it, "[w]e cannot begin to work out a substantive theory of rights—what rights there actually are—without a substantive theory of goods. We need to know what is at the centre of a valuable human life and so requires special protection."[10] Or, in the words of legal theorist Richard Fallon, "[T]he point of rights…is to protect or promote

[9] For an argument that "government may not accommodate religious actors when that relegates similarly situated secular actors to disfavored status," see Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Cambridge, MA: Harvard University Press, 2017), 78 and chapter 4 generally.

[10] James Griffin, *Well-Being: Its Meaning, Measurement, and Importance*, Oxford: Clarendon Press, 1988, 64.

goods and opportunities that, from an impersonal standpoint, are adjudged valuable and that are needful of protection or promotion."[11]

Some political theorists may be opposed to any consideration of goods when it comes to justifying and designing any part of our constitutional order,[12] including religious liberty.[13] I will not attempt to offer a rebuttal of their anti-perfectionism here. It is enough to note that a goods-driven analysis will make a meaningful contribution—it will not simply talk past the other participants in this debate—because the arguments made by all "sides" to this *particular* debate,

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[11] Richard H. Jr. Fallon, "Should We All Be Welfare Economists," *Michigan Law Review* 101, no. 4 (February 2003): 1020. Fallon thinks this is true "in morals and to some extent in constitutional law," arguing that in constitutional law some rights serve other interests besides human well-being, such as "agency," or "dignitary interests," or " 'systemic' interests in avoiding abuse of government power or the collection of excessive power in the hands of government." Richard H. Jr. Fallon, "Individual Rights and the Powers of Government," *Georgia Law Review* 27, no. 2 (Winter 1993): 354-55. On Fallon's view it is agency, not wellbeing, that seems to be the interest implicated by a right to freedom of religion, but I suspect that this is because Fallon is thinking of wellbeing in an indeterminate utilitarian sense, not the thicker conception of wellbeing we can find in what he calls "more substantive conceptions of human flourishing" (348, fn 14, citing Martha Nussbaum's "Aristotelian Social Democracy").

[12] For a full explanation of the concepts of public reason and comprehensive doctrines, see John Rawls, "The Idea of Public Reason Revisited," in *Political Liberalism* (New York: Columbia University Press, 2005), 440-490.

[13] Indeed, in both *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999) and *Political Liberalism* (New York: Columbia University Press, 2005), Rawls seems concerned to show that the "equal liberty of conscience" (a label significant in itself, as it avoids reference to religion) would be defensible from the original position without appeal to any distinctive value at stake in conscience or religion. In *A Theory of Justice*, for example, when he describes the deliberations about these liberties that would occur in what he calls "the original position"—or the set of intellectual constraints that should guide our reasoning about the foundations of liberal democracies so as to yield a fair construction—we don't decide to adopt freedom of conscience out of concern to protect some unique value in religion or moral beliefs that this freedom would help people realize. Instead, we do so out of concern to maximize our freedom to live according to those commitments. Of course, Rawls thinks that we don't know what these commitments will be in the original position; we aren't informed in our deliberations by any comprehensive conception of the good that might define religion's distinctive importance for human wellbeing, and so recommend a special political protection for it (181). But this presupposition also means that any society constructed from the original position's premises will support freedom of conscience only out of a general commitment to freedom itself, not some particular good that we realize through the free exercise of conscience.

Later, in *Political Liberalism*, Rawls expands this argument for liberty of conscience, again refraining from a full defense of that right by appeal to the value of religion or conscience itself. There he suggests that for people in the original position to take comprehensive doctrines seriously, to understand what the conceptions of the good that they offer truly are in nature, is to realize that they cannot gamble on the possibility of getting more freedom for some religions or philosophies at the expense of freedom for others (311). These doctrines, he explains, are all forms of developing the two moral powers he ascribes to human beings—the capacity for a sense of justice and for a conception of the good. Developing these capacities to their fullest potential is part of a meaningful life, and to risk depriving some people of this possibility while securing it for others is unfair to those who will suffer the deprivation (312-14). Although this argument is somewhat closer to a defense of a right based on appeal to substantive values (in this case, the value of a full and meaningful life), it still avoids suggesting that a distinct good to be found in having religion or a set of conscientious beliefs is what could justify a right protecting the freedom to live by them.

including liberal egalitarian views, end up presupposing answers to the question of what goods, benefits, values, or interests might be advanced by religious liberty protections.

And that is not surprising. Liberal egalitarian arguments against a distinctive right of protection for religion hold that the moral principle that can and should settle this debate is equality or fairness. Fairness, on their perspective, means that religion should receive no more and no less protection than other "deep commitments,"[14] or "integrity-protecting commitments,"[15] or forms of "self-determination."[16] But we can only know what equality requires once we answer the prior question put so aptly by philosopher Amartya Sen, "equality of what?"[17] As legal theorist Joseph Raz observes, "[p]rinciples of equality always depend on other principles determining the value of the benefits which egalitarian principles regulate."[18] What important goods or purposes does the state have a duty to secure our equal access to in the first place? Before we can say whether legal protections for religion would be fair or equal, we have to ask what valuable ends (if any) are served by protecting religion.

Indeed, one liberal egalitarian contributor to the present debate, Cécile Laborde, accepts this in almost so many words. As she explains, any defense of the view that religion and other kinds of commitments require *equal* protection naturally invites us to ask: "Which category of beliefs and identities is protection-worthy in the first place?"[19] For if "equality is not to be an empty, purely formal notion," she continues, "theories of equality and nondiscrimination must

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[14] Eisgruber and Sager, *Religious Freedom and the Constitution*, 87.
[15] Laborde, *Liberalism's Religion*, 203.
[16] Alan Patten, "The Normative Logic of Religious Liberty," *Journal of Political Philosophy* 25, no. 2 (2017): 129-154.
[17] Amartya Sen, "Equality of What?" *The Tanner Lecture on Human Values*, Stanford, CA. May 22, 1979.
[18] Joseph Raz, *The Morality of Freedom* (Oxford, UK: Oxford University Press, 1988), 240. See also Peter Westen, "The Empty Idea of Equality," *Harvard Law Review* 95, no. 3 (1982): 536-596. Westen argues that the idea of equality is "empty" unless we draw on "external values that determine which persons and treatments are alike" and so require the same treatment (537).
[19] Laborde, *Liberalism's Religion*, 53.

specify in respect of *what* people must be treated equally."[20] Below I draw out this premise further, by showing that contemporary liberalism's shift away from religion's special treatment or protection in the law is undergirded by a substantive account of what makes religion and other commitments comparable in their value or purpose (and so deserving of equal legal protection). (Whether the goods at issue turn out to be "thin" enough for a Rawlsian approach to allow into the foundations of our political morality after all is not something I will address directly here.)

Simply put, to settle a debate about what equality requires in this domain, we have to consider what goods are at stake. Thus, in this chapter I show that the disagreement between supporters of a distinct religious freedom and liberal egalitarian critics is not ultimately about whether our law should be fair or equal. It is over what purposes or goals make religion worth protecting at all. In particular, the debate about whether to give religion a distinctive legal right of protection distills into a debate between two rival views of the values that could make religion protection-worthy in the first place. Subsequent chapters draw from contemporary sociology and normative theory to develop one of the rival views: what I will call the *ultimate principle account* of religion's value. This view presents religion as uniquely about seeking harmony with a ground or source of reality and meaning that is higher than and outside the self or the community.[21] I will develop this account of religion's distinctive value enough to offer a *justification* for its *continued* legal protection—and see what that justification entails about the scope religious liberty should (as a matter of political morality) have in the future. To build this

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[20] Ibid.

[21] I'm not alone in seeing the dividing line as the question of the existence of a transcendent or ultimate source of reality: as Ronald Dworkin observes, historically the right to religious freedom has been "understood as the right to make one's own choice about the existence and nature of a god." Ronald Dworkin, *Religion without God*, Cambridge, MA: Harvard University Press, 2013, 108. Douglas Laycock denies that religious liberty is justified by some underlying value or interest, but still thinks "religious liberty guarantees…that each citizen in a free country may believe as he will about the existence and characteristics of God and about the role of faith." Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7, no. 2 (1996): 313.

political-moral case for religion's special protection on a normative account of religion's distinctive value is an endeavor oddly absent from the literature.[22]

But what if there is no ultimate or higher principle that could explain the practice of religion (as religious believers maintain and scholars of religion argue)? Or what if we can't know the answer to that question at all? Then we will need to explain and justify religion's protection, if at all, by reference to some other account of its value or purposes. If there is no ultimate principle, or if the law should remain agnostic on that question, then religion's cognizable point or value—if it has any at all[23]—is best explained by reference to something about the self (or community) alone.[24] Hence the second of the two rival views of religion, with which the rest of this chapter is concerned: the identity-construction account. Religion is valuable, on this view, because and to the extent that it is an important, self-selected source of personal or communal understanding, meaning, and fulfillment—not, as on the first view,

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[22] Legal literature offers some philosophical defenses of religion's special value: see, e.g., John Garvey, "An Anti-Liberal Argument for Religious Freedom," *Journal of Contemporary Legal Issues* 7, no 2 (September 1996): 275-292; Michael Stokes Paulsen, "The Priority of God: A Theory of Religious Liberty," *Pepperdine Law Review* 39 (2012): 1159-1222. Both of these articles are short enough to invite a lengthier treatment like the one this dissertation develops. I return to Paulsen's work in Chapter 3. Kathleen Brady's *The Distinctiveness of Religion in American Law* (fn 1) is the only book-length treatment I'm aware of, but she doesn't directly apply her account of religion's special importance to prescribe legal outcomes. For other attempts to build a case for religious liberty on goods or interests at stake, see John Garvey, *What Are Freedoms For?* (Cambridge, MA: Harvard University Press, 1996; Robert P. George, "Religious Liberty: A Fundamental Human Right," in *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, DE: ISI Books, 2013): 115-125; and John Finnis, "Religion and State: Some Main Issues and Sources," *American Journal of Jurisprudence* 51 (2006): 107-30.

[23] To ensure a thorough treatment, this dissertation focuses on only various objections that a distinct right to religious liberty violates principles of equality by treating similarly situated secular (or minority religious) persons or interests differently. These objections obviously presuppose that there is *some* interest or good at stake in religious activity (albeit not unique to religion). A different set of objections, which it is beyond the scope of this dissertation to address, rests on the view that religion lacks not only *distinctive* value but any intelligible value at all. See, e.g., Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001) (in pp. 32-36 Barry analogizes religion to other forms of "expensive taste" – i.e., mere subjective preferences not subject to norms of reason or grasped by reason as intrinsically or even instrumentally worthwhile.)

[24] Similarly, Peter Jones highlights how inadequate the identity construction view of religion's value will seem to the religious believer as a defense of his religious liberty, when he understands his religion as primarily about carrying out obligations to God. Peter Jones, "Beliefs and Identities," in *Toleration, Identity, and Difference*, eds. John Horton and Susan Mendus (New York: St. Martin's Press, 1999), 76, 81-83.

because it involves the pursuit of some *relationship* to an ultimate source *outside* the self or the community.

Each of these opposing accounts of religion's importance covers a wider family of views, and I won't attempt to address every variation of both families.[25] Instead I've picked what I think are three compelling representatives of the identity-construction view in the debate about religion's special protection, and in Chapter 3 will set them against a kind of interdisciplinary case for the ultimate principle view that I'll build out of existing literature on religion's distinctiveness.[26]

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[25] Both Martha Nussbaum and Ronald Dworkin offer a kind of hybrid of the two views that leans toward the identity-construction view, where the right to religious liberty is grounded in the human capacity to define one's existence and the meaning of life more generally. In *Religion without God* (fn 11), Dworkin describes religion as "a deep, distinct, and comprehensive worldview," which "holds that inherent, objective value permeates everything, that the universe and its creatures are awe-inspiring, [and] that human life has purpose and the universe order" (1). The core of religion involves carrying out one's "innate and inescapable responsibility to try to make his life a successful one" (10), and Dworkin justifies religious liberty as protecting the freedom of each person "to decide for himself ethical questions about which kinds of lives are appropriate and which would be degrading for him" (114). For Nussbaum, "the argument for religious liberty and equality in the [American political] tradition begins from a special respect for the faculty in human beings with which they search for life's ultimate meaning." Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 19. I say they lean toward the identity-construction view because in each case, the justification for religious liberty focuses ultimately on the self and its capacities, not on the idea of a relationship with something outside or higher than the self. Indeed, Laborde summarizes Nussbaum's "conception of freedom of conscience" as "protect[ing] the deep ethical convictions that *define the practical identity of persons*" (*Liberalism's Religion*, 204; emphasis added).

On the other side, Andrew Koppelman and Michael McConnell justify religion's distinctive treatment by appeal to variations on the ultimate principle view. Both ground religious liberty in values or ends higher than the self. McConnell points to the value of carrying out one's duties to God. See Michael McConnell, "The Problem of Singling Out Religion" 50 *DePaul Law Review* 50, no. 1 (Fall 2000): 28-29; McConnell, "Accommodation of Religion," *The Supreme Court Review* 1985 (1985): 26. Koppelman presents religion as a kind of "hypergood" (Charles Taylor's term) – a "cluster" of "*intersubjectively intelligible* goods…whose value transcends individual preferences." Andrew Koppelman, "How Could Religious Liberty Be a Human Right?" *International Journal of Constitutional Law* 16, no. 3 (2018): 987. I'll engage with their accounts more fully in Chapter 3.

[26] Douglas Laycock offers a third, purportedly value-neutral defense of special treatment of religion that is based on three propositions: (a) religious liberty is required to avoid bloody conflicts over religion and to foster peaceful conditions for religious disagreement; (b) religious beliefs "are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for," so the government should leave people free to make up their own minds about religion; and (c) religious beliefs "are of little importance to the civil government": history and practice has borne out that the government needs only "to regulate behavior, not belief; to regulate conduct, not theology or liturgy or church governance." Douglas Laycock, "Religious Liberty as Liberty," 317-8. But note that even this defense ends up appealing to a premise about the value of religion—its "extraordinary importance" to the people who profess it. We will see in the rest of the chapter, however, that mere appeals to religion's subjective importance can't justify its special treatment—indeed, those appeals predominantly guide cases *against* its special treatment.

Although some liberal egalitarian theories explicitly aim to avoid delving too deeply into questions about religion's value, I show in part II that the identity-construction view undergirds at least three prominent liberal egalitarian approaches. Yet these accounts, part III will suggest, are incomplete on their own terms—and in ways that point up the need for precisely the kind of analysis provided in rest of the dissertation. In particular, these approaches end up endorsing (as independently plausible) certain applications—prescriptions about the right result in certain cases—that presuppose that there is *some* value distinctively at stake in religion after all.

II. *The Identity-Construction View in Liberal Egalitarian Theories of Religious Freedom*

If there is no ultimate principle for us to know and be aligned with, or if one thinks it's impossible to know the answer to that question, then the most natural alternative view to take of religion's point or purpose would be that it is a form of self-development. More particularly, I submit, religion on this view would be best understood as a way to shape or fulfill one's conception of his or her identity (or a group's identity) along various dimensions. Such an account will focus on features typical of religion *aside* from their purported capacity to build up one's relationship with an ultimate principle of reality (whereas on the view I'll develop in chapter 3, the following features are typical of religion only *because* they naturally grow out of the more *fundamental* value of seeking harmony with the ultimate): religion offers one way to shape both personal and social identity by offering benefits like comprehensiveness in existential and moral knowledge, conceptions of integrity, and a sense of authenticity and self-worth.

I will show here that this view of the kind of substantive value on offer in religious activity drives three major liberal-egalitarian critiques of special treatment for religion. For on this view, the purpose served by religion—identity-construction—is equally well advanced by

other meaningful commitments. So the identity-construction view best explains the liberal egalitarian conclusion that we should widen the scope of religious liberty's protection to cover a broader category of identity-shaping commitments. In particular, the three strands of liberal egalitarianism explored here defend the extension of legal protection and accommodation to a wider set of (a) "deep concerns"; or (b) "integrity-protecting commitments"; or (c) other forms of "self-determination."

A. The Equal Liberty Approach

We can begin with the most prominent egalitarian theory of religious freedom: Christopher Eisgruber and Lawrence Sager's theory of "equal liberty," which "denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[27] In their view, religion under the U.S. Constitution should only be regarded as "special" in two senses: first, as "more important than matters of fashion or recreation"; and second, as a form of activity that "people are especially likely to undervalue, or persecute" if different from their own religion.[28] But these distinctions, Eisgruber and Sager conclude, do not justify "privileging" religion over "comparably serious secular commitments."[29] Rather than interpret the First Amendment's religion clauses as giving religious believers a presumptive right of exemption from laws that burden their practice, we should instead see their purpose as chiefly "to protect all citizens from discrimination born of religious diversity"—whether by protecting "vulnerable" minority religious groups from the neglect of its "needs or interests" by a "hostile (or simply indifferent) majority"; or by ensuring

[27] Eisgruber and Sager, *Religious Freedom and the Constitution*, 6.
[28] Christopher Eisgruber and Lawrence Sager, "The Vulnerability of Conscience," *University of Chicago Law Review* 61, no. 4 (1994): 1271.
[29] Ibid.

that a "powerful religious group" does not "disregard the needs and interests of non-members."[30] In short, Eisgruber and Sager think the religion clauses should prevent the privileging of majority religions' interests over those of minorities, and of religious citizens' interests over those of non-religious ones.

In their earliest work on this topic, they defend a judicial principle of "equal regard," which requires that the "judiciary ought to intervene" to protect minorities and non-believers from unfair discrimination wherever the state fails to do so, "whether through hate, habit, a misguided impulse to lead others to the true way, or an indifference born of a lack of empathy."[31] In their more recent work, this principle is articulated as part of a broader egalitarian approach to religious freedom that they call "equal liberty"—to signify that religious citizens should enjoy equal but not special freedom.[32] Under this theory, protection for religion is only grounded on whether the beliefs and practices at risk constitute "an interest of great weight" for believers, not on whether those beliefs and practices are distinctly religious.[33] What could make religion such a weighty interest for its practitioners, on Eisgruber and Sager's view? As we'll see below, it's religion's deep importance and contribution to their sense of identity.

Consider, for example, the following discussion of public endorsements of religion in the United States. Eisgruber and Sager present four features of religion as relevant to any evaluation of such endorsements, all of which "affect the social meaning…that competent participants in American culture may reasonably associate with the government display of religious symbols."[34] These include first, *comprehensiveness*: religions "are not discrete propositions or theories, but

[30] Eisgruber and Sager, "Does It Matter What Religion Is?", *Notre Dame Law Review* (2009): 826.
[31] Eisgruber and Sager, "Vulnerability of Conscience," 1284.
[32] See generally Eisgruber and Sager, *Religious Freedom and the Constitution*, Chapter 2.
[33] Ibid., "The Vulnerability of Conscience," *University of Chicago Law Review* 61, no. 4 (1994), 1286.
[34] Eisgruber and Sager, *Religion and the Constitution*, 125-126.

large, expansive webs of belief and conduct."[35] Second, religions make *distinctions between insiders and outsiders*, whether in "a strictly enforced, institutional sense" or in a "more loosely structured" way.[36] Third, religions include *ritual*: "standing up or staying seated, bowing one's head or not, repeating designated words or remaining silent," and so on, are all key to "signifying" religious membership or exclusion from it.[37] Fourth and finally, religions have *"momentous" stakes*: "being chosen or not, being saved and slotted for eternal joyous life or condemned to eternal damnation, leading a life of virtue or a life of sin, acknowledging or repudiating one's deepest possible debt, fulfilling or squandering one's highest destiny."[38]

Why do these four features help us identify acceptable public endorsements of religion? Eisgruber and Sager are suggesting that because markers for who is in and who is out are central to religion, public endorsements of religion risk signaling to some people their incomplete citizenship or exclusion from it. But presumably deciding whether religion can be endorsed publicly or not requires knowing something about why people would want to endorse religion in the first place—about what makes it (allegedly) valuable to begin with. So in identifying these common features of religion, Eisgruber and Sager aren't just identifying what could make religion exclusionary or inclusive; they're also saying something deeper about the apparent value of religion (to practitioners at least), by identifying the purpose (apparently) served by salient features of religious practice. And crucially, the relevant goods, on Eisgruber and Sager's account, are simply the building blocks of personal identity: a comprehensive set of views (presumably about one's meaning and value); a sense of belonging to a particular "structure of

[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.

belief and membership" as an insider; or a sense of "transcendental" purpose as one who has been saved (or is at risk of damnation) or is living virtuously (or immorally).

Of course, religion is not the only kind of commitment that shapes personal identity: far from it. And so an analogy between religion and other sources of personal identity—grouped together under a heading of "deep concerns"—becomes the basis for Eisgruber and Sager's view that religion should be treated equally with non-religious commitments under the U.S. Constitution. Indeed, Cécile Laborde interprets Eisgruber and Sager as offering the "Depth Criterion" for analogizing religious interests with "comparable, or protection-worthy" interests: a requirement that religious and non-religious interests receive equal treatment according to their similarly "deep," "serious," "spiritual," or "moral" nature.[39] For Eisgruber and Sager, Laborde suggests, it is the *felt depth* of these interests rather than their *content*, religious or not—the fact that individuals "closely identify with" and "recognize them as theirs"—that entitles them to special protection in law.[40] Laborde also sees a second criterion for analogizing religious and non-religious commitments in Eisgruber and Sager's work: "the vulnerability of identities."[41] On that criterion, "religion is a marker for any kind of belief or practice that is particularly vulnerable to invidious discrimination (or neglect) by majorities."[42] In short, what makes religious and other commitments valuable—and identical for the purposes of law—on the equal liberty approach are the facts that (a) people care deeply about the contribution these interests make to their own self-understanding and (b) some self-understandings—some identities—can be particularly vulnerable to discrimination.

[39] Cècile Laborde, "Equal Liberty, Nonestablishment, and Religious Freedom," *Legal Theory* 20, no. 1 (March 2014): 65.
[40] Ibid.
[41] Laborde, *Liberalism's Religion*, 59.
[42] Ibid., 54.

Eisgruber and Sager draw on the same identity-centered justification in their discussion of associational religious liberty rights. In their view, religious institutions are sufficiently protected through individual freedoms of conscience and association. The Catholic Church's inability to ordain women as priests, for example, can be protected in the U.S. under the Supreme Court's recognition of "a right of personal autonomy against an overreaching state," more particularly under the "right of privacy."[43] But the Church's limits on ordination can also be protected by the Constitution's ban on some kinds of state interference in individuals' pursuit of "private relational benefits" like "role-modeling, mentoring, guidance, and friendship" through "voluntary private associations."[44]

Sager develops this argument further with a theory of "close association" rights designed to justify the state's non-interference in organized religion's discriminatory leadership choices.[45] These rights inhere first, in the *dyadic* relationship between "a religious leader and his or her congregants," and second, in the group members' relationship to each other.[46] And the values at stake in this dyadic relationship—which should explain the state's refusal to regulate it—lie for Sager in the formative role of religious leaders in their congregants' self-understanding: "Priests and their counterparts [in other religions]…. function…in close relationship to their congregants, acting as religious guides, moral advisers, sources of consolation, role models, best friends, and mentors."[47] Of course, as Sager clarifies, "the dyadic right of close association is not a right distinct to religion."[48] A secular club that meets weekly to discuss the good life with stringent requirements for its leadership could claim this right, so long as its leaders "function in many of

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[43] Eisgruber and Sager, *Religious Freedom and the Constitution*, 64.
[44] Ibid., 65.
[45] Lawrence Sager, "Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate," in *The Rise of Corporate Religious Liberty*, eds. Micah Schwartzman et al (New York: Oxford University Press, 2016): 77-101.
[46] Ibid., 86-88.
[47] Ibid., 87.
[48] Ibid.

the ways that clergy typically function," through (for example) "group presentations," "individual counseling," and "join[ing] members to celebrate joyous occasions and commiserate sad ones."[49] So here again, what grounds the liberty protections of religious associations is the identity-shaping function they play. Religious groups should be free to choose their leaders even by standards the state would regard as discriminatory, because those leaders play a critical role in believers' efforts to live out and shape their self-understanding according to their religious status (by confiding in, seeking advice from, imitating, and befriending their leaders). Yet because that identity-forming function is not unique to religion but found across many other kinds of groups, a distinct institutional religious liberty right to exemption would be unfair.

Now we can begin to see the force of the first argument I laid out in the introduction: that the lens through which contemporary liberalism would have us see our debates about religious liberty obscures the deeper question on which those debates really turn. This is not the question of whether our regime of rights and liberties should respect the principle of equality—of treating like cases alike. Whether religion is alike in relevant respects to other deep commitments turns on the deeper question of why religion is worth protecting at all. On Eisgruber and Sager's equal liberty approach, *as reflected in the features of religious practice that they think justify certain legal outcomes*, it is that religion is one important source of identity-construction. It is because religion is not the only source of personal identity, not the importance of equality *per se*, that Eisgruber and Sager recommend its equal treatment with other "deep concerns."

B. The Disaggregation Approach

Cécile Laborde's work on liberal egalitarianism—to move to a second prominent case against religion's special protection and accommodation—directly acknowledges the central thrust of this chapter: that any theory of religious freedom will have to take a position on what is

[49] Ibid.

valuable about religion in the first place (on what makes it protection-worthy at all) and work backwards from that to figure out the proper *scope* of protection (including whether and when non-religious commitments warrant equal protection). The central question liberal egalitarians need to ask, she contends, isn't "whether the law adequately captures what is ordinarily meant by religion"—which, she says, would be to use a purely *semantic* interpretation of religion—but rather "what is it about religion that is protection-worthy?" and "What deeper normative values underpin protection of freedom of religion?"[50]

To have such an account of religion's value or protection-worthiness, Laborde argues, does not require thinking that the law must "express the whole of the value" of religion, just as (she argues) "we would not want the law to express the whole of the value of marriage or the family."[51] Instead, the law will give a narrower "interpretive notion of marriage or the family, or of religion," the right question for which is again, not "the semantic meaning of religion," but whether the law (or theory of religious freedom) "expresses and protects the correct underlying values"; it is not "what religion is" but instead "'what makes a belief religious for purposes of the First Amendment.'"[52] In short, even if liberal egalitarianism needs to give some account of the value of religion, albeit a limited, interpretive one, it "does not need to get embroiled in controversial definitions of what religion is," because it "does not single out religion as an area of uniquely special concern."[53]

Yet Laborde finds ultimately unsatisfying other liberal egalitarian efforts to explain religion's value by analogizing it with "conceptions of the good." As she sees it, this theoretical tradition hasn't sufficiently explained *how* conceptions of the good are analogous to religion, in

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[50] Laborde, *Liberalism's Religion*, 31.
[51] Ibid.
[52] Ibid.
[53] Ibid.

its insistence that they be treated equally within the law.[54] This underdevelopment is due at least in part, she thinks, to the fact that saying anything specific about the shared values of religion and conceptions of the good would seem to violate the principle of liberal neutrality toward substantive conceptions of the good and religion: it would seem to endorse a controversial position on what is worthwhile about them and could thus imply that some citizens' conceptions of the good and religions are better to pursue than others.[55]

To this uneasiness, Laborde responds that liberal egalitarians must just give up the goal of *total* neutrality about the values realized by religion and conceptions of the good.[56] In fact, she thinks they already *do* violate absolute neutrality about the good (unproblematically, in her view). After all, she explains, the priority of the basic liberties in liberal political philosophy—including freedom of conscience—is "rooted in what John Rawls called a 'thin theory of the *good*'": freedom of conscience ranks among the most important rights and liberties because it, like the others, is "closely connected to two salient moral powers."[57] So it's already the case, she contends, that "liberals are committed to the view that the state is not neutral toward higher-order interests or moral powers: it grants special protection to a class of ethically salient interests."[58] Thus, not only is it permissible to consider the values at stake in the vicinity of religion and other cherished pursuits, in determining what to protect; considering values is actually inevitable.

Looking to the relevant values, Laborde believes that we *can* develop a theory of equal treatment for religious and non-religious commitments, but only by moving away from the constraints of U.S. constitutional law. Eisgruber and Sager's equal liberty theory fails, she thinks, largely because it is "doctrinally coherentist": too invested in approving of the main thrust of

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[54] Ibid., 40.
[55] Ibid., 42-43.
[56] Ibid., 41.
[57] Ibid., 200.
[58] Ibid., 200.

existing jurisprudence.[59] Their approach, on her view, tries to read into the history of First Amendment jurisprudence an egalitarian principle (of equality between majority and minority religions, and between believers and non-believers) that is fundamentally at odds with the premises about religion assumed in those cases, which make religion special.[60]

She pushes Eisgruber and Sager toward a more radical view, one that she regards as more in keeping with their claim that religious freedom doesn't deserve legal privileging. As she sees it, taking seriously their claim that "religion really is only a sub-set of a broader class of beliefs, identities, or practices and should be treated on a par with them" would render "large areas of existing law…normatively indefensible."[61] While legal scholars are "beholden to constitutional coherence," she suggests, normative philosophers "can bite the bullet" and declare that religion's past special treatment in the law "has lost any normative purchase in contemporary society."[62] Then they can "explain away" features of the Constitution like "the special ban on state aid to religion" and the ministerial exception,[63] which is a U.S. legal doctrine that protects churches against employment discrimination claims from their hired or appointed ministers.[64]

Laborde suggests that this "more complexly egalitarian" view would support legal protection for religion only in one of two ways: either (a) under a much broader freedom of conscience included in the list of basic rights and freedoms in liberal societies (as Eisgruber and

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[59] Laborde, "Equal Liberty, Non-Establishment, and Religious Freedom," 76.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), at 188-9. ("We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.")

Sager propose); or (b) simply under the other rights and freedoms on that list—rights to autonomy, to free speech and association, to privacy and property (an approach that she endorses, as we will see, under the label of "disaggregation").[65] Under either set up, in other words, religious interests will not be protected under a distinctive freedom. On a more consistent egalitarian model than Eisgruber and Sager's, Laborde seems to think, everything worth protecting under the older paradigms of religious liberty would be captured if we simply protected other familiar rights (to conscience, and/or autonomy, privacy, association, etc.) in full. And anything left out is something that should not have received special protection to begin with.

On this model, she explains, "religious beliefs and practices are not more ethically salient [interests] than nonreligious commitments and conceptions."[66] Instead, they belong together to a "broader category of commitments and practices" that are salient to the scope of religion's protection and accommodation in the same way.[67] Crucially, Laborde points to identity-construction as the shared, defining value of religion and other members of this ethically salient category. Free-exercise exemptions are on her view justified for all "integrity-protecting commitments" (IPCs), where integrity is understood as "an ideal of congruence between one's ethical commitments and one's actions."[68]

She also follows philosopher Paul Bou-Habib in seeing the value of integrity as primarily a matter of faithfulness to one's identity—that is, to the core beliefs and principles one identifies with. Like Bou-Habib, she cites Cheshire Calhoun's account of integrity as "fidelity to those projects and principles that are constitutive of one's identity."[69] Citing Bernard Williams, she defines integrity "in relation to the commitments that people identify with most deeply,

[65] Ibid., 76-77.
[66] Laborde, *Liberalism's Religion*, 201.
[67] Ibid.
[68] Ibid., 203.
[69] Ibid.

constituting what they consider their life is fundamentally about."[70] On this "Williams-inspired view of integrity," she writes, "I act with integrity when I live by my ideal of the kind of person I should be—when I follow a valued way of life, when I realize my ideals of ethical excellence, and so forth."[71] Like Bou-Habib, Laborde maintains that integrity is only at stake in fidelity to "important ethical and moral commitments," not "mere preferences," that one's identity generates.[72]

How should the law protect IPCs? Laborde develops a multi-pronged framework for exemptions analysis, which is committed to the general premise that "people should take responsibility for their beliefs"—for the consequences of holding their particular IPCs—only when "background circumstances are fair."[73] She notes two forms of unfairness that courts and lawmakers may have a duty to rectify, sometimes through exemptions: what she calls "disproportionate burden" and "majority bias."[74] The strength of the case for alleviating a disproportionate burden on an IPC depends on four factors: the *directness* of the burden (how easily citizens can avoid being subject to it); the *severity* of the burden; the burden's proportionality to the *aim of the law* imposing it; and the amount of *cost-shifting* to third parties that accommodating the burden would require.[75]

Laborde applies this framework to real cases, which helps us understand some concrete implications of the identity-construction view for religion's protection. So, for example, the importance of protecting sexual minorities and the relative market freedom of wedding vendors to opt out of that profession might weigh against an exemption for vendors who object to

[70] Ibid., 204.
[71] Ibid., 215.
[72] Ibid., 204.
[73] Ibid., 220.
[74] Ibid., 217.
[75] Ibid., 221.

creating products that celebrate same-sex marriages.[76] Or, to take another application, since burdens on obligation-IPCs are "intuitively…more severe than identity-IPCs," Laborde thinks identity-IPCs are likely to require an exemption only if the law has favored a comparable practice by the mainstream or majority (i.e., not because the burden on the identity-IPC is severe).[77] I will return to these applications of the identity-construction view in Laborde's framework in part III.

Analogously, just as she recommends subsuming religion's protection under a broader conscience right for IPCs, Laborde argues that religious institutions should get protection only under a general right of freedom of association.[78] The identity-construction account of religion's value supports this conclusion too: associations are eligible to claim exemptions only if they have "coherence interests"—interests in being able to "live by their own standards, purposes, and commitments"[79]—or "competence interests," which are interests in the "interpretation and application of [associational] standards, purposes, and commitments" according to associations' "special expertise."[80] Coherence interests are rooted in the value of a group's integrity—an ability to maintain the structure they give individuals for pursuing the "conceptions of the good they find valuable," including religion.[81] And crucially, the kinds of associations that have coherence interests are those that are formally constituted as voluntary associations, and in which the "primary mode of association" is "identificatory"; that is, the chief purpose of the association is to "allow members to integrate core aspects of their personal beliefs and commitments with associational goals and values."[82]

[76] Ibid., 227.
[77] Ibid., 234.
[78] Ibid., 171.
[79] Ibid., 175.
[80] Ibid., 191.
[81] Ibid., 178.
[82] Ibid., 180, 182.

Thus churches may be eligible for legal protection and accommodation in virtue of helping their members to live out their self-conceptions, which happen to be fulfilled by participating in the church's mission and activities. But Laborde disagrees with Eisgruber and Sager on whether the ministerial exception is justified: on her view, it isn't.[83] It's too broad and too narrow. On the one hand, *only* when churches and other kinds of religious institutions are able to claim coherence interests should they be eligible to an exemption from neutral laws like employment antidiscrimination policies.[84] (The current doctrine, she thinks, is too binary, providing blanket exceptions for anyone deemed to be a minister.[85]) And conversely, the current doctrine is too *narrow* in applying the exception *only* to religious associations, when other associations can have coherence interests, too.[86]

Laborde's account of "liberalism's religion," as her book is aptly titled, ultimately purports to follow what she calls a "disaggregation strategy" toward religion. It determines religion's scope of protection by the liberal state by isolating features of religion that it shares with other commitments that help people live out their integrity (i.e., IPCs),[87] and it determines the state's proper relationship to religion—what kinds of establishment or forms of justification it ought to avoid, for example—by picking out other features of religion that it shares with other IPCs, such as its inaccessibility, divisiveness, and comprehensiveness.[88] Her approach embodies what we are seeing emerge as core logic for any theory of religious freedom: we draw our parameters of legal protection around the valuable purposes at play in religion—whether those values are limited to something religion shares with other forms of commitment (as the identity-

[83] Ibid., 177.
[84] Ibid., 187.
[85] Ibid., 186.
[86] Ibid., 182.
[87] Ibid., 9-10.
[88] Ibid., 8.

construction view holds) or not (as the ultimate principle account I develop in chapter 3 will maintain).

C. The Fair Opportunity Approach

Consider, finally, a third liberal egalitarian account of religious liberty in the work of political theorist Alan Patten. For Patten, contemporary liberal thought on religious liberty *can* acknowledge religion's specialness while supporting legal and policy positions advocated by other egalitarian theories. He defends an approach to religious liberty called the "Fair Opportunity" view, which seeks "substantial protection" for religious conduct that's nevertheless compatible with "other liberal concerns and values."[89] That view proposes a different form of protection from the two most salient proposals, which Patten calls the "No Burden" view and the "No Discrimination" view. On Patten's approach, that is, there would be no presumption against just *any* law that burdens religious conduct (contrary to the "No Burden" view).[90] But nor should we have a presumption against *only* those laws that selectively target or accommodate religion (contrary to what Patten calls Eisgruber and Sager's "No Discrimination" view).[91] Rather, Patten submits, we should have a presumption against applying laws in ways that "leave[] individuals without a fair opportunity to pursue and fulfill their religious commitments."[92] Religious liberty, on his approach, is infringed when a "burden or restriction on religious conduct undermines the fair background conditions against which individuals are entitled to pursue their ends."[93]

For Patten, then, Eisgruber and Sager are mistaken to assume that if we make religion legally special at all, we will have to have a legal presumption against the imposition of any burdens on it—the kind of presumption that he thinks rightly raises concerns from a liberal

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[89] Alan Patten, "The Normative Logic of Religious Liberty," *Journal of Political Philosophy* 25, no. 2 (2017), 131.
[90] Ibid., 130.
[91] Ibid., 130-131.
[92] Ibid., 131.
[93] Ibid., 143.

perspective. Through a principle like fair opportunity, Patten thinks we can accommodate liberal concerns about cases like *Hobby Lobby* or the religious liberty bill passed by the Arizona legislature in 2014 (protecting businesses from the implications of new provisions to anti-discrimination law regarding sexual orientation).[94] But crucially, he thinks, we can also recognize the special importance of religion to some, and even conclude that in some cases, its importance might call for different treatment than other forms of commitment.[95] These would be cases in which the burden undermines believers' fair opportunity to pursue their religious ends.

