

# The First Amendment’s Religion Clauses: “Freedom of Conscience” Versus Institutional Accommodation†

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## I. INTRODUCTION

The phrase “freedom of conscience” is, of course, not to be found in the United States Constitution: the First Amendment says only that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>1</sup> However, it seems probable that one, then-contemporary Protestant conception of freedom of conscience

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1. U.S. CONST. amend. I.

was presupposed in these two clauses. Evidence for this conjecture can be found not only in the debate and proposals concerning the Bill of Rights of the United States Constitution but also in the frequently more expansive language of early state constitutions. The Constitution of Virginia, for example, states:

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.<sup>2</sup>

I take it that the phrase “equally entitled to the free exercise of religion, according to the dictates of conscience” glosses a conception of freedom of conscience that concerns, fundamentally and primarily, the freedom to choose and exercise forms of divine worship. This is essentially an individualistic, private freedom that is understood to entail the freedom to join with like-minded persons in the worship of God and the freedom to refuse communion with—and, perhaps, compulsory subsidization of—any ecclesial community and to refuse participation in any particular religious rite. “Ecclesial community” here signifies the latitudinarian Protestant account of “church” advanced by John Locke in his *Epistola de Tolerantia*: “a free society of men, joining together of their own accord for the public worship of God in such manner as they believe will be acceptable to the Deity for the salvation of their souls.”<sup>3</sup>

So I am inclined to think, insofar as the original intent surrounding the First Amendment’s religion clauses concerned the Church, or churches, that the amendment was concerned only indirectly with religious institutions and that this concern tacitly assumed one particular Protestant conception of “church.” The degree to which the First Amendment’s second Free Exercise Clause was originally understood to mandate legal accommodation based on individual religious conscience is a matter of some dispute. I shall proceed to argue that, if legal accommodation based on free exercise rights is a viable concept, a case can be made for understanding such accommodation in terms of what I shall term an institutional-privilege approach to the First Amendment’s religion clauses. But, insofar as such an approach is deemed *inappropriate*, the theoretically most coherent approach is probably either a Scalia-like minimalist conception of free-exercise-based religious accommodation or a reductive-eliminativist approach,

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2. VA. CONST. art. I, § 16.

3. JOHN LOCKE, *EPISTOLA DE TOLERANTIA: A LETTER ON TOLERATION* 71 (Raymond Klibansky ed., J.W. Gough trans., Oxford Clarendon Press 1968) (1689) (footnote omitted).

such as that of James Nickel, according to which the legitimacy of any religion-based rights would depend upon their being analyzed in terms of or reduced to other basic constitutional rights.

## II. CONSCIENCE: THE THOMISTIC CONCEPTION

The Latin noun *conscientia* is derived from the verb *conscio*, which has the etymology of “to know (in common) with.” *Conscio* is defined by the Oxford Latin Dictionary (OLD) as “to have (a crime) on one’s conscience.”<sup>4</sup> *Conscientia*’s most basic meaning is “[t]he holding of knowledge in common,” particularly “the fact of being privy to a crime, [or] complicity.”<sup>5</sup> But it can also mean *consciousness* of something, particularly “[t]he act of being aware of something one has done or is responsible for.”<sup>6</sup> Finally, OLD gives a definition that looks rather like a common modern definition of *conscience*: “[a]n inward perception of the rectitude or otherwise of one’s actions, moral sense, conscience.”<sup>7</sup> Cicero sometimes uses the phrase *animi conscientiam* in something like the modern sense of “conscience”—or “guilty conscience”—noting in his *De Finibus Bonorum et Malorum* that conscience in this sense is not especially difficult to suppress.<sup>8</sup> In the Latin vulgate translation of the Christian scriptures, *conscientia* typically translates the Greek *suneidêsis*, as in the famous passage from St. Paul’s *Epistle to the Romans* describing an apparently innate natural or moral law:

For when the Gentiles, who have not the law, do by nature those things that are of the law; these having not the law are a law to themselves: Who shew the work of the law written in their hearts, their conscience bearing witness to them, and their thoughts between themselves accusing, or also defending one another . . .<sup>9</sup>

Although there is not an absolute scholarly consensus, it seems that by about the twelfth century St. Jerome’s use of the Greek *suneidêsis* in his *Commentary on Ezekiel* had been corrupted to *sunderesis* in the *glossa*

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4. OXFORD LATIN DICTIONARY 411 (P.G.W. Glare ed., 1982).

5. *Id.*

6. *Id.*

7. *Id.*

8. CICERO, *DE FINIBUS BONORUM ET MALORUM*, 142–43 (H. Rackham trans., Harvard Univ. Press 2d ed. 1994) (c. 45 B.C.E.).

9. *Romans* 2:14 (Douay-Rheims).

*ordinaria*, a running commentary on the Bible drawn primarily from Patristic sources.<sup>10</sup> Hence developed the scholastic doctrine of *synderesis*.

To shorten considerably a rather long and complicated story, Saint Thomas Aquinas distinguishes between *synderesis* and conscience (*conscientia*). In brief, *synderesis* is “immediate apprehension of the first practical moral principles of the natural law.”<sup>11</sup> *Synderesis* is the “natural habit,” the act of which is the undemonstrated understanding and acceptance of the first principles of natural law—the first principles of practical reasoning. In Saint Thomas Aquinas’s own words,

[F]or probity to be possible in human actions, there must be some permanent principle which has unwavering integrity, in reference to which all human works are examined, so that that permanent principle will resist all evil and assent to all good. This is *synderesis*, whose task it is to warn against evil and incline to good. Therefore, we agree that there can be no error in it.<sup>12</sup>

Insofar as Aquinas attributes to *synderesis* a capacity for inerrant moral judgment, it is with respect to propositions so general as to be virtually tautologous: “[G]ood is to be pursued and done, and evil is to be avoided.”<sup>13</sup> Aquinas observes:

So, then, as to the notion of the last end, all agree in desiring the last end, since all desire the fulfilment of their perfection, and it is in this that the last end consists, as stated above. But as to the thing in which this notion is realized, all men are not agreed as to their last end, since some desire riches as their consummate good; some, pleasure; others, something else. Thus to every taste the sweet is pleasant; but to some, the sweetness of wine is most pleasant, to others the sweetness of honey, or of something similar. Yet that sweet is absolutely the best of all pleasant things, in which he who has the best taste takes the most pleasure. In like manner that good is most complete which the man with well-disposed affections desires for his last end.<sup>14</sup>

Attaining “well-disposed affections” involves, *inter alia*, having undergone the right kind of moral training. For Aquinas, conscience (*conscientia*) “is nothing but the application of knowledge to some special act.”<sup>15</sup> So, for Aquinas, the term *conscience* properly applies to a

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10. See DOUGLAS KRIES, *THE PROBLEM OF NATURAL LAW* 7–19 (2007).

11. Robert A. Greene, *Instinct of Nature: Natural Law, Synderesis, and the Moral Sense*, 58 J. HIST. IDEAS 173, 173 (1997); accord KRIES, *supra* note 10, at 3–25.

12. 2 THOMAS AQUINAS, *Question Sixteen: Synderesis*, in TRUTH 300, 310 (James V. McGlynn trans., Henry Regnery Co. 1953) (c. 1259).

13. 2 THOMAS AQUINAS, *Question XCIV: Of the Natural Law*, in THE *SUMMA THEOLOGICA* OF SAINT THOMAS AQUINAS 220, 222 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., Encyclopaedia Britannica, Inc. 1952) (c. 1273).

14. 1 THOMAS AQUINAS, *Question I: Of Man’s Last End*, in THE *SUMMA THEOLOGICA* OF SAINT THOMAS AQUINAS, *supra* note 13, at 609, 614–15.

