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Cooperation, Religious Freedom, and the Liberal State

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ABSTRACT OF THE DISSERTATION

Cooperation, Religious Freedom, and the Liberal State

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Religious freedom is often listed among the core freedoms that characterize the liberal state—along with freedom of speech, freedom of association, and freedom of the person. But it may seem that what is valuable about religion, from a liberal point of view, would be sufficiently protected by these other core freedoms. Does religious freedom have a special role to play in a liberal state?

Traditionally, liberal theorists have thought that religious freedom required maintaining separation between the state and religion. But problems arise when separation is applied strictly to every type of religion-state interaction, without attention to the underlying values at stake. This dissertation defends a conception of religious freedom that makes room for cooperation and compromise, with the aim of creating mutually beneficial relationships between religion and the state. Separation is an important component of this picture, but not its guiding principle.

This dissertation discusses two areas in which strict adherence to religion-state separation may lead to problematic outcomes. First, strict adherence to separation lends support to an all-or-nothing approach to religious accommodation. But compromise can often be more valuable for both religious persons and the state, especially when the meaning or purpose of the religious activity is consistent with the purpose of the conflicting law. In such cases, compromise may generate creative solutions to conflicts and may promote mutual understanding and respect between religious persons and their fellow citizens. This compromise-based approach to accommodation is limited, however, by the principle that accommodation should not be used as a form of political protest.

Second, strict adherence to separation supports protecting the autonomy of religious institutions to oversee their internal own affairs. But the state must also protect the rights and interests of the members of religious institutions. As such, the state must ensure that religious institutions are voluntarily associations, whose members have both a right and a genuine opportunity to exit the association. As one example, the state should generally not enforce religious arbitration agreements against members of religious institutions, even when they have voluntarily agreed to them.

The dissertation of Brian Jeffrey Hutler is approved.

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For Lee-Ann and Noah

TABLE OF CONTENTS

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Chapter 1

The Cooperative Conception of Religious Freedom

What is the role of religious freedom in the liberal state? On the one hand, religious freedom, or something like it, is often listed among the core rights and freedoms that characterize the just state—along with freedom of speech, freedom of association, the right to political participation, legal due process, freedom of the person, and perhaps the right to property.[1] On the other hand, it may seem that what is valuable or worth protecting about religion, from a liberal point of view, would be sufficiently protected by these other rights and freedoms.[2] Religious rituals, for example, typically involve valuable forms of speech, expression, or association. Is there any reason to include religious freedom as a special liberal freedom? If so, what role does religious freedom play in our conception of a just liberal state?

Many scholars who address this question focus on whether there is anything unique or distinctive about religion—about religious beliefs, practices, institutions, identities, and so on—that can justify providing special protections for it. Perhaps religious convictions are especially deeply felt, or religious groups are especially susceptible to suffering violence or neglect.[3] But it

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[1] See, for example, the U.S. Const., First Amend.; Universal Declaration of Human Rights, Art. 18; Canadian Charter of Rights and Freedoms, Sect. 2; Charter of Fundamental Rights of the European Union, Art. 10. See also John Rawls' list of "equal basic liberties", listing "freedom of thought and liberty of conscience" but not freedom of religion. *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

[2] Compare to discussion in Cécile Laborde, "Equal Liberty, Nonestablishment, And Religious Freedom," *Legal Theory* 20, no. 1 (2014): 52-77.

[3] See, for example: Michael W. McConnell, "The Problem Of Singling Out Religion," *DePaul Law Review* 50 (2000): 1-47; Kevin Vallier, "The Moral Basis Of Religious Exemptions," *Law and Philosophy* 35, no. 1 (2016): 1-28; and Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *The University of Chicago Law Review* 61, no. 4 (1994): 1245-1315.

proves difficult to identify a specific aspect of religion that singles it out for special treatment. Religion is just one among many other types of deeply felt beliefs and groups susceptible to mistreatment. A more promising approach may be to look at the actual laws of religious freedom in a liberal state, paying attention to the structuring principles that have emerged over time. Even if religion is not unique, it may be that religion provides a touchstone example for describing a certain type of social structure or social ordering that these religious freedom laws help to bring about. And the value of this social ordering may explain the distinctive role of religious freedom in our conception of the liberal state.

In the U.S. legal and political tradition, it is often said that religious freedom laws are meant to ensure the "separation" of religion and the state—that is, religious institutions and state institutions occupy distinct spheres of operation with minimal interaction between them.[4] There are three core principles of religion-state separation: First, the state should maintain public institutions that are secular or nonreligious, second, the state should provide no form of endorsement or support for religious institutions, and third, the state should avoid interfering in the operations of religious institutions and the religious activities of individuals.[5] Separation is valuable for a number of reasons. Maintaining separate spheres of operation helps to ensure that the state does not fall under the sway of a particular religious group or religious viewpoint, helping to protect minorities or those who citizens do not share that religious views. Separation may also help to protect religious groups from corrupting effects that may result from acquiring

[4] Thomas Jefferson famously used the phrase of a "wall of separation" to describe such a view according to which religious institutions and the state should remain distinct with minimal interaction between them. See Thomas Jefferson, "Letter to the Danbury Baptist Association" (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html (accessed January 17, 2018).

[5] Compare to "Moderate Separation" in Cécile Laborde, "Political Liberalism And Religion: On Separation And Establishment," *Journal of Political Philosophy* 21, no. 1 (2013): 67-86.

political power.[6] Moreover, separation may help to demarcate distinct domains of epistemological or normative authority or competence.[7]

It is clear that maintaining separation between religion and the state is valuable in some cases. The liberal state should maintain secular public schools and secular legal institutions. And the liberal state must not be in the position of enforcing religious rules or doctrines.[8] But problems may arise when the paradigm of religion-state separation is applied strictly to every type of religion-state interaction, without attention to the underlying values at stake. First, it may not be possible to maintain separation in every type of case, especially when commitments to noninterference and non-support conflict. Where there is a baseline policy of state-mandated activity—e.g., in the case of taxation—avoiding interference in a religious practice may amount to a form of state support for religion. Second, maintaining a strict separation between religion and the state may lead to problematic outcomes, such as the political isolation of religious persons and groups. For example, the separation-based paradigm in the U.S. has arguably abetted the creating of religious institutions that reject the mainstream social and political culture, resulting in a form of social fracture.[9] Separation does not always result in the isolation of religious groups from the broader political community, but it may sometimes have this effect. As

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[6] See Andrew Koppelman, "Corruption of Religion and the Establishment Clause," *William & Mary Law Review* 50 (2008): 1831.

[7] Compare to see James Madison, "Memorial and Remonstrance Against Religious Assessments," *The Papers of James Madison*, vol. 8, ed. Robert A. Rutland and William M. E. Rachal (Chicago: The University of Chicago Press, 1973): 295–306.

[8] See Rawls *A Theory of Justice* 212.

[9] See discussion in Daniel T. Rodgers, *Age of Fracture* (Cambridge, MA: Harvard Belknap Press, 2003). Compare to the isolationist approach described by Robert M. Cover, "*Nomos* and Narrative" *Harvard Law Review* 97 (1983): 1.

such, liberalism may have reason to reject strict separation and adopt a softer or more moderate approach to religion-state separation.

Instead of applying separation strictly to every type of religion-state interaction, we should see the function of "religious freedom" and religious freedom laws as helping to encourage the integration of a diverse collection of persons and institutions into a social and political community, while also allowing them to develop and maintain their distinctive identities. Separation is an important component of this picture, but not its guiding principle. Separation is not an end-in-itself. Instead, the liberal state should seek the correct balance between separation and integration. As such, the liberal state should sometimes be open to closer types of interactions with religious people and groups, including interactions based on compromise or collaboration.

This dissertation will describe and defend a conception of religious freedom that incorporates elements of both separation and integration. I will label this conception the "cooperation-based" or "cooperative" conception of religious freedom in order to capture the way in which the state and religion remain distinct, but not necessarily isolated. The term "cooperation" is not meant to suggest that the state and religion should routinely share ends and projects. Rather, the religious freedom laws should aim to achieve a coordinated, non-accidental, mutually beneficial coexistence between the state and religion. Importantly, the scope of the cooperation-based conception is not limited to religious beliefs or religious groups. The state may have reason to "cooperate" with other morally distinctive types of beliefs and groups on the same grounds. According to the cooperative conception, the role of "religious freedom" in the liberal state is to describe the way in which the state may correctly balance separation and

integration with respect to various types of morally distinctive persons and groups, with religion as the key example.

The cooperative conception of religious freedom draws inspiration from John Rawls' idea of the state as a social union composed of social unions—with religious institutions (perhaps along with a variety of other social institutions and organizations) among the social unions nested within the state.[10] On Rawls's analogy, the various social unions or voluntary associations function as members of an orchestra, each existing as an independent entity, with its own talents and skills, and yet able to operate together, harmoniously contributing to a shared purpose. Similarly, on the cooperative conception, religion and the state ought to be kept distinct not because they have incompatible missions or an adversarial posture, but because of their distinct competencies and social functions. On this conception, religious persons and groups may have reason to embrace their place within the liberal state, and the state should likewise benefit from their existence within the social and political community.

This Chapter has two sections. Section 1 describes in more detail the potential problems faced by applying a strict separation conception of religious freedom across the board. Section 2 describes the primary motivation for the cooperative conception, namely, the special value of achieving a diverse social and political community composed of persons and groups holding various moral and religious views. Subsequent Chapters of this dissertation will describe two main ways in which the cooperative conception differs from a strict separation conception of religious freedom. First, the cooperative conception emphasizes a compromise-based approach to religious accommodation, according to which accommodation should be designed to help render

[10] The cooperative conception draws on John Rawls's discussion of the state as a social union of social unions. *A Theory of Justice*, Section 79. Compare to Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield (Chicago: University of Chicago Press, 2000), Book II, Chapter 5 (describing the role of voluntary associations in the American political community).

religious practices consistent with the purpose of the conflicting law. And second, the cooperative conception suggests a way to balance the importance of protecting religious institutions against the need to protect their members, namely, the state should ensure that religious institutions operate as voluntary associations.

1. Two Potential Problems with Strict Separation

Maintaining a separation between religion and the state is an important aspect of religious freedom. But separation should not be an end-in-itself. This Section describes two reasons for thinking that this separation should not be strict—that is, that there must be some flexibility in how we conceive of separation. In particular, this section describes two potential problems that may result from a universal application of strict separation: strict separation may be impossible to maintain, and it may contribute to the social isolation of religious groups from the state or the broader community. "Strict separation" is defined as the view that the state should never or almost never interfere with religious institutions, and should never provide support to religious institutions. That is, there is a very high bar on state interference and state support for religion.

1.1 Impossible to Maintain Strict Separation

First, it may be impossible for a liberal state to maintain strict separation from religious or other similar types of institutions operating in its jurisdiction. The simple reason for this impossibility is the fact that people and institutions operating within the jurisdiction of a liberal state are subject to a wide variety of legal obligations and restrictions. The liberal state must decide whether to enforce these obligations and restrictions against religious persons and groups. But in some cases, neither enforcement nor nonenforcement is consistent with strict separation.

Why would that be the case? According to a strict separation conception of religious freedom, the state should generally not interfere with religious institutions, but it should also not

provide them with support that is not available to others on the same terms. But as others have pointed out, these two commitments may lead to inconsistent policy recommendations.[11] This problem is particularly evident with respect to generally applicable policies, such as taxation, that create a baseline of state involvement in the affairs of every individual and group. Consider, for example, the question of whether the state should require ministers or other leaders of religious congregations to pay income tax on the rental value of their parsonage, or the home they occupy, generally cost-free, as part of their employment. On the one hand, if the state requires payment of such tax, it may preclude religious institutions from allowing their ministers to live near their congregations, perhaps interfering in the inner workings of the institution. But on the other hand, if religious institutions and their employees are not required to pay taxes on an equal basis with others, then it appears they are receiving a special benefit that would be inconsistent with the "no support" requirement. For example, a court recently held that the U.S. tax code, which allows "ministers" to exclude the rental value of a parsonage from their taxable income, discriminates against similarly situated employees of nonreligious institutions.[12] It is not clear that a strict separation conception can avoid these sorts of dilemmas since it may not be clear when the state is supporting religion, and when is it merely not interfering with religion.

1.2 Isolation and Exclusion of Religious Groups

A second problem is that a strict separation conception of religious freedom may risks contributing to the social and political isolation and exclusion of religious persons and groups

[11] Christopher L. Eisgruber and Lawrence G. Sager. *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 25.

[12] See Gaylor v. Mnuchin, No. 16-cv-215 (W.D. WI Oct. 6, 2017) (holding that the parsonage rental allowance exclusion, 26 U.S.C. § 107(2), violates the Establishment Clause of the First Amendment).

from the broader political community. Maintaining separation between the state and religion can sometimes contribute to the integration of religiously diverse communities into the shared political community. Policies of separation may help to ease transitions, and to preserve valuable differences.[13] Individuals and groups may feel more at home in a diverse political community when they are able to identify with certain unique or distinctive local or smaller-scale communities. But at the same time, policies of separation can sometimes result in more pronounced forms of isolation or exclusion, leading to a fracturing of the political community, making social integration less likely.

Separationist policies may interfere with integration for two reasons. First, separation may lend support to an active isolationist strategy on the part of certain religious persons and groups who wish to escape what they view as the polluting or corrupting influence of the secular state and its institutions. The state's public institutions, such as its schools and legal institutions, may seem to compete with religious institutions. In response to this antagonistic view of the relationship between religion and the state, some religious persons have adopted an isolationist strategy with the goal, as some have expressed it, of creating religious institutions that can weathering the (in their view inevitable) collapse of the secular state and its "morally corrupt" institutions.[14] In order to implement this isolationist strategy, religious groups in the U.S. have established and operated a range of institutions that are able to provide key social resources and services to their members or participants, including schools, media outlets, hospitals, and charitable organizations that provide a variety of other social safety net-type services. Religious

[13] Compare to Robert D. Goldstein, "The Structural Wall of Separation and the Erroneous Claim of Anti-Catholic Discrimination," *Cardozo Public Law, Policy & Ethics Journal* 13 (2014): 173.

[14] See Rod Dreher. *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (New York: Sentinel, 2017), drawing on Alasdair MacIntyre's call for a "new St. Benedict", *After Virtue* (South Bend, IN: University of Notre Dame Press, 1981).

minorities who often had little chance of influencing national policy agendas—e.g., orthodox or fundamentalist Jewish, Islamic, and Mormon groups—helped to pioneer many of these autonomous institutions. But recently in the U.S., mainstream Protestants and Catholics, who are often politically well connected and enjoy major financial support, have also adopted this strategy of establishing autonomous religious institutions.[15] While the state may be able to accommodate the autonomous institutions of small religious groups (subject to safeguards for the freedom and equality of their members) the widespread existence of autonomous religious institutions may threaten the social fabric and political structure of the state.

The strict separation conception of religious freedom may lend support to those who wish to pursue this isolationist political strategy because of its commitment to non-interference with religious institutions. Indeed, it is increasingly common for religious persons and groups to appeal directly to religious freedom (and associated legal protections) in support their isolationist strategy—to protect religious institutions from government regulation and oversight.[16] There have been a number of recent cases, some litigated in the U.S. Supreme Court, involving religious corporations and other institutions claiming religious freedom exemptions or other forms of accommodation from government regulations that they believe would interfere with their mission or operation.[17] Liberal theorists should be concerned about a conception of

[15] In Chapter 4 I will discuss in detail one example of this phenomenon, the use of religious arbitration agreements, and in particular, the adoption of legal techniques and language originally designed by a orthodox Jewish group—Beth Din of America—by a mainstream protestant organization—Peacemaker Ministries.

[16] Cf. the litigation strategies of religious groups such as the Becket Fund, the American Center for Law & Justice, and the Alliance Defending Freedom.

[17] This list includes most prominently: Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012) (holding under the Free Exercise Clause that church-operated school was exempt from employment discrimination laws

religious freedom that lends support to a strategy of isolationism, which may lead to the entrenchment of social and political differences and disagreements. But because of its commitment to accommodating religious persons and groups, this potential for religious isolationism is an inherent possibility in a strict separation conception of religious freedom.

Second, the strict separation conception of religious freedom may interfere with the integration of the political community because it may lend support to those who seek to exclude religious persons and groups from the social or political mainstream. That is, in some cases, separation-based policies may lend support to those who are critical of the influence of religious persons and groups in politics and public life, either because they are critical of religion in general or certain policies favored by religious groups. For example, the illiberal or undemocratic aspects of some religious doctrines may impede the state's ability to promote core liberal values such as gender equality and sexual freedom. Similarly, unscientific religious doctrines may threaten the state's ability to develop and implement up-to-date policies with respect to healthcare, medicine, the environment, and so on. For these reasons, many believe that the influence of religion in the domain of politics should be limited as much as possible.

A strict separation approach to religious freedom may sometimes lend support to this strategy of excluding religious persons and groups from public space in order to reduce their influence on politics. One example of this phenomenon in U.S. law is the use of the Establishment Clause to limit as much as possible religious teaching, displays, and rituals in

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as applied to a teacher), and Burwell v. Hobby Lobby, 573 U.S. ___ (2014) (holding under the Religious Freedom Restoration Act that a closely held for-profit corporation was entitled to an exemption from the Affordable Care Act contraceptive mandate because of its religious objections to complying with it).

public spaces such as schools and parks.[18] Separation-based religious freedom laws help to ensure that the state does not endorse any specific religious views or religion in general. But the state should be careful not to draw the line of what qualifies as state endorsement too far on the side of restricting religious speech, else risk excluding from public discourse a variety of religious viewpoints that may be underrepresented or misunderstood.[19] And while some theorists argue that citizens should not appeal to religious arguments to advocate for laws or policies, it would be a mistake to render this as a legal prohibition.[20]

Another example involves the opposition by some liberal groups to the repeal of the Johnson Amendment, which prohibits certain non-profit organizations, including most religious churches and houses of worship, from endorsing or opposing political candidates.[21] While there may be a number of good reasons not to provide tax benefits to organizations that engage in politics, it would be problematic to oppose the repeal of this Amendment specifically on the grounds that it would allow more religious institutions to participate in politics. Liberal theorists should be troubled by this appeal to religious freedom law to discourage certain groups from

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[18] Compare to the legal cases brought by the Freedom from Religion Foundation, "Legal Challenges," https://ffrf.org/legal/challenges (accessed January 19, 2018).

[19] Compare to Reed v. Town of Gilbert, 576 U.S. ___ (2015) (striking down a local ordinance that placed restrictions on the size and content of signs used to advertise events hosted by non-profit organizations, including churches); Good News Club v. Milford Central School, 533 U.S. 98 (2001) (holding that a public school must allow religious groups to rent its facilities after hours on the same terms as other groups); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) (holding that public university must fund Christian student publication on same terms as nonreligious publications).

[20] See Robert Audi, "The Place of Religious Argument in a Free and Democratic Society," *San Diego Law Review* 30 (1993): 667.

[21] The Johnson Amendment is part of the definition of 501(c)(3) corporations in the Internal Revenue Code, U.S.C. Title 26.

fully participating in political decision-making and the life of the community. Even if liberal theorists support policies that are opposed by some religious groups, it does not seem that the correct response is to seek to curtail the ability of such groups to influence politics or to contribute their viewpoints to the public discourse.

It is, therefore, problematic to appeal to a liberal conception of religious freedom in order to exclude religious persons and groups from the community, or to limit their ability to participate in the political and social life. The state must be careful not to unduly exclude religious persons and groups from political decision-making or from the public life of the community. Although it is true that religious freedom protections ought to extend to nonreligious persons as well—that is, religious freedom includes a freedom from religion—protection for one group of people should not require excluding others from public life.

In sum, the strict separation-based conception of religious freedom may be problematic if it lends support to an isolationist strategy on the part of religious groups or an exclusionist strategy on the part of secular or anti-religious groups. Because both the isolationist and the exclusionist strategies find expression in the separation-based conception, there is an appearance of a common ground when in fact both sides—religious and secular—are competing with one another or working at cross-purposes. As a result, the separation paradigm may contribute to creating an antagonistic relationship between religion and the state, or between religious citizens and others in the community. This antagonism can lead to a lack of shared institutions and shared spaces for conversation and growth, causing to social instability and a division of the social space along sectarian lines. Indeed, such social fracture may eventually undermine the legitimacy of the state, especially as a critical mass of voters begin to identify with their religion rather than the political community—a pattern that we may be witnessing in the U.S. at present. Thus there

is a concern that separationist conception of religious freedom may contribute to undermining the liberal state, by splitting the political community into factions with no common ground or shared interests, and perhaps with no avenue for productive or healthy communication. If so, we should be skeptical of the coherence and normative appeal of the separation-based conception of religious freedom for liberalism.

2. The Cooperative Conception of Religious Freedom

Section 1 argued that a strict separation-based conception of religious freedom may be flawed in a number of respects. While separation of the state and religion is an important aspect of religious freedom, it should not be the sole guiding principle. Thus we are in need of an alternative conception of the type of relationship between religion and the state that religious freedom is designed help to bring about. In this section I will begin to describe one such alternative, namely, the "cooperative" conception of religious freedom.

The cooperative conception is motivated by the idea that the relationship between religion (and other similar beliefs and institutions) and the state can be mutually beneficial. First, the health of a liberal society depends on the existence of a diversity of moral or religious viewpoints among its citizens, as well as institutions that are able to augment the state's institutions in a variety of ways. Religion—its system of beliefs and practices as well as its institutions—is able to help provide these important functions for the liberal state. And second, religious persons and institutions may benefit from their existence within the liberal state, because of the services, resources, and social stability that the state provides, as well as the moral and political climate within which individuals and groups may effectively develop their own beliefs, practices, and ways of living or being. Religious freedom—along with the collection of

laws and policies that fall under its heading—ought to bring about this multi-layered social ordering.

2.1 How Religion may Benefit the Liberal State

There are three ways in which the existence of religious and moral persons and groups may benefit the liberal state, namely, by providing moral diversity, political training and organizing capacity, and infrastructural safeguards or redundancies. First, the liberal state benefits from the existence of a wide variety of views and beliefs about how to live, how to think, the value of human life, represented in society. The existence in society of a variety of religious and moral beliefs—and institutions devoted to developing and promulgating these beliefs—may provide a beneficial diversity of moral viewpoints in the liberal political community. This diversity may contribute to moral growth and development both for individuals and for the community as a whole. Exposure to a diversity of moral viewpoints may provide individuals with an opportunity to peruse or to sample a variety of different ways of living and outlooks on life, one or more of which she may come to embrace as her own. And living in a society marked by this diversity may offer opportunities for an individual to test her beliefs, leading to a richer understanding of what she believes.[22] Moreover, the interaction of a variety of moral and religious viewpoints in society may eventually lead to the development of novel moral viewpoints and lifestyles in the community.

Religion may be well positioned to contribute to this valuable diversity within the liberal society. In particular, religion may be able to provide the liberal state with what me might describe as "laboratories of morality", that is, laboratories for the development and refinement of comprehensive doctrines that can be included in and may contribute to the diversity of moral

[22] Compare to John Stuart Mill, *On Liberty* (London: J.W. Parker, 1859).

views and viewpoints in the liberal society.[23] This contribution to moral diversity is the first way in which religion can benefit the liberal state.

There are four main features of religion—both its beliefs and its institutions—that explain why it may be able to provide laboratories of morality for the liberal state. First, religious beliefs often appeal to sources of value that are outside of the normal purview of the liberal state—that is, outside of the core liberal values and the political doctrines of the state and its institutions. Religious doctrines often appeal to a deity or a supernatural source of value that is not—and should not be—among the sources of value that characterize the liberal state and its institutions. Second, many religions have a rich history and tradition. Many religious views have been tested and developed in a wide variety of times and places throughout history, resulting in extensive oral and textual records of complex moral theorizing, which often evidence moral evolution and development. Because of this history, religion may also provide connections to other cultures, both past and present, which a society without religious diversity may lack. For example, the fact that a western liberal society such as the U.S. includes some persons and institutions with traditional Confucian beliefs, training, or experience, may help a liberal society such as the U.S. better understand and interact with a foreign nation, such as China or Singapore, where Confucianism is or has been an important part of its history and culture. Third, many religious views exhibit sophistication and complexity. Many religious views have all-encompassing or far-reaching doctrines that not only provide basic rules or guidelines for human action, but that also attempt to find an overarching meaning for life or purpose for being, or even an account of the

[23] Compare to Burt Neuborne, *Madison's Music: On Reading the First Amendment* (New York: New Press, 2015), arguing that the religion clauses of the First Amendment were intended, by James Madison, to protect the "realm of conscience" where normative ideas can be developed, when then feed into the broader political community first through individual speech, then through the "press" or mass dissemination, and then through the political process through assembly and petition of the government.

existence of the universe. Finally, religious groups may boast institutional support that can be helpful for developing a distinctive normative view: educational and instructional institutions bringing together large number of scholars and students, also publishers and media companies capable of disseminating views, generating comments and feedback.

