ON THE CONSTITUTIONALITY AND POLITICAL MORALITY OF GRANTING CONSCIENCE-PROTECTING EXEMPTIONS ONLY TO RELIGIOUS BELIEVERS[1]

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> *Some legal and public health experts say that one solution [to the threat vaccination exemptions pose to public health] would be to get rid of personal and philosophical exemptions, and to retain the religious ones . . .*[3]

I. Constitutionality

According to the Constitution of the United States, as interpreted and enforced by the Supreme Court of the United States, neither the federal government nor state government may prohibit the free exercise of religion.[4] The free exercise norm is conventionally understood as a right: the right to the freedom both to practice ("exercise") one's own religion (if one is a religious believer) and not to practice a religion not one's own. That the free exercise right is an antidiscrimination right is not disputed; whether it is more than an antidiscrimination right *is* disputed.

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[1] c 2015, Michael J. Perry. Preliminary draft. Please treat accordingly.

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[3] Denise Grady, "Vaccinations Are States' Call," New York Times, Feb.16, 2015. The quoted sentence ends (where I have put the ellipsis) with this: "but enforce them strictly."

[4] The First Amendment to the Constitution states, in relevant part: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."

As an antidiscrimination right, the free exercise right forbids government to discriminate against a person—to treat a person, A, less well than another person, B—on the basis of a religion-specific reason regarding the person's conduct.[5] Examples of such religion-specific reasons: A (unlike B) is engaging in Islamic conduct; A is engaging in religiously based conduct;[6] A is not engaging in Christian conduct; A is not engaging in religiously based conduct.[7] An instance of treating A less well

[5] See Employment Division v. Smith, 494 U.S. 872. --- (1990):

> [T]he "exercise of religion" often involves . . . the performance of (or abstention from) physical acts . . . [A] State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statutes that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

See also Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

When I say, in the text, "on the basis of" a religion-specific reason, I mean it in the sense that government would not be treating A less well than B "but for" the religion-specific reason.

Government discrimination against a person on the basis of a reason, including a religion-specific reason, regarding the person's beliefs or speech implicates, and sometimes violates, the right to freedom of thought and speech. With respect to beliefs and speech, the free exercise right is redundant. Not that redundancy is never salutary, but it is with respect to *conduct*—conduct other than speech—that the free exercise right most matters.

[6] Cf. Lawrie Breen, "A Chinese Puzzle," The Tablet [London], Mar. 5, 2005 (reporting that "new regulations confirm that Beijing perceives religion as unscientific, superstitious and an enemy of progress"). "Last year a secret document, issued by the Central Committee's Propaganda Department, called for a new drive to promote Marxist atheism." Id.

[7] By "religiously based" conduct I mean conduct animated by one or more of one's religious convictions and commitments.

than B can take the form of punishing A, of otherwise imposing a burden on A, or of withholding from A a benefit that is granted to B.[8]

In *Employment Division v. Smith,*[9] five justices of the Supreme Court ruled that the free exercise right is nothing more than an antidiscrimination right.[10] According to a broader understanding of the right, however—an understanding that attracted the support of the four other justices[11]—the free exercise right is more than an antidiscrimination right: The right not only forbids government to discriminate on the basis of a religion-specific reason regarding conduct; the right also requires government, even if it is not discriminating on the basis of such a reason, to accommodate a religious believer by exempting the religiously based choice she wants to make from a law (or other government action) that significantly burdens her ability to make the choice—her ability, that is, to act in accord with her

[8] As no more than an antidiscrimination right, the free exercise right reflects what Boucher and Laborde, in their excellent commentary on Brian Leiter's *Why Tolerate Religion?* (2013), call "a theory of toleration;" it does not reflect what they call "a theory of legal exemptions." See Francois Boucher & Cecile Laborde, "Why Tolerate Conscience," Criminal Law & Philosophy (published online, Nov. 11, 2014).

[9] 494 U.S. 872 (1990).