15. 2 THOMAS AQUINAS, *Question Seventeen: Conscience*, in TRUTH, *supra* note 12, at 314, 323.

moral judgment about a particular act—“whether it is right or not.”<sup>16</sup> A judgment of conscience can be a decision to do something or not to do something *hic et nunc* (here and now); or it can be a judgment whereby an “act, after it has taken place, is examined with reference to the habit of knowledge to see whether it was right or not.”<sup>17</sup> Error of various kinds can certainly infect conscience:

[A] mistake can occur in the judgment of higher reason, as happens when one judges something to be licit or illicit which is not, as heretics who believe that oaths are forbidden by God. Therefore, mistakes occur in conscience because of the error which existed in the higher part of reason. Similarly, error can occur in conscience because of error which exists in the lower part of reason, as happens when one is mistaken about civil norms of what is just or unjust, good or bad.<sup>18</sup> Error also occurs because conscience does not make a correct application to acts. For, as in constructing speculative syllogisms one can neglect the proper form of argumentation, and thus arrive at a false conclusion, so he can do the same in practical syllogisms, as has been said.<sup>19</sup>

It is far from clear what *freedom* of conscience might mean in the Thomistic sense of conscience. A person is, of course, morally required to follow the dictates of his or her conscience. But that merely means that one is obliged to act in conformity with one's considered judgment of what the morally correct thing to do is in a particular situation. If one's judgment is incorrect—and if one is morally culpable for its being incorrect—one sins both in following one's conscience and in not following it. Hence, in the Catholic tradition of moral theology that gives particular weight to the authority of Saint Thomas, it is of signal importance to do everything one can to form correctly one's conscience. In this regard, the adage of learning *sentire cum ecclesia*—“to think with the Church”—becomes especially important. Consequently, within the Thomistic tradition, the most plausible sense one could give to the idea of freedom of conscience would imply some sort of obligation not to attempt to compel—by “force or violence,” to use the phrase of the Constitution of Virginia<sup>20</sup>—rational, mature persons to assent to (true) moral judgments that they have not actually made or would not otherwise make. In its most minimal form, this would amount to a prohibition against something like

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16. *Id.* at 318 (translating to the original Latin phrase “*an sit rectus vel non rectus*”).

17. *Id.* at 319.

18. In the original Latin, “*circa civiles rationes iusti vel iniusti, honesti vel non honesti.*”

19. *Id.* at 324.

20. VA. CONST. of 1776, Bill of Rights, § 16.

suborning perjury by force or violence. However, with respect to most other forms of intentional human behavior, there seems to be little theoretical room within the Thomistic tradition for the legal accommodation of conscience. The very point of positive law is to regulate conduct in a community in circumstances where it is supposed that the “uncoordinated” judgments of practical rationality made by individual persons—also known as dictates of conscience—do not in themselves provide sufficient guidance. To put the point another way, a dictate of conscience is a private, concrete judgment of practical reason, while a positive law is public, general judgment of practical reason. In the political sphere, the latter controls the former except in those cases in which, for whatever reasons, the law, or its legislator, elects to remain silent.

Of course, for it to have any relevance to the First Amendment’s Free Exercise Clause, it seems that the phrase “freedom of conscience” should have some peculiarly *religious* significance: it should apply to judgments or acts pertaining to religious observance and, perhaps, to (some) judgments and acts thought to be grounded in religious conviction. Although it is not clear that Aquinas specifically recognizes a notion of conscience that is specifically religious, as opposed to moral, it seems to me that the preceding discussion would apply to any Thomistic conception of freedom of conscience, as limited to religious contexts. It hardly needs to be noted that for Aquinas religion should be of fundamental significance in any human life. But I think that this obvious fact does not entail that the idea of religiously grounded *conscientia* has a separate and fundamental place in his general account of conscience.

There is some irony in what I take to be the predicament of contemporary defenders of the relevance of an individualistic conception of freedom of conscience to the Free Exercise Clause. The predicament is the following: there is no reason, from the perspective of many contemporary champions of the rights of conscience, why conscience should have a distinctively *religious* basis. Thus, in the manner of Saint Thomas Aquinas, a dictate of conscience becomes any (sincere and deeply felt?) moral judgment on the part of an individual. But, why then should any sort of legal accommodation be accorded to conscience *as such*? It is not the purpose of positive law, in those cases in which it is deemed necessary to have such law, to systematize and direct the practical judgments of *individual* persons (also known as dictates of conscience)?

## III. FREE EXERCISE AND RELIGIOUS (?) ACCOMMODATION

It is a historical conjecture the substantiation of which would require more effort than I am now capable of expending that a particularly religious sense began to be attached to the noun *conscience* amidst the attempt to work out a *modus vivendi* among competing religious traditions that arose subsequent to the Protestant Reformation of the sixteenth century. In Britain, the idea of a *religious* notion of liberty of conscience finds explicit expression in the Declaration of Breda, issued by Charles II in 1660 in connection with the restoration of the Stuart monarchy:

And because the passion and uncharitableness of the times have produced several opinions in religion, by which men are engaged in parties and animosities against each other (which, when they shall hereafter unite in a freedom of conversation, will be composed or better understood), we do declare a liberty to tender consciences, and that no man shall be disquieted or called in question for differences of opinion in matter of religion, which do not disturb the peace of the kingdom; and that we shall be ready to consent to such an Act of Parliament, as, upon mature deliberation, shall be offered to us, for the full granting [of] that indulgence.<sup>21</sup>

In continental Europe, the Treaty of Münster of October 1648, part of the Peace of Westphalia that ended the Thirty Years' War, adopted the general policy that the official religion of certain geographical areas would be the religion of the rulers of those areas—“*cuius regio eius religio*”—but adopted a policy of limited accommodation—“toleration”—for the (Christian) religious minorities in a given area that gave such minorities the right to practice in public their religion at certain times and in certain places, and to practice it at will in private.<sup>22</sup>

There are two principal points that I wish to make about seventeenth-century freedom of conscience: (1) it was largely limited, in terms of external and public behavior, to public worship and (2) its parameters were understood to be defined in terms of particular religious traditions or ecclesial communities that needed to be accommodated in order to obtain a workable *modus vivendi*. With respect to the Peace of Westphalia, the relevant traditions were Catholic, Lutheran, and Reformed (Calvinist) Christianity. The scope of the Declaration of Breda is less explicit. But it is clear that the various Protestant sects that had arisen since the

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21. Declaration of Breda, Apr. 14, 1660, 12 Car. 2 (Eng.).

22. See Treaty of Westphalia, Holy Roman Empire-Fr., art. XXVIII, Oct. 24, 1648, available at [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp).

Reformation were intended to be included; more controversial and less successful was the extension of its principles to Roman Catholicism.

With respect to contemporary interpretation of the religion clauses of the First Amendment, neither of the preceding two points holds. The Free Exercise Clause has been interpreted to implicate *something* more than freedom of public religious worship—although how *much* more remains a matter of legal dispute. And the application of both the Free Exercise and Establishment Clauses has been extended beyond membership in any religious tradition or ecclesial community included in some “approved list.”

Representative of one common, contemporary conception of the concept of freedom of conscience, which is particularly relative to the First Amendment’s religion clauses, is the doctrine developed by Martha C. Nussbaum in her recent book.<sup>23</sup> Perhaps the most fundamental element of Nussbaum’s doctrine, which is indicated in her subtitle, is that the point of the First Amendment’s religion clauses is to guarantee not just liberty, but equality—equality of religious liberty and equality of the public “respect” to be accorded to the religious convictions of individuals. She goes so far as to claim that “both of the ‘religion clauses’ . . . are centrally about equality.”<sup>24</sup> In order for this claim to be at all plausible, Nussbaum—although she does not use this terminology—must implicitly appeal to a notion of “proportional equality,” such as Aristotle believed should characterize distributive justice. An important consequence is that a law or governmental policy may *not*, in fact, equally respect the religious consciences of all citizens even if it is applied in the same arithmetical or mechanical way to all citizens. Citing a New York State ruling of which she approves, *People v. Philips*, which exempted a Roman Catholic priest from testifying in court about what he had been told in the confessional, Nussbaum argues that “what makes [the] Roman Catholic confession special is its sacramental character and the centrality of that sacrament to the religion.”<sup>25</sup> That a Catholic priest is given this privilege, so Nussbaum argues, is not to favor him unfairly or treat him “unequally” relative to any member of the Protestant clergy who is *not* given the same privilege of immunity—because the sacrament of penance (confession) and “seal of the confessional” is not a part of Protestant doctrine—and hence it seems, the privilege would be of no use or value to the Protestant clergy. Although Nussbaum recognizes a

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23. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008).

