What If Religion Is Not Special?

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Leading accounts of the First Amendment's Religion Clauses fail to provide a coherent and morally attractive position on whether religion warrants special treatment as compared with secular ethical and moral doctrines. Focusing on two central issues involving whether laws must have a secular purpose and whether religious exemptions are constitutionally mandatory, this Article rejects existing theories as either theoretically inconsistent or substantively mistaken. If religion does not warrant special treatment, then it is important to ask what our attitude should be toward the constitutional text. Under originalist theories of constitutional interpretation, the Religion Clauses should be considered morally regrettable. Under nonoriginalist theories, there may be interpretations of the text that allow for the possibility of moral reconciliation. Either way, rejecting the idea that religion is special requires reassessing our understanding of the Religion Clauses.

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INTRODUCTION

Nearly thirty years ago, Frederick Schauer published an article asking the question, "Must speech be special?"[1] That question, he said, was not the same as the question, "*Is* speech special?" The first question was about whether an adequate theory of the First Amendment must explain why the law provides special protection for speech. The answer to that question was, "Yes." Otherwise, the theory could not provide guidance in determining the meaning of the constitutional text. But the answer to the second question was probably, "No." As a matter of political morality, speech cannot be distinguished from many other activities as warranting special constitutional protection. These conflicting answers produced what Schauer described as an "intellectual ache."[2] On the one hand, the constitutional text makes speech special; on the other hand, there is no sound normative argument to support the text. If we think speech *must* be special and also that it *is not*, then we face a real conundrum. The law pulls in one direction, and political morality in the other. With a constitutional guarantee as fundamental as the freedom of speech, the need to resolve this tension seemed both pressing and inescapable.[3]

In the last decade or so, it has become increasingly clear that similar concerns apply with equal, or perhaps even greater, force to the Religion Clauses of the First Amendment. If we ask Schauer's question *mutatis mutandis*—"Must *religion* be special?"—the answer again would seem to be, "Yes." The Establishment Clause says that Congress cannot pass any law respecting an establishment of religion. It does not prohibit the establishment of nonreligious ethical or moral views. Religion is special in the sense that it suffers from a le-

1 Frederick Schauer, *Must Speech Be Special?*, 78 Nw U L Rev 1284, 1306 (1983).

2 Id.

3 See id.

gal disability that does not apply to secular beliefs and practices. Similarly, the Free Exercise Clause identifies religion as the subject of special protection. Congress is prohibited from passing laws prohibiting the free exercise of *religion*. There is no general prohibition on laws restricting the free exercise of nonreligious beliefs and practices. Thus, any theory that seeks to explain the Religion Clauses must provide an account of what is special about religion in terms of both its disabilities and protections.[4] The problem, however, is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment. As a normative matter, religion is *not* special. Again, we find ourselves in something of a bind. Religion *must* be special, and yet it *is not*.

This conflict between the legal and normative status of religion is now at the center of debates about the Religion Clauses. For example, the Supreme Court recently decided *Hosanna–Tabor Evangelical Lutheran Church and School v EEOC*,[5] holding that religious institutions are entitled to a special constitutional exemption (the "ministerial exception") from laws prohibiting employment discrimination.[6] The Government had argued that religious groups are not entitled to protections beyond those available to nonreligious expressive associations under the Free Speech Clause. At oral argument, two Justices—from opposite sides of the political spectrum—found this position to be "extraordinary" and "amazing,"[7] and a unanimous Court eventually rejected the Government's view, describing it as "remarkable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[8]

Once it becomes apparent, however, the problem of religion's distinctiveness is pervasive in thinking about the meaning of the Religion Clauses. Must the government provide special accommodations for religious citizens when their beliefs conflict with the law? If so, must those accommodations be extended to similarly situated nonbelievers?[9] What about government speech promoting religion? If a state government can support gay rights, reproductive choice, and gun control, why not also prayer in public school, creationism,

4 See Douglas Laycock, *Religious Liberty as Liberty*, 7 J Contemp Legal Issues 313, 316 (1996).

5 132 S Ct 694 (2012).

6 Id at 707.

7 See Transcript of Oral Argument, *Hosanna–Tabor Evangelical Lutheran Church and School v EEOC,* No 10-533, *28, *37 (US Oct 5, 2011) (available on Westlaw at 2011 WL 4593953) (quoting responses from Justice Antonin Scalia and Justice Elena Kagan, respectively).

8 *Hosanna–Tabor*, 132 S Ct at 706.

9 See Part I.A.

and displays of religious symbols?[10] And why do taxpayers have a special right to challenge legislation taxing them to support religion,[11] when they have no standing to object when the government spends their money on policies that might be more controversial and indeed of far greater consequence to them? If taxpayers cannot sue to stop the War in Iraq, why do they have standing to prevent Congress from spending money on, say, vouchers for religious schools?[12] All of these questions, which are easily proliferated, turn on the constitutional status of religion.

Given the importance of the issue, it is not surprising that there have been numerous attempts in recent years to explain why religion is both morally and legally distinctive.[13] There have also been numerous attempts to explain why it is not.[14] This Article advances beyond the existing literature first by providing, in Part I, a new taxonomy to describe how religion might (or might not) be special for constitutional purposes. Some theories hold that religion should not be treated differently from secular ethical and moral views under the Establishment Clause, but that it should be given more favorable treatment under the Free Exercise Clause. Another set of theories takes the opposite view, namely that religion should be distinctively disfavored under the Establishment Clause but not given any special treatment under the Free Exercise Clause. More recently, some have

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10 Compare *Johanns v Livestock Marketing Association*, 544 US 550, 562 (2005) (stating that government speech is not subject to review under the Free Speech Clause), with *School District of Abington Township, Pennsylvania v Schempp*, 374 US 203, 223 (1963) (rejecting prayer in public schools); *Edwards v Aguillard*, 482 US 578, 593 (1987) (rejecting the teaching of creationism in public schools); *McCreary County v ACLU*, 545 US 844, 861 (2005) (rejecting a display of the Ten Commandments).

11 See *Arizona Christian School Tuition Organization v Winn*, 131 S Ct 1436, 1446 (2011) (affirming taxpayer standing to challenge legislative expenditures that aid religion).

12 See Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va L Rev 317, 321–22 (2011) (attempting to reconcile the principle that taxation to promote religion infringes on the freedom of conscience with the view that religion is not normatively distinctive).

13 See, for example, Alan E. Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 Cardozo L Rev 1701, 1705 (2011); Chad Flanders, *The Possibility of a Secular First Amendment*, 26 Quinnipiac L Rev 257, 301 (2008); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L Rev 1, 3 (2000); John H. Garvey, *What Are Freedoms For?* 139 (Harvard 1996); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L J 1611, 1613 (1993).

14 See, for example, Brian Leiter, *Why Tolerate Religion?* 54–67 (Princeton 2012); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 51–77 (Harvard 2007); Anthony Ellis, *What Is Special about Religion?*, 25 L & Phil 219, 238 (2006); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 Ind L J 193, 202–07 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U Ark Little Rock L J 555, 572–74 (1998).

argued that religion is morally distinctive in both contexts, while others have argued that it is not special in either of them.

In addition to clarifying the substance and structure of these theories, the taxonomy developed in Part I lays the groundwork for systematic criticism of them. Thus, in Part II, I argue that at least in their present form, all of the theories described below are mistaken. Many of the most widely held normative justifications for favoring (or disfavoring) religion are prone to predictable forms of internal incoherence. Furthermore, accounts of religion's distinctiveness that manage to avoid such incoherence succeed only at the cost of committing other serious errors, especially in allowing various types of unfairness toward religious believers, nonbelievers, or both. The upshot of all this is that principles of disestablishment and free exercise ought to be conceived in terms that go beyond the category of religion. Instead of disabling or protecting only religious beliefs and practices, the law ought to provide similar treatment for comparable secular ethical, moral, and philosophical views.

If religion *is not* special, then what attitude should we adopt toward the constitutional text, which says that it *must* be? Answering this question requires a more general theory of constitutional interpretation. Since such theories are at least as controversial as theories of the Religion Clauses, I consider two possible responses in Part III. The first says that if the Religion Clauses are interpreted according to their original meaning, then they should be criticized as morally defective. Departing from original meaning, the second response attempts to reconcile the Religion Clauses with political morality by expanding the definition of religion to include secular ethical and moral doctrines. This approach faces some familiar difficulties, but it suggests one path to bringing existing law into line with the view that religion is not normatively distinctive. Without taking sides between these alternative responses, I argue that adopting either of them has profound implications for our understanding of the First Amendment.

I. HOW RELIGION MIGHT (OR MIGHT NOT) BE SPECIAL

The question of whether religion is special arises in a wide range of doctrinal disputes. This Article focuses attention on two broad disagreements about the Establishment and Free Exercise Clauses, respectively. The first concerns whether religiously justified laws are constitutionally permissible. The second is whether religiously motivated conduct deserves constitutional or mandatory exemptions from otherwise valid laws. Section A explains why it makes sense to

focus on these two issues. Section B presents four views of the Religion Clauses, each with a different position concerning the role of religious convictions in justifying state action and the constitutionality of religious exemptions.

A. Secular Purpose and Religious Accommodation

One set of arguments about whether religion is special focuses on whether, and to what extent, religious convictions ought to enter into political and legal decision making. The Establishment Clause has been interpreted to require that legislation and other state action have a primary or predominant secular purpose.[15] Arguments about whether that requirement is justified are also framed in terms of political morality. The question is whether a legal rule requiring some form of secular purpose is morally justifiable.[16]

In terms of free exercise, arguments tend to focus on whether there is any justification for constitutionally mandatory exemptions from general laws that incidentally burden religious practice. An important subset of those arguments concerns whether religiously motivated conduct has some relevant properties that warrant singling it out for special protection. Some of the arguments in this subset are explicitly normative. They are attempts to show that a legal rule requiring exemptions for religion is (or is not) morally justified.[17]

In thinking about the distinctiveness of religion, it makes sense to concentrate on both the secular purpose requirement and free exercise exemptions. These two issues are arguably at the core of disagreements about the meaning of the Religion Clauses. A central question about the Establishment Clause is whether it constrains the types of justifications that can be given for state action. The enact-

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[15] A secular purpose requirement is part of the three-prong test for determining an Establishment Clause violation under *Lemon v Kurtzman*, 403 US 602, 612 (1971). Although the *Lemon* test has been heavily criticized, the Supreme Court has reaffirmed the need for a "secular legislative purpose" on numerous occasions. See, for example, *McCreary County v ACLU*, 545 US 844, 861 (2005) (rejecting Ten Commandments display for having no predominant secular purpose). See also Andrew Koppelman, *Secular Purpose*, 88 Va L Rev 87, 95–99 (2002).

[16] There is a vast literature about the proper role of religious beliefs in political and legal decision making. For the view that state action ought to be justified according to secular or public reasons, and not solely on the basis of religious beliefs, see John Rawls, *Political Liberalism* 213–54 (Columbia 1996); Robert Audi, *Religious Commitment and Secular Reason* 81–104 (Cambridge 2000); Jonathan Quong, *Liberalism without Perfection* 110 (Oxford 2011). For various criticisms of this view, see Kent Greenawalt, *Religious Convictions and Political Choice* 30–48 (Oxford 1988); Paul Weithman, *Religion and the Obligations of Citizenship* 36–66 (Cambridge 2002); Christopher J. Eberle, *Religious Conviction in Liberal Politics* 71–78 (Cambridge 2002).

[17] See Part I.B.

ment of laws that can only be justified on religious grounds might seem like a paradigmatic example of religious establishment.[18] That claim is, of course, controversial. Critics object that it unfairly excludes those with strong religious convictions from the political process.[19] Similarly, a central question about the Free Exercise Clause is whether it should be interpreted as requiring mandatory exemptions for religion. A major objection to such exemptions is that giving religion special treatment is unfair to nonreligious views. Part of the argument below is that evaluating these various charges of unfairness requires taking a more systematic view of the normative arguments developed on both sides of the Religion Clauses. A survey of these arguments may not be comprehensive or exhaustive, but it might nevertheless provide us with some insight into whether competing theories of the Religion Clauses are internally coherent and normatively appealing.

The remainder of this Part sketches four views of the Religion Clauses, which take different and conflicting positions on whether religion can serve as a proper justification for state action and whether religion warrants special legal exemptions. My main concern in this Part is to give careful descriptions of these competing theories. In the next Part, I shall argue that they are either internally incoherent or, if they are coherent, that they achieve that virtue at the cost of unfairness to either religious believers or nonbelievers, or both.

Before continuing, it is important to note that this Part and the next focus on whether religion is special as a matter of political morality. Moral arguments are often invoked to support legal theories of the Religion Clauses, but I do not claim that there is any necessary connection between the moral and legal status of religion. Even if religion is not distinctive from the perspective of political morality, it might nevertheless have a special place in the law. Indeed, in Part III, I return to the legal question of whether religion must be special

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18 See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 Tex L Rev 583, 590 (2011) ("That the nonestablishment norm prevents government from adopting laws predominantly on the basis that they are required by God or the religious tenets of some particular faith seems axiomatic."); Greene, 102 Yale L J at 1633 (cited in note 13) ("[O]ne principal feature that distinguishes a country like ours from theocracies is the preclusion of law based expressly on religion.").

19 See generally Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J L Phil & Culture 159 (2007); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 Utah L Rev 639; Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons*, in Paul J. Weithman, ed, *Religion and Contemporary Liberalism* 162 (Notre Dame 1997).

to argue that, at least on some theories of constitutional interpretation, the law may lack moral justification.

B. Four Views of the Religion Clauses

Theories of the Religion Clauses can be classified along two dimensions depending on how they view the special treatment of religion. Starting with disestablishment, the question is whether state action must be justified by a secular purpose.[20] Theories that require a secular purpose can be called *exclusive* because they exclude religious beliefs as a basis for justifying state action. Theories that allow for state action on the basis of religious beliefs can be described as *inclusive* because they include or accept religious beliefs as proper grounds for political and legal decision making.

With respect to free exercise, the question is whether religiously motivated conduct should receive constitutional exemptions from general laws that impose incidental burdens.[21] Theories that require special constitutional exemptions for religious practices are versions of *accommodation*; theories that reject special exemptions for religion are forms of *nonaccommodation*.

Bringing these categories together, and simplifying somewhat, makes it possible to describe four types of theories: inclusive accommodation, exclusive accommodation, exclusive nonaccommodation, and inclusive nonaccommodation. To get a better sense for each theory, the remainder of this Part examines the structure of each position and the main arguments offered for it. Although it would be possible to begin with any of the four theories, I start with

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[20] The secular purpose requirement can be given various formulations, some more stringent than others. The main options are discussed in Part II.A.1.

[21] This question focuses on *constitutional* accommodations, which are those mandated by courts under the Free Exercise Clause. It does not address the permissibility or desirability of statutory exemptions, or those granted by legislative discretion. Of course, a general theory of religious freedom must explain whether religion warrants special treatment for constitutional exemptions, statutory exemptions, or both. There are numerous possibilities here, which have been explored at length in the existing literature. See, for example, Michael W. McConnell, *Accommodation of Religion*, 1985 S Ct Rev 1, 8–24 (arguing for both constitutional and statutory accommodations); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case against Discretionary Accommodation*, 140 U Pa L Rev 555, 558–59 (1991) (arguing for constitutional accommodations but against statutory exemptions); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U Chi L Rev 308, 309 (1991) (rejecting constitutional accommodations but accepting limited statutory exemptions); Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U Pitt L Rev 75, 79 (1990) (arguing against both constitutional and statutory accommodations). To simplify matters, however, I concentrate on constitutional exemptions and leave aside for now the issue of whether, or in what circumstances, statutory exemptions ought to be constitutionally permissible.

inclusive accommodation. Having described one theory in some detail, it should then be possible to give more concise overviews of the others.

1. Inclusive accommodation.

Inclusive accommodation claims that religious convictions *are not special* for justifying political and legal decisions but that they *are special* for purposes of obtaining accommodations.

a) Secular purpose. Taking these claims in order, inclusive accommodation rejects existing legal doctrine, which has for the past forty years required that all laws have a "secular legislative purpose."[22] The Supreme Court has ruled on numerous occasions that laws based primarily or predominantly on religious grounds violate the Establishment Clause.[23] The Court has applied the secular purpose doctrine mainly in cases involving government-sponsored religious speech or the suppression of speech for religious purposes.[24] Lower courts have generally followed the same pattern,[25] although some have suggested that more general uses of state police power for religious purposes violate the Establishment Clause or the Equal Protection Clause of the Fourteenth Amendment.[26]

From the perspective of inclusive accommodation, however, all of this is deeply mistaken. The secular purpose doctrine should be abandoned in favor of allowing religious beliefs to play an equal role in the political process. There should be no constraints on religious views entering into the justification for political and legal decisions. In this regard, religious convictions ought to be treated like nonreligious

22 *Lemon*, 403 US at 612.

23 See, for example, *McCreary County*, 545 US at 860 ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality.").

24 See, for example, *Santa Fe Independent School District v Doe*, 530 US 290, 315 (2000) (rejecting public school policy authorizing student "invocations"); *Stone v Graham,* 449 US 39, 41 (1980) (holding that posting the Ten Commandments in public classrooms had no secular purpose); *Edwards v Aguillard*, 482 US 578, 593 (1987) (invalidating ban on teaching evolution).

25 See, for example, *Doe v School Board of Ouachita Parish*, 274 F3d 289, 294 (5th Cir 2001) (rejecting an amendment to school prayer policy); *May v Cooperman*, 780 F2d 240, 252–53 (3d Cir 1985) (invalidating a moment of silence). See also Koppelman, 88 Va L Rev at 95 n 12 (cited in note 15) (collecting cases).

26 The constitutionality of same-sex marriage is now the most salient issue here. See, for example, *Varnum v Brien*, 763 NW2d 862, 905 (Iowa 2009) ("[C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals."); *Perry v Schwarzenegger*, 704 F Supp 2d 921, 930–31, 1001–02 (ND Cal 2010) (holding that religious justifications for banning gay marriage are not a rational basis under Fourteenth Amendment equal protection doctrine), affd *Perry v Brown*, 671 F3d 1052, 1096 (9th Cir 2012).

moral and political commitments. They should not suffer any special disability when it comes to serving as the basis for state action.[27]

As a preliminary matter, it is worth noting that the secular purpose doctrine can be specified in various ways. First, it can be made more or less stringent depending on the *role* that a secular purpose is required to play in justifying state action. The most stringent or exclusive version of the doctrine demands that a secular purpose be the *only* justification for a law. No court has ever endorsed this test, which would preclude any reliance on religious conviction even if it were wholly redundant given the existence of a secular purpose.[28] In recent years, the Supreme Court has favored a less stringent requirement that a secular purpose serve as the *primary* or *predominant* justification for state action.[29] This formulation allows religious convictions to play some role in the legislative process, provided that a secular purpose is the main reason for state action rather than a secondary, ancillary, or pretextual purpose. An even weaker requirement would hold that a law must be justified by a *sufficient* secular purpose, even if the primary or predominant reason for the law is religious. In other words, if religious convictions are necessary to justify the law, then there is no sufficient secular purpose for it.[30] Thus, for any state action that satisfies this rule, religious purposes will always be redundant or superfluous because of the existence of an independently adequate secular justification. Lastly, the weakest version of the secular purpose doctrine requires only that the law not be solely or entirely justified on the basis of religious convictions. This test allows for laws that are justified on religious grounds, provided that a secular purpose plays *some* role in justifying the law.[31] Even under this formulation, however, the government's proffered secular purpose cannot be a false rationalization for the law. No

27 See McConnell, 1 J L Phil & Culture at 161 (cited in note 19); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 Cornell J L & Pub Pol 1, 6–7 (2002).

28 See *Edwards*, 482 US at 599 (Powell concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.").

29 See *McCreary County*, 545 US at 860 ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality.").

30 See Micah Schwartzman, *The Sincerity of Public Reason,* 19 J Polit Phil 375, 386 n 29 (2011) (defending sufficiency as the proper standard for public justification).

31 See *Wallace v Jaffree*, 472 US 38, 56 (1985) ("[T]hough a statute that is motivated in part by a religious purpose may satisfy the [secular purpose prong] . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.").

court has recognized a sham secular purpose as satisfying the demands of the Establishment Clause.[32]

Second, in addition to determining what *role* a secular purpose must play in justifying state action, the doctrine may also take a subjective or objective *form*.[33] In its subjective form, the secular purpose test asks whether those who participated in the legislative process were *motivated* by secular reasons. Framed in this way, the doctrine calls for an inquiry into legislators' *actual* purposes or their subjective legislative intentions.[34] But the doctrine can also be specified so as to avoid asking about individual or collective intentions (or motivations). Instead, the demand for a secular purpose may be understood in objective terms.[35] The question then is whether the express purpose of a law is secular or religious. At least in some cases, the text and structure of legislation may be sufficient to give a clear indication of its central or predominant justification.[36]

Depending on how the secular purpose requirement is specified in terms of its role and form, it may be more or less difficult to satisfy. A highly exclusive and subjective secular purpose test would be very demanding. In evaluating the constitutionality of a law, a court would have to determine that legislators were motivated only by secular reasons and not by their religious convictions. By contrast, a more inclusive and objective secular purpose test would approve of any law with a plausible secular justification even if no legislator was motivated by it. And, of course, it is possible to construct various tests that would fall somewhere in between the strongest and weakest versions of the doctrine.