[10] However, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. --- (2012), the Supreme Court ruled that although the free exercise right is only an antidiscrimination right with respect to government action that interferes with "outward physical acts," it is a broader right with respect to government action that interferes with "internal church decision that affects the faith and mission of the church itself." For expressions of skepticism about the coherence of that bifurcated understanding of the free exercise right, see Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, & Samuel L. Bray, The Constitution of the United States 1133 (2nd ed. 2013); Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism," 99 Virginia Law Review 917, 975 (2013).

[11] And that prevailed before the Supreme Court changed course in *Employment Division v. Smith*. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). It is noteworthy that during the period when it prevailed, the broader understanding of the free exercise right had little practical bite. See, e.g., Ira Lupu, "*Hobby Lobby* and the Dubious Enterprise of Religion Exemptions," 38 Harvard Journal of Law & Gender --- (forthcoming, 2015).

religious convictions and commitments—unless not exempting the choice is the least restrictive means of serving a compelling government interest.[12]

Although ruling, in *Employment Division v. Smith*, that the free exercise right is only an antidiscrimination right and that government is therefore not constitutionally required to accommodate religious believers by exempting religiously based conduct, the Court emphasized that government is constitutionally free to exempt such conduct. An important question arises when government chooses to grant what we may call a "conscience-protecting" exemption (a) to religious believers, so that they can act in accord with their religious convictions and commitments, including their religiously based moral convictions and commitments, but (b) not to persons who are not religious believers but who nonetheless want to be able to act in accord with *their* moral convictions and commitments: Is it constitutional for government to grant conscience-protecting exemptions only to religious believers?

In *Welsh v. United States* (1970), four members of the Supreme Court avoided the question in the preceding paragraph by construing the conscientious objector provision of the Universal Military Training and Service Act, which by its terms provided only for religiously based conscientious objection, also to provide for conscientious objection not

[12] As more than an antidiscrimination right—as a broad, accommodationist right—the free exercise right reflects what Boucher and Laborde call "a theory of legal exemptions" as well as "a theory of toleration." See n. #.

Constitutional scholars too, no less than Supreme Court justices, are divided about which of the two understandings of the free exercise right—the narrow, antidiscrimination understanding that prevailed in *Employment Division v. Smith* or the broader, accommodationist understanding—is the more defensible understanding, in the sense of more faithful to the original understanding of the right. For a defense of the accommodationist understanding as more faithful to the original understanding, see Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 Harvard Law Review 1409 (1990). For a defense of the antidiscrimination understanding as more faithful, see Phillip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," 60 George Washington Law Review 915 (1992).

religiously based.[13] In an opinion that supplied the crucial fifth vote in support of the Court's judgment, Justice Harlan answered the constitutional question; he explained that in his view, the conscientious objector provision "runs afoul of the religion clauses of the First Amendment" by discriminating against those who are not religious believers.[14] "[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."[15]

Justice Harlan's sense that "any such distinctions" are unconstitutional was correct, but his reliance on the Establishment Clause was problematic.[16] It is far from obvious that by granting conscience-protecting exemptions only to (all) religious believers (i.e., who otherwise qualify), government violates even the broadest understanding of the nonestablishment norm, much less a narrower understanding: Granting such exemptions only to religious believers does not affirm—or presuppose or entail the affirmation of—any religious tenet; it does not, in Andrew Koppelman's articulation of what the broadest understanding of the nonestablishment norm forbids government to do, "declare religious

[13] Welsh v. United States, 398 U.S. 333, 335 (1970) (Black, J., joined by Douglas, Brennan, & Marshall, JJ.).

[14] Id. at 345.

[15] Id. at 356.