Patten also criticizes Laborde's emphasis on whether a law imposes a "*disproportionate* burden." An exemption analysis of this kind, he argues, could lead to problematic hierarchies of burdens. More to the point, it asks the wrong question: "the mere fact that a law imposes a disproportionate burden on a person's IPC," he writes, "is not sufficient to show either that there is any unfairness towards that person or that that person should be offered an exemption."[96] "The core of the problem" with Laborde's view is that "whether people find that their commitments are disproportionately burdened by a law depends in part on what commitments they have. And presumably people share some of the responsibility for what commitments they have."[97]

To test the strength of his own position, Patten gives two examples. One presents Mammon Worshippers, who believe they have a moral obligation to make as much money as they can, and see tax requirements as a direct and severe burden on their fulfillment of that obligation.[98] The second example is about a group of religious pilgrims who are obligated to spend a great deal of time in "worship and devotional activities," which deprives them of time to

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[94] Ibid., 131.
[95] Ibid., 146.
[96] Alan Patten, "Religious Accommodation and Disproportionate Burden," *Criminal Law and Philosophy* (forthcoming),https://scholar.princeton.edu/sites/default/files/apatten/files/religious_accommodation_and_disproportionate_burden_-_pre-pub_version.pdf (accessed May 2020), 19.
[97] Ibid.
[98] Ibid.

work in order to fund their annual religious pilgrimage to another country.[99] As to both examples, we are asked to imagine that a carbon tax imposed by the government to address an environmental crisis prevents the Mammon Worshippers from maximizing wealth and raises the cost of international travel so much that the pilgrims can't finance their trip (as they were able to do with their limited means before the tax).[100] On Laborde's framework, Patten explains, both of these cases present a strong exemption claim since the burden is not easily avoided and severe. But "this seems like the wrong result," each time: "these are burdens that the Mammon-worshipper and the Pilgrims are appropriately expected to bear themselves"; "they, and not others in society, are the ones that are rightly expected to bear the burdens associated with having those commitments."[101] Patten implicitly addresses a natural objection one might hear: that religion is not something people can be held "responsible" for in the same way that we are held responsible for other commitments, because it's not something that's always in our control.[102] This is "a further and separable connotation," he responds, and even if it's true, "the law should treat [the groups in each case] as if they have the capacity to exercise such control."[103]

But we might pause to interrogate Patten's claim, which echoes Laborde's view that "people should take responsibility for their beliefs…when background conditions are fair": *Why should* the law presuppose or even just (as Patten says in the alternative) act "as if" people could control the content of their religious commitments? Here, I suggest, the identity-construction view may be at work: it makes sense to take this stance if religion is but one way you might

[99] Ibid., 20.
[100] Ibid.
[101] Ibid., 21.
[102] Michael Sandel, for example, contends that the "liberal conception of the person" as "unencumbered" by prior "aims and attachments….ill equips the Court to secure religious liberty for those who regard themselves as claimed by religious commitments they have not chosen." Michael Sandel, "Religious Liberty—Freedom of Conscience or Freedom of Choice," *Utah Law Review* 1989, no. 3 (1989): 610.
[103] Patten, "Religious Accommodation and Disproportionate Burden," 21.

choose to shape your self-understanding, one persona among others you might choose to live out. If, by contrast, religion is essentially about a relationship or alignment with something *outside* the self, which is understood to impose demands on the self that the self cannot refashion at will, then religious people don't necessarily have the "capacity to exercise… control" over the obligations or commitments their religion creates, and it would be unfair to hold them responsible for alleviating every burden those obligations encounter under the law. So at its foundation, Patten's proposal fits best with something like the identity-construction view.

That becomes even clearer if we probe deeper into Patten's disagreement with Laborde over which religious exemption claims should be granted. "If the only way to avoid burdening an IPC would lead to an unfair distribution of burdens, then that burden should not be considered disproportionate," he concludes: "…. [P]eople should be held responsible for their own IPCs so long as society establishes fair background conditions."[104] So the decisive question for applying Patten's approach to the protection of religion is how we ought to determine what counts as a fair opportunity for religious people to pursue their ends. Just as Eisgruber and Sager's direct focus on equality required us to ask, "equality of *what*," Patten's "fair opportunity" approach requires us to ask, "opportunity *for what*?"

His answer is an identitarian value: self-determination.[105] The point of respecting the fair opportunity principle—the point of preserving people's opportunities to pursue their ends—is to respect or promote their self-determination. What counts as a *fair* opportunity in any given person's case depends on "the reasonable claims of others,"[106] including others' own claims to self-determination (as well as their claims to the enjoyment of other conditions of autonomy;

[104] Ibid., 23-4.
[105] Ibid., 144.
[106] Ibid.

political equality; and the "social conditions of self-respect."[107]). So, in sum, for Patten "the law denies fair opportunity when it limits somebody's opportunity without a good justification grounded in the reasonable claims of others."[108] But since religious ends are not the only kinds of ends people have, or thus the only means of self-determination, they are not *unique* for political-moral purposes.

Patten's commitment to an identity-construction view is more apparent when he rejects the idea that religion is *uniquely*, rather than *specially*, important. To think that religion has "unique" rather than "special significance," he suggests, would require one to accept "certain fairly specific theological premises concerning religious salvation."[109] Instead, the most we can say about religion's importance without appealing to theology is that it is an important source of personal meaning and identity: religious commitments "matter a lot" to people, "involve a sense of obligation," are "connected to judgments about ethics and the meaning of life," involve "the exercise of a valuable capacity," and "are connected with a sense of identity."[110] But these features, of course, don't show that religious commitments are "uniquely special": "There are many non-religious beliefs that matter to people, that involve a sense of obligation, or that touch on a person's core identity. And there are obviously non-religious beliefs about ethics, ultimate value, and the meaning of life."[111]

Patten offers a number of subtle discussions of concrete applications of the fair opportunity approach, which I will discuss in part III. For now, it suffices to say that his view generally tracks the identity-construction view about why religion is valuable: like Eisgruber, Sager, and Laborde's approaches, fair opportunity recommends protection of religion because

[107] Ibid., 144-5.
[108] Ibid., 145.
[109] Patten, "The Normative Logic of Religious Liberty," 134.
[110] Ibid.
[111] Ibid.

having religion matters deeply to religious people as a form of self-determination, one that plays a crucial role in the formation of their identities and moral capacities.

Yet unlike Eisgruber, Sager, and Laborde, Patten openly pushes us to think harder about whether there *is* special significance to religion, and about what implications for its protection that importance might have. While here I have shown that the identity-construction account more deeply informs the fair opportunity approach, in part III I will draw our attention to places where Patten addresses the opposite possibility: that religion might indeed have value distinct from the value of other forms of identity, and would in that case require different legal treatment than other forms of self-determination. Those suggestions will help us segue perfectly into the rest of the dissertation, which bolsters the case for religion's distinctive importance and develops a framework for some of its legal implications.

This section's discussion has shown the identity-construction view's foundational role in just three examples of the liberal egalitarian approach to religious freedom, but an entire dissertation could be devoted to exploring its driving force in other cases against religion's special protection. Consider, for example, the scope of freedom of conscience proposed by Charles Taylor and Jocelyn Maclure: "Within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs that allow individuals to structure their moral identity."[112] The equal protection of religion and non-religious forms of "ethical independence" defended by Ronald Dworkin, to give another case, builds on a more comprehensive treatment of religion as a special kind of capacity to define one's own existence. Indeed, I would venture to say that all the most plausible systematic critiques of special protection for religion—apart from

[112] Charles Taylor and Jocelyn Maclure, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011), 89.

those that are premised on rejecting any value in religion whatsoever—will rely ultimately on the view that religion is protection-worthy because it is one, but not the only, important source of personal identity.[113]

Yet for reasons I show in part III, liberal egalitarian approaches also (if inadvertently) show us the *limits* of the identity-construction view for justifying religious exemptions. Treating religion's value as analogous or identical to the value of other identity-shaping commitments turns out to be insufficient—incapable of justifying some of the particular outcomes that liberal egalitarians themselves find intuitively compelling, including the equal protection of majority and minority religions. Despite themselves, then, the fair opportunity, disaggregation, and equal liberty views all end up highlighting the intuitive *appeal* of the case for religion's distinctive value, and invite us in subsequent chapters to say more about it.

III. *The Inadequacy of the Identity-Construction View for Protecting Religion*

At first glance, the identity-construction view appears a firm, because central, foundation for contemporary liberalism's case against special protection for religion in U.S. constitutional law. Here, however, I explore the limits of that view in the three egalitarian approaches treated in part II. At either the level of foundations or applications, each approach is pulled toward a kind of religious exceptionalism after all. First, Eisgruber and Sager are committed to justifying

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[113] At first glance, Tebbe's *Religious Freedom in an Egalitarian Age* (fn 4) seems to be an important exception. He offers a "social coherence" approach for adjudicating conflicts of religious liberty that is designed to harmonize our existing legal principles and precedents with our deeper assumptions and judgments about what ought to happen in particular cases (11). But his application of that method also sometimes appeals to the importance of protecting personal identity. A chief reason to avoid "official favoritism on the basis of religion," for example, "is that religion has an importance for membership in the social and political community that other grounds for accommodation may not" (72). So exempting only religious but not secular objectors to the draft risks secular objectors "suffer[ing] subordination in their legal relationship with the government and with other members of the political community" (72). And a reason to allow membership discrimination by a range of voluntary associations that includes "religious congregations" is that such groups "serve as sites of identification, they build up social capital, and they influence citizens' ideas and impulses." (83).

certain outcomes in U.S. religious liberty jurisprudence, appealing in their own right, that (I will argue) can't be justified solely by appeal to the importance of personal identity, but rather presuppose the distinctiveness of religion. Second, Laborde's approach seeks equal treatment of majority and minority religions, but is (for reasons to be explained) ultimately unable to justify that without identifying some value that is common to both, over and above the identitarian interest (of integrity) that her account focuses on. Finally, Patten's approach expressly recognizes that religion might well be more important than other forms of self-determination; and furthermore, seems to presuppose as much in some of his examples. These points will show, ultimately, that if the identity-construction view were applied *consistently* it would protect both too much and too little even from our egalitarian theorists' own perspective: it would extend protection to forms of commitment that Eisgruber and Sager rule out, and it would restrict protection for other kinds of commitment Laborde seeks to cover.

But if the egalitarian view (rigorously applied) would contradict its proponents' own (independently appealing) intuitions about concrete cases, we have good reason to doubt its plausibility. These shortcomings push us to reconsider, as I do in subsequent chapters, the case for religion's special importance: the case for a distinctive value that could justify not only its unique protections in American law, but potentially its special protection in any liberal society more broadly.

A. The Equal Liberty Approach on *Sherbert* and the Ministerial Exception

We can begin with Eisgruber and Sager's discussion of *Sherbert v. Verner*, in which the Court held that Adele Sherbert, a Seventh Day Adventist, was entitled to unemployment compensation after being fired from her job for refusing to work on Saturday, her Sabbath. That case, Eisgruber and Sager argue, "became precedent" for the core idea the equal liberty approach

rejects: “that religious conduct is uniquely and specially entitled to a constitutional exemption from generally applicable laws.”[114] Equal liberty would uphold the Court’s decision for a different reason: it rectified a disparity in the law’s treatment of majority and minority religions. State law at that time prohibited businesses from firing employers who refused to work on Sundays, but failed to protect employees who adhered to religions without a Sunday Sabbath.[115] This unjust discrimination against Sherbert—this unequal treatment of her minority religious obligation—should have rendered the state’s treatment of her unconstitutional, rather than the “broad principle” of “unique immunity for religious conduct.”[116]

Against this real case in the Court’s religious liberty jurisprudence, Eisgruber and Sager juxtapose “Mother Sherbert,” a single mother who claims to be unable to work on Saturdays out of a deep commitment to caring for her children. But they reach a conclusion about this case that is curious given their own premises, as we will see. In their judgment, the state’s choice to deny Mother Sherbert unemployment benefits would *not* be the unfair discrimination of the sort that the state had showed the real-life, Sabbatarian Sherbert. In particular, they submit, the state would be discriminating unfairly against Mother Sherbert only if it were “rejecting Mother Sherbert’s claims because of their relation to religion.”[117] Otherwise, “it seems clear that Mother Sherbert has been denied benefits because of some judgment the state has made about childcare needs, not because of hostility or neglect towards either religion or irreligion.”[118] And so, Eisgruber and Sager conclude, Mother Sherbert is suffering no discrimination, and she does not qualify for an exemption just because the real-life (Sabbatarian) Sherbert gets one.

[114] Eisgruber and Sager, *Religious Freedom and the Constitution*, 14.
[115] Ibid., 14, 40.
[116] Ibid., 14-15.
[117] Ibid., 116.
[118] Ibid.

But as Laborde points out, this reasoning "begs the question": the example is supposed to test precisely whether "deep, serious, moral commitments" that are *not* themselves religious—in this case, a commitment to childcare—are nonetheless *sufficiently similar* to religion to require the same treatment.[119] Instead of probing that, Eisgruber and Sager *assume* that because Mother Sherbert's childcare commitment is not *itself* religious, it must be relevantly different from a religious one, so the state is justified in treating it differently. They recognize that their conclusion might "seem to saddle [them] with an embarrassing inconsistency," but instead of resolving it they drive it deeper.[120] They argue that even if Mother Sherbert, like Adele Sherbert, *understood* her obligation as a "religious duty," she would not qualify for compensation, because only Adele's obligation to avoid work on Saturdays was "inflexible": "Mother Sherbert could take Saturday work if she could find childcare."[121] So, as Laborde drives home, Eisgruber and Sager are suggesting that deep concerns such as Mother Sherbert's commitment to her children should be accommodated only if they are perceived as part of a *comprehensive* worldview with *categorical* demands: her commitment must be perceived as the kind of duty that "trigger[s] the same protection as 'inflexible, God-given obligations.'"[122] In short, Eisgruber and Sager's treatment of the Mother Sherbert case suggests that on their view, secular claimants must after all meet sufficiently "religious-like" criteria to merit exemptions from burdensome laws.

In this particular application, it seems, Eisgruber and Sager are departing from the identity-construction view they officially embrace at the level of principle. The reason to accommodate the real Adell Sherbert, on the equal liberty approach, turns out not to be because her Seventh Day Adventism is a particularly strong form of identity-construction—which would

[119] Laborde, "Equal Liberty, Nonestablishment, and Religious Freedom," 69.
[120] Eisgruber and Sager, *Religious Freedom and the Constitution*, 116.
[121] Laborde, "Equal Liberty, Nonestablishment, and Religious Freedom," 69.
[122] Ibid., though her citation of the phrase "inflexible, God-given obligations" doesn't appear in Eisgruber and Sager's book. I've used it here anyway to emphasize her point.

have required accommodation of Mother Sherbert's childcare commitment on the same terms—but instead because it shares some features that might be distinctive to religion (in this case, that it is comprehensive in scope and categorical in its demands).

Similarly, the identity-construction view seems unable to justify churches' longstanding legal protection in the U.S. under the ministerial exception. Eisgruber and Sager's extension of the identity-construction view to a principle of close association can support some autonomy for churches, but nothing even remotely close to the full ministerial exception doctrine recognized in U.S. law, which bars any employment discrimination claims from hired or appointed "ministers" (a term that has broad parameters).[123] As Laborde argues, Eisgruber and Sager's right of close association, if consistently applied, would not even justify protection for the organization it is "designed paradigmatically to apply to"—the Catholic Church.[124] For the close association principle, as we saw in part II and Laborde reminds us, "assumes, first, that individuals are bound together in constitutive relationships and, second, that the choice of a leader is made by those who have close relations with that leader."[125] This might capture the selection process of "a small Baptist congregation," Laborde thinks, but "it is not clear that the argument applies equally well to the Catholic Church, where it is not congregants, but a centralized and top-down church hierarchy, that selects priests."[126] So at best, she concludes, Eisgruber and Sager's proposed

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[123] Justice Alito's concurring opinion in *Hosanna-Tabor*, joined by Justice Kagan, proposes a wide breadth for the term "minister" under the exception: "The 'ministerial' exception should….apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position." 565 U.S. 171,199 (2012). The scope of the "ministerial" role is currently being challenged at the Court in *Our Lady of Guadalupe School v. Morrissey-Beru* and *St. James School v. Biel*.

[124] Laborde, *Liberalism's Religion*, 60.
[125] Ibid.

close association right would protect "[o]nly those isolated sub-relationships within religious groups that involve few people and are both highly selective and generally private[.]"[127]

In other words, extending the logic of the identity-construction view to equal protection for intimate associations, religious or otherwise, cannot justify the freedom of hierarchical religious organizations like the Catholic Church to appoint its leaders using criteria regarded as discriminatory by the liberal state. If Eisgruber and Sager's equal liberty approach seeks to explain and justify this freedom for religious and non-religious associations alike, then it needs some other account of the valuable purposes of association.

To put the point differently, on the identity-construction view it would be more reasonable to reject the ministerial exception altogether, as Laborde does. For if, as she puts it, "religion really is only a sub-set of a broader class of beliefs, identities, or practices and should be treated on a par with them," then "large areas of existing law (which carve out special protections or special prohibitions for religion) become normatively indefensible."[128] We saw in part II that Laborde decides to "bite this bullet": she argues that a disaggregative approach to religion's treatment in liberal states would recommend less than the full exception. But at the same time, I think we can give Eisgruber and Sager more credit than Laborde does. The inconsistency she helps us see in their work might not just be the result of their legal (as opposed to political philosophical) training, which moves them to reach conclusions that fit existing legal doctrines. I'd propose that these apparent discrepancies arise from their intuition (albeit one expressed in their judgments about concrete cases rather than their articulations of general principles) that religion *is* a distinct kind of value from other forms of identity, and for that reason requires different legal treatment after all. Indeed, as I'll discuss below, although Laborde

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[126] Ibid.
[127] Ibid.
[128] Laborde, "Equal Liberty, Nonestablishment, and Religious Freedom," 76.

applies the identity construction view more consistently to both real and hypothetical legal conflicts, that consistency comes at a cost: it yields conclusions about the scope of protection for religion that I suspect would be unappealing to most, if not all, liberal egalitarians.

B. The Disaggregation Approach on Protection for Minority Religions

Here I want to return to Laborde's multi-pronged framework for exemptions analysis, in order to show that it yields outcomes that are troubling from an egalitarian standpoint, and intuitively. Recall that her framework is animated by two general principles: disproportionate burden and majority bias. Any analysis of a disproportionate burden must consider four factors: the burden's *directness* (how easily citizens can avoid being subject to it); its *severity*; the burden's proportionality to the *aim of the law* imposing it; and the amount of *cost-shifting* to third parties that accommodating the burden would require. At first, Laborde suggests that only obligation-IPCs can ever suffer a disproportionate burden;[129] mere *identity*-IPCs cannot, so they get relief only under the principle of majority bias, which entitles them to an exemption only when the law is privileging a similarly situated majority IPC.[130]

That distinction would seem to yield a problematic outcome: Minority exemption claims for *non-obligatory* practices are unlikely to be successful if there is no comparable practice in majority religions that the law already accommodates. For the disproportionate burden principle can be applied only to perceived obligations, and any particular person's identity-IPCs will require an exemption only under the majority bias principle, if the majority's analogous identity-IPCs get one. Yet as many observers have noted and important cases have illustrated, majority religions (such as Christianity) are more likely than minority religions (like Native American

[129] Laborde, *Liberalism's Religion*, 221.
[130] Ibid., 220.

religion) to regard their central practices as obligations.[131] So in practice, Laborde's approach would protect the central practices of majority religions more than those of minority religions.

True, Laborde would recognize the need for exemptions for minority religions' identity IPCs whenever the law is already exempting analogous majority IPCs. But there often won't *be* any majority analogue, precisely because minority and majority religions can differ so widely. As Patten observes in his own critique of Laborde, for the majority bias principle "to have purchase, there needs to be a majority accommodation…that can serve as a benchmark. But in many cases, there is no benchmark at all."[132] So there would seem to be no basis in Laborde's majority bias principle, either, for granting the minority religions an exemption. They will simply get less protection for their central practices on her approach. This seems unfair.

Perhaps anticipating egalitarian concerns about that result, Laborde widens the scope of her framework's protection a little farther when she develops her severity test for identifying disproportionate burdens. That test is worth examining closely, since in the American legal context the strength of an exemption claim often rests heavily on the severity, or what U.S. statutory law and courts call the *substantiality*, of a burden on religion or conscience. It turns out that for Laborde, some non-obligatory religious practices (and, by extension, some identity-IPCs) can *also* be severely burdened—if they are *subjectively experienced* as obligations:

> …[M]any religious rituals, as well as cultural practices, although not strictly speaking mandatory, are also experienced as having the force of obligations by those who engage in them. If they are central to an individual's life, such that her sense of self and integrity is bound up with them, they can have comparable weight as categorical obligations.[133]

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[131] See David C. Williams and Susan H. Williams, "Volitionalism and Religious Liberty," *Cornell Law Review* 76, no. 4 (1990-91): 769-926. Williams and Williams argue that the Supreme Court's jurisprudence has been biased in favor of majority religions as volitionalist religions, for which "the central moral or religious activity, the activity that generates moral or religious consequences for the person, is his own free choice to behave or believe in ways specified by moral or religious rules." (777) The Native American claimants in *Employment Division v. Smith*, for example, didn't plead an exemption for peyote use in order to satisfy an *obligation* to use the drug. 494 U.S. 872 (1990).

[132] Patten, "Religious Accommodation and Disproportionate Burden," 14.

[133] Ibid., 223.

Laborde offers Muslim veiling as an example of a non-obligatory religious practice that could be experienced as an obligation and thus should be treated effectively as an obligation-IPC.[134]

Yet this proposal has little to say about minority religious practices that are *not* experienced as obligatory and lack an obvious majority-religious analogue, but are intuitively just as important to protect. Again, minority religions do not always (or even typically) conform to mainstream religion's conventional terms of sin, obligation, and complicity. To see where Laborde's framework might fail to cover religious activity that is intuitively protection-worthy, consider the widely-lamented decision of the U.S. Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association*: there the Court upheld state construction of a road through Native American territory, even though the Court's majority acknowledged that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices," enough to "render any meaningful continuation of traditional practices impossible."[135] There's no clearly analogous majority practice to compare the Native Americans' religious liberty claims to, and it's not clear what kind of relief they could seek on Laborde's framework. She argues that cases in which there is "no obvious majority equivalent"—listing as examples the practices of "pray[ing] five times a day, cremat[ing] bodies on an open pyre, [and] bleed[ing] animals to death before meat consumption"—"should instead be considered under disproportionate burden—and subjected to the somewhat more stringent test of success that applies there."[136] But to any concern that this might not afford relief for intuitively protection-worthy religious minority practices, such as those of the Native American petitioners in *Lyng*, Laborde replies simply that "all religious believers must take some responsibility for the pursuit

[134] Ibid.
[135] 485 U.S. 439 (1988), at 451.
[136] Laborde, *Liberalism's Religion*, 234.

of their integrity-protecting practices, out of consideration for the fair pursuit of other citizens' projects and opportunities."[137]

I will return to these kinds of burdens in Chapter 4, where I use the ultimate principle account of religion's value to develop my own framework for identifying "substantial" burdens under U.S. constitutional and statutory law. I do so in a way that I think better vindicates minority religious interests, by eschewing a narrow focus on clear-cut notions of obligation and sin. For now, I wish only to drive home this point: Applied consistently in Laborde's disaggregation approach, the identity-construction account of religion's value leads to strikingly inegalitarian conclusions about protection for minority religions. A potentially wide category of practices that would both have a strong *prima facie* claim for exemptions and which would be important for any truly *egalitarian* theory of religious freedom to cover are entirely left out on her view. By contrast, the framework I will propose in Chapter 4 gives us evenhanded treatment of majority and minority religions: burdens on minority religious activity *can* be treated as substantial even when the activity is not regarded as obligatory and lacks a majority-religious analogue.

C. The Fair Opportunity Approach on the Principle of Religion's Specialness

I want to conclude this section, and the chapter more generally, by returning to Patten's approach, which is different from the other two in one important respect, but like them in another. Unlike the equal liberty approach, and the disaggregation approach, Patten's fair opportunity view explicitly allows that religion might have special (though not absolutely unique) significance. But like the other approaches, Patten's highlights the need to undertake the project pursued in the next several chapters—the case for a distinctive value on offer in religion.

[137] Ibid.

Having laid out several ways that fair opportunity can balance conflicts between commitments to self-determination (which Part II introduced), Patten finally considers "whether, and in what way, it makes a difference to the fair opportunity approach that a person's commitments are religious in character."[138] He answers that religious ends often have "special significance" for those who hold them; and that his approach can accommodate this significance by giving extra weight to religious claims for self-determination in conflicts that can be resolved by balancing competing reasonable claims. So, for example, Patten thinks that "traffic and parking regulations that impede religious worship seem harder to justify than identical regulations that would impede ordinary leisure activities."[139] Similarly, his approach can "make the presumption against denying people a fair opportunity to pursue their religious commitments especially strong."[140] Thus, in a case like *Employment Division v. Smith*, where the U.S. Supreme Court rejected two Native Americans' exemption claim from a law prohibiting the use of peyote, a paternalist argument against the use of peyote "might be powerful enough to defeat the presumption [of fair opportunity] for ordinary commitments but not powerful enough to defeat it for religious commitments."[141]

But Patten also thinks the fair opportunity approach *could* operate instead on the view that "there is nothing special about religious commitments."[142] It would do so "by specifying that the presumption against denying somebody a fair opportunity to pursue and fulfill their religious commitments is no stronger or weaker than the presumption against denying fair opportunity to any other kind of commitment."[143] On this same view, fair opportunity might *not* support the

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[138] Patten, "The Normative Logic of Religious Liberty," 146.
[139] Ibid., 146-7.
[140] Ibid., 148.
[141] Ibid., 150.
[142] Ibid., 147.
[143] Ibid., 147-8.

exemption claim in *Smith* against a paternalist argument: that argument might be "powerful" or "compelling enough" to outweigh the self-determination claim of Native Americans just as well as that of any other, non-religiously motivated peyote users.[144]

Patten's view that we can apply the fair opportunity approach from either premise about religion's significance is striking: it shows that even when a liberal egalitarian approach to religious liberty (1) sets fairness as its legal aim and (2) something other than religion as the main touchstone—as the relevant protection-worthy value or interest at stake (self-determination), *applying* the approach may still require first figuring out whether religion matters more than other examples of that value. Here, if religion has more importance than other kinds of self-determination, a case like *Smith* might require an exemption. But if it doesn't, Patten's two examples show us, the presumption weakens against denying a fair opportunity to pursue self-determination. In this way, the examples help reinforce the chapter's central argument: that regardless of what sorts of reasons should guide our political deliberations generally, discussions of why and how we should protect religion in liberal societies will inevitably reflect competing ideas about whether and how religion is distinctively valuable.

But Patten also, in his discussion of another concrete implication of his view, drives home the stronger claim of this final section of the chapter: that the most compelling liberal egalitarian approaches, despite their rejection of religion's distinct importance at the level of principle, end up endorsing particular judgments about concrete cases that make sense only if religion *really is* distinctly valuable (and thus, inadvertently, lend this view support). To see this, we can return to the contemplative pilgrims example we discussed above—in which believers who feel compelled to make a pilgrimage each year cannot afford to do so because of a tax imposed in their jurisdiction. If the tax the pilgrims seek to be exempted from were to fund "an

[144] Ibid., 149-50.

expensive new sports facility demanded by a vocal constituency in the city," Patten explains, then "the contemplative pilgrims would have a decent case for an accommodation."[145] This is so partly because "the tax limits their opportunity to follow their religious convictions in a significant way: the pilgrims are left unable to meet all their religious obligations."[146] But they also have a case for accommodation because "these limits do not seem justified by the reasonable claims of others: if background conditions are otherwise fair, there is no reasonable expectation that the public should pay for discretionary goods like sports facilities that are valued by some people but not others."[147]

I submit that this conclusion reflects an underlying sense that religion *really does* weigh more than at least *some* other deeply desired ends that people determine themselves by pursuing. For it's not clear how else we could be sure, on Patten's account of self-determination, that a "vocal constituency's" desire for a sports facility would not ground a "reasonable claim" to self-determination that might qualify the pilgrims' claim to determine themselves by carrying out religious duties. Recall the general description given in part II of the features religion and other kinds of self-determination share: such commitments "matter a lot" to people, "involve a sense of obligation," are "connected to judgments about ethics and the meaning of life," involve "the exercise of a valuable capacity," and "are connected with a sense of identity."[148] Almost all of these factors can be, and often are, present for deeply devoted sports fans. Following and

[145] Patten, "The Normative Logic of Religious Liberty," 151.
[146] Ibid.
[147] Ibid. To be sure, Patten does not think that religion matters more than *all* other reasonable claims: if the tax revenues will instead "support public purposes that correspond to reasonable claims of some citizens," he, "the contemplative pilgrims would not have any claim at all for an accommodation despite the burdens they are facing." Why? Because "to excuse them from taxes would be to expect other taxpayers to pay more, and these others have a reasonable claim not to pay more than their fair share." In sum, on this second scenario, even if the contemplative pilgrims can't carry out their "religious obligations and ends, …they cannot plausibly say that they are denied a fair opportunity to pursue their convictions." They are instead properly "regarded as responsible for the predicament in which they find themselves." (151)
[148] Ibid., 134.

supporting their team surely matters a lot to them, evokes a sense of loyalty (and, in that sense, obligation), and contributes to their identity. Indeed, deep devotion to sports (on the part of a "vocal" minority) might well have these features of self-determination to a greater degree than a more mildly devoted religious minority. If Patten is nonetheless right in taking for granted that the Contemplative Pilgrims' claims to self-determination are stronger, there must be something different in kind, not just in degree, about the one salient feature of religion Patten identifies that is *not* characteristic of deep sports devotion: a connection to judgments about "ethics, ultimate value, and the meaning of life." But to think that there is something different in kind about the pursuit of ultimate value and meaning in life is to think that there is, in fact, a category of value or interest that is distinctive to religion, over and above its general contribution to self-determination. So it would appear that in this concrete case, Patten may feel some pull beyond the identity construction view's logical rejection of religion's special importance, and toward the view that there may well be something distinctive about religious activity.

To be sure, Patten at times suggests that he does *not* see anything distinctive *in kind* about the value realized by religion. Perhaps, then, he would say that generic self-determination is the only kind of value at stake, and that religion should get more weight in our exemptions analysis only when it realizes self-determination to a greater *degree*. Indeed, at one point Patten writes, in this vein, that the difficulties of marking out the category of commitments that have "special significance" "might support…the plausible thought (which I won't defend here) that special significance is a matter of degree."[149] If this is the view, an adherent of the fair opportunity approach might say that she can account for cases where religion intuitively warrants more weight, without assuming that religion offers a distinctive kind of value. It is only a significant case of self-determination, different from other cases only in degree.

[149] Ibid., 135.

This raises the question: what feature of any given end makes it more or less significant? I believe that Patten has not yet filled out this part of the fair opportunity approach, but in light of the theory's emphasis on self-determination, it seems most natural for adherents of the view to say that the significance of an end depends just on the depth of an agent's commitment to it—on its subjective importance to the agent.

But this seems in tension with Patten's commitment to distinguishing his view from Eisgruber and Sager's equal liberty view. Recall that for Eisgruber and Sager, religion should be treated no differently from other, comparably *deep* commitments. So they too seem to hold the view that the *degree* of deep commitment is what matters in determining whether and when religion deserves more weight than secular commitments. To avoid collapsing into their view, then, the fair opportunity approach must suppose after all that something *other* than the mere degree of deep commitment is relevant and capable of justifying more weight in the exemptions analysis for religion over some (though not all) other commitments.

Thus, the magnetic pull of the view that there *is* a different *kind*, not just degree, of value in religion that explains its special significance—is present not only implicitly, in Patten's comparison of the pilgrims and sports fans, but also explicitly, and at the level of principle, in his commitment to distinguishing his view from Eisgruber and Sager's equal liberty view.

So all three liberal egalitarian approaches treated in this chapter highlight (more or less inadvertently) the need for a theory of a distinctive value at stake in religion—something other than generic self-determination, or integrity protection, or depth of commitment. In other words, each approach I've considered shows the limits of the identity-construction account in defending intuitively compelling outcomes in at least some cases involving exemptions claims. The equal liberty and fair opportunity approaches are pulled toward the idea that religion is specially

important in order to explain certain exemptions outcomes, while the disaggregation approach ends up leaving out protection-worthy minority religious activity when it applies the identity-construction account's logic consistently. In these ways liberal egalitarian critiques actually push us to revisit the case for religion's special value, and to see what legal implications it might have for the scope of American religious freedom.

IV. *Conclusion*

I've proposed that the debate over religion's special protection is best framed not as a disagreement about the requirements of equality, but instead as a deeper divide over the value or interest at stake in religious activity—and how distinctive (or not) it is to religion. Prominent cases against religion's special protection in liberal political theory, identified by their authors as liberal egalitarian approaches, draw on what I've called the identity-construction view of religion's importance to recommend dialing up protections for other comparable identity-shaping commitments or dialing down protections for religion. But as part III shows, the identity-construction view is limited in its capacity to explain why religion is legally protection-worthy.

In the next chapter, then, I begin to develop the case for what I will call the ultimate principle account of religion's value—a view that sees distinctive importance in religion's characteristic pursuit of alignment or harmony with what one perceives to be an ultimate source or ground of reality. To pave the way for the defense of that view provided in chapter 3, chapter 2 first addresses a deeper challenge to religion's special legal protection: the argument that the principle of religious liberty is arbitrary at best, and unjust at worst, because there is no coherent social concept of "religion," grounded in a theory of religion's distinct, objective value, to be had in the first place.

Chapter 2: The Postmodern Challenge

I. *Introduction*

In the first chapter, we saw that political theories of religious freedom must begin from some account of the important purposes or values at stake in religion. Our debates about the proper grounds and scope of that civil liberty, I contended, turn most deeply not on the question of equality—about whether religion should be treated equally with non-religion—but on the question of what makes religion worth protecting at all. I showed that one account of the valuable purposes at play in religion—namely, its contribution to a person (or group's) sense of identity—grounds the growing consensus in the field of liberal political theory that religion does not require special or distinctive protection in American law or in liberal plural regimes more broadly.

Yet the identity-construction view of religion's importance, as we also saw, would protect both too much and too little from a liberal egalitarian perspective. Consistently applied, it would recommend protection for non-religious commitments that some liberal egalitarians seek to rule out, and withhold protection from religious commitments that many liberal egalitarians would urge. In fact, to draw any parameters for protecting identity construction at all—in particular by applying their framework to contested free exercise decisions of the U.S. Supreme Court, or to longstanding features of U.S. religious liberty jurisprudence—liberal egalitarian approaches repeatedly end up falling back on premises that treat religion as distinct after all. It is certain unique features of religion (and some forms of conscience) that such approaches point to in their practical application. This wobbling on religion's specialness in liberal egalitarian approaches, and their inability to justify the full range of protections they seek, together push us

to revisit the normative case for religion's special or distinctive value, so that we can understand some of its political theoretical implications for American law and policy.

But before developing such a case (what I will call the ultimate principle account), I want to consider a more radical challenge to any effort to defend religious liberty, one that surpasses the objection that some approaches lead to inegalitarian outcomes: namely, the idea that all accounts rooted in the value of religion will *inevitably* lead to unjust outcomes because the root itself is diseased. For many scholars, in particular, there is no analytical concept of "religion" that could help us set the parameters of a religious liberty right at all because the contours of that concept are always historically and culturally specific, as is our very assumption that we can treat religion as a fixed set or pattern of human behaviors present in every time and culture. So no matter what definition of religion we try to offer, the objection goes, there will always be examples of peoples or cultures that fail to exhibit the behavior specific to that definition. In short, then, these scholarly critiques challenge my aim to explain religion's distinctive value (which would in turn justify its special legal protection), by suggesting that there's no reference point to give a theory of the special value *of*. This critique, I'll show in part II, is rooted in another point of growing consensus about religion in fields outside political theory, such as anthropology and history: not that religion and non-religion—however we might perceive them—require equal legal treatment, but more fundamentally that the concept of religion itself is inherently parochial, poisoning any political proposal built on it.[150]

[150] To articulate that challenge, I concentrate on the work (cited below) of political scientist Elizabeth Shakman Hurd, anthropologists Saba Mahmood and Talal Asad, and historian Brent Nongbri. For other examples of it, see generally Wilfred Cantwell Smith, *The Meaning and End of Religion* (Minneapolis: Fortress Press, 1991); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) ("What is arguably impossible is justly enforcing laws granting persons rights that are defined with respect to their religious beliefs or practices," 8); William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Oxford University Press, 2009) ("…[T]here is no transhistorical or transcultural concept of religion. Religion has a history, and what counts as religion and what does not in any given context depends on different configurations of power and authority," 59).

That point of consensus I will refer to below as the *postmodern challenge to concepts of religion* (for its roots in skepticism about the utility of social concepts more generally). But as part III contends, this challenge too is unsound, and shouldn't derail our debate about the grounds and scope of religious freedom (in the U.S. or in liberal societies more generally). Those who argue that the concept of religion is inherently parochial (and that this poisons any value-of-religion-based defense of religious liberty) tend to rest this view on the claims that our term "religion" does not find a fair translation in the vocabulary of every culture, or that religion (as we understand it) is not a universal *experience*.[151] But those claims alone do not support the charge of parochialism. The charge stems from the thought that there are too many perspectives on what religion is, what it is for, and whether it is worth pursuing; that because some of these conflict, no concept of religion can capture them all—any concept will have to pick one perspective over others; and that there is no objective basis for privileging one perspective in this way.

This critique, I will argue, is looking for objectivity of the wrong kind. It is asking if religious activity and terminology is *universally occurring* and, having answered in the negative, concludes that there is no objective or therefore just basis for picking a single concept of religion and corresponding right of religious liberty. I argue that this is mistaken, because it draws a normative conclusion from a non-normative premise (an ought from an is). What matters is *normative* objectivity: there will be a fair basis for defining religion and thus religious liberty if there is a distinct *objective good or value or interest* served by (what we would label) religious

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Sullivan actually represents a kind of exception because she, like liberal egalitarians, proposes equal legal treatment for religion and non-religion. She sees that outcome as the best response to the challenges of defining religion more generally. See *The Impossibility of Religious Freedom*, Chapter 5, "Free Religion."

[151] E.g., see Cavanaugh contending that "[r]eligion is a constructed category, not a neutral descriptor of reality that is simply out there in the world." *Myth of Religious Violence*, 58.

activity. The question, in short, is whether religion is characterized by valuable *purposes* or *goals* that *would be* objectively worthwhile to pursue across all epochs and cultures.

(That said, if we *can* identify objective values that are distinctively available in religious activity, we will have some grounds for *expecting* that such activity will indeed be pursued, at least to *some* degree, in most times and cultures.)

Conversely, if there is *no* distinct objective value in the vicinity of a range of activities across different cultures, then I would agree that we also can't offer an adequate theory (or descriptive sociology) that captures a corresponding social phenomenon, and that we could use to build a more-than-merely-parochial case for religious freedom. And that would be so even if religious activity happened to be a universal phenomenon and every culture had a fair translation of our word "religion."

In short, critiques of the concept of religion actually get things backward. Only by first determining whether there is any special objective human good or value in the vicinity of what we call "religion" can we determine whether it's plausible to have an *analytical concept* of religion that might be serviceable for grounding a religious liberty right valid across cultures.

Part III will establish this point in two steps. First, I draw on a response to the postmodern challenge from two contemporary sociologists of religion, Martin Riesebrodt and Christian Smith. In these scholars' view, theories of religion as a sociological phenomenon will have to begin not from a study of that term's use in our language, but from an account of the distinctive *purposes* that religious practitioners understand *themselves* to be pursuing in certain *actions*. For the job of a descriptive sociologist, these scholars show, is to make sense of data about certain kinds of human activity; and we can make sense of any activity only in terms of the *purposes* of the people engaged in that activity—that is, the *values* or *goods* those agents

understand themselves to be pursuing. Or more simply put, these scholars show us that to develop an adequate concept of religion as a social phenomenon, we have to occupy what Riesebrodt calls the "internal perspective" of those engaged in it.

Second, I will take this view one step farther. I will suggest that an adequate description of religion must proceed not from just any practitioner's internal perspective—since there will be many, partly conflicting perspectives—but from a *central* or focal case of that internal perspective. I will defend this point by drawing analogies from certain developments in analytic jurisprudence: that is, inquiry into the nature of *positive law*, another cross-cultural social phenomenon. Those analogies will show that to arrive at the central case of the internal viewpoint of someone engaging in religion, the descriptive theorist has to determine which particular internal perspectives on the point of (or values at stake in) religious activity would *most compellingly* explain the activity as a social phenomenon—including its emergence, its endurance over time, how much agents are willing to sacrifice to continue it, and so on. This, in turn, will require the descriptive sociologist to rely partly on her own evaluative judgments. And as it turns out, the evaluative judgments that best explain this particular social practice (religion) will identify *objective* values served by it. (Furthermore, as I will show in chapter 3, the most adequate explanation of religion's particular features as a social phenomenon will proceed from an internal perspective that judges religion to be *inherently* objectively valuable—that is, worth pursuing *for its own sake*.)

