

Reply: Conscience and Equality

Nelson Tebbe

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REPLY: CONSCIENCE AND EQUALITY

NELSON TEBBE*

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INTRODUCTION

Conflicts between religious freedom and equality law are unlikely to disappear anytime soon. Take for example *Masterpiece Cakeshop*, which is currently pending before the

*Professor of Law, Cornell Law School. Thanks to Professors Elaine Chiu and Rosa Castello, as well as to Jennifer Flores, Brittany Overbeck, and the other editors of the *Journal of Civil Rights and Economic Development* for hosting the symposium on my book, *Religious Freedom in an Egalitarian Age* (2017) and for editing this issue of the *Journal*. This piece replies to the excellent responses I received there. For helpful comments on previous drafts, I am grateful to Elizabeth Anker, Michael Dorf, Kent Greenawalt, Andrew Koppelman, Genevieve Lakier, David Pozen, Micah Schwartzman, and participants at the Cornell Law and Humanities Colloquium and the Columbia Law School Public Law Workshop.

Supreme Court of the United States.¹ After a Christian baker refused to create a wedding cake for a same-sex couple, Colorado found that he had violated the state's public accommodations law, which protects customers against discrimination on the basis of sexual orientation. Challenging that determination, the baker is arguing that serving the couple would have contravened his religious beliefs, and he is claiming protection under the speech and religion clauses of the First Amendment.

Or consider *Barber v. Bryant*, a challenge to Mississippi's H.B. 1523.² That law specifies three beliefs—that marriage should be confined to different-sex couples, that sex outside marriage is wrong, and that gender identity should be fixed at birth—and it provides robust protection for those who hold such beliefs, even against state civil rights law. A federal district court invalidated the law on constitutional grounds.³ A federal First Amendment Defense Act, which bears some resemblance to the Mississippi law, has been considered by Congress and it has the support of President Trump.⁴

Or consider the Attorney General's Memorandum on Federal Law Protections for Religious Liberty, which sets out guidelines for all federal agencies.⁵ It endorses a broad vision of

¹ *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 137 S.Ct. 2290 (2017) (granting cert.). Notably, the Solicitor General filed a brief in support of the baker, even though no federal statute is involved. Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 2017 WL 4004530 (filed Sept. 7, 2017).

² 2016 Miss. Laws H.B. 1523.

³ *Barber v. Bryant*, 193 F. Supp. 3d 677 (2016). That decision was reversed for lack of standing. *Barber v. Bryant*, 872 F.3d 671 (5th Cir. 2017), *cert. denied*, ___ U.S. ___, 2018 WL 311355 (2018). I signed an amicus brief in support of the appellees. Brief of Church-State Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance, 2016 WL 7438560 (5th Cir. filed Dec. 22, 2016).

⁴ First Amendment Defense Act, H.R. 2802, 114th Congress (2015–2016), § 3(a); Mary Emily O'Hara, *First Amendment Defense Act Looms Over Sessions' Confirmation Vote*, NBC NEWS, Jan. 30, 2017, <http://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-looms-over-sessions-confirmation-vote-n714226>. See also *H.R. Comm. On Oversight And Gov't Reform: Hearing on H.R. 2802, the First Amendment Defense Act (FADA)*, 114th Cong. 6 (July 12, 2016) (testimony of Professor Katherine Franke), <https://oversight.house.gov/wp-content/uploads/2016/07/2016-07-12-Franke-Columbia-Law-Testimony.pdf>.

⁵ Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668 (Oct. 26, 2017); see also Naomi Goldenberg, *An Appraisal of Religious Freedom in an Egalitarian Age by Nelson Tebbe: Eight Commentaries and Tebbe's Response*, ___ J. AM. ACAD. RELIG. ___, at *4–*5 (forthcoming, 2018) (analyzing use of the category of religion in the Attorney General's memorandum).

religious freedom, including in situations where it conflicts with equality law. For example, the memorandum broadens a key exemption from employment discrimination law.⁶ And it maintains that religious exemptions may be extended even in situations where they entail harm to others.⁷ (Such third-party harms often accompany religious exemptions from civil rights laws.⁸)

Although many more examples could be given, think finally of the Trump Administration's decision to expand religious and moral exemptions from the "contraception mandate." Promulgated by the Obama Administration under authority of the Affordable Care Act, the contraception mandate protects women by requiring employers who provide health insurance to include coverage for women's contraception. In two regulations, the Trump Administration now has allowed employers with religious or moral objections to opt out of the contraception requirement.⁹ A federal court has enjoined both rules, finding that they violate the Administrative Procedure Act and that they are not required by the Religious Freedom Restoration Act.¹⁰

⁶ 82 Fed. Reg. at 46970. This provision is similar to the Russell Amendment, which had been proposed in Congress but never enacted. Current law allows religious organizations to hire only members of the same faith, despite the general prohibition on religious discrimination. Section 702 of Title VII, codified at 42 U.S.C. § 2000e-1. Going further, the Russell Amendment would have allowed these groups to terminate workers for refusing to follow tenets of the faith. Amendment to H.R. 4909 Offered by Mr. Russell of Oklahoma (Apr. 27, 2016), <http://docs.house.gov/meetings/AS/AS00/20160427/104832/BILLS-114-HR4909-R000604-Amdt-232r2.pdf>. So a worker could be terminated for becoming pregnant out of wedlock, even if she remained a member of the church. And that worker could be fired even when that would otherwise amount to discrimination on the basis of a protected ground, such as sex or even pregnancy itself. The Russell Amendment draws its language from the Americans With Disabilities Act. 42 U.S.C. § 12113(d)(2) ("a religious organization may require that all applicants and employees conform to the religious tenets of such organization"). See Douglas Laycock, *Defense Authorization Bill Needs To Protect Religious Liberty*, THE HILL, Nov. 17, 2016, <http://thehill.com/blogs/congress-blog/labor/306539-defense-authorization-bill-needs-to-protect-religious-liberty>.

⁷ *Id.*

⁸ See Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2534 (2015) (exploring the connection between complicity claims and third-party harms).

⁹ 82 Fed. Reg. 47792 (Oct. 6, 2017); 82 Fed. Reg. 47838 (Oct. 6, 2017).

¹⁰ *Pennsylvania v. Trump*, __ F. Supp. 3d __, 2017 WL 6398465, at *17-*18 (E.D. Pa. 2017).

In *Religious Freedom in an Egalitarian Age*, I offered a way to understand and resolve such conflicts between religious freedom and equality law.¹¹ After proposing a method called social coherence, I deployed it to develop four principles that can guide constitutional decision-making on such questions. I then used that method and those principles to suggest solutions in specific areas of legal controversy. My arguments have now drawn six thoughtful responses, published together in the current issue of the *Journal of Civil Rights & Economic Development*.¹²

In this Reply, I explore some larger questions that have been prompted by the book but that fell outside its focus on the interaction between religious freedom and civil rights law. Spurred by the responses, but also independent of them, I examine the implications of my arguments for an egalitarian theory of the First Amendment. Though it is of course impossible to fully develop such a vision in this Reply, there is room to begin that work. Along the way, I answer some of the more pointed questions posed in these six responses.

In Part I below, I begin by considering challenges to the enterprise of religious freedom jurisprudence from critical theorists. Here, I am most interested in arguments from academic scholars of religion.¹³ In influential work, these writers argue that the category of religion is too unstable and

¹¹ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

¹² Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J.C.R. & ECON. DEV. 233 (2018); Alan Brownstein, *Attempting to Engage in Socially Coherent Dialogue about Religious Liberty and Equality*, 31 J.C.R. & ECON. DEV. 71 (2018); Chad Flanders, *In (Partial) Praise of (Some) Compromise: Comments on Tebbe*, 31 J.C.R. & ECON. DEV. 201 (2018); Andrew Koppelman, *Tebbe and Reflective Equilibrium*, 31 J.C.R. & ECON. DEV. 125 (2018); Patricia Marino, *What Is the "Social" in "Social Coherence?" Commentary on Nelson Tebbe's Religious Freedom in an Egalitarian Age*, 31 J.C.R. & ECON. DEV. 115 (2018); Laura Underkuffler, *Religious Freedom in an Egalitarian Age: Rejecting Doctrinal Nihilism in the Adjudication of Religious Claims*, 31 J.C.R. & ECON. DEV. 217 (2018).

¹³ Several responses to the book from critical theorists of religion have been collected in a forthcoming roundtable in the *Journal of the American Academy of Religion*. Contributions from critical theorists include Christoph Baumgartner, *But There Is No Conceptual Level Playing Field! Challenges to Nelson Tebbe's Social Cohesion Approach to Religious Diversity*, __ J. AM. ACAD. RELIG. __ (forthcoming, 2018); Janet Jakobsen, *Equality of Religious Freedom*, __ J. AM. ACAD. RELIG. __ (forthcoming, 2018); and Roberto Blancarte, *Let's Be Reasonable!*, __ J. AM. ACAD. RELIG. __ (forthcoming, 2018). My reply is *Reasons and Religion*, __ J. AM. ACAD. RELIG. __ (forthcoming, 2018).

ideologically inflected for use in legal administration.¹⁴ They also contend that emphasizing religious freedom distorts our understanding of cultural conflicts and deepens divisions among social groups.¹⁵ Underlying both of these arguments is skepticism about the project of secular constitutionalism generally—doubt about its reliance on unstable distinctions between secular and religious, public and private, group and individual.

Critical work on religion deserves to be taken seriously, not least because some of its critiques are convincing. For example, academic scholars of religion are right to highlight the contestability of the category of religion. That term has no universal referent, and it has been deployed in ways that benefit powerful interests and ideologies. That the category of religion is contingent does not mean that it cannot be used by particular actors in particular institutional settings, however. It can be defined differently in different doctrinal contexts and for different purposes. I argue that the term religion should be specified according to the variegated values that drive particular doctrines. So “religion” may mean one thing for nondiscrimination law under the First Amendment and it might mean another thing for religious exemptions.¹⁶ Proceeding this way brings together critical and constructive approaches to religious freedom.

An implication is that the category of religion can, and often should, include beliefs and practices that are considered nonreligious in colloquial discourse. That raises the related question of whether religion ought to be treated with special solicitude in constitutional law. I address that question in Part II, where I argue explicitly that there are no good reasons to exclude certain convictions of conscience from most areas of religious freedom doctrine. Categorically excluding nonreligious commitments from free exercise and nonestablishment risks serious unfairness, while including them selectively can further the rationales for enacting and enforcing those provisions in the first place.

¹⁴ For citations, see *infra* Part I.A.

¹⁵ For citations, see *infra* Part I.B.

¹⁶ For an earlier version of this argument, Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1130–40 (2011).

A significant development here comes from Andrew Koppelman, who is a leading defender of the view that religion is special in constitutional law. He has now clarified that courts can and should protect convictions of conscience alongside familiar religion.¹⁷ Koppelman resists those that would *supplant* the category of religion in American law, not those who would *supplement* it with analogous categories.¹⁸ So in one important sense, Koppelman has acknowledged that religion is not special. I endorse this move, and I give reasons for retaining the category of religion even though its place in the First Amendment is not unique.

Part III concerns a question that follows naturally: In a world where religion is not special, how should we conceptualize First Amendment law? Unlike some other egalitarians, I do not propose to eliminate religious exemptions from general laws. Religious actors can and should be relieved from government regulations where doing so would not inordinately harm the public interest. Nor do I argue that the Establishment Clause should cease to be enforced—far from it. But my commitments to strong enforcement of free exercise and nonestablishment seem to sit uneasily with a conviction that religion is not special.

Religious Freedom in an Egalitarian Age did not take up this general puzzle, focusing instead on the particular conflict between religious freedom and civil rights law. And although it described a method for thinking through such disputes, it specifically avoided articulating a substantive theory of religious freedom. But in this symposium, critics are inviting me to explore the implications of the book's arguments for a general theory. Again, I cannot defend such a theory in this Reply but I can describe why the puzzle is solvable in principle.

Accordingly, I suggest in Part III that religious freedom law is consistent with a framework of *full and equal membership* in the polity. *Full membership* means that government cannot unreasonably thwart the exercise of basic capacities. It includes the right to believe and practice according to the dictates of

¹⁷ In addition to his contribution to this symposium, see Andrew M. Koppelman, "*Religion*" as a *Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 *SAN DIEGO L. REV.* 1079 (2014).

¹⁸ I also respond to pragmatic arguments by Alan Brownstein.

religion, conscience, and comparable commitments. *Equal membership* guarantees that government will avoid constituting classes of people as subordinate. For example, officials cannot endorse a particular religion because that would relegate nonadherents to an inferior legal status. Together, these imperatives provide a framework that has the potential to make sense of the religion clauses in the context of secular constitutionalism. They organize the values that inform specific legal rules.

Part III also responds to a complaint that the book is too conservative in one respect—in its argument for a robust freedom of association. As I explain, this critique misapprehends both the scope of the associational interest and the stipulation that it can be overbalanced by government imperatives.

Understanding the religion clauses as guaranteeing free and equal membership has implications for a challenge to civil rights law that is prominent at the moment, namely the argument from symmetry. On this view, religious traditionalists themselves are at risk of being relegated to a disfavored citizenship status, not by private discrimination, but instead by a liberal orthodoxy in government policymaking and its refusal to grant sufficient religious exemptions. In Part IV, I address this argument. Whether it is correct depends on law's expressive impact, and on social meanings. Certainly, it is possible to imagine scenarios where religious traditionalists could suffer citizenship degradation as a consequence of civil rights laws. But neither the logic of antidiscrimination laws nor the actual cases that have arisen so far suggest that such a risk is imminent or equivalent to the structural injustice experienced by other groups.

In Part V, I correct several misimpressions about the method of social coherence. Two insightful commentators, Chad Flanders and Patricia Marino, think that the method is designed to generate some sort of legal consensus or agreement. Once that interpretation is corrected, their concerns about the method should ease. Social coherence is designed not to generate consensus or even lower tensions, but merely to preserve the possibility of reason giving.

In a short conclusion, I urge critical theorists and left egalitarians to come together behind something like my vision of conscience and equality. Lawyers and theorists can and should argue for full and equal membership without conceding that the category of religion should dominate the discussion, and without becoming complacent about the political dynamics that inevitably influence First Amendment law.

I. Critical Theories

Today, religious freedom jurisprudence is drawing skepticism from (at least) two directions. Academic scholars of religion, writing mostly from the political left, question the integrity of the category itself, as well as the uses to which it has been put by governments and other powerful actors.¹⁹ And some legal scholars, writing mostly from the political right, question whether religion-clause law can be rationalized, or whether legal decisions in this area are necessarily patternless, arbitrary, or irrational.²⁰ Together, these critiques pose fundamental challenges not just to First Amendment law, but to the project of liberal constitutionalism. Part of my aim here is to show that they deserve to be taken seriously.

Having addressed legal scholars in the book,²¹ I focus here on critical scholars of religion. My conclusion is that they are mostly right to say that existing religious freedom law is unstable and unprincipled, but that their critique can be turned to constructive ends. If we recognize that the category of religion—and the idea of religious freedom—can and should be specified according to the values that properly drive First Amendment analysis in particular contexts, then we can allow those values to dictate the scope and strength of protection in each area. That way, we can push constitutional law beyond the category of religion itself, as it has conventionally been conceived. The success of that project then depends on the persuasiveness of its arguments, which are explored throughout the rest of this Reply.

¹⁹ See notes *infra* Part I.A, and I.B.

²⁰ See *infra* note 52.

²¹ TEBBE, *supra* note 11, at 25–48.

A. *First Wave Critiques*

It is helpful to organize critical theories of religion into two waves. In the first wave, scholars interrogated the category of religion itself. Of course, efforts to define the term had long occupied the field of religious studies. Some scholars had tried to organize the concept substantively, by isolating characteristics that all religions shared.²² Others had developed functional approaches that highlighted the role of beliefs and practices in the construction and reproduction of social groups.²³

Departing from both of these approaches, critical scholars questioned whether the category of religion could be defined at all, or without serious costs. Talal Asad, in seminal work, argued that the category has no universal referent.²⁴ No single attribute, and no cluster of attributes, can distinguish all religions from nonreligion. Even the notion of divinity or superhuman power is absent from, say, Theravada Buddhism, which is commonly considered an important strain of a major world religion.

Asad explained this instability by pointing to the history of the concept, which was curiously infrequent in early Western thought.²⁵ Dividing peoples into faith traditions was a

²² The dominant substantive approach defines religion as a cultural complex of beliefs and practices that relate to the superhuman or supernatural. See MARTIN RIESEBRODT, *THE PROMISE OF SALVATION: A THEORY OF RELIGION* 74–75 (2010) (discussing and citing MELFORD E. SPIRO, *RELIGION: PROBLEMS OF DEFINITION AND EXPLANATION*, IN *ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION* 96 (Michael Banton ed., 1966)); see also Jonathan Z. Smith, *Religion, Religions, Religious*, in *CRITICAL TERMS FOR RELIGIOUS STUDIES* 269, 281 (Mark C. Taylor, ed., 1998) (“The anthropological definition of religion that has gained widespread assent among scholars of religion . . . is that formulated by Melford E. Spiro, ‘an institution consisting of culturally patterned interaction with culturally postulated superhuman beings.’”). Bruce Lincoln proposes a similar definition that nevertheless is “polythetic and flexible.” BRUCE LINCOLN, *HOLY TERRORS: THINKING ABOUT RELIGION AFTER SEPTEMBER 11*, at 5 (2003).

