

Book Reviews

Kent Greenawalt, *Defender of the Faith*

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EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? By Kent Greenawalt. Cambridge, Massachusetts: Harvard University Press, 2016. 288 pages. \$49.95.

Introduction

Not long ago almost everybody loved the idea of exempting religious objectors from generally applicable laws. In 1993, after the Supreme Court, abandoning a decades-old rule, noted that exemptions weren't constitutionally required,¹ Congress was nearly unanimous in reversing that result by statute.²

Two controversies have splintered that coalition. The 1993 law, the Religious Freedom Restoration Act (RFRA), has been deployed to challenge the so-called "contraception mandate," which requires employee and student health insurance plans to cover the costs of most forms of contraception.³ Litigants have sought, and some state legislatures have attempted to provide, religious exemptions from laws banning discrimination on the basis of sexual orientation.⁴

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1. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

2. See Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 *YALE L.J. F.* 416, 416–17 (2016) (noting that "almost every member of Congress" voted for the act, reinstating the standard for religious exemption set in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Religious Freedom Restoration Act provides that "Government shall not substantially burden 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." Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (2012), *application to state governments invalidated* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

3. See Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 *VAND. L. REV. EN BANC* 51, 52–53, 53 n.5 (2014); Andrew Koppelman & Frederick M. Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 *U. ST. THOMAS J.L. & PUB. POL'Y* 223, 233 (2015).

4. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 *S. CAL. L. REV.* 619, 621–22, 630–38 (2015) [hereinafter *Gay Rights, Religious Accommodations*] (listing the various state legislative proposals to provide religious exemptions from antidiscrimination laws).

More fundamental than either of these flashpoints is a growing sense that it is unfair to single out religion in this way—that religion is not distinctive enough to deserve special treatment by the law.⁵

So Kent Greenawalt's defense of exemptions is well timed. For many years, Greenawalt has been a giant in the field of law and religion. His two-volume treatise, *Religion and the Constitution*,⁶ is the most comprehensive treatment of the law of the religion clauses. This new book takes on the specific issue of exemptions in shorter compass, centered on these newer controversies that have arisen since the earlier volumes were published. He has an easy mastery of this complex area. He writes beautifully.

The book is a careful defense of exemptions against the new challenges. It does not offer any general theory of exemptions, instead focusing closely on the details of specific types of situations. The general lesson is that “no sensible person can suggest that all claims of exemption should be granted or refused.”⁷

The book ranges over a wide range of issues, though it is not quite as comprehensive as the first volume of his treatise.⁸ Its aim is “to explore the complexity of many concerns about exemptions and implicitly encourage those on opposite sides of particular controversies to recognize, and perhaps even acknowledge, that competing considerations do carry some weight.”⁹ Greenawalt selects his cases with that in mind.¹⁰

A large literature of general theories of religious accommodation is on offer.¹¹ He resists them all.

No single theory covers everything; multiple reasons typically support a practice and carry varying weights in different contexts. This reality applies to many particular issues about government concessions not to perform general duties. Once this is recognized, people should not

5. The increasing number of scholars who are persuaded by this objection are discussed and cited in KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 46–55 (2015) and ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 153–65 (2013) [hereinafter *DEFENDING AMERICAN RELIGIOUS NEUTRALITY*].

6. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006) [hereinafter *FREE EXERCISE AND FAIRNESS*]; 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008) [hereinafter *ESTABLISHMENT AND FAIRNESS*].

7. KENT GREENAWALT, *EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED?* 33 (2016).

8. The treatise took up history and doctrine, objections to educational requirements, the military, unemployment compensation, Sunday closing laws, government development of sacred property, church property disputes, employment harassment, and child custody issues. See generally *FREE EXERCISE AND FAIRNESS*, *supra* note 6.

9. GREENAWALT, *supra* note 7, at 3.

10. As will become clear, I don't agree with every choice he makes here. Some discussions are tangential to the main ambition of the book.

11. He engages them in detail in *FREE EXERCISE AND FAIRNESS* and *ESTABLISHMENT AND FAIRNESS*, *supra* note 6.

expect matters to reduce to a single justification that clearly warrants some exemptions and does not warrant others¹²

If the book has a general thesis, it is that exemptions should not be rejected wholesale.

Exemptions is, however, deliberately unhelpful with respect to broader questions that weigh on the minds of many. Why is it fair, as a general matter, to single out religion for special treatment? And what general principles should legislatures or courts follow if they are going to devise exemptions on an ad hoc basis?

An intervention tailored to contemporary debates ought to address these questions, which have become so salient.

The overall pattern of special treatment is what has generated a sense of unfairness. Even if the details can be shown to cumulate intelligibly, a defense of exemptions needs to say something about what the cumulation amounts to. The book is thus an important but incomplete defense of exemptions.

This Review will offer an account of the missing principles inferred from what Greenawalt does say.

Whatever is valuable about religion is not directly detectable by law. People are too opaque to one another for the state to assess the value of each person's attachments. Greenawalt is exquisitely attentive to the state's limitations in this regard.

Greenawalt's argument thus points to a strategy of devising workable proxies for what perfect transparency would give us. "Religion" can function as such a proxy. It is a good, albeit rough, indicator of whether the objector has a valuable and weighty reason for the objection. That is the best the law can do. This approach has internal tensions, but courts can muddle through to reasonably just outcomes.

Part I of this Review examines Greenawalt's specific arguments for (and, in some cases, against) exemptions. Part II takes up the question of whether it is fair to give religion special treatment. Part III considers the problem of how to determine substantial burdens on religion.

I. Specifics

Greenawalt starts with some familiar cases in which exemptions are easily justified. The book's strategy is that "reflecting on other circumstances can help one's assessment of what is now most controversial and sharply debated."¹³

12. GREENAWALT, *supra* note 7, at 49.

13. *Id.* at 77.

The exemption of Quakers and Mennonites from military service has been the law since colonial times.¹⁴ No one questions it: Quakers would make lousy soldiers anyway.¹⁵ More generally, accommodation here does not defeat the purpose of the law. “So long as the government does not really need virtually all healthy young men in its armed forces, granting exemptions to pacifists will not interfere with the effectiveness of its service members.”¹⁶ Greenawalt would extend the accommodation to nonreligious conscientious objectors, so long as their sincerity is clear.¹⁷

Religious bodies are exempted from income and property taxation, unlike for-profit businesses. Donations to religious bodies are tax deductible for the donor.¹⁸ Since these accommodations are granted to organizations, individual conscience is not at issue.¹⁹ Greenawalt surveys a number of mutually reinforcing justifications for these exemptions, including the public functions served by nonprofit charities, the value of institutions outside government, encouragement of caring among citizens, and doubt whether, if one subtracts gifts passed on to the beneficiaries of charity work and business expenses, churches have any relevant income to be taxed.²⁰

This discussion establishes that accommodation sometimes rests not on individual conscience but on more general considerations of the public interest. It does not show that special treatment of religion is justified: The exemptions here are generally under the description of nonprofit charities. It is therefore less clear that this chapter does much to advance the general project of justifying religion-specific accommodations. It is probably in this book because preferential tax treatment is such an enormous part of religion’s special treatment,²¹ is often complained about,²² and therefore is likely to loom large in the minds of many readers.

Greenawalt next takes up the consumption of forbidden substances.²³ This issue is salient because the consumption of sacramental wine was

14. *Id.* at 25; R. R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412–13 (1952).

15. See GREENAWALT, *supra* note 7, at 31 (discussing the risks to military effectiveness if a genuine religious pacifist submits to the draft and faces armed combat).

16. *Id.*

17. *Id.* at 35–38.

18. *Id.* at 49.

19. *Id.* at 48.

20. *Id.* at 50–55.

21. Tax exemptions, Greenawalt writes, are the exemptions “that almost certainly have the greatest overall social consequences.” *Id.* at 47.