All four of these features of religion—appeal to supernatural value, rich history and tradition, complexity and sophistication of belief systems, and institutional support—can be found in nonreligious beliefs and institutions as well. We might consider groups organized around moral or political beliefs, such as the Communist Party, or sophisticated moral theories such as utilitarianism. The liberal state may have reason to promote or protect some of these other moral beliefs and institutions as well. But religion is distinctive—if not unique—in the frequent combination of all four of these elements together. Thus it may make sense for the liberal state to design a system of legal and institutional support for complex moral belief systems that display these four features, with religion as the touchstone case or primary example.

The second way in which religion may benefit the liberal state is by providing opportunities for political organization and social activism. Consider Paul Weithman's argument that religious institutions play a valuable venue for political activity in a democratic society.[24] First, religious institutions can provide forums for ground-level democratic participation, especially in the form of political discussions. Because the members of a religious institutions (such as a church group) can discuss political issues against a background of shared moral beliefs, they may be able to help each other working out the implications of their shared beliefs as applied to specific political situations and questions. They may also learn how to more

[24] See Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002): 41, arguing (based on sociological evidence) that churches provide people with "real opportunities to participate in politics" by providing resources such as "information, networks and civic skills."

coherently express their views to a broader political context. Because of their shared moral beliefs, members may also be able to help one another develop their skills of moral judgments, and build systematic moral understandings of persons, communities, and activities. While a religious institution should not be a citizen's sole forum for political discussion, it may provide one valuable venue.

Second, religious institutions may be able to provide their members with some of the central skills and experiences needed by democratic citizens: especially the experience of participating in the self-organization of a complex institution. Religious institutions sometimes operate as ersatz political communities: they share many of the structural features of political communities, including self-organization and membership oriented around moral agency. Members can participate in this self-organization by serving on committees, by taking on community roles and responsibilities, and by contributing to group policy debate and decision-making (e.g. through voting). Many citizens lack opportunities to contribute directly to political decision-making, and their experience of voting in political elections is too abstract or disconnected from the mechanisms of political power to seem like real self-government. Membership in a religious community might give such citizens a hands-on experience of self-government, allowing them to better understand and appreciate their role in the political community. Similarly, for some citizens, opportunities to experience the mutual recognition of moral agency that comes with citizenship can be few and far between. Experiencing this mutual recognition in a more intimate setting can help them better appreciate the mutual recognition that comes with citizenship.

Some of these skills of citizenship may be developed elsewhere, for example, in associations such as social clubs, families, nonprofit organizations, and secular schools including

universities. But three points suggest that religious institutions may often have a special role: First, there may be a benefit in packaging all these elements together into a single self-governing moral community with a conception of membership in terms of moral agency. Second, not everyone may have access to secular alternatives such as universities, especially if they choose to pursue other opportunities such as a career in manufacturing. Third, some people, because of their temperament or upbringing, are more familiar and comfortable with moral communities that are religious. For such people, secular alternatives won't serve the same function because their content is unfamiliar. The risk here is that such persons will not be able to translate their experience within the religious community to their experience in the political community. This risk must be combatted, perhaps even from within the religious institution: that is, religious institutions should not set themselves up in opposition to, or as alternatives to, the political community, but as junior partners. Nevertheless, the risk might be worth taking in some cases because of the inability of citizens to develop the necessary skills of citizenship elsewhere.

Finally the third way in which religion may benefit the liberal state is by providing social infrastructure that can function as a safeguard in case of social stagnation or collapse. The state may benefit from the existence of redundancies in terms of social infrastructure, institutions that provide overlapping services with those that the state provides as part of its basic commitment to protecting individuals and promoting social welfare. Such redundancies may help to make society more robust against external pressures or catastrophes—natural disasters, epidemics, revolutions, or invasions. Thus, the state has reason to support the existence of social institutions that are capable of providing various social services and support is essential for weathering any type of political or social upheaval, independent of state approval, or perhaps in accordance with a different set of values or considerations.

Moreover, these institutional redundancies provided by religious institutions may also help to make it practically possible for individuals to engage in various forms of social resistance or protest, especially against the actions of the liberal state that they view as unjust. When the state does not possess a monopoly on essential social services, citizens may have a greater opportunity to stage widespread social protests. In practice, large-scale resistance—i.e. anything other than the token resistance of individuals acting alone—may require the existence of institutions capable of providing resources to and coordinating the activities of many individuals. And in order to be effective long-term, these institutions must be robust and flexible enough to withstand outside pressure. Consider, for example, the key role played by black churches in the bus boycott in Birmingham Alabama, or the role of the Anglican Church in helping to end apartheid in South Africa. In principle, we may imagine that the just liberal state would not have need for institutions capable of carrying out large-scale, long-term political resistance. But even a just state may need to take measures to guard against the possibility of descending into injustice, much as a healthy person may stockpile medicine in the event of falling ill. Moreover, preserving the opportunity of actively (though perhaps nonviolently) resisting the state may be valuable for ensuring the political autonomy of citizens. But in order to have a real choice about whether to comply with the state or not requires live options for resistance.

In this respect, religion and religious institutions (as well as perhaps some other non-state actors) may help to provide a form of separation of powers, insurance against tyranny or abuse of authority on the part of the state. Institutions organized around religious beliefs may contribute to the possibility of counter-narratives, or counter political pressures, which can help to correct the state if it should veer off course. Thus there may be some benefit to the state when religious institutions are robust enough to withstand the collapse of state institutions. But religious

institutions need not be fully isolated from the state or its values in order to be robust against social collapse or effective means of resistance. On the contrary, they may better fulfill their function of fostering resistance and political reform if they view themselves as members of the community and potential partners of the state.

It is not an accident that religion and religious institutions may be able to play a special role with respect to the liberal state. Other social forms—types of institutions or types of beliefs or doctrines—either have too much or too little overlap with the political domain. Communism, and its associated social or political institutions, to consider one example, rejects the liberal state and seeks to replace it with a much different social structure. Religious groups, by contrast, may not directly compete with the state—even by their own lights they may occupy a different domain; they are playing a different game with different goals and aspirations. Profit-seeking corporations may play a certain collaborative role within the state apparatus, but they typically lack the overarching moral vision that is able to complement—either compete with or augment—the moral view of the state. And because of their reliance on legal and political protections, corporations are not likely to withstand any type of social collapse or rupture. Religious institutions, by contrast, may be able to draw on deeper motives in their members that survive or transcended any particular existing social relationships or structures. The family may also have an important role to play in society—but an individual family (or even a group of families) typically lacks the scope or infrastructural capacity to make any type of lasting social impact. Religious institutions are often able to combine institutional support with moral motivations that allow them to operate outside of or in opposition to the state in cases of crisis.

2.2 How the Liberal State may Benefit Religion

Let us turn now to the other side of the relationship. The liberal state and its institutions may also provide a number of important benefits for religious persons and groups, which may render the liberal state preferable even to living within a society dominated by one's own religious group. I will describe four main benefits or opportunities that the liberal state may provide for religious persons and groups: an ability to pursue focused missions and projects, an opportunity to change or abandon one's religious affiliation, an opportunity to proselytize or share one's religious views, and a normative counter-narrative, or a blank canvas, against which religious persons and groups may define themselves.

First, by providing basic social infrastructure and safety net functions, the state allows religious persons and groups to adopt more focused missions or projects. In this respect, religion is no different from any other higher-level or complex project that citizens or groups of citizens might seek to engage in. The state provides (directly or indirectly) police and fire protection, national defense, water, electric power, sanitation, and a long list of other basic social services. Because of the existence of these goods and services, religious institutions, like any other organization in society, has an opportunity to focus on specific tasks, with the assurance that more basic resources will be available. The state may also provide additional benefits, such as tax subsidies, regulation and accreditation of religious schools and hospitals, and cooperative projects meant to achieve public ends. For example, the state might partner with religious leaders or organizations to help design effective strategies for interacting with religious communities elsewhere in the world.[25]

[25] Consider, for example, the U.S. Department of State Office of Religion and Global Affairs. https://www.state.gov/s/rga/ (accessed January 17, 2018).

Second, the liberal state provides the familiar function of ensuring that individuals and groups are able to discontinue their religious membership or affiliation at any time. The state does not consider religious affiliation to be absolute or fixed, either from birth or at any other moment in an individual's life. Moreover, the state provides public institutions that help to ensure that religious organizations are voluntary associations in the sense that their members are able to freely enter and exit, to begin and end their membership. The existence of public institutions providing alternatives to religious services creates an opportunity for members of religious groups or institutions to exit, or discontinue their membership, thereby foreclosing possibility of coercive membership, and the corrupting effects that can come from that. Thus the liberal state ensures that religious individuals and groups have the opportunity to determine their beliefs for themselves, perhaps by abandoning religion or by forming a new group or subgroup.

Third, the liberal state maintains a robust pluralist social space within which those with different religious beliefs and members of different religious groups may interact and share their beliefs. Thus religious groups and institutions are able to access their fellow citizens in order to broadcast their message, and perhaps find new recruits.

Finally, the liberal state may provide a counter-narrative for religion, much as religion may provide a counter-narrative for the state. Just as the state benefits from the existence of alternative moral views and social institutions, religious persons—and arguably also religious groups—benefit from exposure to alternative viewpoints, and robust possibilities of resistance or alternative approaches to living. The liberal state and its institutions provide a negative space or a counter-space that allows for a diversity of moral views to flourish—sometimes in explicit contrast to the state, and sometimes as a complement to it, an elaboration or specification of it.

2.3 An Analogy with the Family

Given that religion and the liberal state may benefit one another in a number of respects, we still may wonder whether this pattern of mutual benefit a happy coincidence, or is it evidence of a healthy relationship that may be intentionally cultivated or developed over time. That is, should we think of the relationship between religion and the state as collaborative and cooperative, or is it merely passively and accidentally symbiotic? The answer to this question is complicated. John Rawls described a liberal society as like an orchestra composed of "social unions" or voluntary associations such as religious groups. The orchestra represents a strong view of collaboration: like members of an orchestra, the various religious groups consciously collaborate with the state and with one another to achieve a shared end. But perhaps the liberal state should not expect religious groups to adopt a conscious posture of cooperation, or even to acknowledge the cooperative aspects of their relationship. Instead, the state should be aware of the potential cooperative role of religion, and should design its policies in such a way as to encourage the emergence of this mutually beneficial pattern of behavior.

In order to illustrate the nature of the collaboration I have in mind, it may be helpful to describe a similar cooperative or collaborative relationship that arguably exists between the liberal state and another "private" entity, namely, the family. In particular, the state's cooperative role with respect to religion may be similar to what the state's role with respect to the family. Much like religion, the liberal state traditionally provides various forms of protection or recognition for the family as a social structure. But, again like religion, there is a serious question about whether and if so why the liberal state should maintain this tradition. After all, the family is also traditionally a site of abuse and neglect. State support for the family has often reinforced

or supported pernicious gender hierarchies.[26] Much like religion, we may ask whether there is any reason for the liberal state to protect the family, *per se*, rather than just protecting the collection of individual and associational freedoms that might be at stake given that families exist.

In answering this question, it may be helpful to think about what type of valuable social relationship the liberal state's protection for the family may function to achieve. And again, much like religion, there is a traditional view according to which strict separation is the best approach: the state and the family are separate domains, and there should be limited interaction between them. But such a separation-based model fails to avoid the potential abuses of the family, and fails to explain any positive role that the family may play in the liberal state—it reduces the family to a historical vestige or accident. Again, it is possible to describe a cooperative picture of the relationship between the state and the family that is both more appealing and more plausible.

How does the family benefit the state? First, the family may be able to help the state meet its basic responsibility to ensure that children within its territory are cared for, and given the opportunity to develop into free and equal citizens. But there may be reasons for the state to outsource or delegate much of this responsibility to the family, to parents or legal guardians. Parents generally have a vested interest in establishing a caring relationship with their children, an interest that preexists any state involvement. Because of this caring relationship, the family unit can provide safe and efficient units for co-habitation. Moreover, parents and other family members may be best positioned to get to know and to understand children, what they need and how best to meet those needs—both in terms of health and in terms of education or development.

[26] See, for example, Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).

The state should provide resources and oversight in order to ensure that each individual family is functioning appropriately to provide the children under its care with health, safety, education, and adequate opportunity to develop into free and equal citizens. But the state may also benefit from the labor, resources, and tailored knowledge that parents and family can contribute to caring for children.

Similar arguments could extend to a range of other functions that are often performed by the family as well. The state may rely on the family to help provide other important social services to its citizens, including procreation and care for the elderly, sick, or disabled. In addition, the family aids the state in ensuring that its citizens have an opportunity to find personal fulfillment, self-expression, and self-realization through intimate companionship with others, which the family may be central to providing. All of this is a form of moral outsourcing employed by the state to ensure that the state can meet its various obligations to its citizens.

At the same time, the family may benefit from its relationship to the state in a number of ways. First, the state provides direct support to help the family achieve its various internal goals of supporting and caring for its members, raising and educating children, and so on. In particular, the state provides formal legal recognition for families, a network of fundamental rights that protect different aspects of families, rights to privacy and intimate relationships, a right to marry, rights to procreation and cohabitation, right to private education, rights to child custody and child support, and institutions that provide schooling, childcare, and medicine, that are designed with the needs of families in mind.[27] The state also helps to create a social environment in which families can flourish by taking on their own specific projects including travel and leisure, can occupy their own spaces, and interact with other persons and groups of persons in safe spaces

[27] Compare to Harry Brighouse's discussion of the relationship between the state and the family, *School Choice and Social Justice* (Oxford: Oxford University Press, 2000), Ch. 1.

designed to facilitate social events. And by legally recognizing the value of the family, though legal statuses such as marriage and child guardianship, the state may help to bolster the family's self-conception of itself as a valuable social and political entity.

As with religion, it may not be necessary for the families themselves to consciously embrace this role as facilitators of state projects or collaborators with the state. Indeed, families may be most effective at providing special care and valuable relationships if they generally do not think about their collective social impact or political importance. Still, the state may think of itself as collaborating or cooperating with families, and may design a number of policies and institutions with that relationship in mind. In addition to the forms of support for the family discussed above, the state may indirectly affect the internal structure of the family, prompting it to better serve the collaborative function. Perhaps the state should not directly mandate, for example, that partners, spouses, or co-parents treat each other equally, or that parents provide a liberal civic education for their children. But it can directly promote equality in education and employment, which will have an effect on internal family dynamics.

How would this picture of cooperative relationship between the state and the family translate to the religious context? The idea is that religion and the state can have a collaborative relationship that is similar perhaps, in some ways, to the relationship between the state and families. Much like the family, religious beliefs and institutions may play a number of valuable roles in the state, contributing to moral diversity, social activism, and institutional stability. Just as with the family, the state may need to develop a social infrastructure in order to tailor its policies to the fact of religion and the role it plays in society, and to contain and channel religious persons, groups, and beliefs, harnessing their social utility. Yet, the collaboration need not involve conscious participation on the part of religion, nor direct state involvement in

religious affairs. We might imagine that the state resembles a gardener who provides the soil, fertilizes pulls the weeds, prunes the excess stalks and vines, but cannot herself actually make the plants grow, and does not expect the plants to care one way or the other about her overall project. While it may seem odd to say that the gardener cooperates or collaborates with her plants, we can see that the gardener and the plants each bring their distinct and distinctive creative energies to bear on producing a mutually beneficial outcome, though they may not value that outcome for the same reasons.

But perhaps the correct way to think about religion and the state's cooperative relationship lies somewhere between this analogy with a garden and Rawls's analogy of an orchestra. The liberal state should be less hierarchical and single-minded than a typical orchestra, while religious persons and groups may be more agential and self-aware of their social and political role than a typical garden plant. Perhaps a closer analogy is the mutually beneficial symbiotic relationships (or "mutualism") that can be found between different species of plants and animals.[28] Religion and the state each perform functions that contribute to the health and wellbeing of the other, resulting in a stable on-going relationship. The special role of religious freedom in a liberal state should be to preserve this relationship. Religion should operate within the liberal state, not as an outsider or as an adversary, but as a potential collaborator that may be able to serve a complementary function to the state in a diverse liberal society. The key idea is that such a relationship between the liberal state and religion is valuable or even essential for moral and political development, both historically, personally, socially—that there be the

[28] There are many different examples of mutualism between species, but one familiar example is the relationship between sea anemone and certain anemone fish. See Richard N. Mariscal, "The Nature of the Symbiosis Between Indo-Pacific Anemone Fishes and Sea Anemones," *Marine Biology* 6, no. 1 (1970): 58-65.

possibility of an ebb and flow, a dynamic process, allowing space for change and flexibility but also a reservoir of stability and continuity. Progress requires both potential for diversity, change, productivity, but also a foundation of stability and continuity against which change can be tested. A state together with nested religious or moral institutions can provide that dynamic: fluidity plus stability.

Conclusion

This Chapter introduced the key idea of this dissertation, namely, that religious freedom should function to create a cooperative relationship between religion—including religious persons, groups, beliefs, and institutions—and the state and other citizens. The subsequent chapters of this dissertation will develop this cooperative conception of religious freedom by reference to two specific issues: religious accommodation, and the appropriate scope and extent of autonomous authority granted (or delegated) by the state to religious institutions. In both of these examples, the strict separation conception of religious freedom seems to recommend a policy that is inconsistent or intuitively problematic. My aim in each case is to present a liberal philosophical argument that supports a different result. The liberal arguments presented here help to describe the appropriate balance between separation and integration, thereby contributing to the development of an alternative way of thinking about the relationship between religion and the state, which I have labeled the cooperative conception of religious freedom.

In particular, Chapter 2 argues that laws and policies that provide religious accommodation should be oriented around reaching and designing fair compromise-based accommodation arrangements. Chapter 3 argues that this compromise-based approach has limits because religious accommodation should not be used as a form of political protest. Those with religiously motivated objections to the purpose of a certain law may not seek accommodation

from that law on those grounds. Finally, Chapter 4 argues that the state should not allow religious institutions to exercise control over certain core public functions in order to ensure that religious institution operating within society function as voluntary associations whose members have an opportunity to exit.

Chapter 2

Compromise and Religious Accommodation

This Chapter addresses one of the major debates about religious freedom in the liberal tradition, namely, the scope and justification of religious accommodation. "Religious accommodation" is an exemption from or modification to a law or policy, granted to a person, group, or institution, where that law or policy incidentally conflicts with or restricts a religious practice or activity. The conflict is incidental in the sense that the law or policy at issue is not intended or designed to generate this conflict with the religious practices in question. Generally speaking, it would be illegitimate and discriminatory for the state to design a law with the intention of restricting a religious practice.[1] But the issue is more complicated when a generally applicable law that is designed to achieve a legitimate purpose, such as promoting public health and safety, incidentally restricts a religious practice. For example, a dress code policy designed to aid in identification of persons—e.g., in a driver's license photo—may incidentally conflict with the religious practice of wearing a turban, a headscarf, or a burka. Should the state accommodate religious practices that incidentally conflict with its policies?

Generally speaking, liberal theorists and philosophers are divided into two opposing schools of thought about religious accommodation. Accommodation skeptics argue that the state has no obligation to accommodate religious practices, so long as it acts with a legitimate nondiscriminatory purpose.[2] Accommodation supporters argue that the state should generally accommodate religious practices, unless doing so imposes costs (perhaps significant costs) on

[1] See Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[2] See especially Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013). See also Employment Division v. Smith, 494 U.S. 872 (1990) (holding that state employees fired for using peyote as part of a Native American religious ceremony were not entitled to accommodation under the Free Exercise Clause of the First Amendment).

others.[3] But both of these camps tend to assume that accommodation must be all-or-nothing. That is, the religious practice in question is static and cannot be modified, and depending on the case, the state should accommodate the religious practice either completely or not at all. Moreover, the strict separation conception of religious freedom would seem to require such an all-or-nothing approach to granting accommodation. An all-or-nothing approach sets clear limits on the availability of religious accommodation, and avoids any form of state inference or entanglement in the content of religious practices. Where accommodation is granted, individuals and groups may engage in their religious practice without interference. Where accommodation is not granted, the religious persons or groups must comply with the generally applicable law on the same terms as other citizens.

But this all-or-nothing approach overlooks the fact the possibility that seeking to reach a compromise, to find a middle ground, may often be more valuable for both parties, especially when the purposes of the law at issue can be rendered consistent with the meaning or purpose of the religious activity at issue. For example, consider the case of *Holt v. Hobbs*, involving a Muslim prison inmate who sought to grow a beard in accordance with his religious beliefs.[4] The prison maintained a "no beards" policy that was meant to ensure prison safety by facilitating inmate identification and limiting inmates' ability to smuggle contraband. An inmate sought a compromise-based accommodation, namely, a half-inch beard rather than the full beard that would generally be required by his interpretation of his religious doctrine.[5] After all, the inmate

[3] See for example, cases arising under the Religious Freedom Restoration Act, such as Burwell v. Hobby Lobby, 573 U.S. ___ (2014).

[4] Holt v. Hobbs, 574 U.S. ____, 135 S.Ct. 853 (2015) (holding that a prison must allow a Muslim inmate to grow a half-inch beard under the federal Religious Land Use and Institutionalized Persons Act).

[5] See brief for Petitioner at 5-6, Holt v. Hobbs 574 U.S. (2015).

argued, a half-inch beard is not long enough to conceal contraband, and would require minimal extra effort to enforce—e.g., keeping two photos on file (bearded and clean-shaven) for identification purposes. Moreover, a half-inch beard would be consistent with the religious purposes of wearing a beard, as he understood it, namely, as a public expression of his faith.[6]

Drawing on this and other examples, this Chapter will argue that the state should adopt a "compromise-based approach" to accommodation, rather than the more common all-or-nothing approach. The idea behind this compromise-based approach is that a religious practice may often be compatible with the purposes behind a law or policy, even when the law appears to restrict the practice. We should not assume that the conflict between the religious practice and the state's law or policy is inherent or intractable. Instead, it may often be possible to find a fair compromise that accord with the purposes of the religious practice as well as the law or policy. That is, it may be possible for the religious persons and the state to agree to an accommodation arrangement whereby each party modifies their default practice or policy to some extent, but the underlying values and purposes of both parties are preserved. Moreover, attempting to reach a compromise may also prompt individuals to engage in valuable forms of thinking about their moral and religious beliefs, as well as the state's purposes and justifications for its laws and policies. Compromise may also contribute to developing respectful relationships between religious persons and others in the community. The goal of this Chapter will be to defend such a compromise-based approach to accommodation, which in turn helps to elucidate the cooperative conception of religious freedom that this dissertation aims to develop.

If a compromise can be effective and mutually beneficial, at least in a case like this, then why is the compromise-based middle-ground approach to religious accommodation so often

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[6] Ibid.

overlooked by liberal theorists and philosophers? There are two main reasons why it may seem that compromise is incompatible with religious accommodation. First, one might object that compromise-based accommodation will be incompatible with the state's commitment to treating people equally under the law. If the state is justified in accommodating a particular religious practice, this accommodation should be available to all citizens who engage in this practice on the same terms. Accommodation should not depend on whether the religious person, such as the inmate describe above, is willing to modify his or her practice in an idiosyncratic way. Second, one might objection that the religious practices accommodated by the state should not be susceptible to compromise. After all, accommodation should be reserved only for the most extreme cases of personal conflict with the law. If religious accommodation is ever justified, it is because religious practices are motivated by (perceived) categorical commitments such as divine commands.[7] In such a case, compromise-based accommodation would not be a viable option; a full exemption would be the only way to provide adequate accommodation. Compare to Justice Scalia's concern in *Holt v. Hobbs* that the inmate's religious commitment to growing a full beard was evidently not categorical. When the inmate's lawyer suggested that the compromise was reasonable, Scalia responded, "Well, religious beliefs aren't reasonable. I mean, religious beliefs are categorical. You know, it's God tells you. It's not a matter of being reasonable. [] He's supposed to have a full beard."[8] This Chapter argues that these two assumptions should be

[7] For the canonical statement of this argument, see James Madison, "Memorial and Remonstrance Against Religious Assessments," *The Papers of James Madison*, vol. 8, ed. Robert A. Rutland and William M. E. Rachal (Chicago: The University of Chicago Press, 1973): 295-306. See also Michael W. McConnell, "The Problem of Singling Out Religion," *DePaul Law Review* 50 (2000): 1-47, 30, arguing that out of respect for our fellow citizens, we should "refrain from using the power of the state to create conflicts with what are perceived (even if incorrectly) as divine commands" because of the bind that that would place on people who feel they are subject to such commands.

[8] Transcript of Oral Argument at 5:17-25, Holt v. Hobbs, 574 U.S. (2015).

rejected, and that liberal political principles in fact support a compromise-based approach to accommodation.

This Chapter has five sections. Section 1 presents a liberal justification of religious accommodation in terms of the value of freedom of thought. This argument is meant to provide some grounds for rejecting outright skepticism about religious accommodation. Section 2 argues that this basic justification of accommodation is consistent with and may help to support a compromise-based approach. Section 3 describes an additional value of compromise-based accommodation, namely, its ability to contribute to lasting relationships between the parties. Section 4 addresses the objection that religious practices are motivated by categorical commitments and so not susceptible to compromise. Section 5 addresses the objection that providing compromise-based accommodation would be inconsistent with treating people equally under the law.

