

3-1-2016

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Recommended Citation

H.E. Baber, *Religion in the Public Square*, 53 SAN DIEGO L. REV. 31 (2016).

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Religion in the Public Square

H.E. BABER*

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The First Amendment to the U.S. Constitution both prohibits the establishment of religion and guarantees its free exercise. There is, however, a tension between the Free Exercise Clause and the Establishment Clause, which has been understood to erect a “wall of separation” between church and state.¹ Prima facie, the Establishment Clause prohibits the state from providing special benefits to institutions or individuals in virtue of their religious affiliations or convictions. The Free Exercise Clause, however, is cited in support of accommodations for individuals who, because of their religious commitments, cannot in good conscience conform to laws or regulations. This seems to breach the wall of separation: arguably, to the extent that the state provides special accommodations to individuals in virtue of their religious beliefs, it tacitly endorses them.

I suggest, first, that we can square the wall-of-separation doctrine with the Free Exercise Clause if we understand religion in the minimalist sense—according to which religious freedom is nothing more than a license to hold beliefs about supernatural beings and states of affairs and to

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1. Reynolds v. United States, 98 U.S. 145, 164 (1878).

participate in religious rituals that are harmless and therefore not subject to legal restrictions. Secondly, I note that even if, as I suggest, we reject conscience per se, whether religiously informed or not, as a reason for special accommodations, we can still support exemptions from some legal obligations and prohibitions for conscientious individuals on the grounds that, for them, compliance would impose an undue burden: conscience clauses, I suggest, may be understood to be a special case of hardship exemptions. Finally, and perhaps most controversially, I argue that public support for religious displays and ceremonies does not violate separation of church and state.

I. RESTRICTIONS ON PUBLIC DISPLAYS OF RELIGION

Since 1913, a cross has stood atop Mount Soledad in La Jolla, California. The current Mount Soledad cross, erected in 1954, is a remarkably ugly 29-foot-tall concrete structure with a 12-foot wingspan. Since 1989, litigation surrounding the cross has been ongoing.² Opponents argued that its presence on public land violated the separation of church and state mandated by the First Amendment of the United States Constitution. In addition they argued that it violated the No Preference Clause of the California Constitution, insofar as it demonstrated a preference for a specific religion—Christianity.³ In June, 2012, after over two decades of continuous litigation, the United States Supreme Court declined to hear the case of the Mount Soledad cross.⁴ As a consequence, the 2011 decision of the United States Court of Appeals of the Ninth Circuit, which ruled the location of the cross to be unconstitutional, stands.⁵

The ruling against the presence of the cross on public land represents a special restriction on the display of religious symbols. If the structure on the summit of Mount Soledad had been an abstract sculpture of equal size, visibility, and aesthetic deficiency, there would have been no contest. The objection to the Mount Soledad cross came solely from the fact that it was a religious symbol and, in particular, that it was a Christian symbol.

In its ruling, the Court suggested that the presence of the cross on Mount Soledad had undesirable symbolic value and social consequences:

2. Randal C. Archibold, *High on a Hill Above San Diego, a Church-State Fight Plays Out*, N.Y. TIMES (Oct. 1, 2005), <http://www.nytimes.com/2005/10/01/us/high-on-a-hill-above-san-diego-a-churchstate-fight-plays-out.html> [https://perma.cc/Y8S6-UQ6X].

3. See *Murphy v. Bilbray*, 782 F. Supp. 1420, 1427 (S.D. Cal. 1991).

4. Doug Berger, *US Supreme Court Refuses To Hear Appeal in Mt Soledad Cross Case*, SECULAR LEFT (June 25, 2012), <http://www.secularleft.us/archives/2012/06/us-supreme-court-refuses-to-hear-appeal-in-mt-soledad-cross-case.html#.U57mZagWfrh> [https://perma.cc/VJU8-AE7B].

5. *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011).

La Jolla—where the Memorial is located and serves as a prominent landmark — has a history of anti-Semitism that reinforces the Memorial’s sectarian effect.

....

The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion’s symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.⁶

Indeed, in 2006 the American Civil Liberties Union representing the Jewish War Veterans of the United States of America filed a lawsuit against the U.S. government, charging that the continued display of the Mt. Soledad cross on federally owned land unlawfully entangled government with religion and asked the Court to remove it.⁷ Defenders of the Faith sought to have the Mount Soledad cross, which had served as the venue for pan-Protestant Easter sunrise services, recognized as a war memorial in order to *circumvent* regulations concerning the display of religious symbols on public land.⁸ In this they were hoist by their own petards. It is not hard to understand the Jewish War Veterans’ objections: the use of the cross *as a war memorial* suggested that veterans were largely, or exclusively, Christian, that patriotism was a Christian enterprise, and by extension, that non-Christians could not be true patriots.⁹ Representing

6. *Id.* at 1121, 1124–25.

7. Press Release, ACLU, ACLU Represents Jewish War Veterans and San Diego Residents in Effort To Relocate Mt. Soledad Memorial (Aug. 24, 2006), <https://www.aclu.org/religion-belief/aclu-represents-jewish-war-veterans-and-san-diego-residents-effort-relocate-mt> [<https://perma.cc/XF8J-NY2A>].

8. *See Murphy*, 782 F. Supp. at 1437.

9. To understand the worry, we recall an episode from the 1960s, in which the city fathers of Wayne, New Jersey became embroiled in charges of “gray area” anti-Semitism. In preparation for a Fourth of July celebration, civic groups drew lots for the Revolutionary War hero they were to represent. In addition to the usual suspects, there was the joker: Benedict Arnold who, before going over to the Dark Side, had fought with distinction for the Revolution and been wounded. The civic organization that drew the Benedict Arnold card was supposed to support its patron as a jolly joke. Arnold did, after all, lose a leg fighting for the American side, and the Boot Monument in Saratoga New York’s National Historical Park features a high relief of his leg to commemorate his achievement.

As it happened, the Benedict Arnold card was drawn by a local Jewish group. And the city fathers, in embarrassment, immediately apologized and withdrew it—revealing that they tacitly assumed Jewish Americans’ patriotism was in question and that Jews were not quite proper Americans. *Mr. Rauf: Build That Mosque!*, THE ENLIGHTENMENT PROJECT (Sept. 1, 2010, 1:53 PM), <http://theenlightenmentproject.blogspot.com/2010/09/mr.html> [<https://perma.cc/S7RB-U9D5>].

the cross as a war memorial sent a message of exclusion to non-Christian veterans in a way that the mere presence of the cross qua cross would not have done.

