

WHAT'S SO SPECIAL ABOUT RELIGIOUS LIBERTY?:
LAW, PHILOSOPHY, AND SERVING GOD

*Francis J. Beckwith**

INTRODUCTION

Is there something distinct about religious beliefs and practices that is absent from non-religious beliefs and practices that warrants special protection of the former but not the latter? Because non-religious worldviews appear to answer the same questions of ultimate meaning and the ethical life that religious worldviews answer, is there any reason why our legal instruments should single out the free exercise of religion as a fundamental right while ignoring other sorts of comprehensive beliefs that seemingly parallel the religious ones? In recent years, several highly influential legal scholars have answered these questions in the negative.¹ I call this view the Religion is Not Special thesis (RNS). Rather than simply discarding the term “religion” altogether, most RNS advocates suggest that we should interpret, or re-interpret, religious liberty to include not only conventional religions but also non-theological points of view that we are told provide the same sort of solace, meaning, and dignity as conventional religions do for their followers.²

* Professor of Philosophy, Affiliate Professor of Political Science, Resident Fellow in the Institute for Studies of Religion, and Associate Director of the Graduate Program in Philosophy, Baylor University. Ph.D. and M.A. (philosophy), Fordham University; M.J.S. (law), Washington University School of Law, St. Louis. The author would like to thank the provost's office at Baylor University for awarding him a Fall 2021 research leave that allowed him to work on this article and another one, both of which are parts of a larger project on the nature of religious liberty.

¹ See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (2d ed. 1996); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); Micah Schwartzman, *What If Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1377-1492 (2012).

² Take, for example, Eisgruber and Sager's brief account of the three distinct components of their view, which they call “Equal Liberty”: “First, it insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects. Religious faith receives special constitutional solicitude in this respect, but only because of its vulnerability to hostility and neglect. Second, and again in the name of equality, Equal Liberty insists that aside from this deep and

There has been much ink spilled and bytes leaked over the “is religion special?” debate.³ A considerable amount of the dispute has involved philosophical, constitutional, and statutory questions about the propriety of religious accommodations and the extent to which religious reasons should be allowed to shape public policy.⁴ Although those questions are certainly worthy of exploration, my intent here is to largely ignore them and focus on a much more modest goal: to reacquaint us with a venerable alternative to the RNS theory, one that I call the Two-Sovereigns Thesis (TST). As I note below,⁵ it is a view that many of the American Founders had in mind when they argued for incorporating its logic into state laws and constitutions.

In presenting TST, I will draw our attention to those aspects of conventional religions that are often ignored or downplayed by RNS theorists, even though it is those characteristics of common piety that motivated the thinking of figures like John Locke,⁶ James Madison,⁷ Thomas Jefferson,⁸ and the Fathers of the Second Vatican Council.⁹ I will argue that the main reason for this neglect is that the RNS theory is eliminative in its application, meaning that, as an interpretative tool, it eliminates from our vision those aspects of religious belief and practice that have traditionally set it apart from other activities. By attempting to find one overarching theory of religious liberty that

important concern with discrimination, *we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities*. Finally, Equal Liberty insists on a broad understanding of constitutional liberty generally.” EISGRUBER & SAGER, *supra* note 1, at 52 (emphasis added).

³ Salvos from the other side of the debate include the following, though many more could be cited: Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 482 (2017); Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013); David McPherson, *The Claims of Religious Identities in Secular Societies*, 13 J. RELIGION & SOC’Y 216 (2016); Melissa Moschella, *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, 32 J.L. & RELIGION 123 (2017); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014); Andrew Koppleman, *Religion’s Specialized Specialness*, 79 UNIV. CHI. L. REV. Online 71 (2012).

⁴ See, e.g., EISGRUBER & SAGER, *supra* note 1, at 52; Lund, *supra* note 3, at 482-523.

⁵ See *infra* Analysis.

⁶ JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 27 (William Popple trans., Hackett Publishing 1983) (1689).

⁷ JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON: VOLUME II (Gaillard Hunt 1901).

⁸ Thomas Jefferson, *A Bill for Establishing Religious Freedom*, FOUNDERS ONLINE, NATIONAL ARCHIVES (originally published June 18, 1779) <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

⁹ POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM (DIGNITATIS HUMANAЕ) (1965).

does not discriminate between deeply held religious and deeply held non-religious beliefs—by advancing the project of eradicating *rite privilege*¹⁰—the RNS advocate ends up offering us an impoverished description of what religious citizens actually believe and practice. Although I do not think that courts and legislatures should advance the RNS view, I will not develop that position here. My point is simply to draw attention to how its application may distort the way that well-meaning jurists and legal scholars see religion.

To arrive at our destination, I will begin in Section I with an analysis of how religious speech is treated both as non-special and special in the U.S. Supreme Court's religion jurisprudence. Why choose speech rather than other activities? Philosophically, it is because speech is unique to the human species and the primary means by which we express our rational nature.¹¹ Legally, it is because the primary conflicts over religion in the courts involve speech or expression, whether in the forms of words, symbols, texts, or ideas.¹² This approach will lay the groundwork for the second part of my article, in which I explain TST. I will then go on to discuss how that thesis has better explanatory power than the RNS view in accounting for the religious nature of certain types of cases in American jurisprudence.

¹⁰ Inspired by the progressive call for “eradicating white privilege,” “eradicating rite privilege” is a phrase I coined to capture in a pithy way the RNS view that religion, as conventionally understood, is not special and thus should not be singled out for special legal protections or exemptions. If this is a fallacy, we should call it *guilty by alliteration*.

¹¹ As the 18th century Scottish philosopher Thomas Reid noted:

There appears, indeed, to be some degree of social intercourse among brute animals, and between some of them and man. A dog exults in the caresses of his master, and is humbled at his displeasure. But there are two operations of the social kind, of which the brute animals seem to be altogether incapable. They can neither plight their veracity by testimony nor their fidelity by any engagement or promise. If nature had made them capable of these operations, they would have had a language to express them by, as man has: but of this we see no appearance. A fox is said to use stratagems, but he cannot lie; because he cannot give his testimony, or plight his veracity. A dog is said to be faithful to his master; but no more is meant but that he is affectionate, for he never came under any engagement. I see no evidence that any brute animal is capable of either giving testimony, or making a promise.

THOMAS REID, *ESSAYS ON THE ACTIVE POWERS OF THE HUMAN MIND* 366 (Forgotten Books 2018) (1822).

¹² See *infra* Part II.