22. See, e.g., Mark Oppenheimer, *Now’s the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), <http://time.com/3939143/news-the-time-to-end-tax-exemptions-for-religious-institutions/> [<https://perma.cc/BFB8-AXC5>] (arguing that religious institutions should no longer be tax exempt for three reasons: Exemptions force the IRS to determine what organizations qualify as religious, the IRS subsidizes wealthy institutions, and because many religious institutions engage in partisan politicking and advocacy).

23. GREENAWALT, *supra* note 7, at 64.

specifically protected during Prohibition,²⁴ and because the well-known case in which the Supreme Court abandoned the rule of constitutionally compelled accommodation involved the religious use of peyote by Native Americans.²⁵

If a drug is dangerous enough to justify a general prohibition, but some users consume the drug in a disciplined and safe way for unusually exigent reasons, then Greenawalt thinks an exemption is justified.²⁶ In this context, however, such exemptions cannot be safely extended to nonreligious groups.

The difficulty is this: if nonreligious groups can use a drug, individuals who wish personally to do so will have an incentive to get together and form a group and to schedule meetings at a convenient time so that what really happens is that the individuals can take the substance for whatever purposes move them.²⁷

Greenawalt's answer to the question why religion should ever receive special treatment is not only about administrative workability. He evidently thinks that religion is in fact special: "[R]eligious freedom is an important value in this society and in other liberal democracies," and "the government should need a strong interest to interfere with the fundamental practices of worship."²⁸

At this point, the reader is likely to ask: Just what is the nature of this value? Is it unique to religion? Greenawalt gestures toward an answer, conceding that a drug may be used "to enrich the understanding and experience of life for the participants."²⁹ Evidently religion is only one of many activities that enrich the understanding and experience of life. The line should be drawn at religion for "reasons of overall enforcement and prevention of fraud."³⁰ In this context, there is no more workable place to draw it. The general lesson—and the reason this chapter is here—is that we should reject gross generalizations about the appropriateness of special treatment for religion. "One needs to focus on exactly what kind of exemption is involved and what is workable for effective administration."³¹

Now Greenawalt is ready to take on some live controversies. He next considers receiving and participating in medical procedures.³² An extended discussion of the right to refuse medical treatment doesn't help his argument much, since that right is generally available for reasons of bodily integrity,

24. National Prohibition Act, ch. 85, tit. 2, § 3, 41 Stat. 305, 308–09 (1919) (repealed 1935) ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, [and] sold . . . but only as herein provided . . .").

25. *Emp't Div. v. Smith*, 494 U.S. 872, 874, 883, 888–90 (1990).

26. GREENAWALT, *supra* note 7, at 72–73.

27. *Id.* at 73.

28. *Id.* at 72.

29. *Id.* at 73.

30. *Id.* at 75.

31. *Id.*

32. *Id.* at 76.

long protected at common law, that have nothing to do with religion.³³ Harder cases are presented by Christian Scientists and Jehovah's Witnesses who refuse some or all treatment for their children.³⁴

Religiously based parental choices over education are privileged over nonreligious ones, notably in *Wisconsin v. Yoder*,³⁵ which held that the Amish had the right to remove fourteen-year-olds from school after the eighth grade and to learn farming instead.³⁶ Here, again, Greenawalt thinks that religious claims should get special treatment, "because of the dangers of fraud if any claim of conscience is treated similarly."³⁷ Here, however, it is less clear than in the drug case just what the fraud would consist of. With drugs, people might pretend to be pursuing enriched understanding of life when they really want pleasant stupefaction (which the state is stipulated to have a legitimate interest in prohibiting).³⁸ But any parent who withdraws their child from school is likely to think, however misguidedly, that this is really better for the child. As for medical treatment for children, Greenawalt thinks that little will be accomplished by criminal punishment when the child is harmed by the refusal, since strongly religious people may not be deterrable.³⁹

This discussion is interesting but doesn't shed much light on the core issues that motivate the book. It could have been deleted without much loss.

Vaccinations are another case in which religion-alone exceptions may make sense, though here what is doing the work appears to be the need to limit the number of unvaccinated children.⁴⁰ This conclusion seems distressingly ad hoc. Whether exemptions from universal vaccination are safe depends on the contingency of whether the number of claims rises to a level that impairs herd immunity.⁴¹ If it does, there is a public health danger, and it may be fairer to allow no exemptions at all than to arbitrarily single out the religious for special treatment.

On obligations of hospitals to provide abortion services, Greenawalt similarly relies on religion as a good place to draw the line: He proposes to "limit the exemptions for institutions to religious bodies whose convictions

33. See *id.* at 81; see also FREE EXERCISE AND FAIRNESS, *supra* note 6, at 397 & n.4.

34. GREENAWALT, *supra* note 7, at 84.

35. 406 U.S. 205 (1972).

36. *Id.* at 205, 234.

37. GREENAWALT, *supra* note 7, at 85.

38. This raises complexities about legitimate state interests in drug regulation that I cannot explore here. See generally Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006).

39. GREENAWALT, *supra* note 7, at 89.

40. *Id.* at 95–97.

41. See Paul Fine et al., "Herd Immunity": A Rough Guide, 52 CLINICAL INFECTIOUS DISEASES 911, 913–14 (2011) (noting the effect of vaccination exemptions on communities' vulnerability to infectious diseases, especially in conjunction with the "[s]ocial clustering" characteristic of "religious communities that eschew vaccination").

not to supply abortions are drawn from the understandings of their faiths.”⁴² Here, as with vaccination, the question of accommodation can’t be resolved without considering ecological effects. There are regions of the United States where every hospital is either Catholic or constrained to follow Catholic doctrine.⁴³ In some of those places, medically necessary procedures aren’t available anywhere.⁴⁴ Greenawalt observes that, in these cases, a vague statute like RFRA is unhelpful; legislatures should fashion more specific accommodations.⁴⁵

Halfway through the book, at long last, he takes up the contraception problem, as presented in *Burwell v. Hobby Lobby*.⁴⁶ In that case, applying RFRA to federal law, the Court fashioned a new exemption for for-profit businesses that had religious objections to providing insurance for certain contraception methods that they regarded as abortifacients.⁴⁷ Here, Greenawalt thinks that an accommodation is appropriate, though any exemptions “should be carefully constrained so that those who want the drugs suffer no genuine inconvenience or embarrassment.”⁴⁸ It does not matter here whether the exemption is confined to the religious since there are no known nonreligious objectors in this context.⁴⁹

Although he agrees with the result, Greenawalt is troubled by some of the reasoning of the *Hobby Lobby* Court.⁵⁰ The Court’s easy assumption that corporations are covered is doubtful as a matter of statutory interpretation. The Court’s deference on the question of substantial burden raises large problems. The Court, here doing some violence to the language of the statute,⁵¹ thought it unseemly to inquire into whether a burden was sufficiently substantial.⁵²

42. GREENAWALT, *supra* note 7, at 103.

43. See Elizabeth Sepper, *Contracting Religion, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES* (Holly Fernandez Lynch et al. eds., forthcoming 2017) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783518 [<https://perma.cc/N8SA-MK7F>].

44. See *id.* (manuscript at 12).

45. GREENAWALT, *supra* note 7, at 104.

46. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

47. *Id.* at 2759, 2781–82.

48. GREENAWALT, *supra* note 7, at 115.

49. *Id.* at 129.

50. *Id.* at 120–28. Greenawalt observes that “such objections will almost always be connected to religious convictions.” *Id.* at 115. I am unaware of any nonreligious cases, and it is hard to imagine them.

51. See generally Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94 (2017); see also Lederman, *supra* note 2, at 418.