²³ Durkheim argued that religious beliefs work to bind people together into social or cultural groups. ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE: A STUDY IN RELIGIOUS PSYCHOLOGY* 41 (1915). He described religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community . . . all those who adhere to them.” *Id.* at 44. Geertz extended the functional understanding of religion, emphasizing the role of language in group formation. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 90 (1973).

²⁴ TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (1993).

²⁵ Religion or “religio” was first used in Europe to describe forms of Christian monasticism. Smith, *supra* note 22, at 269–270.

surprisingly late development, in other words. When the term religion did become more prominent, it often functioned to describe the beliefs and practices of others, particularly colonized subjects. And today, the diversity of definitions among scholars of religion supports the contention that the term has no fixed referent.²⁶

Asad made two further arguments that have been particularly influential. First, he pointed out that the leading definitions tended to emphasize individuality, inwardness, and privacy.²⁷ That tendency led to misapprehension of traditions that emphasized physical practices or community identification rather than moral or theological conviction. Second and related, he explained that the conventional understanding of religion had roots in European Protestantism that distorted its application to nonwestern cultures.²⁸ That was especially concerning where deployment of the term had political ramifications.²⁹

Building on Asad's work, scholars interested in legal discourses and institutions began to argue that the category of religion was too indeterminate and ideological to be used in jurisprudence. For example, Winnifred Fallers Sullivan conducted careful empirical studies of religious freedom litigation, focusing on the difficulty that courts were having deciding whether actual practices qualified for protection under free exercise doctrine. One of her conclusions was that the category of religion, and therefore the doctrine of religious freedom, could not be deployed by courts without unacceptable distortion.³⁰

B. Second-Wave Critiques

In the second wave of critical work, religion scholars have highlighted the actual use of religious freedom in political and

²⁶ Cécile Laborde calls this the "semantic" critique of religious freedom. CÉCILE LABORDE, *LIBERALISM'S RELIGION* 18 (2017).

²⁷ ASAD, *supra* note 24, at 45–57; *see also* RIESEBRODT, *supra* note 22, at 8; ELIZABETH SHAKMAN HURD, *BEYOND RELIGIOUS FREEDOM* 55–58 (2015) (on Asad).

²⁸ "My argument," he wrote, "is that there cannot be a universal definition of religion. . . ." ASAD, *supra* note 24, at 29.

²⁹ Laborde calls this the "Protestant" critique. LABORDE, *supra* note 26, at 21.

³⁰ WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 8, 10, 150–51 (2005).

legal discourses. They have diagnosed the distortions and divisions that result when the secular state uses religious freedom as the dominant template for understanding diverse instances of injustice.

For example, Elizabeth Shakman Hurd identifies the costs of privileging religious freedom as the sole or primary concern of international efforts to help suffering peoples.³¹ Looking for violations of religious freedom, as international programs often do, not only risks overlooking other forms of government wrongdoing, but it also can incentivize groups to identify as religious. According to Hurd, that incentive ossifies group differences that once were fluid and it prompts people to understand their own traditions in terms of individual belief rather than ritual practices or communal identifications.

Similarly, Saba Mahmood warns against the distorting effects of religious liberty discourse on debates over the political plight of Coptic Christians in Egypt.³² Inspired by Asad, she argues that regulation of religion by the secular state not only has disempowered such groups but also has transformed them. As religion has become increasingly important to their identity, it has contributed to division and inequality. Promoted by the U.S. government and private patrons in the American evangelical movement, the concept of religious freedom has worked to worsen the “precarious position of religious minorities in the polity.”³³ Emphasis on religious freedom and human rights, therefore, risks unintended consequences in actual political practice.³⁴

Importantly, the critique of these authors is not limited to religious freedom and human rights, but it extends to the project of the “secular” state itself. In their view, secularism and neutrality, as government ideals, are intertwined with the concept of free exercise. These political ideas work together to distort social phenomena, to deepen political divisions along

³¹ HURD, *supra* note 27, at 63.

³² SABA MAHMOOD, RELIGIOUS DIFFERENCE IN A SECULAR AGE, 15 (2016); *see also* Camille Robcis, *Decolonizing Secularism*, SYNDICATE, July 11, 2016, <https://syndicate.network/symposia/theology/religious-difference-in-a-secular-age/>.

³³ MAHMOOD, *supra* note 32, at 15–17.

³⁴ Laborde calls this the “realist” critique—her third and final type of critical argument against religious freedom. LABORDE, *supra* note 26, at 13.

religious lines, and to disempower groups that are now constituted as religious minorities.³⁵

Much of this work—both first-wave and second-wave—is powerful and persuasive. Religious freedom law *is* infamously unstable, and one source of its instability is the difficulty of drawing lines around the category of religion.³⁶ For example, it is difficult to explain why atheists and agnostics are considered by courts to be “religious,” and it is even more difficult to explain why they are protected in some cases but not others.³⁷ Moreover, doctrines on free exercise and nonestablishment have been articulated and applied in ways that regularly—some would say, systematically—disfavor religious minorities whose traditions do not center on individual belief or conscience.³⁸ Some might conclude that constitutional doctrine in this area cannot be rationalized.

Yet critical theorists of religious freedom can be understood in another way—and understanding them that way opens up new pathways for thinking about legal protection and political principles. On this alternative view, their key insight is not that it is impossible to define the term religion, but that it is impossible to define it universally.³⁹ According to J.Z. Smith, for example, the lesson that we should draw from observing that scholars have proposed many different definitions is not that the term religion cannot be defined, but that it can be defined in

³⁵ See, e.g., MAHMOOD, *supra* note 32, at 3 (“This book is primarily concerned with political secularism, particularly the modern state’s production and regulation of religious differences in one region of the Middle east . . .”).

³⁶ Legal scholars have had their own debate about the definition of religion—a debate that has been almost entirely isolated from work in the academic study of religion. For a review, see Tebbe, *supra* note 16, at 1130-1140. That said, courts do not frequently have trouble discerning whether a particular practice counts as religious.

³⁷ See *generally id.* (investigating when nonbelievers should fall under the purview of the religion clauses).

³⁸ See, e.g., FRANK RAVITCH, *FREEDOM’S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA* 114 (“religious minorities (especially non-Christian religious minorities) did not reap great benefits from *Sherbert v. Verner*”).

³⁹ ASAD, *supra* note 24, at 29 (“[m]y argument . . . is that there cannot be a universal definition of religion”); HURD, *supra* note 27, at 19 (“Neither religions nor religious actors are singular, agentive forces that can be analyzed, quantified, engaged, celebrated, or condemned—and divided between good and bad. To rely for policy purposes on the category of religious actor is, rather, to presume a certain form of actorship motivated by religion that is neither intellectually coherent nor sociologically defensible. It is something that is claimed about a particular group by a particular authority in a specific context.”).

many different ways.⁴⁰ Religion is a second-order concept that is amenable to being specified for diverse purposes in diverse institutional settings.

Viewed this way, critical work suggests that we should understand the term religion in the First Amendment in a way that is *substantive* and *disaggregated*. While there may be no definition of religion that applies in all legal settings, the effort to protect religious freedom need not be abandoned altogether.⁴¹ Rather, it is possible to circumscribe the right according to the purposes of the particular legal doctrine being applied in a particular context.

This approach is substantive, rather than formal, because it determines who falls within the domain of a legal rule according to the values driving that rule.⁴² In other words, what counts as “religion” depends on the purposes of doctrine concerning free exercise, or nonestablishment, or equal protection. This is similar to Cécile Laborde’s “interpretive” approach to the concept of religion—“what matters,” she says, “is that the law, or the theory, expresses and protects the correct underlying values.”⁴³

And my approach is disaggregated, rather than unitary or monistic, because it recognizes that plural values may drive First Amendment law. For example, the rule against denominational discrimination pursues a commitment to government evenhandedness among sects,⁴⁴ while the ministerial exception seeks to prevent government interference in the relationship between clergy and congregation, among other commitments.⁴⁵ I have defended this variegated view of First Amendment law in

⁴⁰ Smith, *supra* note 22, at 269, 281.

⁴¹ Critical legal scholars can sometimes be read to suggest this.

⁴² Tebbe, *supra* note 16, at 1131–1136.

⁴³ LABORDE, *supra* note 26, at 20.

⁴⁴ See *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). For more on the rule against government preferentialism among sects or denominations, see Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1319–22 (2008).

⁴⁵ See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (recognizing the ministerial exception). For an articulation of the concern with government interference in the relationship between clergy and congregation, see *Petruska v. Gannon Univ.*, 462 F.3d 294, 306–07 (3d Cir. 2006). For other values informing the ministerial exception, see Tebbe, *supra* note 16, at 1167–69.

other writings.⁴⁶ What it means here is that what counts as “free exercise” or “nonestablishment” will differ according to the differing substantive commitments undergirding the jurisprudence.

Part of the reason this insight helps to address critiques of religious freedom is that, as it turns out, few of the convictions that drive the legal doctrine are specific to religion. As I will explain below, there is little reason to differentiate religion from nonreligion for purposes of constitutional law. That argument, together with other normative advances, rectifies many of the distortions and divisions identified by these theorists.

But will this approach satisfy critical scholars of religion? Won't they object that any substantive values that may be identified as important to the jurisprudence—equal citizenship, individual autonomy, etc.—themselves carry dangers of inaccuracy and ideological distortion like the ones that plagued religious freedom? More abstractly, will they object that the dynamics they identify are intrinsic to secular government, and cannot be expunged from within the framework of liberal constitutionalism?

That is possible. Yet two responses convince me that the critical and constructive projects can reinforce each other, nevertheless. First, critical theorists themselves do not categorically reject the possibility of normative argument. In fact, as Laborde points out, their analysis is often performed in the service of normative aspirations that remain unelaborated if not unarticulated.⁴⁷ So Winnifred Sullivan worries that the unfair treatment of nonreligious objectors implicates “the principle of equality” and presents “a question of justice.”⁴⁸ And Peter Danchin discusses the decision of a Jewish school to use religious

⁴⁶ Tebbe, *supra* note 16, at 1127–30. Here too, my approach resembles Laborde's “disaggregated” method of determining the scope and strength of legal protection for religion and conscience. LABORDE, *supra* note 26, at 2–3. *See also* Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 L. & PHIL. 581, 593–94 (2015).

⁴⁷ LABORDE, *supra* note 26, at 18. *See also* Tebbe, *supra* note 13, at 5 (noting that Baumgartner makes normative arguments that are intelligible in constitutional law and political theory).

⁴⁸ SULLIVAN, *supra* note 30, at 150.

criteria in admissions as “a matter of justice.”⁴⁹ The most charitable, and I think the most accurate, reading of these remarks is not that normative argument is being smuggled in, but rather that it falls outside the focus of these scholars’ work. And that is perfectly appropriate; diagnostic argument can be valuable in itself.

Mahmood is perhaps most explicit about this. She refers repeatedly to ideals such as “universal equality and citizenship”⁵⁰ and “the undelivered promise of formal political equality.”⁵¹ And she says plainly that she is not denouncing secular government wholesale.⁵² Rather, her project is to “deprive[] [secular government] of innocence and neutrality so as to craft, perhaps, a different future.”⁵³ This is a normative aspiration, and she understands that. Of course, Mahmood appreciates the limitations of liberal argument—but she also allows for the possibility of reform, even if pursuing it is not part of her own project. Laborde is right that “critical theorists [that] denounce normativity as a system of ideological domination . . . miss out on the critical potential of normative philosophy.”⁵⁴ But Mahmood does not make that mistake. Instead, she allows for the two projects to coexist and even to benefit from each other.

My second response to the deep critique of secular government is to say that whether it can be rehabilitated depends on the success of substantive proposals. For instance, whether the scope of free exercise protection can vary according to its underlying commitments depends on how well that approach works in practice. And whether the scope of nonestablishment law can track values such as full and equal membership for all persons will depend on the persuasiveness of particular projects. Laborde is right about this, too.⁵⁵ Normative

⁴⁹ LABORDE, *supra* note 26, at 18 n.13 (quoting Peter Danchin, *Religious Freedom as a Technology of Modern Secular Governance*, in *INSTITUTIONALIZING RIGHTS AND RELIGION: COMPETING SUPREMACIES* 184, 204 (Leora Batnitzky & Hanoch Dagan eds., 2017)).

⁵⁰ MAHMOOD, *supra* note 32, at 19.

⁵¹ *Id.* at 20.

⁵² *Id.* at 21.

⁵³ *Id.*

⁵⁴ LABORDE, *supra* note 26, at 18.

⁵⁵ *Id.* at 14–15 (noting that some of the arguments of the “critical religion school” can be answered only with the kinds of detailed arguments that she offers in the rest of her book).

theory must prove through its performance that the tensions of secular constitutionalism can be successfully managed.

In the remainder of this Reply, I will explore several aspects of that project. One foundational question is how secular government can remain evenhanded—not only among religions, but also between religion and other forms of profound human commitment and identification. Egalitarians have answered that religion cannot justifiably enjoy unique status in constitutional law. Part II examines how that conviction can be squared with existing doctrine, which is built around a constitutional text that singles out the free exercise and nonestablishment of “religion.” Another foundational question is how a jurisprudence that observes equality between religion and other forms of conscience and community can protect free exercise and nonestablishment, without diluting either guarantee. I address that tension in Part III.

Before turning to those issues, let me briefly address another type of skepticism that denies the very possibility of rational argument in legal institutions. That sort of theory has become influential within the legal academy.

In the book, I engage with legal scholars who take critical approaches to religious freedom from a perspective that is sympathetic to religious traditionalism. My focus there is on their methodological claim that legal decisions on matters of free exercise and nonestablishment are *necessarily* unreasoned, patternless, or ad hoc.⁵⁶ Against those claims, I argue that legal actors can use a coherence approach to reach conclusions backed by reasons, even in areas of law that depend on variegated values and have long been plagued by contradiction. Comparing new

⁵⁶ TEBBE, *supra* note 11, at 25–45. For examples of works with which I engage in my book, see, e.g., Roderick M. Hills, *Decentralizing Religious and Secular Accommodations*, in *INSTITUTIONALIZING RIGHTS AND RELIGION: COMPETING SUPREMACIES* 108, 109 (Leora F. Batnitzky and Hanoch Dagan eds., 2017) (arguing there is no neutral ground for resolving “reasonable and deep disagreement” on questions such as the proper scope of religious accommodations from civil rights laws); STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 1–13 (2014); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 22 (1999) (addressing legal reasoning more generally); Stanley Fish, *Symposium: Is Religion Outdated (As a Constitutional Category)?: Where’s the Beef?*, 51 *SAN DIEGO L. REV.* 1037, 1043 (2014) (“cases involving free exercise exemptions and the danger of establishment continue to arise and must be dealt with, and there is no satisfactorily rational way of dealing with them”).

problems to existing precedents and principles that abstract from them, lawyers and judges can find solutions that fit with existing commitments. Without treating any of those commitments as foundational or fixed, but instead subjecting them to reexamination in light of new information or insights, they can reach conclusions that cohere with one another and therefore are backed by reasons. They can reach conclusions that are justified in that sense.⁵⁷ Because this process is influenced by cultural and political dynamics, including the activities of popular movements and political mobilizations, I argue that coherence methods in constitutional law have a social dimension.⁵⁸ Although the coherence method may seem familiar from common-law reasoning, a defense is productive today and perhaps even provocative, as Laura Underkuffler notices in her review.⁵⁹

In the book, I acknowledge some overlap between the skeptics' way of working on problems of religious freedom and my own.⁶⁰ Here, I want to acknowledge some *substantive* agreement as well. For example, I agree that free exercise and nonestablishment doctrines, as currently constituted, are unstable and difficult to defend on principled grounds. Moreover, the skeptics are right to say that religion-clause law is virtually impossible to rationalize using conventional legal categories. So the main difference between our positions is really methodological: the skeptics believe that giving reasons or justifications for religious freedom outcomes is impossible under modern conditions, whereas I chart a way forward.

An implication of my argument in this Part is that the concept of religion must often be expanded beyond its conventional meaning to accommodate the constitutional or statutory commitments that inform a particular doctrine. Another way of thinking about this implication, however, is that the conventional "religion" category ought not to carry special

⁵⁷ I distinguish between problems of justification, which I argue can be resolved, and problems of epistemology or ontology, which I bracket.

⁵⁸ Cf. Frederick Mark Gedicks, *Rule of Law and Socially Constructed Reasons: Marriage Equality and Religious Accommodation*

5 J.L. RELIGION & ST. (forthcoming, 2017), <https://ssrn.com/abstract=2915601>.

⁵⁹ Underkuffler, *supra* note 12, at 1.

⁶⁰ See, e.g., TEBBE, *supra* note 11, at 7–8.

significance in legal discourse. The next Part pursues that suspicion.

II. Religion's Specialness

Arguments that religion ought not to receive special constitutional consideration, nor be saddled with special burdens, have become familiar in the legal literature, even if they remain unconventional.⁶¹ Their key insight, for my purposes here, is that whatever the principles driving First Amendment law may be, it is difficult to see how they support treating religion differently from all nonreligious beliefs and practices.⁶² If our conception of the First Amendment is not formalistic, then its scope should track the provision's underlying rationales. If those rationales are not explicitly theological, as they cannot be in a constitutional democracy, then they will protect ideologies and identifications that extend beyond religion itself.

For example, consider the rule against government discrimination on the basis of faith or sect. Any plausible commitment driving that rule must apply beyond the conventional understanding of "religion" to include, say, nonbelievers and freethinkers who are targeted because of their beliefs. In much the same way, other areas of First Amendment law ought to protect—or burden—categories of citizens who fall outside the commonplace understanding of what it means to be religious.