BACKGROUND

I. RELIGION AS *NOT* SPECIAL

Although I raise some critical questions about the RNS view, it is not entirely without merit. Certainly, there are ways in which the singling out of religion for special burdens can blind us to those aspects of religious practice and expression that rely on ordinary human actions otherwise protected under the Constitution. Consider, for example, the numerous times the U.S. Supreme Court has appealed to viewpoint discrimination, or at least the idea of it, to vindicate the rights of religious believers in the same way it would vindicate the rights of similarly situated, non-religious plaintiffs.

In the case *Widmar v. Vincent*, the Court confronted a public university's policy that excluded student religious groups from using the university's facilities to conduct services.¹³ The university argued that excluding such groups is required by the Establishment Clause,¹⁴ which under the Court's precedents forbids a public institution from endorsing or supporting a religious activity.¹⁵ The Court rejected this argument, maintaining that the university, by allowing a variety of student groups to use its facilities, had created a limited public forum.¹⁶ Having done that, the Court argued that the university could not exclude groups based on the content of their speech, even if that speech is religious.¹⁷

¹³ 454 U.S. 263, 264-65 (1981).

¹⁴ *Id.* at 270-71.

¹⁵ *Id.* at 267-68.

¹⁶ *Id.* at 273-74. In a subsequent case, the Supreme Court writes that the Constitution forbids "the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that '[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated' The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' . . . nor may it discriminate against speech on the basis of its viewpoint[.]" *Rosenberger v. Rectors & Visitors of the Uni. of Va.*, 515 U.S. 819, 829 (1995) (internal citations omitted).

¹⁷ *Widmar*, 454 U.S. at 273-75.

The case of *Lamb's Chapel v. Center Moriches Union Free School District* concerned the question of whether a New York state school district engaged in viewpoint discrimination when it refused to permit a Christian church to use a room in one of the district's buildings. The church had planned to show a film series on family issues produced by the Christian organization, Focus on the Family.¹⁸ According to the Court, the state rules on which the school district relied had the effect of singling out and excluding a religious viewpoint on a question that a variety of local, non-religious civic groups would be free to address if any one of them were to use the same facility.¹⁹ Although the plaintiff in this case was a religious group, *Lamb's Chapel*, arguing for the right to use public property as a venue to propagate a religious message, the Court framed the issue as one involving solely freedom of speech.²⁰ The state of New York, like the university in *Widmar*, appealed to the Establishment Clause to justify its exclusion, but the Court quickly dismissed it after subjecting it to the rigors of the dreaded Lemon Test.²¹

¹⁸ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 392 (1993).

¹⁹ *Id.* at 393-94 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint. The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'")).

²⁰ *Id.* at 387 ("The issue in this case is whether, against this background of state law, it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today.").

²¹ *Id.* at 395. The *Lemon* Test is derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It is a case in which the Supreme Court assessed whether two statutes, one in Pennsylvania and the other in Rhode Island, violated the Establishment Clause because they provided direct aid to private religious schools. In its majority opinion, the Court provided what it believed was a pithy summary of its prior Establishment Clause cases that amounts to a three-pronged test to determine whether the government has violated the Establishment Clause: "Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13. Any law or policy that violates at least one of these prongs cannot pass constitutional muster. See Francis J. Beckwith, *Lemon v. Kurtzman at 50*, LAW & LIBERTY (June 1, 2021), <https://lawliberty.org/forum/lemon-v-kurtzman-at-50/>. However, in *Kennedy v. Bremerton School District*, 597 U. S. ____ (2022) (slip op.), the Court effectively overturned the *Lemon* Test: "What the District and the Ninth Circuit overlooked, however, is that the 'shortcomings' associated with this 'ambitiously' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot." (cita-

The Court dealt with a policy affecting religious expression at another public university in *Rosenberger v. Rectors and Visitors of the University of Virginia*, but unlike *Widmar*, this case involved money, not merely the physical campus.²² The university prohibited its student activity funds from being used for any activity that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.”²³ An official student group, Wide Awake Productions (WAP), published a newspaper called *Wide Awake: A Christian Perspective at the University of Virginia*, whose purpose was to “‘publish a magazine of philosophical and religious expression,’ ‘facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,’ and ‘provide a unifying focus for Christians of multicultural backgrounds.’”²⁴ WAP, as all recognized groups may do, requested reimbursement from the university for printing costs, but was denied because, according to the school, the content of the newspaper promoted, contrary to university policy, “a particular belief in or about a deity or an ultimate reality.”²⁵

Writing for a five-to-four majority, Justice Anthony Kennedy held that the university had engaged in viewpoint discrimination, pointing out that religion is deeply intertwined, either by promotion or critique, with the most important and influential philosophical traditions that a student will, and should, encounter at a university.²⁶ Consequently, “[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”²⁷

The Court’s opinions in these and other viewpoint discrimination cases seem to be telling us that whenever the government sets up a limited public forum, it cannot exclude public benefits based on viewpoint, even a religious viewpoint, since religious speech is a species of speech. Religion, or at least religious speech, is apparently *not special*. But that is not the same inference one draws when one looks at a

tion omitted). *Id.* at 22. The dissent writes: “The Court now goes much further, overruling *Lemon* entirely and in all contexts.” Kennedy, 597 U.S., at 28 (Sotomayor, J., dissenting) (slip op.).

²² See 515 U.S. at 827.

²³ *Id.* at 825.

²⁴ *Id.* at 825-26.

²⁵ *Id.* at 827.

²⁶ *Id.* at 834-36.

²⁷ *Id.* at 836.

different collection of cases that arise in the context of public education. In these cases, the specialness of religion—its appeal to a transcendent source of moral and epistemic authority that is worthy of worship—is precisely the reason for its *exclusion*.

II. RELIGION AS SPECIAL

In *Engel v. Vitale*, the Court dealt with a school prayer policy instituted by the New York State Board of Regents.²⁸ The Board had composed a non-denominational prayer that it recommended to the state's school districts: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."²⁹ Embracing the Board's suggestion, the Union School District in Hyde Park crafted a policy instructing the district's principal to require the communal oral recitation of the Regents' prayer by students in each class at the beginning of every school day with a teacher present.³⁰

The daily ritual was led by either a teacher or a student selected by the teacher.³¹ Nevertheless, no individual student was required to participate;³² it was technically voluntary.³³ A student could just stand in silence or opt out from being present if a parent or guardian were to request such an arrangement in writing.³⁴ To underline the non-compulsory nature of the exercise, the district's policy included a regulation that it expounded in a letter sent to all parents and taxpayers: "Neither teachers nor any school authority shall comment on participation or non-participation . . . nor suggest or request that any posture or language be used or dress be worn or be not used or not worn."³⁵

According to the majority opinion's author, Justice Hugo Black, it was undeniable that the school district's policy violated the Establishment Clause, for "the constitutional prohibition against laws respecting an establishment of religion must at least mean . . . [that] it is no part of the business of government to compose official prayers

²⁸ *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁹ *Id.* at 422.