52. Compare Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1(b) (2012), application to state governments invalidated by *City of Boerne v. Flores*, 521 U.S. 507 (1997) (requiring a government action to “substantially burden[] someone’s exercise of religion” for the statute’s protections to apply (emphasis added)), with *Hobby Lobby*, 134 S. Ct. at 2778 (noting that “[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim” (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 887

Perhaps the very fact that a claim is being litigated is evidence that the law bears hard on the claimant. But granting that claim will open the door to a lot of others. “When it comes to the coverage of insurance requirements, no one is going to interview all the owners of companies to see if their objection is both fully sincere and adequately intense.”⁵³ The *Hobby Lobby* case suggests to Greenawalt that the assessment of burden should “depend at least partly on how most people would perceive the connection between the convictions and the degree of involvement.”⁵⁴ That is an important point, about which more will come later.

Instead of turning to the gay-rights issue, he takes up prisons and land use. There are live questions here because the Religious Land Use and Institutionalized Persons Act requires states to consider religious exemptions in those contexts.⁵⁵ The land-use cases are not about the protection of conscience but about facilitating the collective exercise of religion, as with tax exemptions.⁵⁶ Prison cases, which generally involve grooming and clothing, diet, group worship, and access to literature, are generally notable for the weakness of the prisons’ reasons for resisting the prisoners’ claims.⁵⁷

(1990)). Instead, the Court’s “‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’” *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas v. Review Bd.* 450 U.S. 707 (1981)). In so holding that judicial review of the substantiality of the burden placed on religious exercise is precluded by the Court’s “religious question” doctrine, RFRA’s prima facie requirement of a “substantial burden” is rendered all but meaningless against essentially any claimant’s invocation of RFRA’s protections and the consequent demands on the government’s justification for its action.

53. GREENAWALT, *supra* note 7, at 124.

54. *Id.* On the question of least restrictive means, he is unfortunately drawn to Justice Alito’s suggestion that government could be required to supply the contraception itself. *See Hobby Lobby*, 134 S. Ct. at 2780–81 (suggesting that RFRA may require the government to expend additional funds, such as to provide contraceptives, to accommodate citizens’ religious beliefs). Government provision of contraception for most women “would be fairly expensive, but it would be a small amount in comparison with the total national budget.” *Id.* at 129. On why this suggestion would be disastrous in practice, see Koppelman & Gedicks, *supra* note 3, at 235–37 (arguing that the necessary funding is unlikely to be provided, and that if it is deemed a less restrictive means, the outcome will be simply to deny women contraception).

55. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc(a)(1) (2012) (“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution . . .”); *id.* at § 2000cc-1(a) (“No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability . . .”).

56. GREENAWALT, *supra* note 7, at 145.

57. *See, e.g., id.* at 137 (describing an Arizona prison rule forbidding beards for reasons other than medical necessity on the grounds that it permitted rapid and accurate identification of prisoners); *id.* at 140 (discussing cases where courts have held that wearing crosses “did not present a sufficient danger of thefts or use as weapons to justify a prohibition”); *id.* at 141 (arguing that insofar as increased costs are the government’s basic competing consideration against allowing religiously observant diets, such as kosher meals, “given all the expenses of prison management” such added costs should not “typically amount to a compelling interest”); *id.* at 142 (referencing a case in which a prisoner was barred from Jewish worship services because as a believer in Judeo-Christianity, Protestant worship services were considered adequate); David M. Shapiro, *Lenient in*

Here, it is worth noting one consideration in favor of special treatment of religion: RLUIPA generates the only prisoner claims that are treated with any respect by the courts.⁵⁸ Absent a discourse of religious liberty, it is hard to see how one could smuggle into American law the notion that convicts are human beings with rights.⁵⁹

Finally comes the gay-rights issue. Many religious conservatives feel that it would be sinful for them to personally facilitate same-sex marriages, and they have sought to amend the laws to accommodate their objections. They argue, with some force, that there are plenty of other wedding photographers, and that accommodating them would have no significant effect on any gay person's opportunities.⁶⁰

These efforts have met fierce resistance and political disaster.⁶¹ Greenawalt sensibly prescinds from political questions and simply tries to decide what rules would make sense.

In this chapter, he becomes less confident than he is in much of the book, aiming to capture the complexity of the problem rather than offer clear prescriptions. He rejects the claim that opposition to same-sex marriage is as repugnant as opposition to interracial marriage, arguing that even though some racists offered religious justifications for their position, "at least for some people, the religious ground was likely an attempt to support, perhaps even in their own minds, a more complex cultural and psychological view."⁶² This is accurate but irrelevant, since this is probably true to some extent of all religious views. The fact that they have social and psychological underpinnings neither confirms nor undermines their reliability.⁶³ Greenawalt thinks that when exemptions for opponents of same-sex marriage are considered, one should consider "not only the overall soundness of convictions but whether they are at least based on acceptable values, such as

Theory, Dumb in Fact: Prison, Speech, and Scrutiny, 84 GEO. WASH. L. REV. 972, 995–1005 (2016) (describing many examples of courts deferring to even weaker reasons for denying prisoner claims).

58. See Shapiro, *supra* note 57, at 980 (2016) (finding that RLUIPA has been "at least moderately successful" in protecting religious-access rights for prisoners).

59. This is particularly important given American law's tendency to overpunish. See Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016) (describing the growing chasm between American and European criminal penalties, the former becoming far more severe).

60. See *Gay Rights, Religious Accommodations*, *supra* note 4, at 621–22, 629, 641–44. Evidently most Americans are inclined toward accommodation. See Maggie Gallagher, *New Poll: 80 Percent of Americans Support the Christian Photographer's Right to Say "No,"* PULSE 2016 (Aug. 6, 2015), <http://thepulse2016.com/maggie-gallagher/2015/08/06/new-poll-80-percent-of-americans-support-the-christian-photographers-right-to-say-no/> [<http://perma.cc/X2Q7-VNDX>].

61. See *Gay Rights, Religious Accommodations*, *supra* note 4, at 631–38 (reviewing negative reactions to state legislatures' attempts to pass laws creating broad religious exemptions to antidiscrimination laws).

62. GREENAWALT, *supra* note 7, at 164.

63. See PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* app. 2 at 179–85 (1969); HANS KÜNG, *FREUD AND THE PROBLEM OF GOD* 42–43 (Edward Quinn trans., 1979).

what is good for children or a deep religious tradition, and are defensible in principle.”⁶⁴ It is dangerous to have religious freedom turn on a state judgment of the reasonableness of the underlying religious views.

On the core question of whether there should be accommodation of religious objectors from antidiscrimination laws, Greenawalt would distinguish expressive from nonexpressive businesses. Thus, to take two prominent recent cases, a wedding photographer should be exempted because her activity implicitly conveys acceptance of the marriage, while the involvement of the baker of a wedding cake is “best viewed as too remote to be protected against.”⁶⁵ There is a constitutional dimension here: “[T]he Supreme Court has sometimes protected a right to discriminate based on free speech considerations.”⁶⁶

Here Greenawalt cites *Boy Scouts of America v. Dale*,⁶⁷ which declared that forbidding the Boy Scouts to expel a gay scoutmaster “would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁶⁸ The Court’s extension of the compelled-speech doctrine has absurd implications: It would allow anyone to violate a law if obeying it would conventionally be taken to convey a message with which the objector disagrees.⁶⁹ This is probably why *Dale* has been largely ignored by lower courts.⁷⁰ It is a mistake to rely on it.

In the actual wedding photographer case, the New Mexico Supreme Court considered and rejected the compelled-speech claim. The antidiscrimination statute “does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another.”⁷¹ A contrary result would have generated a whole new body of legal doctrine:

We decline to draw the line between “creative” or “expressive” professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws Courts cannot be in the business

64. GREENAWALT, *supra* note 7, at 167.

65. *Id.* at 170–71.

66. *Id.* at 174.

67. 530 U.S. 640 (2000); GREENAWALT, *supra* note 7, at 251 n.77.

68. *Dale*, 530 U.S. at 653.

69. ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 39 (2009).

70. *Id.* at 48–52.