There is an equality principle at work here: government action that treats religious and nonreligious actors differently can effect unfairness when those actors are similarly situated with respect to the relevant public values. So the argument has a place in work on religious freedom and equality law, even though it is somewhat orthogonal to the conflict between religion and civil rights that forms the subject matter of *Religious Freedom in an Egalitarian Age*.

⁶¹ See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126 (2007); BRIAN LEITER, WHY TOLERATE RELIGION? 4 (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012).

⁶² See Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 485 (2017) (acknowledging the argument that free exercise is under or over-inclusive with respect to any of the values that drive the doctrine, but arguing that this is true of all constitutional rights).

In the book, I simply assumed that critiques of the specialness of religion were correct, wholly or in large part, and I sought solutions that did not treat religion differently.⁶³ That was appropriate, given the focus on religious freedom and equality law. But now several of this symposium's contributors are questioning the assumption that religion ought not to draw special constitutional concern, and they are asking me to support that assumption with arguments.

A. In Political Theory

One of these contributors is Andrew Koppelman, who focuses his review on the question of religion's specialness.⁶⁴ Koppelman has distinguished himself as one of the leading defenders of religion's special place in constitutional law.⁶⁵ Others have tried to support that view either by simply pointing to the text of the Constitution, which uses the term religion,⁶⁶ or by making theological arguments that are unlikely to satisfy secular citizens.⁶⁷ By contrast, Koppelman has articulated a sophisticated theory that aims to reconcile religion's special place in the text with commitments of liberal constitutionalism.⁶⁸

Koppelman's argument is that religion provides a reasonable proxy for the beliefs and practices that American law

⁶³ See, e.g., TEBBE, *supra* note 11, at 4–5, 73, 86.

⁶⁴ Koppelman, *supra* note 12, at 1.

⁶⁵ See ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 123 (2013).

⁶⁶ See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 189 (2012) (rejecting the government's view that the ministerial exception could be adjudicated under the more general freedom of association doctrine, calling that view "remarkable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."); see also Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 16 (making the textual argument in a more sophisticated way).

⁶⁷ For theological arguments supporting special constitutional solicitude for religion, see, e.g., KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW (2015); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996); see also Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 126, 129 (2005) (asking whether a nonreligious ground is available for human rights, including freedom of religion); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1053 (2014) (arguing that religious liberty can only sensibly be defended on religious grounds).

⁶⁸ See KOPPELMAN, *supra* note 65, at 123 (arguing that religion is an appropriate legal proxy for a distinctive set of secular goods); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 73 (2013).

prizes.⁶⁹ While it may be true that any one of the goods that religion generates can also be delivered by nonreligious beliefs and practices, the entire set of goods is only associated with religion, on his view. Moreover, and I think more important for his argument, Koppelman maintains that the category of religion is a recognizable social phenomenon and therefore administrable by legal actors.⁷⁰ Workability provides a reason to retain the category of religion, rather than trying to pursue the associated goods directly.⁷¹

Relatedly, Koppelman argues that it may be impossible to directly implement the values that undergird religious freedom law because some of them are too vague.⁷² He analogizes to traffic safety—government cannot directly implement the conviction that everyone should drive safely, so instead it enforces the rule that no one can drive without passing a driving test.⁷³ Some imprecision results, but that is unavoidable.⁷⁴ Similarly, using religion as a legal category introduces inaccuracy with respect to any single constitutional value that animates the doctrine, but that is an unavoidable feature of legal administration.⁷⁵

Against that background, what stands out in Koppelman's review of *Religious Freedom in an Egalitarian Age* is that he offers no reasons why law must protect religion alone, without also recognizing profound secular commitments. Putting together his review and other recent writings, I have come to the conclusion that Koppelman does not in fact believe that religion ought to receive special constitutional solicitude, in one specific sense. He now acknowledges that no justification for religious

⁶⁹ Koppelman, *supra* note 68, at 77–78.

⁷⁰ Koppelman, *supra* note 17, at 1082.

⁷¹ *Cf.* Flanders, *supra* note 12, at 8 (“I take it that it is not crazy to think the promotion of religious belief itself may be a good. In fact, far from thinking this is not crazy, I tend to think that religious is itself a unique human good, and that religious organization insofar as they are good at protecting and promoting this good kind of deserve an extra kind of associational freedom.”).

⁷² Koppelman, *supra* note 68, at 77–78.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 77. Christopher Lund makes a similar argument, namely that law has to rely on categories that are administrable and socially recognizable. Lund, *supra* note 62, at 515.

freedom law applies solely to religion, and he accepts that categories of nonreligious conviction and conduct can and should be protected alongside religion.⁷⁶ He even argues that constitutional values should be protected directly, without relying on religion or any other proxy, wherever that is possible.⁷⁷ Koppelman's clarification of these positions counts as a major development in the literature.

His argument might have been difficult to perceive in earlier writings because he focused on combatting the extreme view that religion ought to be replaced with some other concept in constitutional law. Koppelman did specifically consider conscience as a candidate for protection, but only as a substitute for the category of religion.⁷⁸ But considering conscience as a *supplement* for religion, rather than a *substitute*, dissolves Koppelman's objection.⁷⁹ Lawyers and judges can administer that category at least as easily as the term religion, and they are sophisticated enough to handle the two concepts instead of just one.⁸⁰

Actually, constitutional actors can handle more than two categories; religion and conscience can appear on a list of protected liberties. In fact, modern constitutions and international instruments regularly protect freedom of belief and practice not only as to religion, but also as to thought, opinion, and culture—in short, comparable forms of identification and instantiation.⁸¹ I will return to the point below, where I will

⁷⁶ See also Lund, *supra* note 62, at 504 (“[f]reedom of moral conscience, it turns out, serves many of the same values served by freedom of religion”).

⁷⁷ Koppelman, *supra* note 17, at 1082.

⁷⁸ Koppelman, *supra* note 12, at 2 (“American legal theorists have proposed a lot of substitutes for ‘religion.’ Conscience is probably the most popular.”).

⁷⁹ Koppelman, *supra* note 17, at 1082 (“I never have said that religion is the *only* legitimate basis for accommodation, nor that conscience, as such, should never be accommodated.”); see also Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 L. THEORY 215, 240 (2009).

⁸⁰ Lund seems more skeptical about whether conscience is a workable legal category but he acknowledges that it is a “task worth pursuing.” Lund, *supra* note 62, at 509–10. See also Brownstein, *supra* note 12, at 30 (“I ... am uncertain as to how courts can identify what counts as a secular profound commitment that is comparable to religion. I am inclined to agree with Andrew Koppelman's argument in his paper in this symposium and elsewhere that there is simply no way to identify, protect and cabin the class of all deeply valued human concerns.”).

⁸¹ See, e.g., Constitution of the Republic of South Africa, §15(1) (1996) (“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”); *id.* at §31 (“1.

defend more fully against the objection that protecting other beliefs and practices alongside religion is not administrable.⁸²

A disaggregated approach to the First Amendment can work, not only by varying the definition of religion, as I argued in the last Part, but also by including other categories of protection such as conscience or culture. Under that approach, constitutional actors first identify the values informing a particular First Amendment doctrine, and then they allow those values to determine the scope of protection. In virtually every scenario, justifications for free exercise and nonestablishment apply beyond religion—that is the central point of the literature questioning the specialness of religion.

Consider again a simple example: if the objective of the Free Exercise Clause’s protection against religious discrimination is to ban government differentiation that constitutes practitioners as subordinate, then that protection should extend to atheists and agnostics, even if they do not count as religious. Or consider another strain of free exercise law, the one that accommodates people who have sincere religious objections to general laws, so long as the government has no compelling need to apply the law to them. If that doctrine is designed to protect individual autonomy around matters of deep

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community: a. to enjoy their culture, practise their religion and use their language; and b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society” but also providing that the right “may not be exercised in a manner inconsistent with any provision of the Bill of Rights”; *id.* at §9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”); *see also id.* at §10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”); *id.* at §16 (“Everyone has the right to freedom of expression. . . .”); *id.* at §18 (“Everyone has the right to freedom of association.”).

For a seminal provision of international human rights law, see G.A. Res. 217 (XVIII) A, Universal Declaration of Human Rights Art. 18 (December 10, 1948) (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”); *id.* at (II) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . .”).

⁸² *See infra* Part III.B.

commitment and identification, then that rule should also accommodate people with profound nonreligious objections. Parity is demanded by the underlying values themselves, as well as by fairness. Of course, that argument invites numerous objections that need to be answered. But the point here is just to illustrate that many free exercise values suggest parallel protection for nonreligious commitments. Each rationale must be considered independently.

That disaggregated, multivalent approach is perfectly compatible with retaining the concept of religion in constitutional law. Christopher Lund rightly observes that legal actors use socially recognizable categories to protect and pursue basic commitments.⁸³ Lawmakers and courts use familiar concepts partly for rule-of-law reasons, because administering unfamiliar classes would invite arbitrariness and bias. And they use them partly to promote intelligibility and administrability. I myself hesitate to agree with those who argue that the term religion cannot be excised from American law without injustice or inaccuracy.⁸⁴ But regardless, it need not be. Religion is an enduring feature of American constitutional law, and it should be retained partly for that reason, but that does not mean it should enjoy any special status relative to basic First Amendment values.

Some might worry that retaining the category of religion in civil rights law—using it at all—will systematically disfavor nonbelievers or favor mainstream religious practitioners.⁸⁵ But

⁸³ Lund, *supra* note 62, at 515 (“In the context of a written Constitution, the way to protect all deep and valuable human commitments is by naming certain specific deep and valuable commitments. There is no other way. We start with the ones we know, and we keep an open mind about the rest. Religion is not the only deep and valuable human commitment. But it is one of them, and that is enough.”).

⁸⁴ Lund suggests that religion is a necessary category of American constitutional law; he believes that some rights coverage would be lost if courts were to stop using it. *See, e.g.*, Lund, *supra* note 62, at 506 (“disastrous consequences are waiting if judges start thinking about religion *strictly* in terms of [conscience understood as] moral duty”) (emphasis added); *id.* at 511 (“Protections for moral conscience will in no way remove the needs for protections of religion or the reasons why we have those protections.”). *Cf.* Nelson Tebbe, *The End of Religious Freedom: What Is At Stake?*, 41 PEPP. L. REV. 963 (2014) (solicited response to Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903 (2014)).

⁸⁵ *See, e.g.*, SULLIVAN, *supra* note 30, at 8 (“Forsaking religious freedom as a legally enforced right might entail greater equality among personas and greater clarity and self-determination for religious individuals and communities. Such a change would end

the solution to that problem is to police the unfairness by protecting nonreligious beliefs and practices alongside religious ones, where demanded by constitutional commitments, and by disallowing bias against religious minorities that itself offends basic principles. When constitutional protection is keyed to values that do not single out religion, continuing to protect religion as such does not pose a danger of unfairness, because no legal consequences turn on whether a belief or practice is framed as religious.⁸⁶

Koppelman is right that some critics of the specialness of religion wish to supplant that category altogether.⁸⁷ But that is not the only way to argue that religion is not special. It is also conceptually coherent to contend that, for any given area of First Amendment law, other human endeavors will be protected or burdened alongside religion.⁸⁸

Again, this is the way that religious freedom is framed in most international human rights instruments, and in many newer constitutions, as Micah Schwartzman has pointed out.⁸⁹ So the South African constitution, which resembles international law in this respect, provides that “[e]veryone has the freedom of conscience, religion, thought, belief, and opinion.”⁹⁰ It also protects culture, speech, association, and dignity. Those formulations seem sensible. I suspect that if Koppelman were

discrimination against those who do not self-identify as religious or whose religion is disfavored.”).

⁸⁶ Laborde is sometimes ambiguous about whether she would retain the category of religion, probably because she is not focused on questions of legal administration. See LABORDE, *supra* note 26, at 32 (“[B]ecause freedom of religion protects a generic capacity, it can be adequately expressed through basic liberal freedoms such as freedom of thought, speech, and association: it need not be thought of as a distinctive interpretive category. Whatever rights religious citizens have, they have in virtue of a feature that is not exclusive to religion.”).

⁸⁷ This is one way to read Brian Leiter. See LEITER, *supra* note 61, at 27–28.

⁸⁸ At one point, Koppelman argues that critics of religion’s special status in constitutional law are often nonbelievers. Koppelman, *supra* note 68, at 79 (“Their central concern—an entirely legitimate concern, given the vicious prejudices they face—has rather become protecting themselves from discrimination.”). Many of the leading critics are not themselves nonbelievers, but even if they were that fact would be irrelevant to the substance of their arguments. Moreover, the critique of religion’s special status has taken on an importance in the literature that cannot be explained by the personal motivations of any individual theorists.

⁸⁹ Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099–1100 (2014).

⁹⁰ See *supra* note 81.

crafting a new constitutional today, he likely would include some such list. My conclusion is that even the leading defenders of religion's specialness are moving away from the argument that comparable categories should not be protected alongside religion.⁹¹

B. In Law

When it comes to legal authority and judicial administration, it becomes harder to say that religion ought not to receive special constitutional consideration. This is the gravamen of Koppelman's response to me, and of Brownstein's. Both argue that whatever the requirements of political morality, religion does in fact occupy a unique place in existing constitutional and statutory law.⁹² And that is a real problem for a coherence approach, which wants to hold *both* that religion is seldom special *and* that solutions must fit together with accepted judgments.⁹³

My response is twofold. First, coherence methodology takes into account not just existing statutes and judicial

⁹¹ In recent work, serious political theorists seem to be coming to similar conclusions. Alan Patten, for instance, has suggested that "religious commitments are part of a *class* of special commitments that share some feature in common—e.g. they are connected with a claim to normative authority, they are important for personal identity, etc.—and that can be contrasted with 'ordinary' commitments that do not share the relevant feature . . ." Alan Patten, *Religious Exemptions and Fairness*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 212–13 (Cécile Laborde & Aurélie Bardon, eds., 2017) (emphasis original). With respect to any particular value, on this approach, religion is unlikely to be special in the sense that it is unique. This is true even if we continue to call religion and all its supplements "special." Patten says something a little different in another recent paper, where he suggests that religion could be replaced by a larger category that deserves special solicitude but subsumes religion. Alan Patten, *The Normative Logic of Religious Liberty*, 25 J. OF POL. PHIL. 129, 134–35 (2016). But he ends up suggesting that religion could be protected along with other commitments: "There is no tension involved in maintaining that [religion] should have such significance and in holding that certain non-religious kinds of commitment should also be treated as having special significance." *Id.*, at 135.

⁹² Laborde makes a similar point in her review of the book. Cécile Laborde, *Religious Freedom, US Law, and Liberal Political Theory*, J. AM. ACAD. RELIG. (forthcoming, 2018) ("The problem for Tebbe—and other US liberal legal constitutionalists—is that the constitutional system they seek to give 'coherence' to recognizes religious freedom as a special freedom; and yet their political theory is one that implicitly denies such status.").

⁹³ Koppelman, *supra* note 12, at 2 ("I will focus on a deep tension between Tebbe's devotion to reflective equilibrium and his conviction, stated at many points in the book, that 'it is no longer clear that constitutional law should treat religious belief as special, as compared to nonreligious beliefs or nonbelief.'").

authorities, but also constitutional provisions that may articulate commitments on a higher level of generality. It assimilates legal principles that abstract from, and account for, particular judgments embodied in statutes and cases. One such principle is *fairness to others*—the conviction that the government should not accommodate religious actors alone when others would like to engage in the same activity for comparably valuable reasons.⁹⁴ That principle can be appreciated from the government’s perspective as well. If the values animating a particular exemption point beyond religion, then limiting the provision to religious actors generates unfairness. Binding Establishment Clause doctrine includes a rule against that sort of unfairness.

Second, legal authorities do not actually enforce religion’s specialness with consistency or without contradiction. Both Koppelman and Brownstein argue that existing statutory and constitutional provisions regularly single out religious actors for accommodation.⁹⁵ That is true. However, the law is complicated and it also cuts against religion’s specialness.

In cases concerning conscientious objection to the draft, for example, the Court interpreted a congressional statute that exempted only those who held a “religious” objection to war in all forms. Interpreting that provision, the Justices ordered accommodations for two draftees who were arguably nonbelievers. But there was a difficulty with its reasoning, namely that the Court based its holding on a dubious interpretation of the statute. After all, Congress had limited the exemption to draftees whose pacifism was grounded in “religious training and belief,” and it had specifically excluded “essentially political, sociological, or philosophical views or a merely personal moral code.”⁹⁶

Justice Harlan stated the obvious in his concurrence in *Welsh v. United States*—namely, that the Justices’ reading of the

⁹⁴ See TEBBE, *supra* note 11, at 71–80 (defending the principle of fairness to others).

⁹⁵ Sometimes Koppelman goes further, as when he says that “American law consistently treats religion as special.” Koppelman, *supra* note 68, at 73 (emphasis original).