[16] The First Amendment to the Constitution states, in relevant part: "Congress shall make no law respecting an establishment of religion . . ." The nonestablishment norm applies to state government as well as to the federal government. See Michael W. McConnell, "Accommodation of Religion: An Update and Response to the Critics," 60 George Washington Law Review 685, 690 n.19 (1992): "The text [of the First Amendment] states the 'Congress' may make no law 'respecting an establishment' of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this 'federalism' aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion."

truth."[17] The reason: There are *secular* rationales for granting exemptions only to religious believers.[18]

However, by granting such exemptions only to religious believers, government does violate the prevailing understanding—the narrow, antidiscrimination understanding—of the free exercise right: Granting conscience-protecting exemptions only to religious believers discriminates against those who are not religious believers on the basis of a religion-specific reason regarding conduct. More precisely, granting such exemptions only to religious believers is to treat less well those who are not religious believers based on the fact that the conduct that those who are not religious believers want to engage in, unlike the conduct that the religious believers want to engage in, is not religiously based conduct.[19] Justice Harlan's bottom line was correct: It is not constitutional for government, if it grants conscience-protecting exemptions, to grant them only to religious believers.[20]

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[17] Government must be "neutral," insists Koppelman, on the question whether one or another religious tenet is true. "What [government] may not do—what [nonestablishment] doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth." Andrew Koppelman, Defending American Religious Neutrality 3 (2013); see also id. at 84, 90, 91.

[18] See Boucher & Laborde, n. #, Christopher J. Eberle, "Religion and Insularity: Brian Leiter on Accommodating Religion," San Diego Law Review (forthcoming, 2015).

For an argument that granting exemptions to religious believers does not violate the original understanding of the nonestablishment norm, see Douglas Laycock, "Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause," 81 Notre Dame Law Review 1793 (2006).

[19] Douglas Laycock too argues that granting conscience-protecting exemptions only to religious believers is inconsistent with the free exercise right: Douglas Laycock, "Religious Liberty as Liberty," 7 Journal of Contemporary Legal Issues 313, 326-37 (1996).

[20] An important question put to me by Dan Conkle: Is the Supreme Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. --- (2012), consistent with the position that granting exemptions only to religious believers is unconstitutional? On *Hosanna-Tabor*, see n. #.

That government is not constitutionally free to grant conscience-protecting exemptions only to religious believers is not, in the United States, controversial as a practical—political—matter: It is not at all uncommon for the federal government, when it grants exemptions to religious believers so that they can act in accord with their religiously based moral convictions and commitments, also to grant exemptions to persons who are not religious believers so that they can act in accord with *their* moral convictions and commitments, even though their moral convictions and commitments are not religiously based. Micah Schwartzman's list illustrates the point:

> [F]ederal and state legislation often goes beyond the category of religion to protect non-religious ethical and moral beliefs. For a recent example, the Affordable Care Act . . . includes an exemption from its minimum coverage provision—aka the "individual mandate"—for members of a recognized "health care sharing ministry," which the statute defines as a non-profit organization whose members "share a common set of *ethical or religious beliefs* and share medical expenses among members in accordance with those beliefs." Similar language is used in federal legislation prohibiting public officials from requiring health care providers to perform or assist with abortions or sterilizations when doing so would violate their "religious beliefs or moral convictions." The federal government is also barred from requiring employees to participate in the administration of the death penalty "if such participation is contrary to the *moral or religious convictions* of the employee." Numerous other federal and state statutes and regulations involving foreign aid, counseling services, vaccinations, pharmacies, organ donation, assisted suicide, and, of course, military service follow the same pattern of expressly protecting not only religious convictions but also ethical and moral beliefs, conscience, or some combination thereof.[21]

[21] Micah Schwartzman, "Religion as a Legal Proxy" at 14 (2014) (citations omitted), http://ssrn.com/abstract=2416254. See also Lynn D. Wardle, "Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future," 9 Ave Maria Law Review 1 (2010).