24. *Id.* at 16.

25. *Id.* at 128–29.

sense of equality before the law—in effect, Aristotle’s “arithmetical equality”—according to which *all* citizens would be compelled equally to yield to such a law as that compelling testimony in court, she judges that the “understanding of equality . . . by the early anti-accommodationists [with respect to the Free Exercise Clause] is harsh and in a sense superficial, underrating the damage done to conscience by majority laws that place asymmetrical burdens on minorities.”<sup>26</sup>

As this quotation indicates, another of Nussbaum’s tenets is that a fundamental purpose of the religion clauses is—or should be—to protect the religious consciences of minorities. Her assumption appears to be that a religious majority generally can fend for itself in a democracy because it will see to it that no law will be made or government policy adopted that will infringe on the consciences of *its* members. It is not clear, however, how her emphasis on religious accommodation of minorities squares with her emphasis on placing “asymmetrical burdens” on consciences because consciences are by their nature things that belong to *individuals*. I suppose that one might argue that there is no more of a “minority” in a society, particularly a pluralistic one, than the individual citizen—a “minority of one.” However, the problem lurking here seems substantial. It is exacerbated by the tendency of Nussbaum—a tendency that is by no means unique to her conception—to secularize the First Amendment’s religion clauses.

On the one hand, the Establishment Clause is sometimes interpreted to prohibit favoritism not just toward particular religious traditions or ecclesial communities but toward “religiosity” or religion in some generic sense.<sup>27</sup> This is indeed the interpretation favored by Nussbaum herself: she rejects the “nonpreferentialism” favored by former Chief Justice William Rehnquist, according to which “what the Establishment Clause rules out is any *preferential* establishment of religion, that is, one preferring one sect or group of sects to others.”<sup>28</sup> Nussbaum argues that the balance of historical evidence, despite some notable “aberrations,” favors interpreting the Establishment Clause as prohibiting favoritism to religion “in general”—on the grounds that any such preferential treatment

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26. *Id.* at 130.

27. The term *favoritism* would suggest the preference of religiosity to something else. But what? Is it atheism, agnosticism, or simply not caring about religious or theological matters?

28. NUSSBAUM, *supra* note 23, at 109.

would “create a hierarchy among citizens [with respect to the categories of religious, religiously agnostic, antireligious, or simply “not giving a damn one way or the other,” I suppose], so that they do not all enter the polity on equal conditions.”<sup>29</sup> Furthermore, despite her general approval of the doctrine that “[u]nder our Constitution, religion is special,”<sup>30</sup> she favors an interpretation of the Free Exercise Clause that would permit some accommodations of conscience on grounds that are not religious in any traditional sense of the term.

The conceptual problem in Nussbaum’s position—as she is well aware—is that its elements are at least in tension if not flatly inconsistent. How can religious accommodation, by its very nature, fail to favor some religious traditions or ecclesial communities in such a way that does not conflict with the Establishment Clause, *as she interprets it*? And, if certain accommodations are seen as mandated by the Free Exercise Clause on religious grounds, how could one consistently prohibit the same or similar accommodations on grounds that are not religious. But if the First Amendment’s Free Exercise Clause mandates accommodations that are not religiously grounded, the paradoxical result would seem to be that this clause, guaranteeing free exercise of religion, is not essentially about religion at all. So, contrary to Nussbaum’s stated conviction, it seems *not* to be the case that “[u]nder our Constitution, religion is special.”<sup>31</sup>

Nussbaum considers various ways of resolving or mitigating these problems. She begins by considering, as she puts it, possible accounts “of what might be thought special about religion,”<sup>32</sup> with the view that “[i]f that or those characteristics are present in at least some secular commitments, perhaps accommodation should be cautiously extended to those cases.”<sup>33</sup> She quickly—too quickly, I shall later argue—rules out the idea that what is pertinent in characterizing the scope of application of the Free Exercise and Establishment Clauses is that “religion involves a group and some organized structure of authority.”<sup>34</sup> Such an institutional account of religion, while it may originally have been the practical basis for much seventeenth-century religious toleration, would ill accord with Nussbaum’s general emphasis on fundamental importance of accommodation of the *individual* conscience and the phenomenon of

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29. *Id.* at 111.

30. *Id.* at 164.

31. *Id.*

32. *Id.* at 167.

33. *Id.*

34. *Id.*

“solitary seekers, affiliated with no official structure.”<sup>35</sup> She then considers the possibility that free exercise accommodation could be granted on the basis “that religion involves very strongly felt commitments, commitments central to a person’s life.”<sup>36</sup> But this “subjective account of religion’s specialness,” she opines, is both under- and over-inclusive.<sup>37</sup> It might fail to apply to “cases of religious membership that are habitual and not particularly emotional, or that involve religions based on ritual practice rather than strong feeling.”<sup>38</sup> And it might apply to cases of deeply felt commitments that most of us would regard as inappropriate grounds for accommodation because of their triviality, from *our* perspective, or for other reasons:

Nobody wants to give a draft exemption to someone who is intensely attached to his car, however sincere the attachment may be. Nor—should I discover that my employer will not let me attend an afternoon White Sox game without penalty—ought I to have grounds for litigation under the First Amendment when I am fired and denied unemployment compensation.<sup>39</sup>

Ultimately, Nussbaum postulates an “idea of conscience” that she associates particularly with the American colonial theologian and founder of Rhode Island, Roger Williams. Conscience is a:

faculty with which each person searches for the ultimate meaning of life. . . . The faculty is identified in part by what it does—it reasons, searches, and experiences emotions of longing connected to that search—and in part by its subject matter—it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person’s conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others or comes up against some compelling state interest. . . . We

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* Perhaps Nussbaum is not here sufficiently sensitive to the religious significance of the automobile. This is a theme of Flannery O’Connor’s *Wise Blood*, in which the character Hazel Motes makes the pregnant observation, “[N]obody with a good car needed to worry about anything.” See FLANNERY O’CONNOR, *WISE BLOOD* 206 (Noonday Press 1991) (1949). One also thinks of Aldous Huxley’s *Brave New World*, in which “Our [Henry] Ford” is the deity of the religion of “Fordism,” with its cosmic optimism: “Ford’s in his flivver . . . . All’s well with the world.” See ALDOUS HUXLEY, *BRAVE NEW WORLD* 31, 36 (1932).

may arrive at a political consensus concerning the need to respect human faculties, without at all agreeing concerning the value of the specific activities that these faculties perform.<sup>40</sup>

Nussbaum's conception of conscience as a faculty that "reasons, searches, and experiences emotions of longing" connected with "ultimate meaning" is ingeniously designed to accomplish a great deal about which she evidently cares. The equal possession of such a faculty forms the basis for a right of "equality of respect" that she would like to associate with the First Amendment's religion clauses. Furthermore, as the basis of these clauses, this conception of conscience preserves the centrality of individual persons, as opposed to institutions, with respect to the constitutional conception of freedom of religion as freedom of conscience. It also accommodates a secularized understanding of freedom of conscience because the supposed faculty of searching for ultimate meaning does not need to function within any religious tradition and does not presuppose a recognizably religious basis—although it may, in fact, often function within such a religious context.<sup>41</sup> Finally, since it is the *faculty* rather than any particular behavioral manifestations of the faculty that is due "equal respect," a sort of messy selectivity in deciding what behavior warrants free exercise accommodation can be theoretically justified—a messy selectivity that mirrors the actual development of First Amendment religion clause jurisprudence.