⁹⁶ *United States v. Seeger*, 380 U.S. 163, 165 (1965) (internal quotation marks omitted) (quoting 50 U.S.C. § 456(j)). Congress defined religion as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.” *Id.*

statute was unwarranted. He nevertheless agreed that Welsh should win conscientious objector status, despite his arguable nonbelief, but Harlan felt that the result was grounded in the Establishment Clause, specifically its prohibition of “religious gerrymanders.”⁹⁷ A statute cannot exclude nonbelievers who otherwise fall within its “radius.” In *Welsh*, the statute’s “radius” included everyone who conscientiously opposed war in general, and therefore it could not exclude nonbelievers without offending the First Amendment.⁹⁸ Today, that has become the mainstream reading of *Seeger* and *Welsh*—they establish a constitutional rule of evenhandedness in accommodations.⁹⁹

Texas Monthly imparted a similar lesson, albeit less clearly.¹⁰⁰ There, the Court invalidated a state sales tax exemption for periodicals published or distributed by a religious faith. Justice Brennan, writing for a plurality, explained that the class of exempted organizations or activities should fit the state’s purpose. If Texas’s aim was to “promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life,” then it had to include all publications that furthered that purpose, not just religious ones.¹⁰¹ To support that argument, Justice Brennan quoted the “religious gerrymanders” passage from Justice Harlan’s concurrence in *Welsh*.¹⁰² His conclusion was less clear, however, because he also reasoned that the Texas statute actually had a religious purpose and endorsed religion.¹⁰³ Still, the Court did strike down the statute because it impermissibly limited the exemption to religious actors, when nonreligious citizens would have fallen within the scope of any conceivable secular purpose.

⁹⁷ *Welsh v. United States*, 398 U.S. 333, 356–57 (1970) (Harlan, J., concurring).

⁹⁸ *Id.* at 357.

⁹⁹ See, e.g., 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 61–62 (2006) (“Everyone agrees that the Court strained the [statute’s] language considerably in *Seeger*. Scholars widely assumed that the justices did so because they would have regarded an explicit line between objectors who believe in a traditional God and other religious objectors as unconstitutional.”); *Id.* at 63 (“In *Welsh*, . . . [a]s with *Seeger*, powerful doubts among the justices about a line between religious and nonreligious objectors almost certainly explained why they so deftly dispatched Congress’s attempt to draw just that line.”).

¹⁰⁰ See generally *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

¹⁰¹ *Id.* at 16.

¹⁰² *Id.* at 17.

¹⁰³ *Id.*

Finally, the Court in *Estate of Thornton v. Caldor* struck down a Connecticut statute designed to help employees who observed a Sabbath. It held that the statute, which gave workers an absolute right to avoid work on their Sabbath, violated the Establishment Clause. Although the majority opinion focused on the harm to third parties—the employer and other employees—Justice O'Connor wrote separately to note the unfairness to employees who might also like to choose their day off for reasons that were sincere and serious, including religious beliefs that did not happen to include a day of rest. She concluded that the statute violated the Establishment Clause in part because it exempted certain religious workers “without according similar accommodation to ethical and religious beliefs and practices of other private employees.”¹⁰⁴

Admittedly, the Court has also said that religious accommodations “need not ‘come packaged with benefits to secular entities.’”¹⁰⁵ And many statutes, both federal and state, contain exemptions from general laws that apply only to religious actors. Brownstein and Koppelman cite these accommodations as evidence for their positive claim that religion is in fact special in American law, and they argue that a coherence approach will struggle to fit them together with a normative conviction that religion ought not to be a matter of special legal concern.

But much of the time religion has no secular equivalent—and in those situations, laws accommodate religious actors without unfairness. Consider the federal statute that carves out an exemption from the drug laws for Native Americans who use peyote in religious rituals.¹⁰⁶ Because peyote is unpleasant to use, there are few if any nonreligious citizens who have a comparably strong interest in that practice.¹⁰⁷ Or think of the

¹⁰⁴ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (O'Connor, J., concurring).

¹⁰⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

¹⁰⁶ 42 U.S.C. §1996a (2000).

¹⁰⁷ H.R. Rep. No. 103-675, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2404, 2409 (“There is virtually no illegal trafficking in peyote—Drug Enforcement Administration (DEA) data indicates that between 1980 and 1987, only 19.4 pounds of peyote was confiscated, while during the same period the DEA seized over 15 million pounds of marijuana.”); *see also* *Employment Division v. Smith*, 494 U.S. 872, 917–18 (1990) (Blackmun, J., dissenting) (distinguishing between marijuana and peyote).

exemption that allows military personnel to wear religious apparel despite uniform rules.¹⁰⁸ Although many members of the armed forces would like to be able to express themselves through clothing and jewelry, it is unlikely that their interests compare to those of orthodox Jews or Sikhs who feel compelled to observe religious doctrines on dress. At the very least, singling out religious military members can be done without inordinate unfairness. And something similar is true for the vast majority of “retail” religious exemptions (i.e., those contained in specific statutes).

Much the same may also be said for religious freedom statutes that are “wholesale,” meaning they apply across a range of contexts. Most often, they single out religious actors without working unfairness to others—and where they do operate unfairly, courts find ways to widen their protections. For example, the *Cutter* Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁰⁹ That law provides that government cannot substantially burden religious exercise (in prisons and land use) unless it can show that its policy is narrowly tailored to pursue a compelling interest.¹¹⁰ RLUIPA was challenged on Establishment Clause grounds precisely for the kind of unfairness I am considering here—and the lower court actually did strike it down for favoring religious inmates over others. When the Supreme Court reversed, it clarified that there was no reason to think that religious inmates were being preferred over nonreligious ones. It also observed that it was confronting a facial challenge to the statute; specific unfairness to a similarly-situated nonreligious inmate, should it arise, could be addressed in an as-applied challenge.¹¹¹

And in fact, where RLUIPA does risk special solicitude for religion, courts have crafted workarounds. For instance, the Seventh Circuit ruled in favor of a nonbelieving inmate, holding that he could not be prohibited from forming a weekly meeting group for atheists without violating the Establishment Clause.¹¹²

¹⁰⁸ 10 U.S.C. § 774.

¹⁰⁹ 42 U.S.C. §§ 2000cc–2000cc-5.

¹¹⁰ 42 U.S.C. §§ 2000cc–1.

¹¹¹ *Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005).

¹¹² *Kaufman v. McCaughtry*, 419 F.3d 678, 683–84 (7th Cir. 2005).

In an opinion by Judge Wood, the court reasoned that it would have been permissible to favor religious group meetings over ordinary meetings by social groups. To distinguish that hypothetical, Judge Wood found that atheism was a religion, and therefore that granting weekly meetings to traditional adherents but not to nonbelievers violated nonestablishment.¹¹³

So, in sum, unique care for religious interests is not as easy to square with existing practice as Brownstein and Koppelman suggest. Although judicial and legislative precedents are complex and even contradictory, they sometimes support the conviction that religious beliefs and practices should not be favored. They even support a principle of fairness to others, namely those who hold comprehensive commitments of conscience not grounded in religion.¹¹⁴

Examples cited by Brownstein and Koppelman tend to feature religion-specific accommodations without sensitivity to whether they are working unfairness to comparable nonreligious commitments. Brownstein, for his part, spotlights RFRA and RLUIPA as key examples of religion's specialness in American law.¹¹⁵ But, as I have just noted, the Supreme Court has clarified that where those laws do work unfairness to others, they may have to be modified. And lower courts like the one in *Kaufman* have used creative techniques, such as expanding the definition of the term "religion," to avoid unfairness that would result from special exemptions for religious actors under such laws.

Brownstein also offers the example of Section 702 of Title VII, which allows religious organizations to hire only members of the faith, despite the normal prohibition on religious discrimination in hiring.¹¹⁶ That law appears to permit religious employers (and only religious employers) to do something that nonreligious ones might like to do as well—namely, discriminate

¹¹³ *Id.*

¹¹⁴ See TEBBE, *supra* note 11, at 71–80 (defending the principle of fairness to others).

¹¹⁵ Brownstein, *supra* note 12, at 30 ("There are hundreds of religious accommodations in local, state and federal law, the overwhelming majority of which apply on their face to religion alone. Most notably, in addition the First Amendment which speaks of religion, not conscience, there is the federal Religious Freedom Restoration Act (RFRA), numerous state RFRAs, the Religious Land Use and Institutionalized Persons Act (RLUIPA) . . .").

¹¹⁶ *Id.* (listing as an example of special treatment of religion "the exemption in Title VII for religious organizations" and citing 42 U.S.C. § 2000e-1(a)).

on the basis of religion. However, the exemption could be understood to ensure evenhandedness for religious groups, not to frustrate it. After all, nonreligious organizations already have the ability to exclude workers who do not share their ideological preferences—say, for environmentalism or against abortion. Section 702 simply puts religious organizations on the same footing, on this view.¹¹⁷ (Remember that Section 702 does not accommodate all religious discrimination; it only permits a preference for people of the same faith.¹¹⁸) If that reading is right, then this example actually cuts *against* special solicitude for religion.

Koppelman, for his part, cites as his main example the “ministerial exception,” which is a constitutional doctrine that allows religious congregations to hire and fire clergy without regard to employment discrimination laws.¹¹⁹ He believes that this doctrine evidences the specialness of religion. But there is a nonreligious equivalent to the ministerial exception, namely freedom of association. Under that rule, any voluntary organization can win protection from civil rights laws if it can show that it needs that latitude in order to further its expressive mission. For example, a Boy Scouts troop may fire a scoutmaster who comes out as gay, if that is required by its moral code.¹²⁰ I have more to say about that doctrine below.¹²¹ But for now, my point is simply that religious and nonreligious organizations

¹¹⁷ I argue for this interpretation in the book. TEBBE, *supra* note 11, at 155 (“[Secular c]lose associations should have the ability to select employees who share their basic commitments, meaning environmental groups can hire only environmentalists, even outside policy roles. And Section 702 allows religious groups similar leeway by letting them choose workers of the same faith.”).

¹¹⁸ Section 702 only allows religious employers to prefer co-religionists; it does not allow them to engage in other forms of religious discrimination. It is conceivable that an atheist employer might refuse to hire all religious employees. But even if Section 702 applied to atheists, it would not allow that exclusion—it only permits an employer to prefer members of the same sect. So an atheist employer would be able to prefer atheists over all believers and other types of secular applicants, such as agnostics, but it could not target only religious employees for exclusion. Another reason for that conclusion is that religious people may be nonbelievers—for instance, observant Jews can be atheists, as can practicing Theravada Buddhists.

¹¹⁹ Koppelman, *supra* note 12, at 3. The ministerial exemption may relieve congregations from other laws as well. See Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1201–05 (2014).

¹²⁰ *Boy Scouts of America v. Dale*, 530 U.S. 640, 651 (2000).

¹²¹ See *infra* Part III.D.

should be seen to have similar degree of freedom to hire and fire leaders in ways that otherwise would be prevented by civil rights laws. And to the degree that the Speech and Free Exercise Clauses offer divergent protection for associations, they should be rethought in light of equality guarantees.

Koppelman also objects that my approach presents a “big problem,” namely that it would require courts to inquire into theological questions in violation of the common wisdom that judges should not pronounce on questions of religious truth.¹²² I think his concern is understandable but overstated.

First of all, some associational interests should prevail regardless of the content of their beliefs. In those cases, Koppelman’s problem simply does not arise. For example, both secular and sacred organizations should have control over hiring leaders irrespective of whether their missions demand a particular form of discrimination—if the organizations are intimate enough to qualify as close associations.¹²³ Democratic governments must leave some room for civil society to shape the wills and worldviews of citizens, including in illiberal ways.¹²⁴ Moreover, it would be inappropriate for government to limit this protection to demands that are clearly dictated by the doctrine of such organizations. Close associations require latitude to discover and debate ideas—without losing protection if their commitments are less than fully formed.¹²⁵ So my argument there does not require courts to determine the content of anyone’s beliefs.

¹²² Koppelman, *supra* note 12, at 3–4; *see also* Brownstein, *supra* note 12, at 39 (“[S]ome discriminatory decisions by religious values organizations may be determined to be required by the organization’s mission while discriminatory decisions by other religious organizations may be determined to be inadequately connected to the organization’s mission. A legal framework that results in certain religious associations being permitted to discriminate while other, arguably similar, associations are denied such exemptions undermines our commitment to religious neutrality.”)

¹²³ TEBBE, *supra* note 11, at 80–98.

¹²⁴ Here I follow Seana Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. Rev.* 865, 865–866 (2005), and Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY: HOBBY LOBBY AND THE NEW LAW OF RELIGION IN AMERICA* 77, 94 (Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds. 2016).

¹²⁵ *See* TEBBE, *supra* note 11, at 84. I identify factors that constitutional actors can use to identify close associations, including “size, bureaucracy, selectivity, exclusivity, commercialism, and orientation to the expression or implementation of ideas or values.” *Id.*

Second, groups that are larger and looser should still enjoy some deference on questions of mission. Associations that propagate ideas might need some protection from state control over employment of policy leaders, particularly where that control is necessary for the group to espouse unorthodox ideas. Even bureaucratic institutions may require this latitude. But these “values organizations” can and should be required to show that employment exclusion is required by their missions in order to qualify for exemptions from antidiscrimination laws.¹²⁶ That requirement follows from the primary rationale for protecting such organizations from civil rights law in the first place, namely allowing them to promote unorthodox ideas in democratic discourse. Such groups do not require as much latitude to choose their leaders as close associations do—they should be required to show that a particular form of exclusion is required by their mission. Because these groups are fully formed and rationalized, their missions will be well developed and discernable. Even so, however, I support the current rule that courts should defer to the organizations on the question of what their beliefs really are, and what forms of exclusion they require for faithful elaboration and expression.¹²⁷

Traditionally, courts have been reluctant to interpret theologies for two principal reasons: because judges lack *competence* on such matters and because they must guarantee government *neutrality* with respect to religions.¹²⁸ But here, it seems unlikely that courts will lack the competence to ascertain the missions or values of organizations; it also seems unlikely that they will risk any unfairness by doing so.¹²⁹ Judges must

¹²⁶ *Id.* at 85.

¹²⁷ *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”)

¹²⁸ See Richard W. Garnett, *A Hands-Off Approach To Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 857 (2009) (describing the incompetence concern); *id.* at 858 (describing the government neutrality and noninterference rationale and citing Koppelman). See also, e.g., *Kedroff v. Saint Nicholas Church*, 344 U.S. 94, 125 (1952) (“under our Constitution it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion”).

¹²⁹ Cf. LABORDE, *supra* note 26, at 127 (arguing that some theological claims can be assessed by courts, and noting by way of example that “[i]f a religious association asserts

simply ask representatives of the group what its commitments require.¹³⁰ Any group that qualifies as a values organization will already have articulated those commitments.

Even if I am wrong about that, however—and Koppelman *does* have a point when he says that courts properly refuse to adjudicate theological questions¹³¹—the conclusion need not be that religious associations are treated differently in American law. First, it is far from clear that government officials have any greater competence to discern the moral convictions of secular organizations, especially on comparably profound questions like complicity with abortion or contraception.¹³² As Laborde argues, the “competence” rationale for associational freedom extends to certain nonreligious interests as well.¹³³ Perhaps for that reason,

in its defense that a minister violated a tenet against adultery, this is an objectively testable religious justification.”)

¹³⁰ Moreover, it is hard to understand why either danger would be categorically different for moral beliefs than for religious ones. Both competence and non-neutrality would seem to be concerns with respect to associations organized around moral commitments as well. Yet courts’ ability to discern a group’s moral mission (in a deferential way) does not seem to be terribly controversial.

¹³¹ *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778–79 (2014) (refusing to question Hobby Lobby’s contention that providing contraception coverage to employees would substantially burden its leaders religious beliefs.)

¹³² Justice Alito, writing for the Court in *Hobby Lobby*, seemed to indicate in dicta that the Court is prohibited from second-guessing not just religious commitments of citizens, but moral and philosophical ones as well:

The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion *and moral philosophy*, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious *and philosophical* question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. *See, e.g.*, [*Employment Div. v. Smith*, 494 U.S. 872, 887 (1990)] (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim”); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969).

Id. at 2778 (emphasis added).

¹³³ LABORDE, *supra* note 26, at 114; *id.* at 129 (“Religious associations, then, have competence-interests which justify that courts show judicial deference in their adjudication of ministerial employment disputes. But are they the only associations that have such interests, and the employment discretion that they justify? They are not.”).

current law already requires courts to defer to expressive associations when it comes to identifying their message.¹³⁴ Second, government failure of neutrality can raise the same danger of official favoritism for nonreligious groups, at least when they are expressing commitments that are integrated with members' ideology and identity.

As a coda to this Part, let me address Koppelman's observation that "Tebbe seems to be drawn to liberal neutrality," which he defines as the "claim[] that state action should never be justified on the basis of any contested conception of the good."¹³⁵ Actually, my view is somewhat different. A government could hardly operate under such a strict conception of neutrality. Rather, my position is closer to the conviction that government must guarantee full and equal citizenship for everyone in the polity. The guarantee of full and equal membership entails government evenhandedness, but it is limited to situations where bias would denigrate citizenship status or interfere with basic freedoms. In the next Part, I sketch that approach.

III. From Method to Theory

Constitutional actors need a method for resolving pitched conflicts between religious freedom and equality law. Serious thinkers on both sides are arguing that no such method exists, or can exist. Their reasons for this diagnosis vary. But their

Laborde uses academic decisions about tenure to exemplify the competence limitations on courts with regard to nonreligious groups. *Id.*

That the state may be incompetent to assess some nonreligious commitments is not addressed in Lupu and Tuttle's strongly-worded rejection of the claim that the ministerial exception may be an instance of a broader right of associational freedom. *See* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1304–10 (2017). They argue that the ministerial exception is grounded exclusively in the concern about government competence to decide religious questions, that this is a place where "religion must have a distinctive meaning" in constitutional law, and that the shield against antidiscrimination law is "jurisdictional." *Id.* at 1306–07. But Lupu and Tuttle do not consider the possibility that government incompetence may extend to *certain* nonreligious commitments as well.