Note that the arguments presented in this Chapter may extend to a variety of activities motivated by moral beliefs, not just religious activities. That is, this Chapter does not assume that religious actives ought to be specially or uniquely entitled to legal protection. After all, an ability to freely act on one's own beliefs may be morally and politically valuable whether or not those beliefs are religious.[9] At the same time, the arguments of this Chapter are not committed to denying that there is (or ought to be) a fundamental legal right to protection of religious activities in particular.[10] I think such a religion-specific right would be difficult to justify on liberal grounds, but my arguments do not depend on ruling it out—even if there were such a religion-

[9] For a similar point, see Micah Schwartzman, "What if Religion is not Special?" *University of Chicago Law Review* 79, no. 4 (2012): 1351-1427.

[10] For example, Michael McConnell has argued that such a right was part of the original meaning of the Free Exercise Clause of the U.S. Constitution. See Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1409-1517.

specific right, it would not necessarily be incompatible with compromise-based accommodation.

1. Accommodation and Freedom of Thought

This Section argues that a liberal state may sometimes be justified in accommodating the activities of those motivated by certain moral or religious beliefs when a legitimate law or policy incidentally conflicts with those activities. The justification presented in this Section is *pro tanto* because it does not address a range of considerations that might countervail against providing accommodation, either in general or in a particular case. Given this disclaimer, the basic justification may be acceptable to a wide range of theorists. Even some theorists who are skeptical of religious accommodation may be able to accept the *pro tanto* justification, while believing that it is often overcome by countervailing considerations such as the harm that accommodation may impose on third parties.[11]

The basic liberal justification for religious accommodation turns on the value of protecting the freedom or autonomy of individual persons or groups. We might understand the freedom that is at stake in a number of different ways. As a first pass, the state may have a reason to limit its use of coercive authority over individuals who refuse to accept the state's justification for its use of coercion against them. Joshua Cohen, for example, has argued that when an individual has a moral or religious objection to complying with a law or policy, the state or community may be unable to justify enforcing the law against her. For example, because a pacifist does not accept the state's moral justification for going to war, the state may not to be able to justify enforcing a military draft law against her. And because the state may not legitimately enforce the law against her, it may be required to accommodate her objection by

[11] Brian Leiter, for example, emphasizes the harm to third parties in his critique of religious accommodation. Brian Leiter, *Why Tolerate Religion?*

exempting her from the draft.[12]

But I do not wish to rely upon this justification for accommodation. The question of whether the state should accommodate a conscientious objector is distinct from the question of whether the state should enforce the objected-to law against her. Assuming that the state is able to justify the law or policy in question in terms of the public moral theory, the state has grounds for enforcing the law against those who reject the theory. There should not be a requirement on the legitimacy of enforcing or implementing a law or policy that all citizens accept it as being the correct law or policy. Part of the logic of democracy is that, when legitimate, the choices made by a majority of citizens may bind the community as a whole, even those who disagree with or are made worse off by the decision.

Instead, I will suggest that accommodation may be better justified in terms of the liberal value of "freedom of thought", i.e., the right of an individual to form beliefs and to make judgments about fundamental aspects of her life independent from undue social or political pressure.[13] At a minimum, a state that is committed to freedom of thought must not interfere with the ability of its citizens to form their own beliefs. For example, the state should not engage in indoctrination, or prohibit an individual's access to expressions of certain ideas. In addition, the state's commitment to protecting and promoting freedom of thought may also justify accommodating certain types of activities. After all, depending on prevailing social conditions, some moral and religious beliefs are more demanding than others—think of veganism or

[12] See, for example, Joshua Cohen "Democracy and Liberty" in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998).

[13] The value of freedom of thought has been tied to one's autonomy as a moral agent, one's agency as a citizen, one's very metaphysical being or existence as a human being. See, for example, Immanuel Kant, "An Answer to the Question: What is Enlightenment?" in *Immanuel Kant: Practical Philosophy,* ed. Mary J. Gregor (Cambridge and New York: Cambridge University Press, 1996): 11-22.

effective altruism. In order to ensure that individuals are best able to develop moral and religious beliefs for themselves, without undue social pressure, the state should avoid imposing costs on these activities, or adding to these costs unnecessarily.[14] Just as a diversity of viewpoints may contribute to an individual's ability to form her own beliefs, the availability of a variety of ways of living inspired by moral beliefs may make it more likely that individuals will decide for themselves whether to hold such beliefs, rather than defaulting to the less costly or more socially acceptable course of action.[15] For example, suppose that in order to qualify for unemployment benefits, one must be willing to work on Saturdays. This "Saturday work" requirement is meant to ensure that those receiving unemployment benefits are not overly selective in their demands for employment. But this requirement imposes costs on those who believe that they ought to observe Saturday Sabbath by taking a day of rest. Freedom of thought provides one reason to exempt Saturday Sabbath observers from this requirement, since doing so would reduce the cost of holding their belief. There may be countervailing factors to consider, such as whether providing an accommodation would be unfair to others or overly costly to administrate, but freedom of thought provides a *pro tanto* justification for modifying the unemployment law in this way.[16]

One may object that an ability to form beliefs about what things are right and wrong will not necessarily require an opportunity to put those thoughts into action. In order to form a belief

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[14] Compare to the arguments in favor of accommodation presented in Seana Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29, no. 3 (2000): 205-250, and Seana Shiffrin, "Egalitarianism, Choice-Sensitivity, and Accommodation" in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, eds. Philip Pettit, *et al.* (Oxford: Oxford Clarendon, 2004): 270-302.

[15] Compare to John Stuart Mill, "Of Individuality, as one of the Elements of Well-being," in *On Liberty* (London: J.W. Parker, 1859).

[16] This example follows the facts of Sherbert v. Verner, 374 U.S. 398 (1963).

about the morality of a certain type of activity it may not be necessary to test out the activity oneself. One may investigate the correctness of moral propositions by means of thought experiments, perhaps, or by reading works of fiction or philosophical texts that put those ideas into concrete examples and circumstances. For example, one may be able to form an opinion about the morality of recreational drug use by acquiring the testimony of others, or by reading Hunter S. Thompson. But in many cases, the moral value of an activity may not be apparent without an opportunity to put the activity into practice. The need for such an opportunity may be especially acute where the activity acquires meaning over a long period of habitual performance, and takes on a different significance for different people. In such cases, an individual may not be able to "test" the moral value of the activity without an ability to perform it. And, indeed, these features may be especially linked to religious rituals.

Still, the scope of this freedom of thought-based justification for accommodation of activities must be limited. After all, we generally expect citizens to comply with the law even when it conflicts with their chosen activities. While it may be regrettable that laws incidentally restrict the activities of some citizens more than others, we expect that, in a functioning democracy, their interests and opinions have duly been taken into account and afforded the appropriate weight in the collective decision-making process. Generally speaking, a recreational marijuana user should not seek an exemption from a ban in her state; she should seek to change the law through the appropriate democratic channels.

So what distinguishes activities that warrant accommodation from those that do not? First, the activities must be based on beliefs that are "moral" in a broad sense—that is, they are motivated by objective normative beliefs about right and wrong human action, how to interact

with others, and the fundamental value of human life.[17] Freedom of thought places special importance on moral beliefs because they are closely connected to individual autonomy and development of a sense of self. Moreover, because the state must offer public moral justifications for its laws and policies, it should acknowledge that the considerations appealed to do not represent the only viable moral opinion.[18] For example, if the state decides to go to war, it must justify its decision, at least in part, on the basis of moral considerations—e.g., in order to save more lives than are lost, or to advert or avenge a wrongful aggression. Implicitly or explicitly, the state's justification conflicts with the moral beliefs of a pacifist who believes that killing another human being in war is morally wrong. The state may be able to demonstrate respect for the pacifist's moral beliefs by exempting her from military service.

Second, activities that warrant accommodation must be "specific" or nonfungible in the sense that their value or importance cannot be achieved in some other way, or replaced by an alternative benefit or activity. That is, the value or importance of the activity is not instrumental—i.e., not a mere means to an end or goal that could be achieved in other ways—but essential to or constitutive of something. For example, attending a religious worship service, or performing a religious ritual, is generally not comparable to attending a sporting event or picnicking in the park, even if the time commitment and enjoyment level of these different activities would be the same, because the value or importance of religious ritual does not reduce to enjoyment or pleasure. Activities based on preferences, by contrast, typically lack specificity. Because happiness can be achieved through many different avenues, the state may be able to

[17] Martha Nussbaum, for example, defends some religious accommodation on the grounds that "we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life." Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 169.

[18] Compare to John Rawls's discussion of the "burdens of judgment", in *Political Liberalism* (New York: Columbia University Press, 1993), 54-8.

compensate citizens for a particular loss of pleasure by providing an alternative benefit down the line. If a recreational marijuana user moves to a jurisdiction where that activity is illegal, she may be able to replace it with an alternative pursuit, such as woodworking or tennis. But if a Native American tribe believes that ingesting peyote is an essential part of its sacred ritual, it may be impossible to substitute the ritual with some other type of activity.

In sum, the liberal value of freedom of thought may provide a *pro tanto* justification for the state to accommodate of some types of morally and religiously motivated activity in certain cases. This justification is most salient where the actions or activities in question are both moral and specific or nonfungible. The next section argues that compromise-based accommodation is consistent with this proposed justification of accommodation.

2. Freedom of Thought and Compromise-based Accommodation

Section 1 presented a basic liberal justification for religious accommodation that appeals to freedom of thought. This Section argues that compromise-based accommodation is not only consistent with this justification, but also, that compromise may be especially beneficial for promoting freedom of thought. A "compromise-based accommodation" is the result of an agreement between a claimant and an accommodator in which each party makes a concession in order to design a mutually acceptable plan of accommodation often involving a modified version of the claimant's religious practice.[19]

Now the first potential concern about compromise-based accommodation is the specificity requirement discussed in the previous section. That is, accommodation of moral and religious practices may be justified only if the activity is "specific" or nonfungible with other

[19] I will assume that a "compromise" is an agreement between two or more parties to resolve a conflict or disagreement by making mutual concessions. Cf. Simon Căbulea May, "Compromise," in *The International Encyclopedia of Ethics*, ed. Hugh LaFollette (Hoboken: Wiley-Blackwell, 2015).

values or benefits. It is sometimes argued that many religious practices especially (or maybe even uniquely) meet this condition of specificity because they are based on categorical commitments. But such categorical commitments would not admit of compromise-based accommodation.

Let us say that a moral or religious commitment is "categorical" when its content is an exceptionless rule and its normative ground has unconditional force, i.e., a force that takes precedence over all other interests and considerations including those generated by the state. Consider, for example, a Jehovah's Witness who believes that receiving a blood transfusion will jeopardize the salvation of her soul, but her insurer refuses to cover the more costly alternative procedure. In the event of a life-threatening injury, she may feel compelled to sacrifice her life rather than undergo the blood transfusion. In such a case, because her objection to undergoing a blood transfusion is categorical, the only way to remedy the costs imposed on her beliefs would be to require that her insurer pay for the more costly procedure—that is, to accommodate her religious practice of refusing blood transfusions.[20]

But here's the key point: A practice or activity may be specific in the relevant sense without being based on a categorical commitment. A religious person might recognize herself to be enmeshed in a complex web of normative commitments—of which her religious commitments are just one part—without it being the case that her religious practices are fungible or of limited importance.[21] For example, a religious employee may be willing to occasionally

[20] These facts are borrowed from Stinemetz v. Kansas Health Policy Authority, 252 P. 3d 141 (Kan. App. 2011) (holding under Kansas law that insurer was required to cover a more costly "bloodless" kidney transplant procedure for a Jehovah's Witness who refused to undergo a blood transfusion).

[21] Religious activities may be specific in something like the way that Rawlsian "practice rules" require performing specific activities within the context of a practice such as a sport or a game. One cannot play the game of baseball without abiding by the rule that three strikes make an out,

work on her Sabbath if required by her employer, and yet, attending worship on her Sabbath is not merely a fungible preference. Indeed, accommodation may be especially valuable for those who are uncertain about their religious beliefs or practices. That is, those whose commitments are not categorical may benefit most from accommodation because they may be most vulnerable to external social or political pressures.[22] The state may have reason to respect the moral beliefs of a pacifist, for example, even if she is motivated by a strong moral intuition, while recognizing that she is uncertain about the normative ground of this intuition. Similarly, we could imagine an employee who feels torn between her Sabbath observance and her obligations to her coworkers to work weekends. Still accommodation of her Sabbath observance may be valuable to her, allowing her to find a creative way to manage her obligations without the extra threat of losing her job. There is no reason to privilege those whose beliefs are most extreme or whose practices are least flexible. Thus, the specificity requirement should not be interpreted in such a way as to exclude the possibility of compromise-based accommodation.

Moreover, compromise may actually make accommodation more likely to promote valuable freedom of thought. Reaching a compromise may itself be the result of independent thinking, especially when it reflects a sincere effort to reconcile one's religious commitment with other moral, religious, or political obligations. Consider *Holt v. Hobbs*, the case of the Muslim prison inmate who suggested a half-inch beard compromise. It seems likely that the inmate, Gregory Holt, made an effort to understand the reasons for his religious requirement to grow a

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for example. But practice rules are generally not grounded in overarching or categorical normative commitments. One might choose not to play baseball, or to quit mid-game, and there are many situation in which other considerations take precedence over the reasons one has to conform to a practice rule. See John Rawls, "Two Concepts of Rules," *Philosophical Review* 64, no. 1 (1955): 3-32.

[22] A similar point is made by Shiffrin, "Egalitarianism, Choice-Sensitivity, and Accommodation," 292-3.

beard—reasons like expressing his devotion to God and distinguishing himself as a Muslim believer—and sought to reconcile these with the purpose of the prison's no beard policy, namely, preventing smuggling contraband and ensuring prison security. In so doing, Holt may have developed a clearer understanding of his own religious faith and the contours of his own practice—a better understanding of the religious purpose of growing a beard, and the meaning of the various passages of the Quran and Surah that bear on his situation.[23] Compromise in this case seems to represent creativity, thinking outside of the box, an example of independent thinking of the sort that the state ought to promote.

It could be objected, however, that in practice, a compromise may owe more to external pressure than to freely formed opinions. Consider an example of a proposed compromise-based accommodation in the context of an employment relationship.[24] Martha Nussbaum describes the case of a female Muslim employee at a Disney hotel in California who sought permission to wear a hijab while at work. Disney was reluctant to grant this accommodation because of a supposed conflict with their corporate "look", offering instead a "compromise" whereby the employee could conceal her hijab under a large ridiculous-looking hat.[25] Depending on the context, the employee may justifiably feel forced to accept this "compromise" or lose her job.

It is certainly true that such coercive pressure would undermine whatever value

[23] See Brief for Petitioner at 5-6, Holt v. Hobbs 574 U.S. (2015). The Islamic texts cited by Holt suggest that when social or political conditions prevent wearing a full beard, a Muslim male may wear a trimmed beard instead.

[24] Although most of the examples I will discuss involve accommodation by the state or by government employees and officials, the value of freedom of thought may also apply to some nonstate actors, such as employers, who have an ability to unduly influence the thoughts or activities of others. Compare to discussion in Elizabeth S. Anderson, *Private Government: How Employers Rule Our Lives* (Princeton: Princeton University Press, 2017).

[25] See Martha C. Nussbaum *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, MA: Harvard Belknap, 2012), 9.

compromise might have for individual freedom of thought. But compromise is consistent with freedom of thought so long as certain conditions are met—in particular, freedom of thought may be promoted by compromises that are *fair*. A "fair" compromise has both substantive and procedural elements. Procedurally, a fair compromise requires that the parties do not influence the terms of the agreement through power or deception. The accommodator, such as the state or the employer, must not leverage their power such as the power to punish or to fire, to force the religious person's hand. And neither party should make insincere or unreasonable demands. A compromise premised on a bluff, for example, is not a fair compromise because only one party makes a genuine concession.[26] And substantively, a compromise is fair when it represents a reasonably equal balancing or a reconciliation of the various interests at stake, much as the half-inch beard apparently allowed for religious expression consistent with prison safety.

As an illustration of fair procedure, consider *EEOC v. Abercrombie & Fitch*, a case in which an employer refused to hire a Muslim job applicant because she wore a black hijab to her interview, which was again considered inconsistent with the company's "look" policy.[27] In fact, a workable compromise-based accommodation may have been available in this case. Testimony in this case suggested that the applicant would have been willing to wear a white hijab, which would fit better with the company's sporty, active look.[28] What was missing was a fair procedural opportunity to arrive at the compromise. The applicant was clearly in a disadvantageous procedural position. She may have been intimidated by the interview process or

[26] Here I draw on Arthur Kuflik's suggestion that a fair compromise typically displays "end-state criteria", e.g. that each party has conceded something of actual value or importance to her. Arthur Kuflick, "Morality and Compromise," *Nomos* 21 (1979): 38-65, 40.

[27] EEOC v. Abercrombie & Fitch, 575 U.S. ___, 135 S.Ct. 2028 (2015).

[28] See the case below, EEOC v. Abercrombie & Fitch, 731 F.3d 1106 (10th Cir. 2013) at 1113.

at a disadvantage because of her need for a job. Moreover, because the hijab was never mentioned in the interview, she may not have known that it conflicted with the company's policy. The Supreme Court rightly held that, under Title VII, the onus is on the employer to initiate the conversation about religious accommodation; a prospective employee is not required to provide explicit notice of her need for accommodation. Because a good faith conversation is so crucial for getting accommodation right, our legal framework should ensure that claimants have a fair opportunity for dialogue, especially in the employment context.

In order to illustrate substantive fairness, let us return to the example of the Disney employee who sought to wear a hijab while at work. Even if the conditions on procedural fairness are met, it seems likely that wearing the ridiculous hat would not be a substantively fair compromise. It certainly seems that Disney's proposal fails to take seriously the meaning and purpose of wearing the hijab, especially if wearing a hijab is meant partly as a public expression of one's faith.[29] The proposal may also be discriminatory because wearing the undignified hat is a cost that other workers (who are not Muslim or not female) do not have to suffer. Indeed, even asking the employee to consider such an agreement is tone-deaf at best, and potentially disrespectful. Yet depending on the reason for Disney's "look" policy, reaching a fair compromise (with quite different terms) may still be possible. The parties need a procedural environment in which they might attempt to collaboratively and in good faith work out a reasonable arrangement.

Building on these examples, religious accommodation laws should generally be designed to provide a procedural framework that provides the parties with a genuine opportunity to reach a substantively fair compromise. A "genuine opportunity" to compromise would require at a

[29] See, e.g., Yvonne Yazbeck Haddad, "The Post-9/11 'Hijab' as Icon," *Sociology of Religion* 68, no. 3 (2007): 253-267.

minimum that a claimant is given a time and place at which to speak with an appropriate official, who is open in principle to modifying the law or policy at issue, and who makes a good faith attempt to reach a mutually acceptable plan of accommodation. Because it may not be easy to design a mutually satisfactory plan of accommodation in a particular case, a "good faith attempt" will often require collaboration and creativity on both sides, and an attempt by potential accommodators to understand the religious basis for the claimant's practice. Reaching a fair compromise will often require comparing and evaluating a wide range of different possible accommodation arrangements, including those that have not previously been considered. The parties may need creativity and ingenuity as well as collaboration to come up with mutually viable alternatives.

Laws such as the federal Religious Freedom Restoration Act (RFRA), which employ the "substantial burden test", will generally be ill suited to promoting compromise.[30] The substantial burden test is designed to determine whether a claimant is entitled to accommodation in an all-or-nothing fashion—accommodation may be warranted when the law imposes a significant cost on noncompliance, but not if the believer must pay a small fee or forego a minor benefit.[31] But in order to apply the test, courts assume that the claimant will not comply with the law. For example, in the important *Hobby Lobby* case, the Supreme Court assumed that the employer

[30] For example, the Religious Freedom Restoration Act (RFRA) provides citizens (and some institutions) with a right against the federal government to an exemption from a law or policy that "substantially" burdens a claimant's religious practice unless the law is the "least restrictive means" of furthering a "compelling governmental interest". (42 U.S.C. § 2000bb–1.)

[31] Although critical of it, Chris Eisgruber and Larry Sager describe the idea behind the substantial burden test thusly: "religiously motivated persons are constitutionally entitled to disregard otherwise valid laws unless the government can demonstrate that a state interest of the highest order is at stake." Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press 2007), 82-3.

would refuse to comply with the Affordable Care Act's contraceptive mandate.[32] The "burden" was the monetary cost that the employer would have to bear as a result of noncompliance, either tax penalties or the economic loss resulting from not providing its employees with insurance (which would likely require spending more on salary). But the substantial burden test is premised on the assumption that the claimant is categorically unwilling to comply with the law, and by implication, unwilling to compromise about it. Bringing a claim under a law such as RFRA forces the claimant to adopt a posture that is antithetical to collaboration and compromise.

Instead of laws like RFRA that employ the substantial burden test, religious accommodation laws could perhaps be designed to incorporate elements of procedural due process. Rather than simply determining whether a claimant is entitled to an accommodation, courts could ensure that the claimant receives an opportunity to receive a good faith hearing.[33] Moreover, by providing neutral oversight, creative thinking, and inducements to the parties to work out a mutually acceptable plan, a court may be able to directly provide the fair procedure to which the claimant is entitled.

3. Compromise and the Value of Neighborly Relationships

Section 2 argued that compromise-based accommodation is consistent with, and may even help to promote, the core political value of freedom of thought. This section suggests an additional reason for thinking that compromise-based accommodation may be beneficial in the liberal state, namely, that compromise can contribute to building lasting relationships based on mutual understanding and respect. In particular, compromise may form the basis for relationships

[32] Burwell v. Hobby Lobby, 573 U.S. ___ 134, S.Ct. 2751 (2014) (holding under RFRA that closely held private corporations with religious objections are not required to pay for their employees' insurance coverage of contraceptives as mandated by the Affordable Care Act).

[33] Compare to Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (noting that procedural due process requires that a claimant have an "opportunity to be heard at a meaningful time and in a meaningful manner").

between neighbors, or what I will call "neighborly" relationships—that is, relationships between persons based on a pattern of interactions displaying respectfulness, congeniality, and politeness.[34] Unlike a robust relationship like friendship, neighbors need have no shared ends aside perhaps from the maintenance of the relationship itself, and the relationship generates no special obligations other than being a good neighbor.[35] Nevertheless, neighborly relationships can be beneficial to maintaining a diverse political community because they promote feelings of belonging, and help to reinforce the equal status of citizens, particularly those who are members of minority groups.[36] Such relationships allow us to build connections that bridge the gap between our more insular, intimate, and tightly knit associations such as family, friends, and religious communities. An overlapping network of neighborly relationships provides the connective tissue that allows a political community to form out of our other more intimate associations.[37]

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[34] The idea of "neighborliness" (or the related idea of "neighboring") has received some attention from sociologists, psychologists, and urban planners. See, e.g., Peter H. Mann, "The Concept of Neighborliness," *American Journal of Sociology* 60, no. 2 (1954): 163-168; Donald G. Unger and Abraham Wandersman, "The Importance of Neighbors: The Social, Cognitive, and Affective Components of Neighboring," *American Journal of Community Psychology* 13, no. 2 (1985): 139-169; Hollie Lund, "Testing the Claims of New Urbanism: Local Access, Pedestrian Travel, and Neighboring Behaviors," *Journal of the American Planning Association* 69, no. 4 (2003): 414-429.

[35] Thus my argument here avoids Simon May's criticism of the concept of "civic friendship", see Simon Căbulea May, "Moral Compromise, Civic Friendship, and Political Reconciliation," *Critical Review of International Social and Political Philosophy* 14, no. 5 (2011): 581-602.

[36] Martha Nussbaum suggests a similar point, arguing that respecting persons as moral and political equals may require actually getting to know them and working with them to understand what beliefs and values contribute to their own search for meaning. Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008).

[37] The picture described here is influenced by John Rawls' idea that the political community is a "social union of social unions"—that is, a broad overarching association composed of smaller private associations. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University

Compromise may contribute to building neighborly relationships in two respects. First, reaching a compromise is a communicative endeavor; recognizing another person or group as a potential partner for compromise may help to establish channels of communication that the parties can draw on in the future. Second, the fact that a compromise is based on mutual concessions may also help to provide a foundation for a relationship. Making concessions could help to cement a relationship in something like the way that giving gifts can.[38] And because each party agrees to make a concession, a compromise can be a way of sharing or distributing responsibility for the compromise-based plan, which may not be the case if one of the parties simply deferred to the judgment or authority of the other.[39]

As an example of the relationship-forming potential of compromise, consider a Canadian case, *Multani v. Commission*, involving a 12-year-old Sikh student who sought to carry a ceremonial knife or kirpan at a public school.[40] The school board had initially compromised with the student, allowing him to carry the kirpan, subject to the requirement that it be "sewn securely in a sturdy cloth envelope" and hidden under his clothing at all times. But some of the other students' parents objected to this arrangement, and the school administrators sought to prevent the student from carrying a kirpan at all. The Canadian Supreme Court sided with the student,

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Press, 1971), 520-9. Compare to Alexis de Tocqueville, *Democracy in America*, Vol. II, Part 2, Ch. 5, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 489-93.

[38] Compare also to the ritual destruction of goods in a potlatch ceremony in Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, trans. W.D. Halls (London: Routledge, 1990).

[39] Thanks to Lee-Ann Chae for suggesting this idea. For a similar point, see Chiara Lepora, "On Compromise and Being Compromised," *Journal of Political Philosophy* 20, no. 1 (2012): 1-22.