But then there is RFRA—the Religious Freedom Restoration Act of 1993—which by its explicit terms grants exemptions (when doing do does not disserve a "compelling" government interest) only to religious believers. Specifically, RFRA prohibits the federal "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[22]

How should the Supreme Court respond if one who is not a religious believer seeks a conscience-protecting exemption under a statute that, like RFRA, grants such exemptions only to religious believers? Is there, all things considered, a more appropriate way to respond than the way the Court responded in *Welsh v. United States*, in which one who was not a religious believer sought conscientious objector status under the Universal Military Training and Service Act, which by its explicit terms granted conscientious objector status only to (otherwise qualifying) religious

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Andy Koppelman writes: "Other, more specific categories [than "religion"] are either too sectarian to be politically usable, too underinclusive, or too vague to be administrable." Andrew Koppelman, Nonexistent & Irreplaceable: Keep the Religion in Religious Freedom," Commonweal, Apr. 10, 2015, https://www.commonwealmagazine.org/nonexistent-irreplaceable. However, the *twofold* categories that Schwartzman quotes in the text accompanying this note—"ethical or religious beliefs;" "religious beliefs or moral convictions;" "moral or religious convictions"—are a conclusive, real-world counterexample to Koppelman's claim. See also Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality op'n)): "[The Universal Military Training and Service Act exempts] from military service 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."

[22] 42 U. S. C. §§2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc–5(7)(A). As of October 2014, twenty states have enacted laws that are substantially like RFRA, except that whereas RFRA applies only to the federal government, each state law applies to the government of the state whose law it is. See http://rfraperils.com/.

believers? I concur in Douglas Laycock's judgment that responding the way the Court responded in *Welsh* is optimal, namely, by broadening the coverage of the law at issue rather than by invalidating the law.[23] In *Welsh*, the Court construed the Act to exempt "from military service 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."[24]

II. Political Morality

The second of the two main questions I address here is not about constitutionality but about—for want of a better term—political-morality. Let us assume, for the sake of discussion, that it *is* constitutional—that it does *not* violate the free exercise right—for government to grant conscience-protecting exemptions only to religious believers. This question nonetheless remains: When government grants conscience-protecting exemptions to religious believers, should it grant them to nonbelievers too?

This position, which is reflected in the internationally recognized human right to religious and moral freedom, answers the foregoing question: When it can do so without disserving a weighty government interest, government should accommodate conscientious objection by granting conscience-protecting exemptions to religious believers and nonbelievers alike; that is, government should grant conscience-protecting

[23] Laycock, "Religious Liberty as Liberty," n. #, at 336-37.

[24] Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality op'n)). Cf. Mark L. Rienzi, "The Case for Religious Exemptions—Whether Religion Is Special or Not," 127 Harvard Law Review 1395, 1409n.39 (2014) (citations omitted): "The federal government has since expressly changed its conscientious objector provisions to embrace both secular and religious conscience objections."

Responding the way the Court responded in *Welsh*—by broadening RFRA's coverage—would have the great virtue of bringing RFRA into alignment with Article 18 of the International Covenant on Civil and Political Rights, to which the United States has been a party since 1992. See Perry, "Freedom of Conscience as Religious and Moral Freedom," supra n. #, at 126-33.

exemptions—and should do so without regard to whether the conscientious objection is religiously based.[25]

Let's examine the right to religious and moral freedom, which is the right to the freedom to live one's life in accord with one's religious and/or moral convictions and commitments. The articulation of the right in Article 18 of the International Covenant on Civil and Political Rights (ICCPR) is canonical: As of [date], the great majority of the countries of the world—more than 86%—are parties to the ICCPR, including, as of 1992, the United States.[26] Article 18 states:[27]

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[25] Compare that answer with this narrower answer, which is agnostic about whether government should accommodate conscientious objection by granting conscience-protecting exemptions: If government grants conscience-protecting exemptions, it should grant them to religious believers and nonbelievers alike.

[26] As of [date], 167 of the 193 members of the United Nations were parties to the ICCPR, including the United States.