¹³⁴ *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000).

¹³⁵ Koppelman, *supra* note 12, at 2–3. *Cf.* Koppelman, *supra* note 17, at 1080 & n.6 (defining "neutralitarian liberals" as "liberals who claim that the law should be neutral among all contested conceptions of the good" and noting that "[Micah] Schwartzman is attracted to this position"). For an influential argument against liberal neutrality, *see* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000) ("I will defend government advancement of specific, perhaps contested, conceptions of the good").

conclusions are remarkably consistent—they maintain that disputes on these questions cannot be resolved with reasons.¹³⁶

In the book, I propose a coherence method for reaching solutions that are backed by reasons. No foundation undergirds this approach, which remains dynamic rather than static. Moreover, it accepts and even accents the reality that judgments on matters of religious freedom are often colored by interests and ideologies. Importantly, the method is not inherently conservative or atavistic. On the contrary, it is engineered to stimulate a search for justifications for views we might hold reflexively. In Part II of the book, I then infer principles for resolving conflicts at the intersection of free exercise and civil rights law. Four principles in particular seem to be doing much of the work in contemporary conversations: avoiding harm to others, fairness to others, freedom of association, and government nonendorsement.¹³⁷ In the third and final part, I deploy that method and those principles to suggest solutions to ground-level problems. Four areas of civil rights law have been most prominent, namely public accommodations, employment discrimination, public funding, and government officials.¹³⁸ Although my conclusions often match the intuitions of left-egalitarians, they do not invariably track them. And the fact that the method generates surprises is *some* evidence of its integrity. Importantly, even where my proposals are congenial to those on the left, they are undergirded by reasons that carry their own authority and that must be confronted by people who disagree.

Some contributors to this symposium are pushing me to move beyond *method* and to articulate a *theory* of religious freedom. I decided not to do that in the book because I wanted to

¹³⁶ See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1893, 1895 (2009); *id.* at 1906 (“[T]he various pronouncements of judges and scholars in this domain come to look like a thinly veiled exercise in *ipse dixit*.”). Policy prescriptions for addressing this situation differ. Some recommend leaving religious freedom questions to legislatures. See, e.g., STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 6, 68 (2001); POSNER, *supra* note 56, at x (“[T]he limitations of moral and constitutional theory provide a compelling argument for judicial self-restraint”). Roderick Hills would devolve questions about religious freedom to state and local governments. HILLS, *supra* note 56, at 3.

¹³⁷ TEBBE, *supra* note 11, at 49–114.

¹³⁸ *Id.* at 115–197.

stay focused on the intricate relationship between religious freedom and equality law. But in his review, Alan Brownstein is asking how the positions I take fit together into a framework for thinking about free exercise and nonestablishment—or even the First Amendment more generally.

In particular, Brownstein wonders how it is possible to hold these two commitments at the same time: 1) that religion ought not to enjoy special regard in constitutional law, and 2) that the Free Exercise Clause and the Establishment Clause ought to be vigorously enforced.¹³⁹ That is the question I address in this Part. Although I cannot articulate a full theory of religious freedom here, I can sketch the outlines of an account that both denies that religion is special and imposes serious constraints on government regulation and endorsement of religion, conscience, belief, thought, and opinion.

Before I explain that argument, let me highlight how much Brownstein and I share. First, we agree that religious actors should sometimes receive exemptions from general laws. Unlike some other egalitarians, I defend RFRA, which I think is important for the protection of religious minorities.¹⁴⁰ I also maintain that there should be a *constitutional* basis for religious exemptions (although strict scrutiny is too high a standard for considering such claims). Therefore, I reject the Court's suggestion in *Employment Division v. Smith* that incidental burdens on religion *never* present a constitutional difficulty.¹⁴¹ I

¹³⁹ Brownstein, *supra* note 12, at 15.

¹⁴⁰ Compare IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 228, 226–47 (2014) (noting “serious constitutional difficulties” with asking judges to the theological import of government regulation, as RFRA and RLUIPA do). My support for RFRA may intensify problems with the claim that religion should not be special in American law. However, I believe there are mechanisms for managing that tension, in particular a flexible definition of religion, supported above in Part I, and constitutional requirements of evenhandedness, discussed in Part II.

¹⁴¹ See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 731 (2005); cf. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1128 (1990) (proposing a test that is stronger than “toothless rationality review” but “recast[s] the ‘compelling interest’ test in a more realistic form”). In fact, even the *Smith* Court carves out exceptions to its main rule which provide a constitutional basis for religious exemptions. See Nelson Tebbe, *Smith in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2056–57 (2011). The Supreme Court's subsequent jurisprudence has provided further doctrinal mechanisms for religious exemptions. For example, the Court recognized the ministerial exemption, which provides a constitutional exemption from employment discrimination laws, even though those laws are neutral and generally applicable. Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,

also agree with Brownstein that the Establishment Clause provides a strong guarantee against government endorsement of religious commitments and purposive funding of religious activities.

More profoundly, Brownstein and I share a certain form of pluralism, specifically the view that no single rule or rubric can do all the conceptual and doctrinal work across the broad range of First Amendment issues—only variegated values can explain and justify outcomes in cases concerning free exercise, non-establishment, and freedom of expression.¹⁴² These are significant points of accord, and they make more interesting the differences between our positions. In short, Brownstein wants to know how someone who shares those commitments can also maintain that religious and nonreligious commitments can and should be protected and burdened concomitantly.

A. Full and Equal Membership

The religion clauses of the First Amendment work to ensure that everyone is able to exercise basic liberties, and that they face the government and each other on equal footing, without stratification or subordination. This is the core commitment of full and equal membership, a vision of political morality that is shared among many egalitarian theorists, albeit often in a vague sort of way.¹⁴³ Rather than a master concept, it

132 S.Ct. 694, 707 (2012) (attempting to distinguish *Smith* by saying that *Smith* “involved government regulation of only outward physical acts”).

¹⁴² Compare Alan Brownstein, *Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights*, 33 HARV. J.L. & PUB. POL’Y 925, 929 (2010) (“[R]eligion is a multidimensional constitutional interest which subsumes and implicates several independently recognized constitutional values.”), with Tebbe, *supra* note 16, at 1127–30 (describing and defending religion-clause pluralism). Brownstein and I are not alone in our pluralist orientation to religious freedom. See, e.g., MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 3 (2013) (“[T]he values which swirl around the conflicts of religious liberty are incompatible and incommensurable.”); 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 1 (2008) (“Neither free exercise nor nonestablishment is reducible to any single value; many values count.”); STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 2 (2009) (“[T]he religion clauses are supported by pluralistic foundations.”).

¹⁴³ I have suggested this approach in parts of previous works. See TEBBE, *supra* note 11, at 72–73; Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 649–50 (2013). For one recent articulation of full and equal citizenship in the context of religious freedom theory, see Jean L. Cohen, *Rethinking Political Secularism and the American*

is a theme or guide for constitutional actors who must manage the variegated commitments that animate First Amendment doctrines.

In brief, full membership means that everyone can exercise fundamental freedoms and basic human capacities. Those include the free exercise of religion, freedom of speech and association, and the formation of thought, belief, and opinion, among others. As Madison put it in the *Memorial and Remonstrance*, “[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”¹⁴⁴ This need not be just a matter of belief or opinion, but also conduct or action. For example, Madison asks “[w]ho does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”¹⁴⁵ Both freedom of belief and its manifestation in practice are basic.¹⁴⁶

Equal membership signifies protection against subordination of any class of citizens, including those defined by religion. To draw on Madison once more, the Virginia bill to support clergy offended equality because it “degrades from the

Model of Constitutional Dualism, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 115 (Jean L. Cohen & Cécile Laborde, eds., 2016) (“The dualist constitutional framework thus helped constitute the political principles central to a civil-republican, liberal-democratic polity: equal civil standing and rights for every citizen, personal and political freedom, and the pursuit of public purposes by the political community as a whole supported and watched over by a diverse yet vigilant citizenry.”).

¹⁴⁴ JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 1, 15 (n.p. 1785), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

¹⁴⁵ *Id.* at para. 3.

¹⁴⁶ I offer Madison here not because of his authority for originalist interpretation, but just as a persuasive guide to central constitutional commitments. *Cf.* EISGRUBER & SAGER, *supra* note 61, at 52–53 (insisting “on a broad understanding of constitutional liberty generally . . . all persons—whether engaged in religiously inspired enterprises or not—enjoy rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish”). My approach differs only insofar as it allows for a separately defined freedom of religion that nevertheless enjoys no priority over other constitutional rights. As Madison puts it, “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience is held by the same tenure with all our other rights.” MADISON, *supra* note 133, at para. 15 (internal quotation marks omitted).

equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”¹⁴⁷ In another passage, Madison said “the Bill violates that equality which ought to be the basis of every law.”¹⁴⁸ Equal membership is vulnerable when the government imposes special burdens on a sect, and it can also be violated when the government grants “extraordinary privileges” to a particular denomination.¹⁴⁹

Of course, there is much more that can and should be said about this twofold normative framework. Here, my point is relatively narrow: just that the framework facilitates an understanding of the First Amendment that makes sense of religious freedom—including both free exercise and nonestablishment—without unjustifiably singling out religious beliefs and practices. So when the Free Exercise Clause prohibits government from discriminating on the basis of religion, say, it does so not because of any unique characteristic but because of a more general principle of equality that protects all groups that are susceptible to systematic stratification.¹⁵⁰ Or when free exercise law demands exemptions from general laws, that is not because of concerns that apply solely to religious actors, but because of a commitment to freedom of belief and practice that includes comparable nonreligious manifestations of conscience. Much the same could be said of the various aspects of nonestablishment and free speech law.¹⁵¹

In other words, the scope and strength of constitutional and statutory protections are driven by their underlying substantive concerns, which cannot include a simple preference for religious actors without working considerable unfairness. Protecting full and equal membership is consistent with the response to religion’s specialness set out in the last part: religion

¹⁴⁷ *Id.*, at para. 9.

¹⁴⁸ *Id.* at para. 4.

¹⁴⁹ *Id.*

¹⁵⁰ *Cf.* EISGRUBER & SAGER, *supra* note 61, at 52–53 (“[N]o members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects. Religious faith receives special constitutional solicitude in this respect, but only because of its vulnerability to hostility and neglect.”).

¹⁵¹ On nonestablishment of nonreligious ideas, *see* Tebbe, *supra* note 143, at 649, 709–10. On the puzzling differences between speech and religion law, *see* Tebbe, *supra* note 44, at 1296–98, 1301–03.

need not be jettisoned as a category, but it will benefit from protections, or face prohibitions, alongside nonreligious commitments that are similarly situated relative to the relevant constitutional values. So full and equal membership is not a substitute for constitutional protection of religion, but instead an interpretive guide for courts seeking to guarantee religious freedom alongside comparable commitments.

As I explained in Part II.B, treating the religion clauses as manifestations of constitutional commitments that reach more broadly is consistent with much existing law. And, in fact, it helps to make sense of seemingly anomalous elements of the doctrine, such as the conscientious objector cases or the ministerial exception. But the approach also elicits several sorts of objections—some of them quite powerful.

B. General Objections

Perhaps the most powerful argument against a disaggregated approach to the First Amendment is that vindicating constitutional values directly is unworkable using the existing institutions of state power. As background, recall the argument that law regularly uses familiar categories to implement underlying purposes, rather than trying to pursue those objectives directly. As noted above, criminal statutes do not direct citizens to simply “drive safely,” even if that is their underlying objective, because that standard would be difficult to enforce.¹⁵² Instead, laws impose speed limits, they require drivers to pass a license test, they prohibit driving while intoxicated, and the like.¹⁵³

Similarly, on this view, constitutional law uses religion as a category for administering values such as individual autonomy, government nondiscrimination, national unity, and so forth. American law could not simply say “people have a right to hold profound beliefs and to engage in associated practices.”¹⁵⁴ That would risk unfairness, because judges and lawmakers would

¹⁵² See *supra* Part II.A.

¹⁵³ See Koppelman, *supra* note 68, at 71, 77–78.

¹⁵⁴ See Koppelman, *supra* note 17, at 1082–83 (arguing that Eisgruber and Sager’s principle that the government should protect all “deep’ commitments” is “simply not administrable”).

disagree about which beliefs are profound, and what it means to exercise them. It could also undermine the rule of law, because judges' rulings might not be predictable or impersonal. So the First Amendment deploys recognized social categories—such as religion and speech—to implement constitutional commitments. That is the administrability or proxy argument for retaining the category of religion, and it has considerable strength.¹⁵⁵ But the category of religion is underinclusive or overinclusive with respect to virtually every commitment that drives the First Amendment. And that results in basic unfairness, as I have been arguing.¹⁵⁶

So the next question—and the one I wish to address in this section—is whether it would be workable to *add* categories of protected or prohibited beliefs and practices. Some such categories seem perfectly administrable in some contexts—think of accommodating conscientious opposition to the draft.¹⁵⁷ Or think of protecting nonbelievers from government discrimination, in the same manner that religious practitioners are protected. Conscientious objection and nonbelief are socially recognized phenomena that courts can identify at least as easily as religion itself. And although supplementing religion in this way would not eliminate all unfairness, it would mitigate constitutional overinclusiveness and underinclusiveness.¹⁵⁸ Fairness seems to require at least that much.

Perhaps someone with this objection could respond that such a system would be too complex. Not only would protected categories proliferate, but the list would vary with the particular doctrine within First Amendment law. For example, atheists may require protection against government discrimination, even if their belief system does not demand practices that need to be accommodated.¹⁵⁹

¹⁵⁵ See Lund, *supra* note 62, at 486, 514–15; see also Brownstein, *supra* note 12, at 30.

¹⁵⁶ See *supra* Part II.A.

¹⁵⁷ Schwartzman, *supra* note 89, at 1093–94.

¹⁵⁸ Koppelman, *supra* note 17, at 1083 (observing that adding conscience to religion as a protected category “will diminish, but not eliminate, the law’s imperfection”).

¹⁵⁹ For example, Michael McConnell seems to believe that atheism requires protection against discrimination, but that it does not generate beliefs that government can or must accommodate through exemptions. Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10–11 (1986) (“[U]nbelief entails no obligations and no observances.

Yet complexity should not be confused with unworkability. Legal professionals are fully capable of handling intricate doctrines. If the concern is that courts will be regularly required to make unguided judgments in order to determine legal outcomes, then the answer is that expanding the list of protected beliefs and practices does not require them to do that in an extraordinary way.

A second general objection is that using the term religion allows the state to remain neutral *among* faiths. Avoiding direct discussion of underlying values allows officials to avoid having to say that some denominations promote those values—say, autonomy of belief or equality of persons—while others do not.¹⁶⁰ Religion is a general enough category to allow the government to maintain this neutrality among sects or denominations.

My approach is not vulnerable to that objection because it retains the category of religion. Conversely, however, relying on religion alone to implement underlying constitutional values results in a distinct and definite kind of unevenness. We should be no more willing to tolerate that kind of bias than we are willing to tolerate nonneutrality among sects.

C. Avoiding Harm to Others

A theory of religious freedom oriented toward full and equal membership may draw other objections that are more specific. Critics may ask whether rejecting the specialness of religion can be squared with vigorous enforcement of free exercise and nonestablishment in particular areas of law.

Take this fascinating problem, for instance. One of the principles that properly guides thinking about conflicts between

Unbelief may be coupled with various sorts of moral conviction But these convictions must necessarily be derived from some source other than unbelief itself.”). I take a different view—and I identify practices that nonbelievers may well claim are required by their belief system and ought to be accommodated by government. For example, atheist inmates may wish to hold weekly meetings to discuss their convictions, or they may want to receive relevant literature, despite prison censorship rules. Such exemption claims have in fact been brought, and some of them have been successful. Tebbe, *supra* note 16, at 1156–57 (citing cases).

¹⁶⁰ Koppelman, *supra* note 17, at 1080.

religious freedom and equality law is the commitment of *avoiding harm to others*.¹⁶¹

Normally, when government exempts observant citizens from general laws, any associated costs are borne by the government itself or by the public. That is unobjectionable (on these grounds). But sometimes government accommodation of religious citizens results in harm to other private citizens, and when it does constitutional difficulties may arise. Third parties can experience coercion and unfairness, raising concerns under the Free Exercise Clause and the Establishment Clause. The principle that emerges is that government should avoid harm to others when it accommodates religious citizens. That rule is normatively attractive, and it is embodied in much Supreme Court doctrine, if not all.¹⁶²

How does that analysis change if religious is no longer special in constitutional law? Can it possibly be the case that *all* exemptions from general laws raise constitutional concerns when they shift harm to others? That's the fascinating question that is now being raised by Brownstein and other commentators.¹⁶³

Of course, it proves too much to say that every exemption from a general law is impermissible if it shifts harm from some citizens to others. For example, disability law requires employers to accommodate disabled workers, yet that law is legitimate even if it results in increased costs to the employer and even if it results in burdens on other employees.¹⁶⁴ Affirmative action programs in university admissions may impact nonminority

¹⁶¹ See TEBBE, *supra* note 11, at 49–70 (defending the principle of “avoiding harm to others”); see also Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?* in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (Susanna Mancini & Michel Rosenfeld eds., forthcoming 2018); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?* in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 215–29 (Holly Fernandez Lynch, I. Glenn Cohen, and Elizabeth Sepper, eds., 2017).

¹⁶² For a defense, see TEBBE, *supra* note 11, at 52–59.