Nussbaum's theory mirrors, in several respects, the twentieth-century development of this jurisprudence. In particular, it mirrors one area in which the Court has attempted to secularize free exercise accommodation, while both maintaining a robust conception of nonestablishment and retaining some notion of the constitutional "specialness" of religion: cases dealing with exemption from compulsory military service. There has been a long-standing tradition of exempting from military service adherents to religious traditions in which commitments to pacifism are central. "The Draft Act of 1917 afforded exemptions to conscientious objectors who were affiliated with a 'well-recognized religious sect or

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40. NUSSBAUM, *supra* note 23, at 168–69.

41. As a psychological matter, it seems to me rather implausible to suppose that there is a particular faculty the function of which is focused on—searching for, reasoning about, and experiencing—"ultimate meaning." Surely, not everyone actually *cares* about such matters or recognizes the existence and importance of the idea of ultimate meaning. And, among those who do, ultimate meaning is not always either a religious or even a moral matter but can be, say, aesthetic. Do we really want to grant, for example, an exemption to military service for someone who finds ultimate meaning in beauty and objects to war simply because it is so *ugly*? My thanks to my colleague Jeffrie G. Murphy for discussing this issue with me.

organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form . . . .”<sup>42</sup> The 1940 Selective Training and Service Act made it “unnecessary to belong to a pacifist religious sect if the claimant’s own opposition to war was based on ‘religious training and belief.’”<sup>43</sup> According to Justice Clark’s review in *United States v. Seeger*:

Between 1940 and 1948 two courts of appeals held that the phrase “religious training and belief” did not include philosophical, social or political policy. Then in 1948 the Congress amended the language of the statute and declared that “religious training and belief” was to be defined 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.”<sup>44</sup>

The problem in Seeger’s case was that, although he had been raised a Roman Catholic and had been a “close student of Quaker beliefs,”<sup>45</sup> he was unprepared to assert the existence of a Supreme Being and, hence, to found his conscientious objection on obligations owed to a deity in any traditional sense of “deity.” Rather, it was founded, in Seeger’s own words, on:

“[B]elief in and devotion to goodness and virtue for their own sakes, and a religious faith as a purely ethical creed.” He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity “without belief in God, except in the remotest sense.”<sup>46</sup>

Although it is clear that Seeger’s objections to war were essentially ethical and fundamentally secular, those objections appear to retain what one might describe as a faint but distinctive odor of religiosity. Faced with the sizeable task of discounting Congress’s explicit refusal to extend exemptions on the basis of “essentially political, sociological, or philosophical views or a merely personal moral code,”<sup>47</sup> Justice Clark, writing for the majority, focused on that odor. He interpreted the statute’s phrase “religious training and belief” to connote:

42. *United States v. Seeger*, 380 U.S. 163, 171 (1965) (alterations in original) (quoting The Draft Act of 1917, Pub. L. No. 65-12, 40 Stat. 76).

43. *Id.*

44. *Id.* at 172 (alteration in original) (footnote omitted) (quoting *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946), and *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943)).

45. *Id.* at 186.

46. *Id.* at 166 (citation omitted).

47. *Id.* at 172.

[A]ll sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: 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 comes within the statutory definition.<sup>48</sup>

On this basis, the Supreme Court affirmed the finding of the court of appeals “that the registrant demonstrated that his belief as to opposition to war was related to a Supreme Being.”<sup>49</sup>

If *United States v. Seeger* seemed to stretch the language of a congressional statute past the breaking point—in the interest of maintaining the statute’s constitutionality—the problem was exacerbated in *Welsh v. United States* in which the petitioner had at one time characterized the basis of his pacifism as “nonreligious” and, at another, as “religious [only] in the ethical sense of the word.”<sup>50</sup> Nonetheless, Justice Black, writing for the majority, ruled in favor of the petitioner, noting that Welsh had mischaracterized his own views of the sense of term *religious* that the court had adopted in *Seeger* to interpret the language of section 6(j) of the Universal Military Training and Service Act.<sup>51</sup> Consequently, according to Justice Black:

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a “religious” conscientious objector exemption under § 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions.<sup>52</sup>

Justice Black still had to deal with the explicit exclusion in section 6(j) of persons whose pacifism is grounded in “essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>53</sup> He opined:

The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.<sup>54</sup>

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48. *Id.* at 176.

49. *Id.* at 187.

50. *Welsh v. United States*, 398 U.S. 333, 341 (1970) (internal quotation marks omitted).

51. *See id.*

52. *Id.* at 340 (ellipsis in original).

53. *See id.* at 336.

54. *Id.* at 342–43.

It is clear that the Court had found itself with an essentially subjective, psychological criterion of religious exemption from military service: persons who are entitled to exemption are 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.”<sup>55</sup> In a concurring opinion, Justice Harlan objected to this doctrine as an account of the congressional language and intent of section 6(j) of the Universal Military Training and Service Act.<sup>56</sup> His view was that that clause was intended to limit exemption to those professing total pacifism on the basis of some sort of theistic belief.<sup>57</sup> However, he believed that such a limitation violated the First Amendment’s Establishment Clause.<sup>58</sup> Although holding that congressional elimination of *all* exemptions for conscientious objectors “would be wholly ‘neutral’ and, in [his] view, would not offend the Free Exercise Clause,”<sup>59</sup> he preferred an interpretation of the congressional exemption<sup>60</sup> such that “it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held.”<sup>61</sup>

These cases are, of course, largely cases dealing with statutory interpretation and not directly with the First Amendment’s religion clauses. However, concern about what the religion clauses permit and demand obviously is one motivating factor in the Court’s reasoning. The subjective and psychological approach that the Court appeared to adopt toward conscientious objection, if viewed as an issue of free exercise, obviously conjures visions of a very slippery slope. Who can discern the point at which a “moral conviction” is not sufficiently “intense” to warrant free exercise protection, even within the limited area of conscientious objection—and *why* should one want to ground

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55. *Id.* at 344.

56. *See id.* at 345 (Harlan, J., concurring).

57. *See id.* at 344–45.

58. *Id.* at 356.

59. *Id.*

60. *Id.*

61. *Id.* at 358 (footnote omitted). As my colleague Jeffrie Murphy has emphasized to me, convictions concerning “ultimate meaning,” as in Nussbaum’s theory and as in Justice Scalia’s ridicule of the “sweet-mystery-of-life” rationale for privacy rights, are not necessarily to be equated with religious, moral, or ethical convictions. *See Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

constitutional rights in “intensity” of conviction anyway? One way that a slippery slope is sometimes avoided is by an abrupt, if not always clearly principled, application of brakes. And it appears that the Court applied the brakes rather abruptly in some later, Vietnam War era conscientious objection cases. The petitioners in *Gillette v. United States*, for example, sought exemption from military service on the grounds of moral objections to the Vietnam War, not to all wars in general.<sup>62</sup> Petitioner Gillette’s grounds were, in his own characterization, “based on a humanist approach to religion,”<sup>63</sup> while petitioner Negre’s moral objections were grounded in Roman Catholic just war theory.<sup>64</sup> Section 6(j), incorporated into the Military Service Act of 1967, was interpreted by the Court as limiting exemption, in the words of the Act, to those “conscientiously opposed to participation in war in any form.”<sup>65</sup> Thus, the Court rejected each petitioner’s claim to “a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples.”<sup>66</sup>

However, the Court also considered the contention of the petitioners that Congress’s restriction of exemption to conscientious objection to *all* war violated the First Amendment’s Establishment Clause because it favors one sort of religious basis for exemption—conscientious objection based in total pacifism—over another—a selective basis of conscientious objection such as just war theory.<sup>67</sup> Justice Marshall, writing for the majority, admitted that the sincerity—or “intensity”—of the petitioners’ beliefs is not in question:

Properly phrased, petitioners’ contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in “just” and in “unjust” wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course, this contention of de facto religious discrimination, rendering § 6 (j) fatally underinclusive, cannot simply be brushed aside.<sup>68</sup>

Although the constitutional contention is not exactly “brushed aside,” it is rejected by Justice Marshall. He opines that there are sufficient

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62. *See Gillette v. United States*, 401 U.S. 437, 439 (1971).