[27] Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is substantially identical:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 12 of the American Convention on Human Rights is also substantially identical:

> 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
>
> 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[28]

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3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

[28] Article 18 of the ICCPR is an elaboration of Article 18 of the Universal Declaration: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Another international document merits mention: The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the UN General Assembly on Nov. 25, 1981. See Symposium, "The Foundations and Frontiers of Religious Liberty: A 25th Anniversary Celebration of the

Note the breadth of the right that according to Article 18 “[e]veryone shall have:” the right to freedom not just of “religion” but also of “conscience.” The “right shall include freedom to have or adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching" (emphasis added). Article 18 explicitly indicates that “belief” centrally includes moral belief when it states that "[t]he State parties to the [ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious *and moral* education of their children in conformity with their own convictions" (emphasis added).[29]

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by one or more individuals alleging that a state party is in violation of the ICCPR—has stated that “[t]he right to freedom of thought, conscience and religion . . . in article 18.1 is far-reaching and profound . . .”[30] How “far-reaching and profound?” The right protects not only freedom to practice one’s religion, including, of course, one’s religiously-based morality; it also protects freedom to practice one’s morality—freedom to “to manifest his . . . belief in . . . practice”—*even if one’s morality is not religiously-based.* As the Human Rights Committee has explained:

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. . . .

1981 U.N. Declaration on Religious Tolerance," 21 Emory International Law Review 1-275 (2007).

[29] Cf. Barbara Bennett Woodhouse, “Religion and Children’s Rights,” in John Witte, Jr., & M. Christian Green, eds., Religion and Human Rights 299 (2012).

[30] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[31]

In deriving a right to conscientious objection to military service from Article 18, the Human Rights Committee observed that "the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" and emphasized that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs . . ."[32]

It is misleading, though common, to describe the right we are examining here as the right to *religious* freedom.[33] Given the breadth of the right—the "far-reaching and profound" right of which the ICCPR's Article 18 is the canonical articulation—the right is accurately described as the right to *religious and moral* freedom. Or, as many call it, the right to freedom of conscience, in the sense of freedom to live one's life in accord with the deliverances of one's conscience. Whether one calls it the right to freedom of conscience or the right to religious and moral freedom, it is the right to freedom to live one's life in accord with one's religious and/or moral convictions and commitments. As the Supreme Court of Canada has emphasized, it is a broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously-based.

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[31] Human Rights Committee, General Comment 22, n. #.

[32] Id. See *Yoon and Choi v. Republic of Korea*, CCPR/C/88/D/1321-22/2004 (2006), http://www.wri-irg.org/node/6221 (ruling that Article 18 requires that parties to the ICCPR provide for conscientious objection to military service). For relevant discussion, see Jocelyn Maclure & Charles Taylor, Secularism and Freedom of Conscience 89-91 (2011).

[33] For an example of such a description, see Christopher McCrudden, "Catholicism, Human Rights and the Public Sphere," 5 International Journal of Public Theology 331 (2011).

Referring to section 2(a) of the Canada's Charter of Rights and Freedoms, which states that "[e]veryone has . . . freedom of conscience and religion," the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[34] Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[35]

Moreover, that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing not entail that the choice is not protected by the right to religious and moral freedom. As the Canadian Supreme Court has explained, in a case involving a religious practice:

> [T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is required . . . would disregard the value of non-obligatory religious experiences by excluding those experience from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may personally deny the modern relevance of literal biblical "obligation" or "commandment," be precluded from making a freedom of religion argument despite the fact

[34] R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 759.

[35] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337. See Kislowicz, Haigh, & Ng, n. #, at 707-13.

> that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[36]

"It is the religious or spiritual essence of an action," reasoned the Canadian Supreme Court, "not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."[37]

But by the same token—that is, because "[i]t is the religious or spiritual essence of an action . . . that attracts protection"—not every choice one makes or wants to make qualifies as a choice protected by the right to religious and moral freedom. A choice to do or not to do something is protected by the right if, and only if, the choice fits this profile: animated by what Jocelyn Maclure and Charles Taylor, in their book *Secularism and Freedom of Conscience*, call "core or meaning-giving beliefs and commitments" as distinct from "the legitimate but less fundamental 'preferences' we display as individuals."[38]

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[36] Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 588 (passages rearranged).

