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WILLIAM A. GALSTON*

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I. INTRODUCTION
Given the venue of this speech, I must immediately offer a disclaimer: I am not now, nor have I ever been, a Catholic. Nonetheless, it is a Pope—Gelasius the First, to be precise—with whom I begin. In 494 A.D., Gelasius declared that the world is ruled under two heads: “the consecrated authority of priests and the royal power.”¹ Two years later, he elaborated this idea. Christ himself, Gelasius said, “made a distinction between the two rules, assigning each its sphere of operation and its due respect.”² The emperor governs “human,” that is, “secular,” affairs, while

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2. Id. (quoting FROM IRENAEUS TO GROTIUS, supra note 1, at 178).
the Pope has governance over “divine affairs” or—otherwise put—“spiritual activity.”

It hardly needs saying that what came to be known as the doctrine of “two rules” has undergone many vicissitudes since it was set forth more than 1500 years ago. The Reformation reconfigured the relation between church and state, and political theorists from Machiavelli to Rousseau and beyond have labored to overcome the challenge to civil power that the presence of religious authority inevitably produces. Nonetheless, the core of the Gelasian view survives and makes its way to the contemporary West, not the least in the United States.

Consider, for example, the words from James Madison’s famous *Memorial and Remonstrance Against Religious Assessments*, one of the foundational documents of our religious liberties: “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.” And, Madison goes on to say, “This duty is precedent both in order of time and degree of obligation to the claims of civil society.”

Madison’s views track those of many believers—in his time and ours—who consider themselves to be subject to two authorities, one human and the other divine. In some, but not necessarily all, cases of conflict between them, the faithful believe that God’s authority is paramount. The Madisonian conception of conscience thus establishes a basis for conscientious objections to laws and regulations that individuals regard as going beyond appropriate bounds, and also for demands that civil authorities “accommodate” what conscience dictates.

Madison’s claim has forced American policymakers and judges to confront a number of challenging questions. What do we mean by conscience anyway? Is it exclusively religious, or can it have secular roots as well? And how wide is the writ of conscience when it runs up against duly enacted civil law? In a few minutes, I will address the evolution of conscience in theology and philosophy. But I want to start out closer to practical life.

As many of you know, American jurisprudence has wrestled with the challenge of conscience for most of the past century. Two issues have proved pivotal. First, are all conscientious claims against the state religious, or are some rooted in secular philosophy and morality? And second, how broad are the claims against state power—if any—that conscience warrants?

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3. *Id.* (quoting FROM IRENAEUS TO GROTIIUS, *supra* note 1, at 179).
5. *Id.*
Taken together, these two positions generate four alternatives. The scope of conscience can be either narrow—restricted to religion—or broad—extending beyond religion, and the writ of conscience over against civil law can be either strong—warranting numerous exemptions and accommodations—or weak—warranting few or none.6

I have represented these four alternatives in the following figure: In the upper left quadrant is a conception of conscience restricted to religion coupled with a strong conception of conscientious claims; in the bottom right quadrant is a wide view of conscience with weak or no claims; and the two remaining quadrants are wide/strong and restricted/weak, respectively.

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6. See infra note 7 and accompanying text.
In the middle decades of the twentieth century, the prevailing view combined a narrow conception of conscience—restricted to religion—

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7. *See, e.g., Emp’t Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that Oregon’s prohibition of sacramental peyote use was consistent with the Free Exercise Clause); see also Welsh v. United States, 398 U.S. 333, 344 (1970) (holding that exemption “from military service [applies to] all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war”); United States v. Seeger, 380 U.S. 163, 165–66 (1965) (holding that “the test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption [from military service]’); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina may not restrict public welfare benefits by criteria that require “a worker to abandon his religious convictions”).*
with a capacious understanding of conscientious claims as warranting, in suitable circumstances, exemption from generally valid public laws.\(^8\) This view then came under pressure, from two directions. During the Vietnam era, in response to claims for exemption from the draft, the Supreme Court expanded the perimeter of conscience to include explicitly secular beliefs.\(^9\)

In 1990, the other shoe dropped. In a decision that has remained controversial ever since, Justice Antonin Scalia rejected a claimed exemption from drug laws for peyote used in Native American religious rituals.\(^10\) Granting this claim, he argued, would create a system “in which each conscience is a law unto itself.”\(^11\) A society that did this would be “courting anarchy.”\(^12\)

It was not the expansive concept of conscience that worried Scalia; it was the core meaning of “actions thought to be religiously commanded.”\(^13\) The more religiously diverse the society, the more such actions there will be, covering an ever-greater sphere of social life and public law. Acting through their elected representatives, the people may carve out exceptions for religious individuals and institutions. But religion does not enjoy exemption from law as a matter of constitutional or moral right. Nor, \textit{a fortiori}, do claims based on secular conscience.