³⁰ *Id.*

³¹ *Id.* at 438 (Douglas, J., concurring).

³² *Id.*

³³ *Id.*

³⁴ *Engel v. Vitale*, 370 U.S. 421, 438 (1962) (Douglas, J., concurring).

³⁵ *Id.*

for any group of the American people to recite as a part of a religious program carried out by the government.”³⁶ Justice Black further argued that the Establishment Clause’s “first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion,” that “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”³⁷ But what precisely is it about the content of a prayer that makes it religious? Justice Black’s answer is simple: “It is a solemn avowal of divine faith and supplication for the blessings of the Almighty.”³⁸

In *Abington School District v. Schempp*, the Court found two statutes unconstitutional, one in Pennsylvania and the other in Maryland, each of which required public-school exercises that included recitation of Bible verses and the Lord’s Prayer.³⁹ But, as under the school prayer policy in *Engel*, students could opt out of the two statutes with parental approval.⁴⁰ The *Schempp* Court further elaborated on *Engel*’s understanding of the government’s obligation under the Establishment Clause to remain neutral on religion.⁴¹ In response to Maryland’s argument that its exercises had a secular purpose, the Court stated the following:

[S]urely the place of the Bible as an instrument of religion cannot be gainsaid, and the State’s recognition of the pervading religious character of the ceremony is evident from the rule’s specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises.⁴²

The Court’s point was that some speech that is religious in character, when propagated or endorsed by the state, or its actors, in ceremony or text, is prohibited by the Establishment Clause.⁴³ In such cases, it seems that viewpoint discrimination is a virtue and not a vice.

³⁶ *Id.* at 425.

³⁷ *Id.* at 432 (quoting MADISON, *supra* note 7, at 187).

³⁸ *Engel*, 370 U.S. at 424.

³⁹ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 204 (1963).

⁴⁰ *Id.* at 205, 211.

⁴¹ *Id.* at 225-26.

⁴² *Id.* at 224 (referring to the Douay-Rhimes translation of the Catholic Bible).

⁴³ *See id.* at 223.

Religious speech continued to get special treatment in the 1992 case of *Lee v. Weisman*.⁴⁴ In this case, the Supreme Court ruled as unconstitutional a Providence, Rhode Island, policy that allowed its middle and high schools to invite clergy to give invocations or benedictions at commencement ceremonies.⁴⁵ The prayers' compositions were guided by instructions provided to the clergy by the school.⁴⁶ But this was constitutionally verboten, the Court wrote, because "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."⁴⁷ Although attendance was technically non-compulsory, the Court nevertheless concluded that graduating students were indirectly coerced, since the only way for an objecting student to opt out of the ceremony and the prayer would be for her to miss out on an important milestone in her life.⁴⁸ That is hardly free.⁴⁹ Like in the other school prayer cases, *Weisman* depicts religious speech as something special and set apart because of its form and content: it is a verbally uttered petition to, or a text believed to be revealed truth from, the transcendent source of being to whom we owe obedience (otherwise known as "God").⁵⁰

⁴⁴ *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

⁴⁵ *Id.* at 580-81, 599.

⁴⁶ *Id.* at 581.

⁴⁷ *Id.* at 489.

⁴⁸ *See id.* at 593.

⁴⁹ *See id.* at 592-93 ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . Our decisions in *Engel v. Vitale*, . . . and *Sch. Dist. of Abington* . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.").

⁵⁰ *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (internal citations omitted) ("We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, picked up by Judge Campbell's dissent in the Court of Appeals in this case, that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers

Prayer and the recitation of religious texts are not the only types of religious speech that have been treated as special by the Court in the context of public education; some curricular speech has also been so treated. The Court, in two cases—*Epperson v. Arkansas*⁵¹ and *Edwards v. Aguillard*⁵²—rejected two statutes that, in differing degrees, restricted the teaching of Darwinian evolution.

Epperson dealt with the question of whether a 1929 Arkansas anti-evolution statute was unconstitutional.⁵³ Defining evolution as “the theory or doctrine that mankind ascended or descended from a lower order of animals,” the statute banned the teaching of evolution in the textbooks and classrooms of all the state’s educational institutions, including public schools, colleges, and universities.⁵⁴ Ruling that the statute was unconstitutional because it ran afoul of both the Free Exercise and Establishment clauses, the Court focused on what it concluded was the sole reason for the Arkansas law: the theory of evolution was contrary to the creation account of human origins in the Book of Genesis.⁵⁵ It drew this conclusion because “[n]o suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens,”⁵⁶ and “fundamentalist sectarian conviction was and is the law’s reason for existence.”⁵⁷ In support of the second reason, the Court pointed to the Arkansas statute’s historical connection to the Tennessee statute that was at the center of the famous Scopes Trial.⁵⁸

After losing in *Epperson*, creationists changed strategies. Instead of calling for an outright ban on evolution, they proposed legislation that would require so-called “balanced treatment” in public-school science classes.⁵⁹ It was such a law that was the focus of the *Edwards* case. A 1981 Louisiana statute prohibited “the teaching of the theory of evolution in public schools unless accompanied by instruction in

which aspire to these ends, neither does it permit the government to undertake that task for itself.”).

⁵¹ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁵² *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁵³ *Epperson*, 393 U.S. at 98.

⁵⁴ *Id.* at 98-99.

⁵⁵ *Id.* at 103.

⁵⁶ *Id.* at 107.

⁵⁷ *Id.* at 108.

⁵⁸ *Id.* at 108-09; see also *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

⁵⁹ The first of these balanced treatment acts was passed in 1981 in Arkansas and was invalidated in 1982 by *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

‘creation science.’”⁶⁰ The state did not require or prohibit schools from teaching creation science or evolution, but if a school taught one of them, the other also had to be taught.⁶¹

According to the Court, because the law’s purpose was to discredit the theory of evolution because of its apparent inconsistency with the Genesis account of creation, the statute violated the Establishment Clause.⁶² To ascertain this purpose, the Court looked at the “historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution,”⁶³ as well as the law’s legislative history, which “reveals that the term ‘creation science,’ as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind.”⁶⁴ The Court also noted that the statute and its sponsor selected only one scientific theory, evolution, that could not be taught without the curriculum fulfilling the balance-treatment condition.⁶⁵ It turns out, not coincidentally, that evolution is the one theory that many citizens, including the law’s sponsor, maintain is uncongenial to their religious beliefs.⁶⁶ But, the Court held, the Constitution “‘forbids *alike* the preference of a religious doctrine or the prohibition of a theory which is deemed antagonistic to a particular dogma.’”⁶⁷

III. WHAT’S THE DIFFERENCE?

In the second set of cases—those concerning school prayer and curriculum—religious speech is restricted because the government may not endorse a religious viewpoint, even if the viewpoint happens to be integral to the lives of many citizens that the government represents. But as we saw in the first set of cases, those involving viewpoint discrimination, the government may not target religious speech for special burdens because religious speech is, in fact, not special. When, for example, a state university designates space for a limited public

⁶⁰ *Edwards*, 482 U.S. at 581.