In short, developing a concept and theory of a social practice requires a kind of reflective equilibrium: between cross-cultural observations of the practice to be theorized, and the purposes pursued by its practitioners, on the one hand, and judgments about the explanatory power of those purposes (and practices) on the other. Perhaps the most controversial step in this

reasoning—and thus one I articulate and defend from different angles, to make it more plausible—is that a fully successful descriptive sociology can't avoid being evaluative. I will argue that this is so because theorizing about activities involves making sense of them, which involves giving a simplifying account of their purposes, which requires saying which purposes better explain the activity than others. The postmodern challenge to concepts of religion, I'll then argue in part IV, is most charitably understood as an objection to the possibility of any objective value at stake in religious activity as such.

Let me make two crucial clarifications. First, when I contend that the best descriptive theory of religion will be organized around the central case of the internal perspective of religious practitioners, I am *not* arguing that the descriptive theorist (or the political theorist looking to draw conclusions about the proper scope of religious liberty rights) will have to endorse particular religions' claims about when and where a divinity has revealed itself or what it has revealed. The judgments that have to be made by the descriptive theorist are not historical or exegetical; they are judgments of practical reason—about the universal value at stake (if any) in religious conduct.

Second, I am not trying to rule out the possibility that in the effort to reach reflective equilibrium, theorists of religion (or any social practice) might ultimately settle on the conclusion there is *no* possible justification of the practice's salient features. That's what would happen, for example, if we tried to provide a descriptive sociology of a practice that was futile (like alchemy) or evil (like murder). And I'm not trying to suggest that I've already shown this *won't* be the result of the search for a concept of religion. Rather, by exploring the internal perspective of practitioners of religion, as a starting point for developing a theory of it, I am inviting us to assume those perspectives (and expect there to be one most compelling or justifiable perspective)

provisionally, based on a principle of interpretive charity as applied to people's activities. If on reflection it turns out there's no value in the vicinity of religious behavior, so be it.

Responding to the postmodern challenge will ultimately pave the way for Chapter 3, where I develop a theory of religion from the ground up, so to speak: I'll offer an account of a distinctly, objectively valuable purpose at stake in human activity that would help us identify activities that count as distinctively religious and in turn tell us what kind of distinctly valuable activity it would be important for the law to protect under a religious liberty right. I'll begin by considering the theories offered by the sociologists treated in part III, because they go a long way toward giving us an account of such valuable purposes at stake in religion. Religion, on both Riesebrodt and Smith's accounts, is the universal practice of seeking help from (or alignment with) superhuman powers in order to avoid misfortune and secure blessings. It is not, both theories are careful to show, primarily a practice of identity construction—or else many things that we conventionally do not describe as religious would have to fall under that category.

Yet even though these theories offer an explanation of what could be uniquely valuable or important in religion, the framework I develop in this chapter by drawing lessons from analytic jurisprudence will help us see that the picture these sociologists give is incomplete. The account of value at stake in religion presupposed by these two accounts doesn't fully capture the range of distinctly valuable activity that it would be important for the law to protect. Religion, I'll argue, is more fully understood as the good of seeking harmony or alignment—not just for purely instrumental reasons like avoiding crises or gaining material wellbeing but *for its own sake*—with what one understands to be not just a superhuman power but the *ultimate* or *transcendent* source of meaning, existence, and value. Understanding the value of religion in these terms will help us establish some of its further features that U.S. law and policy should

protect, and the remainder of chapter 3 together with chapter 4 will propose some concrete ways it might do so.

II. *The Postmodern Challenge to Concepts of Religion*

The goal of this section is to introduce, so that later sections may overcome, a deep and direct challenge to the aims of this dissertation. Some scholars of social science question whether justice requires universally recognizing a right to religious liberty, because they think there is no *universal (sufficiently objective) analytic concept* of religion that could help us define the scope of that right in the first place. Since the bounds of any concept of religion will be historically contingent, the argument goes, applying them to say who benefits from the protection of religious liberty will be arbitrary, simply a matter of how prevailing political powers understand the meaning of the concept of religion. Part A introduces this challenge to religious freedom in the work of political scientist Elizabeth Shakman Hurd and anthropologist Saba Mahmood, in order to identify skepticism about the concept of religion as its motivating principle. Part B explores this skepticism fully spelled out in the work of two other scholars, who offer what we can best describe as the postmodern challenge to the concept of religion.

A. The Scope of Religious Freedom as Inevitably Arbitrary

In her recent book *Beyond Religious Freedom*, political scientist Elizabeth Shakman Hurd contends that efforts to promote and defend religious freedom internationally unfairly privilege some forms of religion over others. She describes the K'iche people in Guatemala, descendants of the Mayans with a special attachment to their land. They have been abused and oppressed by the Guatemalan government for their refusal to cooperate in land destruction.[152] But because their way of life doesn't count as a religion by the state's standards, they fly under

[152] Elizabeth Shakman Hurd, *Beyond Religious Freedom* (Princeton: Princeton University Press, 2015), 50-51.

the radar of religious freedom protection.[153] Similarly, women imprisoned for witchcraft in the Central African Republic cannot file a claim for the same protection because traditional African religion fails to register as a religion in that country.[154]

Likewise, for anthropologist Saba Mahmood, some of the secular state's key features—the distinction between the public and private domains, the concept of "public order," and crucially, the right to religious liberty—inevitably privilege majority religions over minority ones.[155] And again like Hurd, Mahmood attributes this privilege to a distinctly Protestant conception of religion, which she suggests defines religion primarily in terms of individual beliefs, as opposed to ritual or worship or communal activity.[156] Only religions that conform to this conception are given the full protection of religious freedom in secular states. Mahmood tries to show that this is the case not only in the secular but majority-Muslim regime of Egypt, but also in Western European countries like Italy, France, and Switzerland. In both "Egyptian law" and "various European constitutions and international legal protocols," Mahmood contends, the "right to religious liberty is predicated upon a foundational distinction between the privacy of religious belief (*forum internum*) and the public expression of this belief (*forum externum*)."[157] Thus in Egypt, for example, the Bahais, a religious minority, are not recognized as equal citizens alongside Coptic Christians and Muslims because they are not considered "People of the Book," an Islamic concept denoting the Abrahamic faiths. In other words, the protection of the right to religious freedom guaranteed all citizens in the Egyptian constitution, including in principle the Bahais, hardly helps them, because of its Protestant, individualist roots. In particular, the

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[153] Ibid., 51.
[154] Ibid.
[155] Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2015), 175-177.
[156] Hurd, *Beyond Religious Freedom*, 55-56; Mahmood, *Religious Difference*, 178-179.
[157] Mahmood, *Religious Difference*, 155.

distinction between private belief and public action, enforced through the idea of "public order," has been used by Egyptian courts many times to prohibit Bahai "communal forms," including "temples, institutions, and the public performance of Bahai rites and rituals," even as the courts maintain that "Bahais are free to believe in whatever precepts they deem worthy."[158]

For Mahmood, the treatment of the Bahai, coupled with the oppression of Muslims and Jews in Europe, is sufficient to show that some forms of religious equality are nearly (if not totally) impossible in the secular state. To address this problem, Mahmood thinks not that we should expand the scope of religious freedom protection, but that we must recognize "the indelibly partial nature of the secular state."[159] We must discern how "the ongoing entwinement of religion and politics open[s] up certain avenues to religious equality while foreclosing others."[160]

Hurd and Mahmood waver on whether their scholarly aims are simply to give us a more accurate picture of religious freedom's application, or to make moral recommendations based upon it. Yet in the end, they both discourage wholehearted support for the principle. Even though Hurd early on describes her book as merely a "cautionary tale" that invites scholars and foreign policy leaders to "step back" and "catch sight of the possibilities of a world beyond religious freedom," she later argues much more prescriptively that "we need to destabilize" the "privilege" given to the West's belief-centered conception of religion.[161] Similarly, while Mahmood assures us that it's "not [her] point" to argue that "religious freedom is impossible to attain in the modern world," she does want us to see "how inadequate the individualized conception of religious

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[158] Ibid.
[159] Ibid., 179.
[160] Ibid.
[161] Hurd, *Beyond Religious Freedom*, 20, 60.

liberty is for protecting an endangered minority."[162] And she doesn't fully defend herself against the charge that on her view religious minorities could *never* be treated equally in secular liberal polities, responding instead that this claim doesn't truly "capture the argumentative arc" of her work.[163]

Are Hurd and Mahmood right, then, that religious freedom is not a universal moral principle, or that it can never be applied justly? To address this challenge, it's first necessary to take a closer look at the core premise of their critique: namely, that religion is not a social phenomenon we can give an adequate analytical, or descriptive, concept of. Anthropologist Talal Asad and historian Brent Nongbri each give us a full-fledged articulation of that view, and to their work I now turn.

B. The Concept of Religion as Inherently Parochial

Here I introduce two more developed critiques of the effort to form an analytic concept of religion, in order to show more clearly the challenge they pose to the dissertation. Talal Asad argues that there is no conceptual "essence" of religion—no transhistorical, transcultural, and thus universal definition of it—because the meaning of that term both in social science fields (in sociological definitions of religion, for example) and in specific religious traditions (such as Christianity and Islam) is always the product of choices by people in power in a given community about what is acceptable to believe or to treat as "religious."[164] Historian Brent Nongbri, meanwhile, argues that our translation of terms in ancient texts according to a contingent "modern" concept of religion—understood as a sphere of private belief without political implications—obscures the reality of what ancient peoples understood themselves to be

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[162] Mahmood, *Religious Difference*, 180, 55-56.
[163] Ibid., 176.
[164] Talal Asad, "The Construction of Religion as an Anthropological Category," in *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore, MD: Johns Hopkins University Press, 1993), 27-54. 1993 The Johns Hopkins University Press. Abridged. 116.

doing.[165] So for different reasons, each scholar sees any analytic concept of religion as an obstacle, a distraction, to our adequate understanding of human history and reality.

But as I will draw on scholarship in sociology and legal theory in part III to argue, both sets of arguments miss the true foundation for any sound descriptive theory of social phenomena: namely, the question whether there are any distinct objectively valuable goals that make sense of the range of activities the theory aims to account for. Indeed, any descriptive social concept will presuppose an account of those values. In short, Asad and Nongbri get their reasoning backward: it isn't by establishing problems with a descriptive concept that we can rule out the existence of a basic human value grounding it; instead we would have to rule out the *existence* of such a value in order to prove that no descriptive concept could give us a sufficiently objective and hence just basis for capturing a cross-cultural range of activities. As part IV will then conclude, this postmodern challenge only becomes fully intelligible, and forceful, as a rejection of a special value of religion.

i. Asad on why there is no "essence" of religion

In his book chapter "The Construction of Religion as an Anthropological Category," Asad challenges Clifford Geertz's definition of religion as symptomatic of a twentieth century shift in anthropology, one that treats religion as "a distinctive space of human practice and belief which cannot be reduced to any other."[166] Contemporary scholars have come to believe, for example, that even if "the social extension and function" of religion were different in the medieval period than they are now, what counts as "medieval religion" is still "analytically identifiable," because religion has "the same essence" across the two periods.[167] And this idea that religion has an "autonomous essence," Asad explains, "invites us to define religion (like any

[165] Brent Nongbri, *Before Religion* (New Haven: Yale University Press, 2013).
[166] Asad, "The Construction of Religion as an Anthropological Category," 115.
[167] Ibid., 116.

essence) as a transhistorical and transcultural phenomenon."[168] More specifically, scholars have come to think of religion differently from other spheres such as science, law, and politics that Asad—in the intellectual tradition of Michel Foucault—thinks have been defined by the "varieties of power and reason [that] articulate our distinctively modern life."[169] Asad hopes to show that this is a mistake—that religion, too, is a sphere defined by configurations of power and discursive authority. The search for a transhistorical, transcultural meaning of religion, an essence of religion, only reinforces our tendency to miss how religion's meaning—and even the effort to give a universal definition—is a product of historical change and power dynamics.

Asad further contends that religion's meaning has been directly shaped by the Christian tradition. In his view, the changing contours of the "religious" and efforts to treat religion as a universal concept are best understood as efforts by Christian authorities to maintain a unified tradition with coherent boundaries, despite the fracturing caused by the Reformation.[170] Thus, what religion meant to the Church in ancient and medieval times, he points out, is quite different from what it means today to anthropologists like Geertz. A careful study of the shifting dynamics of religious power and authority across these periods reveals as much. "What we call religious power was differently distributed and had a different thrust" in the pre-modern period, he tells us: "There were different ways in which it created and worked through legal institutions, different selves that it shaped and responded to, and different categories of knowledge which it authorized and made available."[171]

Augustine, he thinks, was particularly sensitive to the inevitable shaping of "religion" by historically and culturally specific power (here, the power of the Church). His written treatment

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[168] Ibid., 115-6.
[169] Ibid., 116.
[170] Ibid.
[171] Ibid.

of the Donatists, Asad observes, reveals that he saw quite clearly "the creative religious function of power," that "coercion was a condition for the realization of truth, and discipline essential to its maintenance."[172] In Asad's telling, Augustine believed that "it was not the mind that moved spontaneously to religious truth, but power that created the conditions for experiencing that truth."[173] He recognized that "particular discourses and practices were to be systematically excluded, forbidden, denounced," while "others were to be included, allowed, praised, and drawn into the narrative of sacred truth."[174]

This shaping of correct belief and practice Asad attributes to "configurations of power" that have "varied profoundly in Christendom from one epoch to another[.]"[175] In the Middle Ages, for example, the Church's power in "defining and creating religion" covered an "enormous domain."[176] The Church exercised this power to define religion in "rejecting 'pagan' practices or accepting them; authenticating particular miracles and relics…; [or] requiring the regular telling of sinful thoughts, words, and deeds to a priestly confessor and giving absolution to a penitent."[177] Yet over time, Asad continues, with "the triumphant rise of modern science, modern production, and the modern state," the Catholic Church (and then dissenting churches that split off from it) was increasingly concerned to "distinguish the religious from the secular," a process that shifted "the weight of religion more and more onto the moods and motivations of the individual believer."[178] In short, the meaning of religion changed as the Church's political and social power to define what was central to Christianity waned.

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[172] Ibid., 119.
[173] Ibid.
[174] Ibid., 119-20.
[175] Ibid., 120.
[176] Ibid., 121.
[177] Ibid.
[178] Ibid.

Yet even as the Church's power declined, Asad points out, the power to shape the meaning of Christianity simply shifted to others, as philosophers (for example) tried to articulate a concept of "Natural Religion."[179] These philosophical efforts, he thinks, should be seen as the "earliest systematic attempts" at conceptualizing religion after the Protestant Reformation and subsequent European wars.[180] Scholars like Edward Herbert centered religion around "beliefs (about a supreme power), practices (its ordered worship), and ethics (a code of conduct based on rewards and punishments after this life)."[181] This idea of natural religion allowed later philosophers like Kant to "produce a fully essentialized idea of religion" that could be "counterposed to its phenomenal forms," or what we actually encounter in the world.[182] For Kant, different religions' confessions were all derivative from one valid religion suitable for all human beings. Theories of religion, then, became just the latest means for Christians to continue shaping the meaning of their own religion and that of others.[183]

In short, because the "definition [of religion] is itself the historical product of discursive processes" within Christianity, Asad thinks "there cannot be a universal definition" of religion.[184] No matter which definition one might try to offer, any religion's variations across different centuries—and the Christian roots of "abstracted and universalized" concepts of religion[185]—rule out the possibility of finding essential features of religion as a social phenomenon that would show up in every time and culture.

If a descriptive concept of religion can't be universal, how should anthropologists approach the study of Christianity, Islam, or other traditions we typically treat as "religions"?

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[179] Ibid.
[180] Ibid.
[181] Ibid., 121-22.
[182] Ibid., 122.
[183] Ibid.
[184] Ibid., 116.
[185] Ibid., 122.

Asad thinks social scientists are wrong to begin by seeking "the meanings of religious practices and utterances…in social phenomena," as if we could find them in *every* culture and time period.[186] Instead, the "anthropological student of *particular* religions" should work by "unpacking the comprehensive concept which he or she translates as 'religion' into heterogeneous elements according to its historical character."[187] In short, the anthropologist should attempt to understand the particulars of specific religious traditions, such as Islam or Christianity, without assuming that they can all be grouped under a generic descriptive concept defined in Geertz's terms or those of any other scholar.

To summarize Asad's objection to concepts of religion: to the extent that there is anything "essential" about religion, it cannot extend beyond the meanings it might have *within* specific traditions—meanings that are always determined by historically and culturally specific practices and human relationships. In the next section, I explore a more explicitly historical challenge to analytic concepts of religion.

B. Nongbri on the historical roots of the concept of religion

In *Before Religion*, Brent Nongbri argues that the meaning of the modern concept of religion insufficiently explains the beliefs and practices of some cultures, particularly ancient ones. The context-specific roots of the modern concept of religion, he writes, challenge the view that "religion is a universal human phenomenon."[188] The "popular assumption that religion and faith are timeless mysterious things"[189] is undermined both by the absence of terms in ancient texts that convey the same meaning "religion" has for us today, and the historically specific roots of this "modern view" of religion in the Reformation, Renaissance, and Enlightenment periods.

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[186] Ibid., 129.
[187] Ibid.
[188] Nongbri, *Before Religion*, 1.
[189] Ibid., 15.

Unlike Asad, Nongbri doesn't take issue with the theoretical attempt to systematize religion that we see in the work of scholars like Geertz. The central problem with assuming that religion is a universal human phenomenon, he insists, isn't that it's mistaken to try to systematize. "After all," he reminds us, "ancient people systematized"; they "had 'concepts'"; the problem is rather that "the *particular* concept of religion is absent in the ancient world."[190] Nongbri develops this point in his book's early chapters, arguing first that words resembling or typically translated as "religion" today in ancient texts—such as the Latin *religio*, the Greek *threskeia*, or the Arabic *din*, *milla*, and *umma*—did not carry the same meaning for the people who used these terms that is conveyed by our modern use of the term "religion." The term *religio*, for example, has ranged from denoting personal scruples in early Latin plays, to suggesting an "excessive concern about the gods" in Lucretius's writings,[191] to expressing the ideas of "worship," "rite," or "reverence" in early Christian writings from Tertullian, to covering monastic rites in medieval times.[192] And in general, Nongbri argues, pre-modern peoples had "different vocabularies and different means for conceptualizing one another" than the "world religions" we today describe them as practicing, "if they even chose to differentiate themselves from one another at all."[193] Early orthodox Christians like Eusebius, for example, saw Manicheans not as adherents of "the first World Religion" but instead as a "heretical sect,"[194] while the eighth century monk John of Damascus described "followers of Muhammad not as members of a separate religion but as Christian heretics."[195]

[190] Ibid., 4.
[191] Ibid., 28.
[192] Ibid., 29.
[193] Ibid., 66.
[194] Ibid., 65-66.
[195] Ibid., 66.

But if religion isn't a central concept of the ancient and pre-modern periods, then where did that concept come from and how did its meaning develop? Or, as Nongbri puts it, "[i]f religion has not simply 'just been there' since antiquity, how did this particular way of conceiving the world, the manner of carving the world into 'religious' and 'not-religious,' come to be so dominant?"[196]

It is the modern period Nongbri proposes we look to for origins of the concept of religion, particularly the Reformation, Renaissance, and Enlightenment. In these periods, thinkers started to see the world as divided into different religions, all understood as "different systems of privately held beliefs about how individuals attain salvation."[197] Marsilio Ficino, for example, wrote "on the plurality and unity of *religio*,"[198] contending that although there are different instances of *religio*, these can all be ordered in a hierarchy under Christianity, which is "not simply one item in a class, on par with other examples of *religio*," but rather the "pinnacle of what *religio* can and should be."[199] All forms of worship are connected in some way even if unintentionally to "the one true God": as Ficino himself argued, "All *religio* has something good in it; provided that it is directed towards God, the creator of all things, it is sincere, Christian *religio*."[200] Other thinkers, like Giordano Bruno, later argued that Christianity was just one *religio* among others.[201] Over time, growing dissent among different sects of Christianity encouraged scholars to take a least-common-denominator approach to the explanation of religion, yielding, for example, Edward Herbert's five Common Notions, or what he considered "undeniable propositions," of Religion:

[196] Ibid., 85.
[197] Ibid., 86.
[198] Ibid., 87.
[199] Ibid., 88.
[200] Ibid., 89.
[201] Ibid., 90.

> that there is one Supreme God, that he ought to be worshipped, that Vertue and Piety are the chief parts of Divine Worship, that we ought to be sorry for our Sins, and repent of them, and that Divine Goodness doth dispense Rewards and Punishments both in this life, and after it.[202]

Herbert's propositions contributed directly to the modern concept of religion by emphasizing the importance of abstract beliefs: "by shearing away all the practices of ancient people in his discussions of what was essential and original in these religions," Nongbri continues, he "contributed to the growing sense that religion was a matter of beliefs apart from" ritual, ceremony, and mystery.[203] Religion was ultimately "a mental phenomenon" for Herbert, and his increasingly common view that religion was "a set of beliefs that could be either true or false would become standard in the next century."[204]

Beyond developing the idea of religion as centrally about abstract beliefs, thinkers in the modern period also treated religion as a sphere of private, apolitical convictions. This understanding of religion, Nongbri suggests, grew out of the political conflict generated by growing division among Christians. Whereas the Catholic Church was once a source of religious and political homogeneity in Western Europe, in these years it lost that status and declined in power as nation-states began to form around the divided religious affiliations and secular interests of their rulers. Protestant authorities like Martin Luther challenged core doctrines of Catholicism and shifted the emphasis of spiritual authority to the individual rather than the church. Over time, in response to what we now consider the Wars of Religion, political thinkers like Locke and Bodin began to argue for a vision of the state as a cohesive entity presiding over a multiplicity of religious views, which should be relegated to a private sphere.[205] For such

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[202] Ibid., 94.
[203] Ibid., 95-6.
[204] Ibid., 96.
[205] Ibid., 97-104.

thinkers, this understanding of the state presented a path to stability and peace in spite of increasing religious division.

Collectively, then, for Nongbri these historical developments resulted in a "modern concept of religion": an understanding of religion as privatized, apolitical, and essentially comprising abstract beliefs about the divine.[206] This view, he argues in later chapters, helped to "generate what are now known as religions in India, Africa, and Japan" through European colonization,[207] and encouraged scholars to construct the idea of "ancient religion" in pre-modern cultures.[208] He describes two accounts of "ancient Mesopotamian religion" as a matter of individual feelings and experiences, which the scholars studying it believed to be the locus of "religion" more generally.[209]

Nongbri also points to problems inherent in the use of concepts like "embedded religion," which are a tool for scholars to explain some social phenomena in ancient cultures.[210] Such a phrase helps convey that for ancient peoples, religion was not distinct from other spheres of human activity like politics. Yet the use of this term, Nongbri argues, is deceptively treated as "descriptive" rather than "redescriptive:" whereas for an anthropologist a *descriptive* use of a term is an "observer's best effort at reproducing classification systems of a group of people being studied," through which the observer approximates but doesn't exactly reproduce this "native viewpoint," a *redescriptive* use of a term involves classifying phenomena in terms foreign to those being observed, as for instance if we were to discuss the idea of political parties among the Native Americans.[211] For Nongbri, much of current scholarship slips between these two uses of

[206] Ibid., 106.
[207] Ibid., 107.
[208] Ibid., Chapter 7.
[209] Ibid., 146-50.
[210] Ibid., 151.
[211] Ibid., 21-22.

the term religion, failing to distinguish clearly when that term accurately captures phenomena in terms ancient people would have understood, and when it simply imposes a conceptual framework that would have been alien to their way of thinking. The concept of "embedded religion" highlights this challenge, he thinks, by suggesting implicitly that there "really is something 'out there' in antiquity called 'Greek religion' that scholars are simply describing rather than creating."[212]

I'll return to this distinction between descriptive and *re*descriptive terms, and Nongbri's claim that modern scolars have "generated" or "constructed" ancient religions, in part IV. For they help us understand why Nongbri thinks he has shown that religion is not a universal human phenomenon. Like Asad, Nongbri seems to believe that the historically, culturally specific context of the *concept* of religion rules out that there is any universal phenomenon we can point to. Ancient Mesopotamian practices, for example, can't be satisfactorily explained in terms of the "modern view" of religion—which treats religion as a matter of private, apolitical conviction—because their practices were intimately bound up with political institutions.

Let's say, then, that we accept both Asad and Nongbri's detailed arguments for their view that our particular concept of religion (the one evoked by the English word "religion") is historically contingent. Is that enough to support Hurd and Mahmood's skepticism about religious liberty? Can Asad and Nongrbri's claims about concepts—about a bit of our language—support substantive normative conclusions about policies aimed at protecting certain activities? The remainder of the chapter will argue that they cannot, by developing a stronger, deeper disagreement with this line of critique. The conclusion these scholars of religion share—namely, that religion can't be the "universal" human phenomenon we think it is, owing to the historically specific roots and meaning of religion as an analytical concept—doesn't undermine

[212] Ibid., 151.

the basis for a religious liberty right, as Hurd and Mahmood contend. In fact, determining whether religion is or has been a universal social phenomenon isn't a prerequisite to making the case for such a right. Instead, as part III will draw on contemporary sociology of religion as well as a recent strain in legal theory to suggest, whether or not we can fashion a sufficiently objective, and hence fair or just, concept of religion (and corresponding right of religious liberty) depends on whether there is a distinct objective *value* in the vicinity of religious activity. This value would give descriptive theorists of religion an objective groundwork for efforts to organize (simplify, pick from among) a wide variety of perspectives on the purpose of religion. How? By identifying what is important or significant in this realm and thus worth shaping our concepts around in an effort to make sense of social realities found in different times and places.

But even so, I'll argue, we don't need evidence that there is behavior in *every* time and culture to determine that wherever it *does* occur, it is objectively valuable and therefore justifies a universal religious liberty right. (At the same time, though, if there is a distinct objective value in the vicinity of religious activities, we should expect to find those activities being engaged in (or at least approximated) in most times and places.) Denials of the existence of any such value, I'll then argue in part IV, seem to undergird at least Asad and Nongbri's positions, and illuminate the strongest challenge they pose to my dissertation goals.

III. *Answering the Challenge*

Having identified the postmodern challenge to concepts of religion, I'll now develop a three-part response. First, I'll draw on recent work in contemporary sociology to show that the critique actually begins from the wrong place. Any effort to give a theory of religion, this work shows, must start not from an account of how or when the term religion is used in human

language, but instead from an account of the meaning and purpose religious practitioners understand their actions to have—a point Nongbri actually anticipates in distinguishing between descriptive and redescriptive terms. Second, I'll amplify this point by tracing its parallel in the development of legal theory: the emphasis given by different legal philosophers such as H.L.A. Hart, Joseph Raz, and John Finnis to the "internal viewpoint" of law-abiding agents in explaining law as a social phenomenon—its existence, endurance over time, and so on. This emphasis actually helps us take the third step: I'll draw further on Finnis's account of the requirements for any adequate theory of law to sketch what the analogous requirements for an adequate theory of religion might be. Finnis shows that a theory of law will be organized around the viewpoint of someone who is attentive to all the possibilities of human flourishing that law serves to protect. So too, I'll argue, a theory of one particular kind of law—the law of religious liberty—will have to be organized around the viewpoint of someone who is fully attentive to the kind of distinctly valuable activity that law should protect. And as chapter 3 will go on to argue, this will include not just the construction of identity—a kind of fulfillment found in many other pursuits besides religion—but something else that is distinctively and objectively valuable, namely the pursuit of harmony or alignment with an ultimate ground or source of reality. Before defending a theory of religion organized around this attentive viewpoint, however, I'll finally use Finnis's account in part IV of this chapter to build the deepest and strongest possible response to the postmodern challenge: such critiques are most charitably reframed as rejections of any distinct objective value of religion that could help us draw the boundaries of a descriptive concept of it.

A. The Internal Perspective: Insights from Sociology of Religion

Two contemporary sociologists have proposed theories of religion that respond directly to the postmodernist challenge. In doing so, they give us two key insights for overcoming that

challenge, by giving us the groundwork for an adequate theory of religion's value that could inform the parameters of religious liberty: first, they show us that the proper basis for a theory of any social phenomenon, including religion (and any analytic concept of it), is the perceived meaning of human *practices*, not the use of a particular concept in human languages. Second, they also show us that in developing an account of that meaning, social theorists must consider the *internal point of view* of human practitioners—the perspective of those who are *doing* the particular actions the theorists have set out to study.

Martin Riesebrodt opens his account of religion with a direct response to Asad: critiques like his "are right in that the concept cannot be universalized on the basis of either a theory of discourse or a theory of institutions, but they overlook approaches founded on a theory of action."[213] For Riesebrodt, we can develop a concept of religion if we start not from the particular use of "religion" in human languages, but instead with common behaviors across time and culture that could make up a distinct sphere of action we could organize under a general descriptive concept. Indeed, Riesebrodt forthrightly rejects any skepticism about the usefulness or adequacy of the concept of religion to explain a universal reality in human history and behavior. His "adherence to the concept of religion," he clarifies, "is based on neither theological nor religious but solely pragmatic grounds":

> From my point of view, the concept of religion as action makes sense and is indispensable….Given the great significance of religiously motivated action in our time, not to mention in other centuries, an abandonment of the concept of religion would represent a loss for knowledge…I will therefore propose a definition and a theory of religion that will make possible a better understanding of religion as a specific type of meaningful social action, and, at the same time, account for its universality.[214]

[213] Martin Riesebrodt, *The Promise of Salvation* (Chicago: University of Chicago Press, 2010), 6.
[214] Ibid.

To abandon the prospect of developing any social concept is to risk losing, Riesebrodt thinks, our ability to "adequately describe the uniqueness of social phenomena[.]"[215] "[W]ithout general concepts and comparisons," in other words, we risk not fully understanding or explaining to the best of our ability the complexities of human behavior.[216] In short, for Riesebrodt "the postmodern debate…includes arguments that far overshoot the target."[217] The implication of challenges like Asad's (or Nongbri's) that "scholars, in analyzing society and culture, should use only universal concepts that are also linguistically universal," he argues, "…is a position that would spell the end of all scholarly work."[218]

Moreover, Riesebrodt continues, critiques of the concept of religion need to presuppose at least a weak form of that concept to have any force in the first place. "Asad's claim that there could be no universal concept of religion is neither sufficiently grounded nor logically valid," he contends:

> [E]ven if one adheres to the view that religion has a different structure, function, and meaning in different social formations, this view requires a concept of religion on which such a claim can be grounded. If religion always means something different in different contexts, how do the critics of religion know that what is different in each case still represents 'religion,' especially in societies that have no concept of religion?[219]

In sum, for Riesebrodt, "The universality or general applicability of a concept of religion depends not on the universality of discursively produced concepts but rather on the existence of certain types of meaningful action."[220]

At the same time, he thinks it would be a mistake simply to define religion "so that its modern, Western shaping is…universalized."[221] "Neither God, nor church, nor the relative

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[215] Ibid., 11.
[216] Ibid.
[217] Ibid., 16.
[218] Ibid.
[219] Ibid., 11.
[220] Ibid., 21.
[221] Ibid., 17.

autonomy of religious institutions or subjects constitutes an appropriate foundation for a general concept of religion," he insists.[222] So how do we arrive at a universal concept or definition of religion? The right approach begins, Riesebrodt explains, by asking if there are "structures of meaning that can be used, over and beyond cultural boundaries, as the foundations for such a definition[.]"[223] To see those structures of meaning, crucially, "we have to replace a model based on linguistic criteria by one based on action."[224] "Then it becomes clear," he continues, that human beings universally draw two kinds of "distinctions between religious and nonreligious phenomena."[225] One is the distinction between religious and nonreligious actions in one's own society; the other is the distinction people draw between "their own religious beliefs and practices" and those of other cultures or societies.[226] Riesebrodt describes several ways that human beings draw these distinctions, within what he calls both "Abrahamic" and "Asian" religions: they "demarcate" their boundaries relative to each other, they "assimilate" or borrow ideas and practices from each other, and they "superimpose" their own beliefs and practices onto other religions.[227] Societies also universally develop what Riesebrodt calls a "politics of religion."[228]

The presence of these distinctions in every culture does not all by itself generate a *universal* concept of religion; rather Riesebrodt treats them as the foundational data points for fashioning such a concept, because they show that every culture exhibits the use of some *particular* concept of religion. The fundamental distinction between religion and non-religion gives Riesebrodt some starting material to work with in developing a universal concept. And in

[222] Ibid.
[223] Ibid., 20.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid., 23-37.
[228] Ibid., 37-42.

that effort, Riesebrodt clarifies that he wants to avoid two extremes: one would be simply to list various examples—"to present a world history"—of religious polemics, borrowings, syncretisms, edicts, and travelers' reports."[229] The other would be to try "to prove that 'religion' is a category of the human mind that is given *a priori*."[230] To articulate a universal concept of religion requires two further steps Riesebrodt then takes: first, to explain why other existing "scholarly imaginations of religion"—other concepts—are not universalizable in the way Riesebrodt thinks his own is;[231] and second, to consider more closely what he calls the "internal perspective" of those who practice religion, so as to be able to organize the common thread among those different perspectives as the basis for a universal concept.

Christian Smith similarly emphasizes the study of human action, and the internal perspective of those who engage in it, as the proper foundation for a descriptive theory of religion. Like Riesebrodt, Smith directly responds to the postmodern challenge, pointing out that it obscures the proper focus for social theorists of religion: the challenge "may be largely correct, insofar as it goes, when it comes to religion as a *concept*, but…this does not negate the fact that humans have been *practicing* something real and identifiable that we call religion for countless millennia."[232] Smith also follows Riesebrodt in emphasizing the internal perspective of religious agents as key to understanding the meaning of religious behavior, and so to developing a concept of religion. "[T]he necessary theoretical starting place for understanding religion," he contends, "is what a religious culture or tradition says those practices mean and intends its practices to

[229] Ibid., 44. For a counterexample of such a list, see Jonathan Z. Smith, "Religion, Religions, Religious," in *Critical Terms in Religious Studies*, ed. Mark Taylor (Chicago: University of Chicago Press, 1998), 269-284. Rather than defend a particular concept of religion or the religious, Smith instead catalogues the history of the term's use, emphasizing that it has changed greatly over time, that at least historically it has been "a category imposed from the outside on some aspect of native culture," and that it is generally thought to be a universal human experience by those who apply it to describe what they observe in foreign cultures or peoples (269).
[230] Ibid.
[231] Ibid., 45.
[232] Christian Smith, *Religion: What It Is, How It Works, and Why It Matters* (Princeton: Princeton University Press, 2017), 16.

achieve."[233] Smith lays out three methodological steps for any theory of religion that closely track Riesebrodt's and give us a general sense of what is required for any descriptive theory of a social phenomenon. First, he argues, we mustn't get sidetracked by debates about the historically contingent use of concepts; instead "we must turn our attention away from various debated concepts of religion and focus instead on the *reality* of religion as it is found in actual human lives and societies."[234] Second, we must focus our attention more specifically on the meaning of the actions we seek to explain: "we need to put on hold our interest in the *ideas and beliefs* of religious people, and concentrate on their religious practices," that is, on "repeated, religiously meaningful behaviors."[235] And third, we can't just settle on a list of different possible understandings of religion: "we must do more than ponder various arguments for and against different views of religion. We also need to make rational judgments about which approaches seem better and so deserve our assent."[236]

I will return to the universal concepts of religion that Riesebrodt and Smith propose in the next chapter, because they closely approximate (though ultimately fall short of) the theoretical account I want to defend as the normative foundation for religious liberty rights. For now it's worth summarizing the steps they show us toward a complete answer to the postmodern challenge: we can defend a theory of religion as a universal value, but only by starting from the meaning of religious practices as it is perceived by those who engage in them. In fact, the only way the postmodern challenge can have force at all is if we take seriously its contention that many concepts of religion fail to capture adequately the internal perspective of religious

[233] Ibid., 33.
[234] Ibid., 21.
[235] Ibid.
[236] Ibid., 21-2.

practitioners.[237] In other words, the critics themselves presuppose that there *is* a more or less unified set of activities across different cultures that equally *deserve* the label "religion"—otherwise it would be impossible to say that our concept is too exclusionary.

The importance of the internal perspective of those engaged in a practice is confirmed, I'll now show, in another field of foundational social science or descriptive sociology: the theory of law. And the development of this field—sometimes called analytic jurisprudence—I'll also argue illuminates a further necessary step for an adequate theory of any social phenomenon, whether of law or of religion: the theorist must draw upon his own judgments to select the internal perspective (to use Riesebrodt's phrase) or the internal point of view (as some legal theorists have described it) that *most compellingly* explains the practices in question. Only this final differentiation between more central and more peripheral agential viewpoints can generate the best explanation of a distinctive kind of human behavior, and that differentiation can only be achieved through a kind of reflective equilibrium between (a) the actual perspectives of agents about the values sought in their behavior; and (b) the theorist's judgment about what is objectively valuable at stake in the behavior, which is a perspective that would best explain its existence and endurance over time.

By piecing together these insights from legal theorists such as Hart and Finnis with those I've already drawn from Smith and Riesebrodt, I will finally be able to articulate the central claim of this chapter: that any descriptive theory of a social phenomenon, including religion, is necessarily internal and evaluative: it starts with religion's *perceived* values from the perspective of *those who pursue it*, and settles on one or a consistent subset of those (partially conflicting) perspectives based on the theorist's own evaluative judgment of the most objectively *compelling*

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[237] Cf. Riesebrodt, *The Promise of Salvation*, 15. ("Postmodern criticism's most important contribution consists in examining general concepts to see how far they universalize historically particularist ideas and thereby misunderstand other cultures and especially non-Western cultures.")

account of religion's value. It is this sort of account of religion that must inform a political-moral theory in defining the scope of religious liberty rights if that scope is to be sufficiently objective, and hence just, rather than exclusionary in the way that the postmodern critics fear.

A crucial note of clarification: what I've said above and what I will argue in the next section will not require us to settle on an internal perspective that endorses one particular religion as the true religion. Instead it will be the internal perspective on what practical *reason* tells us is valuable about religion, not any particular historical claim to revelation; and practical reason will itself (I'll argue more fully in chapter 3) tell us that the relevant value is at stake even in (honest but) theologically mistaken religions (if such there be).

B. The Central Case of the Internal Perspective: Analogies to the Theory of Law

To begin to understand the claim I want to fully establish here—the inevitable relationship between a descriptive theory of a social phenomenon and a theory of objective human values at stake in it—it's best to remind ourselves of the point of any descriptive theory. It is to simplify a set of data points—which in any descriptive *social* theory, are facts about human action—in a way that is illuminating, or makes sense of them. Simplifying the facts in illuminating ways requires organizing them. And organizing them requires ordering them—focusing (and fashioning our descriptive concepts around) what is more or most important among them. But understanding what is important or significant in *social* phenomena—in human activities—will require the social theorist to grasp the activities' *point* or *purpose*.