No exemptions as a matter of right is roughly the position many contemporary philosophers end up defending as well.\(^14\) Does it make sense? To motivate the discussion, I begin with three controversies: two are current, and the third is historical. I proceed to discuss what we might mean by \textit{conscience} in religion, philosophy, and law. Against that backdrop, I assess the “no exemptions” position in two ways—constitutionally and

\(^8\) See \textit{Sherbert}, 374 U.S. at 403–06 (“[A]ppellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.”).

\(^9\) \textit{Welsh}, 398 U.S. at 356 (Harlan, J., 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.”).

\(^10\) \textit{Emp’t Div.}, 494 U.S. at 890.

\(^11\) \textit{Id.}

\(^12\) \textit{Id.} at 888.

\(^13\) \textit{Id.}

\(^14\) See, \textit{e.g.}, \textit{Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism} 50–54 (2001) (describing the effects of retaining a law while rescinding the exemptions and the negative implications the law would have on different religious groups).
philosophically. I conclude that the claims of conscience, though far from absolute, are stronger than what either the contemporary Supreme Court or secular-oriented philosophers are willing to concede.

II. THREE CONTROVERSIES

In September of 2011, the University of Medicine and Dentistry of New Jersey announced that all nurses employed in the hospital it runs would have to help with abortion patients before and after the procedure, “reversing a long-standing policy exempting employees who refuse based on religious or moral objections.”15 In October, a group of objecting nurses filed a federal lawsuit.16 In November, U.S. District Court Judge Jose Linares granted a request for a temporary restraining order barring the hospital from requiring the objecting nurses to undergo any “training, procedures or performances relating to abortions.”17 In December, the hospital backed down, agreeing that nurses with conscientious objections would not have to assist with pre- or post-operative care for abortions except when the mother’s life is threatened and no other nonobjecting staff are available to assist.18

Here is a second controversy: On January 20, 2012, the Department of Health and Human Services announced a final rule specifying preventive health services that most new insurance plans would be required to cover under the Affordable Care Act.19 Contraceptives and sterilizations were listed as required services, including drugs such as Plan B and Ella.20 The Department provided a narrow exemption from this rule for certain religious entities such as churches, but this exemption did not exempt


most religiously affiliated universities, hospitals, and social service agencies.21

Cardinal Timothy Dolan, President of the United States Conference of Catholic Bishops, swiftly condemned this decision: “Never before . . . has the federal government forced individuals and organizations to go out into the marketplace and buy a product that violates their conscience. This shouldn’t happen in a land where free exercise of religion ranks first in the Bill of Rights.”22 John Garvey, President of the Catholic University of America, argued that the mandate “requires us to contradict in our actions the very lessons that we’re teaching with our words in classes and in our daily activities at the university. It makes us hypocrites in front of the students that we’re trying to educate.”23

I draw my third controversy from what was perhaps the least successful constitutional experiment in American history.

The Eighteenth Amendment was ratified on January 16, 1919.24 It was widely understood that without the concurrent legislation authorized in Section 2, the general prohibition on the manufacture, sale, and transportation of alcoholic beverages would be too vague to enforce.25 On October 29, 1919, the National Prohibition Act—popularly known as the Volstead Act, which created the legal definition of intoxicating liquor and specified penalties for producing it—passed over President Wilson’s veto and stood as the law of the land until 1933.26

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25. See U.S. Const. amend. XVIII, § 2 (repealed 1933) (“The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”).
The Volstead Act created a number of exemptions to the prohibition regime, of which two are especially noteworthy. First, the Act allowed physicians to prescribe liquor to individuals for medicinal purposes and to employ it pursuant to treatment for alcoholism in certified treatment programs. Second, the Act stated that nothing it contained should be construed as applying to "wines for sacramental purposes or like religious rites," and it permitted the sale or transfer of wine to rabbis, ministers, priests, or officers duly authorized by any church or congregation.