Inclusive accommodation rejects all versions of the secular purpose requirement. It should be emphasized that the reasons for this

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32 See *McCreary County*, 545 US at 864 ("[T]he secular purpose required has to be genuine, not a sham."); *Santa Fe*, 530 US at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is . . . entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'") (second alteration in original).

33 Or the doctrine could include both subjective and objective tests. See, for example, *Lynch v Donnelly*, 465 US 668, 690–91 (1984) (O'Connor concurring) (describing objective and subjective tests for determining whether government has endorsed religion).

34 See *Wallace*, 472 US at 56–60 (invalidating a state statute authorizing a moment of silence in public schools on the ground that the state legislature was motivated by a religious purpose).

35 See Koppelman, 88 Va L Rev at 114–17 (cited in note 15); Greene, 102 Yale L J at 1623 (cited in note 13).

36 On some accounts of statutory interpretation, extrinsic evidence of subjective legislative intent (such as legislative history) may be either unnecessary or counterproductive in determining a law's purpose. See, for example, Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 349 (2005) (arguing for rule-like methods of interpretation in determining statutory purpose).

blanket rejection have little, if anything, to do with matters of statutory interpretation. Sometimes critics of the secular purpose doctrine argue that it requires courts to inquire into legislators' intentions and that this form of inquiry is incoherent or impossible.[37] Those who are skeptical about the existence of legislative intent, or about the ability of courts to discern it, will naturally object to the secular purpose doctrine in its subjective form. But this source of opposition is both avoidable and ultimately a distraction from inclusive accommodationists' main concerns. First, as others have shown, the secular purpose doctrine can be formulated in objective terms and in ways that eschew inquiries into legislative motive or intent, thereby rendering textualist objections inapplicable.[38] Second, and more importantly, even if every legislator had exactly the same beliefs about a law, such that it were possible for a single, unified legislative intent to exist, and even if it were possible for courts to know that intent in a reliable way, inclusive accommodationists would *still* object to the secular purpose doctrine. Arguments about the form of the doctrine are for the most part ancillary to objections concerning the proper role of religious convictions in the legislative process.

Setting aside issues of statutory interpretation, inclusive accommodationists object to the secular purpose doctrine on grounds of text, tradition, legal precedent, and political morality.[39] For now, I focus on the last category of arguments. The reason is that textual, historical, and precedential claims can determine, at most, whether religion must be special as a legal matter. They cannot decide whether religion is morally distinctive for purposes of political decision making.[40] Yet inclusive accommodationists deny that religion is special in

37 See, for example, *Edwards*, 482 US at 636 (Scalia dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is . . . almost always an impossible task."). See also Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* 34 (Oxford 1997) (discussing objections to judicial inquiries into legislative secular purpose).

38 See Koppelman, 88 Va L Rev at 113–17 (cited in note 15) (defending an objective form of the secular purpose doctrine). Of course, those who reject skepticism about legislative intent and the judiciary's competence to discern it may not see any special difficulty in adopting a subjective form of the secular purpose doctrine. See, for example, *McCreary County*, 545 US at 862 (Souter) ("[S]crutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts.").

39 See, for example, McConnell, 1 J L Phil & Culture at 165 (cited in note 19) ("[N]o one can plausibly claim that an insistence on secular public reason is characteristic of the American political tradition or logically entailed by the principles animating the First Amendment.").

40 One could argue that history and tradition ought to be given moral weight, and so may form part of an argument for the moral distinctiveness of religion. But while there might be reasons to assign weight to history and tradition in legal decision making, I am skeptical that they carry independent weight in determining whether a practice is moral. For some objections to tradition as a source of legal and moral justification, see Kim Forde-Mazrui, *Tradition as*

this way, not only as a matter of law but also as a matter of the political morality best suited for a democratic society, especially one marked by a diversity of religious and nonreligious views.[41]

Although inclusive accommodationists reject the secular purpose doctrine for many reasons, two objections are especially important for present purposes.[42] First, they argue that religious believers are unfairly excluded from the political process.[43] If courts invalidate legislation based primarily on religious beliefs, then, even if they are in the majority, religious citizens will not be able to convert their deeply held views into law, except perhaps when their views coincide with those of nonreligious participants in the legislative process. Religious majorities are thereby disabled from acting in ways that nonreligious majorities are not. Inclusive accommodationists contend that this makes religious believers into second-class citizens, who are effectively disenfranchised with respect to those issues on which their religious views predominate.[44]

Second, inclusive accommodationists object that the secular purpose doctrine rests on a dubious epistemological view that distinguishes between secular moral views and religious beliefs on the grounds that the former are publicly justifiable in a way that the

Justification: The Case of Opposite-Sex Marriage, 78 U Chi L Rev 281, 289 (2011); David Luban, *Legal Traditionalism*, 43 Stan L Rev 1035, 1036 (1991).

41 See, for example, Michael W. McConnell, *Religious Conviction and Political Participation*, 20 Regent U L Rev 313, 316 (2008); Idleman, 12 Cornell J L & Pub Pol at 71–82 (cited in note 27).

42 There are other significant objections not addressed here, including that the secular purpose doctrine (1) leads to indeterminate outcomes with respect to important political issues; (2) requires religious believers to "bracket" their most deeply held views, which is both psychologically impossible and morally objectionable; and (3) creates incentives for believers to be insincere in public deliberations. See, for example, Greenawalt, *Religious Convictions and Political Choice* at 150, 155 (cited in note 16) (stating the indeterminacy and bracketing objections); Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Political Dynamism*, 86 Notre Dame L Rev 119, 168–69 (2011) (raising an insincerity objection). But see Micah Schwartzman, *The Completeness of Public Reason*, 3 Polit Phil & Econ 151, 203–08 (2004) (responding to indeterminacy objection); Schwartzman, 19 J Polit Phil at 393–98 (cited in note 30) (rejecting psychological impossibility and insincerity objections). See also Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* 200–30 (Cambridge 2009) (defending public reason against these and other objections).

43 This is probably the most common objection to secular purpose requirements. See, for example, McConnell, 1 J L Phil & Culture at 171–73 (cited in note 19) ("To prevent certain citizens from making arguments premised on their most deeply held beliefs . . . is demeaning. It makes religious believers unequal citizens."); Wolterstorff, *Why We Should Reject What Liberalism Tells Us* at 175 (cited in note 19); Idleman, 12 Cornell J L & Pub Pol at 72–78 (cited in note 27).

44 See, for example, Michael W. McConnell, *Believers as Equal Citizens*, in Nancy L. Rosenblum, ed, *Obligations of Citizenship and Demands of Faith* 90, 105 (Princeton 2000).

latter are not.[45] As discussed below, proponents of the secular purpose doctrine argue that state action is legitimate only if it is based on values that are publicly justifiable and, further, that since religious convictions are not justifiable to nonbelievers, it is inappropriate for the government to rely on them (or rely solely on them) in making political and legal decisions. Inclusive accommodationists respond that religious beliefs are not different in any relevant sense from beliefs about morality, aesthetics, or other controversial domains of value. The basic argument for this claim is that however the principle for determining what counts as publicly justifiable is specified, it will fail to select uniquely for religious beliefs. All the proposed candidates either sweep in secular moral values, making them overinclusive, or do not exclude many religious beliefs, making them underinclusive.[46] Either way, religious views are not distinctive with respect to participation in the political process. They should therefore be included like all other sources of belief.

b) Religious accommodation. The claim that religion should not be especially constrained in justifying state action is the first part of inclusive accommodation. The second part is that the Free Exercise Clause ought to be interpreted as incorporating a principle of religious accommodation. According to this principle, government regulations that significantly burden religiously motivated conduct must be narrowly tailored to achieve a compelling state interest.[47] This principle would not only prohibit laws that facially discriminate against religion or that have the purpose of discriminating against religion. It would also require courts to apply heightened scrutiny to laws that incidentally burden religious practices. In such cases, the government would have to provide religious exemptions, unless it could show that doing so would threaten important state interests.[48]

In calling for mandatory constitutional exemptions, inclusive accommodation rejects existing doctrine under the Free Exercise Clause. In *Employment Division, Department of Human Resources of Oregon v Smith*,[49] the Court held that although the Free Exercise Clause prohibits laws that facially discriminate against religion or

45 See, for example, McConnell, 1 J L Phil & Culture at 168–71 (cited in note 19).

46 See Eberle, *Religious Convictions in Liberal Politics* at 199–201 (cited in note 16); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 San Diego L Rev 763, 764–80 (1993).

47 See McConnell, 1985 S Ct Rev at 57–59 (cited in note 21); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo Wash L Rev 685, 687–88 (1992).

48 See McConnell, 60 Geo Wash L Rev at 708–09 (cited in note 47).

49 494 US 872 (1990).

that aim at such discrimination, the government is not required to grant exemptions from "neutral and generally applicable" laws that substantially burden religious conduct.[50] For example, in *Smith* itself, the Court rejected a free exercise challenge to a state law that criminalized a Native American religious rite by prohibiting the use of peyote. The Court held that because the law was not facially discriminatory or aimed at suppressing religion, no exemption was constitu-constitutionally mandated.[51]

Of course, according to inclusive accommodation, this was exactly the wrong result. Even if the state's ban on peyote did not discriminate on religious grounds, the law significantly burdened—indeed, outlawed—a religious sacrament. For that reason, the state should have been required to produce a compelling justification for applying the law to the facts in question, and absent such a justification, the state should have been required to grant a religious exemption.[52]

Inclusive accommodationists offer a range of arguments for their view of the Free Exercise Clause. Again, they draw on constitutional text, tradition, precedent, and political morality.[53] Focusing again on the last category, the main normative argument for religious accommodation is based on the idea that religious believers have an inalienable right to pursue salvation according to the dictates of their consciences.[54] The explicitly religious premise of this argument is that God, or some transcendent authority, has imposed duties on mankind and that fulfillment of those duties takes priority over complying with positive law. As James Madison wrote in his *Memorial and Remonstrance,* religious duties are "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[55] Since nothing is more important than obtaining salvation (and avoiding damnation), rational believers cannot relinquish the right to follow their consciences in fulfilling their religious duties. That is why the

50 Id at 879.

51 Id at 890.

52 See Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U Chi L Rev 1109, 1132 (1990); Douglas Laycock, *Peyote, Wine and the First Amendment*, 1989 Christian Century 876, 879–80.

53 See, for example, McConnell, 60 Geo Wash L Rev at 689–94 (cited in note 47) (summarizing the case for religious accommodation).

54 See McConnell, 50 DePaul L Rev at 28–29 (cited in note 13); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 Notre Dame L Rev 1597, 1611 (1997).

55 James Madison, *Memorial and Remonstrance against Religious Assessments*, in Jack N. Rakove, ed, *Madison: Writings* 29, 30 (Library of America 1999).

right is *inalienable*.[56] To avoid infringing on this right, the state should minimize conflicts between legal and religious duties, which it can do partly by granting exemptions from laws that burden religious practices.[57]

A second and related argument for religious accommodation is that when religious believers are forced to choose between their religious and legal duties, they experience greater suffering than nonbelievers faced with similar moral conflicts. Because believers affirm the existence of a transcendent authority and fear extratemporal punishments, they are anguished in ways that nonbelievers are not.[58] Furthermore, on this view, even those who are not religious might sympathize with believers who are torn between following their consciences and obeying the law. Nonbelievers might recognize that religious people experience psychological harms that differ in kind from those without a sense of obligation to a transcendent power.[59]

These two arguments for accommodation—one explicitly religious and the other indirectly so—are both narrow in scope. They do not support a right of accommodation for nonreligious claims of conscience, whether based on personal autonomy or a more general right to liberty. Instead, they quite consciously "single out" religion for special protection. It is the existence of a transcendent authority, or at least the belief in one, that motivates the argument. Without such belief, no accommodation is required, at least not under the Free Exercise Clause.[60] For example, in the Vietnam draft protest cases, the Supreme Court extended statutory exemptions for religious pacifists to include those who objected to military conscription on nonreligious moral grounds.[61] According to inclusive accommodation,

56 John Locke gave this argument its canonical expression. See John Locke, *A Letter Concerning Toleration* 46–48 (Hackett 1983) (James H. Tully, ed). See also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L Rev 346, 350 (2002) (discussing Locke's pervasive influence during the Founding era).

57 See McConnell, 60 Geo Wash L Rev at 692 (cited in note 47) ("The principle underlying the First Amendment is that the freedom to carry out one's duties to God is an inalienable right, not one dependent on the grace of the legislature."); Garvey, *What Are Freedoms For?* at 52 (cited in note 13); Paulsen, 72 Notre Dame L Rev at 1624–25 (cited in note 54).

58 See Garvey, *What Are Freedoms For?* at 54 (cited in note 13); Paulsen, 72 Notre Dame L Rev at 1622 (cited in note 54).

59 See McConnell, 50 DePaul L Rev at 30 (cited in note 13).

60 See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1500 (1990); Garvey, *What Are Freedoms For?* at 53–54 (cited in note 13).

61 See *Welsh v United States*, 398 US 333, 340 (1970) (interpreting the exemption to include those whose "opposition to war stem[s] from . . . moral, ethical, or religious beliefs about what is right and wrong"); *United States v Seeger*, 380 US 163, 176 (1965) (applying the exemption to cover any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption").

however, those cases were mistaken since only those protesters motivated by a belief in a transcendent authority were entitled to exemptions.[62] The Court came closer to this view in *Wisconsin v Yoder*,[63] which granted Amish children a religious exemption from mandatory school attendance.[64] Interpreting the Free Exercise Clause, the Court stated in dicta that it would not have exempted those with merely "philosophical and personal" views because "such belief does not rise to the demands of the Religion Clauses."[65] The Amish might receive special treatment, but if a latter-day Henry David Thoreau sought the same exemption for his children, he would not.[66] This conclusion is justified under inclusive accommodation. Although religious convictions are not distinctive for purposes of engaging in the political process, only those motivated by such convictions warrant constitutional religious exemptions.

2. Exclusive accommodation.

Exclusive accommodation holds that religious convictions *are special* for justifying political and legal decisions *and* for purposes of accommodation. With respect to the Free Exercise Clause, inclusive and exclusive accommodation are in basic agreement about the doctrine, which is to say that both reject the Supreme Court's holding in

62 See, for example, Garvey, *What Are Freedoms For?* at 54 (cited in note 13) ("None of the reasons I have given seems to cover the conscientious objection of nonreligious young men to service in the armed forces."); Paulsen, 72 Notre Dame L Rev at 1617–20 (cited in note 54) (arguing that *Seeger* and *Welsh* were wrongly decided). McConnell has suggested that *Seeger* might be explained by a concern that nonreligious objectors would feel pressure to adopt religious views in order to qualify for the exemption. McConnell, 1985 S Ct Rev at 11–12 (cited in note 21). But this explanation seems implausible and perhaps even demeaning to secular conscientious objectors because it implies that they might give up their deeply held convictions to satisfy the law's religious test. Moreover, there is a more plausible explanation for the outcome in *Seeger*, which is that the Court thought it was unfair and, implicitly, a violation of the Establishment Clause to exempt religious objectors but not those with strongly held moral views. See *Seeger*, 380 US at 356–57 (Harlan concurring) ("[H]aving chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment."). If that interpretation of *Seeger* is correct, inclusive accommodation is committed to rejecting it, both as a legal matter and perhaps also as a matter of political morality. See McConnell, 60 Geo Wash L Rev at 711 (cited in note 47) ("[U]nder the Religion Clauses, there will be an asymmetry in the treatment of religion and unbelief. The protection of . . . religious action will primarily benefit religion.").

63 406 US 205 (1972).

64 Id at 235–36.

65 Id at 216.

66 See id ("[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.").

Smith and instead favor constitutional exemptions under a compelling interest test. But the two positions disagree about the justification for religious accommodations and, more generally, about the role of religious convictions in the political process. According to exclusive accommodation, religion warrants special treatment with respect to free exercise exemptions precisely because of the special disabilities imposed on religion by the Establishment Clause and, more specifically, by the secular purpose doctrine. On this view, which has been developed most forcefully by Abner Greene, the symmetry of religion's distinctiveness—both in terms of exemptions and in terms of its role in the political process—provides the basis for a balanced interpretation of the Religion Clauses.[67]

Unlike inclusive accommodation, which puts religious exemptions at the center of its theoretical and doctrinal analysis, exclusive accommodation begins with a normative account of the political process. Its most fundamental premise, which we can call the *participation principle*, is that citizens are obligated to obey the law only if they have a full opportunity to participate in the process of making it.[68] But a second premise, derived from the Establishment Clause, is that legislation based expressly and primarily on religious values excludes nonbelievers from full participation. Briefly stated, the argument for this premise is that if religious convictions dominate political discussion about whether to adopt a law, nonbelievers cannot take part meaningfully in that discussion.[69] Because they do not share a belief in the normative authority of religious convictions, which by definition appeal to a transcendent source, nonbelievers will be excluded from the deliberative process. Moreover, given the participation principle, it follows that they will have no moral reason to abide by the outcomes of that process. Thus, to include nonbelievers and to provide them with moral reasons to obey, laws must be justified by

67 See Greene, 102 Yale L J at 1635 (cited in note 13); Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U Ill L Rev 535, 535; Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 Fordham L Rev 2089, 2091 (2004). See also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195, 222 (1992) ("Just as the free exercise of religion implies the free exercise of nonreligion, so the ban on establishment of religion establishes a civil public order, which ends the war of all sects against all. The price of this truce is the banishment of religion from the public square, but the reward should be allowing religious subcultures to withdraw from regulation insofar as compatible with peaceful diarchic coexistence.").

68 See Greene, 102 Yale L J at 1613 (cited in note 13).

69 See id.

an "express secular purpose,"[70] or what I described above as an objectively sufficient secular purpose.[71]

If legislation must have an objective secular purpose, however, then religious citizens are uniquely disabled from enacting their values into law. Unlike secular citizens, they must either "translate" their views into terms that nonbelievers find accessible, or they must show that the legal outcomes they favor are also supported by sufficient secular justifications. Either way, they face obstacles that those with secular views do not. As a result, when subject to laws that burden their religious practices, religious citizens can complain that they were denied the opportunity to enact their values in order to prevent such laws.[72] One could respond to this complaint by arguing that having an opportunity is no guarantee of success. Even if they were permitted to enact their values into law, religious citizens might still find themselves in the minority. But this response misses the point of the initial objection, which is that the secular purpose doctrine places ex ante constraints on what religious citizens can hope to obtain in the democratic process. No matter how large their numbers, unless their views are supported by sufficient secular justifications, they are effectively barred from shaping the law according to their values.[73]

Under exclusive accommodation, this complaint is properly answered through constitutional exemptions. As Greene writes, "[I]f we preclude faith from being the express purpose behind law, then exemptions are required to compensate religious people for the obstacle that this disability poses to their participation in the democratic process."[74] What is lost under the secular purpose doctrine is, at least in part, returned through religious accommodations. Interpreted in this way, the Religion Clauses are balanced against each other, preserving the legitimacy of the political process for nonbelievers while protecting the free exercise rights of religious citizens.

An implication of exclusive accommodation is that exemptions under the Free Exercise Clause are limited to those motivated by

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70 See id at 1622.

71 An objective secular purpose requirement allows for the possibility that citizens and public officials will be informed or motivated by their religious convictions in the political process. Provided that political debates are conducted mainly in terms of express secular purposes, nonbelievers can still engage in deliberations about those purposes and thereby meaningfully participate in the political process. See id at 1621–23. See also Schwartzman, 19 J Polit Phil at 387–90 (cited in note 30) (arguing that the idea of public reason does not necessarily preclude citizens and public officials from acting on religious and other nonpublic motivations).

72 See Greene, 102 Yale L J at 1636 (cited in note 13).

73 See id at 1637.

74 Id at 1634.

religious convictions.[75] For example, because religious conscientious objectors can properly object that their views had no chance of becoming law, they are entitled to an accommodation. But secular objectors cannot make the same argument. Nothing prevented them from raising their views in the political process, and so they are not owed any special consideration ex post. Religious views are privileged with respect to accommodations *only* because they are disadvantaged in the political process.[76] Views that compete on equal terms in the process have no grounds for special dispensations to avoid the consequences of their political failures.

The fundamental question for exclusive accommodation, to which we shall return in Part II, is why religious views are singled out for exclusion from the political process. Greene argues that religious convictions are best understood as beliefs in and about an extratemporal source of normative authority.[77] This, of course, does not distinguish his view of religion from that of many inclusive accommodationists, who also conceive of religion in transcendent terms. But unlike those who take an inclusive view, Greene claims that appeals to an extratemporal authority are not accessible to nonbelievers.[78] Religious convictions are not grounded in human reason or shared experience. At bottom, they rest on leaps of faith, and those who have not taken such leaps cannot be expected to share in the beliefs of those who have. This is what makes religion different from other sources of value, which appeal to intuition, reason, or lived experience. People may disagree about how to evaluate arguments based on these other sources, but they are familiar and accessible grounds that require no special insight, capacity, or revelation to understand or accept as legitimate bases for political and legal decision making. Citizens can argue with each other on these terms solely in their capacities as citizens, which is not the case for religious sources of value, accessible only to those who are (or who become) members of a particular religious community.[79]

As noted above, inclusive accommodationists, among others, have challenged this argument for religion's distinctiveness. For now, however, it is enough to note that exclusive accommodation rests in part on a controversial epistemic premise, namely, that religious convictions are inaccessible in a way that other normative claims are

75 See id at 1640–43.

76 See Greene, 102 Yale L J at 1639 (cited in note 13).

77 Id at 1616–19.

78 Id at 1619–22.

79 See id at 1634.

not.[80] That premise is crucial for the theory. Even if one agrees with the participation principle and with the idea that constitutional exemptions might remedy certain forms of political exclusion, the argument collapses if there is no good reason to single out religion, as opposed to other moral or political views, for special treatment in the political process.