> Andrew Koppelman has argued that
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> > [c]onscience excludes some claims that are widely recognized as valid; and many claims that nearly everyone would want to accommodate are not conscientious. . . . The emphasis on conscience focuses excessively on duty, while many people engage in religious practice not from a sense of duty prescribed by sacred texts, but on other grounds: adherence to custom; a need to cope with misfortune or injustice, temptation or guilt; a desire to feel connected to God. Indeed, core religious practices often have nothing to do with conscience.

Koppelman, "Nonexistent & Irreplaceable," n. #. However, conscience-talk is used more broadly than Andrew Koppelman supposes. As the Canadian Supreme Court's conscience-talk, in the text accompanying this note, illustrates, contra Koppelman, the category of conscientious acts includes more than just acts that one believes oneself to be duty-bound to perform (or to refrain from performing).

[37] Id. at 553.

> [The] beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict "moral harm."[39]

Although, as Maclure and Taylor are well aware, "it is difficult to establish in the abstract where the line between preferences and core commitments lies,"[40] I am inclined to concur in what Maclure and Taylor have argued:

> Whereas it is not overly controversial to classify beliefs stemming from established philosophical, spiritual, or religious doctrines as meaning-giving, what about the more fluid and fragmented field of values? Should the person who has her heart set on attending to a loved one in the terminal stage of life be classified with the . . . Muslim who is intent on honoring her moral obligations? The answer to that question is likely yes. It is unclear why a hierarchy ought to be created between, on the one hand, convictions stemming from established secular or religious doctrines and, on the other, values that do not originate in any totalizing system of thought. Why, in order to be "core," "fundamental," or "meaning-giving," must a conviction originate in a doctrine based on exegetical and apologetic

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[38] Maclure & Taylor, n. #, 12-13. For Maclure and Taylor's elaboration and discussion of the distinction, see id. at 76-77, 89-97. For a functionally similar distinction, see Audi, n. #, at 42-43.

[39] Maclure & Taylor, n. #, at 77.

[40] Id. at 92.

> texts? Moreover, attending to an ailing loved one is for some people an experience charged with meaning, one that leads them to face their own finitude and incites them to reassess their values and commitments. . . . A man may very well come to believe that if he cannot devote himself to his gravely ill wife or child, his life has no meaning, but he may not necessarily conduct a sustained metaphysical reflection on human existence. . . . [W]e believe it is rather the intensity of a person's commitment to a given conviction or practice that constitutes the similarity between religious convictions and secular convictions.[41]

Wherever "in the abstract" the line "between preferences and core commitments" is drawn, there will be cases in which the distinction is relatively easy to administer. For example:

> [A] Muslim nurse's decision to wear a scarf cannot be placed on the same footing as a colleague's choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague.[42]

And there will be cases in which there is room for reasonable doubt about which side of the line a choice falls on. Wouldn't a generous application of the right to religious and moral freedom involve resolving the benefit of the doubt in favor of the conclusion that the choice at issue is animated by "core or meaning-giving beliefs and commitments"—and is therefore protected by the right?

A generous application of the right—more precisely, a default rule according to which the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right—is much more feasible than it would be were the protection provided by the right

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[41] Id. at 92-93, 96, 97.

[42] Id. at 77.

unconditional (absolute). However, the protection provided by the right to religious and moral freedom is only conditional. The protection provided by some ICCPR rights—such as the Article 7 right not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment"—is unconditional, in the sense that the rights forbid (or require) government to do something, *period*.[43] The protection provided by some other ICCPR rights, by contrast, is conditional, in the sense that the rights forbid (or require) government to do something *unless certain conditions are satisfied*. As Article 18 makes clear, the protection provided by the right to religious and moral freedom is—as a practical matter, it must be—conditional: The right forbids government to ban or otherwise impede certain choices, thereby interfering with one's freedom to live one's life in accord with one's religious and/or moral convictions and commitments, unless each of three conditions is satisfied:

- ***The legitimacy condition:*** The government action at issue (law, policy, etc.) must serve a legitimate government objective.[44] The specific government action at issue might be not the law (policy, etc.) itself but that the law does not exempt the protected conduct.[45]

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[43] Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[44] The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, . . . [and] (c) pursues a legitimate aim . . ."