[40] Multani v. Commission Scolaire Marguerite-Bourgeoys 1 S.C.R. 256, 2006 SCC 6 (holding that the school's refusal to allow the kirpan violated Section 2(a) of the Canadian Charter of Rights and Freedoms).

reasoning that a knife that has been rendered effectively inoperative simply does not present the same risks as a fully functional knife. Moreover, the Court argued that public schools must sometimes accept a small loss of safety—or take on extra costs to ensure that safety is maintained—in order to integrate a diverse population of students into a single educational community. As forums for civic education, they should reflect and be sensitive to the diversity of the broader political community.[41]

Brian Leiter is critical of the Court's discussion of this case on the grounds that any form of accommodation represents an unjustifiable cost to school safety.[42] But Leiter fails to take into account the *compromise* that is at the root of this case, and indeed, fails to recognize the value that could be gained by reaching a compromise. In a case like *Multani*, a compromise-based accommodation is especially well suited to promoting inclusion, integration, and respect.[43] Reaching a fair compromise requires that all parties strive to understand one another's points of view. In so doing, they develop a more inclusive and accepting community. We might say that mutual understanding is both the means and an end of reaching a fair compromise. Moreover, actually reaching a compromise might provide a foundation for lasting neighborly relationships between the Sikh student, his family, the school administrators, the teachers, and the other students and their families.

Whether an accommodation is justified in a case like *Multani* will often depend on specific aspects of the situation—such as the culture of the school, the likelihood of student

[41] Id. at 296: "If some students consider it unfair that [the Sikh student] may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students [the] value [of diversity] that is [...] at the very foundation of our democracy."

[42] See Brian Leiter, *Why Tolerate Religion?* (2013), 64-6.

[43] Compare to Daniel Weinstock, "On the Possibility of Principled Moral Compromise," *Critical Review of International Social and Political Philosophy* 16, no. 4 (2013): 537-556, 542.

violence, and the particular personality and beliefs of the Sikh student. Sitting down and talking in the spirit of compromise may be the only way to work out this complexity. Indeed, the missing element in this case seems to be that the many of the affected parties—the teachers and the other students' parents—should have been included in the discussion surrounding accommodation from the outset. There was arguably a flaw in the procedure of the compromise.

What may be required in a case like this is a good faith effort on the part of the school administrators, teachers, and other parents, to acquire a better understanding of the Sikh practice of carrying a kirpan. In particular, school officials must try to understand whether the religious meaning or purpose of the kirpan, as the student understands it, is consistent with rendering it inoperative. Generally speaking, carry a kirpan is a requirement for Sikhs (both male and female) who have been baptized or initiated into the Khalsa order—a voluntary but, for those who enter it, deeply important aspect of the Sikh religious practice, a way to mark one's coming of age and an expression of individual devotion.[44] The Khalsa order is a warrior class that is traditionally devoted to resisting tyranny and religious persecution; carrying the kirpan is tied to the Sikh's commitment to both self-defense and defense of others. So the question becomes: would allowing a kirpan in a public school encourage a culture of vigilantism or self-reliance that is incompatible with maintaining school safety?

To flesh out this question, consider *Cheema v. Thompson*, a case in which a Sikh student at a public school in the State of Washington was allowed to carry a kirpan on the condition that it was sewn tightly into its sheath.[45] The court considered alternative accommodations such as

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[44] See Arvind-Pal Singh Mandair, *Sikhism: A Guide for the Perplexed* (London and New York: Bloomsbury Publishing, 2013), 123-4.

[45] Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (holding under RFRA that public school must devise a plan of accommodation for a Sikh student who sought to carry a kirpan). Note that although *Cheema* arose under RFRA prior to City of Boerne v. Flores, 521 U.S. 507 (1997)

permanently riveting the kirpan to its sheath. But the student insisted that riveting the kirpan to its sheath would undermine its defensive purpose and destroy its "character" as a kirpan. The dissenting judge argued, apparently quite reasonably, that this compromise-based plan of accommodation was incoherent.[46] If its purpose is merely symbolic, then the kirpan ought to be rendered permanently inoperative. But if its purpose is to actually use it in self-defense or defense of others, then it should not be allowed at school. Either way, carrying the kirpan in a sewn sheath would seem an inappropriate compromise.

But there is space for the thought here that the kirpan does not actually have to be used in order to fulfill its defensive purpose—that is, the kirpan may be used for self- and other-defense in nonviolent ways. Perhaps carrying a kirpan could be a source of confidence that a Sikh student can draw upon in nonviolently confronting or speaking out against an aggressor. If so, a compromise whereby the kirpan is rendered inaccessible but not inoperative might allow the student's values to coexist with school safety. Thus, in order to reach a compromise that respects all of values or interests at stake, it is incumbent upon the school to try to understand the student's values, what his practice means, and why it matters to him. Likewise, it is important for the Sikh student not only to appreciate the importance of maintaining school safety, but also to develop a clear understanding of what the kirpan means for him and to communicate that sincerely to the school officials.

Against this position, one might argue that inclusivity and respect can often be achieved in other, potentially less costly ways, e.g., by making a greater effort to include religious

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(striking down RFRA as applied to the state and local actors), its central reasoning does not rely on anything specific to RFRA.

[46] See id. at 886, Wiggins J. dissenting.

minorities in collective decision-making processes.[47] But in a situation like *Multani*, I doubt that providing access to school board meetings, e.g., would be enough to foster an inclusive school environment. Compromise can help to build relationships directly. It is not clear that the complexity of the student's religious beliefs could or should be adequately addressed in an open legislative-style meeting. Moreover, the school's respect for diversity may begin to seem insincere if it holds meetings but does not evidence some genuine willingness to compromise about the policies that govern the school.

4. The Compatibility of Compromise with Religious Practices

This Chapter has argued that compromise-based accommodation may help to promote freedom of thought and neighborly relationships, both of which are valuable for the liberal state. There may be a concern, however, that reaching a fair compromise with a religious person would be a rare occurrence—an exception rather than the rule. The claimant in *Holt v. Hobbs* who sought the half-inch beard is an outlier because most religious persons feel themselves to be bound by categorical commitments of the sort that would be incompatible with compromise. Any compromise reached with religious persons would be pragmatic at best, and might even be seen as a taboo exchange or a "rotten compromise" in Avishai Margalit's phrase.[48] That is, the compromise might seem to involve accepting terms that are incompatible with one's core commitments. Regardless of the potential virtues of compromise in general, religious practices are not the sorts of activities that typically admit of compromise.

But this objection overstates the case. Some religious commitments, especially those that involve standards or ideals, may leave room for interpretation even when they are accorded great

[47] Simon Căbulea May, "Principled Compromise and the Abortion Controversy," *Philosophy & Public Affairs* 33, no. 4 (2005): 317-348, 343.

[48] See Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton: Princeton University Press, 2009).

weight or significance. In some cases, these commitments might allow for flexibility in the performance of certain religious practices or activities. For example, we might imagine a religious person who, out of a religiously mandated love or respect for her coworkers, agrees to work every-other weekend, even though she also believes that she is obligated to observe the Sabbath. In such a case, the believer may feel that there is a tension or complexity within her religious commitments that allows for flexibility with respect to her obligation to observe the Sabbath. Similarly, some religions recognize an obligation to obey the secular or nonreligious laws, perhaps out of respect for other people or the value of maintaining an ordered society.[49] Given such an obligation, a believer may have reason to modify some of her religious practices in order to comply with the laws of her state. Compromising with the state, then, might represent an attempt to reconcile an internal tension within her religious commitments. Again, Gregory Holt's half-inch beard might be an example of such a compromise.

More generally, it can be argued that a fair compromise is potentially justified whenever an individual is committed to two incommensurable values or principles that require incompatible actions in a given case, even if one or both of these commitments is nominally "categorical" in the sense of admitting of no exceptions. When one faces a practical conflict between one's normative commitments, the first response is generally to assign them a rank ordering or lexical priority. But a rank ordering may not be possible when the values at stake are incommensurable—i.e., there is no basis for comparing them and no overarching value that determines their priority.[50] For example, I may believe that there is no way to rank the salvation

[49] In the Christian tradition, for example, see Romans 13:1-7 (describing the Christian's duty to obey the law and civil authorities). See also Thomas Aquinas *Summa Theologiae I-II*, trans. Thomas Gilby (New York: McGraw-Hill, 1964), q. 90.

[50] For a canonical discussion of incommensurability, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 342.

of one's soul against the overall good of humanity. Yet it is perhaps not correct to say that one values these things equally, or is indifferent between them.

When one must choose a course of action in the face of conflicting incommensurable values, considerations that would otherwise be extrinsic or of secondary importance may become more directly relevant. In such cases, the possibility of reaching a compromise with another person about how we should act together or interact may rightly be decisive in my decision-making, for two reasons. First, the fact that another person who is affected by my decision is willing to accept a particular compromise could be a form of moral testimony, providing evidence of the correct ranking of the values at stake, or for the existence of other relevant values of which I am unaware.[51] Second, the apparent fairness or reasonableness of a compromise could provide indirect evidence that the agreed-upon position is correct or morally optimal. The fairness or reasonableness of a compromise might point to the correct result because the spark of creativity or ingenuity needed to reach a fair compromise can be evidence of a kind of intuition, an intuitive and perhaps not fully rational grasp of some underlying moral value.

But even if compromise is consistent with religious convictions in some cases, there might be a further concern that an individual's compromise will negatively affect her coreligionists who are unwilling to accept similar terms. The precedential or persuasive effect of the compromise might undermine the ability of those who share her practice to demand a more complete accommodation. Returning to the example of the half-inch beard, if Gregory Holt is granted a half-inch beard, how will the compromise affect other inmates? Holt argued that other religious inmates suffer from the prison's no beards policy, and that granting the compromise

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[51] See for example Karen Jones, "Second-Hand Moral Knowledge," *Journal of Philosophy* 96, no. 2 (1999): 55-78.

would be a relief to them as well.[52] But this claim raises a complex issue. Although Holt is not acting as a representative for other inmates—he has not been appointed or elected—the state's decision to accept his compromise could limit their options going forward. And the partial accommodation that Holt agreed to may not reflect their understanding of their religious activity.

But if a compromise is substantively fair—i.e., it actually does justice to the religious values at stake, as Holt understands them, and is not a mere capitulation—then it may be possible for others to accept the same values expressed in the compromise. In such a case, a compromise might represent a "moral innovation", in the sense that others who are motivated by the same or similar moral values may be able to follow the path of moral reasoning that led to the compromise.[53] Holt's compromise may provide his fellow inmates with a path that they can follow for reconciling their religious practice with the political values at stake. This result is most likely for persons who share a religion or who share substantially similar religious beliefs and values; but there might be more overlap than it at first appears, particularly when we are already talking about the same activity (e.g., growing a beard). The value of this practice—e.g., a public expression of one's faith—might be similar across different religions.

5. Compromise and Political Equality

It may also be objected that compromise-based accommodation will be incompatible with political equality. In particular, it may seem that employing compromise-based accommodation

[52] Holt notes that the issue in his case is important in part because "it has the potential to affect thousands of inmates," noting that "[t]here are many different religious beliefs, besides Islam, that require their adherents to [] maintain a beard[.]" Petition for Certiorari at 5, Holt v. Hobbs, 574 U.S. (2015).

[53] Compare to Barbara Herman, "Contingency at Ground Level" in *Moral Universalism and Pluralism*, eds. Henry S. Richardson and Melissa S. Williams (New York: New York University Press, 2009), 85-6: "moral front-runners or innovators can determine the structure of obligations for the rest of us by making some [moral principle] that is generally not regarded as a real possibility appear viable or even compelling."

will entail that citizens will not be treated equally by the state. According to a basic "equal treatment" principle, the state must adhere to rules that are clearly announced and generally applicable, and that do not single out a specific individual for special benefit or burden. Like cases must be treated alike. Religious accommodation may be consistent with this principle so long as the law identifies a general class of persons and a type of activity, and provides accommodation to all who qualify on an equal basis. But compromise-based accommodation would seem to require modifying the law on an ad hoc or case-specific basis, in violation of this equal treatment principle.[54]

Return to the case of Gregory Holt, the Muslim prison inmate who sought to grow a half-inch beard.[55] Holt brought his claim under a U.S. law, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides accommodation to religious persons confined to prisons or jails.[56] According to the equal treatment principle, RLUIPA should provide all "institutionalized persons" with the same accommodation in the same situations, with clear rules of interpretation yielding predictable outcomes, and clear procedures for claiming an entitlement under the law. But Holt's compromise appears to upset this normal process, leading to unpredictability in the meaning and scope of the law. If Holt brings a claim under RLUIPA, the court should simply decide whether the law requires the prison to accommodate Holt's full beard, or else enforce the "no beards" policy against him.[57]

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[54] Compare to arguments in May, "Principled Compromise and the Abortion Controversy."

[55] See *Holt*, 574 U.S. ___ (2015).

[56] 42 U.S.C. § 2000cc–1 and § 1997.

[57] Compare to Chief Justice Roberts' concern that the case would have to be relitigated for a three-quarter-inch beard. Transcript of Oral Arguments at 24:3-7, Holt v. Hobbs 574 U.S. (2015).

But the equal treatment principle is an overly rigid way to think about how the law promotes political equality, especially in the context of religious accommodation. Political equality depends on something more complex than formally equal legal treatment; political equality requires that individuals do not occupy positions of power or privilege with respect to others (unless they have consented under certain conditions). The risk of unequal power or privilege is especially acute with respect to certain groups or aspects of individual identity, either because of existing power imbalances, or because of the intrinsic risk of exploitation attaching to certain groups or traits. Because religion has historically been vulnerable to this form of inequality, the state should be careful to ensure that inequalities with respect to religious groups or religious identities do not arise.

Because of the existing power imbalances, whether and how to accommodate a particular religious practice cannot always be determined through the normal channels of democratic decision-making.[58] Although the state should not act arbitrarily, it must recognize that each individual religious person and practice is potentially unique, and the suitability of an accommodation arrangement will often be case-specific. The state may have to provide alternative procedural mechanisms for religious accommodation, distinct from the general political decision-making procedures. And case-specific compromise could be an appropriate part of how the state determines how best to accommodate their religious activities.

More generally, the equal treatment principle overlooks the fact that generally applicable laws will often admit of case-specific interpretation and application. To borrow an example from Seana Shiffrin, consider the "hostile work environment" standard in the context of workplace

[58] Moreover, the requirement that all must laws serve a secular purpose might prevent the state from considering the content of religious beliefs when deciding on its general law or policy, yet this religious content may be relevant to shaping an appropriate accommodation. For an argument along these lines, see Abner S. Greene, "The Political Balance of the Religion Clauses," *Yale Law Journal* 102, no. 7 (1993): 1611-1644.

gender discrimination.[59] Shiffrin argues that part of the point of having a legal standard as opposed to a bright-line rule in this context is that employers and coworkers must work together to interpret and apply the standard to their own specific situations. In order to apply the standard, coworkers must have a conversation about what sorts of actions amount to sexual harassment in the workplace, and how best to combat it. The value of sparking such conversations, and their pragmatic role in helping to reduce actual gender discrimination, may justify allowing coworkers to reach case-specific interpretations of the standard, even if the standard is applied differently in difference contexts, and even if its interpretation is not determined in advance. Moreover, because of the complex and shifting nature of sexual harassment, it may be impossible to provide a full definition in advance—think of the complex ways in which microagression can create a work environment that is hostile to women or to gay, lesbian, or transgender persons.

Similarly, in the context of workplace disability accommodation, an employer is required to attempt to modify disabled employees' workspaces and job tasks in order to make it feasible for them to perform (unless the disability renders it impossible to perform a bona fide occupational qualification).[60] Complying with this law will typically require creative and case-specific solutions to very particular problems. Every disability (and, for that matter, every workplace) is different in complicated ways, and so the law properly delegates authority to employers to attempt (in good faith) to determine the appropriate accommodation arrangement. There may be a similar role for case-specific tailoring in the context of religious accommodation. Religious accommodation aims to fit a complex and often idiosyncratic variety of religious practices into complex social spaces, including schools, workplaces, and even prisons. Effective

[59] See Seana Shiffrin "Inducing Moral Deliberation: On the Occasional Virtues of Fog," *Harvard Law Review* 123 (2010): 1214-46, 1224-7 (citing 29 CFR 1604.11).

[60] See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

accommodation arrangements must often be tailored to the idiosyncratic beliefs and practices of specific individuals, just as accommodation of disability will require ad hoc, case specific creativity. A compromise, like Holt's half-inch beard, might be the best way to reconcile a religious practice with the requirements of the institutional context. Moreover, just as a legal standard in the context of workplace discrimination can prompt valuable interactions that themselves help to counteract discrimination, an effort to compromise with religious persons might lead to increased mutual understanding and respect that contribute to political equality.

Conclusion

This Chapter has argued that a compromise-based accommodation is able to promote the core liberal values—especially freedom of thought, neighborly relationships, and political equality—better than an all-or-nothing approach. Moreover, the compromise-based approach to accommodation may have the positive effects of protecting third parties and fostering lasting relationships in the community. Although reaching a compromise may not always be possible, recognizing that compromise is a legitimate alternative to a full exemption may help to reduce the animosity that has come to dominate the political debate surrounding religious accommodation. Of course, compromise cannot solve all political controversies related to religion. But it is a mistake to think of religious accommodation as a tool for resolving broader political controversies. Indeed, accommodation may be all the more valuable because it allows us to live together without resolving all of our intractable political disagreements. This Chapter has argued that, with this more limited goal in mind, compromise can be a legitimate and potentially effective way to structure religious accommodation.

Chapter 3

Accommodation, Political Protest, and Accepting a Law's Legitimacy

Chapter 2 defended a compromise-based approach to accommodation. This compromise-based approach contrasts with an all-or-nothing approach, recommended by the strict separation conception of religious freedom, according to which the state should either accommodate a religious activity fully or not at all, but should not require or expect religious persons to modify their practices. However, I argued that reaching a compromise can often be more valuable for both parties, especially when the purpose of the law at issue is consistent with the meaning or purpose of the religiously or morally motivated activity. For example, accommodating a Muslim prison inmate's half-inch beard may be consistent both with the prison's needs to maintain security and with the religious significance of the beard for the inmate, namely, expressing his faith and religious affiliation.

But the compromise-based approach faces questions about an important set of examples involving persons who have "principled objections" to the law at issue. One who has a "principled objection" to a law not only objects to the law as it applies to her, but also opposes, perhaps on the same or related grounds, the state's purpose or justification for the law in general. For example, a pacifist who is subject to a military draft may seek an accommodation in order to avoid active military service. But she may also oppose the state's decision to go to war for much the same reason: namely, she believes that killing in war is wrong. This pacifist presents a case of principled objection in that she objects to both the overall purpose and the specific application of the law at issue. By contrast, the Muslim inmate does not present a case of principled objection because the inmate did not object to the purpose of the no-beards policy—namely, maintaining prison security—but only to the way in which that policy was applied to him.

In cases of principled objection, it may seem impossible for the state and the person seeking accommodation (or the "objector") to reach a compromise-based accommodation. After all, if the pacifist seeking an exemption from the draft also opposes the war effort as a whole, then how can she agree to a compromise that is consistent with the purpose of the state's draft law? Such a compromise would seem to be either inconsistent with the moral or religious basis for her accommodation, or else evidence of her insincerity. That is, if a compromise requires her to support the war effort by other means, then either her religious beliefs are not adequately protected, or her beliefs were really not that important after all. For example, we might question the justifiability of rules such as the Alternative Service Requirement—that is, the provision of the U.S. Military Selective Service Act that conditions exemptions from the military draft on the objector's agreement to serve in a civilian field such as healthcare or education.[1] Performing such alternative service will often indirectly support the state's goal of mobilizing troops and going to war. But then, it may seem that in order to receive an accommodation, the objector must transgress or ignore her basic conviction that killing in war is wrong.

This Chapter will argue, to the contrary, that compromise-based accommodation may be appropriate in cases of principled objection, but only if a further condition is met—namely, that the party seeking accommodation accepts the democratic legitimacy of the law at issue, even if she continues to oppose the purpose or justification of the law at issue. One who "accepts the legitimacy" of a law believes, first, that the law has some moral significance because it is the result of appropriate democratic procedures. Respect for the decision made by her fellow citizens dictates that she at least consider the merits of the law, and determine the appropriate way to respond to it. Second, one who accepts the legitimacy of a law believes that the appropriate way to oppose the law is to utilize the available democratic channels in order to change it. The

[1] U.S. Military Selective Service Act, 50 U.S.C. 3806(j).

pacifist who accepts the legitimacy of the state's decision may seek to convince her fellow citizens that the war is a mistake through campaigning, protesting, or public speaking; but she would not seek to undermine the war effort through sabotage or clandestine activity.

Accepting the legitimacy of the law at issue opens up a pathway for reaching a compromise-based accommodation. In particular, by accepting the legitimacy of the law, the objector may be able to separate her personal objection to the law from her political objection. The basis for the pacifist's personal objection may be the fact that, if drafted, she would be required to take on a role-specific obligation to kill in certain circumstances. She may reasonably wish to avoid personally acquiring that role-specific obligation on moral or religious grounds. At the same time, her belief that the draft law was the result of a fair democratic decision procedure may provide her with a moral reason to perform alternative service as part of an accommodation arrangement, even if this indirectly supports the war effort. Moreover, the pacifist recognizes that her political opposition to the war—though premised on the same moral or religious grounds—should proceed through appropriate democratic channels. And, crucially, accommodation is not an appropriate channel for engaging in political protest or seeking to effect political change. Thus in general, the state and a principled objector may be able to reach a compromise-based accommodation that is consistent with the objector's personal objection to complying with the law on the grounds that she accepts the democratic legitimacy of the war, and will express her political opposition to it by other means.

By contrast, compromise-based accommodation would not be appropriate where a principled objector rejects the democratic legitimacy of the law at issue. One who objects to both the purposes of the law and to its democratic legitimacy has no moral grounds on which to agree to a compromise with the state that would require accepting the purposes of the law. Moreover,

there would be no reason for the state to think that the compromise would be stable—the objector would have reason to resist engaging in in any form of activity that is consistent with a law believed to be illegitimate. Consider the example of Kim Davis, a county clerk in Kentucky who refused to issue marriage licenses to same-sex couples and publicly denied the legal legitimacy of same-sex marriage.[2] Whatever we might say about her actions as a form of political protest, it is clear that her claim for religious accommodation would not be appropriate according to the compromise-based approach.

The example of Kim Davis helps to illustrate a more general problem with "complicity-based" accommodation claims, that is, claims based on the argument that complying with a particular law would render one complicit in an activity of another that is deemed to be sinful or immoral. For example, a number of religious institutions in the U.S. argued that complying with the contraceptive mandate of the Affordable Care Act would render them complicit in others' use of potentially abortion-causing contraceptives.[3] Similarly, some religious wedding-related service providers—such as photographers, bakers, and florists—have objected to serving same-sex couples on the grounds that doing so would render them complicit in same-sex marriage.[4]

This Chapter argues that the logic of complicity raises a question about whether complicity-based claimants will be willing to agree to a compromise that would require them to support, however indirectly, the purposes of the laws at issue. Where they are unwilling, there is reason to think that these claimants reject the democratic legitimacy of the law at issue, and

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[2] See Miller v. Davis, 123 F.Supp.3d 924 (ED Ky. 2015) (holding that county clerk must issue marriage licenses to same-sex couples despite her religious objection).

[3] See Burwell v. Hobby Lobby, 573 U.S. ___ , 134 S.Ct. 2751 (2014); Zubik v. Burwell, 136 S. Ct. 1557 (2016).

[4] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 137 S. Ct. 2290 (2017).

accommodation would be inappropriate according to the compromise-based account. But then, refusal to serve same-sex couples should not be treated as a religious activity but as politically motivated civil disobedience. This point of drawing this conclusion is not to pass judgment—civil disobedience may sometimes be an important avenue of political participation, one that in some cases ought to be respected by the liberal state. But those who seek accommodation should not protest a law by means of an accommodation.

This Chapter has four sections. Section 1 develops the contrast between personal and political objections that is central to the argument that compromise-based accommodation may be appropriate in cases of principled objection so long as the objector accepts the democratic legitimacy of the law at issue. Section 2 defends the key premise that accommodation should not be used as a form of political protest, or a legal permission to engage in activity that may be used as a form of political protest. Drawing on these arguments, Section 3 develops a concrete way to draw the line between appropriate and inappropriate accommodation claims. Finally, Section 4 applies the arguments to recent U.S. cases involving complicity-based accommodation claims.

1. Principled Objections and Accepting the Legitimacy of a Law

An individual has a "principled objection" to a law when she both objects to the requirements that the law imposes on her, and to the overall purpose or justification of the law. Principled objectors may sometimes seek some form of accommodation or exemption from the specific obligations or requirements that the law imposes on them personally. For example, a pacifist may seek an exemption from the military draft. According to the all-or-nothing approach discussed in Chapter 2, there is nothing distinctive about the fact that her objection is principled—either the costs of granting the accommodation can be justified, or not. The compromise-based approach, however, must provide a special analysis of such cases. After all, it

may seem that it will be impossible for the state to reach a fair compromise that reconciles the purpose of the law with the objections of someone who opposes the law on principled grounds.