3. Exclusive nonaccommodation.

Exclusive nonaccommodation holds that religious convictions *are special* for justifying political and legal decisions but are *not special* for purposes of accommodation. Of the four theories described in this Part, this one is closest to existing constitutional doctrine. It supports the secular purpose doctrine, which singles out religious convictions as impermissible grounds for legal justification, and it accords with the rule in *Smith*, which provides no constitutional privileges for religiously motivated conduct.[81]

When it comes to the role of religious convictions in the political process, exclusive nonaccommodation holds that religion should not serve as the primary justification for political and legal decisions. Proponents of this view offer different arguments for it, without always agreeing among each other. First, like exclusive accommodationists, some claim that religious convictions have certain epistemic qualities that make them inappropriate grounds for justifying law. In particular, religious beliefs are based on faith in a transcendent authority, which cannot be proven, verified, or validated according to common human reason, intuition, or experience.[82] As such, they are

80 Greene has denied that his argument rests on an epistemic claim about the nature of religious belief. See Greene, 1994 U Ill L Rev at 539 (cited in note 67) ("I am not making the epistemological claim that religious knowledge differs in kind from secular knowledge."). He argues that his claim is a political one, namely, that nonbelievers' "perception of inaccessibility to the source of authority animating the believers differs in kind from the converse case, i.e., believers' perception of inaccessibility to the nonbelievers' source of authority." Id. But in fact Greene relies heavily on epistemic claims about the nature of religious belief. He says that religious authority rests on a "leap of faith" and that religion "revels in the unsensible, whereas science and other sources from which people make arguments at least purport to rely solely on the observable, on what we share as humans." Id at 537–38, 540. These are not psychological reports about the perceptions of nonbelievers, but rather positive assertions about the nature of religious belief. And even if they were reports about what nonbelievers believe, Greene would have to show that those reports were reasonable, that is, that they did not reflect some serious epistemic mistakes. After all, if they were mistaken, then it is not clear why nonbelievers' perceptions should warrant restrictions on appeals to religious convictions in the democratic process.

81 See *Smith*, 494 US at 890.

82 See Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J Contemp Legal Issues 473, 478–82 (1996) (asserting that religion is based on nonrational faith, rather than "common

inaccessible to nonbelievers.[83] This alone might not be a reason to limit or exclude appeals to religion, but, as noted above,[84] it becomes part of a larger argument based on the idea that citizens in a modern democratic society ought to be governed according to reasons that they can, at least in principle, comprehend and accept.[85]

A second argument for limiting the role of religious convictions is psychological rather than epistemic. William Marshall has argued that religion cannot be distinguished on epistemic grounds from certain types of moral claims, which are based on beliefs and intuitions that are no more rationally confirmable than beliefs derived from faith in a transcendent authority.[86] Even so, he claims, religion can be singled out because of its psychological and behavioral implications. Briefly stated, the argument is that religion addresses terrifying existential questions and, in providing authoritative answers to those questions, it insulates believers against their fears of a meaningless and chaotic universe. Religion does this by providing a comprehensive set of beliefs and doctrines that enable believers to understand the world and their place within it. When those beliefs and doctrines are challenged, however, believers may respond to what they perceive as external threats with fear and hatred, which can lead to intolerance, persecution, and, in some circumstances, devastating social conflicts.[87] Limiting the role of religion in politics is a means of reducing this risk. Believers might still pose serious challenges to one another, but the psychological and political stakes are significantly lower if they do not also wield state power for the purpose of advancing their religious ends.[88]

The epistemic and psychological accounts are not necessarily competitors. But whether exclusive nonaccommodationists accept either or both of these accounts, they share the view that religion is

human observation, experience, and reasoning"); Gey, 52 U Pitt L Rev at 167 (cited in note 21) (same).

83 See Gey, 52 U Pitt L Rev at 181 (cited in note 21) (arguing that "religion contains an ineffable transcendental core that cannot be explained to or experienced by outsiders to the religion").

84 See notes 77–79 and accompanying text.

85 See Gey, 52 U Pitt L Rev at 173 (cited in note 21) (arguing that religious justifications for law are incompatible with a "democratic government's ultimate claim to legitimacy[, which] must be that those subject to the dictates of the system acquiesce to the system's exercise of power"); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DePaul L Rev 499, 501 (1998) ("All laws should be justified by secular reasons accessible to all citizens, whether religious or not.").

86 See William P. Marshall, *The Other Side of Religion*, 44 Hastings L J 843, 845–47 (1993).

87 See id at 856–59.

88 See id at 861–63.

not distinctive with respect to secular moral claims for purposes of granting legal exemptions. According to exclusive nonaccommodation, there is nothing special about religion that warrants granting it protections that are denied to nonreligious moral views, at least when the latter rise to the level of conscientious objection. The general argument for this claim is that attempts to distinguish religion from nonreligion are either too sectarian or else fatally over- and underinclusive.

First, exclusive nonaccommodationists argue that religious justifications are too sectarian to serve as the basis for singling out religion. If accommodations rest on claims about the truth of religious convictions, then nonbelievers will have little, if any, reason to accept them.[89] Unless one adopts an internal point of view with respect to religion, it is unlikely that arguments premised on the existence of a transcendent reality will have much force.[90]

Second, if the argument for accommodation takes a psychological, rather than theological, form, then the reply is that those with secular claims of conscience may also experience intense suffering and anguish when faced with serious conflicts between moral and legal duties.[91] Although it is ultimately an empirical claim, there is no good reason to think that the psychological harms experienced by religious believers will be greater than those experienced by at least some nonbelievers. The psychological justification for singling out religion is therefore underinclusive. Furthermore, as a number of commentators have pointed out, it is also overinclusive because religious believers may seek accommodations even if they do not believe in an afterlife or in extratemporal punishment. And even those who do hold such beliefs may claim protection for religious practices that are not motivated by divine commands but that are nevertheless part of their religious experience.[92] But if religious exemptions are

89 This point is implicit in Sherry's claim that "[t]he harm done to believers who are prevented from practicing religion is no different in kind or degree from the harm done to nonbelievers." Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 S Ct Rev 123, 143. If Sherry believed that claims about eternal punishment were true, she would not equate those harms with temporal harms suffered by nonbelievers. But she clearly rejects those claims and, from a nonreligious perspective, finds no reason to place greater weight on them than on claims of psychological harm made by nonbelievers. See id at 137–38.

90 See Laycock, 7 J Contemp Legal Issues at 313 (cited in note 4); Kent Greenawalt, 2 *Religion and the Constitution: Establishment and Fairness* 492 (Princeton 2008); Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U Chi L Rev 1245, 1262 (1994).

91 See Gedicks, 20 U Ark Little Rock L J at 562–63 (cited in note 14); Marshall, 58 U Chi L Rev at 321 (cited in note 21); Sherry, 1992 S Ct Rev at 138 (cited in note 89).

92 See Kent Greenawalt, 1 *Religion and the Constitution: Free Exercise and Fairness* 131 (Princeton 2006); Gedicks, 20 U Ark Little Rock L J at 562 (cited in note 14).

available even when the psychological costs of obeying the law are low, then it is difficult to see why they should not also apply to nonbelievers who are similarly burdened by the law.

For exclusive nonaccommodationists, underlying these objections to religious exemptions is the notion that privileging religious over secular claims violates a fundamental principle of neutrality, one that is most explicitly articulated in the context of the Free Speech Clause of the First Amendment. According to this principle, "all ideas, regardless of whether they are based on religious or secular beliefs, should be entitled to equal constitutional status."[93] By singling out religion for special treatment, the government discriminates impermissibly against nonbelievers and sends a message that their views have an inferior status in the law.[94] Thus, although exclusive nonaccommodationists argue that religious convictions may play only a limited role in the political process, believers are not entitled to special treatment in receiving legal exemptions.

4. Inclusive nonaccommodation.

Inclusive nonaccommodation holds that religious convictions *are not special* for justifying political and legal decisions *or* for purposes of accommodation. Proponents of this view reject the claim that religious convictions should be singled out for specific constraints in the political process. They are therefore critical of the secular purpose doctrine, or at least some of the more robust versions of it. Inclusive nonaccommodationists also tend to be sympathetic to the Supreme Court's decision in *Smith* on the grounds that it provides no greater protection for religiously motivated conduct than it does for any other.[95]

Although inclusive nonaccommodation can be developed in different ways, the most influential version of it is Christopher Eisgruber and Lawrence Sager's theory, which they call "Equal Liberty."[96] This theory has three main principles. First, the *equality principle* holds that "no members of our political community ought to be devalued on account of the spiritual foundations of their

93 William P. Marshall, *The Inequality of Anti-establishment*, 1993 BYU L Rev 63, 65. See also Sherry, 1992 S Ct Rev at 138 (cited in note 89); Gey, 52 U Pitt L Rev at 79 (cited in note 21).

94 See Marshall, 75 Ind L J at 203–04 (cited in note 14).

95 See, for example, Eisgruber and Sager, *Religious Freedom and the Constitution* at 96 (cited in note 14) (arguing that *Smith* "was entirely correct in rejecting the idea that religiously motivated persons are presumptively entitled to disregard the laws that the rest of us are obliged to obey" but also claiming that the Court was wrong in not articulating a more "robust principle of equality").

96 Id at 4 (cited in note 14).

important commitments and projects."[97] Second, according to Eisgruber and Sager, it follows from this principle that religion has a distinctive constitutional status, but only because of its historical vulnerability to hostility and neglect in the political process. The equality principle thus generates a corollary *neutrality principle*, which says that, except for concerns about discrimination, there is "no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities."[98] Third, Equal Liberty is premised on a *general liberty principle*, which states that all people, regardless of their religious views, are entitled to a broad scheme of liberal rights, including those of personal autonomy, freedom of speech, freedom of association, and private property.[99] For the most part, according to Eisgruber and Sager, religious freedom is a matter of ensuring that the general liberty principle is applied equally.

Turning to the role of religious convictions in the political process, Equal Liberty can be considered a version of inclusive nonaccommodation because it is committed, in principle, to treating religious and nonreligious moral claims as equally viable grounds for justifying political and legal decisions. The argument here, however, is somewhat complex. On the one hand, Eisgruber and Sager argue that there are no differences between the "epistemic foundations" of religious and moral views.[100] There are also no necessary normative or psychological differences between religious convictions and deeply held moral beliefs. For this reason, Eisgruber and Sager argue against a conception of disestablishment in which "the public official or citizen whose moral compass was religiously inspired would be silenced."[101] Their theory thus appears to be inclusive in recognizing religious beliefs as a legitimate basis for political and legal decision making. On the other hand, Eisgruber and Sager do recognize some constraints on appeals to religious convictions in justifying state

97 Id at 52.

98 Id.

99 Eisgruber and Sager, *Religious Freedom and the Constitution* at 52 (cited in note 14).

100 In earlier work, Eisgruber and Sager had argued that there are epistemic differences between religious and secular moral beliefs. See Eisgruber and Sager, 61 U Chi L Rev at 1292–93 (cited in note 90). But in response to criticism, they abandoned that line of argument as inconsistent with their general view. See Eisgruber and Sager, *Religious Freedom and the Constitution* at 300–01 n 37 (cited in note 14).

101 Eisgruber and Sager, *Religious Freedom and the Constitution* at 50 (cited in note 14). Eisgruber and Sager say that it would be unconstitutional for a judge to cite biblical texts for the purpose of interpreting an ambiguous law. Id at 49. Although they do not elaborate on this point, perhaps they would also say that it is impermissible for a judge to interpret an ambiguous law by appealing to his or her particular secular moral views. Yet if that is not the case, then their view comes closer to exclusive nonaccommodation, which precludes appeal to religious convictions in justifying law, while allowing appeals to secular moral commitments.

action (especially government endorsements of religion), which may suggest the need to qualify the description of Equal Liberty as a version of inclusive nonaccommodation.[102]

As applied to religious accommodations, and as a version of inclusive nonaccommodation, Equal Liberty has much in common with exclusive nonaccommodation. Both theories are skeptical about religious justifications for the distinctiveness of religion, which are "unacceptably sectarian,"[103] and for similar reasons both reject the claim that there is something psychologically distinctive about religion that requires constitutionally mandatory exemptions.[104] At least there is nothing about religion that marks it out as distinctive when compared to weighty moral claims that lack religious motivation.[105]

Equal Liberty is a theory of nonaccommodation in the sense that it would not privilege religion over comparable nonreligious ethical and moral claims in granting constitutional exemptions. Thus, if religious conduct receives legal privileges, the same must be true for similar nonreligious conduct. And if nonreligious conduct is not privileged, then absent some showing of discrimination or neglect on the part of political majorities, religious conduct should be treated in the same way. Generally speaking, the two categories of conduct rise or fall together, a result that follows from applying the equality and neutrality principles.[106]

Although I shall return to the details of Eisgruber and Sager's position,[107] for now it should be sufficient to note the broad outlines of inclusive nonaccommodation, which takes as its fundamental premise the equality of religious and secular moral views. In terms of justifying political and legal decisions, the implication of this position is that citizens with religious and secular moral views may compete on equal terms, provided they respect the general rights and liberties that otherwise constrain the democratic process. In the context of legal exemptions, the presumption is that, barring evidence of animus

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102 I return to this point in Part II.B.2. See also Ellis, 25 L & Phil at 241 (cited in note 14) (arguing that since religion is not special, there should be no general prohibition on noncoercive government endorsements of religion).

103 Eisgruber and Sager, *Religious Freedom and the Constitution* at 103, 301 n 39 (cited in note 14).

104 See id at 100–04.

105 See Eisgruber and Sager, 61 U Chi L Rev at 1263 (cited in note 90).

106 For numerous examples illustrating these principles, see Eisgruber and Sager, *Religious Freedom and the Constitution* at 9–14, 112–18 (cited in note 14) (discussing hypothetical exemptions for running soup kitchens and providing examples based on *Seeger*, *Sherbert*, and other accommodation cases).

107 See Part II.B.2.

or neglect in the political process, there is no moral reason for granting special privileges to religiously motivated conduct.

II. WHY RELIGION IS NOT SPECIAL

The four theories described above take very different views about whether, or in what ways, religion is special. In this Part, I argue that two of these views—inclusive accommodation and exclusive nonaccommodation—are built on inconsistent claims about the nature of religion. For some purposes, religion is special; for others, it is not. At the very least, these theories adopt internal positions on the distinctiveness of religion that are seriously in tension with each other. My claim is that those tensions can be resolved only by moving in the direction of either of the remaining two theories—exclusive accommodation or inclusive nonaccommodation, which treat religion as special for all purposes or for none, respectively. But as I argue in Part II.B, both of those theories rest on important substantive mistakes. Exclusive accommodation is unfair to religious believers because it singles out their views for special constraints in the political process, and it is also unfair to nonbelievers whose secular claims of conscience receive worse treatment than their religious counterparts. Inclusive nonaccommodation is more attractive, but it, too, has serious drawbacks. It would allow for at least some legislation to be justified solely on religious grounds, which fails to respect the interest that nonbelievers have in being governed according to reasons that are, at least in principle, acceptable from their perspectives. The purpose of this Part, then, is to show that there are significant problems with all four views. In Part III, I then ask how this skeptical conclusion should bear on our attitudes toward the Religion Clauses of the First Amendment.

A. Inconsistency

Inclusive accommodation and exclusive nonaccommodation both take inconsistent positions on whether religion is special. Inclusive accommodation says that religion is special for purposes of accommodation but not for purposes of justifying the law. Exclusive nonaccommodation takes exactly the reverse positions. My argument in this Section is that these two theories adopt mirror images of what amounts to the same basic tension, the resolution of which leads to one of the two remaining theories.[108]

[108] To be sure, the arguments presented in this Section are not meant to be exhaustive. If it turns out that inclusive accommodation and exclusive nonaccommodation can be made

1. The inconsistency of inclusive accommodation.

The basic problem for inclusive accommodation is to explain why religion is singled out for purposes of accommodation but treated equally with respect to serving as a basis for justifying political and legal decisions. What is it about religion that explains this asymmetry? Here are two possible answers: First, the metaphysical nature of religion is distinctive in a way that warrants accommodation, but that does not justify excluding religious reasons for legislation. Second, the asymmetry might be explained away by a political process theory. Religious believers ought to be able to participate on equal terms in the political process, but as vulnerable minorities, they are sometimes entitled to special protections in the form of constitutional exemptions. The problem for inclusive accommodation is that neither of these arguments works. The first takes contradictory views about the nature of religion. The second is consistent, but it provides no reason to treat religion differently from comparable secular moral views that lose out in the political process.

First, proponents of inclusive accommodation argue that religion deserves constitutional exemptions because of its distinctive metaphysical commitments, namely, that a transcendent source of normative authority (God) imposes duties that take priority over obligations to follow positive law.[109] Religion thus makes certain metaphysical claims that are, by definition, lacking in secular moral views. But inclusive accommodationists might argue that these claims can still serve as the basis for participation in the political process and, indeed, as the justification for state action. They are no more controversial than many secular ideological claims, such as those made by feminists, environmentalists, and Marxists, none of which are constrained by anything like the secular purpose doctrine.[110]

Of course the answer to this response is that feminists, environmentalists, and Marxists do not receive any special treatment when they fail to win support in the political process. They are not entitled to any constitutional exemptions. Michael McConnell, perhaps the most prominent inclusive accommodationist, is well aware of this point. Indeed, in defending religious exemptions, he has argued for

internally consistent, both views might still be subject to additional criticisms, including some that apply to the two remaining views discussed in Part II.B.

109 See text accompanying notes 54–56.

110 See, for example, McConnell, 1 J L Phil & Culture at 160 (cited in note 19) ("When it comes to political activism, religious citizens are no different from other ideologically oriented citizens, for good and for ill, and are properly subject to no limitations on democratic participation that are not equally applicable to others.").

their fairness on the ground that the Establishment Clause disables the government from promoting religion.[111] McConnell gives the hypothetical of two employees who are fired from their jobs, one because of religious objections to the work and the other because of environmental objections. McConnell says it is fair to give an exemption to the religious worker and not to the environmentalist because

> the government can (and does) inculcate environmentalist sensibilities in the public schools, the government can (and does) establish an agency to promote the objectives of environmentalism, and the government can (and does) use the coercive power of the state to promote environmentalist objectives. If we had a constitutional provision protecting the free exercise of beliefs about environmental protection, and forbidding the state to establish an orthodoxy on that subject, the environmentalist worker would be protected, and each of the above policies would also be unconstitutional. However, beliefs about environmental protection are not treated the same as beliefs about religion. With respect to religion, the government's hands are tied. In regard to other secular causes, the government is free to impose these types of burdens, but it is also free to promote the cause through legislative policy.[112]

The problem with this argument is that while it might show that granting religious exemptions is fair, it does so only at the cost of conceding the legitimacy of a secular purpose requirement. To see this, notice how closely McConnell's claim tracks the central argument of exclusive accommodation, which is that religious exemptions are fair precisely because the government is disabled from promoting religious ends. To extend McConnell's example, under exclusive accommodation, environmentalists face no specific constitutional constraints on how their views can shape legislative outcomes in the political process. Since they can compete on equal terms with other secular views, there is no unfairness in limiting their gains to whatever they can achieve electorally. But in contrast, the Establishment Clause hamstrings religious believers, and so they deserve special treatment when the political process disadvantages them. If this is the form of McConnell's argument, inclusive accommodation is at risk of collapsing into its exclusive counterpart.

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111 See, for example, McConnell, 50 DePaul L Rev at 10–11 (cited in note 13); Michael W. McConnell, *A Response to Professor Marshall*, 58 U Chi L Rev 329, 329–31 (1991).

112 McConnell, 50 DePaul L Rev at 10 (cited in note 13).

In response, McConnell might claim that his argument does not preclude legislation based on religious purposes. The Establishment Clause forbids religious believers from promoting religion through the public schools, setting up a government agency to sponsor religion, and using the state's coercive power to advance religious ends. All of those are disabilities suffered by religious believers and not by those who adhere to various secular ideologies. But according to this argument, while those disabilities are sufficient to demonstrate the overall fairness of a system that includes constitutional exemptions for religion, they do not include any prohibition on appeals to religion in justifying state action.[113] Thus, unless state action runs afoul of the stated disabilities (such as teaching in public schools, setting up a state agency, or using the government's coercive power), it can be premised solely on a religious purpose. For example, if a majority of religious citizens want to advance their religious view through noncoercive government religious speech, and if they succeed in obtaining legislation to further that end, there is nothing in the Religion Clauses to prevent that outcome. Similarly, if a majority of religious citizens vote on religious grounds for morals legislation to prohibit otherwise secular conduct that is inconsistent with their religiously informed moral norms, that also does not amount to using the state's coercive power to enforce a religious practice. Thus, inclusive accommodationists can point to at least two sets of cases—government religious speech and morals legislation—to mark a difference with exclusive accommodation, which accepts a version of the Court's secular purpose doctrine.