⁶¹ *Id.*

⁶² *Id.* at 603-04 (Powell, J., concurring).

⁶³ *Id.* at 590.

⁶⁴ *Id.* at 592.

⁶⁵ *Id.* at 589.

⁶⁶ *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

⁶⁷ *Id.* at 593 (quoting *Epperson*, 393 U.S. at 106-07).

forum, it can no more prohibit the Young Democrats from using that space than it can prohibit InterVarsity Christian Fellowship from doing the same.⁶⁸ It seems then that there is something distinct in the second set of cases that warrants government prohibition that is absent from the first set.

One distinction, of course, is that, in the first set, the government merely provides the venue in which contrary points of view may be advanced by private parties, whereas, in the second set, the government is the actor. But that does not quite answer the question as to what it is about *religion* that accounts for the differing treatment of religious speech between the two sets of cases. After all, the same public-school teacher who is free to instruct her students on chemistry or literature cannot lead them in prayer or teach them creationism, even if approved by her government employer. So, there must be something about religion qua religion that earns this exclusion.

ANALYSIS

I. THE TWO SOVEREIGNS THESIS

If one looks carefully at the second set of cases described above, what stands out religiously are three features: (1) sacred liturgy, (2) a transcendent source of being, and (3) obedience to the divine. The first feature involves the ceremonies, prayers, celebrations, symbols, wardrobes, postures, texts, and rituals that are often integral to religious traditions.⁶⁹ Think, for example, not only of the prayers and Scripture readings required in the statutes struck down in *Engel* and *Abington School District*, but also the restrictions the states placed on how these activities were to be conducted so as to ensure that no student or teacher was coerced to engage in a bodily movement or wear a particular garb they did not freely choose.⁷⁰ The assumption here is that these activities, as typically practiced in houses of worship, are usually accompanied with special accoutrements and postures that

⁶⁸ *Widmar*, 454 U.S. at 274 (internal citations omitted) (“[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy ‘would no more commit the University . . . to religious goals’ than it is ‘now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,’ or any other group eligible to use its facilities.”).

⁶⁹ See, e.g., *Engel*, 370 U.S. at 430-32.

⁷⁰ See *id.* at 438 (Douglas, J., concurring).

communicate some sacramental truth. But there is also a sacredness about them for the devout. Recall Justice Black's claim in *Engel* that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate,"⁷¹ or Justice Kennedy's assertion in *Weisman* that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."⁷² These comments are reminiscent of the sort of thinking one finds in Justice Harry Blackmun's dissent in *Lynch v. Donnelly*, a case in which the Supreme Court held that a Christmas nativity scene sponsored by a local municipality did *not* violate the Establishment Clause:

The import of the Court's decision is to encourage use of the crèche in . . . a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the crèche, I dissent⁷³

The second feature—a transcendent source of being—refers to God, the creator and sustainer of all that exists, the First Cause of all contingent reality who may have revealed himself through a sacred text and special individuals and events throughout human history. We see this clearly in the creationist cases, though it is found in the prayer cases as well. In the creationist cases, the states of Arkansas and Louisiana lose precisely because the laws in question either imply or affirm that public education science curricula ought to be informed by the belief that a transcendent source of being has specially revealed how he created the world.⁷⁴ Ironically, by treating God as a rival hypothesis to neo-Darwinian evolution, the supporters of these laws may actually be treating God more like another being in the universe rather than a transcendent source of being, or so I argue elsewhere.⁷⁵

The third feature—obedience to the divine—refers to what constitutes a right relationship with that transcendent source of being. This is the essence of the Regents' Prayer in *Engel*, "Almighty God,

⁷¹ *Id.* at 432 (quoting MADISON, *supra* note 7, at 187).

⁷² *Lee*, 505 U.S. at 589.

⁷³ *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting).

⁷⁴ See *Epperson*, 393 U.S. at 106-08; *Edwards*, 482 U.S. at 603-04.

⁷⁵ See FRANCIS J. BECKWITH, *TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH* 139-171 (2015); FRANCIS J. BECKWITH, *NEVER DOUBT THOMAS: THE CATHOLIC AQUINAS AS EVANGELICAL AND CATHOLIC* 59-86 (2019).

we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”⁷⁶ Imagine if the New York Regents had merely required that students at the beginning of each day communally express gratitude for their parents, teachers, and country without any mention of God or our dependence on him. To be sure, some citizens would likely object to this policy based on free speech grounds if a student could not opt out of the exercise, as was the case with the compulsory Pledge of Allegiance statute struck down in *West Virginia State Board of Education v. Barnett*.⁷⁷ But, unlike the Regents’ Prayer, an exercise of gratitude would not violate the Establishment Clause because it does not address obedience to the divine, even if it was later discovered that both the praying students and the gratitude-cultivating students experienced the same psychological degree of pride and thankfulness as a result of their exercises. What makes government-guided prayer special and verboten is what is absent from government-guided cultivation of gratitude: obedience to God.

What makes religion special in these Establishment Clause cases is that its adherents claim that there is a transcendent source of being to whom they owe obedience and who has specially revealed to them liturgical practices and other truths that are sacred and ought to be followed. Although separated from us by over two centuries and holding differing views on the propriety of religious establishment, leading voices in the early American founding recognized this reality about the religious lives of the nation’s citizens.⁷⁸ This is why they grounded *religious liberty* in a citizen’s conscientious duty to God.

⁷⁶ *Engel*, 370 U.S. at 422.

⁷⁷ *W. Va. St. Bd. of Ed. v. Barnett*, 319 U.S. 624, 642 (1943).