This Section argues that reaching a fair compromise-based accommodation may be appropriate so long as the principled objector accepts the democratic legitimacy of the law at issue. This is because the legitimacy of a law may provide an objector with a moral reason to perform an action that supports or is consistent with the purpose of the law, even as she continues to oppose it.[5] The legitimacy of a law may not provide decisive moral reason to act in all cases, but it provides at least one reason to support the law even if one believes its content is wrong. For example, the democratic legitimacy of a law banning recreational use of marijuana may provide a citizen with a reason to comply with law, even if she thinks it is mistaken. And when serving as a member of a jury, she may vote to find someone guilty of breaking this law on the grounds that the law is democratically legitimate.

Similarly, the fact that the draft law was the result of a fair democratic decision procedure may provide the pacifist with a moral reason to perform alternative service as part of an accommodation arrangement, even if that indirectly contributes to the war effort she opposes. The legitimacy of the state's decision to go to war may not provide her with a reason to believe that the war is morally correct or justified. She may continue to protest the war. But the legitimacy may provide her with a reason to accept the compromise.

The moral reason to act provided by a law's legitimacy is linked to one's role as a citizen, or an equal member of a democratic political community. Accepting the legitimacy of fair democratic decision procedures is part of how one shows respect for one's fellow citizens. By

[5] Compare to Brian Barry, *Justice as Impartiality* (Oxford: Clarendon, 1995): 150: "[Y]ou can [] say, if you adhere to justice as impartiality, that majority voting was a fair way of resolving the issue and that you must, therefore, accept that what the majority supports should become public policy. The outcome is, as far as you are concerned, legitimate but bad—bad in the precise sense that it offends against your conception of the good."

accepting the legitimacy of laws enacted through fair collective decision procedures, one shows respect for one's fellow citizens as persons capable of making accurate judgments about political matters (i.e., about matters that affect the community), and so as capable of coexisting as equal decision-makers, even if in the particular case one believes that one's fellow citizens have erred in a particular case. And acting in ways that support the legitimate law may be one way to express this respect for one's fellow citizens. In some cases, a citizen may simply comply with a law because it is legitimate. But in other cases, a citizen may be able to express respect while avoiding direct compliance. Compromise-based accommodation exploits this possibility. A principled objector may seek an exemption from direct compliance with the law—e.g., registering for the draft—while agreeing to respect the legitimacy of the law in other ways, e.g., by performing alternative service. That is, she may separate her "personal objection" to the law from her "political objection", and seek accommodation only for the former.[6]

This argument depends on the idea that it may be reasonable for a principled objector to wish to avoid personally engaging in an action she believes to be wrongful while accepting the fact that other members of her political community will continue to perform this action. But if an individual citizen has a principled objection to a law on moral or religious grounds, why should she be willing to act in any way that might support the implementation of the law or policy by others? If killing in war is wrong, it seems that it is wrong for everyone. Generally speaking, we do not make distinctions between agents with respect to actions that are believed to be objectively right or wrong on moral or religious grounds. Normative objectivity is characterized by impartiality—moral obligations may be fine-grained and case-specific, but they are not person-specific, in the sense of applying only to me, but not to you, or only to the in-group but

[6] A "personal objection" is an objection to direct compliance with a law; while a "political objection" is an objection to the law itself in general application or as applied to others.

not the out-group. It is true that some religious obligations have this partial, limited scope feature. For example, some Muslims may believe that only those persons who identify as Muslims must wear a beard. But in the case of principled objections to laws, it is typically the case that the objection is based on a moral or religious requirement that is believed to be universal or objective. The problem with going to war, according to the pacifist, is not merely that she may be required to kill, but that the state is authorizing many people to kill, and killing in war is wrong, regardless of who pulls the trigger. But then, even if she respects her fellow citizens—or maybe even because of that respect—she should seek to ensure that no one performs the wrongful action.

In order to distinguish her personal objection to a law from her political objection, the principled objector must adopt a form of partiality within her normative reasoning. Although she believes that some actions—e.g., killing in war—are wrong for all people, she nevertheless distinguishes between her own performance of this wrongful activity and the performance of others. One way to make sense of this distinction is in terms of role-specific obligations, that is, obligations that attach to persons because they occupy specific roles. It may make sense for an individual to avoid acquiring a role-specific obligation to do something one believes to be morally or religiously wrong, while accepting the fact that others may acquire this obligation. One then recognizes and respects the fact that those who occupy such roles must comply with their role-specific obligations, while at the same time arguing that the role itself should be eliminated. One may respect a person (e.g. a fellow citizen) who occupies a role, while arguing that the role is unjust. Thus one's personal objection is to occupying a certain role, while one's political objection is to the existence of the role. This leaves open space for one to accept that the democratic political community has created the role and requires some people to occupy it, and

the people who occupy it must perform the role-specific obligations that come with it.

This distinction between personal objection and a political objection may be reflected in the traditional professional specializations or role-specific obligations that ensure that the task of killing in war falls only on some specific persons, namely, professional soldiers. A citizen who opposes killing in war may reasonably distinguish between her decision not to take on the role of soldier, and the actions of others have taken on the role. Compare a similar example of role-specific obligations and moral specialization in the case of law enforcement, and the role of police officer in particular. Let us suppose that police officers have role-specific obligations that may require them to use physical restraints such as handcuffs or holding cells as part of performing their basic public safety function. Now imagine that someone believed, on moral or religious grounds, that human beings ought not use coercive force to restrict the activity or movement of another individual. In particular, this individual may believe that the use of physical restraints such as handcuffs or holding cells are problematic across the board. She may believe that police officers ought to abstain from using physical restraints—in effect, whether the policing function ought to be radically changed or eliminated. Nevertheless, the individual may believe that the use of physical restraints by police officers is a legitimate aspect of her democratic society, one that has been agreed upon by her fellow citizens through appropriate democratic mechanisms, perhaps over a long period of time. And because of this democratic legitimacy, she may reserve judgment about the morality of her fellow citizens occupying the role of police officer in its current manifestation. Still, it seems that she may very sensibly choose not to become a police officer—i.e., she may choose not to take on the role-specific obligations that may require her to personally use physical restraints on another human being.

One might be uncomfortable with these traditional forms of professional specialization on the grounds that if an action is ever politically necessary (e.g. killing in war), then all capable citizens ought to be willing and able to do it. But that requirement seems overly demanding. There are many ways in which a political community may engage in moral specialization according to talents, interests, and moral beliefs. For example, we may distribute obligations regarding caring for children to some people who have chosen to taken on the roles of parents, but not others. It does not follow from the fact that raising children is a politically necessary action that all citizens must participate in the action equally. We may think of a political community as a mechanism for distributing a variety of different benefits and burdens, and moral obligations and responsibilities might reasonably be among the things distributed.

In sum, the potential legitimacy of the law, and the distinction between personal and political objections, allows for the possibility of a compromise-based accommodation that is consistent with the individual's personal objection to the law, even if it is not consistent with the individual's political objection to the law. Whether such a compromise would be appropriate or fair in a given case will depend on a full analysis of the terms of the agreement, the costs of accommodation, and especially the potential impact on third parties.[7] But compromise-based accommodation is at least on the table.

2. The Incompatibility of Accommodation and Political Protest

The previous Section argued that, even in cases of principled objection, compromise-based accommodation may be appropriate so long as the objector accepts the democratic legitimacy of the law at issue, and is able to distinguish her personal objection to the law from her political objection. But one might object to the argument along these lines: Suppose that a principled objector accepted the legitimacy of the law at issue, and believed that she should

[7] Compare to discussion in Chapter 2.

lodge her political objection to the law through the appropriate democratic channels. Still, she might argue that accommodation is an appropriate channel for democratic protest. Perhaps part of the purpose of exempting pacifist objectors from the military draft is to protect their ability to protest the war effort. If so, then there is no reason for the principled objector to accept a compromise-based accommodation, such as performing alternative service, that is inconsistent with her posture of protesting against the law. She should be free to lodge her protest through all available channels, including by seeking a full exemption from the draft with no compromise.

This Section replies to this objection by arguing that accommodation is not an appropriate channel of democratic participation or a means of political protest. Accommodation should not be used as a form of political protest because the form of accommodation is personalized or tailored to the individual claimant. An accommodation is designed to insulate an individual claimant from the application of a law to her, without affecting the applicability of the law to others. As such, the ground or basis for an accommodation must reflect something distinctive about the claimant's situation such that the accommodation is consistent with the continued application of the law to others and the achievement of the law's purposes.

The personalized form is apparent in many paradigmatic cases of religious accommodation, where the claimant's argument for an exemption turns on her distinctive religious practice, such as a dress code, ritual, or observance of a Sabbath or holiday. Because not all citizens share the claimant's religious practice, granting an exemption to her does not call into question the law's applicability to others or the achievement of the law's purposes. Accommodating a Muslim's half-inch beard is consistent with applying the no-beard rule to others, and maintaining prison security generally. But a political protest against a law is meant to express one's opposition to the law's application in general, or to its overall purpose or

justification. As such, the appropriate grounds for an accommodation are not consistent with its use as a form of political protest.

Even in cases of principled objection, the claimant seeking accommodation must keep her personal objection distinct from her political objection to the law. The pacifist argues that because of her moral beliefs, she should not be drafted into active military duty, or to take on the role of soldier, even as she allow that others may have to take on that role, at least until she is able to convince her fellow citizens to repeal the law. The claim of accommodation in this case is structurally identical to a Muslim inmate seeking to grow a beard. The value of the accommodation, to the pacifist, is not premised on the value of discontinued the war or the draft for all others. She may seek both outcomes, but they are independently valuable to her.

This argument is not meant to suggest that all persons with principled objections to a law will or should be willing to accept accommodation. Those who reject the democratic legitimacy of the law at issue may protest the law, or may simply seek to avoid what they view as the state's illegitimate reach.[8] Even those who accept the democratic legitimacy of the law may feel that they ought not seek a personal accommodation, but should instead devote their energies to repealing the law, perhaps even through civilly disobedient protest against the law. For example, a citizen may engage in direct civil disobedience against a law she opposes—e.g., burning a draft card—as a form of political protest. A healthy democracy should have room for such protest, and the state may offer various forms of protection to such individuals.[9] But in such cases, accommodation is not the appropriate register. Accommodation is not a license to engage in a political protest that would otherwise be illegal—indeed, claiming accommodation may seem to

[8] Compare to discussion of "conscientious refusal" in John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971): 368-9.

[9] Compare to Ronald Dworkin, "Civil Disobedience," in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), Chapter 8.

undermine the force of the civil disobedience. Thus, the pacifist who protests the war by means of her public refusal to comply with the draft law may be entitled to respect, but not to accommodation; while the pacifist who seeks an exemption from the draft, but saves her protest for another venue, may appropriately seek accommodation.

One important piece of evidence for the claim that accommodation is not a form of political protest is the fact that many people who intend to engage in political protest, or to express their political opposition to some law or policy, refuse to claim accommodation even when it might be available to them. I suggest that this otherwise puzzling refusal can be explained by the fact that claiming an exemption would undermine their political protest. Consider the example of a pacifist who wishes to protest the state's war effort by refusing to enter the draft. In such a case, claiming conscientious objector status may seem to undermine the force of the protest.[10]

Martin Luther King, Jr. may be another important historical example of a principled objector who refused to seek religious or moral accommodation for his protest. King, along with many other civil rights era protestors, was motivated in part by his religious beliefs. King often voiced religious grounds for his opposition to the racist and discriminatory laws and policies of the Jim Crow South.[11] But the motivation for his political activity was not solely religious—he was not simply acting on his personal religious convictions, but seeking as a citizen to remedy an injustice in the political community. And it would seem inconsistent with the political nature of

[10] Compare to Randy Kehler, a Vietnam-era pacifist who refused to claim conscientious objector status on the grounds that he denied the legitimacy of the state's war effort in this case. Kehler is notable also for having, through a speech he gave at an anti-war conference, inspired Daniel Ellsberg to release the Pentagon Papers to the press. See Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Viking Penguin, 2002): 265.

[11] Martin Luther King, Jr. "Letter from Birmingham Jail," https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail (accessed January 17, 2018).

his activity to claim a personal religious exemption from the laws that he disobeyed as part of his protests. If King had sought a personal accommodation for sitting at a whites-only lunch counter, or for staging an illegal boycott, such an argument would have undermined the political meaning of his protests. That is, seeking a religious accommodation for the protesting activity itself would have undermined the force of his point that the laws at issue were unjust in general, not just as applied to him.

One might object that in a situation like King's, in which the political system (or some aspect of the system) is deeply unjust, it would be morally permissible for one who seeks to oppose the unjust system to make use of whatever legal protections are available—including protection for conscientious objectors. If you were King's defense attorney, for example, you might feel an obligation to utilize whatever legal protections were available for your client. In such a nonideal case, it certainly may be morally permissible to make a moral or religious accommodation claim. But there is a cost to doing so: a misuse of a legal protection undermines one's ability to politically oppose the system from within because of the implicit acceptance of legitimacy built into one's claim. Indeed, the fact that political protestors such as Martin Luther King refused to seek personal accommodations, even when it might have been available to them, provides some evidence that accommodation is not a form of political protest.

So far I've argued that the grounds for seeking accommodation are inconsistent with using accommodation as a form of political protest. But one might point that accommodation nevertheless can be an effective tool of political protest. For example, a coordinated campaign of seeking accommodation, employed by many individuals or by a large voluntary association, can be an effective strategy for protesting or even undermining the implementation of a law or policy. If a sufficient number of pacifists were to claim conscientious objector status, the military

draft might become unworkable—either because of the difficulty of finding enough non-pacifists to fight in the war, the unfairness of drafting only non-pacifists, or the costs of administering the conscientious objector system itself. Or, similarly, the coordinated conscientious objection of a small number of individuals might be effective where all of those individuals occupy certain specific positions or roles.

But given the purpose of accommodation, and the need for a claimant to articulate a ground consistent with that purpose, intending to use as a form of protest would be a violation of the perspicuity requirement on political activity. Political activity, undertaken by citizens of a democracy in an effort to influence their fellow citizens to engage in a particular course of action, must typically be done publicly, with open acknowledgement of one's aims, purposes, and reasons. Clandestine political activity tends to render its effects illegitimate, because other citizens have not had the opportunity to hear, to understand, and to counter, one's justification for the project that one supports (given that political legitimacy requires that collective decisions be reached through a process of openly expressing and discussing rival positions and the justifications for these positions). The perspicuity requirement calls into question secret political activities such as closed-door meetings between lobbyists and legislators, and the secret donations to super PACs. Likewise, a strategy of coordinated accommodation claims may violate the perspicuity requirement, because the true political purposes of the individual objectors would have to be kept secret when they articulate the personal grounds for their objections.

But it is worth noting that the perspicuity requirement rules out using accommodation to effect political change only where political change is the conscious (though secret) motive of the objectors. If the state's granting personalized accommodations to many people contributes to political change spontaneously or organically—i.e., because when it came time to implement a

particular law, too many citizens raised personal moral objections to complying—that may be consistent with the purpose of accommodation, and it might even be beneficial for the community. If the war effort is undermined as a result of numerous individuals claiming conscientious objector status, then maybe the community should not have decided to go to war in the first place, even if the war had been sanctioned by the appropriate democratic processes. In such a case, the personal moral convictions of citizens might provide a backstop condition or a further constraint on the legitimacy of a law or policy, over and above the state's legal and procedural constraints. One striking example of this phenomenon is the role of churches in South Africa, whose activities were largely protected by the apartheid regime, and who were therefore able to keep open a channel of public or semi-public moral criticism of the abuses and injustices committed by the regime and by others.[12]

Compare the backstop function of accommodation to the example of jury nullification, that is, the doctrine according to which a jury may vote to acquit a criminal defendant, despite there being evidence sufficient for a conviction, on the basis of an extra-legal concern that the conviction would be morally wrong in this case. Jury nullification may provide a legal system with a valuable backstop, helping to ensure that the law does not become dehumanized, or lose its moral compass. But it is important that jury nullification is itself extra-legal: it is respected and allowed by the legal process, but not explicitly part of that process, else it may undermine the legality of the criminal trial. If jurors were encouraged to simply vote their conscience, without reference to law, there would be little point in designing a system that defines crimes and lays down rules of evidence and procedure in advance. An informal presentation of morally relevant facts would suffice. Likewise, while it is possible that the accommodation afforded to certain individuals may result in political change in some cases, this potential must not be an

[12] I am grateful to David Dyzenhaus for a helpful conversation regarding this example.

explicit purpose of the system. Else, as with the example of the jury tasked with voting their conscience, the normal channels of democratic decision-making may be routinely undermined or sidestepped.

3. Setting a Limit on Accommodation Claims: The Cooperation Test

This Chapter has argued that accommodation may be appropriate even in the case of principled objections so long as the objector accepts the legitimacy of the law at issue, and does not seek to use her accommodation as a form of protest. This point establishes a condition on valid or justified accommodation claims, namely, that claimants must base their claims on personal objections that can be kept distinct from whatever political objections to the law at issue they may have. In practice, however, this condition will often be hard to apply. How can others in the community—a judge, a jury, or an administrator, for example—determine whether an objector has a personal ground for her objection that is appropriately distinct from her political opposition of the law at issue?

The practical problem here may be related to a similar difficulty with applying the sincerity condition on religious accommodation claims. In U.S. law, it is generally a condition on receiving accommodation for one's religious practice that one is sincere in her religious beliefs.[13] The sincerity condition does not require absence of doubt or blind conviction, but it certainly rules out claims where the claimant disbelieves the religious basis for their claim, or where the claimant merely pretends to be religious in order to receive legal protection. But actually determining the sincerity of a claimant's religious beliefs is often difficult, and may even be inappropriate because questioning the sincerity of one's belief often implies that the belief is false, and the state should not be involved in trying to determine whether personal moral or

[13] See, for example, United States v. Ballard, 322 U.S. 78 (1944) (holding that while the truth of religious claims may not be submitted to a jury, the sincerity of a religious belief).

religious beliefs are true or false. It is not the place of a court to pry too deeply into the sincerity of a claimant's moral or religious beliefs. As such, it is often difficult to show that a claimant's beliefs are insincere absent quite specific evidence such as direct testimony.

Likewise, it might often be difficult to determine whether an objector is sincere in her claim—which may be explicit or implicit in her request for accommodation—that she is objecting on personal moral or religious grounds that are appropriately distinct from whatever political opposition she might have. But it may be possible to design a test or a rule that indirectly tracks whether a claimant's grounds for seeking accommodation are personal rather than political. In particular, the accommodation may be granted on the condition that the claimant is willing to cooperate in the implementation of the law at issue in some way other than direct compliance—e.g., by performing some alternative service that indirectly supports the state's ability to achieve the purposes of the law. Call this the "cooperation test".

As an illustration of the cooperation test, consider again the example of the pacifist seeking an exemption from the military draft. How can we be sure that, despite her principled objection to the war, she is not intending to use her exemption itself as a form of political protest, or license to engage in political protest? The Alternative Service Requirement imposed by the Selective Service Act could be seen as a concrete implementation of the cooperation test. The objectors' acceptance of the alternative service is concrete evidence of their willingness to cooperate. And so, even if the objectors' cooperation were not necessary for the war effort, the alternative service requirement is a way to ensure, both practically and symbolically, that the objector's objection is based on her personal moral beliefs, not her political opposition to the war. As a practical matter, the alternative service requirement makes it difficult for the objector to use her status as a platform for protesting. If one must work full-time as a teacher or a nurse,

for example, one's objection has not netted significant extra time or other resources with which to stage a political protest of the war.[14] Moreover, if one agrees to support the war effort in a noncombat capacity, then whatever power one's objection might have had as an expression of protest against the war is significantly muted. It does not make sense to base one's objection on a political opposition to the war itself only to participate in the war effort in a noncombat capacity.

Given this description, let us apply the cooperation test to a different example involving a principled objection—a doctor who on religious grounds objects to personally performing abortions and to the right to abortion (or the legality of abortion) in general. Such a doctor may seek an exemption from a law requiring doctors to provide abortion-related services in some cases, such as emergencies. An accommodation may be appropriate only if the doctor accepts the legitimacy of the right to abortion, and does not seek to use the accommodation as a form of protest against the right to abortion. The doctor may continue to oppose the right to abortion through appropriate democratic channels, but the purpose of accommodation is not consistent with its use as a form of political protest. In order to ensure that the accommodation in this case is appropriate, the state might condition accommodation on the doctor's willingness to cooperate in the implementation of the right to abortion in other ways, perhaps as a condition on receiving a personalized accommodation. Like the pacifist who performs alternative service, the doctor may satisfy the cooperation test if he or she were willing to cooperate in other ways. We might imagine a law that provided an exemption for doctors who objected to personally performing certain abortion-related activities, but that required claimants to support or uphold the right to abortion in other ways—e.g., by providing adequate referral and informational services. The doctor might meet this cooperation requirement by counseling the patient and referring her to

[14] See description of alternative service performed by Vietnam-era conscientious objectors in "Conscientious Objectors," in Spencer C. Tucker, ed., *The Encyclopedia of the Vietnam War*, (New York: Oxford University Press, 2001): 213.

another doctor, or by partnering with another doctor who performs abortions.[15] Satisfying the cooperation test does not necessarily mean that an exemption is warranted. We would still need to take into account other features of the situation, including the costs of accommodation and the impact it may have on the rights of women. But as with the Alternative Service Requirement, such a cooperation test may be an important aspect of justified accommodation according to the compromise-based approach.

4. Application of the Cooperation Test to Complicity-based Claims

Section 3 introduced the "cooperation test" as one possible way to determine whether an objector's accommodation claim is properly based on a personal objection, or is intended as a form of political protest. The test requires that the objector be willing to cooperate in the implementation of the objected to law other ways, i.e. other than by directly or personally performing the activity to which she has a personal objection. This Section will apply the cooperation test to a number of recent cases involving objections to participating in same-sex marriages and objections to providing contraceptive coverage under the Affordable Care Act's contraceptive mandate. These cases tend to display a structurally similar type of claim, a "complicity-based claim".[16] That is, the claimants in these cases argue that performing a certain action would render them complicit in an action, performed by another person, which action the claimant believes to be wrong or sinful. Ostensibly, the claimant does not seek to prevent the

[15] Note that there are a number of laws in the U.S. meant to accommodate doctors and others who have religious objections to performing abortions. But unlike the Selective Service Act, these laws generally do not require alternative forms of compliance on the part of doctors. See discussion in Ronit Y. Stahl and Ezekiel J. Emanuel, "Physicians, Not Conscripts — Conscientious Objection in Health Care" *The New England Journal of Medicine* 376, no. 14 (2017): 1380-1385.

[16] See discussion in Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (2015): 2516-2591.

other from performing the action, but to eliminate her complicity in the performance of that action. So for example, *Burwell v. Hobby Lobby*, the claimant seeking accommodation—here, a chain of retain stores—argued that while it would allow its employees to receive coverage of contraceptives through other sources, it objected to paying for that coverage directly on grounds of avoiding complicity.[17] This section will consider three specific examples in order to consider how the test may be applied.

4.1 Kim Davis

First, consider the case of Kim Davis, the county clerk in Kentucky who refused to issue marriage licenses to same-sex couples on the grounds that doing so would make her complicit in the marriages.[18] It was clear from her public statements that Kim Davis's objection was principled: she not only objected to issuing marriage licenses, she also opposed the same-sex marriage right in general. If she were casting a vote on the issue, she would vote against the right. But this principled objection does not disqualify her from religious accommodation. How should the compromise-based approach apply in this case?

Let us set aside the threshold question about whether religious accommodation is ever warranted for public officials. As already discussed, the compromise-based approach prohibits the use of religious accommodation as a political tactic—i.e. as part of an attempt to undermine the law or to publically challenge its legitimacy or its popularity. Accommodation is justified only if an exemption or modification is consistent with (i.e., does not conflict with or undermine) the purpose or justification for the law at issue. That is, accommodation is not meant to provide

[17] Burwell v. Hobby Lobby, 573 US ___ (2014) (holding that Hobby Lobby was entitled to accommodation under the Religious Freedom Restoration Act on the assumption that its employees would receive coverage of contraceptives directly from the insurer, even without payment from Hobby Lobby).

[18] See Miller v. Davis, 123 F.Supp.3d 924 (ED Ky. 2015).

an opportunity or license for protesting or objecting to the law at issue. The question with respect to Kim Davis is whether the grounds for her objection to issuing the marriage licenses that is distinct from her political opposition to the same-sex marriage right. One way to answer this question is to apply the cooperation test.

In order to apply the cooperation test, we have to state Ms. Davis' argument for conscientious objector status. The first premise of Ms. Davis' argument is that the same-sex marriage is morally wrong or sinful. (This belief presumably forms at least part of the basis for her political opposition to the same-sex marriage right.) The second premise is that by issuing the marriage license, she is a contributory cause in their getting married. She is not a but-for or necessary cause, strictly speaking, since it is likely that they would marry without her license—they could get a license in a different county or a different state. But if she does issue the license to the couple, she will have contributed one of the necessary ingredients to their getting married. And this form of contribution, she believes, renders her complicit in the marriage itself, which marriage she believes to be a sin. By being a contributory cause to the sin of another, Ms. Davis would herself commit a sin, in violation of her religious code of conduct.