¹⁶³ Brownstein, *supra* note 12, at 26–28.

¹⁶⁴ See 42 U.S.C. § 12112(a) (prohibiting discrimination against disabled employees); 42 U.S.C. § 12112(b)(5)(A) (defining “discrimination” in part as “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

applicants.¹⁶⁵ And free speech law might require exemptions from general laws that incidentally burden expression—and normally those exemptions are permissible even if they externalize costs onto other citizens.¹⁶⁶ So there cannot be a universal rule against constitutional claims that negatively impact third parties.

Yet it may well be the case that *some* nonreligious exemptions can be impermissible because they shift costs to others. To determine this—according to the theory I have been outlining—it is necessary to refer to the values animating the principle against harm to others. Two concerns are doing most of the work.¹⁶⁷ First, there is a worry about *coercion concerning a fundamental right*: individuals ought not to be forced by the government to subsidize religious beliefs that they reject. That insight drove much of the opposition to colonial establishments, and it operates here as well.¹⁶⁸ Of course, citizens are forced through taxation to support many policies they disagree with—but they suffer a different kind of harm, on this view, when they bear costs because of the religious commitments of other private citizens.¹⁶⁹

Second, there is a concern about *equal standing before the government*.¹⁷⁰ Normally, when law accommodates private beliefs its purpose and effect is simply to show concern for government burdens on religious exercise. However, when it accommodates certain private beliefs by shifting harm to other private citizens that stratifies classes of citizens according to basic identity characteristics. That too transforms an ordinary government act into a violation of an individual right.

¹⁶⁵ I am thankful to Katherine Franke and Kira Shepherd for raising this equal protection concern.

¹⁶⁶ *Cf. McCullen v. Coakley*, 134 S.Ct. 2518, 2526 (2014) (carving out a speech exemption from a Massachusetts law that created a 35-foot buffer zone around abortion clinics).

¹⁶⁷ See TEBBE, *supra* note 11, at 53–54.

¹⁶⁸ *Id.* at 52. *Cf. Micah Schwartzman, Conscience, Speech, and Money*, 97 VA. L. REV. 317, 319 (2011) (reviewing the argument that “government spending to advance religion imposes special burdens on the freedom of conscience in a way that other controversial government expenditures do not”).

¹⁶⁹ See TEBBE, *supra* note 11, at 53–54.

¹⁷⁰ See *id.* at 54.

Do these two concerns have any application to *nonreligious* commitments of conscience, belief, thought, or opinion? They do, as it turns out, but that does not mean that the rule against harm to others applies to *all* nonreligious commitments.

Take for example *Seeger* and *Welsh*, the cases concerning conscientious objectors to the draft.¹⁷¹ In those cases, the Supreme Court held that pacifists who were arguably nonbelievers could claim conscientious objector status on the same terms as religious pacifists.¹⁷² Would someone who is sent to the battlefield in the place of *Seeger* or *Welsh* suffer coercion or denigration of the relevant sort? Quite possibly. That person could justifiably say that they were drafted because of conscientious beliefs that they rejected. They might hold, for instance, that this *particular* war is immoral, without holding that all wars are morally unjustified, as required by the conscientious objector statute.¹⁷³ They then would be forced to bear a serious cost—risk of bodily harm and compelled conduct that they consider immoral—because the government exempted another private citizen with different beliefs.¹⁷⁴

Even if that is right, *Seeger* and *Welsh* might still be correctly decided, but reason would not be that the principle of harm to others has no application to nonreligious commitments.¹⁷⁵ Instead, it would be that there is no—or only an attenuated—causal connection between the exemption of *Seeger* or *Welsh* and the drafting of any other identifiable citizen.¹⁷⁶ Conscription laws contain so many exemptions, and leave officials so much discretion, that no one sent to the battlefield

¹⁷¹ *United States v. Seeger*, 380 U.S. 163, 164 (1965); *Welsh v. U.S.*, 398 U.S. 333, 335 (1970).

¹⁷² *Seeger*, 380 U.S. at 187–88; *Welsh*, 398 U.S. at 343–44.

¹⁷³ *See Seeger*, 380 U.S. at 164–65. It is less obvious that such a draftee could complain that the government was rendering them subordinate, but the idea would be that the government was advantaging one profound commitment of conscience over another.

¹⁷⁴ What would the legal source of a nonreligious third-party harm rule be? Would it be the Establishment Clause, or some other provision? Brownstein, *supra* note 142, at 927.

¹⁷⁵ *See* 380 U.S. at 187–88; 398 U.S. at 343–44.

¹⁷⁶ *See generally Seeger*, 380 U.S. 163; *Welsh*, 398 U.S. 333.

would be able to point to a conscientious objector as the reason that they were put in harm's way.¹⁷⁷

Or imagine a situation where an employer seeks and wins an exemption from the contraception mandate because of a nonreligious objection to (certain forms of) contraception. March for Life was that kind of employer: it was a secular pro-life nonprofit organization that objected on grounds of conscience to paying for its employees' contraception coverage.¹⁷⁸ And March for Life did win an exemption in a lower court (albeit on equal protection grounds).¹⁷⁹ Would that result violate the rule against harm to others in the relevant sense? Again, that is conceivable. Employees of such an organization could rightly claim that they were being forced by the government to bear costs—loss of coverage—associated with profound conscientious beliefs that differ markedly from their own. They could justifiably worry that the government was taking sides in a fight between employers and employees on a matter of profound conscience. Now that the Trump Administration has created an exemption from the contraception mandate for employers with moral (as well as religious) objections to contraception, without providing alternative contraception coverage, the prospect of nonreligious third-party harms has increased significantly.¹⁸⁰

Yet again, the values behind the rule against harm to others would not frustrate all nonreligious accommodations. Most do not implicate the fundamental liberty or equality interests of others. Think again of accommodations for disabled employees, or exemptions from general laws that impose an incidental burden on speech (on matters that do not involve conscience or comprehensive morality). So the argument that the principle of avoiding harm to others could not possibly be

¹⁷⁷ See TEBBE, *supra* note 11, at 57–58.

¹⁷⁸ *March for Life v. Burwell*, 128 F. Supp. 3d 116, 122 (D.D.C. 2015).

¹⁷⁹ *Id.* at 128. In a similar case, the Third Circuit disallowed a secular pro-life organization from an exemption, reasoning that the exemption was specific to religious objections and that the organization did not fall under the definition of religion. *Real Alternatives, Inc. v. Secretary Dept. of Health and Human Services*, 867 F.3d 338, 349–52 (3rd Cir. 2017).

¹⁸⁰ See 82 Fed. Reg. 47838 (Oct. 6, 2017). Very likely, the Trump Administration promulgated a moral exemption, in addition to a religious one, in response to *March for Life v. Burwell*.

extended to nonreligious commitments without unsettling a great number of exemptions is overstated. Lines can be drawn.

Work remains to be done on the general issue of the cost of rights, especially regarding the doctrine's underpinnings in political theory. Exactly which nonreligious convictions will trigger the rule against harm to others? Exactly when will deprivation of a welfare-state benefit constitute harm in the relevant sense?¹⁸¹ These and other questions must be answered, but they are answerable.

Brownstein also raises a more practical question. He notices that I limit the principle to cases where the harm to others rises to the level of "undue hardship" and he asks whether courts should be entrusted with administration of such a standard.¹⁸² He reminds readers that the Court eliminated free exercise exemptions in *Employment Division v. Smith* largely because it believed that courts could not administer the old balancing regime without arbitrariness and indeterminacy.¹⁸³ If judges can administer the undue hardship standard in the Establishment Clause context, he asks, is there any reason to support the *Smith* Court's view that they cannot balance private and public interests in the free exercise context?¹⁸⁴

My answer is that judicial balancing is tolerable in both contexts, despite dangers that should lead us to impose limits where practicable. With regard to the undue hardship standard, lower courts have been using it to decide Title VII cases for years without apparent injustice.¹⁸⁵ Moreover, the body of precedent

¹⁸¹ We have taken steps toward answering the baseline question for legal purposes. See Tebbe et al., *When Do Religious Accommodations Harm Others?*, *supra* note 161.

¹⁸² See TEBBE, *supra* note 11, at 62–66; see also Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *supra* note 161, at 219–20.

¹⁸³ *Employment Division v. Smith*, 494 U.S. 872 (1990).

¹⁸⁴ Brownstein, *supra* note 12, at 23–24 (“[I]f a balancing test may be reasonably and effectively employed under the Establishment Clause to invalidate unacceptably burdensome accommodations, is there any reason to continue to support the *Smith* opinion’s argument that the balancing of religious freedom and state interests is so difficult and constitutionally improper that it requires dramatically limiting the scope of free exercise rights[?]”).

¹⁸⁵ Courts have deployed the undue hardship standard as a real balancing test, not a de facto rule against religious accommodations, despite the Court’s strict interpretation of that test as permitting nothing more than “de minimis” harm to others. See Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *supra* note 161, at 221–22. It is true that courts sometimes defend themselves by saying that Congress actually struck the balance when it adopted the undue hardship standard, and that they are merely

that they have developed can guide courts who deploy the same standard to limit the rule against harm to others, reducing the scope of judicial discretion.¹⁸⁶ And with regard to free exercise, courts in practice regularly find ways to accommodate religious beliefs despite the main *Smith* rule.¹⁸⁷ Even the Supreme Court itself exempted a religious actor under the Free Exercise Clause after *Smith*.¹⁸⁸

Consequently, I would allow a role for judicial judgment not only in nonestablishment cases, but also in free exercise doctrine.¹⁸⁹ I suspect that Brownstein would actually agree that the *Smith* Court's concern was overstated, and that free exercise law must allow for some balancing. Therefore I would expect him to be tolerant of such approaches in the Establishment Clause context as well.

D. Freedom of Association

Recall that I am tracing the objection that it is impossible both to deny that religion is special and to vigorously enforce the religion provisions of the First Amendment. Section C considered this argument with respect to the third-party harm principle. Another important application concerns freedom of association.

In the book, I propose a framework for protecting the ability of people to join together in groups—even when that means excluding others in ways that otherwise would violate civil rights laws. For example, a Roman Catholic congregation may exclude women when it is hiring a parish priest, even though discrimination on the basis of sex or gender is prohibited by employment law. In this instance and others, constitutional

applying Congress's standard to particular cases. *Id.* But judges applying the standard here could argue similarly that the balance has been struck by the Establishment Clause, as interpreted in precedent.

¹⁸⁶ See *id.* at 225-28 (giving examples where courts held that a religious accommodation would not impose an undue hardship, and therefore it was required by Title VII, even though others would be harmed).

¹⁸⁷ Tebbe, *Smith in Theory and Practice*, *supra* note 141, at 2056-67.

¹⁸⁸ See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694 (2012).

¹⁸⁹ Tebbe, *Free Exercise and the Problem of Symmetry*, *supra* note 141, at 705. Patten has recently embraced some balancing of private and public interests in the religious freedom context, though he emphasizes mechanisms to limit its role. Patten, *Normative Logic*, *supra* note 91, at 146-47.

law guarantees a right to form inegalitarian associations—groups that reject constitutional values themselves.

My approach clarifies law on the freedom of association by identifying its substantive objectives, which then are allowed to guide the doctrine. Because those objectives are plural, and because they differ with different sorts of groups, I argue that it is necessary to disaggregate at least three types of associations along with the rationales for protecting each.

First, *intimate associations* are basic to personhood and enjoy near-absolute protection in their formation. Think here of the family—people can select and exclude family members for virtually any reason. Second are *close associations*, which are community groups that are relatively small and selective. These groups serve an important function in a democracy; they influence the formation of individuals' interests and ideologies.¹⁹⁰ And, of course, such diversity among citizens is a necessary condition for the robust debate that is essential to a self-governing polity. Close associations require latitude to select members in discriminatory ways because otherwise they might not be able to formulate dissenting wills and worldviews.¹⁹¹

Finally, *values organizations* are rationalized and bureaucratized associations that manifest particular sets of commitments.¹⁹² These groups are protected for a distinct reason, namely their role in communicating diverse perspectives on critical questions of the day. Yet in order to fulfill that function, they require only limited freedom to exclude—they only need to be able to reject policy leaders for reasons that are related to their mission. By definition, that mission is rationalized and embodied in institutional structures. So it is discoverable, as I noted above. And it can be construed and communicated by the organization's leaders without broad exemptions from civil rights laws.

A deliberate and distinctive feature of this scheme is that it does not categorically distinguish between religious and

¹⁹⁰ I borrow the term close associations from Sager, *supra* note 124.

¹⁹¹ For more on the importance of close associations for the formation of ideas and impulses, see Sager, *supra* note 124; Shiffrin, *supra* note 124.

¹⁹² See MAX WEBER, 1 *ECONOMY AND SOCIETY* 220–26 (Guenther Roth & Claus Wittich, eds. 1978) (describing the bureaucratized form of social authority).

nonreligious associations. Instead, it identifies the constitutional values behind each type of associational freedom, and it shows how those values suggest protection for both religious and nonreligious groups. None of the categories matter in any formalistic way—they simply help differentiate the various purposes served by the law of associational freedom. And because those values can combine in particular cases, these types can be blended in practice.

If religious and nonreligious associations are treated similarly, someone might ask, doesn't that raise the worry that *either* some congregations will go unprotected, *or* close associations will have too much latitude to ignore civil rights protections?¹⁹³ If all local congregations qualify as close associations, as it seems they must, won't the category will sweep in so many nonreligious organizations that it will allow widespread discrimination against members of protected groups? According to this worry, exemptions from civil rights laws can be kept within reasonable bounds only by cabining the category of close associations to *religious* congregations.¹⁹⁴ There is no other administrable mechanism for striking a balance between associational freedom and equal citizenship. Religion must be special here, or else civil rights will be unduly compromised.

These fears are exaggerated. Before I explain why, it's helpful to recall my affirmative case. Maintaining the status quo results in another sort of unfairness, namely inequity between religious and nonreligious associations. What justification could there be for categorically withholding from nonreligious groups the freedom to associate (and disassociate), when that liberty is enjoyed by religious ones? Think of religious and nonreligious local fraternal organizations, for instance. Both are organized around community service and charity work, let us assume, and both otherwise qualify as close associations, let us assume further.¹⁹⁵ Would we really let one but not the other select members on discriminatory grounds?

¹⁹³ Brownstein, *supra* note 12, at 42.

¹⁹⁴ *Id.*

¹⁹⁵ The criterion I offer for identifying close associations includes size, bureaucracy, selectivity, exclusivity, commercialism, and orientation toward the expression or implementation of ideas or values. TEBBE, *supra* note __, at 84. These criteria are drawn

To overcome that unfairness, one needs a strong reason. Yet the one offered by this criticism is merely pragmatic: that protecting religious and nonreligious associations alike would simply result in too much discrimination. We need to draw a line, and the line around the category of religion is socially available and judicially administrable.¹⁹⁶

My answer is twofold but straightforward. First, relatively few groups will qualify as close associations. And qualifying as a close association only triggers a *presumption*, which the government can overcome by showing its policies are necessary for the pursuit of a compelling interest.¹⁹⁷

Let's unpack my two responses. Close associations are distinguished by the state's recognition that any democracy must preserve a social space for the independent formation of interests and ideologies. That is even true, or maybe especially true, where the ideas are illiberal or exclusionary. Since bonds of trust and identification are important to will formation, they are protected from government intrusion—but they characterize only a few organizations outside the family.

Rather than simply directing constitutional actors to protect close associations, defined as groups knit together tightly enough to incubate independent ideas, the law of association provides several identifying characteristics that can be administered by constitutional actors. So courts inquire into the group's size, bureaucracy, selectivity, exclusivity, commercialism, and orientation to ideas.¹⁹⁸ These factors are taken from the "private club" exception to public accommodation laws, but they

from doctrine on whether a group qualifies as a private club, such that it will be exempt from public accommodations laws. See Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 646 (2016). Sepper highlights how courts have established what qualifies as a private club. See *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970); *Daniel v. Paul*, 395 U.S. 298, 301–02 (1969); *Nesmith v. Young Men's Christian Ass'n of Raleigh*, 397 F.2d 96, 101–02 (4th Cir. 1968).

¹⁹⁶ Brownstein, *supra* note 12, at 50 ("American society intuitively recognizes that religious groups, notwithstanding all of the good that they do for their own members and the community at large, are intrinsically exclusionary. That intuition, I suggest, is not so commonly accepted for other kinds of associations in our society. The fact that the exclusionary nature of religious associations is recognized to be distinctive and deserving of greater protection from the mandates of civil rights laws than secular associations may be a valuable working arrangement that maximizes both religious liberty and anti-discrimination principles.")

¹⁹⁷ TEBBE, *supra* note 11, at 84–85.

¹⁹⁸ See *id.* at 84 (citing Sepper, *supra* note 195, at 646).

also help to orient the constitutional exemption.¹⁹⁹ They have often been applied by courts, providing a rich set of precedents to guide judges. And although they are readily administrable, they should be interpreted and enforced with an eye to the animating purposes of associational law. When that is done properly, few groups will qualify as close associations.

Once a group is recognized as a close association, it enjoys a presumption of protection in its decisions over inclusion and exclusion. However, that presumption can be overcome if the government can show that enforcement against the group is necessary to vindicate a policy of the highest order. Here, my proposal tracks the Court's actual jurisprudence.²⁰⁰ In the context of civil rights laws, the government often will have compelling reasons for enforcing antidiscrimination measures, namely ensuring equal economic opportunity, guarding against unequal standing in the social and political communities, and communicating disapproval of bias.²⁰¹ Those ends, taken seriously, give the government an overriding reason not just to enact civil rights laws in the first place, but also to deny an exemption to an individual practitioner. Accommodating even a

¹⁹⁹ See Sepper, *supra* note 195, at 649–50 (“The Supreme Court’s analysis of constitutional freedom of association tracks this statutory distinction between private club and public accommodation.”).