Suppose the Act had not exempted physicians. The omission would have been subject to criticism on policy grounds, but no one would have suggested that it ran afoul of constitutional norms. If the Act had failed to exempt wine for sacramental purposes, however, there would have been both a political firestorm and a First Amendment challenge that almost certainly would have succeeded.

The use of sacramental wine lies at the heart of more than one religion. The Code of Canon Law of the Catholic Church prescribes that "[t]he most holy eucharistic sacrifice must be offered with bread and with wine in which a little water must be mixed." For its part, Jewish law commands the drinking of wine during the Passover Seder, specifying not only the famous four cups but also a minimum quantity to be consumed—as anyone who has attended a Seder knows, there is no maximum. Comprehensive prohibition without exemptions would have prevented faithful Jews and Catholics from behaving as their religion requires. The Constitution’s presumption in favor of free exercise is designed to reduce to an avoidable minimum the circumstances in which such clashes are resolved in favor of the state. If free exercise means anything, it means the liberty to conduct the mandatory rites of one’s faith.

This liberty is not absolute, of course; there are "side-constraints" on its scope and exercise. A neo-Aztec religious group could not claim...
moral or constitutional protection for human sacrifice, however central to its beliefs that ritual might be. Although adult Christian Scientists may spurn standard medical practices, parents may not withhold treatment when the life of their child is at stake. A denomination might claim that God commands it to evangelize, but free exercise does not give it the right to conduct a revival meeting at 2:00 AM in a residential neighborhood. In such circumstances, religious noise is on all fours with its secular counterpart.

There are, in short, some bedrock civil concerns that the law may enforce, regardless of their effects on particular religions. But for most of our national history, legislators and jurists distinguished between such concerns and the more typical objects of legislation, which were thought to be not so fundamental as to outweigh religious free exercise. Despite the obvious importance of communal self-defense, many colonies exempted Quakers from serving in battles against the French and Native Americans, an exemption that some colonies continued during the Revolutionary War. Madison and the members of the First Congress who crafted the Bill of Rights were well aware of this history. Notably, Madison’s original draft of the First Amendment made explicit reference to liberty of conscience.

III. CONSCIENCE IN RELIGION AND PHILOSOPHY

How does the Madisonian view, which has so profoundly shaped American policy and jurisprudence, line up with the phenomenon of conscience as it has been understood in religion and philosophy?

Conscience is generally regarded as an inner state or faculty linked to an awareness of moral limits and to the ability to distinguish right from wrong. Different faiths and philosophical creeds offer varying accounts of the source of conscience—intuition, reason, natural law, God’s revealed law, or an unmediated encounter with the divine. But they agree that

34. See 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).
35. See, e.g., BLACK’S LAW DICTIONARY 345 (9th ed. 2009) (defining conscience as “[t]he moral sense of right or wrong; esp., a moral sense applied to one’s own judgment and actions”).
conscience is something individuals experience and invoke as a source of moral guidance. Many traditions, moreover, see conscience as the source of the discomfort we feel when we act in ways that we know we should not and of the self-criticism that attends the violation of obligations or commands. But conscience is not merely negative. For millennia, philosophers as well as pious believers have cited conscience as a source of affirmative obligations as well.

Beyond these broad commonalities, faith traditions offer divergent accounts of conscience. For Catholics, conscience is a faculty for the apprehension of practical truth, including the core propositions of natural law. Because all human beings are endowed with this faculty and because practical truth is one and the same for everyone everywhere, conscience in principle tends toward agreement. Catholic thinkers thus encounter two challenges—accounting for legitimate conscientious disagreement and offering principled grounds for respecting the outcome of conscientious but erring moral reflection.