This point, we've already seen, is explicit in the work of contemporary sociologists of religion like Riesebrodt and Smith.[238] But it also finds support in the work of legal philosophers

[238] In their attention to the internal perspective of religious agents, Smith and Riesebrodt are continuing in the tradition of their predecessor Émile Durkheim, who recognized that this practical perspective is what differentiates the work of the descriptive theorist of religion from the historian or the ethnographer of religion. Unlike these other fields, sociology, he writes, "does not seek to become acquainted with bygone forms of civilization for the sole

like H.L.A. Hart and Joseph Raz, who recognized that determining what is significant in a particular set of human affairs requires adopting a "practical" point of view—practical not, as their colleague John Finnis says, as a viewpoint on what is "'workable' as opposed to unworkable, efficient as opposed to inefficient," but rather a viewpoint on "decision and action," about "what (one ought) to do"—the viewpoint of practical reason, of an account of human goods.[239]

To capture most accurately the *point* of the particular behaviors she is studying, we saw in Riesebrodt and Smith, the descriptive theorist needs to adopt the practical viewpoint of *those who engage in* the activity. Nongbri too recognizes this point when he distinguishes "describing" a social phenomenon like religion, in which the "native viewpoint" guides the social theorist's explanation of the behavior under study, from "redescribing" it, or adopting a perspective on the point of the actions that would be foreign to those who engage in them. And Hurd and Mahmood offer indirect support too in criticizing a Protestant conception of religious liberty: such a conception fails to protect minority religious practitioners adequately, on their view, because it is out of sync with how they understand themselves, with *their internal perspective*.[240] Likewise

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purpose of becoming acquainted with and reconstructing them." Rather, "like any positive science, its purpose above all is to explain a present reality that is near to us and thus capable of affecting our ideas and actions." Émile Durkheim, *The Elementary Forms of Religious Life*, ed. Karen E. Fields (New York: The Free Press, 1995), 1.

[239] John Finnis, *Natural Law & Natural Rights* (New York: Oxford University Press, 2011), 12.

[240] In *Beyond Religious Freedom* Hurd also emphasizes, implicitly, not only the importance of the internal point of view, but its function as a touchstone for any adequate concept of religion (even though she thinks that ultimately there isn't any), in drawing three distinctions: between "lived religion," which is a "diverse field of human activity, relations, investments, beliefs, and practices that may or may not be captured" in what gets "identified as 'religion' for the purposes of law and governance"; [240] "expert religion," or the view of religion among "those who generate 'policy-relevant' knowledge about religion in various contexts"; and "governed religion," which is the manipulation of lived religion to conform with the way religion is understood by those in power (8). For Hurd these differences entail that "religion is too unstable a category to be treated as an isolable entity" (6).

But the use of these terms *is* one step toward a stable concept of religion, and Hurd sees that. She admits to the tension between her "claim that religion is too unstable a category for government management," on the one hand, and her distinction between lived, expert, and governed religion on the other (13). For in order to criticize the inclusion of some religions in positive laws around the world (under "expert" religion), and not others (under "lived religion"), she has to presuppose that there is some stable category of "religion" (lived religion) that's independent of what the law just happens to say it is. Unfortunately, she only sidesteps this problem, replying only that her book

Hart, in *The Concept of Law*, defends the necessity of adopting what he calls the "internal point of view" in a devising a theory (and concept) of law—making sense of the behaviors broadly called "legal" (e.g., making, changing, and applying rules, and adhering to them) requires grasping the perspective of those who engage in those behaviors.[241] By introducing this idea, Hart took himself to be improving upon earlier theories of law (developed, for example, by Jeremy Bentham) that defined law as simply a set of commands backed by threats of force.[242] To see law in this way, Hart recognized, leaves one unable to explain some of the most crucial facts about a legal system, such as why one would not only want to establish a legal system but to sustain it.[243]

Hart drives home the key importance of the internal viewpoint by describing how we explain the phenomenon of someone stopping at a red light. How else can we understand what we observe—a person sitting in a car, ceasing to hit the gas pedal, and beginning to hit the brakes as the light above the road he is traveling changes from green to red—unless we ask what that driver believes himself to be doing, what goals he means to pursue?[244] Raz agrees with Hart in this in his discussion of the "legal point of view."[245] And so does Finnis, who notes that Hart "gives descriptive explanatory priority to the concerns and evaluations…of…those who not merely 'record and predict behavior conforming to rules', or attend to rules 'only from the external point of view as a sign of possible punishment', but rather '*use* the rules as standards for

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"emphasizes the mutual interactions and blurred boundaries between these fields" of religion, and reiterating that "there are no clean lines" between the categories she has given us (13).

[241] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 89-90.

[242] Ibid., 16-17.

[243] Ibid., 79.

[244] Ibid., 90.

[245] Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), 171. ("The ideal law-abiding citizen is the man who acts from the legal point of view. He does not merely conform to the law. He follows legal norms and legally recognized norms as norms and accepts them also as exclusionary reasons for disregarding those conflicting reasons which they exclude.")

the appraisal of their own and others' behavior.'"[246] Indeed, all three philosophers find the internal point of view crucial for a theory of law because without it, the theory can't fit (explain) all the salient facts (explananda) about a legal system, such as the existence not just of primary rules like "Don't run red lights" but also of secondary rules for changing the primary ones.

Simply put, a theory of a social practice that fails to take the internal perspective of those engaged in it will always fail *as* a theory—as an *explanation* of the practice's salient features. Establishing this is the signal (and widely recognized) achievement of Hart's philosophy of law, further developed in the work of positivist successors of his like Joseph Raz.

But we can discern some further requirements for any descriptive social theory, as Finnis's own account of the theory of law shows, building on those of Hart and Raz. Finnis's insight is that while theories of an activity need to be sensitive to the purposes of agents engaged in it, that isn't enough. That is because the agents' purposes themselves differ and conflict, so the social theorist will have to organize—that is, order, rank, privilege some of those purposes over others. Or as Finnis puts it, while Hart and Raz "sharply differentiated the 'internal' or 'legal' point of view from the point of view of those who merely acquiesce in the law and who do so only because, when, and to the extent that they fear the punishments that will follow non-acquiescence," they "firmly refuse to differentiate further" between points of view that could serve as the *central* case of the legal viewpoint, that is, the points of view that best explain the existence and maintenance of the rule of law.[247] Finnis thinks this is a mistake on their part—and as we'll see in the next chapter, we can trace a similar mistake in the theories of religion proposed by Riesebrodt and Smith.

[246] Finnis, *Natural Law & Natural Rights*, 12.
[247] Ibid., 13.

In particular, a theory that fails to pick from among the various internal perspectives on an activity will do no more than give us a list or chronology of all the different possible points of view someone could have on the reasons for her behavior. Yet theories must do more—they must distinguish which points of view (which goals) *best* explain and make sense of the *range* of activities at issue—that is, which agential purposes most fully and compellingly explain the existence of the social phenomenon in question and its most salient features. And to explain a practice in a compelling way, one must put it in its best light—seek an account that *justifies* its salient features (if those are in fact justifiable).

Recall again my earlier point that the search for a justification is driven by a mere *starting presumption* (rooted in a kind of principle of interpretive charity) that the people who see real value in the activity to be theorized are right. It may still turn out that on further reflection, we have to disagree with them, finding no value in the practice after all (as we would with practices like alchemy, for instance). For now, in the rest of this chapter and the beginning of the next one, I am merely asking the reader to assume *provisionally* that there will turn out to be a fully justifiable internal perspective on religious behavior, which is right to see in religious practice something distinctly, objectively valuable. The goal of Chapter 3 will be to move us beyond this provisional assumption of value to considered acceptance of it, based on both sociological evidence and critical normative reasoning.

Moreover, as we will see below, the compelling perspective the descriptive theorist needs to look for is not one that just zooms in on one salient feature of a practice to the exclusion of others, but instead a perspective that gives us a wide-angle lens on the value at stake in a broad range of activity: the more activity a perspective can compellingly explain, the better a descriptive theory it gives rise to.

We can unpack and defend Finnis's point (about the multiplicity of internal perspectives, and the need for any adequate theory of a practice to pick and choose) with concrete examples that arise for the theorist of law. Finnis asks us to consider, for example, "the viewpoint of Raz's anarchistic judge, who covertly picks and chooses amongst the laws he will enforce, with the intention of overthrowing the whole system": that viewpoint "is not a paradigm of either the judicial or legal point of view."[248] Finnis argues that attitudes like this one, or others that Hart imagines (like an "'unreflecting inherited or traditional attitude…or mere wish to do as others do'") might sustain a legal system "up to a point," but they cannot explain or bring about "the transition from a pre-legal (or post-legal!) social order of custom or discretion to a legal order, to remedy the defects of pre-legal social orders."[249] And in that sense they fail to do something that a fully adequate theory of law would do: explain not only the existence of law and legal systems, but their initiation and reform over time. So too, then, an adequate theory of religion will form its general descriptive concept according to the internal religious viewpoint that best explains not only the existence of religious people, communities, and traditions, but their emergence, endurance, and evolution.

Likewise, the people Hart describes as motivated primarily by "'calculations of long-term interest' water down any concern they may have for the function of law as an answer to real social problems," and their preoccupation with their own interests "dilute[s] their allegiance to law and the pursuit of legal methods of thought," the very point of which is to "subordinate [self-interest] to social needs."[250] Together, Finnis concludes, these "considerations and attitudes" all mark "manifestly deviant, diluted, or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as

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[248] Ibid.
[249] Ibid., 13-14.
[250] Ibid., 14.

such."[251] Here again, he thinks, a descriptive theory that refuses to distinguish the internal viewpoint of those who see law and adherence to it as genuinely valuable from the viewpoint of those who follow it for merely incidental or ulterior reasons (to avoid punishment or game the system, etc.), will be a theory that fails to explain all the facts worth explaining about legal systems, including their maintenance over time.

Another way of putting this point is to say that the "watered-down instances" of the legal viewpoint—the anarchistic judge, the calculating and self-interested citizen—*can* provide *some* explanation of *some* features of the social practice of law, but the picture they give is radically incomplete. We should be looking for one that does more, in order to have the best possible account of law as an enduring social practice. So too, I'll argue below and in the next chapter, the descriptive theorist of religion should be seeking the internal perspective of religious practitioners that can explain a range of salient practices in an intelligible and stable way.

Thus, Finnis argues, in determining the central or paradigm instance of the legal viewpoint, the descriptive theorist should choose "a point of view in which legal obligation is treated at least presumptively as a moral obligation."[252] It is only this point of view, he thinks, that can fully explain the transition from a pre-legal to a legal order, for treating legal obligation as a kind of moral obligation explains why it ought "to be maintained 'against the drive of strong passions' and 'at the cost of sacrificing considerable personal interest.'"[253] And in treating "the establishment and maintenance of legal…order…as a moral ideal if not a compelling demand of justice," this perspective sees the "institution of the Rule of Law" and "compliance with rules and principles of law" as "presumptive requirements of practical reasonableness."[254]

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[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Ibid., 14-15.

In the same way, the theorist of religion should be in search of the religious viewpoint that sees religion as worth doing over the long run, not just for short-term gains (e.g., to secure a good harvest this fall, or avoid sickness, or maintain one's good standing with colleagues). Yet, as I'll argue more fully in the next chapter, the most explanatory religious viewpoint would go even a step further: it would see religion not just as worth doing over a sustained period of time, but *for its own sake*. Only this kind of perspective can fully explain, for instance, religion's endurance in human history in the face of the great and sometimes extreme risks it often involves to human life (in a world where minorities are so often persecuted). The central case of the religious viewpoint, then, will be a perspective that sees not only a distinct objectively valuable purpose in religion, but one whose value is *inherent*, not instrumental. This will be the central case of the internal perspective. It is this perspective that should guide both the descriptive theorist studying religion and, we will see momentarily, the political theorist making judgments about the scope of religious liberty.

Finnis concludes that the descriptive theorist of law can make "one further differentiation" in choosing the central case of the legal viewpoint.[255] For even among those who see the institution of law as required by practical reason, some viewpoints will grasp better than others what practical reason really requires in the domain of law.[256] Thus the central case of the legal viewpoint will be, according to Finnis,

> the viewpoint of those who not only appeal to practical reasonableness but also are practically reasonable, that is to say, consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.[257]

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[255] Ibid., 15.
[256] Ibid.
[257] Ibid.

"What reason could one as a descriptive theorist have," Finnis asks, "for rejecting the conceptual choices and discriminations of these persons, when one is selecting the concepts with which one will construct one's description of the central case and then of all the other instances of law as a specific social institution?"[258]

Likewise, a theory of *religion* will have to be organized around the viewpoint of someone who is fully attentive to "all aspects of human opportunity and flourishing" in that area of human activity—in short, of someone who in fact sees religion as an objectively worthwhile human pursuit. As we will see in the next chapter, the theories of religion proposed by Riesebrodt and Smith offer something quite close to this viewpoint but still sufficiently different from it to render it inadequate for the purpose of grounding religious liberty rights.

Thus in the development of the theory of law—in the progress of analytic jurisprudence across the 20th century, from Bentham to Hart and Raz and then to Finnis—we can see a gradual recognition of what must be central to any descriptive theory of social phenomena: a concern with the viewpoint of those who engage in the behaviors the theorist seeks to make sense of, and a differentiation between viewpoints that explain the behaviors more or less adequately. And what makes a viewpoint an apt explanation, or central case, for the theorist will be how closely and reasonably that viewpoint aims, through the activities it motivates, at securing genuine goods. Those objective goods at stake in the activities of *religion*, as the next chapter argues, will in turn indicate to the political theorist a distinctive range of valuable activities that a religious liberty regime needs to protect and what sort of protection they warrant.

To be clear, the study of which values make up human wellbeing is a normative issue, not reducible to or derivable from purely descriptive premises. No *ought* from an *is*. But the point I'm trying to defend is analogous to Finnis's argument in his theory of law: the descriptive social

[258] Ibid.

theorist *cannot do without* some presuppositions about the values that normative theorists study, for two reasons. First, because the subject of his own study is human activity, which is always at bottom a pursuit of some value, whether real or illusory. And second, because any theory will have to simplify—and thus sift through and pick from among specific views of the value—and the only basis for picking the right view is a first-order moral judgment about which value(s) most compellingly explains the existence and endurance of the phenomenon. As Finnis points out, early sociologists like Weber grasped this fundamental relationship between the theorist's judgments about value and descriptions of social phenomena: Weber knew that "the evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concept for use in description of such aspects of human affairs as law or legal order."[259] Weber's concept of the ideal-type concretely captures this inevitable reliance of the descriptive theorist on judgments about what worthwhile goals are at stake in the human behavior he studies.

At the same time, the descriptive theorist's observations of the data before him may in turn inform, shape, and indeed modify his judgments about value over time. Ideally, in other words, the descriptive theorist will attain a kind of "reflective equilibrium," to follow Finnis in using Rawls's phrase, between his or her "assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions…of the human context in which human well-being is variously realized and variously ruined."[260] "Descriptive knowledge," Finnis tells us, "can occasion a modification of the judgments of importance and significance with which one first approached the data as a theorist, and can suggest a reconceptualization."[261] Yet even so, mere descriptive knowledge (e.g., a list of certain activities that seem to appear in every culture and time period) can never be sufficient for the descriptive theorist's effort to give

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[259] Ibid., 16.
[260] Ibid., 17.
[261] Ibid.

a *theory*, which by definition must organize and therefore simplify that knowledge in a way that makes sense of what is known about the practice by observation. For as Finnis continues, "the knowledge will not have been attained without a preliminary conceptualization and thus a preliminary set of principles of selection and relevance drawn from some practical viewpoint."[262] And this viewpoint, I've been trying to show, whether in the study of law or of religion or of any other social phenomenon, must be fundamentally of what is good and therefore to be done in human affairs, and correspondingly of what is bad and therefore to be avoided.

Riesebrodt also acknowledges, at least implicitly, the theorist's own evaluative judgments about the goods at stake in religion as the organizing principles for the concept of religion—of what counts as a more or less central case of that phenomenon. "Which phenomena are subsumed under the concept of religion…implies overt or covert value judgments," he writes.[263] Depending on the theory of religion one ascribes to, for example, one might think that all religions are "always morally 'good,'" or sometimes "'evil' if they justify…cannibalism, oppression, or violence"; or that "only conventional and orthodox forms of 'religion' [are] really religion," as opposed to "deviations from them [that] are either 'magic,' 'superstition,' or 'witchcraft.'"[264] Note, however, that these judgments are not about whether certain forms of religion are "true" or "false" in their distinctly theological claims, but only about whether they are more or less central cases of realizations of the objective (natural, *philosophically* definable and defensible) value or interest at stake in religious liberty.

This account of the connection between a descriptive theory of any social phenomenon and a normative theory of value helps us understand, then, why it can't make sense for the descriptive theorist, as opposed to the ethnographer or historian, simply to catalogue all the

[262] Ibid.
[263] Riesebrodt, *The Promise of Salvation*, 2.
[264] Ibid., 2-3.

different goals people might have in the behaviors pertinent to law or to religion, and then conclude from this diversity that these spheres of human action have no fixed boundaries, or that we can't establish that some actions are more or less instances of "law" or "religion." For even drawing up a list, as Finnis (like Riesebrodt) points out, requires some principles for deciding what goes on the list, which already requires judgments (on the list-maker's—that is, the theorist's—part!) of relative importance. Thus, the descriptive social theorist should be up front about the value judgments that inform his or her selection of the relevant material for study—the relevant human activities.

Having tried to show the link between descriptive social theory and normative value theory, I can now argue in the next section that critiques of the concept of religion like Asad's and Nongbri's are best read as (implicitly) rejecting the possibility that there is any distinct objective value to pursue in the field of human behavior scholars of religion set out to study. For as this section has argued, it is belief in that kind of value that gives all descriptive social theorists the touchstone of their simplifying and organizing work, and by extension, that gives political theorists the grounds for defending the existence of universal human rights like religious liberty.

IV. *The Postmodern Challenge as a Rejection of Distinct, Objective Value in Religion*

The work of the preceding sections was to show that critiques of the concept of religion, and objections to religious liberty informed by them, effectively miss the point: the idea that our terms for referring to religion are contingent and local cannot by itself rule out the possibility that religion is a universal human *good, value, or interest* of the sort fit to be an object of study and, ultimately, of legal protection. We can rule out that possibility—and so undermine the basis for a

universal, distinctive religious liberty right—only by refuting claims that there *are* certain objective values at stake in the human behaviors that scholars of religion study. For as the previous part of the chapter argued, by way of insight from contemporary sociology of religion and analogy to the theory of law, all descriptive analytical concepts for social phenomena presuppose and proceed from an account of the values to be gained or lost in the relevant realm of human activity. Here, then, I want to try to make sense of what seem like strange argumentative leaps in both Asad and Nongbri's critiques by presenting them as implicit rejections of any category of objective value we can call "religion."

As we've seen, Asad wants to challenge our inclination to "define religion (like any essence) as a transhistorical and transcultural phenomenon."[265] He seems to believe that whatever it is we could point to as the fixed conditions or features of a sphere of activity called "religion" just don't exist, unless we're considering any one religious tradition. This problem is especially devastating for essentialist views of religion, he suggests, when we observe it within the Christian tradition, since it is the Christian tradition that has historically been responsible for efforts to define religion. This conundrum seems to be the heart of Asad's critique: efforts to define religion universally, built upon the presumption that religion is a sphere of human activity with some fixed patterns or features, are not based on "self-evident" truths about what religion is, but rather on historically and culturally specific constructions of that concept.

Let's now consider the strength of this objection. If it's true, as Asad seems to think, that historically and culturally contingent conceptions of "religion" (or even the relatively recent birth of that concept, as Nongbri's work addresses more closely) are the only sources for an abstract concept of religion—if all we can do is observe and chronicle different cultures' views on what religion essentially is—then the definitional efforts of anthropologists and philosophers alike

[265] Asad, "The Construction of Religion as an Anthropological Category," 115-6.

seem pointless. For there would be no sound basis for privileging one view of what religion is over any other; and thus no basis for ascertaining (as anthropologists) which forms of human activity in each culture count as paradigm instances of the exercise of religion, and which ones are more peripheral, and which ones fall outside the boundaries of the category altogether.

But now we can see that these historical and cultural shifts aren't the only data points available to the aspiring theorist of religion (as Asad seems to be suggesting they are). The only way we can study the meaning of any social phenomenon—including its diverse historic and cultural variations—is to have some abstract guiding principles that tell us how to simplify that data; for a theory of a phenomenon is an organization—a value-laden simplification—of data about it. And Asad actually recognizes, at least implicitly, that the principles for selection come first of all from the data the theorist seeks to study – human activity.

The best way to make full sense of Asad's opposition to seeing religion as a transhistorical, transcultural phenomenon, I would argue, is to see that he is objecting, fundamentally, to the possibility that there is some distinct objective value to be realized by the activities we try to categorize under religion. For it seems mistaken to infer that the specific historical or cultural origins of analytical concepts *by themselves* rule out the possibility that the concepts can pick out an activity of objective value. As noted, the latter possibility can only be ruled out if there isn't an objective value served by the activities the theorist of religion wants to address, which in turn could provide a reasonable basis for organizing his or her selection of the material (the specific activities) to be assessed and analyzed (in terms of whether, how, and to what extent they realize the value at stake). For then any descriptive sociology—any organization, any ordering of some purposes over others—really would be arbitrary. It would

have no objective basis, no reference point outside the particular and contingent (and perhaps idiosyncratic, questionable, or even malign) subjective desires or private goals of the theorist.

And I think, at the end of the day, that this—the denial of any such objective value distinct to religious activity—is the position Asad wants to defend, even if it isn't explicitly articulated. He is extending to religion Foucault's understanding of politics (along with other disciplines) as a sphere of action the meaning of which is entirely socially constructed by those who hold discursive authority—the cultural and social power to define what is true and false within a particular sphere. In reducing the formation of such concepts to sheer power dynamics, Asad is presumably denying that the concepts thus formed have any basis in objective and universal values, as opposed to the private interests or goals of those wielding authority.

It is this perspective that ultimately motivates his critique of Geertz's (and others') essentialist reasoning about religion: for Asad, Geertz is wrong to think that the study of religion is primarily about identifying various conceptions of "symbolic meanings linked to notions of a general order" in the world or the universe, because this approach is rooted in an understanding (whether Geertz realized it or not) of some value that can be realized mainly or only by pursuing particular beliefs and practices.[266] Absent the existence or possibility of such a value, it would then seem important that we pay less attention to the particular "moods and motivations" that Geertz thinks the symbols central to religion induce, and more attention to the "configurations of power" by which the "*patterns* of religious moods and motivations" and "the possibilities for religious knowledge and truth" have varied and been conditioned "from one epoch to another."[267]

[266] Ibid., 116, 122 (emphasis added).
[267] Ibid., 120.

Indeed, it is telling that Asad admits that for the Christian, the meaning of religious symbols, indeed their "essence," has primarily to do with whether they reflect the *truth* about God, and then rejects this perspective as the proper approach to the study of religious phenomena. Instead, he urges that we focus on their power or efficacy within a particular society. He tries to persuade the reader that "even a committed Christian cannot be unconcerned at the existence of truthful symbols that appear to be largely powerless in a modern society."[268] The most important question she will want to ask when trying to understand whether particular symbols are religious is not whether they reflect some truth about the divine, but rather "What are the conditions in which [the symbols] can actually produce religious dispositions?" or, "*as the nonbeliever would put it*: *how does (religious) power create (religious) truth?*"[269]

But as we have seen, the nonbeliever (or the committed Christian, for that matter) isn't limited to seeing religion as *either* a particular set of claims about revelation *or* as merely the product of discursive power. The second option, it should now be clear from the preceding discussion, is a kind of external perspective on the purposes of religion (or at most, a very marginal internal perspective, comparable to Raz's anarchistic judge): it assumes a perspective that's alien to the way most religious practitioners understand their behavior. There is a third possibility that I've asked the reader to be open to in this chapter: the judgment of practical reason that something distinctly and objectively worthwhile is at stake in a wide range of religious behavior. (A fourth possibility, of course, is that religious practitioners converge on the pursuit of something they *honestly, but mistakenly*, perceive as distinctly, objectively valuable, but that is not the view I defend in the next chapter.) It would seem, then, that Asad's challenge to concepts of religion relies on a deeper rejection of that third possibility.

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[268] Ibid., 118.
[269] Ibid. (emphasis added)

I think we can understand Nongbri's critique the same way. This explanation would help make sense of a jump his reasoning shares with Asad's—namely, from the historical and cultural contingency of descriptive concepts like religion, to the impossibility of a universal phenomenon the concepts seek to capture. For what precisely does it mean to say that scholars who discuss "ancient religion" (like the modern-era Europeans in their colonial encounters with other peoples) are "*generating*" or "*constructing*" religion? Surely Nongbri doesn't mean they are bringing into being new social phenomena. He must mean, at least in part, that sometimes these scholars aren't fully or adequately explaining the data (ancient human beliefs and practices) because they are using the wrong point of view to understand what is important or significant in it—that is, what explains its value for the people engaging in it. Hence when they "redescribe" certain beliefs and practices in ancient cultures as instances of "religion," they are trying to organize and explain, or make sense of, these beliefs and practices from their own modern point of view rather than the "native" point of view that the scholar must reproduce (to the extent possible) to accurately describe them. It must be in this sense that Nongbri thinks scholars can "construct" or "create" religion—they can impose a conceptual framework onto certain forms of human activity that doesn't fully explain the actual purposes the people engaged in them were pursuing.

But the mere diversity of actual purposes that people have had in pursuing religious activities (broadly construed) is not, by itself, proof that any conception of religion will be inadequate. For that further claim, one must also assume that it will always be arbitrary to order or rank the goals one might be pursuing in religious activity. One must assume that any such ordering or organization will be rooted only in the subjective preferences of the theorist, and not in any objective values. If there *were* objective values distinctively available in religious activity,

then they would provide a non-arbitrary basis for organizing the actual purposes that have been pursued in religious activity—i.e., for devising a *concept* of the (focal case of) religion, which might be serviceable in developing a political theory of religious liberty.

Indeed, as the next chapter will be devoted to arguing, I still think the possibility remains that there is some purpose in the sphere of human actions studied by scholars of religion—more specifically, some objective value distinctly available in this realm—the pursuit of which could explain the existence of a variety of diverse social phenomena (various beliefs and practices). It also remains possible that this value gives the descriptive theorist a conceptual category of "religion" that is indeed transcultural and transhistorical, one that isn't arbitrarily selected but reflects what is objectively valuable about religious activities, and more or less distinctive to them.

Nongbri seems motivated by an implicit denial of this idea at another point in his argument: namely, when he argues that it was presumptuous of European colonizers (by relying on least-common-denominator definitions of religion developed by neo-Platonist and Deist scholars) to think that the activity they observed could be analogous to their own religious pursuits. For this belief on the Europeans' part would have been reasonable, not presumptuous, if there were a human good at stake in the Europeans' own religious pursuits that was also a genuine good for any other human being (i.e., a universal good). Then it would have made sense to expect that good to be pursued *somehow* or other even in cultures very different from their own. So Nongbri's opposition to this European assumption of a shared purpose among Western and non-Western cultures in similar patterns of behavior is perhaps most charitably read as stemming from skepticism that there's anything objectively valuable at stake in those phenomena. For if there is such a value at stake, then it would be rash to judge these European

colonizers and scholars as presumptuous (even if they were unreasonable in many of their other beliefs about non-Western cultures).

Similarly, in arguing that later scholars who use the category of religion to explain behavior in pre-modern cultures are simply constructing or creating analytical frameworks that don't match the reality, I think Nongbri is really assuming that there's nothing objectively worthwhile at stake in the behavior, and so nothing in turn that could be the proper foundation for these theorists' descriptive efforts. Theorists can't truly describe anything before the modern era as religion because there just isn't an objective value—an inherently worthwhile purpose—that could aptly explain pre-modern behavior approximating or corresponding to what we today consider religion.

We've seen, then, that what appear to be leaps in both Asad's and Nongbri's critiques actually make sense if we construe them as rejecting the possibility of a special—objective, distinctive—value of religion.

V. *Conclusion*

We now have the beginning of our answer to the postmodern challenge to concepts of religion. The skepticism of religious freedom we saw in the work of Hurd and Mahmood is grounded in a deeper skepticism of concepts of religion articulated by scholars such as Asad and Nongbri, which I have traced in turn to a rejection of a distinct and objectively valuable purpose at stake in religious behavior. Grasping that purpose, as part III's discussion of sociology and legal theory showed us, begins with attention to religious practitioners' internal perspectives. But it also inevitably requires the theorist's evaluative judgment *among* those viewpoints to pick a central case that best explains the phenomenon as a whole. Not only does the central case serve

as the foundation for the descriptive theorist's formation of a social concept of religion; it also, we will see in the next two chapters, helps the political theorist identify the range of distinctly valuable religious activity that the law of liberal societies should be attentive to and seek to protect. Before undertaking that effort, however, I must first make the case that there is in fact a distinct and objective value at stake in human behavior (and accessible to practical reason) for both descriptive theorists and political theorists of religion to attend to.

It should now be clear that a political theory of religious freedom doesn't require a linguistic concept or term of "religion" that roughly corresponds to one in every other culture, or that religion (as we use that term) is actually pursued, as a descriptive matter, in every time and place. Yet because a political theory of religious freedom presupposes (because it can be framed only in terms of) *some* concept of religion, it *will* need a firm stance, on whether and what kind of distinctive (subset of) objective goods or values are at stake in the activities the theorist of religion sets out to capture, organize, and make sense of. The political theorist's position on *this* point about goods or values at stake in human behavior, will inform *both* her view on which descriptive concept of religion is most sensitive to the objective rational values at stake, *and* her view on the proper scope of a civil liberty protecting the value of religion so described. It is a theory of this value that I will try to develop in the next chapter—a normative theory with implications for a wide area of U.S. religious liberty jurisprudence that I will consider in part of Chapter 3 and all of Chapter 4.

Chapter 3: The Final Value of Religion and Doctrinal Implications for American Law

I. *Introduction*

Together, Chapters 1 and 2 showed us what would be required of an account of religion as a distinct human value that could justify a distinct legal protection. Chapter 1 sought to establish that debates about the scope of religious liberty are most deeply disagreements about what makes religion protection-worthy. Different approaches to the proper scope of religious liberty all presuppose a view of whether and how religious activity is valuable, and adjudicating among them therefore requires critical thinking about that evaluative question.

In particular, what I called the identity construction account of religion's value—or the view that what makes religion protection-worthy is its contribution to identity formation and fulfillment—undergirds the liberal egalitarian consensus that religion does not require special legal protection. Yet this view, we've seen, falls short of liberal egalitarian aspirations: consistently applied, it supports protections that are both over- and under-inclusive even by the lights of those who defend such approaches. In fact, liberal egalitarians often end up inclining toward the very premise they reject from the outset: religion's distinctiveness. So the intuitive pull of that premise when it comes to judgments about particular cases is strong, suggesting that to reach a reflective equilibrium between our general guiding principles and considered judgments about particular outcomes, we need to consider alternatives to the identity construction view. We need a view that explains at the level of general principle how religion might sometimes warrant different treatment than other interests without any consequent unfairness to nonreligious people or interests.

In this chapter, then, I am going to try to spell out such a view. A preliminary note on my method: to address questions about the proper scope of a religious liberty rights regime in the United States, I will apply the sort of fit-and-justification approach that Ronald Dworkin proposed for judicial reasoning in "hard cases." Dworkin argued that in those cases, judges should interpret law in a way that both *fits* their regime's existing legal precedents and practices and, where there are multiple interpretations that fit, picks the one that best normatively *justifies* the law in question.[270] Similarly, I will defend the outlines of a theory of religion's special value that could both justify, as a matter of normative political theory, a basic liberty right protecting it in general, and fit at least some of the more intuitively and widely compelling features of our existing religious liberty regime under U.S. constitutional law.

Chapter 2 cleared the path for this effort by addressing what I have called the postmodernist challenge to concepts of religion. On this view, no fair standards for deciding the scope of religious liberty exist because any attempt to define it will rely on the concept of religion, which is (the objection goes) inevitably parochial, arbitrary, and exclusionary. I argued that this objection fails if there is a universal—objective—value distinctively on offer in religious activity, on which we could then base our concept of religion. Defending this involved defending a certain methodological claim: that it is appropriate—and indeed unavoidable—to ground a general concept or descriptive theory of a social phenomenon like religion on some value judgments that are informed by the *internal perspective* of those who engage in the practice. We are looking for what I called the *central case of the internal perspective*: this is the

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[270] Ronald Dworkin, "Hard Cases," in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 86-7. In taking this broadly Dworkinian approach to questions of constitutional design, I do not mean to endorse a Dworkinian approach to judging. For a critique of Dworkin's understanding of the judiciary's role, see Robert P. George, "Judicial Review and the Religion Clauses: A Response to Professor Greenawalt," *Loyola of Los Angeles Law Review* 32, no. 1 (November 1998): 59-62.

selection, from among different views religious practitioners have of the reasons for their behavior, the one that could most compellingly explain the behavior's existence and endurance over time.

But here (if not already in Chapter 2), one might ask: Why should we be attentive to the internal perspective of those who practice religion, when that perspective might be (to put it bluntly) a complete delusion? The object of religious behavior might very well be worthless, if those who engage in it are totally mistaken that it aims at anything true.

To this concern, I have proposed a principle of interpretive charity, applied in this case to human actions rather than scholarly theories, on which we should provisionally assume that people's practices aren't based on a delusion until we see reasons to think otherwise. Our starting-point should be that the practice of religion, like any other social practice, is worth engaging in, and we should then try to see if there's a stable and in itself coherent and plausible theory of the phenomenon consistent with that fact. If it turns out there isn't such a theory, then the presumption has been rebutted in this case: the activity turns out not to be worth engaging in.

To put the point otherwise, a sympathetic reconstruction of a practice—one that interprets the practice in such a way that it's worthwhile—is a better sociological theory, *other things being equal*. Just as in science a simple theory is better, *other things being equal*, than a complicated one, and so on. We should begin from the presumption that religious practices aren't deluded—that the internal perspective of religious people is more or less sound—and give up that presumption only if the effort to find a theory that makes sense of the practice as valuable keeps running into problems. This presumption shouldn't just be true for efforts to form a theory of religion; it should apply to the effort to make sense of other social phenomena too (and indeed often does).

So a principle of interpretive charity will motivate this chapter's effort to trace the central, because most explanatory, case of the religious internal perspective, in order to show how it would inform the scope of a distinct religious liberty right. A crucial note: Identifying the value at stake for the central case of the internal perspective will not tell us to protect *only* religions that have all the features of the central case, or even only the ones that have *most* of those features. Instead it will tell us which features may warrant protection regardless of the particular tradition in which they appear.

In chapter 2, I started to argue that the central case of the internal perspective would see an objective value distinctly on offer in religious behavior. I will develop that claim more fully here in parts II-IV, contending that to account for salient features of religious practice, the value of religion from the internal perspective has to be what some moral philosophers call a "final" value: something valuable for its own sake, and thus capable of providing non-instrumental reasons for action.[271] The viewpoint that religion is of final value explains observable facts about religious behavior in ways an instrumentalist view cannot: it makes sense, for example, of many believers' decision to risk or accept incidental harm to many natural goods for religion (including—and especially—martyrdom); it also explains religion's continued practice in an ever more technologically sophisticated world, where religion seems to become less and less needed as a technique for ensuring that crops grow, that we avoid illness and other kinds of misfortune, and other instrumental goals.

Any attempt to reach a view of religion's final value that will hold up under reflective equilibrium will have to begin somewhere—to begin with some well-developed proposals on that question and see whether and how they need to be revised. To that end, Parts II and III will

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[271] See, e.g., Christine Korsgaard, "Two Distinctions in Goodness," *The Philosophical Review* 92, no. 2 (April 1983): 169-95. For a similar account of intrinsic values as a range of "basic goods," see generally John Finnis, *Natural Law & Natural Rights* (Oxford, UK: Oxford University Press, 2011).

explore two different sets of accounts of *some* distinctive value in religious activity. I will argue that each set of views presents a case of the religious internal perspective that is plausible but either too narrow (part II) or not specific enough (part III).

Part II considers the merits of two defenses of religion's distinctive value from legal scholars Michael McConnell and Michael Stokes Paulsen. McConnell and Paulsen each seek to explain the special importance of religion in a way that both fits America's existing tradition and precedent of special protection for religion *and* normatively justifies that history and practice. Their accounts of religion's distinctive value are also similar in content: they each defend the framing generation's view that religion was valuable as the discharge of the highest kind of duties, duties to God. But I think these proposals offer a needlessly narrow case of the religious perspective, for they limit paradigm cases of the value of religion—and thus of protection-worthy activity under a religious liberty right—to the monotheistic practices the framers were most concerned to protect, and in Paulsen's case, only to religiously obligatory conduct in particular.

In keeping with my theme that any sound account of religion's distinct value will be informed by awareness of religious practice, Part III will return to contemporary sociologists Riesebrodt and Smith, who hold that the most critically justified and explanatorily powerful account of religion's special importance would understand religion as the pursuit of harmony with superhuman powers. But I think that such an account, though careful to reject identity construction as an incomplete explanation of religion as a social phenomenon, is still insufficiently explanatory. To defend this, I will return to my analogy (first proposed in chapter 2) to a different debate about the best account of a social phenomenon from the internal perspective of those engaged in it: the debate in analytic jurisprudence about the nature of law. I

will argue that Riesebrodt's and Smith's views are incomplete in the way that legal philosopher John Finnis plausibly argued that his colleagues Hart's and Raz's views of law were incomplete.

As we saw in Chapter 2, Finnis noted that Hart's and Raz's views of law, while appropriately sensitive to the internal perspective of the law-abiding citizen, don't go far enough, because they fail to differentiate between several different and incompatible internal perspectives of the best reasons to follow the law. Since not all those perspectives can be true (since they conflict), an adequate theory will have to pick one as the most justified perspective: the *central case of the internal perspective*. That selection will require normative judgments about which reasons for abiding by law best explain its creation and maintenance. Like Hart and Raz, I will suggest, Riesebrodt and Smith fail to fully home in on the religious point of view that would best explain an especially salient feature of religion: its existence and endurance as a social practice. Riesebrodt and Smith fail to distinguish between those who seek harmony with superhuman powers for merely *instrumental* reasons (e.g., securing temporal goods, like a plentiful harvest or freedom from sickness) and those who do so because that harmony or *relationship* is worthwhile for its own sake. They also fail to distinguish between those powers that are merely *superhuman* and those that are regarded by religious practitioners as *ultimate*. I'll argue that these two further distinctions—between intrinsic and instrumental reasons to practice religion, and between harmony with the superhuman and the truly ultimate—better explain religion's existence as a social phenomenon, and so better capture what's objectively worthwhile in religious pursuits.

Thus we will reach in part IV what I take to be the best resolution to the explanatory and justificatory problems in other accounts of religion's special importance: the *ultimate principle account*. On this view, the central case of the religious internal perspective—the one that best explains the social fact of religion—is one that understands religious behavior as the final value

of pursuing harmony what one perceives to be the ultimate or transcendent (more-than-merely-human) ground of reality. It is the *intrinsic value of relationship to the ultimate*, not its instrumental contributions to personal identity or anything else, that fully justifies and explains the proper scope of a distinct civil liberty of religion.