Ms. Davis' argument may seem similar in some respects to that of the pacifist who believes that killing in war is morally wrong, and so the country should not go to war. But the pacifist objector who objects on personal grounds is willing to cooperate in other ways or to allow others to serve in her place. And this willingness is consistent with the grounds for her objection, because although she believes killing in war is wrong generally, she is able to accept the legitimacy of the war and so distinguish her personal objection from her political objection. For this reason, she may be willing to perform alternative service. By contrast, it is hard to see how Ms. Davis' complicity-based argument would be consistent with a willingness to cooperate

in other ways or to allow others to comply in her place. Her argument turns on the claim that a causal chain links her to the marriage of the same-sex couple, making her complicit in the marriage. If Ms. Davis allowed others to issue the licenses on her behalf, she may still be contributing to the causal chain that results in the same-sex couple getting married. But then she would still be complicit according to the causal-chain logic employed in the argument above, and her objection may not be consistent with a willingness to cooperate in implementing the same-sex marriage right.

In fact, it may be possible to test this result. A judge ordered that the marriage licenses could be issued by her office and signed by a deputy.[19] So long as the licenses issued in this fashion are legally valid, such a compromise may be both fair and workable.[20] But Ms. Davis was evidently unwilling to accept the compromise according to which her deputies would issue the marriage licenses to same-sex couples on her behalf. So it seems that Ms. Davis' apparent unwillingness to cooperate does indeed seem to evidence her refusal to accept the democratic legitimacy of the same-sex marriage right. This fact is not meant as a criticism of Ms. Davis directly: she is entitled to her opinion about the legitimacy of the same-sex marriage right. But it does show that her conscientious objection claim is insincere in an important respect: her objection to issuing the marriage licenses is not merely personal; she was attempting to misuse the protection we afford to conscientious objectors.

4.2 Zubik v. Burwell

A similar complicity-based claim was raised by the plaintiffs in *Zubik v. Burwell*, a case in which a number of religious nonprofit institutions objected to a provision of the Affordable

[19] See Alan Blinder and Richard Pérez-Peña, "Released Kentucky Clerk Won't Say if She Will Continue to Defy Court," *N.Y. Times* (New York), Sept. 9, 2015: A20.

[20] See Alan Blinder, "Kentucky Clerk Allows Same-Sex Licenses but Questions Their Legality," *N.Y. Times* (New York) Sept. 15, 2015: A12.

Care Act according to which they would have to provide coverage of contraceptives to their female students and employees as part of their standard health insurance plans.[21] The religious institutions grounded their conscientious objection claims on a complicity-based argument that is structurally similar to Ms. Davis' argument. The institutions believed that the using certain contraceptives, including Plan B, constitutes abortion, which they believe to be sinful. They argued that by providing insurance coverage for these contraceptives, they would be contributing to a causal chain resulting in the sinful use of the contraceptives by their students and employees.

As above, the causal-chain logic of complicity suggests that they would be unwilling to cooperate with the government's policy by allowing contraceptive coverage to be provided to their students and employees in some other way. And indeed, the institutions were reluctant to cooperate with the government, even refusing to fill out the form that would register their formal objection with the government. They argued that by filing the form, they would cause the coverage to go into effect, thereby rendering them complicit in the use of the objected-to contraceptives. The religious institutions may resemble pacifists who are reluctant to formally register as conscientious objectors because by doing so they would alert the government to the need to draft someone else to fill their place. The institutions apparently did not want to cooperate in implementing the law, nor did not want to allow others to comply with the law on their behalf. Unless they are willing to accept such a compromise, it seems likely that the basis for their seeking accommodation was a political objection to the law itself.

After hearing arguments in this case, the Supreme Court ultimately sent it back to a lower

[21] Zubik v. Burwell, 578 U.S. ___, 136 S. Ct. 1557 (2016) (vacating and remanding for further proceedings cases involving religious institutions who sought to avoid complying with the Affordable Care Act contraceptive mandate under the Religious Freedom Restoration Act).

court, partly in an effort to encourage the parties to reach a workable settlement.[22] Perhaps the Court was right to ask the parties, along with the lower court, to attempt to find a workable compromise according to which the students and employees can still get reliable contraceptive coverage. Like an alternative service requirement, requiring the institutions to compromise with the government is a concrete way to implement the cooperation test. The institutions must either come clean about the political nature of their claim, or else evidence their good faith through their willingness to cooperate. One upshot of my argument here is that if such a compromise is not forthcoming, then the Court would be justified in denying the institutions' claim outright, on the grounds that they were unwilling to cooperate in implementing the policy at issue. In this case, the cooperation test would have the effect of placing the burden of reaching a compromise on the institutions, rather than the government: if they can't reach a compromise to ensure that the policy is implemented, then their conscientious objection claim is not well grounded.[23]

One clear mistake that the Court made in this case was to impute an objection to the institutions, thereby ensuring that the government cannot use its enforcement mechanism against them. It is up to the institutions to make a formal objection, and if they do not, then we should assume that they are acting politically. Like the pacifists who refused to formally object to the draft, the institutions may be entitled to a certain form of respect, as political protestors, but they are not conscientious objectors entitled to an exemption. One cannot refuse to formally make a conscientious objection claim on the grounds that the nature of one's objection is political and

[22] Ibid.

[23] We might also note that if alternative service requirements may be used as a concrete implementation of the cooperation test, then the narrow tailoring analysis found in some laws, such as the Religious Freedom Restoration Act, would be inappropriate. Even if it is true that the state should in general try to accommodate religious activity, including conscientious objection, it is not always the case that a lack of accommodation is justified only where the objector's participation is necessary for the successful implementation of the law or policy at issue. In some cases the state may require alternative forms of participation or compliance as a test of sincerity.

not merely personal, and then, in the next breath, argue that the law should not apply to you because it interferes with your religious practice. It can't be both ways: either your objection is personal, and so you may be entitled to a personal exemption from the law, or your objection is political, and so you are not entitled to an exemption, but must take your argument to the court of public opinion on equal footing with the political judgments of your fellow citizens.

4.3 Masterpiece Cakeshop

Finally, let us apply the compromise-based approach and the cooperation test to the most recent case (which is currently pending before the Supreme Court) *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. This case involves a cake baker in Colorado who refused to provide a wedding cake for a gay couple on the grounds that participating in a same-sex wedding celebration would violate his religious belief that only opposite-sex couples may be married.[24] The Colorado Civil Rights Commission—a state agency tasked with enforcing that state's anti-discrimination law that applies to businesses open to the public—determined that the baker's refusal amounted to discrimination against the couple on the basis of sexual orientation. The question in the case is whether the baker must comply with the anti-discrimination law despite his religious objection to same-sex marriage. The baker argues that the law should not require him to bake a cake for the same-sex couple on two grounds: it would compel him to engage in expressive artistic activity—namely baking and decorating the cake—in violation of his free speech right; and it would require him to engage in activity that conflicts with his religious beliefs, in violation of his (purported) right to religious accommodation.[25]

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[24] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 137 S. Ct. 2290 (2017).

[25] The baker raised arguments under both the Free Speech Clause and the Free Exercise Clause of the First Amendment of the U.S. Constitution. See Petition for Writ of Certiorari, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 137 S. Ct. 2290 (No. 16-111). Note that

For the purposes of this discussion, let us set aside the baker's free speech claim. If we were to evaluate the baker's religious accommodation claim, we might evaluable whether the baker's claim is consistent with the cooperation test. As in the other examples, we must determine, first, whether there is any form of compromise-based accommodation that would be consistent with the purposes of the anti-discrimination law, and second, whether the claimant is willing to accept that accommodation.

First, is there a compromise that can render the claimant's religious objection be consistent with the purpose of Colorado's civil rights law? In this case, the relevant purpose of the anti-discrimination law is to ensure the social and political equality of all people regardless of their sexual orientation. Thus, an accommodation would be justified only if it is consistent with sexual orientation equality. In enacting the Civil Rights law, the state has committed to the view that gay and lesbian persons are moral and political equals, and those businesses that are asked to comply with the law must at least respect and not undermine this claim. Part of what it means to comply with the law is to respect this substantive normative claim that the state is making about equality of persons.

One possible way to satisfy the cooperation test might be for the baker to outsource the job, or to assign her assistant the task of baking the case for the same-sex couple's wedding. It is unclear whether such an arrangement would be consistent with the purposes of the anti-discrimination law. It may require that the operation appear seamless from the point of view of the couple buying the cake, and that the quality of product and service be identical. Still, there may be the concern that "separate but equal" is never really equal. An alternative solution may be for the baker to stop personally baking all of his wedding cakes—that is, to hire an employee

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there is not currently a recognized "right" to religious accommodation under the Free Exercise Clause, see Employment Division v. Smith, 494 U.S. 872 (1990).

who handles all wedding cake orders going forward. Such a solution may ensure that his bakery complies with the anti-discrimination law, while allowing him to personally avoid baking the cakes that he finds objectionable.

The second stage of the cooperation test is to determine whether, if there is a suitable available compromise, the claimant is willing to accept it. This step may require on-the-ground fact-finding, and perhaps conversation with the baker himself. As in *Zubik v. Burwell* this task may be better suited to a lower court or a government agency, such as the Civil Rights Commission, rather than the U.S. Supreme Court.[26] Indeed, the Civil Rights Commission may be especially well positioned to determine whether the cake baker may be willing to agree to a fair compromise-based accommodation without forcing this case into an adversarial posture.

As with Kim Davis and the religious institutions in *Zubik v. Burwell*, the baker's argument for religious accommodation is at least partly based on complicity. The baker, of course, is not getting married himself, but would be contributing to or participating in a marriage that he believe to be immoral. Unlike the marriage license in the Davis case, however, the wedding cake is not necessary for the marriage to take place. So the baker believes himself to be complicit not as a contributory cause, but because he is in some way supporting or condoning what he believes to be morally wrong.

It may be possible to dispute the baker's premise here: it is not at all clear that by providing a good or service on the open market one thereby condones the use to which one's customers put it. Think of the standard example from criminal law in which the gas station attendant is not criminally liable for filling the tank of the robbers' getaway car, even if the attendant knows the use to which they will put the purchased gasoline. One might argue that moral complicity extends beyond criminal accomplice liability, but the criminal law here seems

[26] Compare to Zubik v. Burwell, 136 S. Ct. 1557 (2016).

to capture a basic intuition about market transactions: one provides goods and services to others with the assumption that they won't abuse them. The alternative presumption—that sellers are responsible for the uses to which their goods and services are put—places too heavy a (moral or legal) burden onto sellers. If sellers had this responsibility it might lead to an unhealthy form of social scrutiny that conflicts with the privacy interests of buyers in many types of cases.

It may also matter for assessing the baker's claim whether his religious belief simply involves avoiding participation in a specific event, or whether it involves (perhaps at a not fully articulated level) a rejection of the equal standing of gay and lesbian persons in the community. If it is the latter, then accommodation will not be appropriate—and indeed, reaching a mutually satisfying compromise will likely be impossible. But if the baker's objection really is limited to participation in a specific event, then a compromise may possibly be feasible. At the very least, the Commission should have generated a more detailed factual record on this point, and attempted to specify what exactly what services the baker was willing to provide, and what alternatives might have be available.

Of course, even if the baker's accommodation claim meets the cooperation test, there may be other interests or considerations to take into account. The Civil Rights Commission may be well positioned to carry out this inquiry, or it may fall to courts. Either way, the state must accurately account for all of the interests at stake, including those of future couples in similar situations. For example, the resulting accommodation should not be to require same-sex couples to negotiate special deals with wedding service providers, or to file complaints with state agencies whenever they want to buy a cake.

In conclusion, the baker's apparent unwillingness to take on the same-sex couple as customers (and perhaps outsource the work) suggests that the nature of the objection is indeed

political and not merely personal. As in the case of Kim Davis, the cake baker seems unlikely to meet the cooperation test or to qualify for accommodation. Those who base their claims for accommodation on complicity often have a difficult time distinguishing their personal objection from their political objection. The point of the argument here is not to be critical of their political stance or their religious beliefs. Citizens of a democracy are entitled to take political stands on issues that matter to the community. However, accommodation is not appropriate where the claimant denies the legitimacy of the law at issue, and cannot distinguish her personal objection from her political objection. Such claims misunderstand and may misuse the purpose of accommodation protections.

Conclusion

This Chapter developed the compromise-based account of religious accommodation, arguing that the account implies important limitations on the availability of accommodation in certain cases. In particular, where the claimant's objection to a law is principled, accommodation is not appropriate unless she accepts the legitimacy of the law and does not seek to use the accommodation as a form of protest against the law. Because accommodation has a personalized form, the grounds for accommodation must be consistent with the continued application of the law to others and the achievement of the law's purposes, which rules out intentionally using an accommodation as a form of political protest. I then developed a cooperation test for determining whether an accommodation claim conforms to this limitation. I applied this cooperation test to recent U.S. Supreme Court cases, including *Zubik v. Burwell* and *Masterpiece Cakeshop*, involving complicity-based accommodation claims. Although it is not impossible for a complicity-based claim to satisfy the cooperation test, it is often unlikely, because of the logic of complicity.

Chapter 4

Religious Institutions as Voluntary Associations

Religion often has both a personal and an institutional dimension, which may contribute to its potentially valuable role in the liberal state. Religious institutions may function as "laboratories of morality," providing resources for individuals and groups to develop complex moral views, views that often draw on sources of value outside of the appropriate expertise of the liberal state. Religious institutions may also provide valuable venues for individual expression and interpersonal associations, including friendships and mentoring relationships. And religious institutions may be able to support the state's role in providing necessary social services such as education, childcare, and healthcare. Thus the liberal state may be justified in offering various forms of support and protection to religious institutions—either as part of its general commitment to protecting freedom of association, or as a form of religious accommodation, especially where religious practices and beliefs require specific communal or institutionalized contexts for their optimal exercise and realization. For example, religious institutions in the U.S. are often entitled to tax benefits as charitable organizations, and may receive exemptions from government regulations regarding such as zoning restrictions.[1]

For these same reasons—freedom of association, religious accommodation, and limited state expertise—the liberal state should generally grant religious institutions quite a lot of leeway in organizing their own affairs, especially with respect to their internal authority structure, their basic rules and doctrines, decisions about their leadership and their missions and projects, and

[1] Many churches and other religious institutions qualify as charitable organizations under the Federal Tax Code, 26 U.S.C. § 501(c)(3). On exemptions from zoning restrictions, see for example the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq.

control over their membership.[2] However, this posture of deference to religious institutions may sometimes conflict with the state's commitment to protecting the rights and interests of individuals. A religious institution may exert a powerful influence over its members and others who may be subject to its authority, such as its employees, patients, or students. In some cases, a religious institution may be able to exert indirect control over its members' ability to autonomously form their own religious or moral beliefs. Moreover, a religious institution may be able to limit its members' ability to access to legal rights, especially members who are dependent on services provided by the institution. For example, some students and employees of religious institutions have been unable to obtain the insurance coverage for contraceptives that is generally required by the Affordable Care Act.[3] Members of religious institutions may also be subject to various forms of internal discipline, including termination of employment or membership, if they fail to abide by the institution's rules or engage in the institution's practices.[4] For example, certain employees of religious institutions may lack protection from various forms of

[2] This view is sometimes labeled the "church autonomy" or "hands off" doctrine. For a defense of this general view, see, for example, Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," *Columbia Law Review* 81, no. 7 (1981): 1373-1417, and Richard W. Garnett, "Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses," *Villanova Law Review* 53 (2008): 273.

[3] See, for example, Laurie Sobel, Alina Salganicoff, and Nisha Kurani, "Coverage of Contraceptive Services: A Review of Health Insurance Plans in Five States," *A Kaiser Family Foundation Report*, (April 16, 2015) https://www.kff.org/private-insurance/report/coverage-of-contraceptive-services-a-review-of-health-insurance-plans-in-five-states (accessed January 18, 2018). The report found that insurers were frequently denying full coverage of contraceptives to women who should be entitled to it under the ACA's contraceptive mandate, particularly in cases in which the women's employers had claimed a religious exemption.

[4] For arguments along these lines, see Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review*, 99, (2013): 917.

employment discrimination.[5]

What is the best way for the liberal state to balance or reconcile these competing considerations—deference to religious institutions on the one hand, versus the rights and interest of individuals on the other? I will not attempt to fully resolve this complicated question here. But I will argue that one important aspect of the answer is that religious institutions within the liberal must be "voluntary associations" in the sense that their members voluntarily chose to become members, and maintain a right and a genuine opportunity to exit the institution or to end their affiliation at any time.[6] I will use the term "member" to include not only official members of a church or a religious group, but also those, such as some students or employees, who have a substantial, long-term relationship with the institution.[7] Membership in a religious institution need not be open to all comers—the voluntariness condition applies to those who in fact become members, but the institution may have the prerogative to exclude some potential members. In addition, an institution may have the prerogative to terminate memberships in some cases, though this power may be subject to a number of constraints.

On the view I will defend, the requirement that religious institutions must be voluntary associations—what I will call the "voluntariness requirement"—represents a significant aspect of the relationship between religion and the liberal state. The state must sometimes limit the activities of religious institutions in order to ensure that this voluntariness requirement is met.

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[5] Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012) (holding that employment discrimination laws did not apply to a church-operated school who allegedly fired a teacher because of her medical disability).

[6] This characterization of the concept draws on John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 212: "[P]articular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation."

[7] Those who are unable to make voluntary membership decisions, such as children, are not among the group's "members" in the relevant sense, and the state should generally not defer to the institutions' authority over such individuals.

For example, the state may use its police power to intervene in religious institutions that coercively recruit members, or prohibit them from exiting. At the same time, the state should sometimes implement policies that facilitate the ability of religious institutions to meet the voluntariness requirement. For example, the state may provide secular alternatives to religious service-providing institutions, such as schools, hospitals, and childcare facilities, in order to ensure that individual members of these institutions have a genuine opportunity to exit, without forfeiting access to necessary social goods.

Additionally, this Chapter argues that the state must not allow religious institutions to acquire control over any of the state's essential legal functions, especially those related to the legislation, enforcement, and adjudication of the law. That is, the state must not delegate or abdicate its legal authority or functionality to religious institutions. This important restriction on the state's ability to delegate legal functions helps to ensure that individual members of religious institutions are able to access their legal rights regardless of religious affiliation or membership. It also helps to ensure that the state is able to maintain a space of legal norms and values that is shared by all members of the community.

This Chapter is divided into four Sections. Section 1 argues that the liberal state has an obligation to ensure that "comprehensive institutions" including many religious institutions operate as voluntary associations within its jurisdiction. Section 2 argues that the state may have reason in some cases to implement policies designed to ensure that comprehensive institutions are able to meet this voluntariness requirement. For example, the state may provide secular alternatives to religious service providers, such as schools and hospitals. Section 3 argues that in order to ensure that religious institutions satisfy the voluntariness requirement, the state must also exclusive control over its core legal functions, especially those related to the legislation,

enforcement, and adjudication of the law. Finally, Section 4 applies the voluntariness requirement to a specific example—religious arbitration agreements—arguing, contrary to existing practice in the U.S., that the state should generally not enforce such agreements.

1. Comprehensive Institutions and the Voluntariness Requirement

This Section argues that certain institutions within the liberal political community must be "voluntary associations" in the sense that their members voluntarily chose to become members, and have both a right and a genuine opportunity to exit the institution or to end their affiliation at any time. That is, in order to protect the rights and interests of its citizens, the liberal state has an obligation to ensure that some types of institutions within its jurisdiction remain voluntary associations in the above sense, or satisfy what I will call the "voluntariness requirement". The key idea is that in order for the liberal state to balance deference to institutions against the rights and interests of their members, it may allow institutions to exercise various forms of internal authority over its members subject to the condition that this authority is always limited or constrained by the fact that its members voluntarily participate in the institution. In a familiar point of contrast, voluntary associations differ from the state, since the state may permissibly require participation of various sorts, and employ various sorts of coercive authority—such as taxation; coercive enforcement of law; jury duty—without even if its citizens did not voluntarily choose to be subject to state authority, and even if they do not have a genuine opportunity to exit. Because the state is not a voluntary association, it must limit the scope of its authority over persons to those aspects of life that are related to the limited political purposes of the state.[8] On the other hand, the state may sometimes allow voluntary associations to make more expansive demands of its members, on the condition that membership is entirely voluntary.

[8] For a discussion of the state as a nonvoluntary association, see for example Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005): 113-147.

In general, the voluntariness requirement applies to "comprehensive institutions" that operate within the jurisdiction of the liberal state. "Comprehensive institutions" are characterized by two key features: (i) they have an organized institutional structure within which some individuals hold role-based authority over other members or participants, and (ii) they enforce, advance, promote, or act on a comprehensive moral or religious doctrine or set of beliefs.[9] A comprehensive institution may enforce or advance its moral or religious doctrine in a number of different ways. It may organize or coordinate the activity of its members to achieve a specific social, political, religious, or artistic goal or project. The institution may publicly promote or encourage favored activities or lifestyles, perhaps by offering material or psychological support for those who pursue them. The institution may provide a range of social services in accordance with, or in order to promote, their beliefs and values.

Comprehensive institutions may be organized around a variety of different types of doctrines or sets of beliefs. For example, some political parties may be organized around a specific comprehensive doctrine, and seek to advance their moral views either both through social or political action and through the education or indoctrination of their members. In addition, many religious institutions are also comprehensive in this sense. Religious institutions are generally organized around comprehensive religious doctrines, and may undertake a number of different projects designed to advance, enforce, promote, or act on these doctrines. For example, many religious institutions encourage, recommend, or require that other members abide by specific codes of action or behavior as conditions on or aspects of their membership.

Given this description of comprehensive institutions, there are three main reasons why

[9] "Comprehensive doctrine" is a term employed by John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). A "comprehensive institution" may be similar to what Rawls calls a "community" (42), defining a "community" to be a "special kind of association, one united by a comprehensive doctrine, for example, a church."

the liberal state must ensure that they meet the voluntariness requirement. First, the state must generally protect the individual rights and interests of an institution's members, including rights associated with speech and expression, sexual freedom, and gender equality. This is an application of the state's general goal of promoting freedom and equality in private settings, such as the workplace and the family.[10] The voluntariness requirement is an important mechanism for protecting individual rights and limiting the coercive or hierarchical control that the institution is able to exert over its members. Religious institutions may have their own internal hierarchies and codes of conduct, which may sometimes conflict in content with the state's commitment to freedom and equality. But the voluntariness requirement helps to ensure that individuals may always opt-out of these internal rules. For example, some religious orders may require their members to remain celibate, a requirement which conflicts in content with the state's commitment to sexual freedom. Yet individual members of such orders retain their freedom so long as they retain their ability to exit or discontinue membership at any time.

Second, out of an interest in promoting religious freedom and freedom of thought in particular, the state should ensure that each individual has an opportunity to form her moral beliefs for herself. Because of their authority structure and their commitment to a particular comprehensive doctrine, comprehensive institutions may have a tendency to interfere with or disrupt this process. The voluntariness requirement helps to ensure that individuals are able to gain exposure to other points of view, and to end their affiliation with a particular institution at will. Moreover, individuals may derive additional benefit from the opportunity to take on roles and obligations within comprehensive institutions without the risk that those roles and obligations will become mandatory or inescapable. After all, religious and moral commitments

[10] Compare to Elizabeth S. Anderson, *Private Government: How Employers Rule Our Lives* (Princeton: Princeton University Press, 2017).

and affiliations may admit of personal exploration and even experimentation. An individual may reasonably come to change her religious and moral beliefs over the course of her life. Thus individuals may benefit from an opportunity to make commitments within a comprehensive institution that is subject to the voluntariness requirement.

Third, voluntary membership, including an opportunity to exit, may in some cases help to enhance the value of certain types of moral or religious commitments. That is, the value of performing certain moral or religious obligations may often be enhanced by voluntary compliance. A background condition of voluntary membership may help to ensure that who do choose to be members of religious or other comprehensive institutions have done so as a result of a genuine or authentic choice, and not as a result of coercion or fear.[11] Acting on a motive of self-interest or fear of punishment may render a moral or religious activity less valuable for the individual. And the performance of some moral and religious obligations may require a special type of motivation or quality of the will on the part of the agent.[12] Where this is the case, coercive enforcement of the obligation may distract from or undermine the authentic performance of the obligation, or even to undermine the value of performance. Threat of enforcement might render the agent's true motives for compliance opaque or muddled, or might interject a note of self-interest or fear into what should otherwise be an action motivated purely by benevolence or love or good will.

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[11] Compare to the argument in James Madison, "Memorial and Remonstrance Against Religious Assessments," in *The Papers of James Madison*, vol. 8, ed. Robert A. Rutland and William M. E. Rachal (Chicago: The University of Chicago Press, 1973): 295–306. Making support for religion mandatory, Madison argued, would harm the "purity and efficacy" of the supported religion in two respects: by undermining believers' "confidence in [the] innate excellence," of their religious beliefs or practices, and by arousing "suspicion that its friends are too conscious of its fallacies to trust in its own merits."

[12] Cf. Immanuel Kant, *Religion Within the Boundaries of Mere Reason*, ed. and trans. Allen Wood and George Di Giovanni (Cambridge: Cambridge University Press, 1998): 106 (6:94).