For their part, Protestants are less likely than Catholics to see conscience in close relation to natural law, or indeed to reason. We know only what God’s grace allows, they say, and human beings experience that grace in different ways. To be sure, for many Protestants, shared communal understandings shape the development and content of conscience. Still, conscience has a subjective as well as objective component, based on what one leading Protestant theologian calls the “free personal ‘center’” that each individual possesses. This freedom contributes to the “last best judgment” in moral matters—our resting point after inquiry and reflection—that many Protestants and secular thinkers see as the manifestation of conscience in action. Conversely, there is an obvious objection to situating conscience too comfortably within communities, even faith communities: because individual conscience may require standing up to majorities or authorities within one’s community of

37. See 1 Encyclopedia of Christian Theology 1304 (Jean-Yves Lacoste ed., 2005) (stating that Protestant “[b]elievers are justified before God not by their works or their merit, but by grace alone”).
38. See id. at 341 (“Conscience thus becomes the nucleus of personal decision around which orbit other realities . . . .”).
39. See Dietrich Von Hildebrand, Transformation in Christ 50 (1948) (stating that truly conscious people can “advance[] over [their] nature [so] that [they] no longer agree[] implicitly to all its suggestions” by using their free personal centers to disavow a negative impulse).
40. See Kevin D. O’Rourke & Philip J. Boyle, Medical Ethics: Sources of Catholic Teachings 28 (2011).
origin, any viable account of conscience must make room for a locus of moral judgment not reducible to communal norms.

Although the conception of conscience as individual inner awareness fits awkwardly within the framework of Judaism, the idea of religious conviction as a source of authority against the state is clearly present. Jews were forbidden to commit three acts—murder, sexual immorality, or idolatry—and were to pay for their disobedience with their lives if necessary.\textsuperscript{41} Martyrdom for these three causes—and only for them—is called “sanctifying God’s name.”\textsuperscript{42} Jews resisted and then revolted when Hellenistic rulers ordered them to bow down before Greek gods, and some of the most famous rabbis were executed by the Romans after rejecting orders to cease teaching Jewish law to their students.\textsuperscript{43}

Conceptions of conscience are found within secular contexts as well. Among philosophical traditions, Greek and Roman Stoicism and Immanuel Kant’s practical philosophy offer especially well-developed understandings. For Kant, conscience is rooted in our awareness of the inner freedom that gives us our inalienable capacity for moral agency.\textsuperscript{44} Even when we act so as to degrade others or ourselves, we can never expunge our ability to judge the wrong we have committed and to act rightly in the future.\textsuperscript{45}

Secular conscience often manifests itself in professional and institutional contexts. Becoming a physician means entering into a dense network of moral responsibilities to one’s patients and society. At times this creed sets physicians in opposition to medical authorities and even the law of the state.\textsuperscript{46} Norms of doctor-patient confidentiality can collide with the requirements of legal proceedings, and the law does not always exempt from disclosure the communications that professionals and their clients

\textsuperscript{41.} See \textsc{The New Encyclopedia of Judaism}, supra note 31, at 457.
\textsuperscript{42.} See id. (defining martyrdom as “dying under kiddush ha-Shem,” or in other words, under “sanctification of the (Divine) Name” (internal quotation marks omitted)).
\textsuperscript{43.} See, e.g., Jeffrey S. Shoulson, Milton and the Rabbis: Hebraism, Hellenism & Christianity 214 (2001) (stating that multiple rabbis were executed by Roman authorities for continuing to teach the Torah); Victor Tcherikover, Hellenistic Civilization and the Jews 364–65 (S. Applebaum trans., 1959) (describing the anti-Semitic Hellenistic period where the Jews refused to worship Greek gods).
\textsuperscript{44.} See \textsc{Immanuel Kant, Groundwork of the Metaphysics of Morals} 40–47 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).
\textsuperscript{45.} See id.
regard as private and privileged. Similar issues arise in journalism: from time to time, reporters go to jail rather than reveal the names of sources to whom they have promised confidentiality.

IV. CONSCIENCE IN U.S. CONSTITUTIONAL HISTORY

There is no guarantee that any nation’s legal structure will reflect the core claims of conscience. In this respect, among others, U.S. constitutional history is fraught with ambiguity. Madison’s original draft of what became the First Amendment would have protected “the full and equal rights of conscience.” By the close of the House debate, the language included protections for both the free exercise of religion and rights of conscience, implying a distinction between them. After moving back and forth between these two formulations, the Senate ultimately selected religious free exercise, which became the language sent to the states for ratification.