Some might fear that a right built on a perceived *central case* of the religious internal perspective will turn out to be too narrow—theistic, for example, or exclusive of Eastern religions. But as part IV will draw on the work of legal scholar Kathleen Brady to show, nearly every single religious tradition in the world—including those that are polytheistic or nontheistic—offers evidence of concern for harmony or alignment with what that tradition regards as an ultimate ground of reality.

As for a more affirmative defense of the value of harmony with the ultimate principle of reality: If this harmony really is (as I claim) valuable *in itself*, its value cannot be demonstrated by showing that it promotes some other or more fundamental value. Instead, part IV will defend its value by appeal to examples and analogies to other, structurally similar activities whose value is more widely acknowledged. I will then draw on other scholarship in political and moral philosophy to highlight some of the distinct characteristic features of this value: it will tend to be both (a) uniquely *fragile*—that is, accessible through a relatively narrow range of activity for any given person, depending on her particular religious beliefs, which she can't change on command; and (b) uniquely *architectonic*—tending to motivate, direct, and shape many (if not all) other pursuits in the lives of its practitioners.

The final part of this chapter will draw concrete implications for U.S. legal doctrines on religious liberty. Each of the implications explored will flow from one or another component of the chapter's central conclusion: that a proper theory of religious liberty will work from the

central case of the (1) *religious internal* perspective, which sees a (2) *final* value that is (3) *distinctively* on offer in religious activity, namely, (4) *harmony* with the (5) *ultimate* ground of reality. Drawing on each of these components in turn, my discussion will defend general doctrinal principles for cases involving, in particular, public displays of religion, exemptions for secular conscience, protection for minority religions, and the ministerial exception.

While the sketches of these doctrinal implications will be brief, gestural, and offered mainly to illustrate the practical payoff of this chapter's evaluative claims, the next and final chapter will draw on the same thesis to offer more extended and detailed prescriptions for one doctrinal question in particular. That is the question about what should count as a "substantial burden" on religion under U.S. statutory and constitutional law—a test that is a necessary (but not sufficient) requirement for any doctrinal regime of religious exemptions.

II. *The Insufficiency of Religion Theorized as Satisfying God's Commands*

A good way to think about the views sketched here and in part III is to see them as members of a *family* of views approximating the ultimate principle account. Just as there are different variations on the identity construction account that I noted in chapter 1, so too there are explanations of religion's special importance that resemble the one I will later defend. Here I consider—but ultimately reject—the view, articulated by legal scholars Michael Stokes Paulsen and Michael McConnell, that what makes religion distinctively valuable is that it involves carrying out one's duties to God. This view would draw overly narrow parameters around what is of value, and therefore worth protecting, in religion. Only a small subset of religious practices would count as protection-worthy on this view, and so we should reject it in favor of a broader account that can better explain the variety and distinctive importance of religious phenomena.

A. Paulsen on the Priority of God's Commands

Paulsen proposes an originalist interpretation of the grounds and scope of the First Amendment's protection of religious liberty: that is, he (along with a number of other legal scholars) sees an historical account of how the framing generation understood religion as the best guide for constitutional interpretation of the First Amendment.[272] But he also attempts what I've sketched as a Dworkinian approach to the defense of special protection for religion: he contends that the framing generation's historical understanding of religion not only makes sense of existing U.S. precedent and practice on religious liberty, but *best justifies them*. I will focus on the latter—on Paulsen's view of what justifies special treatment for religion as a matter of political morality, rather than purely historical inquiry into the Constitution's original meaning.

In Paulsen's view, the best justification of religious liberty rests on a belief in the existence of God, and the superiority of His demands on human beings. As he summarizes:

> Religious freedom only makes entire sense as a social and constitutional arrangement on the supposition that God exists (or very likely exists); that God makes claims on the loyalty and conduct of human beings; and that such claims, rightly perceived and understood, are prior to, and superior to, the claims of any human authority….Freedom of religion, understood as a human legal right, is government's recognition of the priority and superiority of God's true commands over anything the state or anyone else requires or forbids.[273]

[272] Michael Stokes Paulsen, "The Priority of God: A Theory of Religious Liberty," *Pepperdine Law Review* 39, no. Special Issue (2013): 1187. ("If the Religion Clauses are to make sense, they must be understood in the sense and in the social context in which they were originally written. And so we are left with the original, late-eighteenth century reasons for religious freedom. Religious freedom, in the sense of categorical protection of religious conduct from state interference, makes entire sense within an eighteenth century conception that thinks religion is categorically a good thing; that religion aims at, and left alone may well hit, something true, vital, and of the highest importance: and that, because true religion is intrinsically worth protecting for its own sake, it merits being placed beyond the reach of society's usual rules.") See also Michael Stokes Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?" *Northwestern University Law Review* 103, no. 2 (2009): 857-922; Vincent Phillip Muñoz, "The Original Meaning of the Free Exercise Clause: Evidence from the First Congress," *Harvard Journal of Law and Public Policy* 31, no. 3 (2008): 1083-1120; Muñoz, "The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation," *University of Pennsylvania Journal of Constitutional Law* 8, no. 4 (2006): 585-640; Michael McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (May 1990): 1409-1517; McConnell, "Free Exercise Revisionism and the Smith Decision," *The University of Chicago Law Review* 57, no. 4 (1990): 1109-1153.
[273] Ibid., 1160.

Religious liberty as we understand it today, Paulsen further contends, is merely “a cipher, shadow, or parody of” that right, insofar as it justifies freedom of religion as a kind of “state-conferred-dispensation,” on which “the state, in its beneficence, grants the exercise of religion…a certain amount of leeway,” while preserving total discretion over “the nature and extent of such freedom.”[274] Rather, “at bottom,” religious liberty is only “sensible as a liberty distinct from other liberties” if there is “some shared sense that *true religious obligation is more important than civil obligation*[.]”[275] So on Paulsen’s articulation, the distinctiveness of religion lies chiefly in the fact that duties to God trump all others, including duties to the state.

Belief in God, as well as the possibility of error in matters of religion, both for Paulsen explain the special place of religious liberty in the Constitution. The Free Exercise Clause, he elaborates, “is properly understood as conferring broad substantive immunity from government laws or regulations that would operate to prohibit sincere religious belief and exercise.”[276] The Establishment Clause, meanwhile, “is properly understood as barring government from compelling religious belief or exercise or punishing failure to adhere to a state-prescribed religious orthodoxy.”[277] Together, Paulsen concludes, “the two clauses protect the same central liberty, from two slightly different directions: the Establishment Clause forbids government *prescription* of religious exercise; the Free Exercise Clause forbids government *proscription* of religious exercise.”[278]

So on Paulsen’s telling, it is the superior importance of carrying out religious duty paired with the possibility of religious error that gives grounds for its special legal protection and treatment. But does this account best justify—or even best fit—existing precedent and practice

[274] Ibid.
[275] Ibid.
[276] Ibid., 1162.
[277] Ibid.
[278] Ibid. (emphasis added)

on religious liberty in U.S. law? It has at least three troubling implications: first, as Paulsen acknowledges, it would protect “only the free exercise of religion and not analogous claims of secular conscience and conduct, no matter how similar in form or sympathetic.”[279] Second, it has trouble justifying the protection of actions based on religious beliefs that turn out to be false—as presumably some are—since false religions by Paulsen’s criteria aren’t reporting God’s commands at all, which means they lack the status of supreme law that trumps all other law: the status that special protection of religion hinges on in Paulsen’s view. It is only when “a claimed religious practice is truly religious, not pretextual, and has any plausible claim to religious truth” that Paulsen’s account would have us give it the protection of religious liberty.[280] And third, it is hard to see why on this view some non-obligatory but centrally important religious practices should have the protection of a legal right. For only those claims that are attempts to satisfy the “the clear, universal *command* of God” would be entitled to legal protection and accommodation.[281]

In short, Paulsen’s account of what’s distinctively valuable and thus protection-worthy in religion is overly confining: We don’t need to understand religion as centrally about meeting the demands of Christianity or even monotheism in order to explain its fundamental and unique importance in human life, and in turn to justify a distinct religious liberty right. I think we can arrive at a broader and fairer set of religious liberty protections from an improved account of religion’s value that finds a closer approximation in Michael McConnell’s work, which I discuss below.

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[279] Ibid., 1164.
[280] Ibid., 1162.
[281] Ibid.

B. McConnell on the Duty of Obedience to God

For McConnell, the "final, and perhaps the most important, argument for freedom of religion during the formative period" preceding the U.S. Constitution's drafting was the need to respect "the duty of each person to worship God in accordance with the dictates of conscience."[282] McConnell contends that "[i]f believed, this argument explicitly distinguishes religious freedom from other liberties of the individual, and explains why religion is 'singled out' for special insulation from government influence or control. No other freedom is a duty to a higher authority."[283] McConnell defends the plausibility of this account in contemporary times, even to non-religious people. The test of the strength of his view becomes, as he puts the question: "can this account of religious freedom [as respecting the duty to worship God according to one's conscience] be accepted today?"[284] Regardless of whether someone believes in God, he argues, she can recognize that the state should refrain from trying to coerce citizens' judgment on that question, as the "idea [of God's existence] can be revealed only through the 'conviction and conscience' of the individual and not through the hand of the state."[285] In fact, he points out, "sincere atheists and agnostics" already appear to act on that presumption: they "are often passionate in the conviction that the force of the state should not be brought to bear in support of any understanding of religious truth."[286] McConnell draws analogies to our respectful treatment of foreign citizens or other people's children: "[w]e give respect to the obligations of others to carry out duties to the authorities in their lives, even when we ourselves do not recognize or agree with those authorities."[287] In the same way, "even those who do not recognize

[282] Michael McConnell, "The Problem of Singling Out Religion," *DePaul Law Review* 50, no. 1 (Fall 200): 29.
[283] Ibid., 30.
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid., 30-1.

the existence or authority of a God may well believe that the nation should guarantee the free exercise of religion."[288] In short, for McConnell the view that religion is the distinctive exercise of one's duties to God can be a salient justification for its special protection even for nonreligious citizens.

But what about the merits of that view? Like Paulsen's account, McConnell's view would seem to limit paradigm cases of religion's distinctive value to satisfying the demands, the strict requirements, of a monotheistic deity. And from this perspective, a wide range of intuitively valuable religious practice seems less important to protect, including practices that are non-obligatory (which may be more common in minority religions), polytheistic, or even nontheistic.[289]

In other work, McConnell reiterates this narrow view of the value of religion and its justification for religious liberty. "The need for accommodation to the individual believer," he contends, "arises, in the clearest case, from conflicts between religious duties and obligations and the demands of society."[290] He acknowledges that accommodation may extend beyond "duties or obligations in the strictest sense," but seems to think claims for accommodation of non-obligations are weaker.[291] "The assault on a person's religious identity," he observes "is far greater if he is prevented from performing what he understands to be a duty than what he understands to be a religiously praiseworthy practice."[292] At the same time, McConnell insists that "legislators and administrators are not well equipped" to distinguish between obligatory and non-obligatory religious conduct, and concludes that "[t]he purpose of accommodation is

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[288] Ibid., 31.
[289] Cf. Andrew Koppelman, "Is It Fair to Give Religion Special Treatment," *University of Illinois Law Review* 2006, no. 3 (2006): 592-3. (noting that McConnell's view "does not justify the whole range of religious exemptions. It is not only that some religions are nontheistic. Even for the theistic ones, as noted earlier, not all religious activities are divinely ordained, capable of being obeyed by unaided individuals, or matters of conscientious obligation.")
[290] Michael McConnell, "Accommodation of Religion," *The Supreme Court Review* 1985 (January 1985): 26.
[291] Ibid., 27.
[292] Ibid.

furthered when the broadest scope of religiously motivated actions is permitted, within the constraints of countervailing governmental interests."[293]

At some points, however, McConnell seems to defend a wider—and so as Andrew Koppelman puts it, a "more promising"[294]—account of what makes religion protection-worthy:

> Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.[295]

So here, McConnell suggests that the value of religion is not limited to carrying out the obligations it might impose, or to monotheistic or even theistic religious practices. In fact, this account of religion's importance looks much closer to the ultimate principle account I propose in part IV. I think we can articulate, more precisely than this excerpt does, an account of religion's

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[293] Ibid.

[294] Koppelman, "Is It Fair to Give Religion Special Treatment?", 593. Koppelman's own defense of special protection for religion is also a member of the family of views I'm exploring in this chapter. Generally, he grounds religion's protection in religion's status as a kind of "hypergood" (a concept from Charles Taylor's moral philosophy): it is a "cluster" of "*intersubjectively intelligible* goods…whose value transcends individual preferences." Andrew Koppelman, "How Could Religious Liberty Be a Human Right?" *International Journal of Constitutional Law* 16, no. 3 (2018): 987. Koppelman is also skeptical that liberal political theory can explain protection of identity construction, including religious identity, without reference to those goods: "If the state hopes to respect people's moral identities…it cannot accomplish this without relying on the earlier [Charles] Taylor's observation that identity is necessarily grounded not on a person's brute preferences but rather upon her orientation toward sources of value that transcend those preferences. It can only protect Integrity that is oriented toward some intersubjectively intelligible end—which is to say, some good, of the kind that liberal neutrality demands that the state ignore" (997). Insofar as Koppelman thinks there is a further good (or as he see it, cluster of goods) beyond identity construction that justifies religion's protection, his view approaches my own. But sometimes Koppelman seems to suggest a more pragmatic and identity-focused approach than the one I'm articulating: we should keep our religious liberty principle (against those who "think 'religious liberty' is a bad idea") simply because it does a good enough job covering values the law should protect: "Law is inevitably crude. The state cannot possibly recognize each individual's unique identity-constituting attachments. It can, at best, protect broad classes of ends that many people share. 'Religion' is such a class. Where it is an important marker of identity for many people, it is an appropriate category of protection" (985).

[295] McConnell, "Problem of Singling Out Religion," 42.

distinctive value, in particular by emphasizing relationship to an ultimate ground of reality over construction of personal identity as the best explanation of religious phenomena (a point on which McConnell appears to waver). And I think we can use that better account to show that both religious obligations and some forms of non-obligatory religious practice have equally strong claims to accommodation (a view McConnell appears to reject).

III. *The Insufficiency of Religion Theorized as a Means to Superhuman Powers*

I now turn to a closer approximation of the ultimate principle account in the promising work of sociologists Martin Riesebrodt and Christian Smith. The foundations of Riesebrodt and Smith's theoretical work on religion, I argued in Chapter 2, offer the start of a full answer to the postmodernist challenge—a point I recapitulate below. But it's also crucial to consider whether the substance of their theories plausibly captures a distinctive value of religion. In what follows, I find that their theories ultimately fall short on that score, for they are subject to the same criticism Finnis levels against Hart and Raz. Riesebrodt and Smith's accounts of religion, like Hart and Raz's theories of law, fail to fully capture what religion (or law) is as a social phenomenon, because they fail to fully distinguish the religious point of view that best explains, in particular, religion's emergence and maintenance. That point of view, which I will describe and defend in part IV as the central case of the religious viewpoint, is the one that sees a *final*, not merely instrumental, value in the pursuit of harmony with the ultimate ground of reality. It is this perspective that should inform a proper theory of religious liberty, and it supports forms of special protection for religion that I begin to outline in part V.

A. Riesebrodt and Smith: A First Pass at the Internal Perspective

At the very beginning of his chapter laying out his own theory of religion (and as we first saw in Chapter 2), Riesebrodt narrows in on the crucial importance for any theory of religion of understanding the religious practitioner's own view of what he or she is doing. It is the job of the descriptive theorist to keep his own "external perspective" distinct from the "internal perspective" of those whose behavior he studies, and to be able to justify the use of his external perspective:

> Only an interpretive, that is, a meaning-oriented theory of action, is capable of bridging the gap between religious internal perspectives and scientific external perspectives. Explanations that ignore internal perspectives have to justify the outside point of view they adopt. In contrast, interpretive explanations arrive at their external perspective by abstracting and systematizing internal perspectives, and thus claim no privileged or even objective status for themselves. Instead, they transform internal perspectives into an external perspective, which differs from the internal perspectives but does not contradict them.[296]

Riesebrodt further emphasizes the importance of the internal perspective by showing how inadequate it is to explain and organize information about a social practice solely by considering its function: "By analyzing, for instance, the social function of soccer, one thereby neither understands the game nor explains it," he writes.[297] "Functional definitions" of social phenomena "explain [their] alleged contribution…to the constitution and reproduction of society," he continues, and so they "miss[] the meaning of religion from the point of view of religious practitioners and thus also from that of the theory of action. It is unlikely that anyone would seriously attempt to define and explain other institutions—such as music, literature, theater, or sports—solely in relation to their actual or alleged social function."[298] To draw these examples out: we can imagine that a functional account of theater might explain those phenomena as

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[296] Martin Riesebrodt, *The Promise of Salvation* (Chicago: University of Chicago Press, 2010), 71.
[297] Ibid., 73.
[298] Ibid., 72-3.

practices of community-building, whereas from the point of view of actors and their fans, the point is not simply to cultivate community but to cultivate aesthetic experience for its own sake.

In short, by rejecting functionalist accounts, Riesebrodt is showing us the way toward interpretive charity in the study of religion: just as we would work to form a sound, satisfying, and complete account of other social phenomena (such as theater) by assuming the internal perspective of those who find them worth engaging in, so too we should consider carefully the internal perspective of religious agents to make sense of the phenomenon as a whole.

Strikingly, Riesebrodt criticizes the identity construction view I presented in chapter 1 as an especially poor functional definition of religion. To understand religion as primarily either "socially integrative or identity creating," he writes, is to hold one of many functional definitions that "differentiate religion from other phenomena in a nonsensical way, are unspecific, and include too many phenomena that can hardly be subsumed under the concept of religion."[299] On this understanding of religion, since

> [a]ll kinds of activities an be interpreted as socially integrative or identity-creating….The sociology of religion would therefore have to concern itself with alpinists, nudists, vegetarians, philatelists, golfers, and rabbit breeders. In this definition, barbecues with guitar music, soccer games, or group sex are at least potentially religious phenomena.[300]

But if identity creating isn't the right way to understand the practice of religion, then how should we understand it? For Riesebrodt, religion is best interpreted as

> a complex of practices that are based on the premise of the existence of superhuman powers, whether personal or impersonal, that are generally invisible.[301]

Riesebrodt differentiates these practices into three categories: first, *interventionist* practices, or those that "aim at establishing contact with superhuman powers," whether by "interaction through symbolic actions," "manipulation," "temporary interaction or even fusion with

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[299] Ibid., 73.
[300] Ibid.
[301] Ibid., 74-5.

superhuman powers," or "activating superhuman potential that slumbers within a person."[302] Second, he describes *discursive* practices of "interpersonal communication regarding the nature, status, or accessibility of superhuman powers, their manipulability, and their will, as well as techniques of self-empowerment."[303] Discursive practices, he further explains, "hand down and revise religious knowledge concerning interventionist practices and stand in a dialectical relationship to that knowledge."[304] Third, *behavior-regulating* practices are those that involve "reshaping of everyday life with respect to superhuman powers"; and they are "valid as religious practices only when they occur in accord with the will, the principles, or the sanctions of superhuman powers."[305] Through these practices, Riesebrodt further argues, "all religions claim to have the ability to avert misfortune, overcome crises, and provide salvation."[306] Salvation here carries a much more general meaning of "deliverance" from temporal or eternal harm, not the Christian understanding of that term.[307]

Riesebrodt, then, explains and organizes the phenomena (actions) of religion according to whether those actions aim at achieving harmony with the superhuman for instrumental purposes like averting temporal, this-worldly misfortune. Interventionist practices establish contact with the higher powers, discursive practices give knowledge of how to maintain and deepen that connection, and behavior-regulating practices are the means of building it up.

Like Riesebrodt, Smith also treats believing in and seeking help from superhuman powers as the defining features of religion: "Among all the possible concepts available to define

[302] Ibid., 75.
[303] Ibid.
[304] Ibid.
[305] Ibid., 75-76.
[306] Ibid., 89.
[307] Christian Smith, *Religion: What It is, How It Works, and Why It Matters* (Princeton: Princeton University Press, 2017), 14. Riesebrodt is not entirely explicit about the meaning of the term "salvation" in his work, but Smith interprets it as "refer[ring] to something general like 'preservation or deliverance from harm, ruin, or loss,' not the specifically Christian understanding of 'rescue by God from sin and its consequences.'"

religion," he argues, "only one captures the crucial feature of all religions, and that is the idea of superhuman powers."[308] The "core principle, the heart and soul, of religion" is for Smith "the motivation of human persons, in the course of their quest to realize their natural goods, to channel the blessings and assistance of superhuman powers." Spelled out more fully, for Smith religion is

> a complex of *culturally prescribed* practices, based on premises about the existence *and nature* of superhuman powers, whether personal or impersonal, which *seek to help practitioners gain access to and communicate or align themselves with these powers*, in hopes of *realizing human goods and avoiding things bad*.[309]

Smith goes beyond Riesebrodt to describe religious practices as "culturally prescribed," in order to drive home that they are "never random, idiosyncratic, or arbitrary," for this would make them "simply…the strange doings of odd people."[310] Rather, religions stipulate "*which* practices to perform; *how* to perform them correctly; and *when*, *where*, and *in what situations* to perform them."[311] And he adds the phrase "align themselves with" to better capture religions in which the superhuman powers are impersonal (without in any way sidelining, much less excluding, those in which they are understood as personal).[312]

Smith also follows Riesebrodt in rejecting identity construction as the best explanation of what religion is. Instead, he sees identity construction as a key *function* of religion, to use Riesebrodt's term: he lists it as the first of 18 different "secondary products, features, and powers" religion has.[313] These "derivative properties, features, and powers," Smith is careful to explain, "represent not what religion essentially *is* (ontology) but rather what religion can *do*

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[308] Ibid., 24.
[309] Ibid., 22. (emphasis added)
[310] Ibid., 26.
[311] Ibid.
[312] Ibid., 13.
[313] Ibid., 78.

(capacities).”[314] The first of these powers is to create at least three forms of identity: personal identity (“distinct persons’ particular self-concepts that exhibit continuity across time”); group identity (“distinct persons’ understanding of their characteristic selves derived directly from memberships in delineated social groups or institutions”); and social identity (“a social group’s collective sense of belonging, which involves joint self-definition, common social location, and shared emotional investment”).[315] But again as Smith puts it, identity construction is not the only or even the primary explanation of what characterizes religion; instead, it helps sustain religion:

> …[P]eople universally desire the security and belonging of personal, social, and collective identities. When religion provides meaningful identities to people, that is one more motive for them—in the absence of more powerful counteracting influences—to practice religion. Religion, by my account, did not arise in order to provide such identities; that is not its primary source. But after developing for other, more basic reasons, religion’s provision of personal, social, and collective identities became another, reinforcing cause of people’s ongoing religious practice.[316]

Both Riesebrodt and Smith, then, seem to see the unifying point of all the human behaviors they would have us conceptualize as “religion” as alignment with superhuman powers, through all the myriad ways of achieving that goal.

B. Refining the Internal Perspective

How do Riesebrodt and Smith reach their conclusions about the nature and value of religion? By following, again, a central point in Hart’s theory of law introduced in Chapter 2: that to adequately explain social phenomena, descriptive theorists will have to consider the internal point of view of human practitioners—the perspective of those who are *doing* the particular actions these theorists have set out to study.[317]

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[314] Ibid., 219.
[315] Ibid., 78-9.
[316] Ibid., 219-20.
[317] H.L.A. Hart, *The Concept of Law* (Oxford, UK: Oxford University Press, 1994), 89.

Riesebrodt even explicitly recognizes his departure from much of the rest of sociology of religion on this point: his theory, he argues, "leads to a revision of the priorities of the sociology of religion," which have long been centered on "the ethical-moral and power dimensions of religion," but have "neglected…the analysis of individuals and group intercourse with superhuman powers—powers that *from the point of view of religious practitioners clearly represent the very core of religion*."[318] Smith too maintains that "the necessary theoretical starting place for understanding religion is what a religious culture or tradition says those practices mean and intends its practices to achieve."[319] So both scholars directly support the central claim of Chapter 2, from which the theory developed in this chapter proceeds: that any descriptive theory of a social phenomenon, including religion, is necessarily evaluative, and it is an account of the values at stake in religion *as they are understood by people who pursue it* that our law should consider in defining the scope of religious liberty rights.

This is an insight we already saw in the defenses of religion's special protection from Paulsen and McConnell, but their attention to the religious internal perspective is limited to the value of carrying out the duties of monotheistic religion (and perhaps, in McConnell's case, some non-obligatory practices of other religions). Riesebrodt and Smith broaden the range of practices that are critically important from the internal perspective, and it will be the task of parts IV and V successively to improve their account and show some of its implications for religious liberty protection in the United States.

For as a closer look reveals, Riesebrodt and Smith's theoretical accounts are missing the final differentiation we see in Finnis's critique of Hart and Raz. Recall that in their theories of law, Hart and Raz stop short of differentiating the viewpoint that best explains the reasons to

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[318] Riesebrodt, *The Promise of Salvation*, 79. (emphasis added)
[319] Smith, *Religion: What It Is, How It Works, and Why It Matters*, 33.

follow the law. This leaves them unable to explain the *central* case of law, which would coincide with the viewpoint of someone who sees law and adherence to it as genuinely valuable, and who appreciates the full range of values that law can distinctively serve. That will be the perspective of the citizen or official who abides by or makes the law for the sake of the common good of the whole society, rather than, say, the perspective of the self-interested, self-dealing judge. A theory of law that does not rank the first viewpoint as more explanatory than the second will be a theory that fails to explain all the facts worth explaining about legal systems, such as their endurance over time.

Thus consider again Finnis's description of the central case of the legal viewpoint as

> the viewpoint of those who not only appeal to practical reasonableness but also are practically reasonable, that is to say, consistent; *attentive to all aspects of human opportunity and flourishing*, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.[320]

"What reason could one as a descriptive theorist have," Finnis asks, "for rejecting the conceptual choices and discriminations of these persons, when one is selecting the concepts with which one will construct *one's description of the central case* and then of *all the other instances of law as a specific social institution*?"[321] In short, the final differentiation among legal points of view—the selection of the central case—will yield the *most* charitable, or sympathetic, reconstruction of the practice of following law. Why? Because it will help the theorist home in on *the most critically justified* of the possible internal perspectives on the reasons to follow law at all.

So too with religion. Riesebrodt and Smith's theories of religion begin to home in on the internal perspective, but they fall short of an analogous final differentiation, and so they fail to give us the *central case* of the internal perspective. They recognize that the internal perspective

[320] John Finnis, *Natural Law & Natural Rights* (Oxford, UK: Oxford University Press, 2011), 15. (emphasis added)
[321] Ibid.

isn't of someone who seeks religion simply as a means of shaping her identity (a functionalist account), but of someone who seeks help from and alignment with a transcendent power outside the self. They also avoid narrowing the internal perspective to concern for carrying out only (or primarily) religious duties, as Paulsen and McConnell do. But their account leaves out two further distinctions one could make among religious viewpoints that could best explain, among other things, the existence and endurance of religion over time. Those distinctions matter, in turn, because they show us that what's normatively significant and distinctive about religion—and thus the object of the law's protection of religious liberty—is a *final* (intrinsic and foundational) value.

One is the distinction between someone who seeks harmony with and help from superhuman powers for merely instrumental reasons—to secure merely "human goods" and "avoid[] things bad," as Smith puts it—and someone who does so because she sees that relationship as intrinsically worthwhile, a source of goodness that transcends simply natural or human goodness. Without that further distinction, Smith and Riesebrodt's accounts cannot fully explain why religion, unlike other kinds of commitments, is something that its adherents are consistently willing to suffer and die for under political pressure or persecution. Religious practitioners are often ready to accept incidental harm to many natural goods for the sake of their religion. But religion is something one does for merely instrumental reasons, then under threat of serious harm or pressure the religious person would be much more likely to look for other means of achieving the same goals.

The same distinction also fails to explain religion's value even in technologically sophisticated societies,[322] where religion's more instrumental purposes (ensuring crops grow, avoiding sickness, and so on) at least *seem* to be achievable without spiritual means.[323]

The second distinction Riesebrodt and Smith refrain from making but which would give us more explanatory power (and later, a better eye to the range of religious well-being law should protect) is between belief in the merely *superhuman* and belief in the *ultimate* or *transcendent*.[324] That further specification better explains why many people choose to organize their entire lives around their religious beliefs. For insofar as people understand a superhuman power or powers to be actually the *ultimate* ground or source of everything that they are and do, then all of their pursuits could be understood as efforts to build up a relationship to that ultimate ground—to cooperate with it across all spheres of life.

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[322] In short, Riesebrodt and Smith cannot adequately account for the failed predictions of secularization theory. As sociologist Peter Berger has observed, "The key idea of secularization theory is simple and can be traced to the Enlightenment: Modernization necessarily leads to a decline of religion, both in society and in the minds of individuals. It is precisely this key idea that has turned out to be wrong. To be sure, modernization has had some secularizing effects, more in some places than in others. But it has also provoked powerful movements of counter-secularization….Thus, certain religious institutions have lost power and influence in many societies, but both old and new religious beliefs and practices have nevertheless continued in the lives of individuals, sometimes taking new institutional forms and sometimes leading to great explosions of religious fervor. Conversely, religiously-identified institutions can play social or political roles even when very few people believe or practice the religion supposedly represented by these institutions." Peter Berger, "Secularism in Retreat," *The National Interest* 46 (Winter 1996), https://csrs.nd.edu/assets/50014/secularism_in_retreat.html (accessed May 18, 2020). For a more comprehensive rebuttal of the secularization thesis, see Monica Duffy Toft, Timothy Samuel Shah, and Daniel Philpott, *God's Century: Resurgent Religion and Global Politics* (New York: W.W. Norton & Co., 2011).

[323] I say "seem" because if it turns out that monotheistic religions are correct that God is the ultimate principle, then even secondary causes (like the water, sunlight, nutrients, and carbon dioxide that cause crop growth) are ultimately caused by God, so that it could after all make sense to pray for the crops to grow, and this is consistent with doing what one can to achieve those goals by human means.

[324] Smith actually explicitly rejects that distinction, arguing that "many religions have conceived their superhuman powers, the spirits of trees and streams, for instance, as immanent to this reality, not transcending it. Likewise, the idea that religion is about "ultimate" realities or concerns does not work, since many religions are concerned in part—and some are almost wholly concerned—with this-worldly, even mundane issues, like fertile crops and healing sickness, not ultimate things like eternity or the 'meaning of life.'" Smith, *Religion*, 24. But these objections—which we might see as Smith's visible refusal to differentiate further among internal religious perspectives that have greater or less explanatory power—do not rule out the possibility that the *most* plausible, the *most* explanatory internal perspective of religious practitioners that Smith and Riesebrodt are concerned to track is a concern for harmony with an ultimate ground of reality (as I argue in the next section). From that perspective, religions that see "superhuman powers" as "immanent to this reality," or those that "are concerned in part" or "almost wholly" with "this-worldly" or "mundane issues," are more *peripheral* instances of the value of religion. But they still count as examples of that value.

Now we can finally piece together the various insights into the central religious viewpoint from Paulsen and McConnell in part II and from Riesebrodt and Smith here. All four theorists show attentiveness to the internal perspective of *some* religious practitioners (unlike the identity construction account presented in Chapter 1, which is rejected as a functionalist account by Riesebrodt and Smith), and Paulsen and McConnell begin to show us how attention to that perspective identifies what forms of religious well-being the law should protect. But none of these accounts compellingly explains all the salient features of religious practice, or some of the more widely agreed upon outcomes for religious liberty cases. Paulsen and McConnell describe a perspective concerned only (or in McConnell's case, primarily) with satisfaction of religious duty to God, and show this would limit the scope of religious liberty protection to monotheistic obligations (Paulsen) or at the very least weaken protection for non-obligatory religious conduct (McConnell). Riesebrodt and Smith widen the religious perspective to concern for instrumentally beneficial cooperation with superhuman powers. But as I have started to suggest here, and will argue more fully in the next part, there is more content to the central case of the religious viewpoint: it's a perspective that sees a *final* value distinctively on offer in religious activity, which is harmony with what one perceives to be the ultimate ground or source of reality, meaning, or value. From the central case of the religious internal perspective, in other words, harmony with the ultimate ground of reality is worth cultivating independently of personal preferences about it and any other instrumental goods it might help achieve.

Before I begin to articulate that viewpoint more fully in part IV, it is important to clarify that cases of religious practice or exercise where someone is motivated by more instrumental reasons (e.g. securing a good harvest, or a good marriage, or fertility, or healing, and so on) are *not*, from this perspective, irreligious. They simply do not include everything "visible" from the

central case of the religious point of view. For if we treat the instrumental perspective as our central case—as the identity construction account of religion's value requires us to do—it will be harder to see why the widespread and salient practice of unconditional fidelity to religion analogous to the fidelity people display toward friends, families, and conscience; of adherence to one's religious beliefs even to the point of death, out of fidelity to a transcendent power or source—is in fact a non-deluded exercise of religion.

IV. *Religion's Final Value: The Ultimate Principle Account*

Thus far the dissertation has shown that that the moral-political principle of religious liberty is not arbitrary (the work of chapter 2), or best explained or justified by the identity construction view of religion's value (the argument of chapter 1). And in this chapter, we've seen several promising efforts to explicate the most salient alternative account of religion's value: the view that what makes religion a distinct good worthy of its own civil liberty right is its intrinsically valuable quest for harmony with a ground or source of reality higher than the self. Having traced the shortcomings of those attempts, allow me now to spell out more fully the improved view that scholars such as Riesebrodt, Smith, Paulsen, and McConnell point us toward: the ultimate principle account of religion's final value.

This view has roots going back centuries, and resonances in Eastern as well as Western traditions, as we will see, but has been articulated much more recently by a number of political and legal theorists.[325] The final value of religion, on this account, lies in seeking harmony with

[325] See, e.g., Melissa Moschella, "Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom," *Journal of Law and Religion* 32, no. 1 (2017): 123-146; Kathleen Brady, *The Distinctiveness of Religion in American Law* (New York: Cambridge University Press, 2015; Robert P. George, "Religious Liberty: A Fundamental Human Right," in *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, DE: ISI Books, 2013): 115-125; John Finnis, "Religion and State: Some Main Issues and Sources," *American Journal of Jurisprudence* 51, no. 1 (2006): 107–30; Finnis, "Does Free Exercise of Religion Deserve Constitutional Mention?" *American Journal of Jurisprudence* 54, no. 1 (2009): 41–66;

an ultimate ground or principle of reality, transcendent to human beings. And by principle, I mean a source, not a proposition. In this section I do not want to rehearse or develop arguments for the existence of an ultimate ground or principle of reality—there are already well-known debates on theism, for example, and other affirmations of a transcendent order.[326] (Indeed, there are arguments that no argument is required for justified belief in theism.[327]) But the deep roots of this view shouldn't raise concern that the account is simply a cover for, say, classical theism. For the value to be realized, the ultimate ground or principle being pursued doesn't have to be the one, simple, impassive, immutable, all-knowing, all-powerful God of that philosophical system. Rather, from the perspective of the person seeking harmony with it, this ground in question (i) must be the *ultimate* ground or source and (ii) must be such that more or less harmony with it is possible (and (iii) valuable). In the spirit of the interpretive charity I've described above (as applied to social practices and those engaged in them), I want to take as given the possibility that such a ground or principle does exist, say a bit more about how religious traditions understand it to be, and explain why alignment with it if it did exist—pursuing harmony with it—would plausibly be of final value. I will also introduce two particular features of this final value of religion—its fragility and its architectonic role—that will give rise to implications for exemptions analysis in U.S. jurisprudence in Chapter 4.

Christopher Tollefsen, "Conscience, Religion and the State," *American Journal of Jurisprudence* 54, no. 1 (2009): 93–115; Joseph Boyle, "The Place of Religion in the Practical Reasoning of Individuals and Groups," *American Journal of Jurisprudence* 43, no. 1 (1998): 1-24.

[326] For a recent philosophical exchange, see J.J.C. Smart and John Haldane, *Atheism and Theism* (Blackwell Publishing, 2003).
[327] See generally Alvin Plantinga, *Warrant and Proper Function* (New York: Oxford University Press, 1993).

A. The Central Case of the Religious Viewpoint: Seeking Harmony with the Ultimate Principle of Reality

Over the course of this chapter (and the dissertation more broadly), we've gradually worked toward recovering, for purposes of developing a theory of religious liberty, the central case of the religious internal perspective. Having rejected as possible candidates identity construction as well as several members of the family of ultimate principle accounts, we can now focus on articulating the viewpoint that best explains the existence and endurance of religion, which is a perspective that sees religious behavior as having final value. Although I won't delve into deep and contentious debates surrounding the existence of God or gods or superhuman powers, I do want to begin by highlighting two of the broad sets of considerations that many religions take as starting-points. That is because they show us, as legal scholar Kathleen Brady has argued, that religion begins from experiences common to every human being, such as "creatureliness or finitude"—a point that can help the non-religious person better appreciate and even empathize with the religious person's perspective, and vice versa.[328]

First, many religions begin from the contingency of our existence, if not that of all entities in our experience (which invites us to ask whether there is any *non*-contingent ground of existence). As Brady writes, "We find ourselves in a world we did not make and can only barely control."[329] Second, religions begin from what Brady describes as "an order in this world" that we did not create. [330] In other words, regardless of the particular traditions or communities that we are born into, we each need to make (or affirm) certain judgments about, in Brady's words,

[328] Brady, *The Distinctiveness of Religion in American Law*, 82.
[329] Ibid.
[330] Ibid. Or what philosopher John Finnis describes as the "mathematically expressible orderliness…and directionality of states of affairs…which (not without fortuity and disorderliness) is so thoroughly characteristic of the world we know." Finnis, "Religion and State: Some Main Issues," 108.

"the world and its order," and "how we ought to live."[331] Considering those questions gives rise to "a still more basic" one: "From whence do we come? What is the source of our lives and all that is, and how does the answer to this question inform the answers to other questions about human purposes and goals?"[332] From these starting-points, we'll see below, religions draw inferences to an ultimate ground or principle of existence (or being) as well as meaning or value. Or as Brady concludes, "religion is fundamentally a relationship to the ultimate Reality or Power that grounds all that is."[333]

In sketching out later why a relationship with that principle would be of final value if the principle existed, I will *not* be endorsing (or conditioning anything on) the truth of any particular theological or philosophical conception of what that principle is like, such as the Christian understanding of a Trinitarian God or the Hindu polytheistic tradition or the Buddhist account of an overarching cosmic order. I do contend, however, that these diverse traditions of thought, belief, and practice are analogous to one another—from the internal perspective of practitioners—not just as attempted explanations of the ultimate ground of reality (whether understood as a monotheistic personal being, or a set of myriad divinities, or an impersonal force) but as ways to pursue a central value of *harmony* or *alignment* with it.