For the Siracusa Principles, see United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), reprinted at 7 Human Rights Quarterly 3 (1985).

[45] I have argued elsewhere that although "the public morals" is a legitimate government objective, sectarian morality—whether or not it is religiously based—is not public morality. See Michael J. Perry, "Freedom of Conscience as Religious and Moral Freedom," 29 Journal of Law and Religion 124 (2014); Michael J. Perry, "A Right to

- ***The least burdensome alternative condition:*** The government action—which, again, might be that the law does not exempt—must be necessary to serve the legitimate objective, in the sense that the action serves the objective significantly better than would any less burdensome government action.[46]

- ***The proportionality condition:*** The legitimate objective served by the government action must be sufficiently weighty to warrant the burden imposed by the government action.[47]

Religious and Moral Freedom? A Reply to Rafael Domingo," 12 International Journal of Constitutional Law 248 (2014).

[46] The Siracusa Principles state: "11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation."

[47] The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: . . . (b) responds to a pressing public or social need, . . . and (d) is proportionate to that aim."

The right to religious and moral freedom obviously would provide no meaningful protection for practices covered by the right if the consistency of a ban or other policy with the right was to be determined without regard to whether the benefit of the policy was proportionate to the cost of the policy. And, indeed, Article 18 is authoritatively understood to require that the benefit of the policy be proportionate to the cost of the policy.

Commentaries on proportionality inquiry have become voluminous in recent years. See, e.g., Grant Huscroft, Bradley W. Miller, & Gregoire Weber, eds., Proportionality and the Rule of Law: Rights, Justification, Reasoning (2014). In the volume just cited, the chapters by Stephen Gardbaum and Frederick Schauer are, in my judgment, especially insightful. Among the many other pieces that have been published in recent years, I recommend these: Matthias Klatt & Moritz Meister, "Proportionality—A Benefit to Human Rights? Remarks on the I*CON Controversy," 10 International Journal of Constitutional Law 687 (2012); Kai Möller, "Proportionality: Challenging the Critics," 10 International Journal of Constitutional Law 709 (2012); Julian Rivers, "The Presumption of Proportionality," 77 Modern Law Review 409 (2014); Cora Chan, "The Burden of Proof under the Human Rights Act," – Judicial Review 46 (2014). On proportionality inquiry under the right to religious and moral freedom, see T. Jeremy Gunn, "Permissible Limitations on the Freedom of Religion or Belief," in John Witte, Jr.

But, does it make sense—is it warranted—that the right we are examining here protects the freedom to practice one's morality *without regard to whether one's morality is religiously based*? Reaching a conclusion that is increasingly widespread among those who reflect on the issue, Maclure and Taylor write: "The democratic state," insofar as the protection of conscience is concerned, "must . . . treat equally citizens who act on religious beliefs and those who do not; it must, in other words, be neutral in relation to the different worldviews and conceptions of the good—secular, spiritual, and religious—with which citizens identify." [48] Why? Because "[t]here do not seem to be any principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good."[49]

Indeed, there is *this* reason, which is both fundamental and ecumenical,[50] for *not* isolating religion and placing it in a class apart: To

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& M. Christian Green, eds., Religion and Human Rights 254, 263-66 (2012); see also Kislowicz, Haigh, & Ng, n. #, at 686-93; Megan Pearson, "Proportionality: A Way Forward for Resolving Religious Claims?" (2012), http://ssrn.com/abstract=2223973.

[48] Maclure & Taylor, n. #, at 9-10.