On its face, this legislative history points unequivocally toward a single interpretation of the constitutional language. Either the Framers viewed conscience and religion as coextensive, or they saw them as different but opted to protect religion rather than conscience. In either case, claims of conscience lacking a religious basis would fall outside the realm of constitutional protection.

If religious but not secular claims of conscience are potentially eligible for constitutional protection, then legislators and courts have no choice but to reach the questions of what religion is and what distinguishes it from other comprehensive worldviews. Given America’s religious demography during the founding period, it would be natural for the Framers to regard belief in a “creator”—the source of transcendent rights and duties—as the defining and distinguishing feature of religion. But as the makeup of America’s population has become more diverse, especially in recent

47. See CAL. EVID. CODE § 1016 (West 2014) for exceptions to normal confidentiality rules in certain patient-therapist relationships. One of the most famous patient-therapist confidentiality cases is Tarasoff v. Regents of the University of California, where the California Supreme Court held that mental health professionals have a duty to warn individuals who are being threatened with “a serious danger of violence” by a patient. 551 P.2d 334, 340 (Cal. 1976). The case arose when Prosenjit Poddar told his psychologist that he intended to kill Tatiana Tarasoff. Id. at 339. Tarasoff did not receive any warning about the threat, and Poddar later killed her. Id. at 339–40.


49. See 1 ANNALS OF CONG., supra note 34, at 434 (statement of Rep. Madison).

50. See id. at 729–31.

decades, pressure on that definition has intensified. Can the law really draw a bright-line distinction between Christianity, Judaism, and Islam, on the one hand, and Buddhism, Taoism, and Confucianism on the other? Or would doing so eviscerate the robust religious freedom promised by the First Amendment?

It might seem more defensible to distinguish between worldviews based exclusively on reason and experience and those relying on revelation or a direct relationship with the divine. But complications abound here as well. After all, no less authoritative document than the Declaration of Independence characterizes certain truths as “self-evident,” including the “Laws of Nature and of Nature’s God,” which the document proceeds to spell out with considerable particularity.52 Although the Declaration has an unmistakably theological foundation, which some scholars characterize as Deist rather than specifically Christian,53 its foundational truths are in principle equally accessible to the reason of all human beings, regardless of other creedal differences. In practice, how can the law distinguish between this religion of reason and other comprehensive views, such as Kantianism, that claim an exclusively rational foundation for binding duties? If we say that the Declaration’s rational religion includes a “creator” in distinction to other reason-based views, we have returned to the problem of excluding non-Western creedal communities from the ambit of the Constitution.

In light of these difficulties, it is not surprising that U.S. Supreme Court interpretation ended up moving toward a broader conception of conscience. As early as World War I, an organization that would become the American Civil Liberties Union unsuccessfully brought suit on behalf of individuals who conscientiously objected to military service on moral


53. See AMERICAN PHILOSOPHY: AN ENCYCLOPEDIA 164 (John Lachs & Robert Talisse eds., 2008) (stating that the same reason that permits the people to declare their independence by rational assertion in the Declaration of Independence allows Deistic thinkers to stand up to threats by religious leaders); Lori A. Catalano, Comment, Totalitarianism in Public Schools: Enforcing a Religious and Public Orthodoxy, 34 CAP. U. L. REV. 601, 629 (2006) (referencing one court that placed the Declaration of Independence in a category of ceremonial Deism along with the Pledge of Allegiance and the motto “In God We Trust.”).
rather than religious grounds.\textsuperscript{54} Nearly half a century later, during the Vietnam era, this broader view prevailed. Section 6(j) of the Universal Military Training and Service Act invoked the traditional view by making draft exemptions available to those who were conscientiously opposed to military service by reason of “religious training and belief.”\textsuperscript{55} The Act proceeded to define the required religious conviction as “an individual’s 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.”\textsuperscript{56} In \textit{United States v. Seeger}, however, the Supreme Court broadened the statutory definition by interpreting the Act to include a “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.”\textsuperscript{57} Five years later, in \textit{Welsh v. United States}, the Court further expanded the reach of the statute to include explicitly secular beliefs that “play the role of a religion and function as a religion in the registrant’s life.”\textsuperscript{58} Thus, the Court argued, exemptions could be extended to “those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”\textsuperscript{59}

\section{V. THE CASE AGAINST CONSCIENCE}

For about two decades, U.S. constitutional jurisprudence occupied one of the four boxes in my figure—a wide conception of conscience, coupled with strong claims of conscience. But during that period, doubts grew about the entire enterprise of offering religion or conscience-based exemptions and accommodations from generally valid statutes.