Serious secularists' objections to religious symbols in public space have not, however, been grounded in worries about the hegemony of religious majorities: secularists have been equally hostile to traditionally oppressed religious minorities. So the Freedom from Religion Foundation objected to a design for the Ohio Statehouse Holocaust memorial incorporating a Star of David, on the grounds that it would violate separation of church and state.¹⁰ Supporters of the memorial argued that, within the proposed context, a six-pointed star was *not* religious. It was a symbol of an ethnic group—and in fact the symbol that Hitler's government required ethnically identified Jews to display visibly on their persons.¹¹ Like the Mount Soledad Cross devotees who claimed the cross was a war memorial, their aim was to detoxify the symbolic shape by making the case that it was not inherently religious. Opponents challenged the inclusion of a six-pointed star in the statehouse's Holocaust memorial on the grounds that it would ordinarily be construed as a religious symbol;¹² defenders argued that within the context of the memorial it had secular significance.¹³ Both sides, however, agreed that the *sole* concern about the inclusion of the star was its putative religious significance. Here, once again, the question was not whether religion should be accorded a privileged status, but whether special restrictions should be imposed on religious expression.

Perhaps the clearest case of special restrictions on religious practice concerns the rental of space in public schools by religious groups. Throughout the U.S., public schools rent their facilities for weekend use to local organizations, including religious groups. The Freedom from Religion Foundation, a Madison, Wisconsin-based secularist organization, notes that this is legal but nevertheless objects to the benefit it provides to religious groups:

Unfortunately, two decisions by the U.S. Supreme Court provide for the use of public school buildings by churches [and] religious and political groups on a viewpoint-neutral basis The subsidy involved in use of public schools by

10. Press Release, Freedom from Religion Found., FFRF Objects to Religious Symbol at Ohio Capitol (July 18, 2013), <http://ffrf.org/news/news-releases/item/18172-ffrf-objects-to-religious-symbol-at-ohio-capitol> [https://perma.cc/A9SV-LFDR].

11. See Alan Johnson, *Freedom from Religion Foundation Objects to Star of David in Holocaust Memorial*, COLUMBUS DISPATCH (July 17, 2013, 11:32 AM), <http://www.dispatch.com/content/blogs/the-daily-briefing/2013/07/07-17-13-freedom-from-religion.html> [https://perma.cc/HY3N-6J9X].

12. See Press Release, Freedom from Religion Found., *supra* note 10.

13. See Johnson, *supra* note 11.

religious organizations, however, continues to create concern, confusion, and litigation. The law on the limits of church use is not completely settled. . . .

Since public school districts often have the least expensive rental rates available in a community, rental to churches often involves what many of us consider taxpayer subsidy of congregations. Start-up churches often take advantage of low school rental to establish themselves. They obtain a prominent site for a new church, collect church donations on public property, and use their savings to eventually buy their own tax-free buildings.¹⁴

The Freedom from Religion Foundation regards it as unfortunate that the Supreme Court recognizes the right of religious groups to be treated on a par with secular organizations but notes, hopefully, that public facilities may impose restrictions on the kinds of activities in which renters may engage and may, in particular, prohibit them from conducting worship services.

While schools are not permitted to discriminate against religious groups because they are religious, schools can create regulations that impact church use of school buildings One appellate court, the 2nd Circuit, ruled in 2011 that a school board's prohibition of hosting a particular type of activity, religious worship services, was constitutional.¹⁵

While the Freedom from Religion Foundation and other secularist groups apparently have no worry about hobbyists meeting in schools to discuss stamp-collecting or couples meeting to practice Lamaze breathing in prenatal classes, they are adamant that religious services should be prohibited.¹⁶ Why?

14. *State/Church FAQ: Churches Meeting at Public Schools*, FREEDOM FROM RELIGION FOUND., <http://ffrf.org/faq/state-church/item/14033-churches-meeting-at-public-schools> [<https://perma.cc/RHV2-3FVE>] (last updated Jan. 2012); *see also Supreme Court Skips N.Y. Battle over Church Rental of Public School*, AMERICANS UNITED FOR SEPARATION OF CHURCH & ST. (Jan. 2012), <https://www.au.org/church-state/january-2012-church-state/people-events/supreme-court-skips-ny-battle-over-church> [<https://perma.cc/3NH4-MJFT>] (discussing the Court's decision not to hear a church's appeal from the Second Circuit's decision upholding a New York City policy prohibiting churches from holding services in public schools during off hours).

15. FREEDOM FROM RELIGION FOUND., *supra* note 14 (citing *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 33 (2d Cir. 2011)); *see also* AMERICANS UNITED FOR SEPARATION OF CHURCH & ST., *supra* note 14 (noting that while religious worship is not permitted, religious groups could still use schools for "lectures, meetings[,] and other events on religious topics").

16. *See* FREEDOM FROM RELIGION FOUND., *supra* note 14; AMERICANS UNITED FOR SEPARATION OF CHURCH & ST., *supra* note 14.

It has been traditional to cite the “wall of separation between church and state” espoused by Jefferson and built into the United States Constitution in such cases.¹⁷ But the wall of separation, as it has existed in the U.S., is at best permeable. Churches are routinely granted tax-exempt status, and clergy are given tax-free housing allowances¹⁸—which, in good times, facilitate lucrative real estate speculation by clerics.¹⁹ In addition, religious belief and affiliation can be invoked in support of conscientious-objector status for military service and for exemption from other duties.²⁰ At the same time, increasingly restrictions have been imposed on the presence of religious symbols and ceremonies in public spaces.²¹

The general public is puzzled. La Jolla-area residents wonder why the Mount Soledad cross is a problem. The Ohio statehouse controversy is even more puzzling to most observers. Why should the Star of David in a Holocaust memorial offend anyone? As for the use of school facilities why, they wonder, should anyone care whether religious groups meeting in schools conduct religious services if they pay their rent like everyone else and don't leave a mess? Even if providing the use of facilities at reasonable rates could be construed as subsidizing the activities of renters, why should taxpayers be more concerned about subsidizing religious rituals than they would be about subsidizing stamp collecting or Lamaze?