⁷⁸ Some at the American Founding, such as Patrick Henry, defended the idea of an established church, though they did not think this was inconsistent with religious liberty. They thought that as long as the state did not coerce a citizen to worship contrary to his conscience, it was permissible for a state to recognize one or several churches to be worthy of support through taxation. See, e.g., *Barnes v. Inhabitants of First Parish in Falmouth*, 6 Mass. 401 (1810). This case involved a Universalist minister, Thomas Barnes, who challenged a Massachusetts constitutional provision that allowed for local governments to provide financial assistance to Christian ministers through taxation. Because Universalism was not an incorporated religious society, the Reverend Barnes and his congregants were taxed but he received no remuneration. The Supreme Judicial Court ruled against Barnes, arguing that as long as the state does not compel him to “attend any religious instruction, which he conscientiously disapproves, and that he is absolutely protected in the most perfect freedom of conscience in his religious opinions and worship,” he is not harmed simply because a majority of his fellow citizens thought it wise for the tax system to support ministers they believed advance the common good. *Id.* at 408.

The logic of some of the early state constitutions bear this out.⁷⁹ Consider first the 1780 Constitution of Massachusetts:

It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.⁸⁰

Similar reasoning appears in the New Jersey Constitution of 1776:

That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.⁸¹

Further, in *A Memorial and Remonstrance*, a pamphlet written to oppose a Virginia property tax scheme to support Christian clergy, James Madison articulates a defense of religious liberty that ties it to obedience to the transcendent source of being:

Because we hold it for a fundamental and undeniable truth, “that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.⁸²

⁷⁹ See MASS. CONST. of 1780, art. II; N.J. CONST. of 1776, art. XVIII.

⁸⁰ MASS. CONST. of 1780, art. II.

⁸¹ N.J. CONST. of 1776, art. XVIII.

⁸² MADISON, *supra* note 7, at 184 (quoting Virginia Declaration of Rights, § XVI (1776)).

Madison frames this duty as taking precedence over temporal obligations one may have as a member of civil society.⁸³ He writes: “Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe.”⁸⁴ For this reason, the point of any law or constitutional provision to protect religious liberty should be to ensure that there are as few conflicts as possible between a citizen’s duties to each sovereign, God and the State. I refer to two sovereigns, because, for Madison, a key component to preserving religious liberty is for the state to acknowledge that there is an aspect of human life, religious belief and practice, that falls outside the scope of its jurisdiction: “We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”⁸⁵ This thinking finds its way into American law in a variety of cases, but most especially in those involving ministerial exceptions,⁸⁶ church autonomy,⁸⁷ and parental rights.⁸⁸ As the Court noted in one of these cases: “‘It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.’”⁸⁹

As should be evident, the TST depends on a kind of epistemic modesty arising from the nature of religious disagreement. Recall

⁸³ *Id.* at 185.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *DeMarco v. Holy Cross High Sch.* 4 F.3d 166 (2d Cir. 1993); *Orr v. Christian Brothers High Sch., Inc.*, No. 21-15109, 2021 WL 5493416 (9th Cir. Nov. 23, 2021).

⁸⁷ See *Watson v. Jones*, 80 U.S. 679 (1871); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church of Am.*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 715 n. 8 (1976) (quoting *Watson*, 80 U.S. at 729 (“‘It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.’”)).

⁸⁸ See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the state; those who nurture him and direct his destiny have the right*, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce*, 268 U.S. at 535 (emphasis added). “[T]he Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.” *Yoder*, 406 U.S. at 233.

⁸⁹ *Serbian Eastern Orthodox Diocese*, 426 U.S. at 715 n. 8. (quoting *Watson*, 80 U.S. at 729).

that, for Madison, our religious duty to God “‘can be directed only by reason and conviction’” and thus should be left to each person’s “conviction and conscience.”⁹⁰ But this implies that on the question of one’s duty to God, reasonable citizens, just as intelligent, informed, and conversant with the facts, will come to different conclusions about what constitutes a right relation to God.

Suppose, for example, that I am convinced that the Catholic doctrine of transubstantiation is philosophically defensible, consistent with the pre-Reformation teachings of the Christian churches, and that those who disagree with this conclusion are mistaken.⁹¹ But when I reflect more deeply on the matter, I not only realize that I have many very smart Protestant friends who are convinced I am wrong and marshal the arguments to try to prove it, I also realize that my convictions do not arise merely from the conclusion of an airtight syllogism. I am, after all, duty bound to accept the doctrine, even if I do not have any philosophical or historical arguments that are completely convincing. My conscience, formed by my religious training, tells me that I must accept the teaching as a matter of obedience to a transcendent authority. But the content of my conscience is not something I explicitly choose like a pair of slacks tailored to my specifications. There is a sense in which my conscience chooses me.

Madison seems to have understood this complex and dynamic interaction between reason and conviction in the soul of the believer. Perhaps this is why he warns his audience that if they engage in religious coercion, they may be tempting the judgment of God:

Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.⁹²

⁹⁰ MADISON, *supra* note 7, at 184 (quoting Virginia Declaration of Rights, § XVI (1776)).

⁹¹ I have in fact made this argument in two places. See Francis J. Beckwith, *Transubstantiation: From Stumbling Block to Cornerstone*, THE CATHOLIC THING (Jan. 21, 2011), <https://www.thecatholicthing.org/2011/01/21/transubstantiation-from-stumbling-block-to-cornerstone/>; Francis J. Beckwith, *A Journey to Catholicism* in JOURNEYS OF FAITH: EVANGELICALISM, EASTERN ORTHODOXY, AND ANGLICANISM 81, 99-103 (Robert L. Plummer ed., 2012).

⁹² MADISON, *supra* note 7, at 186.

II. THINKING THROUGH THE TWO SOVEREIGNS THESIS

As I noted in my introductory comments, I contend that the RNS view is an eliminative theory that, by its very nature, obscures from our vision those aspects of religious belief and practice that the religion's adherents recognize as central to their faith. To show why this is so, I review three religious liberty claims—one involving a conflict between a major corporation and federal civil rights law, a second concerning public education and the wearing of a sacred object, and the last involving a conflict between a local vendor and state anti-discrimination law. These claims illustrate why the TST, in comparison to the RNS view, has better explanatory power in accounting for the nature of the conflicts in these cases.

A. *The Case of Ms. Pious*

Imagine that Ms. Pious, a young Muslim woman, applies for a sales position at a large clothing retailer. The retailer offers her the job under the condition that she must not wear her headscarf because it does not reflect “the look” the corporation wants to convey to the buying public. She tells the retailer that she must wear it because it is her religious duty to do so, that if she does not wear it, she will be disobedient to what she believes is a divine command. She also points out that, for her, the headscarf is not merely a piece of desirable clothing but represents to the world her convictions about devotion and piety. The retailer, nevertheless, withdraws its employment offer. Ms. Pious then files a lawsuit against the retailer alleging religious discrimination.