We have already seen the jurisprudential result of these reservations. In \textit{Employment Division v. Smith}, the Court rejected the claims of individuals who invoked the Native American practice of sacramental peyote-smoking as a defense against Oregon’s controlled substances law.\textsuperscript{60} Writing for the majority, Justice Scalia declared that “[a]ny society...

\begin{thebibliography}{99}
\bibitem{54} See, e.g., Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918); see also Brian Niiya, \textit{American Civil Liberties Union}, DENSHO ENCYCLOPEDIA (last updated Apr. 5, 2013, 3:21 AM), http://encyclopedia.densho.org/American_Civil_Liberties_Union/#U2K4Abv4aeY.email.
\bibitem{56} Id.
\bibitem{57} 380 U.S. 163, 176 (1965).
\bibitem{58} 398 U.S. 333, 339 (1970) (defining the meaning of the \textit{Seeger} Court’s reference to the registrant’s “own scheme of things”).
\bibitem{59} Id. at 344.
\bibitem{60} See 494 U.S. 872, 874, 890 (1990).
\end{thebibliography}
adoption of such a system would be courting anarchy” and that this danger “increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.” 61 Within very broad limits, legislators are free to enact such exemptions and accommodations as they see fit. But individuals may not claim them as a matter of right under the First Amendment. The majority acknowledged the risks their holding entailed: “It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . .” 62 But this outcome represents the lesser evil, and the Court said it “must be preferred to a system in which each conscience is a law unto itself.” 63

From a philosophical point of view, however, these constitutional stances are hardly dispositive. That is why Brian Leiter, the author of a recent book titled Why Tolerate Religion?, begins with what he calls the “central puzzle”—why the state “should have to tolerate exemptions from generally applicable laws when they conflict with religious obligations but not with any other equally serious obligations of conscience.” 64 A satisfactory answer would have to show, first, that there is a distinction between religious and nonreligious conscience, and second, that this difference is such as to warrant disparate state treatment. And if we conclude that there is no fundamental difference between religious and secular claims, it remains to decide whether those claims deserve any deference when they contradict generally valid law—recall the two-by-two figure with which we began. 65

Leiter suggests that two things single out religion from other modes of belief. First, beliefs issue in “categorical” demands that must be satisfied “no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up.” 66 Second, beliefs do not ultimately answer to evidence and reasons as ordinarily understood: “Religious beliefs, [by] virtue of being based on ‘faith,’ are insulated from ordinary standards of evidence and rational justification . . . we employ

61. Id. at 888.
62. Id. at 890.
63. Id.
64. BRIAN LEITER, WHY TOLERATE RELIGION? 3 (2013).
65. See supra Figure 1 and note 7.
66. See LEITER, supra note 64, at 34 (emphasis omitted).
in both common sense and in science. 67 Religion is distinctive in conjoining these two features of belief.

The second feature is more controversial than Leiter suggests. Theologians in more than one religion would deny that all significant tenets of their creed are based on modes of belief impervious to evidence and argument as ordinarily understood. Every religion that rests on a historical narrative is exposed to the possibility of discoveries that may challenge its core beliefs.

The first feature of religion—categorical demands that contradict public law—is, I believe, the heart of the matter. In agreement with both the Supreme Court and the facts of human life, Leiter argues that the experience of being categorically commanded “does not track religious belief.”68 “Here stand I. I can do no other” can be a sincere secular claim.69 The Supreme Court was not wrong to recognize the claims of secular creeds that “play the role of a religion and function as a religion in . . . life.”70 Nor was the Court wrong to see religion as the paradigm for such claims.

But at least religion identifies the source of the command and specifies the content of the command in ways that can be verified. When Quakers say that they cannot engage in armed conflict, or Jews that they cannot worship idols, they can point to the core texts and settled practices of their faith as proof. Religion offers conscience a measure of public objectification. Individualized claims of conscience detached from religion are harder to assess. That does not mean that they should be dismissed outright.