The separation of church and state doctrine mandates that religion should not get special treatment by the state. Yet, considering these cases, we see that a variety of religious activities are subject to special restrictions for no reason other than that they are religious. What is the problem with religion?

17. The *locus classicus* is Thomas Jefferson's letter to the Danbury Baptist Association. Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), reprinted in THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1994).

18. See INTERNAL REVENUE SERV., PUB. NO. 1828, 501(c)(3): TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 2, 22 (2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf> [<https://perma.cc/FDG9-4CG9>].

19. See Press Release, Freedom from Religion Found., Major Federal Court Victory!: FFRF, Gaylor, Barker Overturn 'Parsonage Exemption' Clergy Privilege (Nov. 22, 2013), <http://ffrf.org/news/news-releases/item/19361-ffrf-gaylor-barker-overturn-%E2%80%98parsonage-exemption%E2%80%99-clergy-privilege> [<https://perma.cc/EXJ3-5295>].

20. See *Who Is a Military Conscientious Objector?*, CTR. ON CONSCIENCE & WAR (last visited Jan. 28, 2015), <http://www.centeronconscience.org/co/military.html> [<https://perma.cc/J2C9-NBKN>].

21. Keith Gunnar Bentele et al., *Breaking Down the Wall between Church and State: State Adoption of Religious Inclusion Legislation, 1995–2009*, 56 J. CHURCH & ST. 503, 503–04 (2014).

II. IT DEPENDS WHAT YOU MEAN BY *RELIGION*

Religion, as the folk understand it, is inconsequential. It consists of metaphysical speculation, concerning the existence and nature of God, gods, or supernatural states of affairs, and ceremonies intended to honor, petition, or placate supernatural beings or otherwise to secure material or supernatural benefits. Thus Durkheim defines religion as a “unified system of beliefs and practices relative to sacred things . . . set apart and forbidden.”²² Religion understood in this way is innocuous and, some suggest, trivial.

Conservative religionists, however, claim that *real* religion is quite another thing. So in *First Things*, Discovery Institute fellow Wesley Smith complains that “freedom of worship,” constitutes an assault on “freedom of religion”:

Freedom of religion means the right to live according to one’s own faith, that is, to “manifest” our religion or belief in *practice*, both “in public or private,” without interference from the state.

. . . Strident secularism is on the march and freedom of religion is the target, with secularist warriors attempting to drive religious practice behind closed doors by redefining religious liberty down to a hyper-restricted, “freedom of worship.”

What’s the difference? Under freedom of worship, the Catholic and Orthodox churches both remain perfectly free to teach that the Eucharistic bread and wine transform into the body and blood of Christ. Muslims can continue to require women to be segregated from men at the mosque. But *outside worship contexts, the state may compel the faithful to violate their faith by acting in accord with secular morality rather than consistently with their dogmatic precepts.*²³

Nevertheless, arguably, the guarantee of “freedom of religion” in the Constitution was motivated precisely by a definition of religion as “worship” in Smith’s sense—recognizing that religion understood in this minimalist sense was harmless.²⁴ As Jefferson, the architect of the wall of separation

22. BRIAN LEITER, WHY TOLERATE RELIGION? 28 n.7, 29 n.9 (2013) (citing EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 44 (Karen E. Fields trans., Free Press 1995) (1912)).

23. Wesley J. Smith, *Freedom of Worship’s Assault on Freedom of Religion*, FIRST THINGS (July 13, 2012), <http://www.firstthings.com/onthesquare/2012/07/freedom-of-worshippers-quos-assault-on-freedom-of-religion/wesley-j-smith> [https://perma.cc/4R2C-Z7QY] (second emphasis added) (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 18 (Dec. 10, 1948)).

24. My aim is not to argue that this was indeed Jefferson’s view, that the Folk understand religion in this minimalist sense, or that this was the Founders’ intent in endorsing a Constitutional guarantee of freedom of religion that should guide subsequent legal decisions. Rather I suggest that *if* we understand religion in this minimalist sense, then the tension between the Establishment Clause and the Free Exercise Clause is resolved.

between church and state famously asserted: “it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.”²⁵

Jefferson assumed that religion was inconsequential and would soon evolve into an innocuous program of edification and social improvement. Writing at the beginning of the 19th Century, before the Evangelical revivals that were to come, when the triumph of the Enlightenment seemed assured, Jefferson could be sanguine. “I trust,” he wrote in 1822, “that there is not a young man now living in the U[.]S. who will not die an Unitarian.”²⁶ Arguably, Jefferson promoted freedom of religion precisely because he was convinced that it was harmless—because he understood religion in the minimalist sense as ceremony, metaphysics, and maxims concerning common decency that did not compete with “secular morality.”

If, however, religion is indeed trivial and innocuous, it is hard to see why religious liberty should get special consideration in the Constitution and, among Constitutional Amendments, pride of place, as Brian Leiter, considering the case for “tolerating religion,” and other legal theorists have noted.²⁷ Leiter therefore rejects Durkheim’s definition of religion on that grounds that “it would leave mysterious why such beliefs and practices should command special moral or legal consideration.”²⁸ So Leiter writes:

Moreover, as a matter of historical speculation, it seems reasonable to assume that this was the view of the Founders who were, for the most part, deists and skeptics, and who did not anticipate the revival of Evangelical Christianity later in the 19th Century. See David L. Holmes, *The Founding Fathers, Deism, and Christianity: Founding Fathers*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214/article-history> [<https://perma.cc/753L-FJVT>] (last visited Feb. 2, 2016).

25. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of North Carolina Press 1955) (1787). Since Jefferson’s day, academics have proposed a range of fanciful revisionary definitions of religion: “knowledge possessed by the finite mind of its nature as absolute mind,” (Hegel), “the state of being grasped by an ultimate concern,” (Tillich), and “a set of symbolic forms and acts which relate man to the ultimate conditions of his existence,” (Robert Bellah). LOUIS BERKHOF, SYSTEMATIC THEOLOGY 104 (combined ed. 1996) (“[Hegel] speaks of [religion] as ‘the knowledge possessed by the finite mind of its nature as absolute mind[.]’”); PAUL TILLICH, CHRISTIANITY AND THE ENCOUNTER OF THE WORLD RELIGIONS 4 (1963); Robert N. Bellah, *Religious Evolution*, 29 AM. SOC. REV. 358, 359 (1964).