Let me illustrate this point by way of an example. Suppose that two people make a commitment to remain in a monogamous romantic relationship, which they then view as a cornerstone or emblem of their relationship. It may be that the value and importance of the commitment for the relationship depends in part on the voluntary compliance of the people in the relationship. Coercive enforcement of the commitment—or even a background threat of coercion—may corrupt or displace the significance of the obligation, e.g. by creating doubts about one's own or the other's motives for remaining monogamous.

Partly because of the potential value of voluntary compliance, the state should generally not be in the position of enforcing moral or religious commitments. For example, the no-fault divorce regime may be justified, in part, by the idea that in issuing a divorce, the state should indifferent as to whether either of the parties breached a moral or religious commitment.[13] For similar reasons, the state should not be involved in or facilitate the enforcement of religious rules by religious institutions. Religious institutions may enforce their own rules by means of internal enforcement mechanisms. But the voluntariness requirement serves to ensure that an individual's commitment to remain a member of the institution subject to its enforcement authority is always voluntary, and that the state is not involve in the enforcement of religious commitments.

In conclusion, religious and other comprehensive institutions operating in the liberal state must be voluntary associations, meaning that their members must be able to voluntarily choose whether to join and to remain members. The fact that comprehensive institutions are subject to this voluntariness requirement helps to protect individual rights and interest, promote individual

[13] All 50 U.S. States now offer some form of "no fault" divorce scheme whereby spousal support claims do not depend on the fault of the spouses. No-fault divorce is generally seen as the mandatory form of divorce in the U.S. today. Cf. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Section 7.08(1) (2002), https://www.ali.org/publications/show/family-dissolution-analysis-and-recommendations/ (accessed January 19, 2018) (premarital or marital agreements affecting grounds for divorce should not be enforceable).

autonomy and freedom of thought, and may enhance the value of certain moral and religious commitments.

2. The State's Role in Maintaining Voluntary Associations

Section 1 argued that religious institutions and other comprehensive institutions operating within a liberal state are subject to a voluntariness requirement. This Section describes a number of steps that the liberal state ought to take steps to ensure that comprehensive institutions satisfy this requirement. There are three primary steps the liberal state must take in order to ensure that comprehensive institutions are voluntary associations. First, it is clear that the state must not punish "apostasy" or use its own coercive mechanism to enforce the rules of comprehensive institutions.[14] Second, the state may engage in basic law enforcement intervention when a comprehensive institution crosses the line into illegal activity such as employing coercive methods against their own members or participants. Third, the state may engage in certain forms of "soft power" ranging from education and outreach to curtailing public funding or subsidies when comprehensive institutions risk flouting the voluntariness requirement. For example, the state may condition its granting of religious accommodation on the condition that religious organizations treat their members in a way that is consistent with the voluntary nature of the association.[15]

But aside from these regulations and incentives, the state's ability to ensure that religious institutions meet the voluntariness requirement may seem quite limited. After all, the state should

[14] Rawls argues, "[T]he law protects the right of sanctuary in the sense that apostasy is not recognized, much less penalized, as a legal offense." John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 212.

[15] One example of the state's "soft power" over religion might be Bob Jones University v. U.S. 461 U.S. 574 (1983), a case in which the Court upheld the IRS's decision to deny tax-exempt status to a religious university that espoused and practiced various white supremacist and segregationist polices.

not claim an authority to directly regulate the internal affairs of religious institutions, especially aspects related to their rules, doctrines, or organizational structure.[16] For example, a law requiring all comprehensive institutions to officially acknowledge the right of their members to exit may be problematic because it would require such institutions to modify their official comprehensive doctrines. Such an acknowledgment may be inconsistent with the "lifelong" nature of some commitments associated with membership in some religious institutions.[17]

Instead of directly regulating the internal structure or doctrine of comprehensive institutions, the state should implement policies that are designed to indirectly ensure that religious institutions meet the voluntariness requirement. First, the state should ensure that members have a legal right to exit religious institutions, even if the institutions do not acknowledge such a right. That is, even if some religious institutions claim that their members lack a *religious* right to exit—e.g., if membership is understood to be binding for life—still it is important that the state will treat their members as having a *legal* right to exit.

As an analogy, consider again the relationship of marriage in the context of a no-fault divorce regime. Some individuals who get married may believe that their commitments are "for life" and that once they get married they retain no right to end the marriage. But from the point of view of the state, each spouse retain a right to exit the marriage relationship at any time, without the need to state a reason or to meet some threshold for eligibility. Divorce must at least be an active option for all who get married, a clearly defined legal right with clearly marked and available channels for exercising the right. This legal right to exit helps to ensure that the

[16] Compare to Jones v. Wolf, 443 U.S. 595 (1979) (holding that courts may resolve civil disputes between members of a religious groups only by applying "neutral principles of law" and not by appeal to religious doctrine).

[17] Compare to discussion of Hindu women who make lifelong renunciation vows in Samta P. Pandya and Jamie Halsall, "Lifelong Commitment To Ascetic Life And Orders: Hindu Women Renunciants In India," *Cogent Social Sciences* 3, no. 1 (2017): 1293469.

marriage relationship remains voluntary in a legal or political sense, even if some of those who are married believe that their commitments are binding for life.

Second the state may take a number of steps to ensure that members of comprehensive institutions have a genuine opportunity to exit. An individual has a "genuine opportunity to exit" an institution of which she is a member only if she has adequate resources available to exit without suffering significant harm to herself, and without forfeiting sufficient opportunities for access to social goods such as education or employment. A genuine opportunity to exit does not require that exiting is completely cost-free, but that any cost associated with exit must be reasonable and affordable for each individual member. For example, while an exiting member may owe contractual damages if she has made contractual commitments, she must not be required to pay a "penalty" for exiting the association. That is, she may not be subject to contractual damages simply for relinquishing her membership.

Moreover, in order for a member to have a genuine opportunity to exit she must be able to access a roughly comparable range of opportunities to those available via her institutional membership. Thus, one important way for the state to ensure that members of comprehensive institutions have a genuine opportunity to exit would be to provide members with an alternative way to access the goods or services provided by the association. Returning to the example of marriage, the state may be able to ensure that those who are married have not only a legal right, but also a genuine opportunity to exit the relationship. Ending a marriage under a no-fault divorce scheme may not be cost-free or uncomplicated, but the state may be able to help ensure that it is feasible and not unreasonably costly. For example, the state may provide various family law provisions that are meant to ensure a fair division of marital assets and a fair chance for each partner to retain custody of his or her children, if any. In addition, the state's provision of general

social safety net provisions may help to ensure that a financially dependent spouse is in a position to afford to leave the marriage if he or she chooses.

Similarly, the state may be able to ensure that members of comprehensive institutions have access to the social safety net and other sorts of protections that they would need to actually exit the institution, and to give up the benefits and services that may come with that membership. That is, the state may be able to indirectly maintain the voluntary nature of religious organizations, without incurring unjustifiable costs, by maintaining a basic social infrastructure composed of public secular institutions that are open to all comers. A "secular institution" for my purposes is an institution that does not discriminate in those that it serves on the basis of religious affiliation or any other comprehensive doctrine, and whose content or function does not involve or depend upon an endorsement of any particular religious doctrine.

Secular institutions that provide social services may help to ensure that the costs of exiting comprehensive institutions are not overwhelming for exiting members. Alternative secular service providers are especially important where religious or other comprehensive institutions provide essential social services, such as education, childcare, healthcare, and income assistance. These services are generally within the competence of the state to provide, and are tied in to important social values such as individual freedom, distributive justice, and the equal standing of citizens in the community. In contrast, services such as recreational sports leagues, since, although beneficial, may not be essential in the specified way. It may be permissible or even beneficial for religious institutions to provide essential social services. But when individuals access these essential services through religious institutions, they run the risk of losing out on these important social values if they were to end their affiliation with the institution. In such cases, the existence of alternative service providers may be necessary to

ensure individuals have a genuine opportunity to exit.

As an illustration of this idea that the state may provide secular alternatives to religious institutions, consider the idea that when the state implements a school voucher program that allows state funds to be directed toward religious schools, the state must ensure that primary and secondary students (or their parents) have "genuine secular alternatives" to religious schools.[18] That is, the state may permissibly allow state funds to flow to religious schools through vouchers only if it ensures that those who make use of the vouchers to attend religious schools also have secular alternatives available. The existence of secular alternatives helps to ensure that the choice of the students to attend religious schools is voluntary.

Secular service providing institutions may perform a large number of valuable functions in the liberal state, such as promoting individual wellbeing, distributive justice, and social stability. The fact that secular service providers may provide an alternative to comprehensive institutions is merely one additional reason for the state to maintain them. State support for secular institutions may be over-determined. On the other hand, the state may not always be required to provide such resources—if they are too costly, then the state may be forced to curtail the authority of comprehensive institutions over their members in other ways. But creating an infrastructure of secular service providers may be part of an indirect but effective way for the state to ensure that comprehensive institutions meet the voluntariness requirement.

Thus the existence of secular service providing institutions may also help to facilitate the role of religious institutions in providing valuable social services, such as healthcare or education. If not for these the secular alternatives, the religious institutions may risk running

[18] The phrase "genuine secular alternative" is used by Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2009), drawing on similar language in Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

afoul of the voluntariness requirement, which may then prompt the liberal state to take other more drastic measures to curtail their authority over their members. In this respect, state support for secular institutions could be seen as part of the state's collaborative relationship with religious institutions. Secular institutions help to create the social and political context within which religious and other comprehensive institutions may thrive as voluntary associations.

In conclusion, this Section has argued that the liberal state has an obligation to ensure that comprehensive institutions operating within its jurisdiction function as voluntary associations, meaning that their members join voluntarily, and have a right and an opportunity to exit at any time. One way in which the state can ensure that individual members or participants have an opportunity to exit is by providing secular alternatives to certain religious institutions. In this respect, secular institutions may function as a counterweight to religious institutions in the community.

3. Legal Institutions and The Nondelegation Doctrine

Section 2 argued that the state has an obligation to ensure that religious organizations within the community are voluntary associations, and one way in which the state may be able to facilitate this opportunity is by providing a background infrastructure of secular institutions that provide essential social services to all comers. The state thereby ensures that those who may choose to exit religious institutions are able to access these essential services.

This Section will discuss another key aspect of the state's obligation to ensuring that religious institutions remain voluntary associations, namely, that the state must maintain exclusive control over its legal institutions, that is, institutions that perform legislative, enforcement, and adjudicative functions for the community as a whole (within a certain jurisdiction). That is, the state must not delegate or share control over its core legal institutions

with religious and other comprehensive institutions.

There are two main reasons why the state must not delegate its legal functions to comprehensive institutions. First, the state must limit the coercive authority that comprehensive institutions may possess over their members. Operating a legal institution with binding force would be is inconsistent with the voluntariness requirement. In some respects, the state's legal functions are similar to other essential social services such as education and healthcare. Like education and healthcare, the state should not allow comprehensive institutions to acquire exclusive control over the state's legal functions. But unlike these other social services, the state should not allow religious institutions to play a parallel legal function. For example, religious institutions may not use power that is comparable to the state's legal institutions to enforce their own rules or codes of conduct. Just as the state may not punish apostasy, the state may not allow religious institutions to occupy a position that is on a par with the state's legal authority. Thus, although the state may sometimes delegate some responsibility for providing education or healthcare to religious institutions, it may not delegate its legal functions to religious institutions.

Second, the state should not delegate its legal functions to comprehensive institutions because the state's legal institutions are able to provide a shared normative infrastructure that, in principle, allows citizens to interact as normative equals, regardless of their comprehensive beliefs or institutional affiliations. That is, within the state's legal institutions, each citizen has equal standing to seek to shape the laws, to assert legal rights, to benefit from legal protections, and to be subject to legal sanctions. Because the state operates a single legal system, shared by individuals with a variety of different beliefs and who may be members of a variety of different groups, they are sometimes required to interact with one another and resolve differences according to set legislative or adjudicative procedures. Although the legislative or adjudicative

outcomes in any particular case or circumstance may not be ideal for all parties, the overall requirement of sharing a single legal system encourages the parties to seek reconciliation and consensus over time. Allowing comprehensive institutions to set up alternative separate systems would not achieve the same effect. Thus, by creating legal institutions shared by all citizens, the state creates a pressure toward centralization or communication, a nexus point and an impetus toward reconciliation. The state's legal authority creates a centripetal force, one that counteracts and complements the centrifugal forces of allowing institutions wide-ranging authority to oversee their own affairs.

This idea that the state must maintain exclusive authority over its legal institutions has been expressed by the Establishment Clause's "nondelegation doctrine".[19] The nondelegation doctrine prohibits the state from delegating certain important powers—especially legal functions—to religious organizations. For example, in *Larkin v. Grendel's Den*, the Court held that the government may not delegate to churches the authority to veto applications for liquor licenses.[20] The Court reasoned that this delegation violated the Establishment clause because it resulted in a "a fusion of governmental and religious functions" similar to arrangements in 18th century England whereby church officials were granted legal control over various occupations, including the liquor trade, with problematic results.[21]

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[19] The Establishment Clause "nondelegation doctrine" described in this Chapter is not to be confused with the seldom-enforced Article I "nondelegation doctrine" according to which Congress may not pass a law that effectively delegates law-making authority to executive agencies.

[20] Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (striking down on Establishment Clause grounds a state statute that delegated to churches the power to reject certain liquor license applications).

[21] Id. at 126-7 and n. 10 (noting that church officials in England were given authority to grant certificate of character, a prerequisite for an alehouse license).

A subsequent case reflects a similar concern on the part of the Court about religious institutions acquiring control over the state's policy-making authority. In *Kiryas Joel Village School District v. Grumet*, the Court held that a state law authorizing the creation of a public school district that would exclusively serve a Hasidic Jewish community in upstate New York violated the Establishment Clause.[22] A plurality of the Justices reasoned that the state law was an impermissible delegation under *Larkin* because it allowed a religious group—in particular, the religious leaders of the village—to effectively take control of the town's public school district.[23] Although the delegation in this case would be merely indirect—a result of the fact that a single religious group occupied an entire town—the plurality reasoned that the delegation of governmental authority was unconstitutional in a similar way.[24] It may be debatable whether such an indirect delegation raises the same problems as the direct delegation in *Larkin*.[25] But this cases helps to illustrate the same concern as in *Larkin*. If, in fact, the leaders of the Hasidic

[22] Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) (holding that creation of school district by state legislature intended to serve a village populated exclusively by members of a single Jewish community violated the Establishment Clause). Note that although Justices Kennedy and O'Connor concurred in judgment, they each based their opinion on somewhat different grounds. Justice O'Connor, in particular, was concerned to distance her opinion from the controversial "*Lemon* test", not from the nondelegation rationale found in *Larkin*. See id., O'Connor, J., concurring, at 718-9, citing to Lemon v. Kurtzman, 403 U.S. 602 (1971).

[23] Id. at 696-7, 699, citing to *Larkin*, 459 U. S. 116 (1982).

[24] Id. at 704-5.

[25] Note that Justice Scalia argued in dissent that the plurality opinion elided a distinction between the religious leaders of the Jewish community in Kiryas Joel, and the residents of the village who have actual legal authority to elect members of the school board. See *Kiryas Joel* at 734-35 (Scalia, J., dissenting). It may have been likely that the voters would elect religious leaders who would have run the school district in a way that reflects the values and policies of the religious group—but this is an assumption not based on the factual record of the case. But for my purposes, I will assume that the plurality opinion represents a useful doctrinal point, so long as we assume that the religious institution would have acquired effective control over the town's school board. It does not matter for my purposes whether the case itself was correctly decided.

community were able to exercise control over the district's school board, a religious institution would acquire an ability to create and implement policies in the name of the school district.

In both *Larkin* and *Kiryas Joel*, the Court prevented the state from delegating a specific legislative or policy-making power to a religious institution or institutions. The delegation in each case was problematic for at least two distinct reasons. First, the delegation creates the risk that religious institutions would shape the policies in such a way as to favor their own religious ends or purposes, rather than those of the community as a whole. That is, religious institutions that acquire legal authority may seek to benefit those who are affiliated with their religious group; or they may seek to use the state's legislative authority to impose rules onto their own members. In *Kiryas Joel*, for example, there would have been a risk that the religious affiliation of students will affect their access to public school within the newly created district, either because the school board will implement policies that exclude or disadvantage non-Jewish students, or, perhaps, the opposite: because the board will effectively exclude Jewish students from public school so that they have to attend parochial school.[26]

Second, such a delegation of the state's legal authority to religious institutions is also problematic because it puts a religious institution in a position where it can directly control the community's shared normative and legal agenda and goals. Even if the rights and interests of individuals are in fact unaffected by the delegation—e.g., in the end, the churches never vetoed a liquor license application—the delegation is problematic because religious institutions are able to insert their normative reasoning and judgment into the community's legislative or policy-making process. This decentralization of legal authority may result in the loss of a shared normative space within which all citizens may interact as equals.

[26] See *Kiryas Joel* at 694 (noting that all children in the village aside from special education students attend Jewish parochial schools).

This section argued that the liberal state must not delegate its legal functions to comprehensive institutions. Nondelegation helps to ensure that membership in comprehensive institutions remains voluntary. Nondelegation also ensures that the state's legal institutions may function as a normative nexus point for all members of the community. The Establishment Clause nondelegation doctrine, as expressed in *Larkin* and *Kiryas Joel*, provides an important expression of this basic idea in U.S. constitutional law.

4. Religious Arbitration Agreements and the Nondelegation Doctrine

The previous Section argued that the liberal state should not delegate its legal functions to comprehensive institutions—an idea that is expressed in U.S. law by the Establishment Clause's nondelegation doctrine. This Section will explore the application of this nondelegation principle to a concrete example, namely, the use of religious arbitration agreements.[27]

Religious arbitration agreements are contractual provisions that require contracting parties to resolve their past or future legal disputes before a religiously affiliated arbitrator, who may be a religious leader, a representative of a religious institution, or a layperson who will conduct the arbitration by reference to specific religious rules or doctrines.[28] Such agreements may be included in prenuptial agreements, employment contracts, lease agreements, consumer service agreements, agreements to settle lawsuits, and other contracts. Appealing to the Federal Arbitration Act, which creates a strong presumption on favor of enforcing arbitration agreements, courts in the U.S. have consistently enforced religious arbitration agreements against

[27] For a related discussion, please see my "Religious Arbitration and the Establishment Clause" *Ohio State Journal on Dispute Resolution* 33 (2018) forthcoming.

[28] For a useful overview of religious arbitration and other forms of religious dispute resolution in the U.S., see Pew Research Center, "Applying God's Law: Religious Courts and Mediation in the U.S.," accessed January 13, 2018, http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/.

parties who have voluntarily entered into them.[29] But very little attention has been paid to whether the enforcement of religious arbitration agreements may constitute a delegation of state legal authority to religious institutions, raising Establishment Clause concerns.[30]

Religious arbitration agreements raise interesting and important questions for the liberal conception of religious freedom. On the one hand, these contractual provisions are enforceable only if they are voluntarily agreed to, which may suggest that enforcement would be consistent with treating religious institutions a voluntary association.[31] By relying on these agreements, religious institutions may be able to have more predictability and control over their internal affairs, while providing individual members a clear opportunity to consent to specific terms.

On the other hand, those who enter into such agreements generally lack recourse to a civil

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[29] The United States Arbitration Act or "Federal Arbitration Act" (FAA), 9 U.S.C. §§ 1–16, applies to all contracts within the stream of commerce under the Commerce Clause of the U.S. Constitution. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) (construing Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural policies to the contrary.") An important early case involving a religious arbitration agreement is Matter of Greenberg v. Greenberg, 238 A.D.2d 420 (N.Y. 1997) (vacating spousal support award issued by the Family Court on the grounds that the wife had signed an agreement requiring that all disputes between husband and wife be submitted to a "Bais Din" or Rabbinical Court).

[30] The most direct discussion of the enforceability of religious arbitration agreements under the Establishment Clause can be found in Michael A. Helfand, "Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders," *New York University Law Review* 86 (2011): 1231, esp. 1244-5, n.61 (noting that courts have consistently rejected Establishment Clause arguments against enforceability of religious arbitration agreements) and at 1272-9 (discussing the application of Establishment Clause doctrine, including *Kiryas Joel*, to religious arbitration agreements).

[31] For arguments in favor of enforcement, see, e.g., Eugene Volokh, "Religious Law (Especially Islamic Law) in American Courts," *Oklahoma Law Review* 66 (2013): 431 (arguing that enforcement of religious arbitration agreements may be protected by religious freedom laws); Farrah Ahmed and Senwung Luk, "How Religious Arbitration could Enhance Personal Autonomy," *Oxford Journal of Law and Religion* 1 (2012): 424 (arguing that judicial enforcement of religious arbitration agreements can enhance the individual autonomy of some religious believers).

court or a secular arbitrator in the event of a legal dispute with the other contracting party. Thus, they may be forced to assert their legal rights in a religious context, rather than a secular context, leading to concerns that their treatment before the religious arbitrator would depend on their religious affiliation or their standing in the religious community.[32] Moreover, we might worry that, by means of such agreements, religious institutions may begin to develop their own adjudicative institutions operating in parallel with the state's legal institutions, but without sufficient interaction or point of contact. That is, religious institutions may be able to use arbitration agreements to break away from the legal and political mainstream, resulting in a fracturing of the state's shared normative framework.

4.1 Overview

Because of the complexity of this subject matter, let me provide a brief overview of religious arbitration agreements before assessing their appropriate status in the liberal state. There are a number of different types of examples in which religious institutions have employed religious arbitration agreements when entering into contractual relationships with their members, such as employment contracts or contracts governing institutional membership. The Church of Scientology has required its members to agree to resolve any legal disputes with the Church through arbitration conducted by a panel of high-ranking Scientologists according to Church doctrine.[33] The Catholic Church has also used binding mediation and arbitration procedures to

[32] See, e.g., Shiva Falsafi, "Religion, Women, and the Holy Grail of Legal Pluralism," *Cardozo Law Review* 35 (2014): 1881 (suggesting that "unfettered religious autonomy runs the risk of excluding parties to religious contracts from the civil courts, thereby potentially compromising important individual liberties").

[33] For discussion of the use of arbitration in Scientology, see Michael Corkery and Jessica Silver-Greenberg, "When Scripture Is the Rule of Law", *N.Y. Times* (New York, NY), Nov. 3, 2015.

settle lawsuits brought against the Church by victims of sexual abuse by priests.[34] While the mediators and arbitrators were typically not official representatives of the Church, they were often chosen by the Church and were sometimes seen as acting on behalf of the Church.[35]

Many Orthodox and Conservative Jewish communities employ agreements that direct certain legal disputes to a Rabbinical Court or "beth din".[36] Agreements to submit legal disputes to a beth din are sometimes included in commercial contracts, such as sales of goods and property, lease agreements.[37] They are also commonly employed as part of marriage or divorce agreements.[38] In such cases, while the spouses must go before a civil court in order to obtain a civil divorce, the court will often defer to the award of spousal support and division of marital property issued by the beth din on the grounds that the spouses has agreed that the beth din's resolution of disputes between the parties would be binding.[39] (These "beth din" pre- or

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[34] Michelle Rosenblatt, "Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church," *Pepperdine Dispute Resolution Law Journal* 5 (2005): 115, 127-9 (describing binding mediation/arbitration procedures used to settle lawsuits or to award damages by the Archdioceses of Milwaukee and Boston).

[35] Ibid., 131-3.

[36] For a description of the operation of a typical beth din (sometimes transliterated from the Hebrew to "bet din" or "bais din"), see Pew Research Center, "Applying God's Law." See also Helfand, "Religious Arbitration and the New Multiculturalism," 1247-9. See also See Beth Din of America, "About Us," https://bethdin.org/about/ (accessed January 18, 2018). For the prenuptial agreement, see: http://www.theprenup.org/ (accessed January 19, 2018).

[37] Cf. Zeiler v. Deitsch, 500 F.3d 157 (2nd Cir. 2007) (holding that, in a property dispute between an Israeli citizen and an American citizen, where the parties have agreed to arbitrate their dispute before a Beth Din panel of three named rabbis, the panel can proceed to make an award even after one rabbi had resigned).

[38] See Kent Greenawalt, "Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance," *Southern California Law Review* 71 (1997): 781, 817 (discussing legal mechanisms used to compel Orthodox and Conservative Jewish husbands to submit to Jewish divorce procedures).

[39] Matter of Greenberg v. Greenberg 238 A.D.2d 420 (N.Y. 1997) (vacating spousal support

postnuptial agreements are also sometimes used to compel husbands to agree to sign a Jewish divorce or "get".[40]) Drawing in part on this Orthodox Jewish model of rabbinical tribunals, some Islamic communities also employ religious courts, in which Imams and lay community leaders apply Islamic law (Sharia or Shari'ia), to resolve legal disputes between members, including especially family law disputes.[41]

Another common type of religious arbitration agreement, often employed by Christian corporations and organizations, requires parties to submit to binding arbitration in accordance with the "Rules of Procedure for Christian Conciliation" promulgated by the Institute for Christian Conciliation (ICC), which is a non-denominational Christian organization that certifies religious arbitrators.[42] These certified arbitrators may be laypersons, but must affirm a Statement of Faith, adhere to a Standard of Conduct, and take a "Peacemaker's Pledge", all of which contain explicitly religious content.[43] The rules governing the arbitration, as well as the resulting

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award issued by the civil court on the grounds that the wife had signed an agreement requiring that all disputes between husband and wife be submitted to a "Bais Din" or Rabbinical Court).