Still, inquiries into such claims are bound to be risky and intrusive. The external indicia of sincerity are less than reliable. And if courts try to reason from the credibility of belief to the sincerity of the believer, many religions would fail the test. By definition, all miracles defy the laws of nature, and it is hard to see what makes one purported miracle more or less credible than the next. Surely courts cannot “grandfather” religions whose miracles have been long and widely accepted while subjecting newer faiths to stricter scrutiny.

Let me set questions of proof aside and return to the main thread. Leiter argues, and I agree, that conscientious claims include but extend beyond religion and that honoring only religious claims is indefensible,

67. Id.
68. Id. at 132.
at least on the plane of principle. 71 We agree that conscientious claims should be treated equally. But we disagree about what that uniform treatment should be.

If I understand Leiter correctly, he endorses a generalized version of the position Scalia espoused in Smith: As long as the state is pursuing generally valid public purposes and is not directly targeting or burdening claims of conscience, it need not accommodate conscientious claims for exemptions from the law. 72 And, Leiter adds, it must not do so if accommodation would have the effect of transferring burdens to others or of undermining the law’s capacity to promote the common good. 73

The nub of the matter is this: Leiter believes that even when his two conditions—no transferring of burdens and no impeding the common good—are satisfied, the state has no obligation to accommodate conscientious claims. 74 I disagree. Unless the state can credibly argue that making an exception for sacramental wine or sacramental peyote violates one of Leiter’s conditions—and I do not think it can—the inherent moral weight of allowing individuals to act in accordance with their deepest convictions should trump the application of the law to those with conscientious objections against it; all the more so when the law prevents believers from practicing core rituals of their faith. If free exercise means anything, surely it means that.

But what of the fear that recognizing claims of conscience invites anarchy? My response is simple: in the real world, claims of conscience have not had, and will not have, the consequences the objectors fear. The law is capable of establishing templates to distinguish between real and spurious claims, and courts and agencies are capable of applying them. Even when the stakes are very high, as they are in wars of total mobilization, authorities are able to accommodate conscientious claims without undermining military effectiveness. And consistent with specific accommodations, states may legitimately require those receiving accommodations to perform alternative services that compensate for

71. See Leiter, supra note 64, at 93.
72. See id. at 99–100; see also Emp’t Div. v. Smith, 494 U.S. 872, 878–79 (1990) (reasoning that the right of free exercise does not allow an individual to refuse to comply with a valid and neutral law and precisely because the United States values and protects religious divergence, the Court cannot deem as presumptively invalid every regulation that does not protect a particular interest of the highest order).
73. See Leiter, supra note 64, at 100.
74. See id. at 100–06, 110.
whatever burden may have been shifted. Given the risks and costs of seeking accommodations—the time and money needed to meet strict tests, plus the likelihood of social disapproval—it is no wonder that relatively few people choose to run the gauntlet, or that those who do are typically committed and sincere. This is not anarchy, unless every limit to state authority implies anarchy, in which case liberal democracy is by definition anarchic.

VI. CONCLUSION

In the end, it seems to me, the matter boils down to a single issue. Many individuals consider themselves bound by two sources of authority—public law and conscience—whose demands do not always coincide. Is the state prepared to take cognizance of this fact, and if so, how should it respond?

Unlike other regimes, liberal democracies should not find these questions unduly challenging. To be a liberal state is to recognize limits on the legitimate scope of public authority; to be a liberal democracy is to recognize limits on the authority of the people and on the writ of law enacted by majorities. And it was the clash between civil law and religion that gave rise to the idea of limited public authority. The claims of conscience found—and continue to find—their place within the space this limitation opened up.

The same logic points to the limits of conscientious claims, however, and in particular cases, the weight of fact and argument may fall on the side of denying those claims. The point is that the state may not rightly assume that its claims are trumps in every case, any more than individuals may assume that their claims are dispositive.

I conclude by returning to my figure. The correct quadrant is in the upper right—a wide conception of conscience that entails strong but rebuttable claims for accommodation. That is where the law of the United States stood four decades ago. In my judgment, the philosophical as well as practical reasons for returning the law to where it stood are compelling. And we can do so without either legitimating unfairness or courting anarchy.

75. See supra Figure 1.