71. *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.⁷²

Greenawalt acknowledges that it may be difficult to write legislation that draws the line in the way he contemplates.⁷³ He doesn't appear to see just how difficult it would be.

A better approach to the free speech issue would build on a different suggestion by the New Mexico court: “[B]usinesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.”⁷⁴

Such an announcement inevitably would function as a signal, and as such would effectively keep gay customers away—unless they have no reasonable alternative—without technically violating the antidiscrimination statute. Who wants their wedding photographed, or their cake baked, by someone who despises the whole undertaking? A business that posts such a disclaimer might never need to violate its conscience by facilitating same-sex marriages.⁷⁵

Present constitutional law is confused about whether the speech described by the New Mexico court is constitutionally protected or whether it would be actionable harassment.⁷⁶ I have elsewhere argued that it should be protected by the First Amendment.⁷⁷

Greenawalt would allow exemptions for the facilitation of weddings. “For the provision of ordinary services broadly available to the public, no exemption is justified from laws barring unequal treatment of gays.”⁷⁸ The only other exemption he would allow is for expressive associations and schools. “Whether religious or not, an organization whose purpose is to educate children or convey an important public message should not have to hire someone for a position whose important tasks include conveying its

72. *Id.* at 71. For a defense of this conclusion and a response to additional free speech arguments, see Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 95–96 (2015).

73. GREENAWALT, *supra* note 7, at 172–73.

74. *Elane Photography*, 309 P.3d at 59.

75. There are, to be sure, some gay people who *are* spoiling for a fight, who will spend their money at such establishments just to have the satisfaction of forcing them to comply with the law. The New Mexico court's proposal will not prevent all such conflicts. It will prevent most of them.

76. See Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1129–30 (2016) (discussing the “contradictory lines of authority” that the Supreme Court has created between antidiscrimination and free speech law).

77. See *id.* at 1138 (arguing that the First Amendment's protection of free speech allows business owners to post disclaimers about their views in their stores).

78. GREENAWALT, *supra* note 7, at 179.

basic premises, if that person is obviously living a life directly contrary to . . . those premises.”⁷⁹

His final chapter takes up whether religion should ever be a defense against a private lawsuit. The question arises because the New Mexico court held that the state’s mini-RFRA did not apply to such suits.⁸⁰ Greenawalt argues that tort recovery can be a burden on religion and that legislatures should consider accommodation when they create new statutory duties.⁸¹

He could have stopped there. His pertinent point is made. Instead, he takes up a range of issues that he dealt with at greater length in his earlier treatise: Clerical privilege not to testify, failure to give adequate advice, disclosure of embarrassing facts, defamation, shunning, and institutional liability. Here, once more, it is not obvious what these discussions are doing in this book. They have nothing to do with the question raised by the New Mexico courts, and they have not become more salient since Greenawalt wrote his treatise. The defamation question is already covered by free speech, so religion is not even relevant.⁸² This chapter should have been much shorter, perhaps even folded into the gay-rights chapter.

II. Why Single Out Religion?

A. *A Heap of Judgments*

A growing body of scholars insist that singling out religion for special protection is unfair to comparable nonreligious views.⁸³ Greenawalt responds by showing, in various areas, that accommodation is appropriate and that religion is a sensible place to draw the line. For the reasons already discussed, religion-only accommodation is appropriate for forbidden substances,⁸⁴ withdrawing children from school,⁸⁵ exemption from vaccines,⁸⁶ pharmacists’ objections from providing abortifacients,⁸⁷

79. *Id.* at 183.

80. *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

81. GREENAWALT, *supra* note 7, at 188–210; *see also* FREE EXERCISE AND FAIRNESS, *supra* note 6, at 246–48 (clerical privilege not to testify); *id.* at 292–303 (shunning); *id.* at 303–08 (disclosure of embarrassing facts and defamation); *id.* at 315–20 (failure to give adequate advice); *id.* at 320–25 (institutional liability).

82. Greenawalt’s discussion of the issue cites only free speech law. GREENAWALT, *supra* note 7, at 203–04 (discussing how the Free Speech Clause limits recovery for defamation of public officials and analyzing the potential applicability of this limitation to religious figures).

83. *See* sources cited *supra* note 5.

84. GREENAWALT, *supra* note 7, at 73, 75.

85. *Id.* at 84–85.

86. *Id.* at 97.

87. *Id.* at 115.

employer provision of contraceptives,⁸⁸ and exemption from land-use regulations.⁸⁹

In a way, that disposes of the objection: If it is sometimes appropriate to single out religion for special treatment, then that is the end of the claim that exemptions are never appropriate. Many readers, however, will still want to know what all of these specific answers amount to. On that question, Greenawalt is less helpful. In the treatise, he wrote:

A person who believes that multiple values bear on the resolution of major social and legal issues . . . [m]ay feel confident about which features matter most and even about particular overall assessments, without being able to offer a set of abstract principles to demonstrate the correctness of his judgments.⁹⁰

The book risks becoming a heap of particular judgments without any overall structure. Steven D. Smith, reviewing the earlier treatise, complains that Greenawalt, after stating each issue, “does not purport to reconcile the positions or to show that one set of arguments and authorities is right and the other wrong[; r]ather, he pronounces his judgment.”⁹¹ Smith finds no persuasive power in Greenawalt’s “highly conclusory pronouncements.”⁹²

Greenawalt does not deduce his conclusions logically from any clear set of premises. But then, why do I have the experience, when I read him, of being in the presence of an intellect of the very-first rank, one that captures each of these difficult questions with extraordinary nuance and fairness? Why do Greenawalt’s pronouncements command my assent? Resolutions repeatedly emerge from the careful description of what is at stake, in the same way that, in a good appellate brief, the preferred resolution emerges from the statement of the facts. Greenawalt thinks that if we can just perceive each situation correctly, a solution will become apparent based on the reader’s inarticulable common sense. The fact that Smith is so isolated in his complaint suggests that Greenawalt is on to something.

At the very end of *Exemptions*, Greenawalt does offer a few generalizations. When there are religious exemptions, “if there are genuine nonreligious views that are closely similar and the dangers of fraud are not increased significantly, the exemption should definitely be broadened.”⁹³ There are also some areas in which vague standards of accommodation, such as RFRA, “are too hard for officials and judges to apply, and they do not give individuals, organizations, and employers adequate notice about what

88. *Id.* at 129.

89. *Id.* at 145–52.

90. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 7.

91. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1892 (2009) (reviewing 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008)).

92. *Id.* at 1893.

93. GREENAWALT, *supra* note 7, at 220.

behavior is protected or not.”⁹⁴ (An example is the case, discussed above, of hospital refusals to provide medical services which, depending on local circumstances, may not be available elsewhere.)⁹⁵ In such situations, legislatures should draw specific lines for courts to administer.

All this makes sense, but it still doesn’t explain why religion is the core from which one extrapolates additional accommodations. However, it is possible to build upon what Greenawalt does say to a more general defense of singling out religion.

Greenawalt describes two kinds of accommodation claims: Those based on individual conscience, such as draft exemptions,⁹⁶ and those based on communal exercise of religion, such as exemption from land-use restrictions.⁹⁷ It is not clear, and Greenawalt does not tell us, what these two kinds of cases have in common.

On the other hand, the case for some accommodation in both of those cases is powerful. We have had those accommodations for a long time, and they have done obvious good and little harm. Any general principle should not bar such longstanding and benign practices.

Political philosophy does not only work from first principles. It also relies on settled cases. John Rawls famously proposed a theory of justice that aimed to be “strictly deductive.”⁹⁸ His deductions, however, take place within a larger account of justification that he calls “reflective equilibrium,” in which we try to bring our considered moral judgments into line with our more general principles.⁹⁹ “A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.”¹⁰⁰ Any general theory must be consistent with the specific judgments “in which we have the greatest confidence,” such as our judgments “that religious intolerance and racial discrimination are unjust.”¹⁰¹ These are “provisional fixed points which we presume any conception of justice must fit.”¹⁰² The deduction, in short, does not always go in one direction. “It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments.”¹⁰³ Greenawalt provides us with a set of carefully defended particular judgments.