26. Letter from Thomas Jefferson to Benjamin Waterhouse (June 26, 1822) (on file with the National Archives), <http://founders.archives.gov/documents/Jefferson/98-01-02-2905> [<https://perma.cc/4H42-TJEC>] (meaning, at least, that they would not be “a Trinitarian”).

27. LEITER, *supra* note 22, at 29–30.

28. *Id.* (“[W]e want to identify religion in such a way that we can see why it has some moral and possibly legal claim on special treatment. To that end, if the best analysis of religion—one that identifies what makes it distinctive *and* suggests why it has a claim on toleration—requires us to forfeit some of our pretheoretical intuitions, that may be the cost of clear thinking about religious toleration and its parameters.”).

On my proposed account, for all religions, there are at least some beliefs central to the religion that

1. issue in *categorical* demands on action—that is, demands that must be satisfied no matter what . . . incentives or disincentives the world offers up; and
2. do not answer ultimately (or at the limit) to *evidence* and *reasons*. . . . Religious beliefs . . . are insulated from ordinary standards of evidence and rational justification²⁹

Leiter wonders why religious liberty should get special consideration in the Constitution and, among Constitutional Amendments, pride of place if it is indeed trivial and innocuous. Arguably, however, it is precisely *because* religion is harmless but has not always been recognized as such that special moral and legal guarantees of religious freedom were required.

Jefferson's views were unorthodox and novel—a fact that we, who assume that theology has no practical import, are inclined to overlook. For millennia it was taken for granted that one's neighbor's heterodoxy *could* do harm: that the gods, or God, punished whole communities for harboring members who ignored or slighted them. Socrates' failure to honor the gods properly, as his accusers saw it, jeopardized the entire polis.³⁰ Once Greco-Roman paganism evolved into state Christianity, belief as well as practice became a matter of concern. Constantine worried that theological controversy was displeasing to God and did everything in his power to promote agreement;³¹ Justinian took it to be an established fact that God punished communities that tolerated heresy with earthquakes, plagues, famines, and other natural disasters.³² During the medieval period it was widely assumed that the presence of Jews, heretics, and unbelievers drew divine wrath down on everyone. Millenarian sects, such as those described by Norman Cohn in *The Pursuit of the Millennium*, strove to

29. *Id.* at 33–34.

30. See Plato, *Apology*, in 7 GREAT BOOKS OF THE WESTERN WORLD 200 (Robert Maynard Hutchins et al. eds., Benjamin Jowett trans., Encyclopedia Britannica, Inc. 1987) (c. 360 B.C.E.).

31. See PETER J. LEITHART, DEFENDING CONSTANTINE: THE TWILIGHT OF AN EMPIRE AND THE DAWN OF CHRISTENDOM 85 (2010).

32. JAMES ALLAN EVANS, THE EMPEROR JUSTINIAN AND THE BYZANTINE EMPIRE 28 (2005).

“cleanse” the world of heresy and disbelief by exterminating them in order to bring on the Kingdom of God.³³

We do not recognize the novelty of Jefferson’s suggestion that religious diversity and dissent are harmless because we currently take that for granted.³⁴ Most Americans do not believe God punishes entire communities for the heresies or sins of their members. Moreover most, including most Evangelicals as Cunningham and Putnam note in *American Grace*, believe that individuals who do not share their religious views and, indeed, those who reject religious belief altogether, can be “good Americans” and can “get to heaven.”³⁵

Arguably, it was because the Founders recognized that religion was *mistakenly* viewed as a matter of importance that they thought it necessary to include an explicit guarantee of religious freedom in the Constitution—just as it was later noted that because race and gender were *mistakenly* regarded as bars to full citizenship that it was important to state explicitly that citizens had a right to enjoy full civil rights regardless of race or gender. Race, sex and, arguably, religion are mentioned explicitly in Constitutional amendments, and in civil rights legislation, not because they are significant, but in order to affirm that they are *not* significant.

Recognizing the historical context in which the constitution was written, it is easy to see why the Framers included a guarantee of religious freedom but did not mention freedom to engage in other harmless activities.³⁶ Historically, heresy was not tolerated and deviant religious practices were routinely suppressed until very recently in human history. The British Parliament did not pass the Act of Toleration, which granted non-Anglican

33. See generally NORMAN COHN, *THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLENARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES* (rev. ed. 1970) (describing the acts of various millenarian sects throughout history).

34. So, in the wake of 9/11, when Jerry Falwell opined that “the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make . . . an alternative lifestyle” had “helped [the September 11th attacks] happen” Americans were outraged, and Falwell apologized. *Falwell Apologizes to Gays, Feminists, Lesbians*, CNN (Sept. 14, 2001, 2:55 AM), <http://www.cnn.com/2001/US/09/14/Falwell.apology/> [<https://perma.cc/8X5S-YKKL>].

35. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 543–47, 541–42 (2010).

36. Why should we consider it a matter of importance to guarantee freedom of religion explicitly if religion is just a relatively inconsequential business of ceremonies and metaphysical speculation? For the same reason that we should consider it desirable to guarantee individuals’ freedom to engage in all forms of consensual sexual activity. Restrictions on consensual sex prevent people from engaging in harmless activities that produce pleasure. Religion in the minimalist folk sense is, like sex, an innocuous source of enjoyment. Like sex (given the availability of effective birth control), religion understood in this way is inconsequential and harmless. And where activities do no harm, the state ought not to impose any restriction on them and should, if necessary—in particular, if there is a history of suppression—explicitly recognize the right to engage in them without hindrance.

Protestants freedom of worship, until 1680³⁷ and the Catholic Relief Act, which repealed the last of the criminal laws aimed at Roman Catholics in Great Britain, was only adopted in 1829³⁸—long after the First Amendment to the Constitution, along with the rest of the Bill of Rights, was ratified in 1791.

Given Jefferson’s understanding of religion and assumption that religious belief and practice were fundamentally inconsequential, the guarantee of religious liberty is nothing more than a special case of the Harm Principle. Intuitively, individual liberty is justly restricted to prevent harm to others or activities which carry the real and present danger of harm. Religion, understood as metaphysics and ceremony, is neither harmful nor dangerous and so should get the same treatment as other inconsequential, harmless practices. Arguably, the Constitutional guarantee of freedom of religion rests upon Jefferson’s assumption that religious diversity and dissent are harmless.