In the real life case of *Equal Employment Opportunity Commission v. Abercrombie & Fitch*, a young Muslim woman named Samantha Elauf was victorious before the Supreme Court.⁹³ The Court held that Abercrombie had run afoul of Title VII of the 1964 Civil Rights Act, as amended, which asserts that employers cannot “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”⁹⁴ Since the

⁹³ *Equal Emp. Opportunity Comm’n v. Abercrombie & Fitch*, 575 U.S. 770, 775 (2015).

⁹⁴ *Id.* at 771 (quoting Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

law defines religion to “includ[e] all aspects of religious observance and practice, as well as belief” and requires that businesses reasonably accommodate their employees’ religion,⁹⁵ Abercrombie could not argue that, because the wardrobe requirement was applied to all employees equally, Ms. Elauf was not specially singled out for religious discrimination.⁹⁶ For the purpose of the Act was, in fact, to recognize something special about religion that requires extra protection from the government.

Under the RNS view, however, it is difficult to justify the Act or the Court’s ruling. Eisgruber and Sager, for example, in advancing their version of RNS, which they call “Equal Liberty,” state, “[o]ur theory depends upon the idea that the state must not discriminate between religious conviction and comparably serious secular convictions; it does not depend on the idea, which is manifestly false, that religious convictions are comparable to any secular conviction or impulse, however frivolous”⁹⁷ To illustrate their point, they use several examples, one of which is a 1999 New Jersey Free Exercise case in the Third Circuit involving two Muslim police officers who served in a department that required all of its officers to be clean shaven.⁹⁸ Because the Muslim officers could not, for religious reasons, shave their beards, they requested an exemption, but were denied.⁹⁹ It turns out, however, that the department had given exemptions to officers who suffered from a skin condition called pseudo folliculitis barbae.¹⁰⁰ For this reason, the Third Circuit held that because the department allowed for exemptions for secular reasons, it could not deny exemptions for religious reasons.¹⁰¹ According to Eisgruber and Sager, “[w]hen, as in the Newark police case, . . . the government has already accommodated secular needs *that are plainly analogous to a religious one*, it is easy to recognize a failure of equal regard.”¹⁰²

Because Ms. Elauf’s quandary involves a similar conflict between corporate rules of personal appearance and an employee’s religious

⁹⁵ *Abercrombie & Fitch*, 575 U.S. at 771-72 (quoting 42 U.S.C. § 2000e(j)) (internal quotation marks omitted).

⁹⁶ *Abercrombie & Fitch*, 575 U.S. at 775.

⁹⁷ EISGRUBER & SAGER, *supra* note 1, at 101.

⁹⁸ *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360-61 (1999).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 367.

¹⁰¹ *Id.*

¹⁰² EISGRUBER & SAGER, *supra* note 1, at 91 (emphasis added).

beliefs, Eisgruber and Sager would probably say that a “plainly analogous” case to Ms. Elauf’s would be one in which a prospective employee is offered employment despite the fact that she would not remove a headscarf she is required to wear for health reasons.¹⁰³ Whatever virtue such comparisons may have in helping a jurist to detect public or private unfairness, it seems to diminish the significance that Ms. Elauf attributes to her wardrobe. She is, after all, wearing the headscarf because she believes it is commanded by God and it represents her convictions about devotion and piety.¹⁰⁴ If she had told Abercrombie that she needed to wear the headscarf because her and her husband had agreed that each would always dress modestly in public, that reason, by itself, would be no more analogous to a religious claim than would an appeal to the headscarf’s alleged medicinal effects.¹⁰⁵

An analogy is supposed to play a heuristic role in discovery or problem solving. Nobody says, for example, that religion is like Texas football; they say the reverse. But in this case, the use of an analogy does just the opposite. It eliminates from our vision what is at the core of Ms. Elauf’s complaint: she believes she has a duty to a transcendent sovereign.

B. *The Case of Mr. Cross*

Mr. Cross is an eighth grader attending a public middle school that has had its share of gun violence over the years. For this reason, the school strictly forbids students from carrying weapons or wearing any clothing or accoutrement that depicts physical violence. It is one of the many rules in the school’s safety policies. This rule is non-ideological in both its text and its application, meaning that the rule is

¹⁰³ Although the Newark police case was a Free Exercise case and the Abercrombie case was statutory, my point here is to show why the use of secular analogies to religion can be less than illuminating.

¹⁰⁴ See *Abercrombie & Fitch*, 575 U.S. at 775.

¹⁰⁵ See EISGRUBER & SAGER, *supra* note 1, at 113 (Interestingly, Eisgruber and Sager address the possibility of a reverse scenario: “But the fact that the government accommodates religious needs does not automatically generate a constitutional claim that it must accommodate health needs. Because health needs are shared by religious and nonreligious people, there is no reason to suppose that government will discriminate against them by virtue of their nonreligious character.” But that would precisely be the case if Abercrombie, by strictly following the Civil Right Act, had denied employment to Ms. Elauf if she needed to wear the head scarf for medicinal reasons but not if she needed to wear it for religious reasons.).

neutral and generally applicable. All students, regardless of political, cultural, or socio-economic background, are treated equally.

From a devout Catholic family, Mr. Cross wears around his neck a chain from which dangles a two-inch crucifix, which Mr. Cross displays outside his shirt for all the world to see. Because the crucifix depicts a dying innocent man nailed to a Roman cross undergoing excruciating pain, a few students complain to the principal, Mr. Equity, that Mr. Cross is violating the school's safety policy.

Mr. Equity convenes a meeting with Mr. Cross and his parents. The Crosses explain to Mr. Equity that the crucifix worn by their son cannot be descriptively reduced to a mere "depiction of violence." For the crucifix is a sacred object that represents the inexhaustible love of God for the whole human race. Mr. Equity, though not unsympathetic to the Crosses' concerns, tells the family that he cannot carve out an exemption for them, for to do so would be unfair to those students who want to display depictions of violence for deeply held (and often noble) political, social, or personal reasons.¹⁰⁶ But by treating all deeply held beliefs as equally "religious," Mr. Equity renders Mr. Cross' crucifix indistinguishable from the sort of shocking iconography one finds among political and social activists. Although the crucifix gets rebranded from sacred object to provocative trademark, the result, we are told, is "equal liberty."¹⁰⁷

Now consider the real life case of *Cheema v. Thompson*¹⁰⁸ which concerned three middle-school Sikh students in California who were prohibited under a state "no weapons" policy from wearing the traditional kirpan,¹⁰⁹ a ceremonial knife Sikhs are required to wear as part of their religious practice.¹¹⁰ The three students filed suit in federal district court requesting a preliminary injunction against the enforcement of the ban based on their right to religious free exercise protected by the Religious Freedom Restoration Act (RFRA).¹¹¹

¹⁰⁶ For example, some activist students from differing perspectives may want to wear t-shirts with gruesome pictures of Soviet gulags, victims of lynching and gun violence, aborted fetuses, or the Holocaust.