94. *Id.* at 223.

95. *See supra* notes 41–42 and accompanying text.

96. GREENAWALT, *supra* note 7, at 25–26.

97. *Id.* at 132.

98. JOHN RAWLS, A THEORY OF JUSTICE 121 (1971) [hereinafter RAWLS (1971)]; JOHN RAWLS, A THEORY OF JUSTICE 104 (rev. ed. 1999) [hereinafter RAWLS (rev. ed. 1999)].

99. RAWLS (1971), *supra* note 98, at 48–50; RAWLS (rev. ed. 1999), *supra* note 98, at 42–43.

100. RAWLS (1971), *supra* note 98, at 21; RAWLS (rev. ed. 1999), *supra* note 98, at 19.

101. RAWLS (1971), *supra* note 98, at 21; RAWLS (rev. ed. 1999), *supra* note 98, at 17.

102. RAWLS (1971), *supra* note 98, at 20; RAWLS (rev. ed. 1999), *supra* note 98, at 18.

103. JOHN RAWLS, POLITICAL LIBERALISM 45 (expanded ed. 2005); *see also* Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV.

B. *Doing Without “Religion”*

So, take these fixed points and see if we can build some general principles out of them. The only common denominator in the individual and communal accommodations is the practice of treating religion as something special. As we have already noticed, this special treatment is increasingly regarded as unfair. Can it be defended?

Here I propose to defend it by seeing what happens if we try to do without it.

Stipulate, as a thought experiment, that religion is not special and will not be treated as such by the law. What do we do then? I will review a number of proposals. All come to grief and show the attractions of an approach like Greenawalt’s.

I note at the outset that the proposals have all sought to account for exemptions for individuals. Another well-established exemption is the “ministerial exception” from employment regulation: Churches can fire ministers for any reason they like without state interference.¹⁰⁴ Some have tried to defend this rule as an aspect of freedom of association,¹⁰⁵ but no secular entity has comparable freedom.¹⁰⁶

One proposal is that religious liberty ought to be protected indirectly, under the description of more familiar general rights (so that heresy, for example, is protected as free speech),¹⁰⁷ or disaggregated into its component goods.¹⁰⁸ This approach however will not protect religion in some of the most salient cases: It is no help for Quaker draft resisters, or Native

647, 659 (2013). For a good discussion of the role of reflective equilibrium in Rawls’s work, see SAMUEL FREEMAN, *RAWLS* 29–42 (2007). Greenawalt understands Rawls very well and has made major contributions to the interpretation of his work. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 106–20 (1995) (engaging with Rawls at length); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 51–57 (1988) (same).

104. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012).

105. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 63 (2007) (arguing that the constitutional immunity of the Catholic Church from equal-employment-opportunity mandates in the choice of church priests can be readily explained as an instance of the associational freedom that contemporary constitutional law endorses).

106. An absolute right of noncommercial associations to select their leaders was argued and rejected in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). See also Andrew Koppelman, ‘Freedom of the Church’ and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145–47 (2013).

107. IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 177–210 (2014) (arguing that freedom of religion need not be a separate category of protection because it is protected by existing rights and liberties); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 942 (2005) (same). For a further response to Lupu and Tuttle, see Andrew Koppelman, *Lupu, Tuttle, and Singling Out Religion*, 111 NW. U. L. REV. ONLINE 41 (2016) (book review).

108. Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581, 594–95 (2015).

Americans who want to use peyote in their rituals, or Muslim prisoners who want to wear beards, or even Catholics who want to use sacramental wine during Prohibition.¹⁰⁹

Another response is to supplement the familiar rights of speech, association, and so forth with an additional right of individual exemption that captures the salient aspect of religion but is not confined to religion (thus avoiding the unfairness objection). This entails substituting some right *X* for religion as a basis for special treatment, making “religion” disappear as a category of analysis. Many candidates for *X* are on offer: Individual autonomy, mediating institutions between the individual and the state, psychologically urgent needs, norms that are epistemically inaccessible to others, and many more.

Here I will focus on the three most prominent, which I will call “Equality,” “Conscience,” and “Integrity.”

Begin with Equality. Christopher Eisgruber and Lawrence Sager build their whole approach around the unfairness objection. The privileging of religion is wrong because “religion does not exhaust the commitments and passions that move human beings in deep and valuable ways.”¹¹⁰ They claim that the state should “treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.”¹¹¹ When religion is burdened, they write, courts should ask whether comparably deep nonreligious interests are being treated better: Where a police department allowed an officer to wear a beard for medical reasons, it also was appropriately required to allow a beard for religious reasons.¹¹²

Eisgruber and Sager never explain what “deep” means—how to tell which concerns are “serious” and which are “frivolous.”¹¹³ Even if one takes the term commonsensically, to signify interests that are intensely felt, their principle cannot be implemented. Thomas Berg observes that the same police department did not allow beards “to mark an ethnic identity or follow

109. Nickel argues that individual exemptions can be created without using the category of “religion,” for example when it is decided “to give scientific researchers exemptions from drug laws in order to allow them to study controlled substances.” Nickel, *supra* note 107, at 958. It is not obvious, however, and Nickel does not explain, how one could justify classic religious accommodations, such as sacramental wine, under a nonreligious description. Laborde suggests (responding to me) that sacramental wine could be protected by freedom of association. Laborde, *supra* note 108, at 598 n.45. This mischaracterizes that freedom. A group that gathers for the purpose of violating the law is not constitutionally protected. Rather, it is guilty of the additional crime of conspiracy.

110. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1245 n.†† (1994).

111. *Id.* at 1285.

112. EISGRUBER & SAGER, *supra* note 105, at 90–91.

113. *Id.* at 101. See generally Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY 52 (2014).

the model of an honored father.”¹¹⁴ So the requirement of equal regard is incoherent: “When some deeply-felt interests are accommodated and others are not, it is logically impossible to treat religion equally with all of them.”¹¹⁵ Eisgruber and Sager are reluctant to specify a baseline, but they can’t do without one.

The two other candidates for *X* that I will consider here avoid this error by answering the “equality of what?” question.

The most commonly invoked substitute for “religion” is Conscience.¹¹⁶ This doesn’t really address the unfairness problem, because it uncritically thematizes one principal theme of Christianity. Many who propose it treat its value as so obvious as not to require justification,¹¹⁷ suggesting that unstated and perhaps unstatable (because theologically loaded) premises are at work. They also implausibly assume that the will to be moral trumps all other projects and commitments when these conflict and that no other exigency has comparable weight.¹¹⁸

Conscience is also underinclusive, focusing excessively on duty. Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune and guilt, curiosity about metaphysical truth, a desire to feel connected to God, or happy enthusiasm, rather than a sense of duty prescribed by sacred texts. Conscience is salient for some people, but others have needs equally urgent that can’t be described in those terms, and so the fairness problem is simply transcribed into a different register. Conscience, like religion, is one exigency among many.

The Integrity approach avoids these difficulties by broadening the focus beyond conscience. Joseph Raz thinks that “[t]he areas of a person’s life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his

114. Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1194 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007)).

115. *Id.* at 1195.

116. See, e.g., KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 98 (2005) (arguing that “equally conscientious reasons” should be treated the same as religious reasons for objecting to a law); AMY GUTMANN, *IDENTITY IN DEMOCRACY* 168–78 (2003) (arguing that freedom of religion is a subset of and should be replaced by a freedom-of-conscience standard, the source of which is “variously identified as God, nature, reason or human individuality”); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65–71 (1996) (arguing that conscience is more exigent, and so entitled to more respect, than individual choices); Rogers M. Smith, “*Equal Treatment? A Liberal Separationist View*, in *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* 179, 181 (Stephen V. Monsma & J. Christopher Soper eds., 1998) (“[T]here should be no special protections for religious perspectives over . . . those provided for claims of secular moral conscience.”).