Indeed, the degree to which this ultimate principle account coheres with a wide range of internal religious perspectives is remarkable. Through extensive research, Brady bolsters the case for understanding the internal perspective of most (if not all) religions—monotheistic and polytheistic and nontheistic ones alike—in these terms. Whereas "the major Western faiths" (by

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[331] Ibid.
[332] Brady, 82-83.
[333] Ibid. Brady identifies only one exception to this general thesis: Hinayana Buddhism, which "follows the earliest forms of Buddhism and rejects an absolute reality underlying our phenomenal world." This strain of Buddhism, she continues, is "unconcerned with the origin of existence," and seeks the "'perfect extinction'" of the self. Brady, *The Distinctiveness of Religion in American Law*, 89.

this Brady means Christianity, and presumably Judaism and Islam) perceive the ultimate source "in theistic terms as creator and sustainer of the universe,"[334] Eastern faiths understand it "more abstractly as the principle underlying all things."[335] Mahayana Buddhism, for example, "refers to the eternal and timeless 'Absolute' immanent in all things"; Hinduism "has the concept of the Absolute, or the ultimate and absolute reality permeating all that is"; and Confucianism sees the ultimate "as a source of moral and natural order that transcends the world it governs."[336] Such Eastern traditions differ on whether the ultimate is understood personally (in some strains of Hinduism or Buddhism) or impersonally (as in Confucianism).[337]

Brady also shows that even many religious traditions that understand the ultimate in polytheistic terms—a fact one might see as challenging the interpretation of their practices as seeking harmony with something *ultimate* (a concept that suggests singularity)—are "at root monotheistic or monistic."[338] Using the same examples, she observes that "in Mahayana Buddhism, numerous godlike beings help individuals progress on their path toward liberation through identification with the Absolute, which is the one true reality and essence of all."[339] Likewise, "[i]n Hinduism, numerous gods are seen as manifestations of a single High God, and this supreme God may itself be viewed as the manifestation of the Absolute or the Absolute itself."[340] In African faiths, "there is often one High God who is creator and ruler of lower deities and spirits."[341]

Finally, Brady shows that religious traditions generally converge on seeing "relationship with the [ultimate]…at the heart of the religious life," even though they differ in their

[334] Ibid., 85.
[335] Ibid., 86.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Ibid.

understanding of how to achieve it.[342] While Christianity generally perceives "the connection between God and believers…as a matter of duty and obedience" and sees "love of God and neighbor…at the heart of this duty,"[343] "the mystical traditions of the East…seek union or identification with the [ultimate]," whether through the extinction of "individual personality" (Mahayana Buddhism), or in "close contact [of the self] with the divine" (some forms of Hinduism), or "a form of oneness…with the eternal Tao" that "brings a kind of immortality rather than extinction" (Chinese Taoism).[344]

As we saw in Smith and Riesebrodt's theories of religion, pursuing harmony with the ultimate principle in any religion requires several kinds of action: asking and answering questions about the ultimate explanation of reality (what Riesebrodt calls discursive practices), engaging in some way with any ultimate principle of reality that one comes to affirm (interventionist practices), and sustaining or building up that engagement with it (behavior-regulating practices). All religious (and some philosophical) traditions will involve some variation of these activities. In fact, before I present several analogies to show the plausibility of final value in seeking harmony with an ultimate ground or principle of reality, I want to emphasize that some kinds of non-religious practices might actually be thought to pursue this value in some sense. Some variations of veganism, environmentalism (such as "deep ecology")[345], or ethical humanist movements (like the Yale Humanist Community)[346] may

[342] Ibid., 88.
[343] Ibid.
[344] Ibid., 89.
[345] The "Deep Ecology Platform" lists 8 philosophical principles that begin from the intrinsic value of "the well-being and flourishing of human and nonhuman life on earth" and conclude with the obligation of anyone who "subscribe[s] to the foregoing points" to seek political and social action to protect the natural world (and by extension, to make life better for human beings). "The Deep Ecology Platform," Foundation for Deep Ecology, http://www.deepecology.org/platform.htm (accessed May 14, 2020). Thus deep ecology appears to be animated by a kind of ultimate principle of the inherent value of all life, and makes ethical recommendations accordingly. The philosopher Arne Naess originally distinguished between the "long range-deep ecology movement"—which involves deep examination of "our purposes and values when arguing in environmental politics"—and the "shallow

actually be after this same final value of harmony with the ultimate, in some form. For example, refraining from consumption of any animal products may be sought partly as a way to act in line with the environment or nature, or earth or cosmos, considered as a kind of ultimate principle of the existence of (other) natural things. Some versions of atheism might also count as peripheral cases of this value, as philosopher Joseph Boyle has argued.[347] Atheists who reject organized or institutional religion, or personalist conceptions of the ultimate principle of reality, might "nevertheless believe in a 'force' in the universe 'greater than we are,'" to use Dworkin's phrasing.[348] If and to the extent that any of these conventionally secular pursuits are after this value of harmony with the ultimate ground of reality, even in a peripheral way, they would count, on my view, as instances of the value of religion.

B. Defenses by Analogy

Now why would the central case of the religious viewpoint see harmony with an ultimate principle as a *final* value—worthwhile *in itself*? I am contending that religion understood in this way is a basic (foundational) motivation for human action, and as such, a distinct, irreplaceable component of human wellbeing. This is in sharp contrast to the identity construction view, on

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ecology movement," which "stops before the ultimate level of fundamental change, often promoting technological fixes…based on the same consumption-oriented values and methods of the industrial economy." By contrast, the "long-range deep approach involves redesigning our whole systems based on values and methods that truly preserve the ecological and cultural diversity of natural systems." Alan Dregson, "Some Thought on the Deep Ecology Movement," Foundation for Deep Ecology, http://www.deepecology.org/deepecology.htm (accessed May 12, 2020).

[346] David Zax, "True nonbeliever," *Yale Alumni Magazine*, July/August 2016, https://yalealumnimagazine.com/articles/4330-true-nonbeliever (accessed May 14, 2020).

[347] Boyle, "The Place of Religion in the Practical Reasoning of Individuals and Groups," 3. Boyle argues that someone can seek the final (or basic, to use his term) value of religion "only if he or she believes there is some ultimate principle or principles of reality," but goes on to say that "[t]his condition likely excludes from the class of those capable of seeking religious benefits far fewer people than one might have at first thought. Although the relevant beliefs are obviously present in people who profess the religions rooted in the Bible and in other more or less explicitly theistic and polytheistic religions, there is no easy way to restrict them to such paradigmatic religious beliefs. Pantheists can plainly pursue religious benefits. And likewise surely can some atheists; atheists who accept the existence of an objective good to which human action should conform can act for the sake of establishing or maintaining a proper relationship with this impersonal principle of goodness."

[348] Ronald Dworkin, *Religion without God* (Cambridge, MA: Harvard University Press, 2013), 2.

which religion is not a basic motivation for action but a means of achieving the goal of identity shaping. But if the value of religion on my account is final—if seeking to be in harmony with this ultimate principle is intrinsically worthwhile—then by definition I can't prove this claim demonstratively: that is, by appeal to some *other and more basic or final* value that somehow *grounds* the value of religion. The only way to make it plausible is to use analogies to other, more widely acknowledged final values, or basic components of human wellbeing or fulfillment.

Take the final values of health, knowledge, and friendship[349]: a certain kind of harmony or alignment—an order—constitutes all three. Being healthy fundamentally depends upon the cooperation of all our bodily systems (in and toward our long and stable survival). The value of knowing, similarly, is best realized when our perceptions of the world and of ourselves match up to, or are aligned with, reality. And friendship fundamentally requires cultivating good will, a kind of interpersonal harmony constituted by alignment of wills (shared goals, identification with each other's interests), between ourselves and other human beings. So too, then, if there is an ultimate principle that is the source or ground of existence, meaning, and value, then there is at least a *prima facie* case for thinking that maintaining a certain order or harmony between oneself and it would *also* be a kind of valuable goal. If this ultimate principle is, as theistic religions tend to believe, the *cause* of human existence (and the existence of everything else, including meaning and value), and we typically think it valuable to maintain a good relationship or order between ourselves and the two other beings responsible for our existence—our parents—it is plausible to think it would be good to be in line with that more ultimate source. And similarly, since in that causal role this principle can be said to will our good (insofar as it causes and sustains human existence), and we think it valuable to be in harmony with other people who will our good—our friends—then we could logically think it's worth seeking harmony with the

[349] Korsgaard, "Two Distinctions in Goodness," 169.

ultimate source that wills our good *into being*.

Striving after this order would require both knowing the nature of this ground or principle as best one can and doing what is necessary to be rightly disposed toward and in line with it. And these efforts in turn would both explain the presence of, and sustain a need for, the religious and philosophical traditions built upon particular conceptions of it.

Those conceptions will in turn determine, as we saw in Brady's work, the best way to understand or capture the "harmony" with this ground or principle sought after by members of each tradition: if the ultimate ground of reality is understood as a personal being, for example, then harmony with it could mean establishing, maintaining, or cultivating a certain union of mind and will with it (agreement, cooperation, and so on). If it is understood as a kind of impersonal force, on the other hand, then the idea of harmony with it may be better captured by speaking of an alignment with it (as Smith does) or as Brady puts it, an "immediate intuitive unification" with it (sought, for example, in Chinese Taoism).[350]

Moreover, although goods like health, knowledge, or friendship can be pursued for instrumental reasons (e.g., I study up on national politics in order to have more to discuss with new friends and thus bolster our relationship), as *final* goods they are fundamental values that can therefore be basic, or foundational, reasons for our actions (if all actions are motivated by the pursuit of some good, at least apparent): they can be the bottom-line explanation for any particular action, for why *ultimately* we do what we do. And like the order central to these other final values, I propose that if knowing and seeking to be in harmony with an ultimate ground of reality has value at all, it too is plausibly intrinsic: a final good worth seeking for its own sake and a distinct kind of reason that could adequately explain (if not partially, under some conceptions of the ultimate), most or all human actions.

[350] Brady, *The Distinctiveness of Religion in American Law*, 89.

We can also see how pursuing harmony with an ultimate ground or principle of reality would naturally become a social value. For if something really is the ultimate ground of reality—of *everything*—then it would be the ultimate ground of each *person's* existence. Objectively speaking, it would have that status (that of ultimate origin) for everyone, not just for those who affirm its existence. So anyone who believes that she has identified the ultimate ground or principle of reality will think that she has identified something (or truths about it, or norms imposed by it) of fundamental interest and importance to the whole community. It would be a natural (though not *logically* necessary) progression from these conclusions to the further conclusion that how well or ill some members of the community are aligned with this ground or principle might affect how everyone else fares, too. These points might explain why members of religions often want to preserve what they regard as a proper understanding of the ultimate ground or principle (and of how to best be in harmony with it) among each other, through oral and written traditions. Thus the pursuit of harmony with this ground or principle easily takes on social as well as individual dimensions. This in turn may help explain further salient social facts about religion—e.g., the presence in many religious traditions of mediating figures, whether human or superhuman, who serve to represent, intercede, or otherwise deal with the ultimate principle on behalf of the community or humanity as a whole.

Again, analogies to other relational goods are helpful for illustrating the distinctive social component of this value. Consider the goods of friendship or marriage and family: your and my joint friendship with a third friend (who transcends and is a friend to both of us individually) is distinct from, and not reducible to, my friendship with him or her and then yours. Similarly, the joint relationship I share with my three siblings to our parents as their children (with its rich history of family habits, jokes, traditions, and points of agreement or friction) is distinct from the

relationship each of us has to them as an individual son or daughter (with all its dimensions of love or tension). In the same way, the relationship my husband and I now share with our daughters as their parents is distinct from the relationship each one of us has to each one of them as her mother or her father. Each of these relationships—our joint friendship, the family relationship I share with my siblings and parents, or that my husband and daughters and I now share too—require efforts to maintain good standing and goodwill that are distinct from the efforts required in each individual relationship between one friend and another, or between one parent and a specific son or daughter. Moreover, when one person wrongs another in any of these joint relationships, the good standing and good will that constitute the joint relationship—in which each member has a stake—is thrown off balance, and so the wellbeing of each member is affected by what any one member does in relation to the whole. Something similar might be true in the realm of harmony with an ultimate ground or principle of reality: the efforts of all members of a religious community collectively to be on right terms with it signifies something different and greater than individual members' efforts, namely a communal right standing or harmony that is valuable insofar as it affects the standing of each individual with that ground or principle.

C. Two Distinctive Features: Religion's Fragility and Architectonic Role

The final value of seeking harmony with an ultimate ground or principle of reality, I want finally to suggest, points to two distinctive features of religion as a social practice, which have already been sketched by other theorists of religion. Here I will amplify and develop those two features, so as to pave the way for discussing their implications for religious liberty in Chapter 4.

First, religion is a uniquely *fragile* good, as authors Ryan Anderson and Sherif Girgis have argued: its demands tend to be both determinate and fixed enough (at least difficult to

change "at will," as Girgis puts it[351]) that someone easily becomes deficient in her religion because it's easy to fail to meet those demands.[352] It's much easier to become deficient in the pursuit of religion, they argue, than in the pursuit of self-determination more generally (or in other forms of identity construction singled out by liberal egalitarian approaches, e.g., deep concerns or integrity-protecting commitments). Why? Because religion, unlike other kinds of self-determination or deep concern, typically entails a narrow range of "*particular* options" for adequate experience of that good, and the particular options entailed can't be deliberately changed by the religious believer at will (precisely because religious *beliefs* about these matters can't be changed at will).[353] As Anderson and Girgis sum up this distinction:

> [I]f you're barred from pursuing one project, you can adopt another, live out that new one, and your self-determination doesn't take much of a hit. You need only a respectable range of options. But if you're pressured into flouting even one of your perceived *obligations*, you're stuck; your integrity is cracked.[354]

One could press Anderson and Girgis on this point—is religion *uniquely* fragile in this sense? Surely other forms of self-determination are particularly fragile; say, for example, one's devotion to a local sports team. If the team changes cities, you no longer have the same ability to live out your fandom. Or if you're passionately committed to bird-watching on the beach, but are forced to move to a new city for your job far from the ocean, your commitment takes a big hit.

We can respond to this concern with two points: one is about the breadth of ways to realize a final value, and the other is about the flexibility of the requirements of final values other than religion. On the first point: I'm arguing (as Anderson and Girgis do) that religion, unlike sports fandom or bird-watching, is its own broad category of final value. Devotion to a sports

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[351] Sherif Girgis, "More Fragile, Even if Not More Worthy: A New Case for Religion's Special Constitutional Protection," 34 (unpublished draft) (on file with the author).
[352] John T. Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017), 134-7.
[353] Ibid., 135.
[354] Ibid.

team or to bird-watching are simply means to broad categories of final value also achievable in other ways—such as recreation or aesthetic experience. There is a significant difference between the range of options for experiencing those other final values and the range of options for experiencing the final value of *your particular religion*.[355] If the Brooklyn Dodgers become the L.A. Dodgers (as they did in 1957), you can find other ways to experience the value of recreation (e.g., by finding another team to follow, or travelling to see the new Dodgers team play, or even by cultivating an interest in another kind of sport, like basketball). Or if you have to move far from the beach where you enjoy bird-watching, you can find a new beach closer to you, or a new setting to watch birds, or even make annual trips back to the original beach. You aren't deprived in any of these cases, as Anderson and Girgis put it, of a "whole basic [final] good."[356] But it's *not* the case that if you are prevented from keeping your Sabbath, you have other adequate ways of experiencing the final value of religion. As Anderson and Girgis illustrate, "If the law pressures someone into flouting her Muslim obligations, she can't make up for that—and escape deficiency in religion—by fulfilling a Mennonite duty instead. There are no alternative channels for *her* to pursue religion in full."[357] Likewise, "she can't make up for violating the teaching against eating pork by redoubling her efforts to live out her separate duty to pray at certain times."[358]

On the second point: there is also a significant difference between the *flexibility* of requirements for experiencing other final values and the relative *rigidity* of the requirements of religion. Devotion to the Dodgers can be lived out in a variety of adequate ways: You can attend

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[355] For an extended argument developing these two points—about the breadth of ways to realize final values other than religion, and about the comparative rigidity of the requirements of religion, see Sherif Girgis, "More Fragile, Even if Not More Worthy: A New Case for Religion's Constitutional Protection," 35-6.
[356] Ibid., 141.
[357] Ibid., 136.
[358] Ibid., 135-6.

their games and watch them on television, wear a Dodgers jersey on game day, gather a group of fans to watch games together, and so on. The same is true for bird-watching: you can watch a wide range of birds, in a great number of settings. But keeping the Sabbath on Saturday can't be done in a wide range of ways—if you can't do it on Saturday, you can't do it at all.

I will return to these distinctions in part V, to explore what difference they might make for accommodating secular conscience claims. For now, my account of religion as a final value also points us to a second special feature of religion: it is uniquely *architectonic*, to use political theorist Melissa Moschella's framing. The effort to be in harmony with an ultimate principle will tend to motivate, direct, and organize many if not all other areas of one's life. For recognizing the existence of such an ultimate principle or ground of reality as truly ultimate will mean, as philosopher Christopher Tollefsen explains, seeing "every endeavor as part of a potentially cooperative relationship with this [principle or ground]… One's every action, from this standpoint, will be suffused with both gratitude, for the gift that has been given, attentiveness to what [the principle or ground] is asking of us as regards our participation in the relationship, and profound significance, insofar as everything that we do will either contribute positively or negatively to the building up of that relationship."[359] Although this formulation may better capture the perspective of monotheistic religions (which tend to understand the ultimate principle as a loving creator), Brady emphasizes that "ethics is important in any religious tradition, even the mystical traditions of the East" (where "ethics does not assume the same central place as the ultimate goal of human life is escape from the phenomenal world and loss of self in the

[359] Tollefsen, "Conscience, Religion, and the State," 99.

divine").[360] Mahayana Buddhism, for example, "naturally emphasizes compassion for one's fellow men and women."[361]

This unique pervasiveness of religion, as Moschella describes it, means that "it can govern, and be at stake in, every single choice that we make…, and also gives our choices an importance and meaning that they might not otherwise have."[362] So, for example, we can maintain our health not only for our own sake but because we think it will allow us to cooperate longer and better with the ultimate principle.[363] Depending on one's religious tradition, one might form friendships not just for their own sake but because one understands the ultimate principle as a loving creator who wishes human beings to care for each other.[364] Of course, as Moschella points out, "many goods [can] supervene upon others in this way," as when we take care of ourselves or pursue education to please family and friends.[365] The good of practical reasonableness "governs, and is at stake in, all choices between right and wrong courses of actions[.]"[366] Yet "only the good of religion can govern and be implicated in *every choice* at *every time* and in *every circumstance*, and only the good of religion *should* govern (at least implicitly) every choice at every time and in every circumstance."[367]

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[360] Brady, *The Distinctiveness of Religion in American Law*, 90.
[361] Ibid.
[362] Moschella, "Beyond Equal Liberty," 132.
[363] Ibid. Hinayana Buddhism, however (as an outlier to a general account of religion as the pursuit of harmony with an ultimate ground of reality), would not be able to support this conclusion.
[364] Ibid.
[365] Ibid., 132-3.
[366] Ibid., 133.
[367] Ibid. Here it's important to clarify that even if identity construction is not what's of final value in religion, we don't need to deny that religion's pursuit of harmony with the ultimate ground of reality *contributes* to personal identity (as Smith shows it does). It can do so, for example, by providing religious practitioners with a more or less comprehensive set of answers to a spectrum of existential and moral questions; a conception of personal integrity; and a sense of personal authenticity and self-worth.

Crucially, though, on the ultimate principle view these further benefits are only *secondary* (to use Smith's term) to the final value of harmony with the ultimate ground or principle. By this I mean two things. First, these further benefits are not *essential* to realizing the value of harmony with the ultimate ground of reality (since one can seek that harmony independently of a particular religious or philosophical tradition, and a tradition can be religious in the relevant sense without having all of these further benefits, or perhaps by having other further benefits that I've failed to account for here). Second, in the actions that make up religion, the value of these further benefits is

The special fragility and architectonic role of religion will have implications for the way U.S. courts should approach exemptions analysis, as Chapter 4 considers. First, however, I'll highlight more general implications of the ultimate principle account I've offered for some aspects of religious liberty jurisprudence in the United States.

To summarize my discussion here: articulating the distinct, final value of harmony with the ultimate ground or principle of reality helps us clearly see the link between the scholarly conversations engaged in Chapters 1, 2, and 3. These conversations tend to run on parallel tracks, but I've shown here that they all point to the importance for any religious liberty scheme of identifying the *central case* of the religious viewpoint. The liberal egalitarian approaches of Chapter 1, it is now clear, justify religious liberty from a less convincing central case—identity construction. The value at stake in identity construction fails to fully explain religion as a social practice, as Riesebrodt and Smith show, and consequently fails to point us to all the normatively important forms of religious wellbeing that religious liberty law should protect. The postmodernist challenge of Chapter 2 rejects the possibility of *any* central case of the religious viewpoint because it assumes there is no final value that could motivate religious behavior in the first place. The comprehensive answer to both of those chapters that I've given here in chapter 3 is to point to a more compelling central case—a perspective of intrinsic or final value on offer in a quest for harmony with an ultimate principle or ground of all existence, meaning, and value. This value is what we—following Riesebrodt and Smith, with some important qualification to their accounts—should take to be central to the thoughts, beliefs, and practices that make up religion as a social phenomenon (and arguably some philosophical traditions, such as classical theism).

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explained by, and attributable in part to, the final value of seeking harmony with the ultimate. To put the point slightly differently, the more basic value of harmony with the ultimate is *explanatorily prior to, and accounts for,* the value of comprehensiveness, conceptions of integrity, feelings of authenticity, and so on in religion.

Now we are in a good position to ask: what political principles for explaining and critiquing the scope of religious liberty in American law does the final value of religion (understood as harmony with the ultimate ground of reality) recommend? What prescriptions for the scope of religious liberty—and legal doctrine—would follow from it? This will be the subject of the final section of this chapter, where I develop some general implications for the shape of non-establishment and free exercise of religion in the United States, partially in response to outcomes in those areas recommended by the liberal egalitarian approaches of Chapter 1. We will see that the ultimate principle account of religion's final value better explains some of those outcomes, but I will also recommend other kinds of legal protection and support for religion that I suspect they would reject.

V. Doctrinal Implications

To begin this section, let's revisit the general conclusion of the preceding material. A proper theory of religious liberty, Chapters 1 through 3 have shown us, will work from the *central case* of the (1) *internal* religious perspective (or religious viewpoint), which sees a (2) *final* value that is (3) *distinctively* on offer in religious activity, namely, (4) *harmony* with the (5) *ultimate* ground or principle of reality. Below I show that all five components of the central case yield implications for at least four American legal doctrines on religious liberty.

Before I present those implications, I would like to remind the reader of two points. First, these implications are meant to be suggestive and illustrative, not exhaustive or even systematic: I am not trying to reach *all* (or even a systematic sampling of) the conclusions the ultimate principle account might recommend for *all* relevant questions of American doctrine and policy. The main goal and focus of the dissertation—which is primarily a work of normative political

theory, not legal prescription or reform—has been to answer questions about the *foundations* of any legal reform in this area. To that end, I've focused both on rebutting the most radical and theoretically basic objections to religious liberty (from postmodernists and liberal egalitarians), and on developing an account and defense of the most basic normative principle that should guide the design of our religious liberty regime: the final value that's distinctively on offer in this domain of activity. Nevertheless, that foundational account is certainly meant to illuminate our live, practical questions about religious liberty's scope, and below I sketch a few ways it can do so.

Second, it's worth reiterating once more the Dworkinian outlines of my approach: what I propose below is not an interpretation of the positive law we happen to have (e.g., under the First Amendment, or the Religious Freedom Restoration Act), but instead a set of political-moral principles that provide a basis for critiquing existing law, proposing reforms, and perhaps filling in gaps in the existing law.[368] Of course, interpretation and justification can be closely related: depending on what one takes to be the best theory of interpretation and judicial reasoning, political-moral principles might need to inform interpretation at all stages (not just when there are gaps to fill). But if it turns out instead that the best interpretive theory requires looking only to the original public meaning of a legal text, its historical understanding, and other non-normative criteria, then all that this section will provide is, again, a standard for critiquing

[368] Some scholars think that while judges or constitutional interpreters should never go against the text or original understanding in order to impose their value or policy judgments, they *can* use these judgments to try to fill in *gaps* in the law created by, say, vagueness in the text or original understanding. For example, if it's ambiguous what "substantial" means in the Religious Freedom Restoration Act's language of "substantial burdens" on religion, we can use political-moral principles to fashion doctrines that will help us go from that vague test to results in particular concrete cases. See Koppelman, "Is It Fair to Give Religion Special Treatment?" 577-78 ("The normative claim is relevant" when "the text is vague, and the doctrine is confused[.]").

existing law, or for designing future law.[369] Different readers can make use of the theory I've articulated and its normative implications as they will.

A. Public Displays of Religion

There are many possible forms of religious establishment, and I won't attempt to offer comprehensive guidelines for which ones are permissible.[370] But one of the most common forms—public displays of religion—often gives rise to the objection that such displays are unjust because they signal the exclusion or inferior status of citizens who do not share the religion shown.[371] But whatever the merits or demerits of religious displays in general, this *particular* objection is undercut, I submit, when we consider what the *internal perspective* (as opposed to an external one) tells us about the meaning of religious behavior.

On many liberal egalitarian approaches, including equal liberty and disaggregation, many forms of public religious display are impermissible under the Establishment Clause because they *necessarily* demean non-adherents: they carry a certain social meaning, by conveying that some people don't belong.[372] The Supreme Court has developed the "reasonable observer" standard to

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[369] Among scholars who think originalism is the best method of constitutional interpretation, there is debate about whether the First Amendment was originally understood to require exemptions for burdens on religious conduct. For an argument in the affirmative, see, e.g., Michael McConnell, "Free Exercise Revisionism and the *Smith* Decision," *The University of Chicago Law Review* 57, no. 4 (1990): 1109, 1127. For the opposite view, see, e.g., Vincent Phillip Muñoz, "If Religious Liberty Does Not Mean Exemptions, What It Might Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty," *Notre Dame Law Review* 91, no. 4 (April 2016): 1387-1418; Robert P. George, "Protecting Religious Liberty in the Next Millenium: Should We Amend the Religion Clauses of the Constitution?", *Loyola of Los Angeles Law Review* 32, no. 1 (November 1998): 31-2.

[370] In its recent decision in *American Legion v. American Humanist Association*, the Supreme Court distinguished "six rough categories" of Establishment Clause cases: "(1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies…; (2) religious accommodations and exemptions from generally applicable laws…; (3) subsidies and tax exemptions…; (4) religious expression in public schools…; (5) regulation of private religious speech…; and (6) state interference with internal church affairs…." The Court also listed "[a] final, miscellaneous category, including cases involving such issues as Sunday closing laws,…and church involvement in governmental decisionmaking[.]" 588 U.S.__(2019), at 15, footnote 16.

[371] See, e.g., Nelson Tebbe, Richard C. Schragger, and Micah Schwartzman, "The Bladensburg Peace Cross sends the message that some citizens are less valued than others," *The Washington Post*, https://www.washingtonpost.com/outlook/2019/02/26/bladensburg-peace-cross-sends-message-that-some-citizens-are-less-valued-than-others/ (accessed May 14, 2020).

[372] See, e.g., Eisgruber and Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 126 ("Religious endorsements valorize some religious beliefs and those who hold them, and thereby

identify the social meaning of religious displays.[373] If a reasonable observer would perceive the display as intended to exclude or signal who really belongs, then its social meaning is exclusionary in just that way. Indeed, a number of Supreme Court justices have opposed public displays of religion along those lines. Justice Ginsburg, for example, recently argued that a public war memorial in the shape of a cross as "conveys a message of exclusion" to non-Christians: "It tells them they are 'outsiders, not full members of the political community.'"[374] She was in turn citing Justice O'Connor's concerns about a public Nativity crèche in *Lynch v. Donnelly*.[375] O'Connor observed in *Allegheny County v. American Civil Liberties Union* that "There is always a risk that such [public] symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." (And she was cited in turn by Justice Stevens in *Van Orden v. Perry*.[376]) In short, the possibility that public displays automatically signal exclusion is an object of scholarly and judicial concern.

But on the theory I've articulated, the reasonable observer's judgment should be informed by the internal religious viewpoint of the purpose of such a display. That might vary from case to case—sometimes the purpose of a given religious display (as with the cross in the

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disparage those who do not share those beliefs."); Laborde, by contrast, argues in *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017) that the "wrongness of state-endorsed religious symbols….does not hinge on individuals' perceptions of exclusion or domination….[but] is context dependent….[and] symbol dependent" (140). Yet in liberal plural contexts such as Western Europe, she contends, "most forms of state-endorsed symbolic establishment of Christianity—even through seemingly 'cultural' signs such as crucifixes in state schools—are suspect at the bar of liberal inclusiveness," because in that particular context "religion is a fault line of social vulnerability and exclusion" (140). More generally, Laborde "suggest[s] that symbolic establishment is wrong if religious identity independently functions as a marker of social vulnerability and domination in the society in question, or if such establishment can reliably be predicted to increase the social salience of religious identity" (136).

[373] See, e.g., *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, at 773 (1995), where Justice O'Connor seeks "to emphasize that…the endorsement test necessarily focuses on the perception of a reasonable, informed observer"; see also Justice Kennedy's contention in *Town of Greece, N.Y. v. Galloway* that "the reasonable observer is acquainted with this tradition [of opening town meetings with prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens[.]" 572 U.S. 565 (2014), at 587.

[374] *American Legion v. American Humanist Association*, 139 S.Ct. 2067, 2106.

[375] 465 U.S. 668, 688.

[376] *Van Orden v. Perry*, 545 U.S. 677, 708.

above-described *American Legion* case) is actually secular: to memorialize fallen soldiers, for example. But even when the purpose is in fact religious, the goal will not be to mark "who's in" and "who's out" of the political community, but to signal the value of harmony with an ultimate source of meaning and value. There may be other problems with such displays—including other harms to Establishment Clause values. But one particular form of Establishment Clause concern—that the display is best read by observers as intended to exclude—is mistaken.

More precisely, the right inference for the reasonable observer to draw about the meaning of a public display of religion isn't *automatically* that it marks political membership or status. Still, in some contexts that might indeed be the right inference to draw, depending on the details of the display. States could use public displays of religion to support exclusion—e.g., a nationalist agenda—to signal precisely, for example, that Jews are not full citizens in Hitler's regime, or that Muslims are not part of God's chosen people, or that Christians have no place in a majority-Muslim state. In those cases, it would be just to remove the display. But from the account I've developed, it is clear that the religious underpinning of these unjust displays is a very watered down, peripheral case of religion—not the central instance of what a reasonable religious or non-religious person should understand religious expression to mean.

B. Exemptions for Secular Conscience

As we saw in Chapter 1, both the equal liberty approach and the fair opportunity approach are instinctively pulled toward treating religion as having special importance. We see this most clearly in their discussion of exemptions for non-religious identity-shaping practices. Eisgruber and Sager were unwilling to grant Mother Sherbert unemployment compensation to care for her children on Saturdays, and Patten recognized that there may be scenarios in which the paternalist justifications for restricting drug use are outweighed by religious reasons for

peyote consumption but not secular ones. Understanding religion as offering a distinct category of final value makes sense of these conclusions. For on that view, unlike on the identity construction account, we can't find adequate substitutes for religion's value in other pursuits. There is something uniquely valuable at stake in religious behavior—the pursuit of harmony with what one perceives to be the ultimate principle—that gives us ground to consider exempting religious practices but not secular identity commitments.

Here I will say more about how the view I've defended would regard secular claims of conscience (while I take up how we should analyze *religious* exemption claims in the next chapter). The category of non-religious commitments of conscience that have a plausible claim to exemptions will always be a gray area, but understanding religion as offering a distinct, final value of harmony with the ultimate ground of reality helps us draw at least some parameters around claims that ought to be eligible for exemptions.

In particular, I think the ultimate principle account gives us reason to narrow the parameters for secular conscience claims in one direction, and to widen them in two others. First, non-religious commitments can't qualify for an exemption simply because they are subjectively experienced as deeply held (which is part of what Eisgruber and Sager seem to mean by the term "conscience"). Someone might object that no, substituting another team for the new L.A. Dodgers, or a park for the beach to observe birds, isn't a good substitute form of recreation for the avid baseball fan or birdwatcher. Those alternatives will be subjectively experienced as inadequate. But our guiding question, in considering these differences among values, is what salient features of religion and other commitments *justify their protection in law*. And we've now seen from Chapter 1 that the subjective importance of a particular commitment for one's identity isn't enough: it's not the reason to guarantee baseball fans access to following their favorite

team, or birdwatchers access to beaches and parks so they can track rare avian species, and by the same token it isn't the reason to grant the Seventh Day Adventist access to a Saturday Sabbath (to use a real example from the Supreme Court's decision in *Sherbert v. Verner*). Instead, the reason to accommodate religion is that it realizes an objective, final value of harmony with the ultimate ground of reality. The question we need to ask when we are thinking about the case to accommodate secular commitments is not, "Is there another form of recreation you care about as much as you care about golf?" but "Is there another form of recreation that gives you roughly the same underlying objective value, i.e., that of recreation?" Likewise for religion: we are asking not, "Is there a day of rest that you subjectively care about as intensely as you want rest on Saturday?" but "Is there another day of rest that would give you the objective value of harmony with the ultimate principle as you understand it?"

Along those lines, I would argue that we *do* have to reason to accommodate both (a) secular commitments that substantively approximate the value; and (b) secular commitments to a moral absolute (such as the wrongness of killing). On the first category: part IV's discussion suggests that we can consider exemption claims from people with philosophical commitments that closely approximate the final value I've shown is at stake in religion (such as pacifism, deep ecology, or ethical humanism). That kind of reasoning would help us evaluate a famous conscientious objector case from the Court. At least two of the plaintiffs who objected to military service in *United States v. Seeger* framed their secular commitments to pacifism as a kind of pursuit of harmony with what they believed to be an ultimate principle or ground of reality. Arno Jakobson contended that his "opposition to war is based on belief in a Supreme Reality, and is therefore an obligation superior to one resulting from the man's relationship to his fellow

man."[377] Likewise, Forest Peter, another of the plaintiffs, argued that "his opposition to war derives from his acceptance of the existence of a universal power beyond that of man, and that this acceptance, in fact, constitutes belief in a Supreme Being."[378] So Jakobson's and Peter's objections seem clearly to be grounded in beliefs about an ultimate ground or principle of reality, and the Court was right to grant them an exemption.

But we can also use this case, and the theory of religion's value I've sketched, to support accommodating conscience commitments that aim at adherence to a perceived moral absolute. We don't need to accommodate just any secular moral obligation, but we should accommodate those that display the same kind of fragility as religious obligations (in the sense that interior harmony with a moral absolute can't be achieved simply by adhering to a *different* absolute norm). Moreover, moral absolutes are often connected to views about the higher or ultimate meaning of reality, even if those views aren't theistic. So the Court was also right to exempt Daniel Seeger, who by contrast "preferred to leave the question as to his belief in a Supreme Being open," but did not deny having a "'lack of faith in anything whatsoever,'" and "cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense.'"[379] Even though Seeger's objection to military service is not explicitly grounded in beliefs about an ultimate ground or principle of reality, we can still see his objection as an effort to achieve interior harmony with a principle of respect for human life that he regards as a moral absolute. The law doesn't need to accommodate claims for an exemption based on just any moral principle, but moral absolutes closely approximate both the fragility and the organizing role of religious belief in an ultimate

[377] *United States v. Seeger*, 380 U.S. 163, 166 (1965). In general I am following Moschella's analysis of whether and to what extent each of the three plaintiffs is pursuing the final value of religion; see Moschella, "Beyond Equal Liberty," 140-141.
[378] Ibid.
[379] Ibid.

principle of reality. So when someone who does not profess any particular religion faces a hard conflict between that kind of moral principle—an absolute norm—and the law's requirements, they may have a strong case for a conscience-based exemption.

This interpretation also better explains a seeming disparity between Eisgruber and Sager's *support* for Seeger's exemption claim and their *rejection* of Mother Sherbert's claim to unemployment compensation. For Eisgruber and Sager, denying Seeger an exemption would have amounted to discrimination based on the non-religious character of his beliefs. "Seeger's pacifism might be no less sincere, no less intense, no less durable, and no less binding upon his conscience than that of his religiously motivated counterparts, but the government would nevertheless [have] favor[ed] their claims over his," they write.[380] This favoritism of "some needs over others purely on the basis of their theological character or spiritual foundations" would be for Eisgruber and Sager a clear violation of equal liberty.[381] But isn't denying Mother Sherbert unemployment compensation when she is fired for watching her children on Saturdays—while accommodating her real life counterpart Adele Sherbert—an unjust favoritism of the same kind?

No, if our rule is that eligibility for exemptions rests on whether the conscientious commitment burdened by the law is attributable either to a pursuit of harmony with the ultimate principle of reality or to a very close proxy. The reason to accommodate Seeger, but not Mother Sherbert, is that Seeger's objection to military service was an effort to preserve harmony between his actions and his belief in a moral absolute against killing. Mother Sherbert, at least on the terms Eisgruber and Sager present, doesn't risk violating any moral absolute by having someone else watch her children on Saturdays. By contrast, the real Adele Sherbert's case

[380] Eisgruber and Sager, *Religious Freedom and the Constitution*, 114.
[381] Ibid.

warranted an exemption because the law threatened to make her deficient in her experience of the distinct good of religion, by pressuring her to choose between a public benefit (unemployment compensation) and observing her Sabbath. In other words, her commitment to the Sabbath is fragile: there is no substitute for avoiding Saturday work in order to observe it. Eisgruber and Sager seem to be attentive to this fragility when they argue that Mother Sherbert's commitment isn't an "inflexible" commitment like the real Sherbert's Sabbath observance. Indeed, there is conceivably a wider range of ways for Mother Sherbert to honor commitment to spending time with her children than there is for Sherbert to keep her Saturday Sabbath (just one).

C. Equal Protection for Minority Religions

Chapter 1 traced in Laborde's disaggregation approach a surprisingly inegalitarian outcome: the unequal protection of minority religions. Recall that on her view, only obligations (or identity commitments that are *subjectively experienced* as obligations) can claim a "disproportionate burden" in exemptions analysis, while non-obligatory commitments, religious or otherwise, can only seek relief under a "majority bias" principle. But this framework would thus leave unprotected a critical category of minority religious activity—those practices that are not obligatory or experienced as such *and* lack a clear majority analogue. Paulsen and McConnell's emphases on obligation as the protection-worthy core of religion support a similar conclusion. But understanding the value of religion as final, not instrumental (to promoting identity, as on Laborde's view; or to avoiding punishment, as on Paulsen's), helps us rectify that problem. Why? Because it makes room for the idea that any activity that advances harmony with the ultimate principle of reality—not just religious obligations—deserves protection, whether it's carried out by a majority *or* a minority religion. As I will go on to explain in Chapter 4, however,

I think we can adopt more specific criteria for exemption eligibility in the broad category of religiously-motivated (but not obligated) behavior. I am not proposing that the law accommodate every instance of a burden on religious activity; instead I will propose an improved framework for identifying those burdens that are truly "substantial," to use the wording of U.S. federal and statutory religious liberty law.