[40] See discussion in Greenawalt, "Religious Law," at 810-6. See also Avitzur v. Avitzur, 58 N.Y.2d 108 (N.Y. 1983) (compelling former husband's specific performance in appearing before Beth Din panel in order to initiate religious divorce proceedings, where civil divorce was already completed), *cert. denied* 464 U.S. 817 (1983).

[41] See, e.g., Pew Research Center, "Applying God's Law." See also Charles P. Trumbull, "Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts," *Vanderbilt Law Review* 59 (2006): 609.

[42] The ICC is a division of Peacemaker Ministries, a nonprofit organization based in Colorado that was originally an offshoot of the Christian Legal Society. See Peace Maker Ministries, "About Peacemaker Ministries," http://peacemaker.net/about/ (accessed January 19, 2018), and "History," http://peacemaker.net/history/ (accessed January 19, 2018).

[43] See the "Standard of Conduct," http://peacemaker.net/project/standard-of-conduct-for-christian-conciliation/ (accessed January 19, 2018). Note that whether or not they have been Certified all persons using the ICC rules of Procedure must affirm the Statement of Faith; see "Rules of Procedure for Christian Conciliation" (RPCC), http://peacemaker.net/rules-of-procedure/ (accessed January 19, 2018), A.10(A) "Appointment of Conciliators."

arbitration award, are justified by reference to religious doctrine, and are understood or intended to be not only legally binding, but also to express or create religious obligations for the parties.[44] Courts have typically enforced agreements that reference the ICC and its Rules for Christian Conciliation.[45]

In sum, many different types of actors—including both individuals and institutions—may employ religious arbitration agreements in a range of different types of contractual relationships, and probably for a wide variety of different reasons. Moreover, religious arbitration agreements may have a variety of different structures and requirements. What these agreements have in common is the fact that a court may enforce the agreement, thereby requiring the parties to resolve their legal dispute in a religious context—before a religious tribunal, or by reference to religious texts and beliefs. The practice of considering religious arbitration agreements to be enforceable contractual provisions thus raises the question of whether the state has impermissibly delegated its adjudicative authority to religious institutions.

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[44] Among other things, these Rules provide that the Bible "shall be the supreme authority governing every aspect of the conciliation process." See RPCC A.4 "Application of Law," http://peacemaker.net/rules-of-procedure/ (accessed January 19, 2018).

[45] There are numerous cases litigating arbitration agreements with nearly identical language providing that legal disputes between the parties will be settled by "legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation". See, e.g., Encore Productions, Inc. v. Promise Keepers, 53 F.Supp.2d 1101 (D. Colo. 1999) (arbitration agreement in contract for audio-visual services referring to RPCC); Prescott v. Northlake Christian School, 369 F.3d 491 (5th Cir. 2005) (arbitration agreement in employment contract referring to RPCC); Spivey v. Teen Challenge of Florida, 122 So.3d 986 (Fl. App. 1st Dist. 2013) at 988 (service agreement signed by patient admitted to drug rehabilitation facility providing for binding arbitration in accordance with RPCC); Higher Ground Worship Center, Inc. v. Arks, Inc. WL 4738651 (D. Idaho 2011), at *1 (arbitration provision in lease-and-purchase agreement providing for arbitration in accordance with the Rules of Procedure for Christian Conciliation and citing to Matthew 18:15-20 and 1 Corinthians 6:1-8); Gen. Conference of Evangelical Methodist Church v. Faith Evangelical Methodist Church, 809 N.W.2d 117 (Iowa Ct. App. 2011) (arbitration agreement between church and governing religious body referring to RPCC).

4.2 Assessment

I will now argue that enforcement of religious arbitration agreements may be a form of impermissible delegation of the state's civil law adjudication function to religious institutions. My argument will rely on the discussion of the nondelegation principle—and the Establishment Clause nondelegation doctrine—introduced in Section 3. The argument that the judicial enforcement of religious arbitration agreements is an impermissible delegation turns on two key issues: first, whether the judicial enforcement of religious arbitration agreements a state action, or merely the result of private choices; and second, whether the result of enforcement would be a delegation of legal authority to the religious institutions.

The first key question is whether judicial enforcement of religious arbitration agreements is actually a delegation made by the state. It might seem that in a given case, the court is not delegating authority to the religious arbitrator, but is simply deferring to the decision to arbitrate made by the parties to the agreement. If the government is making a delegation of authority, it is at the level of the state's generally applicable law or policy authorizing courts to enforce such agreements across the board, both religious and the (more commonplace) nonreligious variety.[46] But unlike in *Larkin*, where the state delegated legal authority explicitly to "churches", a policy that applies to both religious and secular arbitration agreements may not seem to involve a delegation to religious institutions in particular. Unless there is an explicit or deliberate delegation to religious institutions in particular, it may be unclear what makes delegation so problematic. After all, explicitly delegating authority to religious groups raises concerns about state favoritism toward religion, while explicitly excluding religious entities from a general

[46] The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, applies to all contracts within the stream of commerce under the Commerce Clause of the U.S. Constitution.

policy would seem to raise concerns about state discrimination against religion.[47]

It may be correct that generally applicable laws do not constitute impermissible delegations. But with respect to religious arbitration agreements, the impermissible delegation may occur at the time of enforcement itself—that is, when the court actually enforces a religious arbitration agreement against a particular litigant in a specific case. In this respect, judicial enforcement of religious arbitration agreements may be analogous to the judicial enforcement of racially restrictive covenants at issue in *Shelley v. Kraemer*.[48] In this famous case, the U.S. Supreme Court held that courts may not enforce racially restrictive covenants against parties who sought to sell their land to African American (or non-white) buyers. Racially restrictive covenants were conditions added to property deeds that prohibited the sale of the property to non-white buyers, and were an important aspect of the effort to "redline" or racially segregate cities and neighborhoods and towns throughout the U.S. in the 20th century.[49] Covenants that place restrictions on land use or sale are commonplace in property law, and are routinely enforced by courts. But in *Shelley*, the Court held that judicial enforcement of racially restrictive covenants would amount to state engagement in the unconstitutional practice of racial segregation of housing. Although the covenants themselves were the product of private choices made by individual non-state actors—choices that are typically respected by the private law and

[47] Compare to State v. Yencer, 365 N.C. 292 (N.C. 2011) (holding that a generally applicable a state law allowing employees of any private college in the state, including religiously affiliated colleges, to be deputized as campus police officers was not an impermissible delegation under the Establishment Clause).

[48] Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive real estate covenants violates the Equal Protection Clause).

[49] See discussion in Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Cambridge: Harvard University Press, 2013).

enforced by courts—the judicial enforcement of these covenants is a form of state activity that may have problematic effects both in the particular case and on society as a whole. For this reasons, the judicial enforcement of racially restrictive covenants may be rightly subject to constitutional scrutiny.[50]

Much like racially restrictive covenants, religious arbitration agreements may not be a merely private matter, on a par with other arbitration agreements that are generally enforced by courts. Enforcement of religious arbitration agreements may impact the legal rights of individual litigants, especially if the parties' respective religious beliefs or affiliations may affect the outcome of the arbitration.[51] In addition, by analogy with "redlining", consistent judicial enforcement of religious arbitration agreements may result in the fracturing of the legal landscape, whereby religious and nonreligious citizens adjudicate their private law disputes in completely separate legal venues. Judicial enforcement of religious arbitration agreements may also result in patterns of governmental favoritism toward certain religious groups, since some religious groups may be less sophisticated than others in drafting the agreements or in seeking their enforcement by courts, leaving them disadvantaged relative to other groups who have the requisite legal experience to execute the agreements. Inequality of enforcement is a special concern in light of attempts by some U.S. state legislatures to impose restrictions on court's ability to consider Islamic law or Sharia.[52]

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[50] The "state action doctrine" aspect of Shelley v. Kraemer has been widely debated. See discussion in Erwin Chemerinsky, "Rethinking State Action," *Northwestern University Law Review* 80 (1985): 503, 524-5.

[51] Compare to Garcia v. Church of Scientology Flag Service Org., 2015 WL 2356732 (M.D. Fl. March 13, 2015) at 11 (plaintiffs arguing that because they had been declared to be "suppressives" by the Church, all Scientologists in good standing would be required to be biased against them).

[52] Cf. Awad v. Ziriax, 670 F.3d 1111, 1128-29 (10th Cir. 2012) (holding under the Establishment

Because judicial enforcement of religious arbitration agreements may result in significant effects—both for individual litigants and for society as a whole—which are specific to religious arbitration agreements, there may be reason for the state to consider religious arbitration agreements separately from the nonreligious variety. Much like racially restrictive covenants, they are arguably different in kind from the garden-variety legal mechanism on which they are based. Given this difference, the state must make a decision whether or not to enforce them on the same terms as other arbitration agreements. This choice—whether it is made by a legislature or a court—ought to be subject to considerations of justice, and in the U.S. system, to principles of constitutional law. Enforcement of religious arbitration agreements thus seems to be a state activity, and not merely the result of the private choices of the parties to the agreement.

The second question to consider is whether this state activity—enforcement of religious arbitration agreements—is an impermissible delegation of the state's legal authority to religious institutions. There is a strong argument that the enforcement of the civil or private law is one of the state's core legal functions. "Core legal functions" could be defined as functions for which the state—understood as the political community as a whole—has primary authority and bears ultimate moral responsibility. For example, the enforcement of the criminal law is a core legal function, since the state bears ultimate responsibility for its enforcement. The state may not be the sole agent allowed to operate in the domain of criminal law. Private citizens may have the authority to make citizen arrests in some cases, and the government may delegate some functions to private actors such as privately operated prisons, or individuals deputized to act as police officers. But the state has the last word on enforcement of the criminal law, and all of these private actors must report to the state.

Clause that an Oklahoma law prohibiting courts from considering Sharia law in particular was unconstitutional because it singled out Islam).

Enforcement of the civil law may also be a core legal function, though perhaps the result is less intuitive. Enforcement of the civil law ordinarily bears the government's imprimatur, as evidenced by the fact that civil courts are housed in public buildings, staffed by government employees. But also, enforcement of ultimately is backed the state's authority to use coercive force. The state's civil law adjudication is not simply a form of nonbinding mediation—the state may resort to coercive force to render judgments when necessary. Again, private actors may have a role to play, including drafting enforceable contracts, filing lawsuits, and even private arbitrators helping to resolve disputes. But so long as the state's coercive enforcement may be brought to bear, the state bears ultimately responsibility for the outcome.

Assuming that civil law enforcement is a core legal function, the second aspect of impermissible delegation is whether enforcement of a religious arbitration agreement allows a religious institution to acquire significant control over the enforcement of the civil law. There is a strong argument that enforcement of such agreements does result in the acquisition of significant control by religious institutions. Litigants who have entered into such agreements are prevented from seeking alternative means of adjudication. And awards or judgments issued by religious arbitrators may be enforced by the state's civil court, including through use of coercion. Although courts retain the ability to review arbitration awards, courts routinely enforce those awards except in special cases, such as child custody awards.[53] Thus the awards issues by religious arbitrators are roughly as binding on litigants as the awards issued by the state's civil courts. And because the proceedings may be private, religious arbitrators have arguably more leeway and less precedential constraint in making their judgment.

[53] Courts generally claim a *parens patriae* responsibility to determine whether a child custody award issued by an arbitrator is in the child's best interests. See Jack Ratliff, "*Parens Patriae*: An Overview," *Tulane Law Review* 74 (1999): 1847.

Enforcement of religious arbitration agreements may be contrasted with a limited delegation in which the government retains control over the delegated function. Consider *State v. Yencer*, a North Carolina case involving a law allowing the state to deputize employees of private colleges, including religiously affiliated colleges, as campus police officers with the power to issue tickets and make arrests.[54] Although this is a close case,[55] it could be argued that deputized officers at religious colleges did not acquire sufficient control over criminal law enforcement to raise constitutional concerns. After all, whatever enforcement action a campus police officer might take will be subject to the review of a criminal court, not simply the campus police or the college administrators. Any ticket or arrest issued by a police officer may be challenged before a criminal judge, and the campus police have no authority to render criminal judgments. So although campus police may exercise coercive authority at the point of arrest, they may lack the level of control that would result in an impermissible delegation of the state's authority over the criminal law.

By contrast, enforcement of religious arbitration agreements provides religious arbitrators with significant control over civil law enforcement. The judgments issued by religious arbitrators are binding on the litigants in civil court. And civil courts may often enforce the awards issued by religious arbitrators directly, without conducting a separate trial or review of the arbitration proceedings. Indeed, some courts have argued that, because the arbitration proceedings are religious, the Establishment Clause prevents them from reviewing the procedures employed by

[54] State v. Yencer, 365 N.C. 292 (N.C. 2011) (upholding law deputizing private college campus police offices against Establishment Clause challenge).

[55] Compare to an earlier North Carolina case with similar facts, State v. Pendleton, 451 S.E.2d 274 (N.C. 1994) (holding under the Establishment Clause that state law deputizing private college employees to serve as campus police officers was unconstitutional as applied to religiously affiliated colleges).

religious arbitrators.[56] Thus there is reason to conclude that enforcement of religious arbitration agreements is an impermissible delegation of the state's legal authority with respect to civil law enforcement.

4.3 Practical Implications of Nonenforcement

This Section has argued that the state should not generally enforce religious arbitration agreements because such enforcement would be an impermissible delegation under the Establishment Clause. It is worth noting that this argument for the nonenforcement of religious arbitration agreements is consistent with the continued employment of a number of related alternative dispute resolution mechanisms. First, religious persons and groups may continue to employ nonbinding religious arbitration or mediation to reach mutually acceptable settlements of legal disputes. Parties may use contractual agreements to specify which specific religious authority or tribunal will be relied upon to resolve disputes they may have regarding questions of religious doctrine.[57] And religious institutions could still provide nonbinding religious mediation services. This mediation, if successful, could prompt the parties to agree to a binding settlement agreement, which would resolve their legal dispute. But crucially, in the context of nonbinding mediation, both parties must voluntarily agree to a settlement at the time of mediation, after the dispute has arisen—not in advance of any dispute as with a binding arbitration agreement.

Second, persons who are motivated by their religious beliefs to avoid litigating their disputes in civil court may continue to employ secular arbitration agreements in their contractual

[56] See Garcia v. Church of Scientology Flag Service Org., 2015 WL 2356732 (M.D. Fl. March 13, 2015) (granting Church's motion to compelling arbitration in suit against Church over plaintiff's objection that Church-affiliated arbitrators would be biased against plaintiff).

[57] See McCarthy v. Fuller 714 F.3d 971, 975-6 (7th Cir. 2013) (noting that the religious question doctrine is difficult to apply in cases where there is no clear religious hierarchy, such as congregational churches, and so courts may be required to find some "neutral principle" on which to base their legal decision, rather than attempt to decide a religious question).

relationships. Secular arbitration agreements may still allow the parties to resolve their legal dispute without the cost and potential ignominy of resorting to civil court. Note, however, that nonreligious arbitrators may also acquire some significant control over civil law enforcement, which may be problematic for a variety of reasons.[58] But it does not necessarily give rise to the same concerns about religious institutions—interference with individual religious autonomy, unfair treatment on the basis of religious affiliation, and the fracturing of the shared normative landscape into fiefdoms associated with the various religious groups.[59]

Conclusion

This Chapter has argued that religious and other comprehensive institutions operating in the liberal state must be voluntary associations, in that their members join voluntarily and have a right and opportunity to exit at any time. The liberal state must ensure that comprehensive institutions remain voluntary association in this sense, and the state may have some obligations to indirectly facilitate the ability of religious institutions to meet the requirement. In particular, the state should take some steps to ensure that members of comprehensive institutions have a genuine opportunity to exit, for example, by maintaining secular institutions that provide essential social services to all comers.

In addition, the state should not delegate control over its legal institutions—i.e., those institutions that perform legislative, executive, and adjudicative functions—to comprehensive institutions. This control both ensure that membership in religious institutions is voluntary, and creates a centripetal social pressure to for all citizens to interact in the shared normative

[58] Compare to discussion in Seana Valentine Shiffrin, "Remedial Clauses: The Overprivatization of Private Law," *Hastings Law Journal* 67 (2015): 407 (discussing how enforcement of remedial clauses such as arbitration clauses may undermine the due process principle that like cases should be treated alike).

[59] Compare to *Larkin* at 122 ("We need not decide whether, or upon what conditions, such power may ever be delegated to nongovernmental entities").

landscape created by the law. This concern about delegation is captured by U.S. constitutional law by the Establishment Clause's nondelegation doctrine, expressed for example by the Supreme Court in *Larkin v. Grendel's Den*.

Finally, as an application of this nondelegation principle, the liberal state should not enforce religious arbitration agreements, which require parties to resolve civil law disputes before a religious arbitration tribunal. Enforcement of religious arbitration agreements effectively delegates control over civil law adjudication to religious institutions, leaving very little opportunity for the state's civil courts to review the arbitration awards. The state should not allow religious institutions to acquire this control over civil law adjudication, even where parties have consented, because the government should not act in such a way that a citizen's ability to access important social services depends on her religious affiliation. Moreover, enforcement of religious arbitration agreements may result in a fracturing of the state's shared legal landscape. Thus the Establishment Clause of the U.S. Constitution may prohibit the state from enforcing religious arbitration agreements because such enforcement is an impermissible delegation of the state's legal authority to religious institutions.

Conclusion

The project of this dissertation has been to investigate the role of religious freedom in the liberal state. The initial point of reference for this investigation is the laws that are designed to protect or promote religious freedom in the United States legal tradition. The guiding idea is that it may be possible to identify the role of religious freedom in a liberal state—the social ordering that religious freedom is meant to promote—by looking at the structural features and broad legal principles that have emerged from these laws over time.

Many religious freedom laws in the U.S. function to maintain a separation between religion and the state. Indeed, the concept of church-state separation is central to the U.S. legal tradition and to its self-conception as a country. And it is clear that maintaining separation between religion and the state is necessary in important types of situations. For example, the liberal state should not be in the business of enforcing or interpreting religious doctrine. The liberal state should maintain a secular legal system whose content is not justified in terms of religious beliefs or values. And the liberal state should operate secular public schools that scrupulously avoid endorsing sectarian religious content.

But we should not conclude that the overarching role of religious freedom in a liberal state is to maintain a strict separation between religion and the state. Separation should not be an end-in-itself. A closer attention to the function of religious freedom law, and to the liberal values at stake, reveals a more nuanced type of relationship between religion and the state. In particular, the liberal state should be open to various types of interactions with religious people and groups including interactions based on collaboration or compromise. The central arguments of this dissertation offered principled liberal grounds for rejecting a strict adherence to religion-state

separation in particular cases. These arguments suggested instead a more moderate form of religion-state separation that allows for compromise and mutually beneficial cooperation.

This dissertation identified two primary aspects of religious freedom law that may benefit from rejecting a strict adherence to separation between religion and the state—religious accommodation, and the relationship between religious institutions and their members. First, Chapter 2 argued for a compromise-based approach to accommodating some religiously and morally motivated activities. A strict adherence to religion-state separation would tend to support an "all-or-nothing" approach to accommodation, according to which the state should accommodate a particular religious practice either completely or not at all. In particular, many religious accommodation laws employ a rights-based model that prioritizes inflexible religious views, discourages compromise, and has difficulty accounting for the rights and interests of third parties. But an all-or-nothing approach overlooks the potential for valuable compromise-based accommodation. Seeking to reach a compromise can often be more valuable for both parties, especially when the purposes of the law at issue can be rendered consistent with the meaning or purpose of the religious activity at issue.

Part of what makes compromise-based accommodation valuable is the power of compromise itself—and in particular, the fact that compromise can sometimes reconcile apparently conflicting values or reveal new values. When a compromise is fair, each party makes a concession that is of real significance, and yet is peripheral to what each takes to be of central value or importance. In this way, compromise may provide a deeper or richer understanding of what each party believes to be most valuable, and the ways in which these different values interact. Developing a shared appreciation of the central values at stake may be beneficial for its own sake; and it may also contribute to valuable relationships between persons in the political

community. Thus compromise-based accommodation may help religious persons and their fellow citizens discover creative solutions to conflicts and foster relationships based on mutual understanding and respect.

Chapter 3 described an important limitation on this compromise-based approach to accommodation, namely, that accommodation should not be used as a form of political protest. In many cases, a person seeking accommodation may have a "principled objection" to the law at issue—that is, she may object to the general purpose or justification of the law, as well as its application to her. A principled objector may be able to accept a compromise-based accommodation, but only on the condition that she accepts the democratic legitimacy of the law at issue. Out of respect for one's fellow citizens, and assuming that a law has been enacted through appropriate and fair democratic processes, one may be able to accept the law's legitimacy even if she continues to reject its purpose or justification. Accepting the legitimacy of the law allows space for compromise because it provides grounds on which the objector may indirectly support the law as part of the terms of her compromise. For example, a pacifist objector from the military draft may be willing to perform alternative service, even if this indirectly supports the state's war effort, on the grounds that the war is democratically legitimate.

Some principled objectors may refuse to accept the democratic legitimacy of the law at issue, or may choose to protest the law by all available means, including by refusing to indirectly support its implementation. In some cases, these forms of resistance may be morally appropriate or even morally required. And the liberal state may have reason to respect those who resist laws that they view to be unjust or illegitimate in some cases. But accommodation is not the appropriate avenue for protest or mechanism for citizens to engage in resistance. An accommodation is personalized to the claimant, and its function is to leave the purpose of the law

unaffected. Claiming an accommodation in order to subvert or protest against the law at issue is a misuse of the legal protection. That is, an accommodation should not be used as a form of political protest, or as a legal protection that allows one to engage in political protest. As such, principled objectors who claim accommodation must keep their political objections distinct from their personal objections, and seek accommodation only for the latter.

Finally, Chapter 4 discussed the relationship between religious institutions and their members. A strict adherence to religion-state separation may support a "hands off" or "church autonomy" approach, according to which the state allows religious institutions significant leeway in managing their own internal affairs. This autonomy may include limiting state oversight of decisions made by religious institutions regarding their members and other participants, such as employees, students, or patients. But church autonomy must be balanced against the state's obligation to protect the rights and interests of the members of religious institutions, even those who have voluntarily consented to be subject to the religious institution's authority. In order to correctly strike this balance, the state must ensure that religious institutions are "voluntary associations" in the sense that their members voluntarily choose to join, and are free to exit or discontinue their membership at any time.

One important test case for this "voluntariness condition" is the use of religious arbitration agreements by religious institutions or by their members. Religious arbitration agreements require parties to submit their legal disputes to binding arbitration before a tribunal composed of religious leaders or lay arbitrators applying religious rules. Religious institutions often use such agreements to structure their relationship with their members—including their employees, students, and patients—according to their own doctrine or beliefs, while avoiding state oversight. Because parties must consent to these agreements, it may seem that enforcing

religious arbitration agreements would be one way for the state to balance the autonomy of religious institutions against the rights of their members. However, protecting the ability of individual members to discontinue their membership may require that these members have access to the state's legal system for resolving legal disputes that may arise with other members or with the institution itself. For this reason, the state should generally not enforce religious arbitration agreements against members of religious institutions.

In sum, the arguments of this dissertation provide support for a more moderate picture of the relationship between religion and the state. Instead of strict separation, the liberal state should seek the correct balance between separation and integration. Where possible the state should seek to establish collaborative or mutually beneficial relationships between religion and the state. At the same time, the state must limit the authority of religious groups (as well as other hierarchical groups) over their members—in some cases by prohibiting religious groups from having a certain type of authority over their members.

The social structure or social order that is distinctive to a liberal state is one in which a diverse community of persons and groups organized around a variety of different moral and religious views can not only coexist, but can contribute their distinctive viewpoints and lifestyles to the composition of the community as a whole. In such a community, the state and its public institutions may provide a social nexus point, and a way of forcing interactions between different persons, groups, and viewpoints, allowing them to communicate with and to inform one another. The state is part of this dynamic process of generating diversity and difference on the one hand, and reconciliation and convergence on the other. Cultivating openness to interaction—and to change, growth, and development through interaction—is the great value and function of the liberal state.

If we adopt this picture of the liberal state, then maintaining a separation between religion and the state is preferable to social homogeneity. After all, separation promotes the development of religious and moral diversity by helping to ensure that the liberal state is open to all comers. Separation may have been a necessary first step in the historical process of creating a pluralist, liberal society. But a strict adherence to religion-state separation risks exposing individuals to the unchecked authority of religious institutions, and it may cause the state and religion to miss out on valuable forms of collaboration and compromise. What makes separation beneficial—namely, its ability to promote coexistence by avoiding religious conflict—may inadvertently foreclose valuable forms of interaction and collaboration.

The function of religious freedom in a liberal state is to create a morally and religiously diverse political community. Separation is an important component of this picture, but should not be its guiding principle. Adopting instead a more moderate approach to religion-state separation—perhaps with a more collaborative outlook—may better promote liberal values and help to bring about a just political community.

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