117. See sources cited *supra* note 113.

118. Bernard Williams spent much of his career refuting that. See generally, e.g., BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

self-respect.”¹¹⁹ Paul Bou-Habib relies on the value of acting in light of one’s deepest commitments.¹²⁰ Ronald Dworkin claims that laws are illegitimate if “they deny people power to make their own decisions about matters of ethical foundation—about the basis and character of the objective importance of human life.”¹²¹

Jocelyn Maclure and Charles Taylor offer the most detailed account of Integrity. “Core beliefs” are those that “allow people to structure their moral identity and to exercise their faculty of judgment.”¹²² “Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions.”¹²³ There is no good reason to single out religious views, because what matters is “the intensity of the person’s commitment to a given conviction or practice.”¹²⁴

There is, however, reason to doubt whether wholehearted commitment, without more, should warrant deference. Its object might be worthless.¹²⁵ There is also an epistemic problem. How can the state discern what role any belief plays in anyone’s moral life? What could the state know about my moral life? About which decisions of mine involve matters of ethical foundation?¹²⁶

Proponents of Integrity tend to think that religion is always a matter of intense commitment.¹²⁷ Religion, however, does not hold the same place in the lives of all religious people. An individual may not think much about his religion until a crisis in middle age. If commitment were what matters, then there would be no basis for protecting spiritual exploration by the merely curious.

119. JOSEPH RAZ, *A Right to Dissent? II. Conscientious Objection*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 276, 280 (1979).

120. Paul Bou-Habib, *A Theory of Religious Accommodation*, 23 *J. APPLIED PHIL.* 109, 117–18 (2006). He focuses on moral commitments, but his argument’s logic entails Integrity rather than Conscience. *Id.*

121. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 368 (2011). Dworkin confidently declares that these include “choices in religion.” *Id.* Chandran Kukathas claims that he wants to protect “conscience,” but he understands this term so capaciously that he is more appropriately classified as an Integrity theorist. CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 41–73 (2003).

122. JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 76 (Jane Marie Todd trans., 2011).

123. *Id.*

124. *Id.* at 97.

125. See Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *LEGAL THEORY* 215, 216 (2009) (explaining that wholehearted commitment may result from amoral allegiances and is not necessarily connected to any objective value).

126. Some Supreme Court opinions and commentators have similarly suggested deference to each person’s “ultimate concerns,” with similarly anarchic implications. See, e.g., JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 69–74 (1995).

127. See, e.g., DWORKIN, *supra* note 121, 214–18.

C. *The Hobbes Problem and Its Solution*

Any defense of religious accommodations must confront Thomas Hobbes's classic argument for denying all claims of conscientious objection. For Hobbes, human beings are impenetrable, even to themselves, their happiness consisting in "a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later,"¹²⁸ their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."¹²⁹ Concededly some people have unusually intense desires of various sorts. But "to have stronger, and more vehement Passions for any thing, than is ordinarily seen in others, is that which men call MADNESSE."¹³⁰ No appeal to "such diversity, as there is of private Consciences" is possible in public life for Hobbes.¹³¹

Part of Hobbes's objection to any reliance on Conscience or Integrity is epistemic: He doubts that the law can discern "the diversity of passions, in divers men."¹³² But this epistemic skepticism is parasitic on his skepticism about objective goods: "Since different men desire and shun different things, there must needs be many things that are *good* to some and *evil* to others [T]herefore one cannot speak of something as being *simply good*; since whatsoever is good, is good for someone or other."¹³³

When there are disagreements:

[C]ommonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power¹³⁴

What is most exigent in other minds is not knowable, because there is nothing coherent there to know.¹³⁵

128. THOMAS HOBBS, *LEVIATHAN* 160 (C.B. Macpherson ed., Penguin Classics 1985) (1651).

129. THOMAS PFAU, *MINDING THE MODERN: HUMAN AGENCY, INTELLECTUAL TRADITIONS, AND RESPONSIBLE KNOWLEDGE* 189 (2013).

130. HOBBS, *supra* note 128, at 139.

131. *Id.* at 366; *see also* PFAU, *supra* note 129, at 194–95.

132. HOBBS, *supra* note 126, at 161.

133. THOMAS HOBBS, *DE HOMINE* (1658), *reprinted in* *MAN AND CITIZEN* (Charles T. Wood et al. eds., Anchor Books 1972); *accord* HOBBS, *supra* note 128, at 120.

134. THOMAS HOBBS, *THE ELEMENTS OF LAW: NATURAL AND POLITIC* 188 (Ferdinand Tönnies ed., Barnes & Noble, Inc. 2d ed. 1969) (1650); *see also* HOBBS, *supra* note 128, at 111 (discussing the lack "of a Right reason constituted by nature").

135. *See* HOBBS, *supra* note 128, at 82–83 ("[F]or the similitude of the thoughts, and Passions of one man, to the thoughts, and Passions of another, whosoever looketh into himself, and considereth what he doth, when he does *think, opine, reason, hope, feare, &c.* and upon what grounds; he shall thereby read and know, what are the thoughts, and Passions of all other men, upon the like occasions. I say the similitude of *Passions*, which are the same in all men, *desire, feare, hope, &c.*; not the similitude of *the objects* of the Passions, which are the things *desired, feared,*

At least at the architectonic level, Hobbes's political philosophy is consistent with the constraint of liberal neutrality: In Dworkin's classic formulation, "the government must be neutral on what might be called the question of the good life," so that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."¹³⁶ Hobbes thinks the state can ignore the question of the good life, whose answer is merely the gratification of appetite.¹³⁷

American law, however, does not conform to liberal neutrality. It routinely relies on contestable conceptions of the good.¹³⁸ "Religion" is one of them.¹³⁹ That is how the law manages to overcome Hobbes's objection.

Hobbes is at least right about this: We are too opaque to one another, our depths are too personal and idiosyncratic for the state to know for certain which of one another's commitments and passions really merit respect.

The various integrity principles that have been proposed can't be administered—at least, not with any precision. Maclure and Taylor write that "[t]he special legal status of religious beliefs is derived from the role they play in people's moral lives, rather than from an assessment of their intrinsic validity."¹⁴⁰ If the state is supposed to defer to identity-defining commitments, how can it tell what these are?¹⁴¹ Simon Cabulea May hypothesizes a draft resistor for whom military service would prevent the perfection of his skills at chess, which he regards as "a most vivid manifestation of the awesome beauty of the mathematical universe."¹⁴² Perhaps chess really does play a quasi-religious role in his moral life.

John Rawls thought that, for purposes of theorizing about justice, we must regard one another with a model of agency as opaque as that of Hobbes, in which for all we can tell the man who compulsively counts blades of grass is pursuing what is good for him.¹⁴³ If people are thus incommensurable,

hoped, &c: for these the constitution individuall, and particular education do so vary, and they are so easie to be kept from our knowledge, that the characters of mans heart, blotted and confounded as they are, with dissembling, lying, counterfeiting, and erroneous doctrines, are legible onely to him that searcheth hearts.").

136. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985). For Hobbes, there are no individual rights against the state, but the sovereign's interests entail a broad field of liberty for the subjects. IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 29–34 (1986).

137. See *supra* notes 131–33 and accompanying text.

138. DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 5, at 26–39.

139. *Id.*

140. MACLURE & TAYLOR, *supra* note 122, at 81.

141. Raz understands the difficulty of discerning anyone's conscience, and so advocates less intrusive devices, such as "the avoidance of laws to which people are likely to have conscientious objection." RAZ, *supra* note 119, at 288. This is not possible: there are too many kinds of objections.

142. Simon Cabulea May, *Exemptions for Conscience*, in *RELIGION IN LIBERAL POLITICAL PHILOSOPHY* (Cécile Laborde & Aurelia Bardon, eds., forthcoming 2017).