63. *Id.*

64. *See id.* at 440–41.

65. *Id.* at 441.

66. *Id.* (footnote omitted).

67. *See id.* at 451.

68. *Id.* at 451–52.

“neutral” reasons—the “hopelessness of converting a sincere conscientious objector into an effective fighting man”<sup>69</sup>—for the granting of a religiously based exemption to military service in the case of complete pacifism and, more to the point, that such “affirmative purposes” underlying the congressional grant of exemption are neutral in the sense of the Establishment Clause: “[n]eutrality’ in matters of religion is not inconsistent with ‘benevolence’ by way of exemption from onerous duties so long as an exemption is tailored broadly enough that it reflects valid secular purposes.”<sup>70</sup> Justice Marshall is concerned that “opposition to a particular war may more likely be political and nonconscientious, than otherwise”<sup>71</sup> and that:

[T]he belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant’s view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole.<sup>72</sup>

Such concerns led to sympathy on his part with the “[g]overnment’s contention that a program of excusing objectors to particular wars may be ‘impossible to conduct with any hope of reaching fair and consistent results.’”<sup>73</sup>

But Justice Marshall also considered a deeper theoretical contention by the government:

In addition to the interest in fairness, the Government contends that neutral, secular reasons for the line drawn by § 6 (j)—between objection to all war and objection to a particular war—may be found in the nature of the conscientious claim that these petitioners assert. Opposition to a particular war, states the Government’s brief, necessarily involves a judgment “that is political and particular,” one “based on the same political, sociological and economic factors that the government necessarily considered” in deciding to engage in a particular conflict. Taken in a narrower sense, these considerations do not justify the distinction at issue, for however “political and particular” the judgment underlying objection to a particular war, the objection still might be rooted in religion and conscience, and although the factors underlying that objection were considered and rejected in the process of democratic decisionmaking, likewise the viewpoint of an objector to all war was no doubt considered and “necessarily”

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69. *Id.* at 453.

70. *Id.* at 454.

71. *Id.* at 455.

72. *Id.* at 456.

73. *Id.* (citation omitted).

rejected as well. Nonetheless, it can be seen on a closer view that this line of analysis, conjoined with concern for fairness, does support the statutory distinction.<sup>74</sup>

The government's brief recognized that one rather obvious issue is raised by one important strand in later twentieth-century First Amendment jurisprudence: the particularization, subjectification, and secularization of the idea of "conscience"—as in "conscientious objection." If the phrase "conscientious objection" can be properly applied to any individual demurral from government policy that is sufficiently "serious" and if that demurral has a recognizably moral basis—or, alternatively, a basis in strong and sincere convictions concerning the "meaning of life"—an interpretation of free exercise could be developed that would be broad enough to excuse the individual person from compliance with the results of even the most "democratic decisionmaking." The result would be that the First Amendment's Free Exercise Clause would become, in effect, a constitutional guarantee of a subjective right to civil disobedience. There is perhaps some irony in the fact that the twentieth-century Supreme Court has taken steps—unwittingly, I assume—back toward something like the Thomistic conception of *conscientia*: an individual person's private application of practical reason, in the form of a moral judgment about some individual act in the totality of its particular circumstances. As I previously mentioned, it is far from obvious that there should be any *general* constitutional right of the "free exercise" of a conscience, in *this* sense, which happens to find itself in serious opposition to any positive law or governmental policy.

If the First Amendment's religion clauses are to continue to be interpreted as applying to the consciences of individual persons, it seems that a conception of conscience much more restricted than that of Aquinas is needed. Because of what many have believed to be the demands of the Establishment Clause, the traditional solution to the problem—the requirement of a strong belief grounded in a recognized *religious* tradition—has generally not been regarded as acceptable. Indeed, even relaxing or altering<sup>75</sup> the requirement to that of a strong *moral* belief "based on religious training and belief" has proved insufficient to prevent concerns arising about the Establishment Clause's relevance to legislation

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74. *Id.* at 458.

75. The apparent assumption that the moral is an appropriate secular surrogate for the religious is not at all obviously true. Many religious persons—and traditions—would certainly balk at the idea that the core or essence, so to speak, of religious conviction is its moral or ethical content. Again, my thanks to my colleague Jeffrie Murphy for discussion of this matter.

seemingly favoring religiously based pacifism over nonreligiously based pacifism.

Nussbaum's theoretical solution invokes a perhaps novel account of conscience as the faculty that "reasons, searches, and experiences emotions of longing connected to that search . . . it deals with ultimate questions, questions of ultimate meaning."<sup>76</sup> However, it is not clear that this general characterization of a presumed human faculty gives any indication of *which* of its manifestations should be protected, and which should not be protected, under the First Amendment's Free Exercise Clause. In his magisterial two-volume study of the First Amendment's religious clause jurisprudence, our fellow symposiast Kent Greenawalt mentions—*en passant* and in specific connection with conscientious objection to military service—that:

One fairly simple aspect of delimiting the boundary of "conscientious opposition" is drawing the line between claims of moral duty and claims based on self-interest. A registrant who candidly states that fear or a desire for the easy life rather than moral duty undergirds his opposition to participation obviously does not qualify for an exemption.<sup>77</sup>

As a piece of common sense, this judgment seems to me to be unexceptionable. But what of the registrant who claims that, after much careful thought and study, he has wholeheartedly embraced some version of the moral theory of egoistic ethical hedonism? And, after further careful judgment, he has concluded, on the basis of his sincere, strong, ethical commitments, that his participation in military service would seriously impair his prospects for his pleasure maximization and, hence, that it would be *immoral* for him to comply with the requirement of military service. Of course, as a practical matter, it seems unlikely that such an argument would be successful before many draft boards or courts. But, on what subjective, secularized theory of conscientious objection could it be ruled out in more than a merely *ad hoc* manner?

One assumption, I think, is attractive to both Nussbaum and Greenawalt, despite their other theoretical differences: this is the assumption that we should not expect a general theory of rights of conscience—if we are to have one—to supply, in any algorithmic, systematic way, answers to all individual questions concerning matters of conscience. Rather, "gently

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76. NUSSBAUM, *supra* note 23, at 169.

77. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 66 (2006).

guided” by either a general theory (Nussbaum) or by the diverse values underlying the First Amendment’s religious clauses (Greenawalt), we should let discretion—including judicial discretion—decide the issue on a case-by-case basis by appealing to some combination of common sense, judgment of the contemporary *Zeitgeist*, and precedent. I do not think that this approach should be rejected out of hand. In oral comments, my fellow symposiast Andrew Koppelman and my colleague James Weinstein have both made the point that the Court’s approach in the twentieth century to cases involving conscientious objection need not indicate that there are any great *practical*, legal problems with respect to First Amendment religion clause jurisprudence in general. It has been some time since the country has had military conscription. Thus, the Court has not been faced with draft exemption cases that would further “push the envelope.” And, it can plausibly be maintained, the rule of law has not been threatened by a rash of cases seeking exemption from other statutes on the basis of subjective free exercise claims.