[49] Id. at 105. Robert Audi concurs: Robert Audi, Democratic Authority and the Separation of Church and State 42-43 (2011). Many others have reached the same conclusion. A sampling: Howard Kislowicz, Richard Haigh, & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom," 48 Alberta Law Review 679, 681 (2011) ("there is no principled reason that matters of conscience should be treated differently from matters of religious belief and practice."); Gemma Cornelissen, "Religion-Based Exemptions: Are Religious Beliefs Special?," 25 Ratio Juris 85 (2012) (answering "no"); William A. Galston, "Should Public Law Accommodate the Claims of Conscience?," 51 San Diego Law Review 1, 16-17 (2014) ("honoring only religious claims is indefensible . . . [C]onscientious claims should be treated equally."); Mark L. Rienzi, "The Case for Religious Exemptions—Whether Religion Is Special or Not," 127 Harvard Law Review 1395, 1408 (2014) ("there are strong reasons to protect . . . acts based on a person's deeply held [moral] beliefs . . . regardless of whether those beliefs are religious or secular . . ."). Cf. Kent Greenawalt, "Religious Toleration and Claims of Conscience," 28 Journal of Law and Politics 91, 99 (2013) ("identify[ing] reasons *not* to single out religious conscience.").

[50] Cf. Douglas Laycock, "Reviews of a Lifetime," 89 Texas Law Review 949, 985 (2011): "The only reasons that can justify religious liberty to a broad audience in a

prevent one from living one's life in accord with one's moral convictions and commitments, or to make it significantly more difficult for one to do so, is hurtful, sometimes greatly hurtful, even if one's moral convictions and commitments are not religiously based. As Mark Wicclair, discussing conscientious objection in the context of healthcare, puts the point: "[Even] one instance of acting against one's conscience—an act of self-betrayal—can be devastating and unbearable."[51] Wicclair elaborates:

> [A] loss of moral integrity can be devastating. It can result in strong feelings of guilt, remorse, and shame as well as loss of self-respect. Moral integrity can be of central importance to people whose core beliefs are secular as well as those whose core beliefs are religious. [Martha] Nussbaum cites a powerful image that Roger Williams used to defend liberty of conscience: "To impose an orthodoxy upon the conscience is nothing less than what Williams, in a memorable and oft-repeated image, called 'Soule rape'." The reference to rape of the *soul* suggests that this statement was meant primarily as a defense of religious tolerance. Nevertheless, when a failure to accommodate secular core beliefs results in a loss of moral integrity, it can be experienced as an assault on one's self or identity.[52]

It is fitting, then, that the right we are examining here protects moral freedom as well as religious freedom, by forbidding government to impose

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religiously diverse society are reasons that do not require acceptance or rejection of any propositions of religious faith."

[51] Mark R. Wicclair, Conscientious Objection in Health Care: An Ethical Analysis 11 (2011). See also Gidon Sapir & Daniel Statman, "Why Freedom of Religion Does Not Include Freedom from Religion," 24 Law & Phillosophy 467, 474 (2005): "[C]oercing people to act against their deepest normative beliefs presents a severe threat to their integrity and makes them experience strong feelings of self-alienation and loss of identity; therefore, it should be avoided as far as possible."

[52] Wicclair, n. #, at 26 (quoting Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Defense of Religious Equality 37 (2008)). For Wicclair's full response to the question "why [is] the exercise of conscience is valuable and worth protecting", see id. at 25-31. See also Maclure & Taylor, n. #, at 89-97.

on anyone suffering of the sort Wicclair describes *unless* the law or other policy that is the source of the suffering satisfies each of the three conditions: legitimacy, least burdensome alternative, and proportionality.

Conclusion

Under the constitutional law of the United States, correctly understood, government may not grant conscience-protecting exemptions only to religious believers. In any event, government should not, as a matter of political morality, grant such exemptions only to religious believers. With respect to the issue at hand—granting conscience-protecting exemptions only to religious believers—constitutionality and political morality are aligned.