¹⁰⁷ See EISGRUBER & SAGER, *supra* note 1, at 52.

¹⁰⁸ *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995); see also LEITER, *supra* note 1, at 1-4, 64-66.

¹⁰⁹ CAL. PENAL CODE § 626.10(a) (West 2014); CAL. EDUC. CODE § 48915(a) (West 2013).

¹¹⁰ *Cheema*, 67 F.3d at 884.

¹¹¹ *Id.* at 885.

Although the students eventually won their case,¹¹² the ruling is difficult to understand if one takes an RNS view of religious liberty. Leiter, for example, asks readers to imagine a scenario in which a young man from a rural background associates his cultural and familial identity with the carrying of the family knife that had been passed down to him by his father, who received it from his father, and so on.¹¹³ “A boy’s identity as a man in his community,” writes Leiter, “turns on his carrying of the family knife, for it marks his maturity and his bond with the past. There can be no doubt in this case about the conscientious obligation every boy of knife-bearing age feels to carry his knife with him, even in school.”¹¹⁴ For Leiter, it is puzzling why a Western democracy would tolerate an exemption from its school weapons laws for the Sikh boy with religious obligations but not for the rural boy with obligations that arise from a century-old family tradition, for they are “equally serious obligations of conscience.”¹¹⁵

Leiter’s puzzlement is certainly understandable if one thinks that religious duty is entirely about the psychological states of the agents—their first-person awareness of having conscientious obligations—while dismissing as irrelevant what these agents believe is the source of their obligations or whether there could be such a thing as a sacred object. Suppose, for example, that we combine both stories so that the rural boy is in fact the Sikh middle school student and thus carries with him to school two knives, the family knife and the kirpan. Would not the boy, or his parents, be able to distinguish between the two objects and tell us what would constitute a proper relationship to each of them? Would he, or his parents, not say that his obligation to wear the kirpan, a sacred object, is a religious duty that issues from a transcendent source while his obligation to carry his father’s knife, a family heirloom, is a filial duty that issues from his patrimony? Given that Sikhism teaches absolute obedience to God,¹¹⁶ would not the boy, or his parents, believe that a Sikh’s obligation to wear the kirpan is supe-

¹¹² This was before the Supreme Court held that RFRA was invalid when applied to the states. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

¹¹³ LEITER, *supra* note 1, at 1-4.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 3.

¹¹⁶ *Japji Sahib – 15th Pauree*, SIKH DARMA INTERNATIONAL, <https://www.sikhdharma.org/japji-sahib-fifteenth-pauree/> (last visited June 27, 2022) (“In this the final Mannai pauree, Guru Nanak explains what is attained by living in the state of obedience to the Divine Will.”). This is from a commentary on the Sikh scriptures from the religion’s official website. *Id.* Guru Nanak (1469-1539) was the founder of Sikhism. *Id.*

rior to his obligation to wear the family knife? Yet, under the RNS theory, we would have to say that the boy and his parents are mistaken in their judgments about the nature of their own commitments, that in fact both wardrobe requirements are actually “equally serious obligations of conscience.”¹¹⁷

Now imagine the fictional case of Mr. Nocross, a Sikh public-school teacher with rural roots. He pins on his classroom bulletin board a photograph of a kirpan right next to a photograph of the family knife. During class one day, Mr. Nocross explains to his students why both objects are deeply important to him and why he is obligated to wear them. Several students complain to the principal. They argue that if Mr. Nocross were Catholic and had placed on the classroom bulletin board a photograph of a crucifix, rather than a kirpan, there is little doubt that the school administration would see it as a likely violation of the Establishment Clause.¹¹⁸ On the other hand, no student complains about the family knife photograph. Why? For the same reason a public-school teacher can lead her students in a communal expression of gratitude and not in a communal prayer of thanks to Almighty God: the latter concerns one’s right relationship with the transcendent sovereign on which all contingent being depends, whereas the former does not.

C. *The Case of Mr. Baptist Baker*

Now let’s imagine the fictional case of Mr. Baptist Baker, owner of the Sainly Sugar Shack. He sells off-the-shelf products as well as custom-baked goods for all occasions. One day, Mr. Catholic walks into the store and asks him to design a cake for a very special event. “What event is that?” replies Mr. Baker. “My eldest son’s First Holy Communion,” Mr. Catholic answers. “He will be receiving the sacrament at St. Antonin’s Catholic Church in Arlington, Virginia.”

Mr. Baker then asks, “What type of design did you have mind?” “I was thinking of a crumb vanilla cake with blue and white frosting. But as far as design goes, I envisioned a miniature replica of the

¹¹⁷ LEITER, *supra* note 1, at 3.

¹¹⁸ See, e.g., *Lee v. York Cnty. Sch. Dist.*, 484 F.3d 687, 700 (4th Cir. 2007) (holding that a public-school teacher’s religious bulletin board postings constitute school-sponsored speech, and thus the district court was correct in its summary judgment in favor on the school district, which ordered the teacher to remove the postings because it judged them to violate the Establishment Clause).

blessed sacrament with a priest standing in front of it while giving the eucharist to a kneeling boy with his head bowed." Mr. Baker says, "I get the picture, but I have to tell you, Mr. Catholic, I really can't do it." "Why not?" "You see, I am a Baptist and I believe that what you're asking me to design is a celebration of idolatry, pure and simple. I don't mind at all designing a cake for you and your family for any other type of event. In fact, I don't mind at all selling you an off-the-shelf or non-descript designed cake for the event, but I can't use my talents to create what you're asking for." Deeply troubled, Mr. Catholic exclaims, "I see. You're an anti-Catholic bigot. I'm filing a complaint to the Arlington County Office of Human Rights for discrimination based on religion in a place of public accommodation."