There are two problems with this reply, corresponding to the two categories of religious state action that might be used to distinguish inclusive accommodation (which would reject a secular purpose doctrine) from exclusive accommodation (which would limit

113 See McConnell, 1 J L Phil & Culture at 160 (cited in note 19). Here is McConnell's argument restated: "There are, of course, limitations on the content of laws that burden the exercise of religion or constitute an establishment of religion. But these limitations are not based on the religious or philosophical standpoints of citizens who advocate the laws. . . . The 'secular purpose' prong of the *Lemon* test is best understood as referring to whether the law has a legitimate constitutional purpose, rather than commanding an inquiry into the motivation or ideological orientation of its sponsors." Id. But this raises two questions: First, can religious values ever serve as a "legitimate constitutional purpose"? On this point, McConnell is oddly silent. But see Michael Stokes Paulsen, Lemon *Is Dead*, 43 Case W Res L Rev 795, 803 (1993) (arguing that religiously motivated statutes only violate the Establishment Clause if they have non-neutral effects on the free exercise of religion). Second, if a majority of citizens are explicit about promoting a law solely to advance their religious ends and if the law does indeed faithfully represent their views, it is not clear what, if anything, distinguishes that law from one that requires religious conduct. I return to this point in Part II.B.2.

appeals to religious purposes). First, with respect to government religious speech, inclusive accommodation relies on a distinction between coercive and noncoercive laws. There is, however, no theoretical basis for this distinction. Some explanation must be given for why government is poorly placed to make decisions with respect to religion as a matter of coercive policy, but suddenly better positioned when coercion is not involved. Of course, noncoercive policies might have lower costs or impose fewer burdens on nonbelievers.[114] But even if noncoercive policies are less burdensome, it is not clear why a difference in costs or burdens improves the government's competence with respect to legislating about religious beliefs.

Second, regarding morals legislation, those who reject a secular purpose test must distinguish between coercive laws that rely primarily on religious grounds for their justification, which are permissible, and coercive laws that require nonbelievers to engage in religious practices, which are impermissible. To see the problem, compare two examples: (1) a municipality bans dancing at all public school events on the ground that dancing violates religiously justified moral norms;[115] and (2) a municipality enacts an ordinance requiring students in public schools to pray on the ground that prayer is required by religiously justified moral norms.[116] According to inclusive accommodation, which opposes a secular purpose requirement, the ban on dancing is allowed, but the prayer ordinance is invalid. The problem with this position is that unless the ban on dancing can be supported on nonreligious grounds, it is indistinguishable from the requirement to engage in a religious practice. A legal obligation to perform a religious rite and a religiously justified legal prohibition on an otherwise nonreligious act are both coercive impositions of religious belief.[117] The state need not command nonbelievers to engage in religious worship to establish religion. It can accomplish a

114 But see Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 Iowa L Rev 347, 350–51 (2012) (arguing that government religious speech harms the equality and liberty of nonbelievers).

115 See *Clayton v Place*, 690 F Supp 850, 852 (WD Mo 1988) (holding that a public school ban on dancing violated the secular purpose doctrine), revd 884 F2d 376 (8th Cir 1989), rehg en banc denied, 889 F2d 192 (8th Cir 1989). But see *Clayton*, 889 F2d at 193 (Gibson dissenting from denial of rehearing en banc) (claiming that the court ignored extensive evidence of pretextual justification).

116 See *Engel v Vitale*, 370 US 421, 424 (1962) (prohibiting state-sponsored prayer in public schools); *School District of Abington Township, Pennsylvania v Schempp*, 374 US 203, 205 (1963) (prohibiting state-sponsored Bible readings in public schools).

117 See Perry, *Religion in Politics* at 35–36 (cited in note 37) (arguing that laws based solely on religious reasons amount to government imposition of religion); Schragger, 89 Tex L Rev at 590–92 (cited in note 18).

similar effect by preventing them from acting in ways that are contrary to religious doctrine.[118]

Here an inclusive accommodationist might object that there is an important difference between religiously justified laws that prohibit otherwise nonreligious conduct and laws which compel people to engage in acts of religious worship. When the state prohibits dancing in public schools, it does not compel students to practice religion as it does when it forces them to pray. Put this way, the distinction between religiously grounded morals legislation and religious establishment might appear to have some initial plausibility. But the distinction is illusory. Whatever intuitive force it has turns entirely on the importance of the actions that are either pre- or proscribed. Students have a weak interest in dancing at public schools, but they have a strong interest in not being compelled to utter religious speech, especially when they disbelieve it. Yet, when the underlying interests are more evenly balanced, the distinction between being prevented from doing *X* and being forced to do *Y* starts to fade. To see this, instead of a ban on dancing in public schools, which seems relatively trivial, consider a religiously justified ban on gay and lesbian sexual relationships. This (negative) restriction on conduct is as much an imposition of a religious view as any (positive) requirement that citizens take some religious action. Indeed, a person subject to religiously grounded restrictions on their sexual conduct might well view that proscription as a greater imposition of religion than a requirement to utter a short, nondenominational prayer in public school. There is, then, no reason to define a religious establishment in terms of the imposition of affirmative religious duties. When premised primarily on religious grounds, and without sufficient nonreligious justification, prohibitions on otherwise nonreligious conduct can also, and often quite effectively, require conformity with religious commands.[119]

To summarize my argument so far, inclusive accommodation rests on a tension between treating religion distinctively for purposes of accommodation and allowing for laws based solely or predominantly on religious convictions, which effectively denies the distinctiveness of religion within the political process. To resolve that tension, proponents of inclusive accommodation argue that religious exemptions are justified by the special disabilities imposed on religion under the Establishment Clause. But to prevent this argument

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[118] See, for example, *McGowan v Maryland*, 366 US 420, 426–27 (1961) (upholding Sunday closing laws). See also Koppelman, 88 Va L Rev at 150–51 (cited in note 15) (arguing that Sunday closing laws lack sufficient secular purpose).

[119] For more on this point, see the discussion of *Clayton* in Part II.B.2.

from collapsing into exclusive accommodation—which holds that religion warrants special accommodation but should be excluded as a sufficient basis for legal decisions—there must be some possibility for state action based on religious convictions. The two remaining options involve government religious speech and morals legislation, but these categories merely serve to replicate the underlying problem. If religion's metaphysical commitments are distinctive in requiring prohibitions on state action that coerces religious practices, those commitments are equally present in noncoercive legislative policy and in justifications for the regulation of public morality. Unless it can show that some state action based solely on religious grounds is permissible, however, inclusive accommodation ceases to be normatively viable. It must either accept the exclusion of religious convictions as sufficient justifications for the law (leading to exclusive accommodation) or else abandon the claim that religion warrants special treatment with respect to constitutional exemptions.

To save inclusive accommodation, proponents might rely on a second line of argument. Instead of claiming that religious exemptions are fair because they are balanced by constraints imposed by the Establishment Clause, the justification for singling out religion might rest on a claim about the vulnerability of religion in the political process. For example, some years ago, John Garvey suggested that religious belief is analogous to insanity.[120] Two claims, one cognitive and the other volitional, supported the analogy. Cognitively, religion is like insanity in that both are based on perceptions and beliefs that are inaccessible or incomprehensible to those who lack them. What makes religion special on this view is the radical epistemological break from ordinary standards of practical reasoning.[121] Second, with respect to volition, believers may experience religious convictions as outside their control.[122] Following religious duties is not an exercise of autonomous choice but rather a course of conduct impelled by belief in a transcendent force.

Taken together, the cognitive (or epistemic) and volitional aspects of religious belief are sources of vulnerability in the political process. Epistemic inaccessibility will make it difficult for political majorities to share the beliefs of religious minorities. And, if taken literally, lack of volitional control will make it impossible for those

120 See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 Conn L Rev 779, 798 (1986). See also Paulsen, 72 Notre Dame L Rev at 1622 (cited in note 54) (using the insanity analogy to argue for religious exemptions).

121 See Garvey, 18 Conn L Rev at 798 (cited in note 120).

122 See id at 800.

minorities to comply with laws that conflict with their religious duties. Thus, the combination of epistemic distinctiveness and volitional impairment leads to the imposition of burdens that religious believers cannot choose to avoid. Finally, when disadvantages follow from attributes that are both immutable and vulnerable to hostility in the political process, there is a plausible case for providing legal exemptions. As a luck egalitarian might say, believers should not be disadvantaged through no fault of their own.[123]

But this is a strange defense of including religious views as sufficient justifications for the law. First, and most obviously, insane beliefs are not a legitimate basis for political or legal decision making. In fact, it is difficult to think of a clearer example of a category of belief that should be excluded from the domain of legal justification. To the extent religious beliefs are accommodated because of their epistemic and volitional similarities with insanity, they ought to be similarly constrained in their influence on the political process. Thus, while the analogy to insanity may support accommodations, it fails miserably as an argument for political inclusiveness.

Second, the insanity analogy relies heavily on the claim that religion is cognitively or epistemically distinct from other forms of practical reason. But this claim contradicts one of the main arguments against the secular purpose doctrine made by at least some inclusive accommodationists, namely, that there is no sharp epistemic distinction between religious and nonreligious moral views. If an epistemic claim is necessary to establish the distinctiveness of religion, however, then one of the strongest arguments for political inclusiveness must be abandoned. Again, it is difficult to avoid the conclusion that inclusive accommodation can be defended only by taking contradictory views about the epistemic nature of religious belief.

This point can be reinforced by moving away from the insanity analogy toward an analogy based on physical disability. Like religious believers, those with physical disabilities have certain attributes that are beyond their control. And those attributes are the source of predictable disadvantages in the political process, which can be remedied by providing legal accommodations. The difficulty with this

123 Luck egalitarians generally believe that people should not be made worse off by circumstances for which they are not morally responsible. See, for example, G.A. Cohen, *Luck and Equality*, in Michael Otuska, ed, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* 116, 119 (Princeton 2011) ("[L]uck egalitarianism accounts it an unfairness when some are better off than others through no fault or choice of their own."). But see G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 Ethics 906, 936–37 (1989) (arguing that even if religious believers do not choose their beliefs, they cannot claim compensation for disadvantages they would choose, if they could, to accept).

argument, however, is that it fails to single out religion for special treatment. Without the epistemic premise of the insanity analogy, there is no reason to extend accommodations to religious believers but not to those with secular moral views that are similarly constitutive, rather than chosen, features of their personal identities. The cost of adopting the weaker analogy is that it does not support a clear preference for religion.

My claim up to this point has been that inclusive accommodation is based on an incoherent set of claims about the distinctiveness of religion. If religion is special with respect to accommodations, it is difficult to explain its equal status in the political process. And if it has equal status as compared with all other sources of political claims, then it is difficult to show why it warrants special exemptions. Of the various arguments and analogies that might be offered to support inclusive accommodation, none seem capable of resolving this underlying theoretical inconsistency.

2. The inconsistency of exclusive nonaccommodation.

Exclusive nonaccommodation faces the same charge of inconsistency, only in the opposite direction. This theory treats religion distinctively by constraining its role in justifying law (which makes it exclusive) but denies that religion deserves special exemptions (making it nonaccommodationist). On the one hand, the government should single out religion for special disabilities because it is epistemically inaccessible, or metaphysically and psychologically dangerous, or both. But on the other hand, the government should follow a principle of content neutrality with respect to competing sources of normative authority. It should take no position between religious and nonreligious views. Again the question is whether this asymmetry can be defended against the claim that it relies on contradictory approaches to the nature of religion.[124]

My view is that neither the epistemic nor the psychological justifications for exclusive nonaccommodation provide a consistent account. Both justifications face the same basic problem, which is that the arguments they provide for treating religious and secular views equally with respect to exemptions prove too much. Those arguments simply overwhelm those on the Establishment Clause side of the equation. The result is that exclusive nonaccommodation faces a

[124] See Marshall, 1993 BYU L Rev at 63–64 (cited in note 93) (discussing "whether it is consistent to single out religious belief systems for adverse treatment under the Establishment Clause if all beliefs systems are purportedly equal").

dilemma: either accept that religious and secular beliefs must be treated equally in terms of justifying state action or reject the underlying principle of neutrality, according to which the government must recognize the "equal constitutional dignity"[125] of religious and secular beliefs. If exclusive nonaccommodation accepts the first option, it collapses into *inclusive* nonaccommodation, which does not treat religion as special either for purposes of legal justification or for granting exemptions; if it accepts the second option, it becomes exclusive *accommodation*, which disfavors religion in legal decision making but favors it in terms of providing exemptions. There does not appear to be a consistent alternative.

Consider the epistemic justification for exclusive nonaccommodation, or the view that religion should be treated equally in the context of exemptions but disfavored as a basis for justifying the law. For its proponents, the strongest argument for the consistency of this position begins with the claim that nonbelievers should receive equal treatment with respect to exemptions because they suffer just as much as believers when faced with conflicts between their moral and legal duties.[126] Furthermore, whether it is framed in metaphysical or psychological terms, this argument for equality is compatible with the epistemic claim that religious beliefs are inaccessible to nonbelievers and often impervious to external criticism, making such beliefs exclusionary and therefore unsuitable as grounds for state action.[127] In short, the arguments for equality in accommodations and against equality in legal justifications are based on different types of considerations, which may point in different directions without creating any obvious contradictions.

The difficulty with this response is that exclusive nonaccommodation relies upon a more fundamental principle of equality that is not defined in purely epistemic terms. In other words, the claim that all ideas have "equal constitutional dignity"[128] or that "every idea is of

125 Sherry, 1992 S Ct Rev at 138 (cited in note 89).

126 See Part I.B.1.

127 Compare Sherry, 1992 S Ct Rev at 143 (cited in note 89) (arguing that religious believers faced with legal conflicts suffer no more harm than nonbelievers) and Gey, 52 U Pitt L Rev at 184 (cited in note 21) (same), with Sherry, 7 J Contemp Legal Issues at 482 (cited in note 82) (arguing that faith-based epistemologies exclude nonbelievers and that claims based on reason are "more appropriate for public use") and Gey, 52 U Pitt L Rev at 173–74 (cited in note 21) (same).

128 Sherry, 1992 S Ct Rev at 138 (quotation marks omitted) (cited in note 89), quoting William P. Marshall, *The Case against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W Res L Rev 357, 393 (1989).

equal dignity and status in the marketplace of ideas"[129] does not discriminate among beliefs on the basis of how they are formed, whether by intuition, perception, logical deduction, scientific reasoning, personal revelation, or in some other way. In the free speech context, where the equality of ideas has the most force,[130] the government is not permitted to regulate speech on the basis of a preference for some ideas over others, regardless of their epistemic provenance, rational validity, or, for that matter, their truth or falsity.[131] Of course, the government has significantly more latitude to discriminate among ideas when it is speaking for itself.[132] But government speech is irrelevant at this point in the argument. Exclusive nonaccommodation must show why it is permissible for the government to discriminate on epistemic grounds among ideas competing in the political process that will eventually determine the content of its speech. And discrimination at this point directly interferes with the marketplace of ideas, striking at the heart of the principle of content neutrality, or the equality of ideas, which in turn is what motivates the demand for equal treatment between religious and nonreligious beliefs in the context of constitutional exemptions. Thus, unless the principle of equality is modified to allow (or require) the government to disfavor certain epistemic views, especially those based on faith in transcendent sources, it cannot support a consistent theory of exclusive nonaccommodation.[133]

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129 Sherry, 1992 S Ct Rev at 138 (quotation marks omitted) (cited in note 89), quoting Marshall, 58 U Chi L Rev at 320 (cited in note 21).

130 See Marshall, 58 U Chi L Rev at 320 (cited in note 21) (describing the content-neutrality principle as the "central principle of the Free Speech Clause").

131 See *Gertz v Robert Welch, Inc*, 418 US 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea."); *Police Department of the City of Chicago v Mosley*, 408 US 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). See also Leslie Kendrick, *Content Discrimination Revisited*, 98 Va L Rev 232, 235 (2012).

132 See *Pleasant Grove City, Utah v Summum*, 555 US 460, 469 (2009) (holding that government speech is not subject to review under the Free Speech Clause); *Johanns v Livestock Marketing Association*, 544 US 550, 553 (2005) (same).

133 Sherry has suggested that the Religion Clauses, and the Constitution more generally, should be interpreted in precisely this way, namely, as privileging a rational epistemology based on the Founders' commitment to Enlightenment principles. According to this view, "government may not make decisions that are themselves based on contested religious beliefs that cannot be rationally supported, that privilege religious over secular beliefs, or that single out religious beliefs from among other nonrational beliefs for preferential treatment." Sherry, 7 J Contemp Legal Issues at 492 (cited in note 82). This account may indeed be internally consistent, but it sacrifices any claim to the "equal constitutional dignity" of ideas. Of course, if the "equality of ideas" principle is mistaken, then this is no objection. See Yossi Nehushtan, *Religious Conscientious Exemptions*, 30 L & Phil 143, 155–64 (2011) (arguing for an antireligious

The contradictions in the psychological argument for exclusive nonaccommodation are, if anything, even clearer than those facing the epistemic account. On the one side, the claim for equal treatment with respect to legal exemptions is that nonbelievers may be, and often are, as psychologically committed to their ethical views as believers are to their religious convictions.[134] Nonbelievers may suffer as much or more than some believers when forced to choose between following their principles and following the law.[135] Secular moral views can also be strong motivation for action.[136] Those who espouse them have engaged in acts of civil (and uncivil) disobedience, even at great personal sacrifice.[137] On the other side, however, the argument for limiting the role of religion in the political process is that religious views are a powerful psychological defense mechanism that protects believers from existential fears but that also leads to intolerance and persecution of those who challenge or undermine that protection.[138]

The problem with this account is that if religious convictions lead believers to take extraordinary actions to defend against perceived external threats, then perhaps that is a plausible psychological basis for singling out religion in granting legal exemptions. If the response is that nonbelievers can be equally motivated to maintain their views against dangers posed by outside agents (including the state),[139] then that might be a reason to accommodate them as well. But of course the logic of this reply suggests that at least some secular moral views should be similarly constrained in serving as the basis for state action.

approach to conscientious exemptions). But to the extent this principle is used to justify equality concerning accommodations, it remains a source of tension for exclusive nonaccommodation.

134 See Marshall, 58 U Chi L Rev at 320–21 (cited in note 21) (arguing that "bonds of ethnicity, interpersonal relationships, and social and political relationships, as well as religion, may be, and are, integral to an individual's self-identity").

135 See William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545, 587 (1983) ("The critical element in preventing psychic harm is assessing the strength of the conscientiously held belief. Although traditional religious beliefs may be motivated by strong conscience, the same may be said of most moral beliefs."). See also Part I.B.3.

136 See Eisgruber and Sager, *Religious Freedom and the Constitution* at 104 (cited in note 14) ("It suffices to observe that secular commitments can be sufficiently compelling that people will rather die than compromise them.").

137 See Marshall, 40 Case W Res L Rev at 384 (cited in note 128) ("[T]he problem of civil disobedience is again not unique to religion.").

138 See Marshall, 44 Hastings L J at 856–58 (cited in note 86).

139 See Marshall, 58 U Chi L Rev at 321 (cited in note 21) ("[B]oth non-religious and religious groups . . . for[m] 'intermediate communities' that shield the individual from the state.").

Perhaps it is possible to develop a psychological account showing that nonbelievers suffer as much as believers when faced with legal conflicts, but without producing the same destructive side effects that purportedly follow from having transcendent beliefs at the center of one's personal identity. Such an account would have to explain why secular moral views are strong enough to generate the most serious conflicts of conscience, while at the same time showing that these views do not structure nonbelievers' identities in ways that lead to prejudice, intolerance, and persecution similar to that often attributed to religious believers. If it turns out, however, that many nonbelievers experience the same "psychology of adhesion"[140] to their most fundamental beliefs, with comparable social consequences, then the psychological argument fails because it provides no reason to pick out religion for special disability in the political process.

Thus, to provide the necessary support for exclusive nonaccommodation, a psychological justification must show: (1) that believers and nonbelievers suffer comparable psychic harms from legal conflicts, (2) that religious psychology causes significant social conflict, and (3) that similar psychological forces do not affect those with nonreligious beliefs. Short of a convincing explanation of this kind, which would have to be general enough to cover a wide range of religious and nonreligious views,[141] the psychological arguments on both sides of exclusive nonaccommodation seem to be at odds with one another. Moreover, given that this theory of the Religion Clauses starts from the basic premise that "all ideas, regardless of whether they are based on religious or secular beliefs, should be entitled to equal constitutional status,"[142] one might expect a rather more decisive reason to justify violating such a fundamental commitment to equality.

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140 Marshall, 1993 BYU L Rev at 69 (cited in note 93) (explaining the "psychology of adhesion" as "a psychology which seeks not to understand or address religious issues but rather to avoid them, paradoxically, by passionate and unquestioned devotion to them").

141 There is a vast social science literature concerning the relationship between religious psychology, prejudice, and intolerance. See Bernard Spilka, et al, *The Psychology of Religion: An Empirical Approach* 411–79 (Guilford 4th ed 2009) (surveying research on religious prejudice and discrimination). The balance of this research supports the claim that religion is a significant cause of intolerance, but the empirical results are too varied and complex to be discussed here. See George Klosko, *Democratic Procedures and Liberal Consensus* 80–115 (Oxford 2004) (collecting and reviewing decades of studies measuring the effects of religion on social and political intolerance).