I certainly admit the force of these considerations. Nonetheless, the subjective approach to freedom of conscience, which has become increasingly implicated in the interpretation of free exercise, seems to me to be conceptually problematic. Consequently, in what follows I should like to consider an alternative line of thought. Because I am neither a “practical politician” nor a lawyer, let alone a legal scholar of constitutional law, I make no claims concerning either the political viability or the constitutional plausibility of the approach I consider.

#### IV. THE FIRST AMENDMENT’S RELIGION CLAUSES: INDIVIDUAL- CONSCIENCE VERSUS INSTITUTIONAL- PRIVILEGE INTERPRETATIONS

In the Catholic tradition, the phrase “freedom of religion” has generally focused on the freedom of the Church—the idea that the Church properly possesses a degree of independence from secular control that it needs in order to carry out its divine mandate in the world until the *parousia*, when all secular rule will cease. From at least the time of the conflict between Pope Gregory VII and the Holy Roman Emperor Henry IV in the eleventh century, the Church has resisted claims of the supremacy of the secular state. Indeed, according to George Weigel, the resolution of the medieval investiture controversy by the Concordat of Worms in 1122—according to which the Church retained ultimate authority to appoint bishops and other ecclesiastic officials—entailed that the state:

[W]ould not be all in all. . . . Indeed, the state had to acknowledge that there were some things it couldn't do because it was simply incompetent to do them—and that acknowledgment of limited competence created the social and cultural conditions for the possibility of what a later generation of constitutions and democrats called the limited state.<sup>78</sup>

Of course, the American Constitution owes much to the Protestant Reformation and the subsequent secularizing Age of Enlightenment of the eighteenth century. Nonetheless, it is possible to read the First Amendment's religion clauses as proclaiming (1) a principle of the relative autonomy and independence from secular control of the various ecclesial communities—churches, in the plural and the Lockean sense—as well as (2) a principle of government neutrality—indifferentism—with respect to these religious institutions.

Although an institutional, rather than individualist, interpretation of the religion clauses encounters obstacles of both history and late twentieth-century jurisprudence, it does have what seem to me to be some advantages. As I have already indicated, a case can be made that the development of religion clause jurisprudence over the last sixty years or so constitutes a *reductio* of an individualist or subjective rights-of-conscience approach to those religion clauses. As we saw, the traditional, Thomistic conception of conscience is really just the conception of any particular moral judgment or assessment of practical reason by an individual person. As Steven D. Smith has demonstrated, although not with particular reference to the Thomistic conception, it is difficult to establish a case for political or judicial deference to conscience—in this general sense—*as such*.<sup>79</sup> Although a religiously based—indeed, Protestant—notion of conscience originally grounded the First Amendment's religion clauses, secularizing interpretation of the clauses in the later twentieth century, which has no doubt been grounded in the declension of religious belief among the country's intellectual and economic elites, has led to the paradoxical situation in which the religion clauses are no longer interpreted as really pertaining to religion. In the words of Smith:

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78. GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 101 (2005), *quoted in* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59, 60 (2007).

79. *See* Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

The modern discourse of conscience thus presents a puzzle. Generalizing, we might say that over the centuries since Thomas More and Roger Williams solemnly invoked conscience, the then prevailing metaethical objectivism [or, at least, a *religiously based* metaethical objectivism] has come to be highly contested, at least in the more reflective sectors of our society, and at least in some neighborhoods has been to a significant extent displaced by varieties of conventionalism, subjectivism, and (occasionally) nihilism. At the same time, though, the theme of freedom of conscience has arguably become more widespread and commonplace—perhaps even platitudinous—in our public rhetoric. Thus, as the assumptions under which the case for freedom of conscience is strongest have become embattled, the opinion favoring that freedom has, if anything, become less and less controversial.

What to make of this situation? One natural inference is that the modern invocation of freedom of conscience is partly parasitic on older ways of thinking that many of those who invoke conscience today might find problematic. Another speculation is that if we look closely at the modern invocations of conscience, we will find uncertainty, confusion, and perhaps even a kind of degradation.<sup>80</sup>

Smith’s diagnosis is, in my view, accurate. As I have already mentioned, one option is simply to live with the “uncertainty, confusion, perhaps even a kind of degradation”—even in our First Amendment jurisprudence—relying on a case-by-case appeal, as I put it above, “to some combination of common sense, judgment of the contemporary *Zeitgeist*, and precedent.” Another approach is, in effect, to curtail the First Amendment’s religion clauses, especially the Free Exercise Clause, as sources of individual rights. One variant of this view has been advanced by my former colleague James W. Nickel, who has argued that commitment to some distinctively religious conception of freedom is not needed if other “basic liberties” are guaranteed: “[o]nce we have all of the basic liberties, religious belief and activity are an application area whose content is adequately covered by more general rights and liberties.”<sup>81</sup> Somewhat similarly, our fellow symposiast Brian Leiter has concluded:

[T]here is no principled reason for legal or constitutional regimes to *single out* religion for protection; there is no moral or epistemic consideration that favors special legal solicitude towards beliefs that conjoin *categorical commands* with *insulation from evidence* [Leiter’s characterization—obviously controversial—of a set of beliefs of which “religious beliefs” is a proper subset]. Second, the general principled arguments for toleration noted earlier, both the broadly Rawlsian and Millian ones, do justify legal protection for liberty of conscience, which would necessarily *encompass* toleration of religious beliefs. Third, and perhaps most controversially, the general reasons for being skeptical that there are special reasons to tolerate religion *qua* religion (because of the special potential for harm that attaches to the conjunction of *categorical demands* based

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80. *Id.* at 358 (footnote omitted).

81. James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 942 (2005).

on beliefs *insulated from evidence*) suggest that we must be especially alert to the *limits* of religious toleration imposed by the side-constraints.<sup>82</sup>

Leiter concludes his extended analysis with the appealing pragmatic suggestion that “[i]t may turn out there is no principled reason to tolerate religion *qua* religion, but there may still be compelling practical reasons to think the alternatives are worse.”<sup>83</sup>

Still along somewhat similar lines, Christopher L. Eisgruber and Lawrence G. Sager propose to substitute, in our understanding of religion in politics and jurisprudence, the concept of “Equal Liberty” for the metaphor of “separation of church and state.”<sup>84</sup> They see

concerns of fairness as lying at the very heart of free exercise exemption controversies. What is critical from the vantage of Equal Liberty is that no members of our political community be disadvantaged in the pursuit of their important commitments and projects on account of the spiritual foundations of those commitments and projects.<sup>85</sup>

The “underlying concern” of equal liberty, with its insistence “on equal status for people with diverse spiritual views,”<sup>86</sup> fits nicely with concepts of justice deriving from contemporary liberal political theory. Eisgruber and Sager’s concern is with *distributive* justice, which—to revert to Aristotle’s characterization—involves a proportional or geometrical notion of equality, rather than an arithmetical one. That is, in retaining or enjoining certain free exercise exemptions, equal liberty will not necessarily attempt to achieve its goal of according all citizens “equal regard”<sup>87</sup> by advocating that, if one citizen is to receive a free exercise exemption, each and every citizen must be accorded the same exemption.

As Thomas Hobbes long ago noted, the concept of distributive justice as *proportional* equality “is busied about the dignity and merits of men.”<sup>88</sup> In the absence of a principle of applying laws or policy in exactly the same way to all citizens, such as Aristotle’s arithmetical equality, in

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82. Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1, 26 (2008).

83. *Id.* at 27.

84. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4–5 (2007).

85. *Id.* at 15.

86. *Id.* at 19.

87. *Id.* at 13.

88. THOMAS HOBBS, MAN AND CITIZEN 139 (Bernard Gert ed., Hackett Publ’g Co. 1991) (1642).

what sense does a legal system that has the following effects treat all the relevant persons equally?