III. WALL OF SEPARATION OR FREEDOM OF “RELIGION”?

In the cases considered heretofore, actions, objects, and states of affairs that otherwise would have been regarded as innocuous were taken to be objectionable because they were, in some sense, religious. Groups renting school property were prohibited from engaging in certain activities solely because they were religious activities. If they had done the very same overt actions as part of mock-up religious ceremonies for dramatic purposes there would have been no objection. The Star of David at the Ohio Holocaust Memorial was regarded as objectionable because it was taken to be a religious symbol. If it had merely been a 6-pointed figure with no religious significance, there would be no objection.³⁹

The cases that interest Leiter, by contrast, concern actions, objects, and states of affairs that would have been regarded as objectionable—and legally prohibited—if they had *not* been religiously sanctioned.⁴⁰ “Freedom of religion” has been taken to require that in at least some such cases of conflict individuals may be excused from legal obligations in virtue of their religious commitments: when Leiter asks, somewhat misleadingly, why religion should be “tolerated,” he understands toleration as a matter

37. Toleration Act 1688, 1 W & M c. 18 (Eng.).

38. Roman Catholic Relief Act 1829, 10 Geo. 4 c. 7 (Eng.).

39. See *supra*, notes 14–16 and accompanying text.

40. See LEITER, *supra* note 22, at 3.

of according *special legal and moral treatment* to religious practices broadly construed—as tolerating practices, and omissions, that would otherwise be intolerable. In light of such cases there appears to be a tension, at the very least, between the wall of separation doctrine, insofar as it is understood to mandate religion-blindness, and the constitutional guarantee of religious freedom invoked to provide special accommodation for religious obligations. And that tension is inevitable if we define religion *broadly*, to embody practices and prohibitions beyond the inconsequentially metaphysical and innocuously ceremonial.

Religion has traditionally enjoyed special treatment in the United States. Since the Civil War, Quakers, Mennonites, and members of other “peace churches” have routinely been excused from military service on religious grounds.⁴¹ During the latter decades of the 20th century, conscience clauses and accommodations for religious belief proliferated. The 1972 Supreme Court decision *Wisconsin v. Yoder* exempted Amish children from compulsory education past eighth grade because the Amish’s objection to further formal education was, the decision noted, “firmly grounded in . . . religious concepts.”⁴² Soon after, in the wake of the Court’s ruling in *Roe v. Wade*, a number of states and the federal government enacted conscience clauses excusing health care workers who had religiously based objections to abortion from participating in abortion services.⁴³ In addition, several states enacted “right of refusal laws” allowing pharmacists to refuse to fill prescriptions for birth control drugs where filling such prescriptions would be inconsistent with their religious beliefs.⁴⁴ Last year, the Supreme Court, in *Burwell v. Hobby Lobby*, ruled that requiring family-owned corporations to pay for insurance coverage for contraception under the Affordable Care Act violated a federal law protecting religious freedom.⁴⁵ On a more cheerful note, the American Indian Religious Freedom Act of 1978 exempted members of the Native American Church from prohibitions on “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes.”⁴⁶

41. See Özlem Altıok, *Conscientious Objectors to War*, in *ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE* 389–92 (Gary L. Anderson & Kathryn G. Herr eds., 2007).

42. 406 U.S. 205, 210, 234 (1972).

43. See Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, *GUTTMACHER REP. ON PUB. POL’Y*, Aug. 2005, at 7, 7–9, <https://www.guttmacher.org/pubs/tgr/08/3/gr080307.pdf> [<https://perma.cc/TKH8-NNZR>].

44. See NAT’L WOMEN’S LAW CTR., *PHARMACY REFUSALS* 101, 1–4 (2011), http://www.nwlc.org/sites/default/files/pdfs/pharmacy_refusals_101_july_2011.pdf [<https://perma.cc/766D-ZH7H>].

45. 134 S. Ct. 2751, 2785 (2014).

46. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. § 1996(a) (2012)).

In these cases, the state was *not* religion-blind in its support of “religious freedom.” The Amish were excused from sending their children to high school because it was contrary to their religious convictions; parents who preferred to keep their adolescent children at home for other purposes were not accommodated. Members of the Native American Church were exempted from legal prohibitions on the use of peyote for religious purposes; Americans who wanted to use peyote for other reasons were not allowed to do so. In light of such decisions, there seems to be an inconsistency between the wall of separation doctrine, to the extent that, on one interpretation, it mandates religion-blindness and the constitutional support for the “free exercise of religion,” which in these cases took religion to license practices that would otherwise be legally prohibited. It is hard to see how we can have it both ways *if we understand religion in the broad sense that Leiter proposes*.

If, however, we construe religion in the minimalist sense suggested, as a mere matter of inconsequential metaphysical speculation and innocuous ritual practices that do not conflict with laws or other serious secular obligations, then the guarantee of religious freedom is consistent with religion-blindness—if that is what we understand to be mandated by the wall of separation. Understood in this way, the guarantee of religious freedom simply affirms that religion should be treated in the same way as other harmless activities and preoccupations. Arguably, the United States Constitution and other foundational legal documents mention religion precisely because, historically, it has *not* been treated in the same way as other harmless practices. Guarantees of religious freedom affirm that religion should *not* get special treatment.

So long as religion is understood in the minimalist sense, as a matter of metaphysics and ritual, there is no inconsistency between religious freedom and separation of church and state. Metaphysical speculation and ordinary religious ceremonies are harmless and so do not require any special accommodation. On this account, the Constitutional guarantee of freedom of religion simply asserts that religion should be treated in the same way as other harmless preoccupations and practices.

IV. RELIGION, CONSCIENCE, AND HARDSHIP EXEMPTIONS

If this is correct, then, while the state should not impose special restrictions on religious activities, it should not exempt citizens from legal obligations on religious grounds either. For most Americans this is a hard saying. The provision of conscientious objector status to exempt members of

peace churches from military service is a longstanding practice that most Americans support.⁴⁷ Other religious-based exemptions that have become customary in the U.S. and elsewhere are so inconsequential that rescinding them would seem pointlessly mean-spirited—and biased. Sikhs wearing turbans are exempted from motorcycle helmet laws.⁴⁸ There seems little reason not to excuse them: it is highly unlikely that such an exemption would result in hordes of Sikh motorcyclists bashing their brains out and so imposing a burden on the healthcare system that would be passed on to others. Members of the Native American Church are exempt from restrictions on the use of peyote. Even if we regard restrictions on the use of some recreational drugs as desirable—which is highly controversial—it is unlikely that the consumption of peyote by a small minority of Americans in remote rural areas would promote a crack epidemic among the urban underclass or have any other socially undesirable consequences.