142 Marshall, 1993 BYU L Rev at 65 (cited in note 93).

B. Unfairness

If inclusive accommodation and exclusive nonaccommodation are inconsistent in their treatment of religion, the remaining two theories of the Religion Clauses—exclusive accommodation and inclusive nonaccommodation—do not suffer from the same problem. These theories are consistent: the former treats religion distinctively with respect to both legal justification and accommodations, and, at least in principle, the latter does not treat religion distinctively in either of these contexts. But even if they are internally coherent, these theories face other objections. This Section argues that both theories are unfair to believers and nonbelievers, albeit in rather different ways. My claims are that exclusive accommodation unfairly excludes only religious belief from the political process (which leads to further unfairness in its concomitant rejection of accommodations for nonbelievers), while inclusive nonaccommodation is unfair in not constraining appeals to both religious and comprehensive secular ethical and philosophical doctrines. The result of these criticisms is that none of the four theories of the Religion Clauses are both consistent and fair. What follows from that result for purposes of interpreting the First Amendment is the subject of Part III.

1. The unfairness of exclusive accommodation.

As discussed above,[143] exclusive accommodation is an attempt to strike a political balance between the Religion Clauses. Religion cannot serve as a sufficient basis for justifying state action, but in return, it receives mandatory constitutional exemptions from generally applicable laws. Thus, religious accommodations are justified as a constitutional remedy for the exclusion of religious convictions from the political process.

There are three main problems with this theory. First, and perhaps most fundamentally, the theory is based on an unattractive principle of political legitimacy, which holds that citizens are required to obey the outcomes of a political process only if they (and the views they represent) are permitted to compete on equal terms within that process. According to this participation principle, if citizens compete and lose, then they have no right to complain. But if they are excluded from the competition, then they can argue that they are not morally obligated to respect the outcomes.[144]

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143 See Part I.B.2.

144 See Greene, 102 Yale L J at 1611, 1613 (cited in note 13) ("[T]he legitimacy of legal obligation turns, in part, on the ability of citizens to offer their values for adoption as law.").

Although it may have some superficial appeal—think "no taxation without representation"—this principle of legitimacy should be rejected on the ground that it sets a false baseline for inclusion in the political process. In other words, not every view excluded from participation warrants compensation. For example, racist and sexist views are excluded not because citizens are barred from expressing them but because, like religious convictions, these views are impermissible grounds for justifying the law. Their exclusion does not, however, generate any need for compensation. Racists and sexists have an obligation to obey the results of the political process even though their views are effectively excluded and despite not receiving any compensation for that exclusion.

In response, Greene argues that it is a mistake to draw an analogy between racist and religious views. The reason is that, unlike racist views, religious values are "(a) good things to hold and (b) permissible as the ground of private decisionmaking but not of law."[145] But this reply is not persuasive. Even if we value religion more than racism, the participation principle does not respect this distinction. It is stated categorically, such that any exclusion from the process requires compensation in order to preserve political legitimacy. To allow the uncompensated exclusion of racist views, the principle must be modified to exclude at least some views deemed to be outside the domain of legitimate political participation. Once this qualification is introduced, however, it is necessary to define some further principle of legitimacy for determining which views are excluded with compensation and which without.

Moreover, the fact that some views may serve as reasonable (or permissible) grounds for private decision making does not make them appropriate bases for state action. Some may believe that it is a good thing not to engage in blasphemous, vulgar, or obscene speech in their personal lives, but that does not mean that they are entitled to some form of compensation when their views are excluded from serving as the basis for legislation. The same basic point applies for any right that constrains democratic majorities. To the extent the right precludes participants from appealing to certain values, those values are excluded from the process, no matter how admirable (or permissible) they might be as grounds for private decision making.[146]

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145 Id at 1640.

146 A proponent of the participation principle might accept this conclusion and argue for pure majoritarianism. Some theorists have recently pressed in that direction. See, for example, Jeremy Waldron, *Law and Disagreement* 109 (Oxford 2001).

Of course, the claim that religious views are good things to hold is also controversial. Many atheists and agnostics reject the idea that religious values are good grounds for personal decision making. Many religious believers also reject the idea that it is a good thing for others to make personal decisions on the basis of competing religious views, which they regard as mistaken, sinful, or worse. For some nonbelievers, and indeed for some believers, personal decisions based on particular religious views may be as condemnable as those based on racist or sexist views. Thus, the participation principle cannot be modified to exclude only views that are considered bad to hold without also risking the exclusion of religion.

Second, even if we accept the participation principle, religious views cannot be singled out for exclusion because they are epistemically inaccessible. Although many have argued that religious beliefs are based on faith or revelation, which is inaccessible to nonbelievers,[147] it is difficult to defend a criterion of accessibility that does not also make secular moral views similarly inaccessible to those who do not share them. Greene's argument is that religious views are inaccessible because they are based on a "reference out" to an extrahuman source of normative authority, which is not shared by nonbelievers.[148] Religious beliefs are like the contents of a secret box. They are esoteric, and therefore improper grounds for legal decision making.[149]

The problem with this epistemic argument is that comprehensive secular moral, ethical, and philosophical doctrines (such as Kantianism, utilitarianism, or liberal perfectionism)—which I will refer to as "secular doctrines"[150]—may be similarly inaccessible. Although such views may not appeal to any transcendent source of authority, they are nevertheless supported by values, intuitions, and experiences that are not universally shared and that may be opaque to many people.[151] Indeed, this diversity of perspectives is a mark of any society that protects certain basic freedoms, including those of speech, conscience, and association. In such circumstances, citizens

147 See, for example, Greene, 102 Yale L J at 1619–22 (cited in note 13); Sherry, 7 J Contemp Legal Issues at 478–79 (cited in note 82).

148 Greene, 72 Fordham L Rev at 2095 (cited in note 67). See also Greene, 102 Yale L J at 1617 (cited in note 13).

149 See Greene, 72 Fordham L Rev at 2097–98 (cited in note 67).

150 See John Rawls, *The Idea of Public Reason Revisited*, in Samuel Freedom, ed, *Collected Papers* 573, 573 n 2 (Harvard 1999) (using the term "doctrine" to refer to "comprehensive views of all kinds").

151 See Colin Bird, *Mutual Respect and Neutral Justification*, 107 Ethics 62, 75 (1996) (arguing that political decisions should not be based on opaque moral considerations).

are free to develop and pursue more or less comprehensive religious, ethical, and philosophical doctrines about how to lead meaningful and valuable lives. Their efforts to work out such doctrines are, however, subject to various limitations of theoretical and practical reasoning, which include problems of vagueness and indeterminacy in applying normative concepts, the difficulty of evaluating complex evidence and resolving conflicts between moral values, as well as differences in the totality of personal experiences that bear on such determinations. These "burdens of judgment"[152] not only make it difficult for reasonable people to agree with each other about complicated normative questions, but they also make it easier to see why intuitions and experiences available to some people are not available or accessible (let alone acceptable) to others, at least not without substantial changes in their life experiences, including of the kind that the state is prohibited from requiring in a society that protects basic liberties (for example, religious conversion). Moreover, these limits on our cognitive capacities are not restricted in application to matters of religion. They are perfectly general, applying to all forms of normative reasoning. Thus, there is no reason to identify religious convictions, or "references out," as distinctively inaccessible. Secular doctrines that appeal to intuition and experience may also be inaccessible to those who lack the various associations and attachments necessary to understand them.[153]

Third, if secular doctrines are not generally more accessible than religious views, then exclusive accommodation unfairly burdens both religious believers and nonbelievers. Starting with the former, religious believers are wrongly singled out for special constraints in the political process. To see this, consider that under exclusive

152 Rawls, *Political Liberalism* at 56–57 (cited in note 16) (discussing these limitations on practical reasoning). See also Quong, *Liberalism without Perfection* at 36–37 (cited in note 16) (discussing the "burdens of judgment").

153 See Eberle, *Religious Convictions in Liberal Politics* at 30–35 (cited in note 16) (arguing that religious views are no more accessible than secular moral views); Alexander, 30 San Diego L Rev at 795 (cited in note 46) (same). Note, however, that symmetry between (some) religious and (some) secular claims with respect to epistemic accessibility does not establish that citizens may reasonably reject all moral and political values with which they disagree. For example, in a liberal democratic society, citizens must be committed to some conception of the basic values of freedom and equality. To reject either of those values is to renounce the project of living in such a society. Moreover, it is possible to reach this conclusion without giving a specific justification for accepting the values of freedom and equality since citizens may accept a plurality of justifications depending on their broader religious, philosophical, and ethical perspectives. See Quong, *Liberalism without Perfection* at 194–255 (cited in note 16) (discussing the justification of liberal political principles); Audi, *Religious Commitment* at 61 (cited in note 16) ("[A]ny plausible theory of the basis of liberal democracy will . . . affirm at least two values as essential constituents in such a society: liberty and basic political equality.").

accommodation, antireligious views may serve as permissible justifications for legal decisions. Since atheism does not appeal to a transcendent moral authority, it is not considered epistemically inaccessible. The result is that citizens may rely on religious skepticism in the political process. For example, there would be nothing to stop an atheist majority from demanding government religious speech promoting disbelief in God. But this asymmetric outcome—allowing antireligious but not religious views to compete on equal terms in the political process—is premised on an epistemic mistake, which can be corrected either by abandoning the exclusion of religious convictions or by widening the scope of exclusion to include secular moral, ethical, and philosophical doctrines.[154]

With respect to nonbelievers, exclusive accommodation treats them unfairly by denying constitutional exemptions for secular claims of conscience. For example, in the Vietnam draft protestor cases,[155] exclusive accommodation would reject the extension of religious exemptions to nontheistic conscientious objectors.[156] The reason for this exclusion is that nontheistic views are permissible in the political process, and so they are not due any constitutional remedy if they fail to win political concessions. But as we have seen, this claim rests on a controversial epistemic view, without which it is difficult to distinguish claims for freedom of conscience brought by religious and nonreligious objectors. Indeed, the fact that their cases seem so similar as an intuitive matter is one reason to doubt the epistemological argument for treating them differently.

To summarize the argument above, exclusive accommodation should be rejected because it rests on a defective conception of political legitimacy. The exclusion of certain values and beliefs from the political process does not entitle those who hold them to constitutional remedies. They are only so entitled if they can show that their views satisfy some further principle of legitimacy. One such principle states that values, principles, and beliefs are admissible as political and legal justifications only if reasonable people could, at least in principle, understand and accept them as free and equal citizens in a liberal democracy.[157] If certain values and beliefs meet this (or some

154 I argue for the latter option below in Part II.B.2.

155 See *Welsh v United States*, 398 US 333, 340 (1970); *United States v Seeger*, 380 US 163, 176 (1965).

156 See Greene, 102 Yale L J at 1642–43 (cited in note 13).

157 Although this principle, which resembles Rawls's "liberal principle of legitimacy," is controversial, I shall not attempt to defend it here. Yet if the criticisms of exclusive accommodation and inclusive nonaccommodation offered above have any independent appeal, they may help to confirm this account of legitimacy since they will have shown that neither singling out

similar) condition, then there is no reason to exclude them in the first place.

The main question, then, is not whether the exclusion of religious views warrants compensation but whether such views ought to be excluded as a sufficient basis for state action. If religious views are inaccessible to nonbelievers, such that they would be unable to comprehend the normative authority under which they are governed, then that is a reason to constrain appeals to religion. This claim captures the central appeal of exclusive accommodation, and its validity is not denied by modifying or even abandoning the participation principle. At this point, however, we must recognize that beliefs and values drawn from secular doctrines may also be inaccessible, in which case they, too, ought to play only a limited role in justifying state action. The alternative would be to remove any limitations on both religious and secular views, which leads either to inclusive accommodation or to inclusive nonaccommodation. Since I have already argued that the former is internally inconsistent, it remains to consider the latter.

2. The unfairness of inclusive nonaccommodation.

Inclusive nonaccommodation accepts that many secular beliefs about morality are not more accessible than religious convictions. Partly for this reason, the theory treats religious and secular views equally with respect to both accommodations and the justification of state action. In terms of exemptions, religious and secular claims of conscience rise and fall together. The state need not grant exemptions for general laws in many circumstances. But if it does, it may not discriminate in favor of religious views, at least not when those with deeply held secular moral beliefs have comparable claims. On the question of legal justification, inclusive nonaccommodation is committed to the proposition that religious convictions and secular moral views ought to be treated equally. It follows that the theory is, in principle, opposed to a secular purpose doctrine, which would constrain only religious beliefs from acting as sufficient grounds for state action.[158]

But this is not the only way to resolve the problem of equality in the context of legal justification. Whereas inclusive accommodation "levels up" by expanding the domain of purposes to include religious

religious convictions for exclusion nor allowing them to serve as sufficient justification for state action are acceptable alternatives. For Rawls's principle of legitimacy, see Rawls, *Political Liberalism* at 137, 217 *(*cited in note 16).

158 See Part I.B.4.

convictions, an alternative would be to "level down" by excluding secular moral, ethical, and philosophical doctrines. In what follows, I present a two-part argument against leveling up and in favor of leveling down. The first part of my argument defends the secular purpose doctrine by showing that laws based solely on religious convictions are no different from the coercive imposition of religion. This point was addressed earlier, and I expand on it below. The second part of my argument involves broadening the scope of the secular purpose doctrine to include coverage of secular doctrines. The result is a theory that treats religious and nonreligious doctrines equally, in terms of both legal justification and accommodations, but without compromising the principle that citizens should not be subject to state regulation on the basis of religious convictions or other doctrines that they could not reasonably accept.

In my view, the main problem with inclusive nonaccommodation is that it effectively abandons the secular purpose requirement. This means that majorities could pass legislation based solely on their religious views and with no secular purpose. To see why this is unfair to religious minorities and nonbelievers, we can return to an earlier example based on the facts of *Clayton v Place*,[159] in which a federal district court determined that a public school board violated the Establishment Clause when it acted on religious grounds to prohibit school dances.[160] The Eighth Circuit reversed, even though it failed to articulate a credible secular purpose.[161] Four judges dissented from the denial of rehearing en banc. While noting that "[i]n the overall scheme of things, a dance at Purdy high school . . . may not be of earth-shattering significance," the dissenters charged that imposing a law with no secular purpose involved nothing less than "religious tyranny."[162]

Inclusive nonaccommodationists might respond to this objection in various ways. They might argue that, rightly understood, inclusive nonaccommodation does not, in fact, allow for laws justified solely on religious grounds. For example, Eisgruber and Sager claim that although religious and nonreligious views cannot be distinguished on

159 690 F Supp 850 (WD Mo 1988), revd 884 F2d 376 (8th Cir 1989).

160 *Clayton*, 690 F Supp at 856.

161 The Eighth Circuit held that the board's policy satisfied the secular purpose test because it was facially neutral and because the record contained no evidence about why the policy was initially adopted. *Clayton*, 884 F2d at 379–81. As the dissenters in the denial for rehearing en banc argued, however, these facts were insufficient to show a secular purpose. *Clayton,* 889 F2d at 193 (Gibson dissenting from denial of rehearing en banc). Indeed, they showed no rational purpose at all.

162 *Clayton*, 889 F2d at 195 (Gibson dissenting from denial of rehearing en banc).

epistemic grounds, state endorsements of religion are impermissible because they disparage nonbelievers.[163] They give the example of a small town posting a highway sign that reads, "Fineville—A Christian Community."[164] This sign disparages nonbelievers because it carries a message of social exclusion. By comparison, a sign saying, "Fineville—A Nuclear-Free Community," would not be disparaging in the same way.[165] Eisgruber and Sager argue that the religious sign is different because, at least in the United States, religious identity often has four features that make it vulnerable to social exclusion: religion tends to be (1) *comprehensive* in guiding belief and conduct, (2) *cohesive* in the sense that people are either in or out of the group, (3) *ritualistic* in using expression and conduct to signal group membership, and (4) *momentous*, or extremely important, for believers' temporal and spiritual well-being.[166] Relying on these features, Eisgruber and Sager argue that government endorsements of religion are disparaging to outsiders, whether religious or secular, in ways that many endorsements of secular moral views are not.[167] Some citizens might have strong views about the politics of nuclear power, but religious identities are historically characterized by attributes that make state endorsements of them far more troubling, especially for those who are not part of the "in" group. Thus, one answer to the charge of religious tyranny is simply to concede the point. To the extent that laws based solely on religious doctrines are like religious banners that convey a message of social exclusion and disparagement, they are impermissible.[168]

The problem with this response is that it rests on claims about religion that are inconsistent with treating religious and secular views equally with respect to accommodations.[169] If religious identities involve beliefs and practices that are qualitatively different in various dimensions, including that they are more comprehensive and

163 See Eisgruber and Sager, *Religious Freedom and the Constitution* at 124–28 (cited in note 14).

164 Id at 124.

165 Id.

166 Id at 125–26.

167 See Eisgruber and Sager, *Religious Freedom and the Constitution* at 126 (cited in note 14).

168 The *Clayton* dissenters made exactly this argument. *Clayton*, 889 F2d at 196 (Gibson dissenting from denial of rehearing en banc) ("As a symbol of religious endorsement, the rule [banning school dances] is no less obvious than a monument anchored to the schoolhouse lawn pronouncing: 'THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES.'").

169 See Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 Tex L Rev 1185, 1199 (2007) (arguing that Eisgruber and Sager's four factors "show equally why people are especially harmed when they are prevented from acting according to the demands of their chosen faith").

psychologically significant (or momentous) for those who hold them, then that is a reason to provide them with special protection in the form of constitutional exemptions. But if inclusive nonaccommodationists reject this line of reasoning, and if they maintain that religious convictions cannot serve as sufficient grounds for legal justification (because that would be disparaging), then their view effectively collapses into exclusive nonaccommodation (holding that religion is specially disabled for purposes of legal justification but not specially privileged for purposes of accommodations), in which case it faces the same problems of inconsistency that tend to undermine that theory.

Instead of abandoning the idea that religious beliefs might be sufficient grounds for state action, inclusive nonaccommodation might retreat to the view that religious values can justify government regulation provided that no independent constitutional rights are infringed in the process. But if religious convictions have the same status as secular moral values, then some reason must be given for why they cannot serve as a compelling interest to justify infringements on competing rights.[170] After all, religious convictions are said to provide believers with higher-order interests, indeed duties grounded in a transcendent source of normative authority. Unless there is some reason to exclude such duties as a sufficient basis for legal decisions, or to discount their weight, those who advance them as the basis for state action can rightly wonder why their most deeply held values are trumped by assertions of constitutional rights, even though secular purposes they consider to be of lesser weight might be sufficient in some cases to overcome rights-based claims.

This point can be pressed even further. Inclusive nonaccommodation must not only explain why religious values cannot serve as compelling state interests, it must also explain why such values are insufficient to determine the nature of constitutional rights that might otherwise be used to challenge laws enacted for religious purposes. For example, suppose a municipality passes a law requiring students to pray in public schools for the purpose of promoting the truth of a particular religious view. An atheist student objects that the law violates her rights of religious free exercise. Now, as suggested in the previous paragraph, the municipality could argue that promoting the true religion is a compelling state interest. Alternatively, it might claim that the constitutional right in question—that of

170 See Koppelman, 88 Va L Rev at 163–65 (cited in note 15) (arguing that the secular purpose doctrine insulates federal courts from having to determine whether religious purposes are legitimate or compelling state interests).

religious free exercise—is best understood on religious grounds as protecting one's right to obey duties to a transcendent authority, which is plainly inapplicable in the case of atheists. In other words, the municipality can give a religious justification for the nature and content of the very constitutional right that was meant to serve as an independent constraint on religiously justified legislation. Without a secular purpose requirement, it is difficult to see how this result can be avoided.

Inclusive nonaccommodation can prevent these difficulties in one of two ways. It can concede that a secular purpose requirement must play some role in the theory, singling out religion for special constraints in the political process and in the identification and justification of constitutional rights. Again, this way leads to exclusive nonaccommodation, which disfavors religious beliefs as justifications for legal decisions, including those that involve determining the content of fundamental rights, while treating religion equally with respect to accommodations. The alternative is to accept a secular purpose requirement while expanding its scope to cover secular moral, ethical, and philosophical doctrines. This view does not single out religion, at least not when the concept of religion is defined in relation to a transcendent normative authority, which is how it is understood by proponents of the other three theories.

If the secular purpose test requires that laws be justified according to reasons that do not appeal to some transcendent authority, then it may seem paradoxical to include within its scope of exclusion reasons based on moral, ethical, and philosophical views that do not rest on any transcendent claims. The secular purpose requirement would then exclude what we might otherwise think of as secular purposes. This leads to an apparent contradiction. But this is an artificial, perhaps even a semantic, limitation on determining which reasons are sufficient to justify political and legal decisions. Instead of using the language of "secular reasons," we can talk about "public reasons."[171] The distinction between public and nonpublic would then allow us to distinguish those public values—for example, the moral values of liberty and equality—that can serve as legitimate justifications for state action and those nonpublic values drawn from religious and secular doctrines that cannot.[172] Replacing the distinction between *religious* and *secular* with one between *public* and *nonpublic*

171 Rawls, *The Idea of Public Reason Revisited* at 583 (cited in note 150) (distinguishing public reasons from secular reasons based on "comprehensive nonreligious doctrines").

172 See Michael Perry, *From Religious Freedom to Moral Freedom*, 47 San Diego L Rev 993, 1001 (2010) (distinguishing legitimate government interests from illegitimate interests).

makes it possible to expand the secular purpose requirement into a public purpose requirement, which treats religious and secular doctrines equally in the sense that neither is considered a sufficient basis for political and legal decision making.