²⁰⁰ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 615–16, 623 (1984) (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”); see also *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (reiterating the compelling interest test for freedom of association and quoting the language above from *Jaycees*).

²⁰¹ This is why I think Brownstein is incorrect to say that “[b]asically, [Tebbe] urges us to expand the scope of exemptions from anti-discrimination laws for secular associations – particularly for close associations.” Brownstein, *supra* note 12, at 43.

On the three purposes of antidiscrimination law, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 9–12 (1996) (describing the accepted purposes of antidiscrimination law); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627–628 (2015) (same).

On antidiscrimination as a compelling interest, compare the majority opinion in *Hobby Lobby*: “The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2783 (2014).

single instance of discrimination on the basis of a protected characteristic—think of race or sex—can normalize bias and undermine the communicative impact of equality law.

Applying this framework to both religious and nonreligious associations may be seen to create the dilemma identified earlier. Either too few religious organizations will be protected from civil rights laws, or too many nonreligious associations will be exempt, allowing excessive discrimination. Granting religious congregations special accommodations from civil rights laws seems to avoid this dilemma, because nonreligious groups will be held more strictly to equality laws and thereby the total amount of social discrimination will be confined to tolerable levels.²⁰²

Yet, again, this way of thinking risks unfairness between religious and nonreligious organizations.²⁰³ That is the reason for applying the same rules to both of them, after all: none of the *justifications* for allowing associations to practice exclusion are specific to religious congregations or denominations. Especially with regard to the values that drive freedom for close associations in a democracy—commitments to the importance of independent discovery and to the free development of wills and worldviews—nonreligious groups are similarly situated.²⁰⁴ I doubt whether faith associations have unique combinations of characteristics,²⁰⁵ but even if that were true it would not provide a reason to treat them differently in principle.

²⁰² Brownstein, *supra* note 12, at 50.

²⁰³ See *supra* notes 190–92 and accompanying text.

²⁰⁴ Sepper points out that public accommodations law has looked to factors indicating closeness or privacy to decide which groups get protected—it has not drawn a line between secular and religious groups. “In what has been a stable public-private divide, the state regulates commercial and quasi-commercial entities in the interest of equality, while giving private associations license to discriminate in the interest of their in-turning nature. Statutory law and constitutional doctrine has not drawn a distinction between religious and secular, but rather has relied on multi-factor analysis (including profit status, commercial nature, selectivity, exclusivity, and intimacy of an entity) to police the public-private line.” Sepper, *supra* note 195, at 637.

²⁰⁵ Compare Brownstein’s view: “Religious congregations connect with family life more than any other kind of association in our society. Religion relates to marriage, procreation, child rearing, life cycle changes, and the death of family members. For devoutly religious people, religion is an intrinsic part of their family association. Religious congregations are obviously involved in value formation and the transmission of values within the religious community. Religious associations are also a voice in the market place of ideas. While national or regional religious associations may be speakers and idea

Can secular and sacred groups be analyzed together under the framework I have proposed, without under-protecting the former or overprotecting the latter?²⁰⁶ I think so. Virtually all local congregations will qualify as close associations, so that they can exclude non-adherents without legal reprisal. It is highly doubtful that a municipality or state could identify reasons strong enough to overcome that kind of membership boundary. Perhaps the outcome would be different for a megachurch whose character is entirely different, so that insulation from antidiscrimination law would no longer serve the objectives of associational freedom. Or perhaps a group like scientology would be deemed too commercial to qualify (without questioning whether it is a religion). Yet other examples are difficult to imagine.

For nonreligious associations, courts and other constitutional actors would have to decide first whether the assembly counted as a close association, and then—assuming it did—whether the government’s regulation of membership choices satisfied strict scrutiny. Some would fail the first test. In *Jaycees*, the Court arguably suggested that the Jaycees could not be considered an expressive association in the first place.²⁰⁷ Similarly, county bar associations are designed to promote networking among legal professionals, among other goals, and they therefore are too commercialized to merit insulation from civil rights laws.²⁰⁸ In other words, these groups are not

communicators at the state or national level, religious congregations have a voice at the local level. I doubt any secular association can demonstrate the depth and breadth of religious associations across these categorical lines.” Brownstein, *supra* note 12, at 39.

²⁰⁶ Brownstein says that it is difficult to do both, and therefore my theory occupies a position “between a rock and a hard place.” *Id.* at 43.

²⁰⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) (“There is...no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”). The opinion was ambiguous as to whether the Jaycees failed the threshold test or whether the public accommodations law was sufficiently tailored to the compelling interest in combatting gender discrimination.

²⁰⁸ Ethnically-specific bar associations, like those described by Brownstein, may promote professional advancement among a particular group without the ability to exclude members in discriminatory ways. And the Christian Legal Society, which Brownstein also mentions, seems quite distinct from a bar association. Brownstein, *supra* note 12, at 46–47.

primarily organized to form wills and promote worldviews, but instead they exist to promote professional advancement.²⁰⁹

Other groups may easily qualify as close associations but still be denied protection because their interest in membership exclusion is overbalanced by the state's antidiscrimination imperative.²¹⁰ Think here of the Little League or AYSO, the children's soccer organization.²¹¹ Even assuming these groups exist in part to foster certain values in children, and even if they feature the bonds of trust and identification necessary for effective exploration of basic commitments, lawmakers may well be able to require them to be open to everyone on nondiscriminatory terms. The threefold goals of nondiscrimination law—economic opportunity, equal citizenship, and disapproval of inequality—may justify ensuring that children and their families have equal access to such basic institutions of civil society.²¹²

In between, there will be borderline groups that may or may not receive First Amendment protection for associational decisions, depending either on the threshold determination or on the subsequent test. Again, the Jaycees themselves presented a difficult case. Or think of sports clubs, intellectual organizations, and music groups.²¹³ Courts will have to make contextualized determinations in these situations, but they will engage in those inquiries with the help of developed case law. Unfairness will certainly be a risk—but perhaps that danger should be preferred

²⁰⁹ Parent teacher associations should be analyzed similarly because although public schools are involved in will formation, they are engaged in that endeavor on behalf of the state and for public-regarding reasons. *Cf.* Brownstein, *supra* note 12 at 48–49. Parent teacher associations, like public schools themselves, should be open on a nondiscriminatory basis. *Id.* at 48.

²¹⁰ Flanders wonders why these groups should enjoy a presumption of protection, even if the government's interests defeat that presumption. Flanders, *supra* note 12, at 6. My answer is that they serve democratic interests in independent will formation. This entitles them to the presumption, but it does not necessarily entitle them to protection.

²¹¹ Brownstein, *supra* note 12, at 46 (offering these examples).

²¹² As Brownstein says, there is a danger that “[m]inorities may be systematically shut out of the public life of the community by being denied membership in all of the private associations in which social, political, and economic bonds are developed.” Brownstein, *supra* note 12, at 45.

²¹³ Flanders mentions private golf and tennis clubs in particular. Flanders, *supra* note 12, at 6. I think these might present hard cases, but courts will be able to use the framework I am suggesting—and that is embedded in current law, understood in its best light—to resolve them.

to the inevitable unfairness that would result if religious groups were systematically preferred over nonreligious ones in the constitutional law of freedom of association.

IV. On Symmetry

One argument that has become prominent in public debate is that considerations of equal membership ought to be symmetrical. Risk of subordination affects not only LGBT people and women seeking reproductive freedom, but also adherents of traditional religions, on this account. Traditional believers are dissenters from a new liberal orthodoxy. Their views are just as passionately held and just as vulnerable to disparagement, according to the argument from symmetry.²¹⁴

In his review, Brownstein offers a sophisticated version of the symmetry point. He argues that religious traditionalists face a risk of political humiliation, which can result not just from outright discrimination but also from government refusal to exempt them from general laws. He writes, “religious individuals denied exemptions often feel disrespected and subordinated.”²¹⁵ In a legal system that often carves out exceptions to its laws, religious people who are denied an accommodation may well feel that their “identities and core beliefs are ignored and treated as if they are valueless and unworthy of recognition.”²¹⁶

²¹⁴ See, e.g., Carl H. Esbeck, *Redefining Marriage Would Erode Religious Liberty and Free Speech Rights of Citizens and Churches*, PUBLIC DISCOURSE (April 29, 2015), <http://www.thepublicdiscourse.com/2015/04/14908/> (“Respect for the principle of equal citizenship and equal participation in the democratic process is the only way that the contemporary controversy over same-sex marriage can be resolved without inflicting harm on millions of religious believers and their institutions.”); Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. F. 369, 376, 378 (2016) (“I agree that there is a dignitary harm in being refused service because of perceived immorality . . . [but] NeJaime and Siegel never acknowledge the dignitary harm on the religious side. Those seeking exemption believe that they are being asked to defy God’s will [among other serious infringements of religious convictions].... These are among the harms religious liberty is intended to prevent, and an expressive harm on the other side cannot justify inflicting such harms.... Viewed in purely secular terms, we have intangible emotional harms on both sides of the balance. The emotional harm to potential customers or patients cannot compellingly outweigh the emotional harm to believers.”).

²¹⁵ Brownstein, *supra* note 12, at 34.

²¹⁶ *Id.* at 34. Beyond such academic writers, moreover, the argument from symmetry carries considerable political currency at the moment. See, e.g., Elder Lance R. Wickman, *Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All*, NEWSROOM (2016),

Such arguments can be highly complex, and they require careful analysis. Here, I will limit myself to equal protection and nonestablishment doctrines, both of which ask whether the government has denigrated a particular group defined by attributes such as religion or sexual identity, so that outsiders are rendered disfavored in the political community.²¹⁷ From the perspective of that law, the question ought to be whether the government is constituting outsiders as legally subordinate. That inquiry is objective, not subjective (it asks about the purpose of the law, not the motivation of lawmakers) and it is legal, not psychological (the question is whether the government has changed the legal relationship between itself and particular classes of citizens).²¹⁸

Government discrimination against a protected class does subordinate in this way. For example, states that criminalized acts of sodomy by people of the same sex, or enforced general sodomy bans only against same-sex couples, denigrated gay and lesbian citizens.²¹⁹ And a city that effectively banned animal sacrifice by members of a particular sect rendered them disfavored as a legal matter.²²⁰ So too, a town that erected a crèche on its courthouse steps, without any other holiday symbols, officially endorsed one faith over others.²²¹

<http://www.mormonnewsroom.org/article/promoting-religious-freedom-secular-age-fundamental-principles-practical-priorities-fairness-for-all> (“The risk is that traditional believers and their religious institutions may eventually be relegated to pariah status—officially recognized as ‘equal citizens’ while in practical reality marginalized and penalized for their faith.”).

²¹⁷ Tebbe, *supra* note 143, at 651. Cf. Akhil Reed Amar, *The Creation and Reconstruction of the First Amendment*, in RELIGIOUS LIBERTY: ESSAYS ON FIRST AMENDMENT LAW 36, 61 (Daniel N. Robinson & Richard N. Williams, eds. 2016) (“Surely Alabama could not adopt a state motto proclaiming itself ‘the White Supremacy State.’ Such a motto would offend basic principles of equal citizenship and equal protection.”).

²¹⁸ Tebbe, *supra* note 143, at 659 n.41, 667 & n.79; Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1524, 1528, 1548 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 10 (2000).

²¹⁹ See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (holding that Texas’s sodomy law imposed “stigma” on “homosexual persons”).

²²⁰ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices . . .”).

²²¹ *County of Allegheny v. ACLU*, 492 U.S. 573, 601–02 (1989).

Yet the question here is somewhat different, namely whether refusing to accommodate religious actors relegates them to a diminished position in the political community. Does a civil rights law that prohibits private actors from excluding people based on protected grounds subordinate traditional conservatives whose religion requires such exclusion? To take a specific situation, does the State of Colorado compromise the equal standing of religious bakers when it enforces a general ban on LGBT discrimination, so that they are prohibited from refusing to create wedding cakes for same-sex couples?²²² Does *the government* alter its *legal* relationship to them by enforcing this law?

Start by distinguishing two understandings of these questions. First, the issue might be whether the government has an impermissible purpose in protecting LGBT citizens in public accommodations. At least initially, there seems to be no invidious purpose—after all, Colorado’s civil rights law applies to everyone in the same way. Moreover, the purposes of public accommodations laws—ensuring equal economic opportunity, preserving equal social standing, and encouraging nondiscrimination—are all neutral as to religion.

Another understanding of these questions is that the state disfavored religious conservatives *by refusing or neglecting to grant them an exemption* from its public accommodations law. This is the possibility that Brownstein raises, and it too seems reasonable in theory.²²³ And in practice as well, declining to

²²² See *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 137 S.Ct. 2290 (2017) (granting cert.).

²²³ Brownstein, *supra* note 12, at 33–34. Here I put aside the possibility, raised by Justice Kennedy at oral argument, that Colorado officials were subjectively motivated by contempt for religious traditionalists. See Transcript of Oral Argument at 51, *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n* (2017) (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf (“in this case, pages 293 and 294 of – of the Petitioner appendix, the – Commissioner Hess says freedom of religion used to justify discrimination is a despicable piece of rhetoric”); *id.* at 52 (“Suppose we thought that in significant part at least one member of the Commission based the commissioner’s decision on – on – on the grounds that – of hostility to religion. Can – can your – could your judgment then stand?”). If the state was motivated by bias when it applied the civil rights law to *Masterpiece Cakeshop*, that would be an unusual circumstance that would not be present in most cases. Brownstein’s claim is different, namely that refusing to grant an accommodation *itself* subordinates religious traditionalists, even absent any particular discriminatory motivation.

grant a religious exemption when others are readily accommodated could suffice to denigrate religious adherents under some circumstances. Recall the Newark police department that refused to exempt Muslim officers from its ban on beards, even though it accommodated officers with medical reasons for needing to grow their beards.²²⁴ Arguably at least, the department's selective refusal violated equal citizenship.

Yet in the context of public accommodations laws this seems like an unlikely conclusion. As Elizabeth Sepper has demonstrated, exemptions from these state laws are rare, apart from the common carve-out for private clubs.²²⁵ Religious exemptions are exceptional, and religious exemptions for businesses are nonexistent.²²⁶ As a matter of social meanings, then, it seems doubtful that declining to exempt religious actors is driven by any anti-religious purpose, though again this is a question of history, context, structure, and social meanings.²²⁷

My conclusion from this short analysis is that symmetry of subordination, though possible in principle, can be established in practice only by considering a specific case.²²⁸ In the course of

²²⁴ *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

²²⁵ Sepper, *supra* note 195, at 637.

²²⁶ *Id.* ("Public accommodations laws typically do not offer religious exemptions. When exemptions exist, they tend to be limited to a narrow range of activities of religious non-profits and to co-religionist favoritism alone.")

²²⁷ On the other side, while the significance of religious accommodations from civil rights laws can be concern for religious freedom, it can also represent state endorsement of discrimination. *Cf.* Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 13 (Susanna Mancini & Michel Rosenfeld eds., forthcoming 2018) ("In the culture-war context in which complicity claims are arising, the social meaning of conscience objections is readily intelligible to those whose conduct is condemned. . . . But even when not explicitly communicated, the status-based judgment entailed in the refusal is clear to the recipient.")

²²⁸ I made a similar point in the book:

This symmetry [between the subordination of sexual minorities and religious traditionalists] is more apparent than actual; in fact, religious traditionalists and members of protected classes are not positioned in exactly the same way with respect to the principle of equal citizenship. When civil rights laws prohibit discrimination, they do not single out religious traditionalists for special disfavor but instead express disapproval of all discriminatory practices, whether religious or secular. In other words, the purpose and social meaning of equality law does not target religious people, or even religious traditionalists, and it does not alter their citizenship standing on that

that analysis, it will be necessary to distinguish between losing political battles and becoming subordinate in a legal relationship with the government. To be sure, religious groups have suffered both in the past. And it is quite possible for members of religious majorities to face official denigration. So although the argument from symmetry cannot be dismissed out of hand, it cannot be accepted in a facile way, independent of context.

V. Coherence and Compromise—Method Revisited

Some of the contributions to this symposium have engaged the social coherence method itself. Because they include some misimpressions about the method, but also because they raise fascinating issues, they are worth addressing. But before doing so, let me briefly review and reframe the argument.

Social coherence is designed to answer skeptics who believe that it is impossible to give reasons for outcomes in the field of religious freedom—that conclusions of law cannot be justified there. I argue that coherent conclusions are justified because they are backed by reasons. Resolutions of new cases can be supported through analogy to precedents or through application of principles that account for those cases.²²⁹ No precedent and no principle is invulnerable to reexamination and revision, when using this method. In fact, spurring critique of settled conclusions is close to the central point of social

basis. Instead, it combats discriminatory practices on the part of private actors, whether religious or secular, that work to disadvantage protected classes in the economy, in society, and in politics. Many feel the denial of an exemption acutely and sincerely. But that does not change the social meaning of the law, however contingent it may be.

TEBBE, *supra* note 11, at 118.