Leiter argues, persuasively, that the rationale for accommodating religious individuals in such cases is not their religious convictions per se but the conscientious status of their commitments. He writes the following:

Kantian and utilitarian traditions of moral thought generate compelling support for the conclusion that the state should protect liberty of conscience under the rubric of principled toleration. But there appears to be no equally principled argument that picks out distinctively *religious* conscience as an object of special moral and legal solicitude.⁴⁹

If exemptions are warranted at all, he suggests, they are warranted on the basis of conscience—which may or may not be religiously motivated.⁵⁰ Consequently, if we wish to grant such exemptions we should, to be fair, adopt either a Universal Exemptions approach, extending the conditions for exemption to all conscientious preferences, whether religiously motivated or not or else, Leiter’s preferred alternative, a No Exemption approach.⁵¹

But is there compelling support for the conclusion that the state should protect liberty of conscience? Even if Leiter is correct in holding that religious-based dissent should not be treated any differently from other conscientious objections to legal obligations and prohibitions, it is not clear that conscience *as such* provides any persuasive moral reason for exemption from legal obligations. Arguably we should understand

47. See William D. Palmer, *Time To Exorcise Another Ghost from the Vietnam War: Restructuring the In-service Conscientious Objector Program*, 140 MIL. L. REV. 179, 182 (1993).

48. Associated Press, *Sikhs Will Be Excused from Bike-Helmet Law*, REG.-GUARD (Eugene, Or.), Sept. 26, 1996, at 3D.

49. LEITER, *supra* note 22, at 92.

50. *Id.* at 98.

51. See *id.* at 100–01.

accommodations for conscience—religiously motivated or otherwise—as a species of hardship exemption, on all fours with accommodations for medical, economic, and other kinds of hardship.

Whatever else “conscience” may be, it is at the very least an aggregate of preferences. The Muslim prefers to wear a hijab, and the Sikh prefers to carry a ceremonial dagger; the vegan prefers to abstain from animal products, and the Mennonite prefers to abstain from military service. Characterizing such commitments as preferences is jarring because it seems to trivialize them: surely they are not fleeting urges, superficial yens, or mere tastes—religious and ethical concerns, many assume, are deeper, more stable, more intensely felt, and in some sense more important to a person’s “identity”—in the loose and popular sense—than mere preferences. But this seems, as a matter of empirical fact, to be false. Some nonconscientious preferences are neither trivial nor ephemeral. More to the point, not all conscientious commitments are serious, intensely felt, or important to one’s “identity.” I conscientiously take reusable tote bags to the supermarket when I go shopping. When I forget to take them, I feel a twinge as I pack groceries into environmentally unfriendly single-use plastic bags. But no more than a twinge. My conscientious commitment to support environmental concerns, like most of my conscientious commitments, is not very important to me. My failure to honor these commitments does not impose any serious hardship on me, and I doubt that most people are any more conscientious than I am.

Arguably, the purpose of exemptions and other accommodations is to avoid imposing undue hardship on individuals. We recognize that compliance with some policies, practices, and regulations that does not impose a serious burden on most individuals might represent a serious hardship for others. In some such cases, we regard it as only fair and decent to grant exemptions. Rules forbidding animals in various public and semipublic facilities do not impose a significant burden on the general public. But compliance would represent a serious hardship for handicapped individuals who depend on service dogs—so they are granted exemptions. When conscription laws are in force, individuals whose military service would cause hardship to their families are given 3-A hardship deferments excusing them from service.⁵² Where the law requires that businesses accommodate

52. Rod Powers, *All About the Draft: The United States Selective Service System*, ABOUT.COM, http://usmilitary.about.com/cs/wars/a/draft2_3.htm [https://perma.cc/PEL5-WQLE] (last updated Dec. 15, 2014).

handicapped employees, as mandated by the Americans with Disabilities Act, employers who can show that compliance would impose an “undue hardship” on the operation of their businesses are excused.⁵³

To the extent that hardship exemptions are legitimate, accommodations for conscience may be warranted for some individuals for whom compliance with rules or regulations would impose a special hardship. For a seriously committed pacifist, service in the military would impose such a hardship. In general, when compliance with a law imposes a serious hardship on some individuals and granting exemptions does not impose any significant burden on others or undermine the legitimate purposes of the state, it seems reasonable to grant exemptions. The decision to grant such exemptions is a cost–benefit decision. When it comes to military service for example, we ask: How bad would it be for this individual, who is a committed pacifist, to serve in the military? Would military service impose an undue hardship on him or others? How much do we need him and others like him—because, in fairness, they have to be treated in the same way—to serve in the military? How many like him (in the relevant sense) are there? If there are relatively few, it won’t hurt to excuse them all. And if we can excuse some individuals from military service, we get a bigger utility bang for our buck by excusing conscientious objectors than we would by selecting the lucky few at random by a lottery system. We also need to consider how expensive and time-consuming would it be to screen conscientious objector applications. Would the hardship to conscientiously dissident draftees under a lottery system outweigh the costs of maintaining a conscientious objector system?

This last concern is important: if the criteria for granting exemptions are ill-defined and difficult to establish, the machinery for adjudicating petitions for exemption could be prohibitively costly, cumbersome, and unwieldy. This is among the reasons why Leiter rejects as unworkable a Universal Exemption approach, according to which exemptions would be extended to cover all conscientious commitments rather than just those that are religiously motivated.⁵⁴ It is relatively unproblematic to determine who qualifies for conscientious objector status according to traditional religious-based criteria. If a man is a Quaker or Mennonite, he gets a 1-O classification, which excuses him from military service; if he is a Jehovah’s Witness, he gets 1-A-O classification, which allows him to serve in noncombat positions in the military.⁵⁵ It is easy to determine who qualifies for

53. *What Is Considered an “Undue Hardship” for a Reasonable Accommodation?*, ADA NAT’L NETWORK, <http://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation> [<https://perma.cc/P84E-RJQ6>] (last visited Feb. 2, 2016).