Of course, this distinction between public and nonpublic purposes is one that has become familiar in recent years as central to the idea of political liberalism, which is a theory of liberal rights and institutions that tries to avoid, as much as possible, relying for its content, structure, and justification on any particular conception of human flourishing or well-being, whether religious or secular.[173] It is not my purpose to defend that theory here[174] or to offer a more specific account of its idea of public reason.[175] For now, the important point is that the failure of the four theories described above leads inexorably to an idea of public purposes (or reasons) distinct from the set of religious and secular doctrines that cannot serve as the basis for legitimate state action.

To reject some such idea of public purpose requires abandoning a commitment to either (1) the concerns about protecting minority interests that motivate the secular purpose doctrine or (2) the idea that religious and secular doctrines cannot be distinguished on epistemic or psychological grounds. If we reject (1), then we face all of the problems that confront inclusive nonaccommodation (and which apply, a fortiori, to inclusive accommodation), since both views reject the secular purpose test and would therefore allow religious doctrines to serve as the primary basis for legal decisions, including those identifying the content of compelling state interests and the constitutional rights against which they are balanced. And if we reject (2), then we must accept one of the alternative theories described above, all of which fail, either because they are internally incoherent or because they cannot explain why religious views are to be systematically privileged or disabled (or both) as compared with deeply held secular moral, ethical, and philosophical views. If none of these theories is persuasive, then the only other option, short of

173 See generally Rawls, *Political Liberalism* (cited in note 16). See also Quong, *Liberalism without Perfection* at 12–26 (cited in note 16).

174 I have done some of this work elsewhere. See, for example, Schwartzman, 19 J Polit Phil at 375 (cited in note 30) (defending a principle of sincere public justification); Schwartzman, 3 Polit Phil & Econ at 193 (cited in note 42) (responding to the objection that public reason is indeterminate). See also Den Otter, *Judicial Review* at 200–30 (cited in note 42) (responding to various standard objections).

175 See generally Rawls, *The Idea of Public Reason Revisited* (cited in note 150); Jonathan Quong, *On Public Reason*, in Jon Mandle and David Reidy, eds, *The Blackwell Companion to Rawls* (forthcoming 2013) (on file with author). See also Charles Larmore, *Public Reason*, in Samuel Freeman, ed, *Cambridge Companion to Rawls* 368, 368–93 (Cambridge 2002).

embracing some sort of skepticism or nihilism about religious freedom,[176] is to develop some workable distinction between public and nonpublic purposes, reasons, and values.

C. Beyond Religion

The upshot of the argument so far is that religion is not morally distinctive as compared with secular doctrines. This conclusion has normative implications for both religious exemptions and constraints on the types of purposes that can serve as legitimate justifications for state action. It is useful, however, to clarify what has (and has not) been established up to this point before turning, in Part III, to the question of how religion's lack of distinctiveness vis-à-vis secular doctrines ought to bear on our attitudes toward the Religion Clauses.

With respect to accommodations, the claim that religion is not distinctive narrows but does not fully determine the range of morally permissible options. As a general matter, the state can treat religious and secular doctrines equally either by granting or denying exemptions for both. What it cannot do is single out religion generally for exemptions while denying them to those with comparable secular claims.[177] Establishing moral parity between religious and secular doctrines is not sufficient, however, to decide whether accommodations must be granted in the first place. Nothing in the argument above resolves that more fundamental question. All that can be said here is that the set of permissible options with respect to accommodations is restricted to those consistent with the demand for equal treatment. Within that set, considerations of equality between religious and secular doctrines are indeterminate.[178] They must be supplemented by

176 Although skeptical theories raise serious challenges to any account of religious freedom, I cannot address them here. For leading skeptical views, see generally Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford 1995); Stanley Fish, *The Trouble with Principle* (Harvard 1999). But see Greenawalt, 2 *Religion and the Constitution* at 433–50 (cited in note 90) (distinguishing and rejecting various forms of skepticism about the Religion Clauses).

177 Of course, it may be difficult in some cases to determine when religious and secular claims are comparable. All theories that deny the distinctiveness of religion face this boundary problem. For present purposes, however, it is enough to say that at least some secular claims are comparable to at least some religious claims. The arguments in Part II are, of course, aimed at establishing that conclusion.

178 This is an instance of what Gerald Gaus has called "nested indeterminacy," which occurs when there is a conclusive reason, R, for selecting a policy from a set of mutually exclusive options $\{P_1, P_2, P_3\}$, but where R does not select uniquely from among the options in the set. R cannot tell us which policy to choose, but it can rule out policies $\{P_4, P_5, \ldots\}$, which are not within the range of permissible options. Thus, R is not completely indeterminate; rather, indeterminacy is nested within a range of legitimate possibilities. See Gerald F. Gaus, *Justificatory*

claims about how much weight is properly given to the value of allowing citizens to act according to their religious or secular doctrines, even when the state may have varying levels of conflicting interests.[179]

A similar indeterminacy might be thought to apply in the context of legal justification under the secular purpose doctrine. If religious and secular doctrines must be treated equally, two conclusions might follow: either (1) allow purposes based on both types of doctrines to serve as sufficient grounds for political and legal decisions, or (2) deny that both doctrines can serve this function. But it is a mistake to see indeterminacy in this context. As I have argued above, the first option, which would eliminate the secular purpose requirement, is normatively unattractive. The only plausible alternative is to pursue some version of the second option, which would expand the secular purpose doctrine into a broader constraint on the types of reasons that justify state action.

In the context of both accommodations and legal justification, then, there are normative and epistemic grounds for going beyond the category of religion, at least when that category is defined in terms of doctrines based on belief in a transcendent or supernatural authority, which is a basic feature of religion within all but one of the theories described above.[180] Framed in such terms, religious beliefs and practices do not as a general matter warrant more (or less) favorable treatment than those which follow from secular doctrines.

Although this conclusion is stated at a high level of abstraction, it provides an answer to the question: "*Is* religion special?" As a normative matter, the response must be, "No." But as a legal and constitutional matter, religion *must* be special. The Religion Clauses of the First Amendment were framed in terms of *religious* free exercise and a prohibition on the establishment of *religion*. If religion is not special, but if it must be as a matter of law, then our moral and legal views are at odds with each other. If this were a matter of easily modified statutory law, or an issue of relatively little importance,

Liberalism 156 (Oxford 1996) (discussing the idea of nested indeterminacy); Schwartzman, 3 Polit Phil & Econ at 197–98 (cited in note 42) (same).

179 Compare Amy Gutmann, *Identity in Democracy* 151–91 (Princeton 2004) (arguing against singling out religion for special treatment while defending legal exemptions for claims of conscience), with Leiter, *Why Tolerate Religion?* at 92–133 (cited in note 14) (arguing against singling out religion but rejecting legal exemptions for claims of conscience).

180 The exception is inclusive nonaccommodation, which attempts to avoid specifying a definition of religion by denying that the distinction between religion and nonreligion is morally or epistemically relevant for deciding most legal controversies. See Christopher L. Eisgruber and Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 Notre Dame L Rev 807, 809 (2009) ("[W]here competing theories about the definition of religion become controversial and interesting, they also become irrelevant to constitutional law.").

then perhaps we could downplay this tension. But the problem involves constitutional provisions of the first importance, and so the conflict is not so easily dismissed. If our normative views take us beyond religion, then it is necessary to confront the question of what our attitudes ought to be toward constitutional texts defined in terms that are no longer morally sufficient.

III. AGAINST THE RELIGION CLAUSES?

If one accepts that religion is not special as a normative matter, then there are basically two ways to respond to the conflict between that view and the law. The first is to reject the law as morally defective and argue that it should be changed to remedy its failures. The second is to attempt some form of reconciliation with the law by showing that it can be interpreted in ways that either diminish or dissolve the underlying conflict. This Part explores both options—*rejection* and *reconciliation*—although it does not state a preference between them. Which option is most attractive will turn largely on one's theory of constitutional interpretation. To be clear, I do not adopt a particular theory here. For present purposes, I remain agnostic on the question of whether original meaning serves as a normative constraint on legal interpretation. Instead of taking sides on that issue, my aim is to show what follows from rejecting the distinctiveness of religion *if one adopts an originalist (or nonoriginalist) theory for determining constitutional meaning*. In its general form, my claim is that accepting originalism (or at least most versions of it) commits one to certain moral conclusions about the Religion Clauses, namely, that they are morally defective, whereas accepting nonoriginalism (or at least some versions of it) may be compatible with various strategies for moral reconciliation with the constitutional text. Needless to say, all of this requires a great deal of simplification, but even so, it is possible to indicate in a rough way two directions in which the arguments above might lead us.

A. Rejection

If the Religion Clauses are best interpreted according to their original meaning, and if religion is not normatively distinctive, then the law should be rejected as morally deficient.[181] Under various

[181] This claim is consistent with the view that, at the time of their enactment, the Religion Clauses were a moral and political accomplishment of the first order. One can praise the Founders for their efforts to move beyond the long and painful history of religious persecution in Europe, which continued to a lesser extent in the American colonies, while believing that

theories of what counts as original meaning, the Religion Clauses must be understood in terms of a theistic definition of religion. When that understanding is applied to claims about free exercise and religious disestablishment, it generates outcomes that are inconsistent with the normative view that religion does not warrant special treatment as compared with secular doctrines. Since those outcomes are not morally justifiable, the legal doctrine that produced them must be considered morally defective.[182]

This argument holds across a range of views that fall within the family of originalist theories of constitutional interpretation. At least it applies to those forms of originalism that accept what have been called the *fixation thesis* and the *textual constraint thesis.*[183] According to the fixation thesis, the semantic or linguistic meaning of constitutional terms is fixed at the time of their enactment.[184] Depending on how this meaning is explicated—by reference to framers' (or ratifiers') intentions, expected applications, or the understandings of ordinary (or competent) members of the public—it is possible to generate various conceptions of originalism.[185] The textual constraint thesis holds that however the text's original meaning is determined, that meaning is legally authoritative. Whatever a constitutional provision meant at the time of its adoption constrains how it can be interpreted and applied as a matter of law.[186]

Since nearly all forms of originalism accept the fixation and textual constraint theses,[187] they invite the objection that the Religion Clauses are morally deficient. This is because the Clauses refer to the concept of religion rather than extending protection to secular doctrines, for example by providing for a more general freedom of conscience. It has been suggested that some of the Founders understood the Clauses to protect rights of conscience and that their conception of conscience was detached from theistic premises.[188] But that view is

the freedoms of religion and conscience should now extend beyond the Founders' understanding of them.

182 See Milton R. Konvitz, *Religious Liberty and Conscience: A Constitutional Inquiry* 86–92 (Viking 1968) (arguing that it is a "defect" of the Religion Clauses that they do not protect secular conscience).

183 See Lawrence B. Solum, *We Are All Originalists Now*, in Robert W. Bennett and Lawrence B. Solum, *Constitutional Originalism: A Debate* 1, 4 (Cornell 2011) (stating the fixation and textual constraint theses).

184 See id (stating the fixation thesis).

185 See id at 2–20 (surveying conceptions of originalism).

186 See id at 4 (stating the textual constraint thesis).

187 See Solum, *We Are All Originalists Now* at 4 (cited in note 183) ("[T]he fixation thesis and the textual constraint thesis [ ] are accepted by almost every originalist thinker.").

188 See David A.J. Richards, *Toleration and the Constitution* 104–17 (Oxford 1986) (arguing that moral sense theory, which gained prominence during the Scottish Enlightenment,

controversial,[189] and, in any event, the commonly accepted understanding of the Religion Clauses is that they protected *religious* conscience rather than some more expansive conception.[190] For reasons unknown, the Framers of the First Amendment rejected language that referred to the "rights of conscience" or to "equal rights of conscience," preferring a narrower formulation in terms of the "free exercise" of religion.[191] That decision suggests either that "rights of conscience" were understood to be synonymous with the free exercise of religion, or that the Framers selected a more limited provision to exclude nonreligious matters. On either interpretation, the Religion Clauses do not protect secular claims of conscience.[192]

Furthermore, in addition to focusing on religion rather than some broader category of belief or practice, originalist accounts of the Religion Clauses commonly define the concept of "religion" in terms of theistic belief.[193] There is little, if any, evidence that the Framers, ratifiers, or ordinary members of the public understood the meaning of religion to encompass nontheistic views.[194] And even if

rejected the Lockean view that "respect for conscience is, at bottom, respect for religious conscience," and that this theory was influential during the American founding, including in the framing of the Religion Clauses).

189 See McConnell, 103 Harv L Rev at 1492 (cited in note 60) (arguing that "the vast preponderance of references to 'liberty of conscience' in America were either expressly or impliedly limited to religious conscience"); John Witte Jr and Joel A. Nichols, *Religion and the American Constitutional Experiment* 44 (Westview 3d ed 2011).

190 See, for example, Kent Greenawalt, *The Significance of Conscience*, 47 San Diego L Rev 901, 913 (2010) ("[I]nsofar as the Free Exercise Clause protected conscience, it concerned religious conscience."); McConnell, 103 Harv L Rev at 1494 (cited in note 60) ("There was no recorded controversy in preconstitutional America in which the right of 'conscience' was invoked on behalf of beliefs of a political, social, philosophical, economic, or secular moral origin."); George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 Georgetown L J 1519, 1521–22 (1983) (arguing that the Framers intended to protect "freedom of conscience in matters of religion, not freedom of conscience per se"); Eduardo Peñalver, Note, *The Concept of Religion*, 107 Yale L J 791, 803 (1997) (same).

191 See Witte and Nichols, *Religion and the American Constitutional Experiment* at 88–89 (cited in note 189) (discussing the drafting history of the Religion Clauses); McConnell, 103 Harv L Rev at 1483–84 (cited in note 60) (same).

192 See McConnell, 103 Harv L Rev at 1494–96 (cited in note 60) (arguing that exclusion of nonreligious claims was consistent with the Founders' view that religious duties were of a higher order than duties to secular authorities); Freeman, 71 Georgetown L J at 1522–23 (cited in note 190) (same).

193 See Freeman, 71 Georgetown L J at 1520 (cited in note 190) ("What little evidence there is [ ] suggests that most of the Founders equated religion with theism.").

194 See Witte and Nichols, *Religion and the American Constitutional Experiment* at 102 (cited in note 189) ("[N]o founders writing on religious rights and liberties argued seriously about extending constitutional protection to others by setting the line to include African or Native American religions, let alone nontheistic faiths such as Buddhism."). But see Greenawalt, 1 *Religion and the Constitution* at 130 n 28 (cited in note 92) (arguing that "religion" during the Founding era may have included polytheistic and nontheistic faiths).

they did, it is highly unlikely that the concept extended to agnosticism or atheism.[195] Indeed, there is substantial evidence that the Founders did not understand either of the Religion Clauses to protect atheist beliefs.[196]

To the extent originalism requires interpreting the Religion Clauses according to a theistic definition of religion,[197] it supplies a crucial premise in the argument for their moral defectiveness. In the remainder of this Section, I consider some originalist interpretations of the Free Exercise and Establishment Clauses, showing that this argument applies with more or less force to all of them.

1. Against (original) free exercise.

There is no consensus among originalists about whether the Free Exercise Clause requires exemptions from general laws that incidentally burden religious practices. On one originalist theory, the Clause does require such exemptions; on another, it does not.[198] But in either case, a theistic conception of the Clause's meaning raises serious concerns.

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195 See Greenawalt, 1 *Religion and the Constitution* at 149 (cited in note 92) ("[T]he claim that atheists and agnostics have every privilege of religious believers fits uncomfortably with an approach to interpretation that gives much weight to original understanding."); Freeman, 71 Georgetown L J at 1521 (cited in note 190) ("Although the Founders might have been willing to include nontheism within the meaning of 'religion,' the same cannot easily be said for traditional atheism.").

196 See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L Rev 346, 376 (2002) ("[T]he notion of liberty of conscience for atheists does not seem to appear in the eighteenth-century materials at all.").

197 Andrew Koppelman resists this conclusion, arguing that the original meaning of the Religion Clauses includes a principle of state neutrality with respect to religious controversies, such as disputes about the existence and nature of God. See Andrew Koppelman, *Defending American Religious Neutrality* *82 (forthcoming 2013) (on file with author) ("If [the Framers] aimed to keep the state away from contested religious questions, that is relevant."). He claims that the Religion Clauses therefore protect those who adopt nontheistic, atheistic, and agnostic views about such matters. See id at *95–96, 174–75. Koppelman's argument deserves a more complete response than I can provide here. But, first, his view falls outside standard originalist interpretations of the Religion Clauses, which tend to interpret their meaning far more narrowly and in theistic terms. Furthermore, even if the Framers would have extended constitutional protections to nontheistic believers, as noted above, there is little, if any evidence, that the Religion Clauses were intended (or understood) to protect nonbelievers. Lastly, assuming the original meaning can be stretched to cover atheists and agnostics, Koppelman's conception of neutrality does not extend, in principle, to claims of conscience grounded in nonreligious moral and ethical doctrines. At its limit, then, even the most capacious—or perhaps "living"—original understanding of the Religion Clauses faces a persistent equality objection.

198 Compare McConnell, 103 Harv L Rev at 1410 (cited in note 60) (arguing for constitutional religious exemptions on originalist grounds), with Philip Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 Geo Wash L Rev 915, 916–17 (1992) (arguing against religious exemptions on originalist grounds).

If the original meaning of the Free Exercise Clause is interpreted as authorizing exemptions from general laws, then, as a normative matter, the law is significantly underinclusive. It protects religiously motivated conduct without extending the same privileges to secular claims of conscience. For example, had the Vietnam draft protest cases been argued on constitutional rather than statutory grounds, originalists are committed to the view that secular conscientious objectors would not have been entitled to any constitutional protection.[199] An originalist can accept this as the correct legal interpretation of the Free Exercise Clause and at the same time believe that secular conscientious objectors deserve better, indeed equal, treatment under the law. That is, an originalist can believe both that the law provides special protection for religious believers and that the resulting inequality is morally unjust.

Someone who holds this view might believe that it would have been better if the Framers had inserted a conscience clause into the First Amendment, so that it would read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [or of conscience]."[200] Had the First Amendment been framed in these terms, and assuming (perhaps counterfactually) that the concept of conscience was not limited to matters of religion but extended to secular moral beliefs of sufficient seriousness or importance, it would be possible now to adopt a more positive moral attitude toward the law.[201] Absent such a change, however, an originalist theory that interprets the Religion Clauses as requiring accommodations would allow for significant and unjustifiable legal inequalities.[202]

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199 See McConnell, 103 Harv L Rev at 1500 (cited in note 60).

200 Milton Konvitz suggested this revision more than forty years ago. See Konvitz, *Religious Liberty and Conscience* at 99 (cited in note 182).

201 Though this revision would not address problems related to the Establishment Clause. See Part III.A.

202 Lawrence Solum has suggested to me that an originalist might respond to this objection by defending a general liberty of conscience grounded in the Ninth Amendment and in the Privileges or Immunities Clause of the Fourteenth Amendment. See, for example, Randy E. Barnett, *Restoring the Lost Constitution* 259–61 (Princeton 2004) (arguing that the original meaning of the Ninth and Fourteenth Amendments is best understood as creating a constitutional presumption against any government interference with individual liberty). Whether this is a persuasive originalist interpretation of the Ninth and Fourteenth Amendments is a question I cannot address here. But even if it is, libertarian originalists must confront the pervasive rejection of rights of conscience for nonbelievers during the Founding era and through Reconstruction. The people may have retained unenumerated natural rights, but it is not obvious that the right to profess a rejection of the theistic foundation of those rights was among them. A presumption of liberty might be insensitive to such historical limitations, but its application in this context to the rights of nonbelievers would need further argument, perhaps in ways that go beyond originalism. See, for example, Richards, *Toleration and the Constitution* at 141 (cited in

At this point, one might object that expanding a regime of constitutional accommodation to include secular claims of conscience would result in the dilution of legal protections for everyone.[203] Although potentially significant, this objection is probably overstated. A few brief responses might suggest why one should still retain a sense of moral unease about constitutional provisions that privilege religion in distributing legal exemptions.

First, many state and federal laws provide exemptions for both religious and secular beliefs without leading to any apparent dilution effect. For example, since the passage of the Church Amendment in 1973, the federal government has prohibited public officials from requiring that health care providers perform or assist in sterilization or abortion procedures contrary to their "religious beliefs or moral convictions."[204] Similarly, recent federal health care legislation prohibits discrimination against health care providers whose religious or moral beliefs are contrary to providing abortion services.[205] Moreover, many states have now enacted "conscience clauses" for pharmacists who object on religious or moral grounds to providing various forms of contraception.[206] Whatever the merits of these provisions, and despite the fact that most providers who seek protection under them do so for religious reasons, they are framed in terms that reach beyond the category of religious free exercise to cover secular moral beliefs.

Second, in addition to state and federal statutory law, there is also international precedent for extending religious freedom to cover rights of conscience. In particular, since 1992, the United States has been a party to the International Covenant on Civil and Political Rights[207] (ICCPR), a multilateral treaty adopted by the United Nations General Assembly in 1966. According to Article 18 of the

note 188) (arguing that the Religion Clauses protect a broad right to conscience "whatever its religious or other form").

203 See McConnell, 103 Harv L Rev at 1492–93 (cited in note 60) (raising this objection); W. Cole Durham Jr, *Religious Liberty and the Call of Conscience*, 42 DePaul L Rev 71, 87 (1993) (same).

204 Health Programs Extension Act of 1973 § 401(b), Pub L No 93-45, 87 Stat 91, 95, codified as amended at 42 USC § 300a-7(b).