143. RAWLS (1971), *supra* note 98, at 432–33. Michael Sandel observes that among the circumstances of justice that motivate Rawls's liberalism is an "epistemic deficit" in "our cognitive access to others." MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 172 (1982).

then it is not apparent how some of their desires can legitimately be privileged over others, leaving Rawls's "liberty of conscience" indeterminate. Conscience, at least as it is understood in the original position, is in the same black box that it was in Hobbes.¹⁴⁴

*Sherbert v. Verner*¹⁴⁵ held that a state unemployment bureau could not deny unemployment compensation to a Seventh-Day Adventist who refused to work on Saturdays: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."¹⁴⁶ Suppose someone quits his job because he claims that integrity requires him to spend his days counting blades of grass. What is the state supposed to do?

D. *The Value of Vagueness*

That brings us back to Greenawalt's defense of specifically religious exemptions. The failure of alternatives to religion shows that he is right: Sometimes there is no alternative to using religion as a legal category.

We are in our depths mysterious to one another. But we are similar enough to know where the deep places are likely to be. Those deep places consist, in large part, in goods toward which we are drawn. The sources of value in terms of which people tend to define themselves are not as idiosyncratic as Hobbes imagined. That provides an anchor for accommodations.

Hobbes's skepticism can be avoided—generally *is* avoided—because our agency consists in the pursuit of ends outside ourselves.¹⁴⁷ Hobbes thought there were no such ends. Religion denotes a cluster of such ends that are salient for Americans.

The American idea of religious liberty is rooted in dissenting Protestantism's bitter conflicts, first with the Church of England and then with established Puritanism.¹⁴⁸ Its central ideas, of state incompetence over

144. In Rawls, this problem is remediable at the constitutional stage of the four-stage sequence, but only because at that stage liberal neutrality must be abandoned. Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, in *RELIGION IN LIBERAL POLITICAL PHILOSOPHY*, *supra* note 143.

145. 374 U.S. 398 (1963).

146. *Id.* at 399, 406.

147. My argument is anticipated in a way by C.B. Macpherson, who argued that Hobbes failed to anticipate that there could be a group "with a sufficient sense of its common interest that it could make the recurrent new choice of members of the legally supreme body without the commonwealth being dissolved and everyone being thrown into open struggle with everyone else." C.B. Macpherson, *Introduction* to *HOBBS*, *supra* note 128, at 55. But Macpherson thought that the common interest could be found in the economic position of the bourgeoisie. *Id.* There are other possibilities.

148. See JOHN WITTE & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 15–17 (3d ed. 2011).

religious matters and the importance of individual conscience, are responses to that experience.

Since colonial times, the United States has been religiously diverse, but the overwhelming majority of Americans have felt that religion is valuable. Early struggles turned on an instrumental dispute over whether its value was best realized by state support for religion or by disestablishment. The proponents of disestablishment won. Their views, that religion is valuable and that this value is best realized by disabling the state from taking sides in religious disputes, have shaped American law ever since.¹⁴⁹

In the United States today, “religious liberty” remains an attractive candidate for protection. That’s why the ACLU and the Christian Coalition unite in wanting to protect it.¹⁵⁰ “Religion” denotes a known set of deeply held values. Religious beliefs often motivate socially valuable conduct. Hardly any religious groups seek to violate others’ rights or install an oppressive government. All religions are minorities and so have reason to distrust government authority over religious dogma. There are pockets of local prejudice, especially against Muslims.¹⁵¹

“Religion” is, of course, a cluster concept with no essence, as Greenawalt has shown better than anyone.¹⁵² Within the cluster are multiple goods. Deciding which of them is most salient is itself a theological question that the state had best stay away from.

The singling out of religion is appropriate precisely *because* it doesn’t correspond to any real category of morally salient thought or conduct, and thus is flexible enough to capture intuitions about accommodation while keeping the state neutral about theological questions. It is the most workable proxy for whatever genuine value ought to be promoted in accommodation cases. Other, more specific categories are either too sectarian to be politically usable, too underinclusive to substitute for religion, or too vague to be administrable.

Sometimes the unfairness complaint is made as if one could reasonably demand that law recognize all pressing moral claims, with no imprecision at

149. See DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 5, at 1–77.

150. See, e.g., Christi Parsons, *Religious Groups Unite in the Name of Freedom*, CHI. TRIB. (Mar. 12, 1998), http://articles.chicagotribune.com/1998-03-12/news/9803120216_1_religious-freedom-restoration-act-christian-coalition-senate-committee [<https://perma.cc/E3UJ-QDVY>] (reporting on the ACLU and Christian Coalition joining forces to protect the freedom of religious expression).

151. See, e.g., Joanna Walters, *Muslims in US Fear Increasing Prejudice on Wave of Anti-Islamic Sentiment*, GUARDIAN (Dec. 12, 2015), <https://www.theguardian.com/us-news/2015/dec/12/muslims-fear-prejudice-in-wake-of-anti-islamic-sentiment> [<https://perma.cc/GYW6-4QZE>] (giving examples of hostile and violent incidents against Muslims in American communities).

152. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984), is the leading and classic article. For Greenawalt’s recent restatement of the same claim, see FREE EXERCISE AND FAIRNESS, *supra* note 6, at 124–56.

all.¹⁵³ Clifford Geertz observes that “the defining feature of legal process” is “the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them.”¹⁵⁴ Rules, Frederick Schauer writes, are “crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous.”¹⁵⁵

“Religion” is overinclusive and underinclusive—like most other legal categories. It is an imperfect but workable proxy for the deep commitments that people actually feel.¹⁵⁶

Greenawalt never makes clear what he thinks is good about religion. Reviewing the treatise, Smith complains that, on the core question of why religion is singled out for special treatment, “Greenawalt seems almost aggressively complacent.”¹⁵⁷ I think Greenawalt is consciously trying to avoid proposing a canonical basis for a valuable practice that is the object of overlapping consensus among people with very diverse views. There is some evidence that he has the proxy strategy in mind. In the multiple places where he draws the line at religion, allowing religious but not nonreligious exemptions, it is never because he thinks that religion is more valuable than other human activities. Rather, it is always because of concerns about administrability and potential fraud.¹⁵⁸ Greenawalt sees that “religion” does not denote any essence but that it is a workable legal proxy for what really does matter.

153. Brian Leiter, for example, thinks that religious accommodation should be based on “features that *all and only* religious beliefs have,” and complains that, under prevailing understandings of religious liberty, a Sikh will have a colorable claim to be allowed to carry a ceremonial dagger, while someone whose family traditions value the practice will be summarily rejected. BRIAN LEITER, WHY TOLERATE RELIGION? 1–3, 27 (2013). Under what description could the law accommodate the latter? Much later in his book, Leiter acknowledges the indispensability of legal proxies but does not examine the impact of that concession on his thesis that singling out religion is unfair. *Id.* at 94–99. For further critique, see Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 967–68 (2010).

154. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 170 (3d ed. 2000).

155. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE, at xv (1991). Since rights claims are always rule invoking, they are inevitably underinclusive and distracting. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

156. I have expanded on this point in Andrew Koppelman, “*Religion*” as a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 SAN DIEGO L. REV. 1079 (2014); Andrew Koppelman, *Religion’s Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71 (2013), <http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf> [<https://perma.cc/P9NJ-GYE3>]; Andrew Koppelman, *Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom*, COMMONWEAL (Mar. 27, 2015), <https://www.commonwealmagazine.org/nonexistent-irreplaceable> [<https://perma.cc/4FXE-7C7C>].

157. Smith, *supra* note 91, at 1903.

158. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 72–73.