54. See LEITER, *supra* note 22, at 94–100.

55. See Powers, *supra* note 52.

conscientious objector status on religious grounds: their bona fides can be determined by checking church records. And that does not overly burden the system or require any complicated judgment calls. If, however, the criteria are extended to all conscientious commitments, whether religious-based or not, the decision procedure will be more complicated, and it may be exceedingly difficult to determine whether the requisite claims of conscience are genuine. *A fortiori*, extending the criteria further to cover all cases where military service or other legal requirements would impose a hardship, where that is construed broadly to include psychological as well as material hardship, will be complicated, cumbersome, time-consuming, expensive, and ultimately haphazard at best.

If the costs of adjudicating individually crafted claims of conscience and other personal idiosyncrasies are prohibitive then, regrettably, they cannot be accommodated, and so atypically conscientious individuals and others will have to endure significant hardship. However, regardless of whether it turns out to be cost-effective to recognize the claims of conscience or not, our concern on this account should be solely with the likely *consequences* of requiring individuals to comply with legal requirements, not the condition in virtue of which compliance would impose a hardship. It does not matter whether the condition that would make service in the military a hardship for an individual is moral conviction, responsibility for the care of young children, or flat feet. In general, on this account, the intent of such accommodations is not either to privilege religious conviction as such or to recognize claims of conscience but to provide exemptions from compliance with regulations that would impose undue hardship on conscientious individuals. On this account, when considering such claims as the basis for exemption from legal obligations or prohibitions, we should treat conscience in the way that we treat any other condition that would make it unduly difficult for some individuals to comply with laws or regulations, such as economic hardship, physical disability, or psychological difficulty.

V. PUBLIC DISPLAYS OF RELIGION: A DEFENSE

I have argued that in maintaining the wall of separation between church and state, first, we should assume a minimalist understanding of religion as metaphysics and ceremony and that we should treat religious symbols and ceremonies in the same way that we treat comparable secular symbols and ceremonies. This means that to the extent secular items are allowed in public spaces and subsidized or funded with taxpayers' money, comparable

religious products should be allowed and subsidized or funded. If it is legal to display abstract sculptures on public land, it should be legal to display crosses or other religious artifacts. If school districts “subsidize” groups that meet for secular purposes by renting school facilities to them at reduced rates, they should likewise “subsidize” congregations that conduct religious services in those facilities. So, in short, I suggest that we should be stingy—much stingier than we are now—in granting exemptions for conscience, but lavish in allowing and, indeed supporting, empty ceremonies and other public expressions of superficial religiosity.

There are at least three objections that might be put to the latter policy. First, secularists suggest that public displays of religion, however superficial, “marginalize” members of religious minorities and nonreligious individuals.⁵⁶ Secondly, they argue that at least some such activities constitute “indoctrination” and promote not only the metaphysical views of religious believers but also their moral, social, and political agendas.⁵⁷ Finally, they object to subsidizing or funding religious displays and ceremonies on the grounds that they do not benefit the public at large and so require taxpayers to support programs and facilities that do not benefit them.⁵⁸

The first concern, regarding “marginalization,” is surely inflated. Iris Young in the classic account of marginalization in *Five Faces of Oppression* characterizes it as the act of relegating or confining a group of people to a lower social standing or outer limit or edge of society, expelling “[a] whole category of people . . . from useful participation in social life.” As a result, she writes, these groups are “subjected to severe material deprivation [they don’t have access to basic resources] and even extermination [such as genocide].”⁵⁹ Are religious outsiders *marginalized* by public displays of religion? Certainly practices that valorize exclusive groups, particularly if they are socially recognized as prestigious, can make outsiders feel bad. The extensive display, ceremony, and prestige surrounding school sports makes nerds and wimps feel bad. Beauty pageants make fat women feel bad. Everybody is an outsider somewhere and has some reason to feel bad. But being excluded and feeling bad are not marginalization—and it

56. See, e.g., Sara Wicht, *What Does the First Amendment Say About Displaying Religious Symbols?*, TEACHING TOLERANCE (June 2, 2014), <http://www.tolerance.org/blog/what-does-first-amendment-say-about-displaying-religious-sym> [<https://perma.cc/MB5J-ZY49>].

57. See, e.g., Allison Fick, *Reports of Islamic Indoctrination Spread to Georgia Public Schools*, AM. CTR. FOR L. & JUST., <http://aclj.org/religious-liberty/reports-of-islamic-indoctrination-spread-to-georgia-public-schools> [<https://perma.cc/63QX-P385>] (last visited Feb. 2, 2015).

58. See, e.g., *supra* note 14, and accompanying text.

59. IRIS MARION YOUNG, *Five Faces of Oppression*, in JUSTICE AND THE POLITICS OF DIFFERENCE 39, 53 (1990).

is hard to see what is gained by extending the language of “oppression” and “marginalization” to such relatively minor discomforts and disadvantages. Nerds, wimps, and fat women, whatever disadvantages they may face, are not expelled from useful participation in social life or subjected to severe material deprivation and are in no serious danger of extermination.

Moreover, even given the visibility of religious, typically Christian, symbols and ceremonies in the U.S., members of religious minorities are not seriously disadvantaged. According to the Pew Research Center’s 2009 report on income distribution among U.S. religious groups, the religious groups with the highest income in the U.S. are Hindus and Jews. Evangelicals, the largest and most visible religious group in the U.S., are in the bottom third of income distribution for religious groups. Atheists, while they do not have income to compare to Hindus or Jews—in large part because they are, as a group, younger—do significantly better than Catholics, Evangelicals, or mainline Protestants. Twenty-eight percent of atheists earn over \$100,000 a year; the figures for Catholics, Evangelicals, and mainline Protestants are 19%, 13%, and 21% respectively. As for the lowest earners, 31% of Catholics, 34% of Evangelicals, and 25% of mainline Protestants earn less than \$30,000 a year, while only 21% of atheists do.⁶⁰

Since the rise of the Religious Right in the 1980s, Evangelicalism, once invisible to most Americans, has come to be seen as the religious industry standard in the U.S. The public visibility of Evangelicals’ symbols and ceremonies—from Jesus billboards to televangelist TV to megachurch complexes—has not, however, translated into economic advantage for Evangelicals or “marginalized” religious minorities. There is no serious reason to predict that the presence of additional religious symbols or ceremonies in the public square would result in religious minorities or secularists being expelled from useful participation in social life and subjected to severe material deprivation or the real and present danger of extermination.