205 See Patient Protection and Affordable Care Act §§ 1303, 10104(c), Pub L No 111-148, 124 Stat 119, 168–71, 869–99 (2010), codified at 42 USC § 18023(b)(4), 42 USC § 18023(c)(2)(A) ("No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.").

206 See Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* 155–78 (Cambridge 2010) (discussing conscience clause legislation for pharmacies).

207 1966 UST 521, TIAS No 14668 (1966) (entered into force Mar 23, 1976).

ICCPR, "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion *or belief* of his choice, and freedom . . . to manifest his religion *or belief* in worship, observance, practice and teaching."[208] Given that the United States has already signaled a commitment through this international agreement to protecting the freedom of conscience, including nonreligious belief, limiting domestic constitutional protections to avoid potential dilution seems increasingly anachronistic and unsupported by any clear evidence of adverse effects.

Third, outside of specific high-stakes contexts, there might be relatively few instances in which nonbelievers seek constitutional exemptions for conflicts with their moral beliefs.[209] Perhaps this is because laws justified mainly on the basis of public purposes tend to reduce the scope and intensity of moral disagreements, at least for those with generally secular views.[210] When such conflicts do arise, however, the military conscription and health care examples suggest that they often involve weighty moral issues, which are precisely those in which privileging religious over secular views is most unfair.

Fourth, at least as a matter of constitutional doctrine, an obvious response to the dilution objection is that the Supreme Court has always been stingy about providing exemptions from general laws. Even before its decision in *Smith*, the Court hardly ever granted religious exemptions under the Free Exercise Clause.[211] Of course, one could argue that adding secular claims into the mix would only make things worse. But given the Court's general reluctance to move in the direction of an accommodationist regime, the dilution objection seems rather overdetermined. One might speculate, however, that a legal regime committed to reversing this effect with respect to religiously motivated conduct could also put into place institutions

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208 ICCPR Art 18 (emphasis added). See also Perry, 47 San Diego L Rev at 994–95, 998–1002 (cited in note 172) (discussing religious and moral freedom under Article 18 of the ICCPR).

209 See Leiter, *Why Tolerate Religion?* at 6 (cited in note 14).

210 See Rawls, *The Idea of Public Reason Revisited* at 611–12 (cited in note 150) (arguing that public reason mitigates conflicts between "irreconcilable comprehensive doctrines"); Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J L & Religion 139, 170–71 (2009) (claiming that nonbelievers "do not hold many intense moral commitments that are at odds with the dominant morality reflected in government policy"). Consider Nelson Tebbe, *Nonbelievers*, 97 Va L Rev 1111, 1156–57 (2011) (collecting cases in which nonbelievers have claimed religious exemptions).

211 See James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va L Rev 1407, 1413–16 (1992) (reviewing free exercise cases prior to *Smith* and showing that federal courts rarely granted exemptions).

and doctrines that make it possible to protect secular claims of conscience.[212]

To this point, I have been considering an originalist view of the Free Exercise Clause that requires exemptions from general laws, and my claim has been that this view ought to lead originalists to criticize the law as morally deficient. But what about originalists who reject this understanding in favor of the view that religiously motivated conduct is not entitled to special constitutional exemptions? Must they also view the Religion Clauses as morally defective?

Perhaps not. Earlier I said that equal treatment of religious and secular doctrines is indeterminate on the issue of accommodations. If neither religious nor secular doctrines warrant legal exemptions as a matter of political morality, then this reading of the Free Exercise Clause might treat everyone fairly in that regard. Indeed, some nonaccommodationists have defended existing constitutional doctrine on this basis, arguing that the Supreme Court's decision in *Smith* correctly rejected the idea that religiously motivated conduct should receive privileged treatment.[213]

There is, however, another way in which the moral argument against the Religion Clauses might still apply. Even if the Free Exercise Clause does not require constitutional exemptions, an originalist interpretation must provide the Clause with some meaning. At a minimum, it protects against government regulations aimed at restricting or suppressing religious beliefs and practices.[214] The state may not prohibit otherwise legal activities because they are undertaken for religious reasons; nor can it pass laws that discriminate on their face against religion.[215] Thus, although the Free Exercise Clause might not require exemptions from general laws, it does provide religious believers with some amount of constitutional protection.

All of this is generally thought to be relatively uncontroversial. Indeed, it is usually taken to be common ground among those who favor constitutional exemptions and those who do not. This consensus

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212 See Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary*, 43 Case W Res L Rev 917, 950 (1993) ("If the nation could fight an unpopular war while providing an exemption for conscientious objectors (a class broader than religious objectors), it no doubt could provide exemptions to less significant (at least in terms of life and death and public furor) general laws.").

213 See, for example, Marshall, 58 U Chi L Rev at 308–09 (cited in note 21); Eisgruber and Sager, *Religious Freedom and the Constitution* at 96 (cited in note 14).

214 See *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 532 (1993) ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

215 See id at 532–33, 542.

rests, however, on some background assumptions about other constitutional liberties that protect the rights of nonbelievers. In particular, nonaccommodationists rely on the existence of a robust free speech jurisprudence, which prohibits the government from regulating private expression based on the nature of its content.[216] But that jurisprudence might not be justified on originalist grounds.[217] If it is not, and if one takes a consistent position interpreting the various provisions of the First Amendment according to originalist principles, then once again inequalities might emerge in the treatment of religious and secular doctrines. The Free Exercise Clause would protect religious beliefs and practices from suppression, but, without an expansive Free Speech Clause, nonreligious expression might be afforded little constitutional protection. For example, professions of atheism, which arguably are not protected under an originalist view of the Free Exercise Clause, might be subject to government regulation.[218] Thus, whether an originalist interpretation of the Free Exercise Clause escapes moral criticism turns on the acceptance of a broader regime of constitutional liberties and especially the other freedoms specified by the First Amendment.[219]

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[216] See, for example, Marshall, 40 Case W Res L Rev at 364–65 (cited in note 137) (arguing that "significant protection for rights of conscience exist under the free speech clause"); Marshall, 67 Minn L Rev at 546 (cited in note 135) (arguing that free exercise claims should be resolved under modern free speech analysis).

[217] See, for example, Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 Harv J L & Pub Pol 73, 81 (2011) ("The 'freedom of speech' guarantee of the First Amendment . . . cannot mean what it says unless it is interpreted very narrowly—for which there is historical warrant—to prohibit only prior restraint on publication."). See also Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law* 1, 321–37 (Cambridge 2010) (arguing that severe restrictions on speech were consistent with "accepted jurisprudential and constitutional standards of the [Founding era]"). Finding the text and history of the First Amendment to be unhelpful in constructing a theory of freedom of speech, some originalists have argued on structural grounds that only political speech deserves constitutional protection. Most famously, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political."). Unless what counts as "political" is very widely construed, however, this view is too restrictive to avoid the objection raised above.

[218] Indeed, through the early twentieth century, such professions were widely prohibited under state blasphemy laws. See Blumberg, *Repressive Jurisprudence* at 319 (cited in note 217) ("The criminalization of blasphemy was a firmly embedded feature of state jurisprudence that persisted until well into the 20th century before finally succumbing to modern constitutional decisions vigorously expanding the reach of the federal guaranty of freedom of religion and free speech."). See also Leonard W. Levy, *Blasphemy* 400-23 (North Carolina 1995) (discussing state blasphemy laws adopted in the eighteenth and early nineteenth centuries despite state constitutional protections for freedom of speech and religion).

[219] Consider James W. Nickel, *Who Needs Freedom of Religion?*, 76 U Colo L Rev 941, 943 (2005) (arguing that a robust set of constitutional liberties would protect religious beliefs and practices even without specific provisions for religious liberty).

2. Against (original) disestablishment.

Since originalist interpretations of the Establishment Clause uniformly reject the secular purpose doctrine in favor of allowing religious justifications for state action,[220] there would seem to be little point in belaboring the moral criticism that follows from rejection of that doctrine, let alone from the refusal to consider an expanded version of it. And yet the most prominent originalist interpretations of the Establishment Clause are subject to another equally fundamental criticism, which is that by relying on a theistic conception of religion, they allow for the possibility of pervasive discrimination against secular doctrines. First, under the jurisdictional theory of the Establishment Clause, Congress is prohibited from legislating with respect to state religious establishments.[221] According to this interpretation, the Establishment Clause does not incorporate any substantive principle of religious liberty. It merely prohibits federal interference with state regulations of religion. Under a second theory, the Establishment Clause prohibits the federal government and perhaps the states (given incorporation through the Fourteenth Amendment) from preferring one religion to another.[222] The principle of "nonpreferentialism" requires evenhandedness or neutrality between religions but not between religion and nonreligion. Third, in addition to demanding religious or denominational neutrality, the Establishment Clause is often interpreted as forbidding state coercion of religious belief and practices.[223]

All of these theories are open to the same objection, which is that nothing in any of them prevents the federal or state governments from persecuting atheists, agnostics, and other nontheists, or prohibiting the expression and dissemination of secular moral views. The jurisdictional account would not bar the federal government

220 I am not aware of any originalist account that accepts the secular purpose doctrine. For its rejection, see, for example, McConnell, 1 J L Phil & Culture at 161 (cited in note 19).

221 See *Elk Grove Unified School District v Newdow*, 542 US 1, 49–50 (2004) (Thomas concurring); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 Notre Dame L Rev 1843, 1843–45 (2006).

222 See, for example, *Wallace v Jaffree*, 472 US 38, 113 (1985) (Rehnquist dissenting) (claiming the Establishment Clause was intended to prevent Congress from privileging one religious group over another); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 5 (Lamberth 1982) (same). But see Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 Wm & Mary L Rev 875, 876–78 (1986) (rejecting nonpreferentialism on originalist grounds).

223 See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm & Mary L Rev 933, 935 (1986). But see Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim about the Establishment Clause*, 26 Valp U L Rev 37, 41–48 (1992) (rejecting noncoercive theory on originalist grounds).

from intervening in state affairs to prohibit secular doctrines since such regulations would not, by definition, count as respecting establishments of religion, defined in theistic terms. Nonpreferentialism only requires government neutrality between religions and explicitly rejects neutrality between religion and nonreligion. Under this theory, nothing would prevent the state from coercively imposing a general requirement to engage in some religious practices (for example, attending church), provided people are allowed to decide which ones.[224] Lastly, the anticoercion theory might protect nonbelievers from such requirements.[225] But it would not save them from government policies aimed not at coercing religion but at disparaging and suppressing nonreligious or antireligious doctrines.[226] Of course, other provisions of the First Amendment, including the Free Speech Clause, might be interpreted to prohibit such regulations. Again, however, this way of avoiding moral criticism of the Religion Clauses requires appealing to constitutional liberties outside the scope of the Establishment Clause, at least under the leading originalist interpretations of it.

The argument for rejecting originalist theories of the Free Exercise and Establishment Clauses as morally inadequate does not resolve the gap between the law, which treats religion as distinctive, and political morality, which does not. A resolution would either bring the law into conformity with political morality or reinterpret political morality to make it consistent with the law. The argument above does neither of those things. Instead, it tells us that the law is broken, defective, or deficient, and that it ought to be changed.

Unlike the four theories of the Religion Clauses surveyed above, all of which hold that the proper understanding of the constitutional text fits with the best interpretation of political morality, the account offered here contemplates that law and morality might be at odds with one another in this domain. And to the extent there is a conflict, it suggests the possibility that the law ought to be modified, revised, or amended, or, if that is not possible, that other remedies

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224 See Laycock, 26 Valp U L Rev at 39 (cited in note 223).

225 See McConnell, 103 Harv L Rev at 1499 (cited in note 60) ("[T]he prohibition on an establishment of religion should suffice to protect unbelievers from discrimination, ill-treatment, or coercion."). But see Freeman, 71 Georgetown L J at 1523 (cited in note 190) ("[T]here appears to be no evidence to suggest that the Founders intended for the establishment clause to be construed as the nonbeliever's free exercise clause.").

226 Nor would the noncoercive theory protect religious minorities from government support for religious doctrines that conflict with their own. See Laycock, 26 Valp U L Rev at 39 (cited in note 223) (arguing that, under a noncoercive theory, "Congress could charter the Church of the United States, so long as it did not coerce anyone to join").

ought to be considered, perhaps as a matter of statutory law.[227] Absent some change, however, this account leads to the conclusion that the law is morally regrettable. Although the Religion Clauses were a great moral accomplishment at the time they were enacted, they no longer capture our best understanding of political morality, at least not when interpreted according to their original meaning. The meaning of the law may not change, but our moral sensibilities most certainly do. On this view, then, our Constitution is not perfect.[228] It could be better.

B. Reconciliation

There are a number of ways one can avoid the conclusion that the Religion Clauses are morally defective. Instead of surveying all the options, however, I shall focus here on a strategy that rejects the originalist definition of religion in theistic terms. If one loosens the interpretive constraints imposed by originalist (and textualist[229])

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227 See Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L Rev 645, 649 (arguing that a proposed antidiscrimination statute include protection for freedom of conscience).

228 See Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353, 356 (1981) (criticizing "perfectionists" who claim that the constitution, properly interpreted, is consistent with contemporary moral values). An originalist might object that Monaghan was complaining about those who abandoned the original understanding of the Constitution in favor of interpretations that fit better with their moral views. But according to at least some originalists, the original meaning of the Religion Clauses is, in fact, consistent with their political morality. At least to that extent, the Constitution really is perfect. There are two problems with this response. First, as we have seen, the original meaning of the Clauses is deeply controversial, which leads to the worry that moral views are driving legal interpretations. Second, and more interestingly, Monaghan's point might be reversed, such that some originalists are open to the criticism that they believe the Constitution is perfect only because they remain committed to some eighteenth-century moral views. Thus, what leads them to perfectionism is not necessarily a mistaken constitutional theory but an inadequate moral one. Indeed, it is striking that originalists do not complain more often about the inadequacy of the Religion Clauses. But see Larry Alexander, *Response to Professor Kent Greenawalt's Lecture*, 47 San Diego L Rev 1153, 1155 (2010) (stating his view that the "Constitution *is* its original meaning—nothing more or less," and doubting that his preferences concerning how to resolve various religious controversies "can be justified by reference to the Constitution").

229 A textualist theory might determine the meaning of a constitutional provision by reference to its contemporary, rather than original, public meaning. Under a theory of this kind, legal words and phrases mean what ordinary (or competent, or reasonable) readers today believe they mean rather than what such readers thought they meant at the time they were enacted. Contemporary public meaning textualism might also reject an expansionist approach to defining religion, at least insofar as some proposed meanings (for example, those that embrace secular ethical systems) go beyond what any average, competent, or reasonable member of the public understands by the term "religion." If that is the case, then such textualism also invites moral criticism, although perhaps in a more restricted form, since the contemporary meaning of "religion" is probably inclusive enough to include nontheistic religions. See Michael Martin, *Atheism and Religion*, in Michael Martin, ed, *The Cambridge Companion to Atheism* 217,

theories of constitutional interpretation, it is possible to expand the definition of religion to encompass secular doctrines. Although defining religion in this way departs from original meaning, and perhaps from modern conventional understandings, it is one means of reconciling the Religion Clauses with the view that religion is not normatively distinctive.[230] Again, my aim here is not to defend a theory of constitutional interpretation that would authorize this approach. Assuming for the sake of argument that some such theory is plausible,[231] my purpose is rather to show how one could come to see the Religion Clauses as morally defensible.

The strategy of expanding the definition of religion has two main parts. The first is to say that any answer to an essentially religious question must count as religious for constitutional purposes.[232] Although the boundaries of the concept of religion are vague and contested, there are some easy cases here. Questions about the existence of God (or gods), about the nature of divinity, and about what, if anything, the divine demands of human beings are quintessentially religious.[233] More controversial is the idea that negative answers to such questions should be included within the constitutional concept of religion. Thus, traditional atheism denies the existence of God (or gods), and agnosticism either takes no position on these questions or contemplates serious doubts about affirmative answers to them. These responses to religious questions might not be considered "religious" within the common or conventional meaning of the

221–29 (Cambridge 2007) (arguing that Buddhism and Confucianism can be considered "atheistic religions").

230 Another strategy for reconciliation is to maintain a conventional definition of religion for purposes of interpreting the Religion Clauses while appealing to other constitutional provisions, such as the Equal Protection Clause, to protect nonbelievers' freedom of conscience and to police against state establishments of nonreligious doctrines. See Greenawalt, 1 *Religion and the Constitution* at 150 (cited in note 92). Although this strategy might be more consistent with original and contemporary understandings of the word "religion," it still requires specifying which doctrines warrant equal or comparable treatment. And even if this theory allows for a more conventional understanding of religion, it does so only by taking equal protection doctrine into new and uncharted territory. Perhaps that option is worth exploring. Nothing I say here should be taken to exclude the possibility of developing this or other similar legal strategies.

231 For nonoriginalist theories of constitutional interpretation that might be compatible with the approach suggested here, see Ronald Dworkin, *Law's Empire* 1–44 (Harvard 1986); David A. Strauss, *The Living Constitution* 1–6 (Oxford 2010). Some nonoriginalist theories of constitutional interpretation might be inconsistent with expanding the scope of the Religion Clauses to cover secular doctrines. Theories that prioritize fit with the conventional meaning of constitutional texts over other sources of interpretation, including the purpose of abstract provisions and the use of precedent to guide changes in the Court's understanding of them, may generate resistance to the strategies for reconciliation described above.

232 See Laycock, 11 Rutgers J L & Religion at 170 (cited in note 210).

233 See id.

term.[234] And yet while some atheists and agnostics (among others) might bridle at the suggestion that their views are religious,[235] it might nevertheless make sense to describe them as such for constitutional purposes.[236]

Despite the admittedly awkward textual fit, the argument for bringing atheism and agnosticism within the legal definition of religion is that excluding them has absurd consequences. Atheists and agnostics would not be entitled to claim protection for their beliefs under the Free Exercise Clause. On modern interpretations of the Clause, they could not be forced to engage in religious practices,[237] but they would have no defense against laws that discriminate against their beliefs,[238] for example by conditioning benefits on rejecting them (except perhaps in holding public office, where the prohibition on religious tests would afford some protection[239]). Similarly, if atheism and agnosticism are not considered religious, then the Establishment Clause does not prohibit the government from promoting negative answers to religious questions. It would be constitutionally permissible for the government to endorse atheism, teach it in public schools, and provide direct support (financial or otherwise) to atheist groups and causes.[240] These results are absurd not because they are unlikely to happen, but because the government should have no more power to discriminate against or promote skepticism about religion than it does with respect to religion more generally. The fact that the Framers of the Religion Clauses could not anticipate the appeal of atheism and agnosticism for millions of citizens need not leave us without constitutional remedies. If the Religion Clauses are interpreted as protecting citizens' capacities to address religious questions without government interference, then they

234 See Greenawalt, 1 *Religion and the Constitution* at 146–47 (cited in note 92) (arguing that atheism and agnosticism are not within the ordinary meaning of the concept of religion). See also Peñalver, 107 Yale L J at 802 (cited in note 190) (arguing that preserving the ordinary meaning of religion is a reason to interpret the Religion Clauses narrowly).

235 Hence the oft-quoted line: "Calling atheism a religion is like calling bald a hair color." The quote is sometimes attributed to Don Hirschberg. See *Quotes: Atheism, Atheist*, online at http://atheisme.free.fr/Quotes/Atheist.htm (visited Nov 25, 2012).

236 See *Kaufman v McCaughtry*, 419 F3d 678, 681–84 (7th Cir 2005) (holding that atheism is a religion under the Religion Clauses).

237 See Greenawalt, 1 *Religion and the Constitution* at 149 (cited in note 92). It is an interesting question whether this claim is consistent with the original understanding of religious free exercise. See Part III.A.

238 See Tebbe, 97 Va L Rev at 1150–51 (cited in note 210) (collecting examples of discrimination against nonbelievers).

239 See *Torcaso v Watkins*, 367 US 488, 495 (1961) (invalidating a state law requiring public officeholders to profess belief in God).