- (1) On the basis of the Free Exercise Clause, it grants an exemption that excuses a Roman Catholic priest—but not any other sort of clergyman or a psychiatrist or psychological counselor—from a judicial obligation to reveal information imparted to him under the seal of confession.
- (2) On a different basis, it grants an exemption that excuses a wife from testifying against her husband and vice versa—but does not extend similar immunity to unwed domestic partners or to all other family members.
- (3) It does *not* grant any such exemption from any legal obligation of a person to supply incriminating information confidentially imparted to him by a close friend to whom the person in question has made a promise of confidentiality.

It is far from obvious what the relevant idea of equal treatment might be in these cases. In the first case, is it supposed to devolve from the following, quite questionable line of reasoning? There is a special burden that the seal of confession places on a priest, a burden *not* shared by a Protestant clergyman, a professional counselor, or a layperson, and the priest is entitled as a matter of “compensation” for bearing this burden—as a matter of proportional equality—to receive a special judicial exemption.

To consider another case, Eisgruber and Sager contend that “obviously, Equal Liberty entails that if [the city of] Richmond accommodates a secularly motivated Ms. Campbell [who wishes to set up a soup kitchen to feed the homeless at her residence in a area where zoning ordinances restrict business activity], then it is constitutionally obliged to accommodate her religiously motivated neighbor, too”<sup>89</sup>—and vice versa. But what of a third woman resident in the same neighborhood whose family’s poverty could be relieved by her opening a tearoom in her home but whose personal circumstances prevent her from engaging in such an enterprise in a properly zoned area? In a society characterized by ethical and religious pluralism of the sort emphasized by Eisgruber and Sager, it would seem difficult to achieve agreement concerning relevant criteria—issues of merit or desert, in Hobbes’s language—for achieving the proportional equality at the heart of the notion of equal liberty.

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89. EISGRUBER & SAGER, *supra* note 84, at 13.

Such considerations may lead to a measure of sympathy with the majority decision of Justice Scalia in *Employment Division v. Smith*.<sup>90</sup> Alfred Smith and Galen Black, members of the Native American Church, had been dismissed from employment in a drug rehabilitation clinic because of their ingestion of peyote as part of the ritual of their church.<sup>91</sup> They were denied unemployment compensation by the State of Oregon because their dismissal had been for misconduct.<sup>92</sup> The Oregon Court of Appeals held that denying them unemployment benefits for their religious use of peyote violated their free exercise First Amendment rights.<sup>93</sup> The State of Oregon appealed another ruling of the Oregon Supreme Court favorable to Smith and Black to the U.S. Supreme Court, which returned the case to Oregon courts to determine whether the sacramental use of peyote violated Oregon's state drug laws.<sup>94</sup> The Oregon Supreme Court found that this use did indeed violate Oregon state law but also found that this feature of state law violated the First Amendment's Free Exercise Clause.<sup>95</sup> The U.S. Supreme Court reversed the judgment of the Oregon Supreme Court.<sup>96</sup> Writing for the majority, Justice Scalia asserted that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>97</sup> In Justice Scalia's opinion:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.<sup>98</sup>

Justice Scalia appears to be well disposed to the policy of some states of making an "exception to their drug laws for sacramental peyote use."<sup>99</sup> "But," he continues:

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90. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

91. *See id.* at 874.

92. *See id.* at 875.

93. *Id.*

94. *See id.* at 875-76.

95. *See id.* at 876.

96. *Id.* at 890.

97. *Id.* at 878-79.

98. *Id.* at 881.

99. *Id.* at 890.

to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. 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; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>100</sup>

As Kent Greenawalt has noted, Justice Scalia qualified his opinion in two ways, “[l]argely to accommodate precedents that flew in the face of his general approach.”<sup>101</sup> I have already alluded to one qualification above: cases that involve the “Free Exercise Clause in conjunction with other constitutional protections.”<sup>102</sup> Justice Scalia apparently is willing to allow such “hybrid” accommodations. In his trenchant criticism of the “hybrid analysis,” Greenawalt points out:

[I]f free exercise claims are to carry genuine weight in hybrid cases when someone challenging a law relies on two claims, judges will presumably have to evaluate the strength of the free exercise claims in just the manner to which Justice Scalia objects when free exercise claims stand alone. All these problems suggest that the Court probably does not regard this second sort of hybrid situation seriously; rather the concept is jerry-built to cover the Amish decision.<sup>103</sup>

From a purely theoretical perspective, it would certainly be much neater to push what Greenawalt has termed Justice Scalia’s “general approach” in *Smith* towards the reductive-eliminative theory of Nickel, according to which any valid free exercise claims must be cashed out in terms of other constitutional values. Of course, Justice Scalia does not want simply to ignore stare decisis—or the actual presence of the First Amendment’s religion clauses *in addition to* other enumerated rights with their underlying constitutional values in the Bill of Rights. And there is a well-established tradition in common law for recognizing certain free exercise exemptions, such as conscientious objection to military service and the seal-of-confession privilege from having to give sworn testimony. Nonetheless, the *Smith* decision places in sharp contrast

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100. *Id.*

101. GREENAWALT, *supra* note 77, at 80.

102. *Smith*, 494 U.S. at 881.

103. GREENAWALT, *supra* note 77, at 80–81. The reference is to *Wisconsin v. Yoder*, which invalidated compulsory school attendance laws as applied to Amish parents who refused, on religious grounds, to send their children to school. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). Justice Scalia’s opinion in *Smith* interprets this decision as involving a hybrid of free exercise rights and parental rights or, in the actual words of *Yoder*, “the interests of parenthood.” *See Smith*, 494 U.S. at 881 n.1 (quoting *Yoder*, 406 U.S. at 233).

two different theoretical approaches to the equal treatment enjoined by an individual-conscience interpretation of the First Amendment's religion clauses. One can attempt to balance, judicially, considerations of the common good or public welfare with "serious"—but not necessarily religiously based—claims of conscience on an ad hoc, case-by-case basis for all laws and all conscientiously held beliefs, to paraphrase Justice Scalia, in an attempt to achieve some semblance of Aristotelian "proportional equality." Or one can, much more simply but also much more severely, aim for "arithmetic equality" by maintaining that "equal treatment" is best achieved by forbidding *any* free exercise exemptions to any "otherwise valid law prohibiting conduct that the State is free to regulate."<sup>104</sup> The latter approach would largely limit legitimate free exercise claims to those based on the infringement of the right to engage private or public worship, in a fairly restricted sense of "worship."

Finding a principled *via media* between these two extremes in terms of an individual-conscience-based interpretation of the First Amendment's religion clauses has proved difficult. Perhaps an institutional-privilege-based interpretation could fare somewhat better. For some years now, Frederick Schauer has been an advocate for a more institutionally sensitive approach to First Amendment rights, such as freedom of speech. Of course, institutionally relevant distinctions such as that between ideological advocacy and commercial advertisement have already found their way into constitutional jurisprudence. But Schauer suggests that a more "institutional First Amendment would thus move the inquiry away from direct application of the underlying values of the First Amendment to the conduct at issue and towards the mediating determination of whether the conduct at issue was or was not the conduct of one of these institutions."<sup>105</sup> He imagines

a First Amendment that less grudgingly accepted colleges and universities as appropriate areas for highly (externally) unregulated inquiry, and thus as domains in which the array of privileges in the strict sense—academic freedom as a genuine immunity from certain laws of general application—was constitutionally guaranteed. Much the same might be said about libraries . . . . Similar arguments could support an analogous privilege for scientific research, even that scientific research that does not have a home within a university. For all these institutions, the argument would be that the virtues of special autonomy—

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104. *Smith*, 494 U.S. at 879.

105. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005).

special immunity from regulation—would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural (or at least most comfortable) home within the boundaries of the First Amendment.<sup>106</sup>

With respect to a more institutional approach to the First Amendment, Schauer notes:

Obviously, defining the category of people who receive the privilege will be based both on the reasons for having the privilege and the reasons for locating it in a particular institution, but the case-by-case inquiry will largely consist of applying the rule, rather than applying the reasons lying behind the rule directly to individual cases.<sup>107</sup>

More recently, Richard W. Garnett and others have contemplated extending an institutional-privilege type of analysis to the First Amendment's religion clauses. This sort of analysis is, I believe, in its early stages, and I shall not attempt to deal with its details. Its fundamental idea, however, is that, just as universities, libraries, or news media might receive certain First Amendment protections or privileges that would extend to their representatives or members, so also might "churches"—what I have termed ecclesial communities. Rather than attempting to explore details concerning which I do not have particular competence, I conclude this essay with several comments concerning potential points of controversy that would appear to attach to this approach to the First Amendment's religion clauses.

(1) The institutional-privilege analysis makes it more difficult to engage in an eliminative-reductive approach to the presence of religion in the Constitution. The tendency of much contemporary constitutional jurisprudence, as I have previously noted, has been to attempt to remove "religion *as such*" from the First Amendment—by interpreting the Free Exercise Clause as pertaining to subjective, individual matters of conscience that need not be religiously grounded. The present analysis would forthrightly admit that religion, as represented by ecclesial communities, constitutes a social, moral, and legal category of continuing significance in American life. This analysis would, in fact, coincide more closely with the traditional Catholic conceptualization of issues of religious freedom as issues pertaining to the freedom of the Church. The obvious difference would be that the religion clauses would be understood, in the case of Free Exercise Clause, to guarantee the freedom of *all* legitimate ecclesial communities while, in the case of the Establishment Clause, to guarantee governmental impartiality with respect to these communities. The *fact*

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106. *Id.* at 1274–75.

107. *Id.* at 1275.

that the Constitution accords a special place to religion has seemed evident, at least prior to the eliminative-reductive jurisprudence of the last half century or so. The *justification* of the special treatment accorded by the Constitution to religion is another issue—an issue that perhaps might be better kept separate by the institutional-privilege approach to the religion clauses.<sup>108</sup>

Justification of religion's place in the public square—and, indeed, the issue of *what* that place should be—is likely to remain controversial matters for the foreseeable future. There is, of course, no lack of secular arguments drawn from history for according privileges to ecclesial communities. For example, it can be argued that such communities serve as a buffer between the desire of individual citizens for maximal freedom, on the one hand, and the tendency of the state to assert its hegemony with respect to all aspects of the lives of its citizens, on the other hand. Another very common argument, extending back to antiquity, is that ecclesial communities can serve the state by buttressing the moral scruples of citizens that are conducive to secular welfare. Although they are not without force, I believe that such secular, religiously neutral arguments probably are not conclusive. However, a more important point is that from the perspective of many persons—at least, many religious persons—they are not very important; they do not get at the *real* importance of faith or religious practice. From my own perspective and, I think, that of many other persons, a liberal neutral justification for the state's recognition of certain privileges and obligations distinctive to ecclesial communities is not necessary, nor in all likelihood possible. However, it is undeniable that some persons believe that special constitutional recognition of “religion as such” is problematic or that, at least, such

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108. I certainly recognize that the problem, in contemporary First Amendment jurisprudence, of determining what constitutes a legitimate issue of conscience that should be accorded accommodation would be paralleled, in a more institutionally oriented approach, to determining what constitutes a legitimate ecclesial community or church. My own inclination is to think that the latter issue should be approached partly from an historical perspective. Limiting whatever privileges that are granted under the religion clauses to members of communities with established history of such-and-such years would eliminate ad hoc formation of communities for the exclusive or primary purpose of obtaining for its members such an accommodation. Although it might be argued that such a policy would initially discriminate against new ecclesial communities, this fact does not seem to me to be an overwhelmingly important objection. I have also purposely left open the issue of whether, or to what degree and how, any accommodations accorded to ecclesial communities under the institutional approach could properly be trumped by a compelling state interest.

recognition would require some sort of neutral justification that should, in principle, be acceptable to all reasonable citizens, whether religious, nonreligious, or antireligious. Such persons will naturally be skeptical of the institutional-privilege approach that I am considering.

It is at least conceivable that in time religion will become of no importance to the vast majority of American citizens. In such circumstances, there would seem to me to be a real problem about justifying the continuing presence of the religion clauses in the First Amendment. In such imagined circumstances, any such possible justification—were it to be effective—would apparently need to be secular and in some sense neutral. But I do not think that those circumstances yet obtain in fact.

(2) The institutional-privilege analysis assumes that the Bill of Rights need not be restricted exclusively to the rights of individual citizens considered simply as such. This issue, of course, is a complex one, which I shall not at present attempt to explore further than quoting the animadversions of Frederick Schauer:

But it is hardly apparent that the First Amendment is centrally about individual rights in any strong sense. Not only does the First Amendment frequently and properly provide protection to other-regarding and harmful acts, a surprising feature for a truly individual right, but a large number of the widely accepted justifications for freedom of speech are about the social and not individual value of granting to individuals an instrumental right to freedom of speech. If we embrace the First Amendment because it promotes the values of the marketplace of ideas as a facilitator of the search for truth, or the value of checking government abuses, or even the value of facilitating democratic deliberation among the populace, [for example,] then we perceive a right to freedom of speech that lies not at moral bedrock, but is empirically contingent and instrumental to something deeper.<sup>109</sup>

I must mention that one area in which contemporary First Amendment jurisprudence seems to me to have developed in an extremely subjective, individualistic direction is in decisions concerning conscience-based exemption from military service on which I earlier focused. It is not obvious to me how the institutional-privilege approach could or should be applied to the First Amendment's religion clauses in order to justify all of what the modern Supreme Court has decided on this matter. But, to speak frankly, it seems to me that these decisions constitute a chaotic whole, verging on the incoherent. So I am not convinced that any rational approach to the religion clauses *should* support all of what the Court has decided with respect to military exemption.

(3) The institutional-privilege analysis does not assume that the fundamental rationale behind the First Amendment's religion clauses is

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109. Schauer, *supra* note 105, at 1268–69 (footnotes omitted).

the promotion of persons' equality, according to some conception or theory of equality. It seems relatively uncontroversial that a consequence of the Establishment Clause is the promotion of equality among ecclesial communities in the form of its forbidding the establishment of any ecclesial community as the "national church"—and, by extension, its prohibition of the government's showing favoritism towards any such community or group of such communities. But liberal political theory seems to be the main source of the assumption that the *fundamental* concern of the Establishment and Free Exercise Clauses is—or *should* be—the promotion of some conception of public stance of equality of respect toward persons' religions, nonreligious, or antireligious serious *moral* convictions—or, what is not necessarily the same thing, their serious convictions concerning what is really important in life. Indeed, we have seen that this assumption lies at the heart of one common contemporary conception of freedom of conscience. Whether such a public stance is in itself a good thing is open to debate. But, even if it is, it does not seem to me to be necessary—or, for that matter, prudent—to adopt an interpretation of the First Amendment's religion clauses according to which it is freedom of conscience, in this sense, that they seek to promote. Even if one believes that some conception of the equality of citizens is the most fundamental of constitutional values, there are surely other such values, and not everything in the Constitution need be interpreted in terms of that one particular fundamental value.

## V. CONCLUSION

To conclude, I certainly recognize that the institutional-accommodation approach to the First Amendment's religion clauses is unlikely to be equally attractive to all persons, irrespective of their legal, political, or religious commitments. Nor is this approach inconsistent with the doctrine that it is in some cases morally permissible—or even morally obligatory—to accommodate *individual* consciences, whose scruples are not necessarily religious, with respect to statutes or governmental policies to which they object. However, if such statutes or policies are truly immoral, allowing or mandating exemptions based on the Free Exercise Clause is surely not the optimal legal or political means for dealing with the problem. Nor, I think, is it the optimal means in the case of statutes or policies the morality or wisdom of which are contested on the basis of considerations that are not clearly religious in the commonly accepted sense of that term.