To give a preview of those criteria, and to show concretely the improvement they offer on Laborde's approach, I think the theory of religion as a final value presented in this chapter can better critique the Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*. There the Court upheld a state's decision to construct a road through Native American land, even though the Court recognized that disruption of the land's integrity would prove "devastating" to Native American religious practice.[382] Laborde's framework gives us little ground to reject that outcome, since there is no clear *obligation* the road construction burdened, and we would be hard-pressed to find an analogous religious practice that the law previously accommodated for a majority religion. Indeed, the singular sacredness land holds for Native Americans suggests that searching for a majority analogue in this case would be like comparing apples to oranges. By contrast, my approach would recommend upholding the land preservation at stake in *Lyng*. Native Americans' respect for and effort to protect their land as something sacred is a clear and tangible way of pursuing harmony with what they perceive to be the ultimate ground of reality.[383]

[382] 485 U.S. 439, 451 (1988).
[383] Members of the Native American Church (which does not include all Native Americans) believe in "a supreme being commonly addressed as the Great Spirit." Catherine Beyer, "Peyote and the Native American Church." Learn Religions. https://www.learnreligions.com/peyote-and-the-native-american-church-95705 (accessed May 13, 2020).

D. Justifying the Ministerial Exception

Finally, a theory of religion as the final value of harmony with an *ultimate* principle of reality can justify a legal principle like the ministerial exception. As I argued in part III, we can see from this perspective why religion naturally tends toward social expression, since something that is perceived as the *ultimate* ground of everything will be perceived as having that status for everyone, not just for the believer. So identifying the ultimate ground or principle of reality will naturally (though again, not necessarily in every case) lead many religious practitioners to conclude that communal right standing with the ultimate principle affects individual members' well-being, and vice versa. And these observations in turn, I suggested, can help us explain salient facts about religion as a truly *social* practice: such as the importance of oral and written traditions in particular religious communities, which can be seen as a way of preserving among each other and across generations what those communities see as the correct understanding of the ultimate ground or principle (and of how to best be in harmony with it); or the presence in many religious traditions of mediating figures, whether human or superhuman, who serve as essential points of contact with the ultimate principle on behalf of the community or humanity as a whole. Acknowledging the ultimate status of the ultimate principle at the communal level, in short, will be particularly and intrinsically important for many religions.

This further value of religion practiced communally means that many people's experience of their religion will be seriously incomplete or diminished if they cannot express their religion communally according to the requirements of their particular creed. So just as an adequate pursuit of religion requires you to be free to carry out the particular (and often stringent) requirements of harmony with the ultimate principle of reality, and to shape large swaths of your life in light of it (my discussion of religion's unique fragility and architectonic

role was meant to illustrate), an adequate pursuit of religion also often requires you to be free to practice your beliefs communally in the way your religion specifies. Ensuring that further opportunity for adequate religious experience in many religious traditions justifies a principle like the ministerial exception. So the Court was right in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* to uphold unanimously under this principle a Lutheran church's protection against an employment discrimination claim from one of its hired teachers.[384] Of course, the meaning of a "minister" under that principle is underdetermined, and the Court is currently considering how widely this exception extends in a new pair of cases this term.[385]

VI. *Conclusion*

I have argued that religion is a final human value concerned, in the central case of the religious viewpoint, with the distinctive pursuit of harmony with an ultimate principle of reality. That account of religion satisfies the dissertation's Dworkinian objective: more than the identity construction account, it both fits and justifies at least some existing traditions of religion's protection in American law, while offering us ground to critique other precedents and to make recommendations for the future of our religious liberty regime. The ultimate principle account also better explains some outcomes recommended by liberal egalitarian approaches. We can now see quite clearly why those approaches are mistaken in adopting the identity construction account. Put simply, our disagreements about religious liberty would be more fruitful if we could start from the fact that religious people centrally understand religion as a relationship to the ultimate, and trace out what would be important for the law to protect from that point of view.

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[384] 565 U.S.__ (2012).
[385] *Our Lady of Guadalupe School v. Morrissey-Berru*; *St. James School v. Biel*.

Along those lines, part V introduced some general principles for U.S. legal doctrine on religious freedom that I think the ultimate principle account supports. A more tailored application of that account comes next in Chapter 4. In that chapter, two of religion's natural and pervasive tendencies that I highlighted in this section will take center stage. Religion's special fragility and architectonic role, I'll argue, can help us improve and systematize American courts' analysis of "substantial burdens" on religious exercise. Once again I'll drive home that differences over the value of religion motivate our differences over the bounds of religious liberty, by contrasting Laborde's "disproportionate burden" analysis with my own approach to identifying substantial burdens in American law. The framework of analysis I'll develop will give us a key to help resolve bigger questions about the scope of religious exemptions in the United States, and perhaps in liberal plural societies more broadly.

Chapter 4: A New Test for Identifying "Substantial Burdens" on Religious Exercise under RFRA and the First Amendment

I. *Introduction*

In the previous and core chapter of the dissertation, I sketched an account of religion's distinctive value that could justify its own liberty right, and developed some general political-legal principles for the scope of religious liberty that might follow from it. This final chapter takes a much more tailored approach, by attempting to resolve a puzzle specific to the American religious liberty regime: namely, how we might understand the meaning of a "substantial burden" on religious exercise, which is a question we must know how to answer in order to tackle the bigger and much-debated question of when to grant legal exemptions for religion. So, by the end of this chapter, the dissertation will have provided the foundations of a political theory of American religious freedom: by showing its necessary roots in a conception of religion's value or importance (Chapter 1); by giving the best plausible explanation of its final value, which in turn justifies a distinct religious liberty right (Chapters 2 and 3); by tracing some basic legal implications of that final value (Chapter 3), and here, by working through a pressing legal issue facing today's arbiters of religious liberty in U.S. legislatures and courts.[386]

Consider this case from the Supreme Court's last term: Patrick Murphy, a prisoner on death row, approaches his execution day. In prison he has converted to Pure Land Buddhism, and has requested that his spiritual advisor, Rev. Hui-Yong Shih, be at his side in the execution chamber—not just in the viewing room—to help him preserve focus on his rebirth in the Pure Land as he passes into the next life. The prison says no, because Rev. Shih is not one of the

[386] A similar version of this chapter was circulated and discussed during a symposium on the Religion Clauses of the First Amendment at Washington University School of Law in January 2020. It is forthcoming in the *Washington University Law Review* as Gabrielle M. Girgis, "What Is a 'Substantial Burden' on Religion under RFRA and the First Amendment?" (2020).

many state-and-prison-approved ministers who can be present in the chamber. So when the day for his execution arrives, Murphy is to die in the chamber alone.[387]

How should the Court have understood the religious liberty issues at stake here? At the eleventh hour, it granted a stay of his execution, requiring the prison to permit Murphy's advisor to be at his side in the chamber. The Justices offered two grounds for this outcome. Justices Kagan and Kavanaugh supported the stay by appeal to the Establishment Clause, as a remedy for the religious discrimination inherent in the prison's permitting advisors of other religious denominations in the execution chamber: "What the State may not do," Justice Kavanaugh wrote, "… is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room."[388] But Justice Alito, in his dissent from the stay (on procedural grounds), suggested that Murphy might have a case against the prison's protocol, if he could show that "excluding Rev. Shih would *impose a substantial burden* on the exercise of his religion."[389] The complexities of Murphy's case—and this judicial conversation about it—drive home a question that has vexed courts and scholars from the time of the American founding: when to grant exemptions from laws that burden religious exercise.

Federal law answers that question with the Religious Freedom Restoration Act (RFRA, which many states have adopted their own versions of), as well as the Religious Land Use and Institutionalized Persons Act (RLUIPA): these statutes provide that exemptions are required whenever the law "substantially burdens" someone's religion, unless (1) that law serves a compelling state interest and (2) burdening someone's religion is the least restrictive way to

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[387] "Patrick Henry Murphy v. Bryan Collier, Executive Director, Texas Department of Criminal Justice," *Becket*, https://www.becketlaw.org/case/murphy-v-collier/ (accessed March 3, 2020).
[388] *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019).
[389] Ibid., 1484 (emphasis added).

achieve that interest.[390] But this test, known as the test of strict scrutiny, raises a further question that is surprisingly underexplored both among U.S. judges and justices and in the fields of constitutional and political theory—a question that will be the focus of this chapter: How do we determine what counts as a substantial burden on religion?

Getting clearer about substantial burdens on religion is a key intermediary step toward solving the much bigger problem of exemptions. We need a good answer to this question not only as a matter of public policy—to understand the meaning of RFRA's (and RLUIPA's) "substantial burden" language in an age where religious liberty claims are ever more fraught and contested—but also, we're quite likely to see, as a matter of constitutional law. RFRA introduced the substantial burden test in response to a landmark religious liberty decision by the Court in 1993, *Employment Division v. Smith*.[391] There, the Court decided that neither courts nor state legislatures were required to exempt Native Americans from a law prohibiting the use of peyote, because that law was neutral in its aim (it didn't target religion) and generally applicable to everyone.[392] Prior to *Smith*, the Court's precedent was just the opposite: any neutral and generally applicable law that imposed on someone's exercise of religion was constitutionally suspect. Courts were expected to grant people exemptions from laws that burdened their religion, unless that burden satisfied strict scrutiny (as the least restrictive way to serve a compelling state interest).[393]

Why does this reversal in legal history matter? Because recent murmurings from the Court suggest it might be going back the other way. Quite recently, in a joint opinion authored

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[390] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a) (2000).
[391] 494 U.S. 872 (1990).
[392] Ibid., 878–79, 882.
[393] Some have debated whether pre-*Smith* burdens had to satisfy something less stringent than strict scrutiny. See, e.g., Eugene Volokh, "A Common-Law Model for Religious Exemptions," *UCLA Law Review* 46 (1998):1494–96; (1998); Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," *University of Chicago Law Review* 57, no. 4 (1990): 1109, 1127.

by Justice Alito and joined by Justices Thomas, Gorsuch, and Kagan, Alito noted the "drastic[]" reduction in free exercise protection under U.S. constitutional law since *Smith*, and implicitly invited future petitioners to ask the Court to reconsider that decision.[394] Now, some petitions for a writ of certiorari *do* challenge *Smith*, with others likely to follow.[395] If the Court were to reverse *Smith*, then it would need a clear and reliable method for identifying substantial burdens not just under RFRA, which is part of statutory law, but also under the First Amendment of the Constitution: burdens from laws that are otherwise neutral and generally applicable would most likely be subjected to a substantial burden test, and where they were deemed substantial, the Court would then have to apply strict scrutiny.

Of course, the Court might choose to do something less than fully overturn *Smith*. But there's at least a meaningful chance that the Court *will* fully reverse it, and that makes it important for us to ask what the future of free exercise jurisprudence would look like.[396]

The goal of this chapter, then, is to build a conceptual framework—informed by the theory of religion's distinctive, final value sketched in Chapter 3—that courts could use to

[394] *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct 635, 637 (2019).
[395] See, e.g., Petition for Writ of Certiorari, *Ricks v. State of Idaho Contractors Bd*., 435 P.3d 1 (Idaho 2018); Petition for a Writ of Certiorari, *Sharonell Fulton, et al. v. City of Philadelphia*, i.
[396] One might wonder why overturning *Smith* would raise the stakes of deciding the meaning of "substantial burden," since courts already have to decide what that is now under RFRA (both at the federal and state levels). There are three possible answers: First, the question might have different answers under the Constitution as opposed to statutes. The right answer for how we should interpret the language of "substantial burden" in a statute might differ from the answer to the question of what kinds of burdens the Supreme Court was scrutinizing pre-*Smith*, because it's at least possible that the standard tools of statutory interpretation (dictionary definitions; reliance on the legal context composed of other language in the bill and of other laws on the books, which will differ from state to state; legislative intent or purpose, according to at least some theories of statutory interpretation) would yield a different result than we'd get if we were just asking "what did the Supreme Court have in mind when it was looking for substantial burdens—i.e., what did it tend to treat as 'substantial'?" Second, even if the answer to these two questions is the same, the scrutiny of substantial burdens under the federal Constitution would happen much more often, because it would be required for burdens imposed by any state or federal law or regulation—including state laws and regulations in states that lack their own RFRAs, and federal statutes in which Congress says the federal RFRA doesn't apply. Third, the answer to the meaning of a "substantial burden" after *Smith*'s reversal would be set in stone, politically speaking, rather than subject to being overridden or revised by Congress or state lawmakers (a power Congress has exercised, for example, by clarifying—in response to some lower court interpretations of RFRA's substantial burden language—that religious conduct does not need to be "compelled" or "central" to a religion to be capable of being substantially burdened.)

identify substantial burdens on religion, which would in turn help them decide when to apply strict scrutiny under RFRA or the Free Exercise Clause.[397]

Part II, then, presents three kinds of tests that legal scholars and federal U.S. courts have proposed to help identify substantial burdens. Each test fails when taken on its own, I argue, but together they help us articulate two key questions courts need to consider to determine whether a law imposes a substantial burden. First, about the kind of religious exercise that can experience a *substantial* burden in the first place; and second, about what the impact of a law on religious exercise must be to count as a *burden* at all. Only by considering these two questions together could we give courts a useful framework—or mode of analysis—for identifying substantial burdens.

Part III answers these questions, and so begins to fill out the framework. First, I offer an account of two types of religious exercise—obligation and what I will call substantial religious autonomy—that are susceptible to a substantial burden from law if they are burdened at all; and second, I sketch four categories of impact the law can have on these types of religious exercise that would create substantial burdens on them. This yields a taxonomy, so to speak, of eight different kinds of substantial burdens on religion that we are likely to see under conditions of liberal democracy and pluralism. As I develop this framework, I will also show where Laborde's somewhat parallel method of "disproportionate burden" analysis, which we considered in Chapter 1, might lead her to a different interpretation. This comparison will help drive home once more that foundational disagreements about the value of religion inform people's disagreements over particular religious liberty outcomes.

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[397] Some scholars have suggested that a better method of constitutional interpretation would be to reject tiers of scrutiny altogether. See Joel Alicea and John Ohlendorf, "Against the Tiers of Constitutional Scrutiny," *National Affairs* 43, Spring 2020, https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny (accessed May 14, 2020).

Some scholars, however, including those whose work I build on here, might contend that this way of evaluating substantial burdens violates the Establishment Clause. For judges to ask what kind of religious exercise the law burdens might seem a step too far. As Michael Helfland has argued, judicial line-drawing between burdens that are substantial and those that are not according to their theological significance for the claimant, "runs afoul of core Establishment Clause prohibitions."[398] Ira Lupu and Robert Tuttle share these concerns.[399] And some scholars driven by this concern have proposed tests for substantial burdens that seek to prevent that kind of inquiry altogether,[400] or have intimated that one solution to the problem might be a regime with no exemptions, period.[401] Part IV thus seeks to clarify what exactly *are* the establishment violations at stake in substantial burden analyses, and offers three possibilities. But the framework sketched in part III, I maintain, risks none of them, and could inform not only legal and constitutional interpretation but also the fields of public policy and theoretical scholarship on religious liberty more broadly.

Part V, finally, puts this framework into practice, applying it to explain, to re-envision, and to predict the outcome of past and future Supreme Court cases. The framework makes sense, for example, of the Court's discussion of Murphy's religious liberty claims, and gives us a better articulation of prisoners' religious liberty rights more generally. It also better explains the Court's internal disagreement over the meaning of a substantial burden under RFRA in *Burwell*

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[398] Michael A. Helfland, "Identifying Substantial Burdens," *University of Illinois Law Review* 2016, no. 4 (2016): 1771, 1787.

[399] Ira C. Lupu & Robert W. Tuttle, "The Forms and Limits of Religious Accommodation: The Case of RLUIPA," *Cardozo Law Review* 32 (2011): 1907, 1916–17.

[400] See, e.g., Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (And Why They Must) Judge Burdens on Religion under RFRA," *George Washington Law Review* 85, no. 1 (2017): 94; Chad Flanders, "Insubstantial Burdens," in Kevin Vallier & Michael Weber, *Religious Exemptions* (New York: Oxford University Press, 2018): 279-304.

[401] See, e.g., Marc O. DeGirolami, "Substantial Burdens Imply Central Beliefs," *University of Illinois Law Review Online* (2016): 19, 20.

v. Hobby Lobby.[402] It gives us new reasons to think that some of the Court's pre-*Smith* cases on minority religious liberty rights were wrongly decided, or at least should have required strict scrutiny analysis. And finally but perhaps most importantly, it helps us chart the way forward from the cert petitions that are now asking the Court to reverse its biggest religious liberty decision in the twentieth century.

II. *Three Tests for Identifying Substantial Burdens on Religion*

Courts and legal scholars have proposed a range of tests for substantial burdens on religion under RFRA. Here I'll focus on three kinds that I think narrow in on what's most important for courts to consider in substantial burden analyses: what we can call the "religious substantiality" test, the "severe penalty" test, and the "pressure" test.

A. Religious Substantiality Tests

A "religious substantiality" test requires courts to ask what type of religious exercise has been burdened. Only certain kinds of religious exercise, under this test, can experience substantial burdens. Lower courts developed at least two kinds of religious substantiality tests when they began to interpret the meaning of RFRA in the 1990s. Under the centrality standard, for instance, burdens on religion are substantial if they forbid or penalize practices sufficiently *central* to religion. In *Werner v. McCotter*, the Tenth Circuit considered the claims of Robert Werner, a Native American prisoner, that a prison had substantially burdened his religion by refusing to give him access to (among other things) a prison-maintained sweat lodge and a medicine bag.[403] The circuit court reversed and remanded the district court's dismissal of those

[402] 573 U.S. 682 (2014).
[403] 49 F.3d 1476, 1478 (10th Cir. 1995).

substantial burden claims.[404] Why? Because, the circuit court suggested, access to the sweat lodge and possession of a medicine bag might be *sufficiently central* to Werner's exercise of religion. Noting the case as an opportunity to interpret the meaning of RFRA's "substantial burden" language, the court drew on other prisoner religious liberty cases to argue that

> To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests *some central tenet* of a prisoner's individual beliefs; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.[405]

Werner had proved to the circuit court that "the sweat lodge plays an indispensable role in his own sincerely held beliefs,"[406] and the court further realized that a rule preventing some prisoners from possessing a medicine bag might, "for those faiths for whom the symbol has *sufficient importance*," count as a "substantial burden."[407]

Another kind of "religious substantiality" test is the compulsion standard: to show that the law has imposed a substantial burden, claimants must be able to show that the burdened practice is a *strict obligation* of religion. As Helfland shows, sometimes courts have used just one of these two kinds of religious substantiality tests, while other courts have combined them.[408] We have in *Bryant v. Gomez*, for example, the Ninth Circuit's explanation that

> the religious adherent ... has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion ... by preventing him or her from *engaging in conduct or having a religious experience which the faith mandates*. This interference must be more than an inconvenience; the burden must be substantial and *an interference with a tenet or belief that is central to religious doctrine.*[409]

[404] Ibid., 1480–81.
[405] Ibid., 1480.
[406] Ibid.
[407] Ibid., 1481.
[408] Helfland, "Identifying Substantial Burdens," 1785.
[409] 46 F.3d 948, 949 (9th Cir. 1995) (citing Graham v. C.I.R., 822 F.2d 844, 850–51 (9th Cir. 1987)).

So in decisions like these, the lower courts started to interpret what a substantial burden on religion might be, by qualifying the kind of religious exercise that law can substantially burden. As I discuss further in part IV, Congress responded to these tests by broadening RFRA's application: religious exercise did not need to be compelled by or "central" to someone's religion to qualify as substantially burdened.[410] And today RFRA defines religious exercise as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[411] But even if we support Congress's likely reason for these changes—which was to ensure that the courts' metrics of "compelled" or "central" did not unduly narrow the law's range of protection, especially for minority religions—we can still affirm and build on the courts' instinct in crafting these tests, which was to find a way of distinguishing between trivial and non-trivial burdens on religion. Indeed, RFRA's "substantial burden" language leaves courts no choice but to rely on some kind of guidelines for discerning that the claimant's religious exercise can be *significantly* burdened. Religious substantiality tests, in other words, speak to the first prong of any proper substantial-burden analysis: What is the relevant category of religious "exercise" that laws can *substantially* burden? Of course, it's unclear from the centrality test just what makes a practice central to someone's religion, and a compulsion standard would seem to exclude too much. We'll consider these problems further in part III.

B. The Severe Penalty Test

First, though, I want to introduce two other helpful tests that legal scholars have proposed, so we can lay out the second type of question that courts need to be able to answer about substantial burdens. Helfland's test—which I'll call the "severe penalty" test—identifies substantial burdens according to whether the *penalty* a law imposes on religious believers for

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[410] *See* H.R. Rep. No. 106-219, 13 (1999).
[411] 42 U.S.C. § 2000cc-5(7)(A) (2012).

noncompliance is substantial, either in the form of a tax, a sanction, or some other cost for engaging in religious exercise.[412] For Helfland, we should favor this kind of test because courts either lack the capacity or are constitutionally forbidden (by the Establishment Clause) to adjudicate between different claims about the importance of a particular religious belief for a particular religion—a question that seems to be thoroughly theological and not secular—interpretive.[413] So instead courts should look to the magnitude of the penalty a law imposes on religion.

But the severe penalty test is incomplete. After all, before we can say that a law imposes a substantial penalty on religious exercise, we have to fill out the first prong I introduced above: we have to determine what counts as a religious exercise that can be substantially burdened at all. Otherwise, the severe penalty test would have us scrutinize, under the *Religious* Freedom Restoration Act (and the Free Exercise of *Religion* Clause), laws that severely penalize even non-religious conduct (by telling us to look for substantial penalties on any human pursuit). And more to the point, even on clearly religious conduct, some steep fines aren't substantial burdens on religion. Someone who's late for church might speed in order to satisfy a religious duty to get there on time, but surely the speeding laws don't substantially burden her religion,[414] as I'll discuss in part III.[415]

C. The Pressure Test

The incompleteness of the severe-penalty test points us toward the second prong of an adequate substantial burden analysis: What kinds of *impact* on religious exercise are

[412] Helfland, "Identifying Substantial Burdens," 1791.
[413] Ibid., 1787–88.
[414] Marci A. Hamilton, "The Case for Evidence-Based Free Exercise Accommodation: Why The Religious Freedom Restoration Act Is Bad Policy," *Harvard Law and Policy Review* 9, no. 1 (2015): 129, 131.
[415] And as it will be important for part IV to show, judicial decisions about whether the burdened religious exercise falls in the right category—about whether it is capable of being substantially burdened in the first place—needn't violate the Establishment Clause.

substantially burdensome? Some legal scholars try to answer that question by offering yet a third test for substantial burdens: the "pressure" test. What singles out substantial burdens on this view isn't that they impact a particular *type* of religious exercise (e.g., the "central" or "compelled" practices denoted by religious substantiality tests), or that they impose a severe *penalty* on religion, but instead that they have a specific kind of *impact* on religion: the *pressure* a law puts on religious people to change their beliefs or behavior.

So Chad Flanders, for example, says plaintiffs have to meet a "bare burden" requirement: to get courts to consider whether a substantial burden is present at all, they have to show that "the government is doing something that pressures them to act in a way contrary to their beliefs."[416] Thus in *Wisconsin v. Yoder*, the Court rightly decided that the Amish should not be required to send their children to secular public schools, because that requirement pressured them through coercive means (the threat of a fine and perhaps prison time) to act against their belief that their children should only be educated in Amish schools through the eighth grade.[417] And Kathleen Brady suggests that in identifying substantial burdens, "Courts should look for burdens that place significant pressure on the believer to change their behavior," or for laws and regulations that "have the effect of requiring a believer to choose between following their faith and retaining or obtaining a good of substantial value."[418]

We know from the severe penalty test, though, that pressure doesn't cover every instance of what is at least intuitively a substantial burden on religion. In fact, Helfland and Flanders divide sharply over the Supreme Court's controversial 1988 decision in *Lyng v. Northwest Indian*

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[416] Helfland, "Identifying Substantial Burdens," 1805; Flanders, "Insubstantial Burdens," abstract.
[417] Flanders, "Insubstantial Burdens," 299.
[418] Kathleen Brady, *The Distinctiveness of Religion in American Law* (New York: Cambridge University Press, 2015), 231-2.

Cemetery Protective Association[419] that the U.S. Forest Service could construct a road through lands held sacred by Native American tribes. While Helfland disagrees with this decision, Flanders supports it: "What distinguishes *Yoder* from [*Lyng*] is the idea that the Forest Service wasn't really doing anything directly to the tribes, wasn't making them do anything, wasn't putting them to a choice between their faith and a penalty."[420]

So if we want to be able to explain why a case like *Lyng* also involves a substantial burden on religion even if the state isn't *penalizing* or *pressuring* Native Americans (or claimants more generally), we need a better account of what *effects* of law on a given form of exercise count as *burdening* that exercise *substantially*. We also know, from the religious substantiality tests discussed above, that we need some idea of the kind of religious exercise that is capable of being substantially burdened in the first place.

To sum up, then: the religious substantiality test, the severe penalty test, and the pressure test together help us articulate two parts, two prongs, of a framework for identifying substantial burdens on religion. What I want to do in the next part of the chapter, then, is fill out this two-part framework, by asking:

(1) First, what kind of religious exercise can be substantially burdened at all?

(2) Second, which kinds of impact on those forms of exercise are substantially burdensome?

Only if we have these two things together—if we know both the *type of religious exercise* at stake, and the *type of impact* the law has on that exercise—will we know how to identify a *substantial burden* on *religious exercise*.

III. *A New Framework for Identifying Substantial Burdens*

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[419] 485 U.S. 439 (1988).
[420] Flanders, "Insubstantial Burdens," 299.

Below I propose an improved framework for courts' substantial burden analysis, in two parts. First, I draw on the two natural and pervasive tendencies of religion articulated in chapter 3—its *fragility* and uniquely *architectonic* role in human life[421]—in order to identify two kinds of exercise that are likely to be substantially burdened if they are burdened at all. Those forms of exercise are *obligations* and what I describe as *substantial religious autonomy*. Second, I introduce four ways the law can impose burdens on these kinds of exercise—types of impact that become substantial when they threaten significant material (or in the last case, religious) costs. These categories include *simply punitive*, *indirectly punitive*, *non-punitive*, and *preventive* burdens.

A. What Type of Exercise Does the Law Burden?

To start, consider two examples that bring to light the importance of each part of the framework: of knowing what type of religious exercise is at stake and what kind of impact the law has on it.

Example 1—*Communion Wine*. Let's say a law forbids the consumption of Bordeaux in the U.S., and imposes a million-dollar fine for noncompliance. It so happens that Catholic parishes tend to use Bordeaux as the wine consecrated by the priest at Mass. But Catholics aren't required to use Bordeaux; they are only required to use some kind of red wine. So we can say that the law burdens Catholics' exercise of religion, and by Helfland's measure it would surely be substantial, since it would impose a *very steep* penalty on their religiously motivated conduct—but surely no one would think this burden is substantial in the relevant sense. Why not? Because the impact on religion isn't significant enough.

[421] I draw these concepts from recent work on religious liberty by Sherif Girgis and Melissa Moschella; see notes 422 and 425 respectively.

Now take Example 2—*Toll Booth*. A toll booth happens to go up between your house and the mosque, requiring you to pay an extra 50 cents each way when you attend Friday services. Those services might be obligatory for you, in which case the booth burdens your discharge of a serious religious duty. But the burden doesn't seem substantial in a way that warrants strict scrutiny. Why not? Because the material penalty isn't significant enough.

Both of these examples show us that even when a law burdens someone's religion, knowing that the burden is significant or substantial requires us to say both something about the law's extent of impact on the religious conduct, *and* something about the religious significance of that conduct.

I'll begin with the second issue. To address it—to figure out what types of religious exercise we should think are capable of being substantially burdened in the first place—we have to draw on some premises about what religion is *like* as a human good that the state has reasons to protect.

We can extract those premises, of course, from Chapter 3, and note their operation in lower courts' religious substantiality tests. I think the courts developed the compulsion standard because they were attentive to what Chapter 3 described as religion's special fragility: they recognized that obligations generally must be carried out in a specific or limited number of ways (indeed, perhaps just one way). Allow me to summarize several reasons (which I introduced in Chapter 3) that Sherif Girgis has proposed for why we should see religion as uniquely fragile. First, your access to harmony with an ultimate ground or principle of reality will depend entirely on the "particular creed or code" you happen to have; and second, that creed is not something you can "pick, choose, and change at will," the way you can change some of your more

voluntary commitments.[422] And third, the demands of any particular creed tend to be stricter and more specific than the requirements of identity construction (or self-determination) more generally.[423]

We can remind ourselves of the comparisons I introduced in chapter 3 to illustrate these points: while the avid bird watcher or baseball fan is likely to be able to find other ways of realizing the deeper intrinsic good she seeks (e.g., by finding another team to follow, or making annual trips to watch birds on the beach she has moved away from), the religious person cannot simply substitute living out a different religious obligation for the one she is failing to carry out, or start meeting the obligations of a different faith than the one she professes. She can't sub in fasting for prayer, or a Sunday Sabbath for a Saturday one, or Islam for Buddhism.[424] This general feature of religion, Anderson and Girgis suggest, explains the need for any substantial-burden test to pick out laws that prevent or penalize the pursuit of religious obligations. So it seems reasonable, as a matter of political philosophy and legal tradition, to include obligations in the category of religious exercise that is capable of being substantially burdened.

But I think that obligations aren't the *only* conduct that might require this protection. This point may have motivated the lower courts that once looked for any conduct deemed "central" to a religion. This seems to be how they covered religious practices that *aren't* mandatory but whose proscription still counts, intuitively, as a substantial burden. Indeed, some religions may not have *any mandates at all*: if only mandatory conduct were covered, those religions could be regulated out of existence without raising a legal problem.

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[422] Sherif Girgis, "More Fragile, Even if Not More Worthy: A New Case for Religion's Special Constitutional Protection," 34 (unpublished draft) (on file with the author).
[423] Ibid.
[424] John T. Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017), 135-6.

What should the category of non-mandatory but protected religious conduct include? Here again I think we can build from Chapter 3—by looking at the nature of religion as a human good calling out for protection at all. Anderson and Girgis argue that if religion warrants any legal protection, then religion's relative fragility means that our substantial-burden test will have to extend protection to religious *obligations*. I think this is plausible but incomplete—and that we can craft another critical component of a sound substantial-burden test from the fact that religion tends to be especially or even uniquely architectonic, as the last chapter argued: religion naturally tends to motivate, direct, or organize many if not all other spheres of life.[425] For if Chapter 3's sociological and normative argument about the value of religion is right—that religion is a final value of harmony with an ultimate or transcendent ground of reality—then it will easily be the case that quite a wide range of the actions of religious believers can be construed as efforts to preserve or advance that harmony. For insofar as the ultimate ground or principle is the ultimate ground of *everything*, including all that we are and could be and do, then believers might see every effort and action in some way as an effort to cooperate with that ultimate ground or source of all meaning, existence, and value.[426] That is why religion often spills beyond the bounds of conventional practices such as worship and prayer: it shapes choices about where to live, whom to befriend and to marry, how to raise children and where to send them to school, and which profession to pursue. Call these *exercises of religious autonomy*—decisions that religion has a natural tendency to motivate, direct, or organize in the lives of religious believers.

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[425] Melissa Moschella, "Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom," *Journal of Law and Religion* 32, no. 1 (2017): 123, 132.

[426] Christopher Tollefsen, "Conscience, Religion and the State," *American Journal of Jurisprudence* 54, no. 1 (2009): 99. See also Joseph Boyle, "The Place of Religion in the Practical Reasoning of Individuals and Groups," *American Journal of Jurisprudence* 43, no. 1 (1998): 1-24.

Of course, even if the architectonic nature of religion means that every choice of a religious person is at least potentially an exercise of her religious autonomy, it doesn't follow that every single action of a religious person equally warrants legal protection. But some of those exercises of religious autonomy—which are again, not obligations but still important exercises of religion because of their connection to fostering harmony with the transcendent—are surely hard to replace in an easily acceptable way: in that sense they are more *significant* or *substantial* (such as a choice about our professional path, or where to educate our children, or how to run a business). These kinds of opportunities are different from other exercises of religious autonomy in that they cover a wide swath of significant, decisive undertakings or pursuits that look different than they would if one were *not* in a perceived relationship to a transcendent source, or did *not* have beliefs about what that source asks or requires one to do with respect to other activities (activities in which, again, a believer might reasonably understand that source to be involved, since it is (perceived to be) the source of, ultimately, everything). To be pressured to cut short or give up religion's architectonic direction of one's life in these ways, say by avoiding particular lines of education or work, can leave a religious person seriously deficient in their experience or pursuit of religion overall.

These are also some of the kinds of choices, I want to suggest, that are likely to be substantially burdened by law. In other words, it's not just perceived obligations that the law can substantially burden: it's also those significant or substantial exercises of religious autonomy. To put it simply, any adequate protection of religion as a human good (involving pursuit of some kind of harmony with the ultimate principle of meaning and value) will have to take into account religion's natural and inherent tendency not only to bind the consciences of believers but also to shape wide areas of the rest of their lives (their education, profession, relationships, etc.).

To draw an analogy that further supports avoiding this second kind of substantial burden, consider that our law and policy frequently accommodate and make room for other goods to extensively organize and structure wide areas of human life—notably, for example, marriage. The reason the law does so, ultimately, is because of the nature and value of marriage itself, which gives it a similarly "architectonic" role: as a cooperative relationship between two people who coordinate across a wide range of activities, a marriage naturally plays that organizing role, and so it can't be fully expressed unless it is given room to play that role. So the liberal state not only avoids compromising the freedom minimally required for living out a marriage at all (by respecting people's freedom to choose their own spouse, out of respect for the consent required to form a valid marriage).[427] It also protects a wide range of opportunities for marriage to direct people's lives. Allowing couples to get married but then denying them freedom to make any decisions about how they rear their children (a freedom protected, for example, under the Constitution's substantive due process right to direct the education of one's children),[428] or what they decide to share with each other but not with other people (a discretion protected in ours and many other liberal regimes by marital privacy rights, including testimonial privileges),[429] would fail to protect marriage adequately, by ignoring its natural tendency to organize other aspects of life. To respect that feature of marriage, the state needs to protect not just the initial instantiation of marriage (our freedom to choose whom to consent to marry), but also, at least to some extent, its natural expression, which is to regulate many features of the common life shared by those who marry each other.

So too with religion, another relationship in which someone is (or understands herself to be) coordinating with a source or being across a number of spheres: to guarantee sufficient

[427] See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[428] See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).
[429] See, e.g., *Hawkins v. United States*, 358 U.S. 74, 77–78 (1958).

access to this good, the state should protect not only the very beginning of its citizens' pursuit of it (by leaving them free to choose whether to accept a particular religion's set of claims about the transcendent source, and to carry out the strict obligations a relationship to that source might require); it should also protect a wide sphere of freedom for religion to continue to do its architectonic work, by shaping many kinds of decisions. To do otherwise is a kind of violation of citizens' substantial religious autonomy (as opposed to their strict obligations of conscience)—their discretion over the significant contributions that religion makes to their lives; the organizing role it plays.

Just how wide that sphere needs to be—the kinds of encroachments on this broader sense of free exercise that the state should avoid and which should be subject to strict scrutiny when they arise—should depend, as I've suggested, on whether a law urges citizens to give up a *substantial* opportunity for religion to organize their lives. And "substantiality" in this sense should be judged from within a person's faith tradition. Suppose that as a matter of religion, you consider it very important to be able to preach about your faith, but you have only a slight preference (not a strong one, much less a perceived *obligation*) to evangelize on a quiet neighborhood street in the middle of the night.[430] That slight preference doesn't entail that neutral and reasonable noise ordinances should be subject to heightened scrutiny when applied to you. By your own religious lights (by hypothesis), your experience of religion won't be substantially worse off if you carry out your evangelizing work in a different way: during the day, during a set period of hours in which noise is permitted. By contrast, when your relationship to an ultimate source leads you to think you have a vocation specifically to devote your life to running a school, or a business, or a charitable organization, according to your religious

[430] For a similar example, put to different purposes, see Corvino et al, *Debating Religious Liberty and Discrimination*, 132.

principles, you might well be substantially worse off in your experience or pursuit of religion if a law urges you to give up *that* form of religious exercise.

In short, even if both the choice to evangelize at *this* time rather than *that* one, and the choice to run a charitable organization along one set of principles (or vision of the good) rather than another, are exercises of discretion, only the second (on the hypothetical facts described above) involves discretion we can reasonably call, for these purposes, *substantial*;[431] and so, in my view, only burdens on the second would warrant heightened scrutiny.

Here it's worth noting a key difference between Laborde's disproportionate burden analysis and the framework I'm defending. Laborde recommends heightened scrutiny for what I've called substantial exercises of religious autonomy only if they are subjectively experienced with the force of obligations.[432] She also thinks (mistakenly, in my account) that only minority religions are likely to have claims of a substantial burden on their religious autonomy.[433] And whenever minority faiths do have those claims, Laborde argues that courts would have to evaluate them either according to what she calls the majority bias principle—on which the law should accommodate a minority religious practice if there is a comparable majority religious practice already favored in the law—or under the disproportionate burden test (her equivalent of a substantial burden test), where she thinks they would have less of a chance at succeeding.[434] Thus in practice, her approach applied would likely afford minority religious traditions fewer protections or accommodations than mine. For the distinctions I've drawn above are designed to

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[431] Some would probably argue that this distinction just shifts the focus of judicial decisions about what's a substantial burden, and doesn't get around the Establishment Clause problems that might be inherent to substantial burden analysis. For reasons I explain further in part IV, I think the distinction can withstand that objection. For now, it's worth pointing out that the concept of substantiality is used in many other areas of law, as indeterminate as it often seems. And the point of this chapter is to show that we can be much more specific about "substantiality" as it applies to free exercise jurisprudence.
[432] Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017), 223.
[433] Ibid., 224.
[434] Ibid., 234.

help us see the comparable value of obligations and other significant but non-mandatory exercises of religion, in order to understand the basis for including them in the scope of substantial burden analysis.

So by thinking about the nature of religion, we can give courts a better picture of what practices might be capable of being substantially burdened by law: not only religious obligations but also significant or substantial exercises of religious autonomy.

B. What Type of Impact Does the Law Have on Religion?

But to complete the framework, we need the other half of the picture, which the penalty and pressure tests begin to sketch. We need to know the types of impact law can have on religion that could be *substantially* burdensome (as opposed to the light burden imposed in *Toll Booth*). And to answer that question, we need to know what kinds of impact might make religious obligations or substantial autonomy too expensive. I want to propose four possible categories of this kind of substantial impact that law might have on religion. This will help us complete the framework: we will end up with a taxonomy of at least eight different types of substantial burdens that courts could use (two categories of religious exercise times four types of impact the law can have on those kinds of exercise). I'll then be able to apply this framework in a discussion of past and possible future Supreme Court cases in part V.

How do the penalty and pressure tests come into play? The first three categories of impact I'm about to describe are organized around different ways the law can set the cost of religious exercise too high by pressuring people to give it up, sometimes by threatening a penalty, but also, sometimes, by withholding access to a benefit. Substantial burdens in these three categories will meet Helfland's severe penalty criterion: the material cost they impose on religious exercise will be significant.