Nevertheless, even if there is no reason to be concerned about exclusion, secularists worry about *inclusion*—through indoctrination and recruitment. They worry that public displays of religion will empower religious believers to promote their theological doctrines, moral agendas and political programs. And, indeed, some conservative Christians have precisely this in mind.

60. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGION LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 58–61 (2008), <http://www.pewforum.org/files/2013/05/report-religious-landscape-study-full.pdf> [<https://perma.cc/8B6U-EATH>].

They suggest that the abolition of school prayer in 1993 was a cause of moral decline and imagine that the public presence of religious symbols and practices would be efficacious in promoting faith, virtue, and good order.⁶¹

The Protestant Reformers, particularly the spiritual forbearers of contemporary Evangelicals, knew better. They opposed the public religiosity that pervaded European Catholic culture—the crosses and shrines that littered the landscape and the extensive system of ceremonies, processions, and pilgrimages—because they recognized that these cheapened and trivialized religion. The Protestant Reformation was a protest against the reduction of religion to fetishes, formulaic prayer, trinkets, and empty ceremonies.⁶² The remark about the religion of the 1950s attributed to sociologist Peter Berger is apropos—children inoculated with such a weakened form of religion were forever immune to the real thing.⁶³ There is, in any case, no reason to believe that the practice and display of superficial religion will inculcate the beliefs and commitments Evangelicals wish to establish or promote their social or political agendas. A religion-blind state can support the superficial public religion of fetishes and empty ceremonies without worrying that that it might lead to any serious religious commitment.

Finally, secularists object to support for public displays of religion because they hold that such displays benefit religionists at their expense. Taxpayers, however, fund a great many public projects from which they themselves do not benefit. Childless individuals pay for public education; drivers subsidize public transportation; and philistines support the arts. All of us, as taxpayers, fund a wide range of public amenities that we ourselves do not use and public festivities in which we do not participate.

Like parks, libraries, art exhibitions, public festivals, and farmers' markets, religion is a public amenity. That is obscured by the fact that most Americans, including secular Americans, have unwittingly adopted the Evangelical understanding of religion as a commitment to theological doctrine, a code of conduct and social agenda to which religious symbols and ceremonies

61. See Laurie Goodstein, *Diverse Group Debates Prayer in Public Schools*, WASH. POST (Apr. 6, 1994), <https://www.washingtonpost.com/archive/local/1994/04/06/diverse-group-debates-prayer-in-public-schools/f19cb56f-70dd-4d2f-b5a4-3957b53f7175/> [<https://perma.cc/9T3G-6AR3>].

62. See Martin E. Marty, *The Protestant Heritage*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/major-reference-1354359> [<https://perma.cc/U6WZ-86XA>] (last updated Jan. 28, 2016).

63. PETER L. BERGER, *THE NOISE OF SOLEMN ASSEMBLIES* 116 (1961) (“There occurs a process of religious inoculation, by which small doses of Christianoid concepts and terminology are injected into consciousness. By the time the process is completed, the individual is effectively immunized against any real encounter with the Christian message.”).

are merely peripheral—mechanisms for teaching, encouragement, and proselytization. Understood in this way, it is hard to see how religious symbols and ceremonies could benefit people who do not want to be taught, supported in their ideological commitments, or converted. But this is an assumption that should be resisted: there is no reason why anyone should accept the Evangelical account of what religion is. Historically, people have always enjoyed religious practices for their own sake: people without any religious interests attend choral Evensong and decorate their homes with statues of the Buddha and Byzantine icons. There are no doctrinal requirements for enjoying these good things, and no one is excluded. Religious objects and ceremonies are enjoyable and valuable as ends in themselves.

So perhaps the solution to ongoing Culture Wars is to split the difference: to support unlimited superficial religion, including hilltop crosses, Christmas crèches in parks, and formulaic prayers at civic celebrations, at public meetings, and in schools, while emphatically rejecting all religious “values” and antiscientific myths. “Freedom of religion” on this account is merely “freedom of worship”: freedom to hold whatever metaphysical beliefs one pleases and to participate in any innocuous ceremonies one enjoys—not license to “live according to one’s own faith” or to act consistently with the dogmatic precepts of one’s religion if they deviate from secular morality. Religion on this account is acceptable to the extent, and only to the extent, that it is consistent with secular ethics and science, only insofar as it consists of no more than metaphysics and ritual: only if it neither picks our pockets nor breaks our legs.

Income Levels of Religious Traditions

When the survey breaks down individual religious traditions into income categories, the results show that Hindus and Jews report higher incomes than others, not surprising given their high levels of education. More than four-in-ten (43% and 46%, respectively) of these groups make more than \$100,000 per year. Mainline Protestants, Mormons, Buddhists and Orthodox Christians also tend to have higher income levels, with pluralities of each of these groups making more than \$50,000 per year.

By contrast, majorities of members of evangelical churches, historically black churches, Jehovah's Witnesses and Muslims earn less than \$50,000 per year. Catholics and the unaffiliated population fairly closely resemble the general population in terms of income.

Income Levels of Major Religious Traditions

	Less than \$30,000 %	\$30,000- under \$50,000 %	\$50,000- under \$100,000 %	\$100,000+ %	
Total Population	31	22	30	18	=100
Protestant	32	23	29	15	=100
<i>Evangelical churches</i>	34	24	29	13	=100
<i>Mainline churches</i>	25	21	33	21	=100
<i>Historically black churches</i>	47	26	19	8	=100
Catholic	31	20	30	19	=100
Mormon	26	21	38	16	=100
Jehovah's Witness	42	23	26	9	=100
Orthodox	20	24	29	28	=100
Jewish	14	11	29	46	=100
Muslim*	35	24	25	16	=100
Buddhist	25	19	34	22	=100
Hindu	9	10	37	43	=100
Unaffiliated	29	23	29	19	=100
<i>Atheist</i>	21	20	31	28	=100
<i>Agnostic</i>	18	22	35	25	=100
<i>Secular unaffiliated</i>	25	24	30	21	=100
<i>Religious unaffiliated</i>	40	24	25	12	=100

* From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007

Due to rounding, figures may not add to 100 and nested figures may not add to the subtotal indicated. Results have been repercentaged to exclude nonresponse.

64. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 60, at 60.