240 See Laycock, 7 J Contemp Legal Issues at 330 (cited in note 4).

can be construed broadly to cover negative responses to those questions as well.[241]

The second part of the definitional strategy for reconciliation is to extend the concept of religion to cover what have previously been considered secular doctrines. It is not sufficient to include negative answers to religious questions while leaving out the many positive secular responses developed to address philosophical, ethical, and moral questions in the absence of conventional religious belief. It may be true that atheism and agnosticism do not themselves entail any particular positive philosophical or moral doctrines. Both are, however, compatible with a wide range of views that function analogously to religious convictions in regulating ethical and moral conduct. To the extent those views can be articulated into more or less organized and systematic doctrines, they must also come within the definition of religion to receive constitutional protection.[242]

There is some precedent for moving in this direction. I have already mentioned the Vietnam draft protest cases at various points above.[243] Those cases involved a statutory exemption for conscientious objectors whose opposition was based on "religious training and belief," which was defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code."[244] In *United States v Seeger,*[245] the Court held that this definition was satisfied by any sincere belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[246] The Court went further in *Welsh v United States*,[247] making it clear that even someone who denied belief in a Supreme Being could qualify as a conscientious objector.[248] It was necessary only that "opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."[249] As many commentators have noted, this interpretation of the statutory language was a stretch (and perhaps then some), and it effectively ignored the

241 See id at 338–39.
242 See id at 336.
243 See notes 61–62, 155–56 and accompanying text.
244 *United States v Seeger*, 380 US 163, 172 (1965).
245 380 US 163 (1965).
246 Id at 165–66.
247 398 US 333 (1970).
248 Id at 343–44.
249 Id at 340.

provision excluding those who based their objections on nonreligious philosophical and moral views.[250] If this was a tour de force of statutory interpretation,[251] however, the most likely explanation is that the Court was concerned about constitutional infirmities arising from the exclusion of those with ethical and moral views not grounded in traditional religious beliefs.[252]

The test for defining religion adopted in *Seeger* and *Welsh* is vulnerable to criticism for being underspecified. The main problem is that to know whether beliefs function in the lives of nonbelievers in roughly the same way religious convictions function in the lives of believers, it is necessary to have some underlying account of religious belief and its role in shaping personal identity. There have been various attempts to develop such an account.[253] Here, however, it is not necessary to survey the field and to select the strongest or most plausible conception. And, in any case, the most sophisticated and compelling accounts do not attempt to provide necessary and sufficient conditions for determining whether beliefs and practices are religious.[254] Instead, like the Court in *Seeger* and *Welsh*, they proceed analogically, comparing what are conventionally thought of as nonreligious views to more traditional or paradigmatic examples of religion.[255]

Without providing anything like a complete account, it is nevertheless worth emphasizing two aspects of traditional religions that often characterize secular doctrines. First, with respect to their *subject matter*, religious and secular doctrines address questions of great importance, or what some have referred to as matters of "ultimate concern."[256] These include metaphysical questions about the nature of what exists and why, ethical questions about the meaning of life and

250 See id at 345 (Harlan concurring) (rejecting the Court's test as a matter of statutory interpretation but adopting it on constitutional grounds); John Mansfield, *Conscientious Objection–1964 Term*, in Donald A. Giannella, ed, *Religion and the Public Order* 3, 6–7 (Chicago 1965); Greenawalt, 1 *Religion and the Constitution* at 126–27 (cited in note 92).

251 See *Seeger*, 380 US at 188 (Douglas concurring) (denying that it was such but stating that "[i]f it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds.").

252 See Greenawalt, 1 *Religion and the Constitution* at 126–27 (cited in note 92).

253 See id at 129–42 (surveying different approaches to defining religion).

254 But see Leiter, *Why Tolerate Religion?* at 26–53 (cited in note 14) (identifying criteria for defining religion); Timothy Macklem, *Independence of Mind* 119–54 (Oxford 2006) (same).

255 See Greenawalt, 1 *Religion and the Constitution* at 139–46 (cited in note 92); Peñalver, Note, 107 Yale L J at 814–16 (cited in note 190); Freeman, 71 Georgetown L J at 1553 (cited in note 190).

256 *Malnak v Yogi*, 592 F2d 197, 208–11 (3d Cir 1979) (Adams concurring) (quotation marks omitted). See also Note, *Toward a Constitutional Definition of Religion*, 91 Harv L Rev 1056, 1075 (1978) (defending the idea of "ultimate concern" as the standard for defining religion).

how to live well, and moral questions about what we owe to other people (and perhaps also to animals and the environment).[257] Second, in terms of their *scope*, religious and secular doctrines are to a greater or lesser extent comprehensive in providing answers to fundamental questions. If they address all aspects of life, then they are *fully* comprehensive; if they address a narrower range of fundamental concerns, then they are only *partially* so.[258] Although this dimension of scope is ineliminably vague, it may help to differentiate between doctrines that are more or less complete and more particular theories, opinions, and preferences that are not connected, organized, or developed in any systematic way.

These features of religious and secular doctrines—their *subject matter* and *scope*—are, at most, suggestive.[259] Neither of these criteria is precisely defined, and much more work would be needed to show how they might be used to approach the problem of defining religion for constitutional purposes.[260] But assuming that they, or some similar criteria, are workable, it is possible to get a better sense of how the Religion Clauses might be interpreted in a way that narrows the gap between the constitutional text and political morality.

1. From religious accommodation to freedom of conscience.

The definitional strategy sketched above would constitutionalize the approach to secular doctrines developed in *Seeger* and *Welsh*. Notice, however, that this does not dictate any particular theory of constitutional exemptions. Expanding the definition of religion to include secular doctrines does not indicate one way or another whether courts and legislators must grant accommodations. In some ways, this is a virtue of the definitional strategy. It does not prejudge the issue of whether accommodations ought to be a matter of constitutional law or ordinary politics. It does, however, guarantee that if

257 See *Malnak,* 592 F2d at 208 (Adams concurring); Rawls, *Political Liberalism* at 13, 59–60 (cited in note 16).

258 See Rawls, *Political Liberalism* at 13 (cited in note 16) (distinguishing fully and partially comprehensive doctrines).

259 Interestingly, these two aspects of religious and secular doctrines are common ground between Judge Arlin Adams's approach to defining religion in *Malnak*, 592 F2d at 208–11 (Adams concurring), and the idea of "comprehensive doctrines" developed by Rawls in *Political Liberalism* at 13 (cited in note 16). Both Adams and Rawls emphasize views that address questions of fundamental importance and that are comprehensive in answering those questions.

260 See *Malnak*, 592 F2d at 208–11 (Adams concurring) (describing the subject matter and significance of religious ideas but noting that the indicia listed "should not be thought of as a final 'test' for religion"); *Africa v Pennsylvania*, 662 F2d 1025, 1032 (3d Cir 1981) (applying principles developed in *Malnak*); *United States v DeWitt*, 95 F3d 1374, 1375 (8th Cir 1996) (same).

accommodations are granted, they will be extended generally to both religious and secular doctrines. Again, it is possible either to level up by accommodating both religious convictions and nonreligious beliefs or to level down by rejecting accommodations for both types of doctrines. Either way, they ought to rise and fall together.

There are three main objections to the definitional strategy as applied to free exercise. First, those who favor constitutional religious exemptions worry about the dilution effect, which I have already addressed above.[261] A second objection to leveling up for exemptions involves the possibility of fraudulent claims.[262] It may be difficult to know whether claims based on secular beliefs are sincere. And since nonbelievers will often not be associated with a religious group or some other structured organization, that difficulty is compounded by the lack of some more objective measure for determining the authenticity of their claims. The response to this problem is similar to that of the dilution objection mentioned above. Given the wide diversity of religious views already represented in our society, the issue of determining sincerity is not unique to secular beliefs. Indeed, although accommodations are limited under existing doctrine, there is no bar on claims that rest on idiosyncratic or even seemingly inconsistent religious views.[263] In a regime that accommodates religious beliefs that are highly personal, possibly in conflict with those of fellow believers, and arbitrary or irrational from the perspective of nonbelievers,[264] the range of beliefs that can ground claims for exemptions is already quite wide. In these circumstances, if the potential for insincere claims is considered a manageable risk, it is difficult to see why that risk should become prohibitive only when accommodations are extended to secular beliefs, especially when those beliefs involve weighty matters of conscience for which nonbelievers may be prepared to incur significant penalties. Lastly, as suggested above, the extensive inclusion of provisions protecting the freedom of conscience within federal and state statutes, as well as international treaties such as the ICCPR (which, though not self-executing in the United States, is binding in scores of countries), suggests that fraud,

261 See note 204 and accompanying text.

262 See Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 165, 170 (Basic Books 2008).

263 See *Thomas v Review Board of Indiana Employment Security Division,* 450 US 707, 715–16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

264 See id at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

like dilution, is not a decisive obstacle to regimes that accommodate both religious and secular doctrines.

Regardless of whether the Free Exercise Clause requires constitutional exemptions or some more limited form of protection, the third and most difficult objection to the definitional strategy involves the line-drawing problem of determining which secular beliefs are covered. As I have already indicated, there is no easy response to this problem. Any satisfactory account must specify some criteria to guide analogical reasoning in determining which beliefs (or set of beliefs) count as religious for legal purposes. Recognizing the difficulty of textual fit, negative answers to religious questions should nonetheless be considered religious. I have also suggested, without argument,[265] that beliefs that address matters of fundamental importance and that are sufficiently comprehensive in scope should receive similar treatment. This account may be conceptually loose and practically untidy as compared with some other possible approaches (for example, those that cover only monotheistic religions[266] or that require belief in extratemporal punishments[267]), but some such approach is necessary to prevent discrimination against secular doctrines that cannot be distinguished on normative, epistemic, or psychological grounds from their religious counterparts.

2. From secular to public purpose.

A definitional expansion of the concept of religion to include secular doctrines would lead to the disestablishment of those doctrines

265 Which does not mean that arguments are not available. See, for example, Berg, 85 Tex L Rev at 1203–04 n 116 (cited in note 169) (defending "requirements such as ultimacy and comprehensiveness" on the basis of concerns about dilution and overly restrictive limits on state action that would follow from defining religion too broadly under the Establishment Clause). If religion is defined to include all secular beliefs, as opposed to some subset of weighty ethical and moral claims, then these concerns are valid. But it is not necessary to exclude all secular beliefs to avoid them. I have discussed the dilution objection above in the text accompanying notes 203–12 and concerns about disestablishment are addressed below in Part III.B.2.

266 Justice Scalia has argued that government endorsement of monotheism is permissible under the Establishment Clause. See *McCreary County v ACLU*, 545 US 844, 893–94 (2005) (Scalia dissenting) ("[T]here is a distance between the acknowledgement of a single Creator and the establishment of religion."). He would not allow such favoritism "where the free exercise of religion is at issue." Id at 893. But given the historical nature of his argument, the reason for this double standard is less than obvious. See Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw U L Rev 1097, 1103 (2006) (criticizing Justice Scalia's view).

267 See Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U Ill L Rev 579, 597–601 (defining religion in terms of belief in extratemporal consequences). But see Greenawalt, 1 *Religion and the Constitution* at 131–34 (cited in note 92) (criticizing Choper's account).

under existing law. Here I want to focus specifically on the implications of this strategy for the secular purpose doctrine. Although this doctrine is often taken for granted, or assumed to be easily satisfied, it is, in fact, axiomatic. Unless the government is constrained from acting solely (or primarily) for religious reasons, there is no principled basis for rejecting religious values as compelling state interests, which might authorize infringements on constitutional rights. Moreover, as argued above, if religious values are sufficient to justify state action, it is necessary to explain why they are not also sufficient to determine the content of the constitutional rights and principles that limit state action.[268] Thus, while the secular purpose doctrine might not be at the center of contemporary Establishment Clause debates, which tend to focus on government endorsement and financial support for religion, its proper scope is in many ways the more foundational issue.

To reconcile the secular purpose doctrine with the claim that religion is not distinctive with respect to both (1) negative answers to religious questions (in other words, atheism and agnosticism) and (2) comprehensive secular ethical and moral views, the class of reasons that cannot serve as sufficient justifications for state action must encompass those considerations that fall into either category. For example, state action based on the truth of atheism would be impermissible. As a consequence, government speech promoting atheism could not be justified on atheist grounds, nor could government funding of atheist organizations. The same point holds for a subset of secular beliefs, at least those that are comprehensive in addressing matters of fundamental importance. The major schools of modern ethical thought, such as Kantianism and utilitarianism, might be examples. If a state or local government decided to build into its public school curriculum courses designed to teach that Kantianism is the correct view about ethics and morality (and, we might suppose, metaphysics, epistemology, and aesthetics), parents and students with different perspectives would be justified in objecting on the ground that the state had established a secular doctrine. The same would be true for utilitarianism. It is not for the state to dictate that the only considerations relevant to determining the rightness or wrongness of an action are whether that action maximizes utility.[269] Nor should the state adopt a comprehensive axiology or theory of value to determine whether utility should be understood in terms of pleasure,

268 See note 170 and accompanying text.

269 See Lawrence B. Solum, *Public Legal Reason*, 92 Va L Rev 1449, 1452 (2006) (rejecting welfarism as a basis for legal decision making because it violates the ideal of public reason).

happiness, individual preferences, or some more perfectionist conception of well-being.[270] The sources and nature of ethics and morality are of fundamental importance, and the state should avoid, to the extent possible, taking sides in disagreements over comprehensive theories about such matters.

These examples are, of course, not at the forefront of contemporary disputes about the Establishment Clause. No state or local governments are attempting to establish Kantianism, utilitarianism, Hegelianism, Millian perfectionism, or other comprehensive secular philosophies. Although some have argued that the exclusion of religious education and the use of secular textbooks in public schools implicitly endorse atheism or secular humanism, such claims are seriously overstated.[271] But the fact that the government does not seek to promote particular secular comprehensive views, let alone atheism or agnosticism, does not diminish the importance of interpreting the secular purpose test to cover those doctrines. If there were attempts to establish such doctrines, objections to them would rightly sound in the prohibition on religious establishments, broadly construed. Here I disagree with Eisgruber and Sager, who argue that public schools can teach the virtues of Platonism or Hegelianism but not Christianity.[272] Their argument is that teaching Christianity has implications for equal citizenship that teaching other comprehensive philosophies does not. But that conclusion is mistaken. If a public school were, in fact, to promote the truth of Hegelianism, to inculcate in its students an abiding admiration for his teleological philosophy of history, his phenomenology of spirit, or his conception of morality as culturally situated, and to teach those views to the exclusion of others (rather than alongside them as historically important contributions to philosophical, moral, and political thought), then considerations of equality would quickly come to the fore. Parents and students with competing views could rightly complain that the state had endorsed a

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[270] See Mark Schroeder, *Value Theory* (Stanford Encyclopedia of Philosophy 2012), online at http://plato.stanford.edu/entries/value-theory (visited Nov 24, 2012) (surveying axiological theories).

[271] See *Fleischfresser v Directors of School District 200*, 15 F3d 680, 688 (7th Cir 1994) (rejecting the claim that secular textbooks establish paganism); *Smith v Board of School Commissioners of Mobile County*, 827 F2d 684, 693–94 (11th Cir 1987) (holding the same for secular humanism). See also Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn L Rev 1047, 1081–83 (1996) (arguing that secular humanism is a religion, but that public schools have not established it).

[272] See Christopher L. Eisgruber and Lawrence G. Sager, *Chips off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 Tex L Rev 1273, 1284 (2007). See also Tebbe, 97 Va L Rev at 1173 (cited in note 210) (calling it a "close question of constitutional law" whether municipalities can endorse atheism).

comprehensive secular doctrine, which could not be distinguished from a religious doctrine in any obvious way.

At this point, I must address an obvious and common objection, which is that expanding the definition of religion to include secular doctrines would hamstring the government's ability to speak—and if legislation is a form of expression, then to legislate—about any matter that is subject to moral or political controversy. And, of course, since everything the government says and does is controversial, it would be effectively immobilized.[273] The government would not be able to espouse, promote, inculcate, or advance any moral or political views. The values of religious and ethnic toleration, racial and sexual equality, privacy, equality of opportunity, public health and safety, and economic efficiency, to name a few, let alone more general political philosophies such as liberalism, libertarianism, conservatism, socialism, feminism, environmentalism, and so on—all of these would be off limits. Limiting government in this way is, of course, impossible, or else completely absurd.[274]

In a related context, I have referred to this type of argument as an *anarchy objection* since prohibiting the government from promoting any moral or political values would mean the cessation of all (or nearly all) government activity—the kind of conclusion only an anarchist would find acceptable, hence the nature of the objection.[275] The answer to this *reductio* is that the disestablishment of secular doctrines, no less than that of religious ones, does not require the state to relinquish all of its moral and political commitments. On a wide range of moral and political questions, the state must and will take a position, even if that position is controversial and even if it offends some who believe that their religious or secular doctrines have been contradicted. The state cannot be neutral with respect to a certain subset of moral and political values, including those mentioned in the paragraph above and certainly many others as well.[276] But nothing in the argument for expanding the definition of religion to include secular doctrines requires such neutrality. It is possible to accept the view that the state should not endorse Platonism, Hegelianism, or Christianity, without also accepting that the state is disabled from acting to

273 See Steven D. Smith, Barnette*'s Big Blunder*, 78 Chi Kent L Rev 625, 637–38 (2003); Abner S. Greene, *Government of the Good*, 53 Vand L Rev 1, 7–8 (2000).

274 See Smith, 78 Chi Kent L Rev at 638 (cited in note 273) ("[T]he 'no orthodoxy' position is not one that government will or could adhere to, even approximately.").

275 See Schwartzman, 97 Va L Rev at 323 (cited in note 12).

276 See, for example, Rawls, *Political Liberalism* at 224 (cited in note 16) (describing moral and political values that may serve as sufficient grounds for state action); Perry, 47 San Diego L Rev at 1001 (cited in note 172) (same).

advance some ordering of moral and political values that are widely accepted as relatively fixed and settled features of liberal democratic societies. Citizens with incredibly divergent views about the proper meaning of public values such as liberty and equality, to take two of the most basic, can agree about their proper interpretation and about how they ought to be ordered when they conflict, without at the same time agreeing on the epistemic, metaphysical, and religious foundations of those concepts.[277] And the same is true for many other moral and political values, which can be accepted in some form or another by citizens despite broader disagreements about how they should be integrated into more comprehensive secular and religious doctrines.

The view that I have just sketched is, of course, controversial. Over the last twenty years, it has attracted sustained criticisms and objections, especially in the form of reactions to political liberalism. This form of liberalism, along with its idea of public reason, is premised on the possibility of drawing a fundamental distinction between, on the one hand, religious and secular comprehensive doctrines, which are generally not sufficient grounds for state action, and, on the other, a subset of moral and political values that the government can legitimately promote in a liberal democratic society.[278] This is not the place to address all of the arguments that have been pressed against this view.[279] Yet, unless some distinction can be drawn roughly along these lines, we face an unpalatable choice between restricting only religiously justified state action, where religion is defined narrowly (usually in theistic terms), or removing all such restrictions, which would allow majorities to impose their religious views by enacting legislation justified solely on religious grounds. The first option discriminates against religious believers by constraining their participation in the political process, while allowing those with secular doctrines to legislate their views. The latter option obtains political equality, but only at the cost of significant interferences with the rights of political minorities. To a large extent, both options are avoidable by means of a definitional strategy for interpreting the legal concept of religion broadly to include the many secular doctrines that have been developed to guide ethical and moral judgment for those who do not adhere to particular religious traditions.

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277 See Quong, *Liberalism without Perfection* at 204–12 (cited in note 16) (defending a version of this claim).

278 See Rawls, *Idea of Public Reason Revisited* at 583-84 (cited in note 150) (distinguishing between comprehensive secular and religious doctrines and the "political values of public reason").

279 But see notes 42, 174–75.

The question I have been addressing in this Section is whether it is possible for those who reject the normative distinctiveness of religion to take a positive moral view of the Religion Clauses. With respect to two of the most fundamental issues concerning religious liberty—constitutional religious exemptions and the secular purpose doctrine—such a view is possible if the legal definition of "religious" is interpreted broadly to cover secular doctrines that cannot otherwise be distinguished from religious perspectives along normative, epistemic, and psychological lines. Of course, these two doctrinal areas, important as they are, do not exhaust the coverage of the Religion Clauses. Consequently, more must be done to show that the definitional strategy (or perhaps another strategy based on the Equal Protection Clause, other constitutional provisions, or some combination thereof) can be extended in an appropriate way. The ability of the approach described above to do much of the necessary conceptual work is, however, a reason for some optimism, at least for those whose theories of constitutional interpretation permit the meaning of general terms to change over time in keeping with significant moral and political developments in the law.

CONCLUSION

The Religion Clauses of the First Amendment were framed and ratified at a time when many of the moral and political controversies that dominate our political life were either not particularly salient or were altogether unthinkable. In the years since, the diversity of nontheistic religious, ethical, and moral doctrines has expanded beyond anything the Framers might have anticipated. As a consequence, the terms they used to describe some of our most important freedoms now appear in some important respects anachronistic. As a legal matter, however, we cannot ignore the constitutional text that we have inherited. And so the idea that religion *must* be special is unavoidable. The text simply makes it so. But when we confront the moral question—"*Is* religion special?"—the answer is far more difficult. The most sophisticated theories developed to answer that question in the affirmative encounter serious internal inconsistencies. Those that manage to avoid such incoherence run into other important objections, including that religious views, at least as traditionally conceived, cannot easily be distinguished from comprehensive secular doctrines on epistemic or psychological grounds. Recognizing as much, some have been attracted to the view that religious convictions can serve as sufficient reasons for state action. Yet this view is one that we should reject as a threat to the very foundations of

our constitutional order. And so we are forced to conclude that religion is not distinctive, at least not in the way that that the Founding generation conceived it. This leaves us with a basic conflict between law and morality. The text tells us religion must be special, even though, for us, it is not.

For some, this conflict may be irresolvable as a matter of constitutional law. If one accepts that religion is not special and, at the same time, adopts an originalist or textualist view of the First Amendment, then the Religion Clauses are a reason for moral regret. Moreover, since they are unlikely to be amended, it is difficult to see how that regret is easily remedied. Perhaps statutory law and international agreements might provide some possibility for expanding protections to rights of conscience beyond those covered under the Religion Clauses. As we have seen, however, the federal courts have often followed an alternative path by interpreting the concept of religion to encompass not only traditional or paradigmatic theistic conceptions, but also nontheistic religions, negative responses to religion, and secular ethical and moral doctrines. Those who view constitutional interpretation primarily in terms of common law adjudication, or who accept other forms of nonoriginalist approaches to the text, may find it possible to reconcile the Religion Clauses with the fact that religion can no longer be uniquely privileged among the diversity of philosophical, ethical, and moral doctrines embraced by many citizens today. For those who accept a living constitution, it can be perfected through judicial interpretation. For those who do not, the Constitution, at least in its limited protections for religious freedom, remains regrettably imperfect.