The fourth category is one that I've already suggested the pressure test leaves out entirely: it captures the total prevention of religious exercise that minority religions and religious prisoners (who don't face the same range of options as ordinary citizens) are especially likely to experience.[435]

Burdens imposed by laws in these categories, I should also clarify, are *incidental* burdens (side effects of laws that are designed to be neutral and generally applicable—I'm not referring here to laws that burden religion intentionally, with the aim of targeting or discriminating against them). But we should count them substantial, in any given case, when and because they make someone's religion costly enough that she is pressured (or forced, in the last category) to become deficient in her experience of it (by failing to carry out her obligations, or a substantial form of religious autonomy). That is the feature they all share that explains why each of them can contribute to a substantial burden on religion.

The first kind of burden, then, we can call "simply punitive." This includes laws that force religious citizens to choose between two options: their religious exercise—whether that's an obligation or substantial religious autonomy—and a criminal penalty or other punishment. One example of a simply punitive substantial burden would be the law at issue in *Employment Division* v. *Smith*.[436] That law banned peyote use by religious and nonreligious alike (it was generally applicable), and there was no indication it was motivated by hostility to the members of the Native American religion who consumed it in their worship rituals (so it was neutral in

[435] Helfland addresses the objection that his proposed test won't cover these burdens by arguing that there are even clearer cases of substantial burdens. "In cases like *Lyng* … a law has imposed an even more significant burden on religious exercise. Instead of providing an option to engage in religious exercise and then endure a significant sanction, tax or penalty, the law refuses even that option. And in so doing, such laws … ought to be understood as constituting a substantial burden. What those laws have done is leave a person in a position that is even worse than enduring a substantial burden; they are actually *coercing* a person's failure to engage in religious exercise." Helfland, "Identifying Substantial Burdens," 1805.

[436] 494 U.S. 872 (1990).

aim).[437] Still, the law pressured them to give up a substantial form of religious autonomy (discretion over a central element of their worship rituals) by setting as the price of that exercise of their religion a significant criminal punishment: punishment for a felony.[438]

The second kind of burden, which we might label "indirectly punitive," forces citizens to a choose from a slightly wider set of options: (a) to violate her religious obligations or her substantial religious autonomy; (b) to accept a criminal or civil penalty; or (c) to accept a significant cost of a third kind, giving up access to a public benefit or entitlement that would otherwise be available to her, including the exercise of *other* civil rights or liberties, such as freedom of movement, speech, or association. The choices in short are religious exercise, legal punishment, or benefit.[439]

What kinds of laws might create indirectly punitive substantial burdens? Sabbatarian laws are one plausible example. These would incidentally require a Jewish business to close on Sunday by requiring *all* businesses to close on Sunday, and thereby pressure Jewish business owners into a trilemma: they must choose between giving up an exercise of substantial religious autonomy (by giving up running a business in accordance with their belief that the Sabbath falls on Saturday), a fine for non-compliance (by opening on Sunday), or surrendering their ability to run a business on equal or competitive terms (by closing on Saturday *and* Sunday).[440] "Indirectly punitive" laws might also include bans on certain forms of attire in public spaces that would

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[437] Ibid., 878.
[438] Ibid., 872, 874.
[439] I'm proposing a much broader conception of "benefits" here: I mean it to cover not just funding, but also the wide range of privileges citizens of liberal regimes typically exercise (e.g., the freedom to own and operate a business according to one's political-moral principles).
[440] See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 601-2 (1960). ("Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath.")

incidentally require some Muslim women to choose among an aspect of religious autonomy (e.g., the choice to wear a *niqab* in public), a punitive sanction, and freedom of movement in certain public spaces.[441] Other indirectly punitive burdens might arise from anti-discrimination laws designed to ensure equal access to certain goods or to prevent dignitary harm to certain historically marginalized groups of people. When these laws have the incidental effect of, say, requiring a business owner to provide services that violate her religious conscience, they create another trilemma: the business person must choose among her religious obligations, a fine for non-compliance with the antidiscrimination law applicable to her business, or a surrender of the associational and other interests involved in operating the business.[442]

Here again, Laborde's method of disproportionate burden analysis differs from the application of my framework: on her view, indirectly punitive burdens like the ones I've described above are less substantial than simply punitive ones, and therefore have less of a claim to heightened scrutiny.[443] By contrast, the reason to count indirectly punitive burdens on obligations or substantial religious autonomy as *substantial* is that they are problematic for the same reason simply punitive ones are: they pressure citizens into deficient experience of religion by failing to leave them what Anderson and Girgis call an "*affordable* alternative for avoiding a

[441] See, for example, written comments from the NGO Liberty in the ECHR case *S.A.S. v. France*, which argued that the burqa ban put some Muslim women to "the agonising [sic] choice between remaining at home or removing the veil." 2014-III Eur. Ct. H.R. 349, 365.
[442] This part of the taxonomy I'm developing overlaps with Anderson and Girgis's view of the burden at stake in *Hobby Lobby*. See Corvino et al, *Debating Religious Liberty and Discrimination*, 138–40. Yet I'm arguing that the same trilemma extends beyond cases involving obligations to those involving substantial exercises of religious autonomy.
[443] Laborde, *Liberalism's Religion*. On the disaggregation approach, the less "direct" a burden is—the easier it is for people to opt out of it or avoid being subject to it—the weaker its case for accommodation. "Regulations concerning specific professions and activities," for example, "…are less direct, because—on principle—people enjoy the market freedoms that allow them to avoid being subject to them" (222). So, for example, it's plausible to think on this view that Jack Phillips, the bakery owner whose refusal to make a cake celebrating a same-sex wedding ceremony was at issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, has less of a case of a disproportionate burden requiring relief because market freedoms allow him to seek a different profession, or to make his business a private one. Indeed, Laborde confirms that when she suggests that a bakery owner in Northern Ireland faced with an identical dilemma was "wrong to think that his freedom of speech [was] properly implicated" (even though "to think so [was] not a morally abhorrent failure of judgment" on his part). (211)

violation of [their] religious duty."[444] Laws of both kinds put religious citizens to the *same compromising choice*: violate your conscience (or your religious autonomy) or accept a significant penalty. It's just that the penalty in the case of indirectly punitive laws can take two forms: either to accept the legal punishment imposed for disobeying the law, or to give up one's right to some public benefit (including the exercise of another basic liberty).[445]

Third, there are also what we could call "non-punitive" burdens: burdens imposed by laws that are not backed by any punishment at all. This category includes laws that force a choice between someone's religion (whether obligation or substantial religious autonomy) and access to a public benefit. *Sherbert v. Verner*[446] presents us with a non-punitive substantial burden. There, Justice Brennan argued for the majority that the EEOC could not refuse Adell Sherbert a significant benefit (unemployment compensation) after she was fired from her job for her refusal to work on Saturday (the day she, as a Seventh Day Adventist, understood to be the Sabbath).[447] Denying her this compensation, Brennan wrote, "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion to accept work, on the other hand."[448] Another case that suggests a non-punitive substantial burden is *Trinity Lutheran Church of Columbia, Inc. v. Comer*: here, the Court upheld a Lutheran church-affiliated school's challenge to Missouri's constitutional prohibition on giving public funds to churches, and concluded that the state was required to

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[444] Corvino et al, *Debating Religious Liberty and Discrimination*, 140.
[445] Of course, one objection to this way of justifying strict scrutiny in a case like *Hobby Lobby* is, as Anderson and Girgis note, that by the same logic, "all regulations 'fine' any number of worthy pursuits." Yet while this is true, they reply, "unless those regulations are very onerous, they won't pressure you into deficiency in a whole basic good," as the regulation at issue in *Hobby Lobby* pressured the Greens (via threat of financial penalties or loss of business) into *deficiency* in their religion (i.e., violation of religious conscience). When laws "do put up significant obstacles to the pursuit of other goods," then those "serious burdens on other liberties also merit scrutiny," but "burdens on freedoms of religion and conscience become 'serious' more immediately—and in a more immediately ascertainable way—because the goods they serve are fragile." Hence regulations that impose those burdens on religion and conscience trigger extra scrutiny. See ibid., 141-142.
[446] 374 U.S. 398 (1963).
[447] Ibid.
[448] Ibid., 404.

consider Trinity Lutheran's application for a public grant that would cover the costs of resurfacing the school's playground.[449] On the framework constructed here, Missouri's exclusion of Trinity Lutheran from consideration could be interpreted as a non-punitive substantial burden because it required the church to choose between substantial religious autonomy (running a school according to its religious principles) and access to a public benefit (state funding). As the Court argued, Missouri's rule "puts Trinity Lutheran to a choice: it may participate in an otherwise available public benefit program or remain a religious institution."[450]

Fourth and finally, I want to introduce "preventive burdens." These are burdens on religious obligations or substantial religious autonomy not covered by the pressure test discussed above. People can't choose to opt out of preventive burdens in the way they can choose (albeit at a heavy cost) to opt out of burdens in the first three categories (by violating their obligations or autonomy, by accepting a legal punishment, or by waiving access to a benefit). And because they can't choose to opt out, there is no pressure of the kind central to those other types of burdens: they are simply stopped altogether from exercising their religion in either of the two ways I've specified. As I'll discuss more in part V, preventive substantial burdens could include prison policies that fail to accommodate prisoners' religious obligations or substantial autonomy (say in choosing a minister to be present in the execution chamber), or some kinds of prevention of minority religious practices—e.g., road construction that destroys the integrity of land essential to Native American worship.

Distinguishing these four kinds of substantial burdens doesn't prove that they should all fail strict scrutiny analysis (which is required under RFRA for an exemption to be given in the end). All I've shown here is that courts would be required to apply strict scrutiny to laws within

[449] 137 S. Ct. 2012, 2024 (2017).
[450] Ibid., 2021–22.

these categories that impose substantial material costs on (or entirely prevent) religion (obligations or substantial autonomy), not necessarily that lawmakers or courts would be required to give exemptions from those laws (for again, exemptions won't be required where the law's burdening of religion is the least restrictive means to achieve a compelling state interest).

So to sum up, we now have a developed framework for identifying substantial burdens on religion. I've argued that two types of religious exercise reflect the deep and pervasive natural tendencies of religion articulated in Chapter 3, and so must be protected if religion as a human good is to be sufficiently protected—and furthermore that law can substantially burden those exercises of religion by pressuring people to give them up through threat of substantial material costs.

IV. *When Does Identifying Substantial Burdens on Religion Violate the Establishment Clause?*

So far I've sketched a framework that would allow courts to identify substantial burdens on religion, in two steps: first, by determining the type of religious exercise at stake, and second, by asking what kind of impact the law would have on it. But I've not yet answered a crucial challenge that some scholars might pose: does evaluating the substantiality of a burden in terms of its particular impact on religion violate the Establishment Clause? In other words, someone might think that the first step—asking whether obligation or substantial religious autonomy is at stake—is a kind of religious substantiality test (outlined in part II) that the Establishment Clause forbids. Answering that concern here will be useful in two ways. First, it will help us get clearer on just what Establishment violations might be at risk in substantial burden analyses—a problem already debated in the legal literature, but which lacks a clear resolution. And second, addressing this objection will show us just how courts might put this framework into practice.

Avoiding Establishment violations is the prime motivation for Helfland's severe penalty test, and more broadly the reason for some scholars' concern that RFRA's language invites them. "Courts lack the tools to engage in line drawing when it comes to determining and calibrating the degree of theological impact a particular law imposes on religion," Helfland writes.[451] Similarly, Ira Lupu and Robert Tuttle contend that while state agents are permitted to ask questions about whether a particular activity is religious or whether it has "been burdened in some legal sense," questions "involving the religious substantiality of the burden" are "jurisdictionally off-limits."[452] "A jurisprudence that propels judges into the evaluation of such questions," they argue, "is a contra-constitutional excursion into appraising theological questions, as well as an exercise in amateur sociology."[453] So we have here at least two Establishment-related concerns about judicial efforts to identify substantial burdens according to the type of exercise they impact: (1) that judges are incompetent and/or ill-trained to make that assessment; and (2) that judges are restrained by the Constitution from asking these sorts of questions.

Perhaps the first kind of concern explains the second: the reason the Establishment Clause could be interpreted to prevent judges from asking if a legal burden impacts someone's obligations or her substantial religious autonomy, but not from asking, say, whether it takes too much out of her wallet (as per Helfland's test), is that judges simply aren't equipped by their professional background to decide the first kind of question. Even apart from judicial overreach, though, I think we can articulate at least two further Establishment Clause violations that might be inherent to the framework I've offered, only to see that the framework can withstand all three of them.

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[451] Helfland, "Identifying Substantial Burdens," 1788.
[452] Lupu and Tuttle, "Forms and Limits," 1916.
[453] Ibid., 1916–17.

The first concern is that asking whether a law has burdened religious obligations or substantial autonomy could lead courts to discriminate among religions. As the Court insisted in *Larson v. Valente*: "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[454] One might think judges will be more likely to gauge what counts as an "obligation" or "substantial autonomy" according to their experience or knowledge of mainstream religions, and the protection and accommodation of minority religious practices (which judges might more easily misunderstand) will be more likely to slip through the cracks. Indeed, this kind of concern about the protection of minority religious practices seems to have lead Congress to clarify RFRA's language in 1999: responding to the compulsion and centrality standards developed by the lower courts, Congress explained that "the burdened religious activity [under RFRA] need not be compulsory or central to a religious belief system."[455] And RFRA now defines an "exercise of religion" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[456]

I highly doubt, however, that the first step of the framework I'm proposing would encourage discrimination of this kind. First, because the point of distinguishing obligation from substantial autonomy is precisely to cover a wider range of practices, including those not part of traditional or mainstream religions, than what the earliest and all-too-vague articulation of the centrality standard protected. And second, the framework's specification of religious exercise that can be substantially burdened leaves less room for judicial misunderstanding of (or worse, aversion to) minority religions to bias the analysis.

The second kind of establishment concern one might raise is that by using a religious substantiality test like mine (by asking whether the burdened activity is either an obligation or a

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[454] 456 U.S. 228, 244 (1982).
[455] See note 410.
[456] See note 411.

substantial exercise of autonomy), courts will end up endorsing a particular view about what a religion teaches, by favoring one interpretation of what a religion requires or invites its believers to do over another. Prior to RFRA's enactment and the lower courts' effort to interpret its meaning through the compulsion and centrality tests, a long tradition in judicial interpretation held, as one court put it, that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."[457] Or to take the Supreme Court's opinion in *Lyng*: the majority rejected the dissent's proposal of "a legal test under which it would decide which public lands are 'central' or 'indispensable' to which religions, and by implication which are 'dispensable' or 'peripheral,'" as an occasion for the Court to hold "that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from religious objectors who brought the lawsuit."[458] In other words, the Court rejected the possibility that it would have "to rule that some religious adherents misunderstand their own religious beliefs"—"an approach [that] cannot be squared with the Constitution or with our precedents," and which would "cast the Judiciary in a role that we were never intended to play."[459]

Of course, as we saw above, some think that the reason courts shouldn't play this role is because they are incompetent to do so. Maintaining that courts are incompetent to use a religious substantiality test—in the above framework, a test of whether obligation or substantial autonomy is at stake—sometimes stems from a third kind of establishment worry, which is that it would too thickly entangle government with religion. In cases that would involve "judicial resolution of

[457] *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Another court maintained that it was not within the sphere of judicial authority to resolve "controversies over religious doctrine and practice." *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

[458] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 457 (1988).
[459] Ibid., 458.

claims turning on religious doctrine or practice," Helfland explains, "courts dismiss the plaintiff's claims because adjudicating the case would entail constitutionally impermissible judicial involvement in the resolution of religious questions."[460] And the grounds for this "religious questions doctrine," though of "ambiguous constitutional origin," are at least for some judges to be found in the Establishment Clause's prohibition of "excessive entanglement."[461]

On closer look, these two Establishment concerns about endorsement and entanglement seem to boil down to one deeper problem, which Sherif Girgis has identified as the primary concern of most of the case law and commentary on this issue: that in trying to determine whether a particular burden is substantial, judges will end up displacing, or second-guessing, the claimant's own view of what her religion requires.[462] And it seems there are several ways judges could do that: they could

(a) say that a given theological proposition is true (or false, or reasonable, or plausible);

(b) say that a given religious practice is spiritually valuable (or obligatory, or sinful, or worthless);

(c) say that Claimant Smith is *wrong* about what her own religion says about (a); or

(d) say that Claimant Smith is *wrong* about what her own religion says about (b).

Someone might worry that the kind of questioning required by the first step of the above framework—asking if the burden falls on an obligation or substantial exercise of autonomy—necessarily forces judges to take a position on some of these things. But I don't think this kind of second-guessing is needed or even useful. All the first step of my framework requires is that judges decide, based on Smith's presentation of his case, whether Smith *feels* religiously

[460] Michael Helfland, "Litigating Religion," *Boston University Law Review* 93 (2013): 503.
[461] Ibid., 503 fn. 49.
[462] See Sherif Girgis, *More Fragile, Even If Not More Worthy: A New Defense of Religion's Special Constitutional Protection* (unpublished draft) (on file with author).

obligated to do the thing the law burdens, or whether he *believes* it would be substantially more spiritually valuable for him to do the thing the law burdens instead of something else.

In this way, I think we can build on Marc DeGirolami's suggestion that "[t]here can be no evaluation of the substantiality of a burden without some understanding of the place…or comparative importance of the exercise at issue within a religious system."[463] DeGirolami suggests that substantial burden analysis requires deferring to the claimant on whether the burdened exercise is more central or peripheral (and accordingly of greater or lesser significance) within the claimant's "system of religious belief."[464] Obligations and substantial forms of religious autonomy are likely to occupy a more central place or greater importance within religious traditions—as indeed the lower courts seemed to think in the early years after RFRA's enactment.[465] I've argued that the centrality standard in those decisions reflects a deeper insight from the courts: namely, that respect for the good of religion requires protecting its distinctly fragile and architectonic role in human life, which tends to play out in the two forms of exercise I've described. It's not the centrality or weight alone of a religious exercise, but rather the *form* of exercise that it is (obligation or religious autonomy, both of which will tend to be central or important in many religious systems), that should help courts identify substantial burdens.

In fact, in implementing the framework I've constructed, I think courts could adopt both parts of it by following something like Flanders' proposal (which we considered but ultimately rejected in part II). In their analysis, courts should first ask what type of religious practice the burden impacts, but defer to claimants—take them at their word—on whether that practice is truly an obligation or a form of substantial religious autonomy. They can interpret, based on

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[463] DeGirolami, "Substantial Burdens," 21.
[464] Ibid. For a similar argument that Court has traditionally protected institutionalized religious belief under the Free Exercise Clause, see Stephen Petrany, "Institutionalized Belief Systems, Constitutional Value, and How the Supreme Court Can Decide the HHS Mandate Cases," (unpublished draft) (on file with the author).
[465] See *supra* Part II.

things the claimant says about the exercise in question, whether it falls into the general categories of obligation or substantial autonomy, but they cannot take a view about whether the exercise is in truth required, or reasonable, or architectonic, or about whether the claimant has wrongly interpreted his religion's position on of those things. Then, courts should require claimants to meet something like Flanders' "bare burden requirement," but with broader parameters. Claimants should have to show that the law substantially impacts their religious exercise (either of the two kinds I've described), in one of the four ways I've presented: as the kind of pressure at stake in simply punitive, indirectly punitive, or non-punitive burdens or more broadly the kind of deprivation at stake in preventive burdens.

We now have better clarity on the possible Establishment violations at risk in judicial evaluation of substantial burdens, and reason to think the framework proposed here would avoid them. What remains is a more thorough application of this framework to past and possible forthcoming religious liberty cases at the Supreme Court.

V. *The Future of Substantial Burden Analysis under RFRA and the First Amendment*

Now, finally, how would this framework help us interpret not only the language of RFRA but also—as the Court decides whether to reconsider its decision in *Smith*—the scope of the First Amendment's protection of free exercise? Some of the cases given as examples in part III already show us how we might apply the categories sketched above. Here I'll show at greater length how it might have shaped the Court's analysis of burdens on religion, both in past cases and some that might come before the Court in the near future.

Let's start with a case that divides other methods for identifying substantial burdens that I discussed in part II (from Helfland and Flanders): *Lyng*. There the Court decided to uphold state

road construction through lands integral to Native American worship.[466] On the expanded framework developed here, the state imposed a *preventive burden on a substantial exercise of religious autonomy*. Native American worship doesn't share the contours of monotheistic religions: it doesn't carry identical concepts of sin and obligation and atonement. But preservation of land that Native American tribes held sacred would protect a significant opportunity for religion to organize and direct their lives: a substantial exercise of religious autonomy. The integrity, and more basically the adequacy, of their whole religious experience is entirely shaped by the land's preservation.[467] The majority in *Lyng* overlooked this: it argued that because the state's road construction didn't pressure Native Americans into violating any of their beliefs (as I would put it, in any of the three ways described in part III), there was no significant burden that needed relief.[468] But as DeGirolami succinctly puts it: "[t]here is no reason to think that a law burdens religion any less when it makes the exercise of religion impossible than when it compels action or inaction inconsistent with religious commitment."[469] Indeed, the essential importance of land to Native Americans' religious experience certainly renders destroying the land's integrity (absent a compelling state interest that can only be preserved by its destruction) a preventive burden. So the state's prevention of their ability to exercise their religion altogether should have been counted a substantial burden, and subject to strict scrutiny accordingly.[470]

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[466] 485 U.S. 439 (1988).
[467] Ibid., 451 ("[W]e have no reason to doubt that…the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices…. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible.").
[468] Ibid., 449.
[469] DeGirolami, "Substantial Burdens," 23.
[470] See note 419. It seems odd that the majority failed to see any inconsistency between its application of a kind of coercion test to conclude that there was no burden and its refusal to apply a centrality test like the one proposed by the dissent. Both appear to be a kind of religious substantiality test. But maybe this inconsistency actually helps us better see the line I draw (in in part IV) between questions courts may or may not ask about religious exercise. The majority seems to be firmly resisting the "second-guessing" of claims that it thinks inherent to a centrality test. I'm proposing, however, that courts can apply a more precise version of the centrality test in the same way they applied the coercion test in *Lyng*, which is either (a) to defer to claimants' explicit presentation of the exercise as an

Another case the Court might look to determine the meaning of a substantial burden under the First Amendment would be its decision in *Burwell v. Hobby Lobby*.[471] There a Christian family's ability to continue operating its retail arts and crafts business according to the family members' religious convictions (specifically, by offering employee health insurance plans that do not cover the cost of certain abortifacient contraceptives) was conditioned on their paying a fine of up to $475 million dollars a year.[472] So the Greens, on this framework, faced an *indirectly punitive burden on a religious obligation*: the HHS mandate created a trilemma for them between violating their conscience (either by providing insurance coverage for contraceptives that could cause early abortions or dropping insurance coverage for their employees altogether); paying a fiscally crippling fine for not complying with the mandate; or waiving their right to exercise another basic democratic freedom—of association, in running a business.

The Court's majority seemed to adopt this reading of the burden and subjected the mandate to strict scrutiny analysis. The Greens, it suggested, could only experience the associational benefits available to other citizens of incorporating their business if they either violated their religious beliefs in providing insurance coverage for abortifacient contraceptives, *or* violated their religious duty to provide their employees insurance plans in the first place by dropping insurance plans altogether. Analogizing the Greens' burden to the one faced by Orthodox Jewish owners of small retail businesses in *Braunfeld v. Brown*, which challenged Pennsylvania's requirement that businesses stay closed on Sunday (the owners already closed their stores on Saturday in keeping with their Sabbath), the Court argued that requiring the

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obligation or a form of substantial autonomy, or, (b) in cases where it's not immediately clear how the claimant perceives her exercise, to consider from her own description of it whether the exercise can be construed as either of those things.

[471] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

[472] Ibid., 691.

Greens to provide contraceptive coverage simply because they are an incorporated business would be like telling the Jewish merchants that by incorporating their small retail businesses, they must give up their rights to religious liberty protection (including an accommodation from laws requiring Sunday closure for businesses). "According to HHS," the Court reasoned, "if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights."[473] "HHS would put these merchants to a difficult choice," it continued: "either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."[474]

The Court accepted the state's argument that the mandate served compelling interests in "guaranteeing cost-free access to the four challenged contraceptive methods," but ruled that the mandate did not pursue those interests in the least restrictive way—the burden on religious exercise was unnecessary for the achievement of those interests.[475] In short, the Court's mode of substantial burden analysis in this recent RFRA case offers a template for how that same kind of analysis might proceed under the First Amendment, if *Smith* is fully overturned.

The framework I've proposed could also broaden the scope of prisoner religious liberty rights. Because prisoners don't face the same range of options as other citizens, they can't be said to experience pressuring burdens (simply punitive, indirectly punitive, or non-punitive). To return to the case at the paper's opening, prisoners like Murphy on death row aren't going to suffer a *penalty* for having a minister of their choosing in the death chamber, and they're not going to give up some *benefit* in exchange for practicing their religion. So burdens on their religion will tend to be preventive ones. Indeed, on this framework, prison limits on the

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[473] Ibid., 706.
[474] Ibid.
[475] Ibid., 728.

denominations that can be present in the death chamber are likely to impose a *preventive burden on a substantial exercise of religious autonomy*—at least for a number of religions that specify the importance of having a minister present at one's passing (in Murphy's case, it's something close to a requirement for his rebirth in the Pure Land). So in deciding prisoners' religious liberty claims, courts could require them to show that a prison policy or requirement completely prevents or deprives them of an opportunity to fulfill an obligation or organize their lives substantially according to their religion. They should defer to prisoners, as I argued in part IV, on whether the type of exercise at stake is truly an obligation or a substantial exercise of autonomy.

Indeed, that deference and understanding of burdens on prisoners' free exercise is exactly the direction tentatively recommended by Justice Alito, who dissented from Murphy's stay on procedural grounds. While Justices Kagan and Kavanaugh presented the stay as a remedy for religious discrimination (inherent in the prison's practice of allowing Muslim or Christian ministers in the chamber but not Buddhist ones), Alito suggested that Murphy might have a stronger case that the policy *substantially burdened his religion*. He noted that Murphy "raises serious questions" not only under the Establishment Clause but also RLUIPA.[476] For Murphy's RLUIPA claim to succeed, Alito suggested, he "would have to show at the outset that excluding Rev. Shih [his preferred Buddhist adviser] would impose a substantial burden on his exercise of religion."[477] And crucially, Alito recognized that to do this, Murphy would have to show that laws can substantially burden religion *even when* they do not force citizens to violate strict obligations of conscience: "[w]e [the Court] have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (RFRA)…, there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is

[476] *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019) (Alito, J., dissenting).
[477] Ibid., 12.

merely preferred."[478] He continued, while past cases such as *Hobby Lobby* considered "regulations that compel an activity that a practitioner's faith prohibits," and some Justices "have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden, … a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected belief or practice."[479] On this basis, Alito ultimately found his way to concluding, albeit tentatively, "it may be that RLUIPA and RFRA *do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection*, as both protect 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[480]

So Alito's dissent actually pushes us quite clearly in the direction recommended by this framework. For he recognizes, on the one hand, the limits of a compulsion or centrality test to capture a sufficient range of substantial burdens people might experience on their religion; and he also sees, on the other, that judges are limited in their ability to carry out such tests. I've shown that we can solve both of these problems: first by broadening—and then specifying—both the kinds of religious exercise that we think can be substantially burdened at all, as well as the kinds of legal impact that might significantly burden religion. And second, by requiring judicial deference to claimants on the type of exercise at stake—by limiting judicial "tests" of substantial burdens to asking claimants to show that the law impacts their religion in one of four specific ways I've traced.

Finally, to take a case that directly invites the Court to overturn *Smith*: *Ricks v. State of Idaho Contractors Board* is a case pending before the Court (at the cert review stage) in which George Ricks, an independent construction contractor, has objected on religious grounds to

[478] Ibid.
[479] Ibid.
[480] Ibid.

providing his Social Security number in his mandatory license registration with the state of Idaho.[481] Ricks believes, on his understanding of the Bible, that "it is morally wrong to participate in a governmental universal identification system, especially to buy or sell goods and services."[482] In his petition to the Court, Ricks argued that the state has wrongly put him to a choice between full time work to provide for his family and practicing his religion. In making that case, he is challenging *Smith*'s holding that neutral, generally applicable laws—such as Idaho's regulation requiring independent contractors to register with the state—don't require exemptions for burdens on religious exercise. So, if the Court were to hear Ricks's case and reverse its decision in *Smith*, it would have to decide whether the regulation substantially burdens Ricks' faith in the relevant sense.

On the framework I've sketched here, the answer is yes: Ricks is experiencing a substantial burden on his religion because the regulation imposes *a non-punitive burden on an obligation of conscience*. It creates for him a dilemma between violating his conscience (by providing his SSN) and exercising a standard privilege of liberal democratic citizenship—to seek full-time employment. There's no legal or civil penalty Ricks will suffer for refusing to provide his Social Security number, but he'll have to give up the benefit of full-time work if he wants to continue his employment.

The same analysis might apply to an older, pre-*Smith* case involving Native Americans' objection to the use of Social Security numbers. In *Bowen v. Roy*, two Native American parents objected first, to the mandatory provision of their daughter's Social Security number in an application for a government benefits program, and second, to the government's use of her

[481] Petition for Writ of Certiorari, *Ricks v. State of Idaho Contractors Bd.*, 435 P.3d 1 (Idaho 2018).
[482] *Id*. at 7.

number in administering the benefits.[483] The first requirement, on this new framework, could also be construed as a *non-punitive burden on an obligation of conscience*: it asks the parents to choose between violating their conscience (by providing their daughter's SSN) or a government benefit (financial aid for families with children, and food stamps). But the government's use of their daughter's number does not seem to be a substantial burden covered by the framework, because there isn't any religious exercise on the part of the parents or their daughter that the government's use of the number either pressures or prevents.

So there are at least several kinds of burden on religion that the framework would *not* treat as substantial: (a) cases like *Bowen*, where there's no religious exercise the law can be said to burden; (b) cases like the *Communion Wine* example, where the kind of exercise ruled out is insignificant by the religion's own criteria; and (c) cases like the *Toll Booth* example, involving an incidental, minimal material cost to religious exercise (i.e., one not designed to target or discriminate against that exercise).

In sum, we can see that the framework constructed in this chapter could be applied to a wide range of religious liberty cases at the Court. I've suggested how the Court might interpret the burdens implicated in the above cases by telling us both how we might understand the religious exercise at stake and the law's likely impact on it. But to avoid the Establishment problems discussed in part IV, it would be important in every case for the Court to defer, ultimately, to the claimant on whether the burdened activity is an obligation or substantial exercise of religious autonomy.

VI. *Conclusion*

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[483] 476 U.S. 693 (1986).

The U.S. Supreme Court has never needed as much as it does now a clear method for identifying substantial burdens on religion. Drawing on the account of religion's final value developed in Chapter 3, the framework I've sketched here categorizes substantial burdens into four types of legal impact on two kinds of religious exercise. These kinds of burdens are all substantial because they all seriously undermine religion, understood as a human good that is uniquely fragile and architectonic. Whether it reconsiders its decision in *Smith* and/or tries to interpret more clearly the meaning of a substantial burden under RFRA, the Court could apply this framework to many forthcoming religious liberty cases.

The framework might also have implications for religious liberty cases under other liberal constitutional regimes. In Europe, for example, bans on wearing the hijab or religious symbols in courts or schools or even some kinds of public places could be understood as indirectly punitive burdens: they force Muslims and other religious citizens to choose between giving up their religious autonomy (or violating their conscience), a legal penalty (such as a fine or civic education classes), and full freedom of movement and participation in liberal plural societies.

It's worth addressing here a final question that might sooner or later loom large for the framework's application: what about secular claims of conscience? It hasn't been my goal here to argue that RFRA's definition of religion should be expanded to cover these claims. But if it were expanded, or if the Court reverses *Smith* and then hears a case about an exemption for a secular conscience claim, we might ask ourselves whether the proposed framework would apply (assuming, of course, that the Court would decide in that case that the Free Exercise Clause covered such claims).

I think it would apply. We could use the framework to assess whether burdens on secular conscience claims are costly enough in any of the four ways I've sketched. The analysis, of

course, could not reliably predict the outcome of these cases, for it doesn't tell us how courts should apply the test of strict scrutiny against the burdens they present. Indeed, the possibility of secular substantial burden claims drives home that the framework I've proposed has only been designed to help courts narrow in on truly substantial burdens, not to determine whether those burdens require exemptions. That is a much bigger question that remains largely unresolved in the legal literature, because we need a more comprehensive method that would tell us not only how to identify substantial burdens, but also how to gauge compelling state interests and least restrictive means. But perhaps the Court's reversal of *Smith* would be just the sort of impetus we'd need to finally settle that debate.

Conclusion

Academic debates about religious liberty often have a blind spot: the question of what value is on offer in religious activity. Much of the scholarly conversation assumes, as Chapter 1 showed, that it lies in religion's power to help us decide who we are or want to be. But this instrumental good is not what best explains why we should give religion legal protection or why some of the more intuitively compelling forms of protection are justified. To understand why we should protect religion in the first place, Chapters 2 and 3 contended, we have to start from the central case of the internal perspective of religious practitioners, according to which religion offers a distinct final value consisting of harmony with an ultimate principle or ground of reality.

Chapter 3 further sought to show how this account of religion's distinctive value—what I have called the ultimate principle account—would inform a set of political-moral principles for the scope of religious liberty under the U.S. Constitution. And chapter 4 tailored that approach in order to craft a framework for judicial analysis of substantial burdens on religious exercise. Together, these two chapters were designed not only to offer a basis for critiquing, reforming, and perhaps closing gaps in existing law, but also to make sense of some of the more compelling features of our legal tradition on religious liberty—in a way that casts them in their best light.

In short, the dissertation has worked to counterpoise the emerging egalitarian challenge to religion's special protection.

Of course, I have not tried to offer an exhaustive list of practical applications. So here I offer some closing reflections on two substantive questions that would benefit from further research.

One is the fraught question of institutional religious liberty rights. Although I argued in chapter 3 that the final value of religion can make sense of the ministerial exception, a larger

question remains about the justification for a broader institutional right of religious freedom. A wide subfield of legal literature has made the case against such rights, by contending that religious associations have no religious liberty rights of their own; they have no claims to legal protection apart from the protection afforded the individual citizens who belong to them.[484] Others have objected to institutional religious liberty rights from a different angle: some challenge the idea of corporate personhood,[485] while others (including Laborde) propose a metric of close fit that associations should be able to show between their purpose and membership in order to claim legal protections.[486] As in the general debate about religion's special protection, political theory has yet to offer a strong counterpoint to these objections. Some defend institutional religious freedom by appealing to the limited jurisdiction of the state,[487] or the pragmatic benefits of promoting free association in liberal societies, or by trying to translate into contemporary terms the historical concept of *libertas ecclesiae* – the "freedom of the church."[488] But I have seen no effort to defend institutional religious liberty rights from a normative account of religion's distinctive value, and so this dissertation might offer a starting point for a case along those lines.

For on the account of religion's value sketched in Chapter 3, we have grounds to think there is intrinsic value in associational religious exercise: that religion exercised by a group is an

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[484] See, e.g., Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review* 99, no. 5 (September 2013): 917-85; Schragger and Schwartzman, "Lost in Translation: A Dilemma for Freedom of the Church," *Journal of Contemporary Legal Issues* 21 (2013): 15-33.

[485] See, e.g., Ira Lupu and Robert Tuttle, "Religious Exemptions and the Limited Relevance of Corporate Identity," in *The Rise of Corporate Religious Liberty*, eds. Micah Schwartzman, Chad Flanders, and Zoe Robinson (New York: Oxford University Press, 2016), 373-397; Elizabeth Pollman, "Reconceiving Corporate Personhood," Utah Law Review 2011, no. 4 (2011): 1629-1676.

[486] James Nelson, "Conscience, Incorporated," *Michigan State Law Review*, no. 5 (2013); Cecile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017), 184-7 (following Nelson).

[487] Victor Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014).

[488] See, e.g., Richard Garnett, "The Freedom of the Church: (Towards) an Exposition, Translation, and Defense," *Journal of Contemporary Legal Issues* 21 (2013): 33-58; Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Cambridge, MA: Harvard University Press, 2014).

importantly distinct instance of the final good of seeking harmony with an ultimate principle. That value might accordingly justify a distinct religious liberty right for institutions (just as I have argued that the intrinsic value of religion grounds a distinct religious liberty right for individuals). Indeed, the current Supreme Court seems divided on that very question.[489] The purpose of an institutional religious liberty right, however, even if grounded in religion's intrinsic importance, would be instrumental: its point would be to protect a pre-requisite for minimally adequate religious experience in many traditions, which is the freedom to live by one's belief that what one believes to be true of the ultimate principle—as the *ultimate* ground of reality—is true for everyone else, or at least for other members of one's religious community. Even so, however, it remains unclear how robust that right claim would be, because religious associations by their very nature tend to impact the wellbeing of a wider group of citizens, including those who may not share the association's beliefs.

A second topic that invites further exploration is the proper scope of our longstanding disestablishment principle. I considered some of that scope in Chapter 3's discussion of public displays of religion, as well as in Chapter 4's treatment of possible Establishment Clause violations in substantial burden analysis. But the dissertation's account of religion's final value might also have something to say about other categories of disestablishment cases—and above all, about the intersection of free exercise and disestablishment principles: What forms of religious establishment violate free exercise rights? In general, religion understood as a final value would likely encourage more flexible standards for government support of it than strict

[489] In *Burwell v. Hobby Lobby* (573 U.S. 682, (2014)), Justice Alito's opinion for the Court and Justice Ginsburg's dissent divide sharply over whether corporations can properly be said to have free exercise rights. Against the majority's interpretation of RFRA as intended to protect the free exercise of for-profit corporations, for example, Ginsburg cites Justice Stevens's opinion in *Citizens United v. Federal Election Commission* that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires" (558 US__2010, 972). For a paper further exploring this disagreement, see Gabrielle M. Girgis, "The New Jurisprudence of Associational Free Exercise" (unpublished draft).

separationist theories propose. At the same time, protecting its citizens' freedom to pursue that value will require that the state refrain from favoring one religion more than others.

Some of the general political-moral principles recommended by this dissertation have been reflected in recent developments at the Supreme Court (while others might be so in the future). As court commentators have noted, some aspects of the Roberts Court's religious liberty jurisprudence have been moving in the direction suggested by parts of Chapters 3 and 4—such as its recognition of the ministerial exception (which it is revisiting this term),[490] some associational religious liberty rights,[491] and the eligibility of church-affiliated programs for public benefits.[492] Perhaps most importantly, the Court is slated to reconsider its landmark decision, in *Employment Division v. Smith*, that exemptions are not constitutionally required whenever laws burdening religion are neutral and generally applicable.[493] All of these decisions show that now more than ever, a robust exploration of religion's special importance can give renewed meaning to our longstanding tradition of protecting it.

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[490] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (565 U.S. 171); *Our Lady of Guadalupe School v. Morrissey Beru*; *St. James School v. Biel*.
[491] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).
[492] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S.__ (2017). See also Mark Rienzi, "Symposium: The calm before the storm for religious-liberty cases?", SCOTUSblog, July 26, 2019, https://www.scotusblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/ (accessed May 16, 2020).
[493] See, e.g., Petition for Writ of Certiorari, Ricks v. State of Idaho Contractors Bd., 435 P.3d 1 (Idaho 2018); Petition for a Writ of Certiorari, Sharonell Fulton, et al. v. City of Philadelphia, i.

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