²²⁹ Laura Underkuffler understands this objective particularly well. She writes,

When we think of conflicts between religion and secular norms of equality, we tend – in Tebbe’s words – to assume an area of law that is “inherently or necessarily patternless.” We tend to think of these conflicts as boiling down to a personal view as to which is more intrinsically important – religion or equality. . . . [But Tebbe] rejects the arguments of academic skeptics and others that these conflicts are by nature something that is not amenable to the judicial task. Rather, he argues, conflicts between religious freedom and civil rights can be worked through by courts, using what he calls a “social coherence” approach.

Underkuffler, *supra* note 12, at 3–4. I would only add that I defend such reasoning not only in courts, but wherever constitutional interpretation happens.

coherence.²³⁰ Even so, its outcomes count as law because they rest on interpretive arguments that carry legal authority, such as those from text, structure, precedent, and history.²³¹

Sometimes the method is misunderstood as an effort to overcome or transcend partisan conflict, perhaps by “generating” discrete answers without reliance on controversial commitments. This misimpression draws the critique that actually social coherence will only reproduce partisan conflicts on another level, where each position is backed by reasons instead of merely asserted. And those disagreements will be no less emotional and no less intractable.

But agreement is not goal of the method. As Underkuffler explains in her perceptive review, “[a]lthough [Tebbe] suggests that the antagonists themselves might find the method he suggests to be enlightening, convincing them to abandon preconceived notions and to come to an amicable compromise is not the primary focus of the book.”²³² Yet other commentators sometimes do seem to suggest that agreement is promised, and they are disappointed when it is not delivered.

Chad Flanders, for instance, notices that that there can be more than one coherent solution to a problem. And, he says, “the fact that there are many solutions and many *rational* solutions may just repackage the skeptic’s worry at another level.”²³³ Later, he adds that

[S]ocial coherence may just change the way we look at disagreements, but it may not make those

²³⁰ A helpful comparison is to Dworkin’s interpretivism, insofar as social coherence also acknowledges the role of moral reasoning in legal interpretation. RONALD DWORKIN, *LAW’S EMPIRE* 47, 52, 65–68, 96–98 (1986).

Because the method is designed to spur critique of accepted authorities, both moral and legal, I do not believe it has a conservative bias and I resist the idea that historical resolutions of conflicts between religious freedom and equality law have a “determinative” role in the method, as Carlos Ball suggests at one point in his thoughtful response. Ball, *supra* note 12, at 3. Nearly everything else Ball says in his review seems correct to me.

²³¹ See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (describing authoritative “modalities” of legal interpretation); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987); Robert Post, *Theories of Constitutional Interpretation*, 30 *REPRESENTATIONS* 13, 19 (1990).

²³² Underkuffler, *supra* note 12, at 12.

²³³ Flanders, *supra* note 12, at 3.

disagreements any less fierce, any less intractable. We can agree that both sides have reasons, but we may disagree about what the best reasons are, and how to weigh those reasons. We may have gotten precisely nowhere, substantively, toward an agreement. We have just changed the terms of that disagreement.²³⁴

This account is not exactly wrong, but it is based on a misimpression. The point of a coherence method is not to lower the temperature of debates. Actually, its effect may be to sharpen citizens' claims of injustice by lending them force or authority, at least in the near term.

Rather, my methodological objective is just to defend against the charge that interpretations and outcomes can only be arbitrary or patternless. That charge is dangerous not only because it could fuel an argument that judges should avoid religious freedom disputes—or, worse, that constitutional argument cannot be deployed by any policymakers²³⁵—but also because undermines a crucial component of fair decisionmaking in a democracy. Officials must be able to give reasons for their actions, so that citizens can examine and evaluate those justifications.²³⁶ Social coherence does nothing to avoid disagreement, and in fact it explicitly envisions reasonable

²³⁴ *Id.* at 5.

²³⁵ For an argument that judges should avoid religious freedom disputes because of concerns about arbitrariness, see SMITH, *supra* note 136, at 6, 68; see also POSNER, *supra* note 56, at x. For a suggestion that constitutional arguments on such questions might not be appropriate even outside courts, see SMITH, *supra* note 136, at 79.

²³⁶ Jeremy Kessler and David Pozen argue that prescriptive legal theories have a tendency to “cannibalize themselves.” Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1819 (2016). Such theories begin by promising to offer principles that can transcend partisan legal conflict. But over time, as they encounter and assimilate critiques, they become compromised, so that they no longer can rise above the fray. Ultimately, they end up reproducing first-order political conflicts. *Id.* at 1823. The social coherence method may not be subject to this critique, in one sense. That is because it does not seek to transcend disagreement in the first place—it is, as Kessler and Pozen put it, “impure by design” and therefore not subject to the dynamic they identify. *Id.* at 1831. But other aspects of my project may well work themselves impure. For instance, principles such as the rule against harm to others *do* seek to resolve disputes outside of pure political contestation and they therefore may well be subject to the kind of dialectic that Kessler and Pozen describe. Whether that happens will depend on the reasons people can offer against their attractiveness and authoritativeness, and whether any responses dilute the principles beyond recognition or usefulness. So far, that has not happened but it remains possible.

disagreement as a fixed feature of democratic debate.²³⁷ Over time, citizens can try to change each others' minds, not just through intellectual debate but also through the mechanisms of social and political mobilizations.

When I suggest at the end of the book that preserving a role for reasons permits a more lasting form of national unity, I am not promising that the coherence method will ease quotidian battles, as Flanders suggests.²³⁸ Again, it may have the opposite effect. Instead, I am pointing toward the conviction that citizens should be given reasons for government coercion, reasons that they can access if not accept.²³⁹ That makes it possible for them to resist using arguments that stand a chance of someday prevailing.

By contrast, if citizens are subject to government coercion *without* justification, they may feel differently aggrieved and perhaps alienated. That is why I question *part of* Flanders' call for compromise. Of course, compromise carries significant appeal—it gives something to both sides, as Flanders says, and it avoids the hurt feelings that can accompany an unmitigated loss. A *modus vivendi* solution can also defer a hard legal question in the hope that it will be resolved outside law, through social and political dynamics.²⁴⁰

But I think it is necessary to distinguish between two possible versions of the argument. First, Flanders may be saying just that competing commitments should be considered and accommodated where possible. That is absolutely correct—in fact, I seek and find solutions like that throughout the book. For instance, county clerks with religious objections to same-sex marriage might well be accommodated in ways that have no

²³⁷ See Micah Schwartzman, *The Completeness of Public Reason*, 3 POL., PHIL., AND ECON. 191, 193, 194–197 (2004) (distinguishing between the indeterminacy of individual reason, which is avoidable, and the inconclusiveness of public outcomes, which is an enduring feature of any healthy democracy).

²³⁸ Flanders, *supra* note 12, at 5.

²³⁹ Of course, there is an enormous literature on this subject, which I could review neither in the book's short conclusion nor in this Reply.

²⁴⁰ Flanders, *supra* note 12, at 6 (“there are virtues to compromise, and I want to rehearse them now and, to a great extent, endorse them”); *id* at 7. (“[o]f course, the problem with compromises is obvious: compromises will always be open to the objection that they are not principled”).

impact, material or expressive, on unorthodox couples.²⁴¹ That solution does not give someone like Kim Davis everything that she wants—recall that she initially tried to prevent everyone in her office from processing marriage licenses—but it gives her meaningful protection without harm to others.

But the call for compromise might entail something different, namely *seeking unreasoned solutions as a policy preference*. At times, Flanders seems to embrace this second version. He says that he wants to avoid situations in which the losers are told that “their reasons [are] not looked at as persuasive reasons or reasons at all,”²⁴² or where they are told that their positions “are somehow *incoherent*.”²⁴³ Quite clearly, the benefit here is that those on the losing end of a government decision do not have to face the full emotional impact of their loss.²⁴⁴ Compromise also “buys us time,” during which facts on the ground may evolve, lessening the tension between religious freedom and equality law.²⁴⁵ Again, those are both real benefits.

But government failure to give reasons for its decisions—or its affirmative effort to *avoid* giving reasons—risks a form of injustice. Telling religious traditionalists that they are not getting what they want, or not getting all of what they want, without giving reasons entails the dangers of arbitrary power. Striking these kinds of compromises when reasoned solutions are unavailable is one thing. But actively preferring unreasoned solutions seems to be quite another.

Rather than lowering the temperature of contemporary conflicts, compromise of this second form may well raise pressure on both sides. Justifications for government action can be understood, resisted, and possibly changed, but unjustified outcomes elicit pure contestation. Some of that is unavoidable anyway. But to privilege raw power contests when reasoned

²⁴¹ TEBBE, *supra* note 11, at 180–81.

²⁴² Flanders, *supra* note 12, at 3.

²⁴³ *Id.* at 9 (original emphasis).

²⁴⁴ *Id.* at 7 (“No one gets exactly what they want, and so neither side is fully happy. At the same time, neither side is fully unhappy. That is the benefit of compromise.”).

²⁴⁵ *Id.* 7–8. Here Flanders, like me, is open to Koppelman’s objection that his “expectation [that groups will evolve toward egalitarianism] is likely to be disappointed, at least with respect to some groups. The Catholics, Mormons, Orthodox Jews, and Southern Baptists will not come around any time soon. Tolerance had best not depend on any prediction that they will.” Koppelman, *supra* note 12, at 4–5.

solutions are available may entail costs that overbalance the benefits. Maybe I am misunderstanding Flanders here, but on my reading this risk remains a worry.

Patricia Marino's response paper, though fascinating and erudite, seems to operate with a similar misimpression about the strength and scope of the argument for social coherence. She describes the approach as "meant to point us toward consensus," and she says that "[t]he idea, I take it, is that in the context of legal reasoning we can find and appeal to a shared initial perspective to generate conclusions that we all must recognize as justified."²⁴⁶ But the point of social coherence is not to generate consensus, either about whether an outcome is justified, in the sense of being supported with reasons, or about whether it is actually correct, in the sense that those reasons are persuasive or right. Rather, the point of the method is more modest—again, it is simply to preserve the possibility of reasoned argument over religious freedom outcomes.

A coherence method preserves the possibility of two kinds of conflict. First, actors may disagree about whether an advocated solution is coherent, in the sense that it fits together with precedents and principles that the debaters agree are authoritative. This is a disagreement about justification. Second, they may disagree about whether the outcome is correct—they may differ about whether a solution, though *supportable* by analogies to precedents and applications of principles, nevertheless *is supported* in convincing ways.

So it seems not quite right to say that the coherence method, as I defend it, is meant to "generate" outcomes that everyone must recognize as either coherent or correct. Rather, the method preserves the possibility of disagreement itself. It shows how people can argue both about justification, or coherence, and about persuasiveness, or correctness. And although disagreement is integral to any democracy, that does not mean that arbitrariness is inevitable, as the skeptics would have it.

Can a morally abhorrent position nevertheless be coherent? This is a question that extends beyond the scope of the

²⁴⁶ Marino, *supra* note 12, at 5.

book, but it is interesting to consider. Marino has a position: she says that it is possible for immoral positions to be coherent, and that the way to argue against them is on “moral grounds,” rather than through charges of incoherence.²⁴⁷ That is, one should argue that such positions are substantively wrong, rather than unjustified. But what would be the basis for such a moral argument, for Marino? This calls to mind Joseph Raz’s worry that coherence approaches have nothing to say when coherent accounts conflict—that there is no “base” from which coherence theorists can criticize such positions.²⁴⁸

Whether or not this is true as a matter of general morality, it need not be true of legal interpretation.²⁴⁹ After all, lawyers and judges operate against the background of *some* shared authorities, including, for instance, the text of the Constitution, certain generally-accepted statutes, and basic common-law principles. Legal conventions exist as a matter of specialized social meaning, in other words, and they both ground and constrain interpretive argument in this professional domain. I take this to be relatively uncontroversial, except among some skeptics.

Even if I am right, however, it means only that it is *possible* for lawyers to argue that their opponents’ positions are incoherent, as well as incorrect. For example, in the book I contend that the Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* was incoherent insofar as it failed to account for the rule against third-party harms.²⁵⁰ I would be wrong if Justice Alito, the author of the Court’s opinion, could establish that the principle simply did not exist. Then he could maintain that the Court’s opinion was coherent, as he did, and I would have little to say in response.²⁵¹ However, because the precedents I leverage are authoritative among lawyers, I can maintain that the Court’s decision is not only wrong, but unjustified.

²⁴⁷ *Id.*

²⁴⁸ Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 284 (1992).

²⁴⁹ See TEBBE, *supra* note 11, at 43 (arguing that the social form of coherence theory, as applied to law, addresses Raz’s concern about a lack of “base”).

²⁵⁰ *Id.* at 67–70.

²⁵¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2781 n.37 (2014).

Marino raises two interesting concerns about this approach. First, she worries that it constrains legal change, because recognized legal authorities become fixed.²⁵² Second, she says the approach may discount marginal social voices simply because they resist majoritarian understandings.²⁵³

Neither of these ought to trouble us, however. Because people can disagree about coherence itself, as well as about correctness, change is explicitly contemplated by the method. After all, few legal authorities are permanent, as Marino herself observes in her fascinating discussion of LGBT rights.²⁵⁴ Here, it is important to appreciate that legal interpretations interact with broader social and political understandings of religious freedom and the Constitution. Over time, social movements and political initiatives can work real change to accepted legal authorities.

Nor is it correct to say that the method skews against minority legal positions. On the contrary, I would say that prompting the examination and reexamination of conventional doctrine is close to the heart of the method. Not only dominant players, but marginalized critics can make arguments that must be taken seriously because they deploy authorities that have recognized force, even if only as a matter of contingent social and legal meanings.²⁵⁵ And marginal voices can make claims not only that accepted understandings are incorrect because based on faulty reasoning, but also that they are incoherent or unjustified because they fail to take into account certain precedents or principles. While reasoning in this way may not successfully escape powerful influences, it is not inherently biased in their favor.²⁵⁶

Marino asks, what does it mean for understandings to be “shared” in the sense I use that term? This is a complex matter.

²⁵² Marino, *supra* note 12, at 6.

²⁵³ *Id.* at 8–9.

²⁵⁴ *Id.* at 6–9.

²⁵⁵ You could think of my own defense of the principle of avoiding harm to others in that way.

²⁵⁶ I suppose Marino is right to be concerned that the approach allows privileged legal actors to describe unprivileged positions as “incoherent.” *Id.* at 9. But at least it also empowers the latter to find places where the dominant approach is unjustified or irrational. By contrast, the skeptics’ approach would leave minority or marginalized voices to the vagaries of pure power politics.

Here, I will say only that legal understandings, like social meanings generally, do have a core and a periphery. As Jack Balkin has put it, some legal interpretations are “on the wall” and others are “off the wall” at any given time.²⁵⁷ Think of this as an Overton Window for legal discourses and institutions.²⁵⁸ Almost everything about this domain is contested, contingent, and changeable. But it nonetheless allows lawyers to make arguments that can be justified because backed by reasons—and that is all that a defense of social coherence needs to establish.

I believe that these few misunderstandings follow from Marino’s initial sense that social coherence aims at a kind of consensus—or, even more strongly, that it seeks to “generate” that consensus through some sort of deterministic process. Without that view, her other concerns dissipate. No longer does the approach have any difficulty accounting for legal change, and no longer does it privilege nonminority positions. On the contrary, social coherence opens up space for additional contestation—it allows dissenting voices to argue that established legal understandings not only are incorrect, but that they also can be incoherent. These are powerful weapons. They may well not be sufficient to overcome the countervailing influence of incumbent interests and ideologies, but it will force the articulation of arguments grounded in legal authorities.

CONCLUSION

Thinking broadly about religion and equality law, in the way I have here, suggests several conclusions. First, the lessons of critical theorists on both the political right and left must be fully incorporated—including their teachings on the plasticity of the category of religion. Yet that does not mean that reasons cannot or should not be given for (at least some) conclusions of

²⁵⁷ See generally, Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), available at <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-main-stream/258040>.

²⁵⁸ See Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 393–94 (2015) (“Joseph Overton observed that in a given public policy area, such as education, only a relatively narrow range of potential policies will be considered politically acceptable.”) (citing *The Overton Window: A Model of Policy Change*, MACKINAC CTR. FOR PUB. POLY, www.mackinac.org/OvertonWindow).

constitutional law that we reach in this area. It *does* mean that those justifications are likely to be dynamic and overdetermined.

Second, the specialness of religion should be rejected in one specific sense: the category of religion should be supplemented with other recognizable categories of belief and practice where that is necessary to promote the values animating various First Amendment doctrines. While religious freedom ought not be supplanted, there seems to be no good reason not to reduce the unfairness and arbitrariness of protecting (or burdening) religion alone.

Third and related, a substantive theory of religious freedom will appreciate the several values driving different aspects of the doctrine. Moreover, it will pursue them with an eye to guaranteeing full and equal membership in the democratic polity. As it turns out, it is quite possible to both reject the argument that religion ought to be unique in constitutional law and to vigorously seek to vindicate the values of the First Amendment. But only detailed analysis of specific doctrines can show that to be true. I plan to provide that analysis in my next major project.

Fourth, the argument from symmetry—i.e., the warning that traditional religious people are also at risk of subordination—holds some truth, but should not be accepted uncritically. Whether religious traditionalists are constituted as second-class by government policy is a contextual question that can only be answered by examining the history, purpose, and context of official action.

Finally, nothing about the method of social coherence promises consensus or even an easing of social tensions. Rather, its purpose is to establish that reasons can be given for religious freedom outcomes, even as those reasons exist alongside interests and ideologies. That ameliorates the injustice of unreasoned government rule. It also promotes the health of the democracy, but it does that not by avoiding vigorous debate but instead by allowing and even encouraging government actions that are justified.