In the treatise, he wrote: “The complexities of determining sincerity provide one reason why people may choose ‘second-best’ legal standards, rather than different standards that they would choose as better if all relevant facts were easily knowable.”¹⁵⁹ Sometimes sincerity is detectable: “A finding that a claimant is sincere should be easy if one cannot discern any secular advantage from a person’s engaging in the behavior she asserts is part of her religious exercise.”¹⁶⁰ But that is not true of all accommodation cases.¹⁶¹ And why focus on religious sincerity? The answer is administrability.

III. Substantial Burden and State Competence

Another and more difficult question is deciding whether religion is substantially burdened in any particular case.

The Court in *Burwell v. Hobby Lobby* construed RFRA to almost automatically find both burden and substantiality in every case.¹⁶² The question of how substantial any burden is, the Court declared, is a “difficult and important question of religion and moral philosophy,” and the believer’s response to that deserves deference from courts.¹⁶³

This interpretation is inconsistent with the language of the statute, which makes substantiality and burden elements of a claim.¹⁶⁴ It does, however, respond to a real and intractable problem. If the state must refute these elements, then it inevitably will argue “that a particular religious practice is trivial, or nonobligatory, or capable of being replaced by a substitute practice.”¹⁶⁵ One core premise of disestablishment is the state’s incompetence to decide theological questions.¹⁶⁶

Greenawalt thinks that there is no alternative to directly examining the claimant’s religious views: “[A]ssessing burdens and government interests, which RFRA and similar state requirements require, inevitably makes outcomes partly depend on a group’s religious views and the effects of its actions.”¹⁶⁷ For example, “what counts as a substantial burden should depend significantly on just how close is the connection between one’s convictions and the behavior to which one objects.”¹⁶⁸

159. *Id.* at 109.

160. *Id.* at 122–23.

161. *See id.* at 106–23 (elaborating on the risk of arbitrary administration that results from individualized judgments of sincerity).

162. Gedicks, *supra* note 51, at 98.

163. *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2778 (2014).

164. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1(a) (2012); Gedicks, *supra* note 51, at 149–51; Lederman, *supra* note 2, at 417.

165. LUPU & TUTTLE, *supra* note 107, at 198.

166. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1836, 1841–42 (2009).

167. GREENAWALT, *supra* note 7, at 207–08.

168. *Id.* at 125.

In the treatise, he surveys various proposals to codify the substantial burden and compelling interest requirements into clear rules and finds them all inadequate. The best judges can hope to do is to “reasonably comprehend a person’s religious beliefs and practices” and thereby “be able to identify some interferences as very great and others as trivial.”¹⁶⁹

When the state tries to assess such burdens, disaster can follow. In a particularly egregious recent case, a prison imposed restrictions on Jewish religious groups that it did not impose on any other groups, based on a rabbi’s advice—with which the complaining inmate disagreed—that Jewish worship requires a minyan or quorum of ten adult Jews. Because there were only three Jews in the prison, they were never allowed to meet at all.¹⁷⁰ The lower courts agreed with the rabbi, thus holding, as Justice Alito noted in his dissent from denial of certiorari, that “Ben-Levi’s religious exercise was not burdened because he misunderstands his own religion.”¹⁷¹

This kind of train wreck can be averted if courts, in trying to discern religious burdens, understand the dangers of relying on a group’s theology to determine that of the individual. Greenawalt is clear on that point: “[A]n individual’s convictions need not correspond with the dominant beliefs of his religious group.”¹⁷² Alito is right that the lower courts were wrong under well-settled precedent. The difficulty of perceiving someone else’s religious exigencies—a central problem for Hobbes¹⁷³—is made harder by the Supreme Court’s decision (with which Greenawalt agrees) to focus on the beliefs of individual claimants, rather than those of the groups to which they belong.¹⁷⁴

Greenawalt evidently thinks that, if there is going to be accommodation, courts have to be permitted to ask where it hurts and how much. In his earlier work, he acknowledges concerns “that most administrators have neither the talent nor the time to scrutinize individual religious sentiments and that individuals may be less than candid or genuinely uncertain about what they believe.”¹⁷⁵ But these judgments are inevitable, and they influence judgments of the other elements of a RFRA claim: “[I]n reality, courts consider burden in light of government interest and government interest in light of burden, striking a kind of balance.”¹⁷⁶ An adequately sensitive court will be able to avoid disasters like *Ben-Levi*.

169. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 210.

170. *Ben-Levi v. Brown*, 136 S. Ct. 930, 930–31 (2016) (Alito, J., dissenting) (mem.).

171. *Id.* at 933.

172. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 121.

173. *See supra* subpart II(C).

174. *Thomas v. Review Bd. v. 450 U.S. 707*, 715–16 (1981); FREE EXERCISE AND FAIRNESS, *supra* note 6, at 125 n.6.

175. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 206.

176. *Id.* at 202.

Mutual opacity remains an obstacle: “[O]dd and unusual claims” are less likely to be persuasive.¹⁷⁷ As noted earlier, Greenawalt thinks a court’s judgment will and should “depend at least partly on how most people would perceive the connection between the convictions and the degree of involvement.”¹⁷⁸ This is, however, the least unfair approach. As he notes elsewhere, “in practice, the test may disfavor unpopular minority religions, but this difficulty is not crucial, given that the obvious alternative of no required exemptions is still less favorable for minority religions.”¹⁷⁹

Greenawalt’s proposal, in essence, is that courts muddle through. There are potential dangers, but they have always been there. Courts can arrive at reasonably just outcomes if—it is a big if—they are as intelligent and sensitive as Greenawalt.

Conclusion

Greenawalt’s exceedingly fact-specific casuistry invites Hobbesian skepticism to the extent that it requires daily confrontation with intersubjective opacity. This raises reasonable questions about the workability of the entire operation, at least when legislated into a vague rule such as RFRA. Greenawalt tries to address these questions by microscopically analyzing the facts of specific types of situations. Most of his answers make sense. That is the deepest significance of his work on religious exemptions.

Legislative accommodation predates the framing of the Constitution,¹⁸⁰ but, as Lupu and Tuttle have emphasized, the *principle* of religious accommodation “had never . . . appeared in our constitutional law” before *Sherbert*.¹⁸¹ The Court subsequently limited the principle in a variety of ways: It did not apply it in taxation cases,¹⁸² or cases involving internal government operations, or the disposal of government property.¹⁸³ It emphatically did not apply to claims made by prisoners.¹⁸⁴ Eventually the Court discarded it altogether, provoking Congress to reinstate it by statute in RFRA.¹⁸⁵

There hasn’t been enough reflection on the sheer novelty of this test. It is sometimes offered as if it were the original meaning of the Free Exercise

177. GREENAWALT, *supra* note 7, at 142.

178. *Id.* at 124.

179. KENT GREENAWALT, INTERPRETING THE CONSTITUTION 266 (2015).

180. *See* GREENAWALT, *supra* note 7, at 25.

181. LUPU & TUTTLE, *supra* note 107, at 192.

182. *Hernandez v. Comm’r*, 490 U.S. 680, 700 (1989); *United States v. Lee*, 455 U.S. 252, 260 (1982).

183. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450, 452 (1988); *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986).

184. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 351–53 (1987).

185. *See supra* notes 1–2 and accompanying text.

2017]

Kent Greenawalt, Defender of the Faith

847

Clause, but in fact it is a judicial construct that was invented in 1963.¹⁸⁶ We are still learning how it works. That means we are still learning whether it can work.

So the commonsensical, deliberately atheoretical formulations that Greenawalt offers are an important contribution. They are a persuasive piecemeal defense of the practice of religious exemptions. More importantly: They show that the thing can be done.

186. The notion that it is the original meaning is refuted in Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992). It could nonetheless be the most appropriate interpretive construct. I agree with Greenawalt that “[t]he evidence about any original understanding about compelled exemptions is sufficiently indecisive so that the issue is most sensibly resolved in terms of free exercise values and the appropriate functions of courts and legislatures.” FREE EXERCISE AND FAIRNESS, *supra* note 6, at 25.