Mr. Catholic files his complaint. Mr. Baker's attorney, Ms. Juris, in her written replies to the charges, argues that her client had not discriminated against Mr. Catholic because of his religion. Rather, she contends, all that Mr. Baker did was refuse service because of the nature of the liturgical rite Mr. Catholic was asking Mr. Baker to employ his gifts to help celebrate. Because she is in Virginia, Ms. Juris even quotes Thomas Jefferson: "No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."¹¹⁹ This, alas, is to no avail. The Office of Human Rights is unconvinced and issues its verdict:

The Supreme Court has recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of First Holy Communion constitutes such conduct because it is "engaged in exclusively or predominantly" by Catholics. Therefore, Mr. Baker's distinction between not serving Catholics and not cooperating with the celebration of First Holy Communion is one without a difference. But for his religion, Mr. Catholic would not have sought to celebrate his son's First Holy Communion, and but for his intent to do so, Mr. Baker would not have denied Mr. Catholic his services.

¹¹⁹ JEFFERSON, *supra* note 8.

By ignoring the liturgical significance of First Holy Communion for both Mr. Baker and Mr. Catholic, the authors of our fictional verdict are treating the event as if it were no different than other activities that are correlated with a citizen's protected status. In other words, they are not treating religion as special. But if, as we saw in the Establishment Clause cases above, "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate,"¹²⁰ that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State,"¹²¹ and that there is something deeply wrong about the government facilitating the "misuse of a sacred symbol,"¹²² then the authors of our fictional verdict erred in describing Mr. Baker's liturgical concerns in a way comparable to secular activities. Equal liberty, it seems, may lead to an injustice.

I should come clean and inform you that the imagined verdict against Mr. Baker is not entirely fictional.¹²³ I took it practically verbatim from the actual opinion of the Colorado Court of Appeals in the *Masterpiece Cakeshop* case,¹²⁴ making minimal adjustments to fit the facts of my faux story. In the actual case, Denver baker Jack Phillips refused to design a custom wedding cake for a same-sex couple

¹²⁰ *Engel*, 370 U.S. at 431-32 (quoting MADISON, *supra* note 7, at 187).

¹²¹ *Lee*, 505 U.S. at 589.

¹²² *Lynch*, 465 U.S. at 727 (Blackmun, J., dissenting).

¹²³ I have used similar illustrations in other pieces to make the same point: Francis J. Beckwith, *Up From Political Liberalism (But Not Entirely)*, in *DISSIDENT PHILOSOPHERS: AGAINST THE POLITICAL CURRENT OF THE ACADEMY* 15-17 (Tully Borland & Allan Hillman eds., 2022); Francis J. Beckwith, *Rawls' Political Liberalism and the Problem of Taking Rites Seriously: From Abortion to Same-Sex Wedding Cakes*, in *RAISED ON THE THIRD DAY: THE GARY HABERMAS Festschrift* 75-88 (W. David Beck & Michael R. Licona eds., 2020); Francis J. Beckwith, *Gotta Serve Somebody?: Religious Liberty, Freedom of Conscience, and Religion as Comprehensive Doctrine*, 32 *STUD. IN CHRISTIAN ETHICS* 176-77 (2020); Francis J. Beckwith, *Now, I'm Liberal, But to a Degree: An Essay on Debating Religious Liberty and Discrimination*, 67 *CLEV. ST. L. REV.* 156-58 (2019); Francis J. Beckwith, *Religious Belief, Religious Liberty, and the Art of Taking Rites Seriously*, *LAW & LIBERTY* (May 27, 2016), <https://lawliberty.org/religious-belief-religious-liberty-and-the-art-of-taking-rites-seriously/>.

¹²⁴ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281 (Colo. App. 2015) ("In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is 'engaged in exclusively or predominantly' by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.").

that had tried to procure his services.¹²⁵ Although he eventually won in the Supreme Court because the Colorado Civil Rights Commission had exhibited hostility toward his religious faith,¹²⁶ what was absent from every tribunal who heard Phillips' case, including the Colorado Court of Appeals and the Supreme Court, was a serious consideration of the liturgical and theological significance of weddings, even civil, non-religious ones, for citizens like Phillips.

In my own tradition, Catholicism, there are elaborate and complex rules found in canon law and its commentaries detailing if and when a civil or sacramental marriage should be recognized as valid. In the Scriptures shared by Christians from all traditions, we are told that marriage is inscribed by God in our very nature as men and women,¹²⁷ that it is analogous to the relationship between Christ and his Church,¹²⁸ that the Ten Commandments require marital fidelity,¹²⁹ and that a convert is still obligated to stay married if his or her spouse remains an unbeliever.¹³⁰ Moreover, state governments legally recognize religious weddings performed by clergy from religious traditions that maintain that such nuptial celebrations are blessed by God.¹³¹ Consequently, for Christians like Phillips, weddings, whether religious or civil, are more like bar mitzvahs and baptisms than they are like birthday parties and barbecues. This is why Phillips believed that he had a special duty to a divine sovereign not to use his gifts in a way that celebrates a ceremony that he believes is contrary to the sacred ends of the natural order created by that sovereign. In a sense, then, if

¹²⁵ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

¹²⁶ *Id.* at 1732.

¹²⁷ Genesis 2:18-25; Matthew 19:6; CATECHISM OF THE CATHOLIC CHURCH 400 (Libreria Editrice Vaticana, 2d ed., 2000) ("[T]he vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may have undergone through the centuries in different cultures, social structures, and spiritual attitudes. These differences should not cause us to forget its common and permanent characteristics. Although the dignity of this institution is not transparent everywhere with the same clarity, some sense of the greatness of the matrimonial union exists in all cultures.").

¹²⁸ Matthew 9:15; Mark 2:19; Luke 5:34; John 3:29; 2 Corinthians 11:2; Ephesians 5:25, 31-32; Revelation 19:7; Revelation 21:2, 9; Revelation 22:17.

¹²⁹ Exodus 20:17.

¹³⁰ 1 Corinthians 7:12-14.

¹³¹ See, e.g., TEX. FAM. CODE ANN. § 2.202(a)(1)-(3) (West 2015). In addition to variety of different jurists, "[t]he following persons are authorized to conduct a marriage ceremony: (1) a licensed or ordained Christian minister or priest; (2) a Jewish rabbi; (3) a person who is an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony"

the state were to compel Phillips to design the cake, it would seem to him that the state was, in the words of John Locke, compelling Phillips “to embrace a strange religion, and join in the worship and ceremonies of another Church,”¹³² for “it appears not that God has ever given any such Authority to one Man over another, as to compel anyone to his Religion.”¹³³ Under TST, this framing of the dispute makes perfect sense. But not so much under RNS, for it requires that state actors treat religious practices, actions, and events as qualitatively indistinguishable from non-religious practices, actions, and events from which some citizens claim to find deep meaning and purpose.¹³⁴

CONCLUSION

Although the TST is an important corrective to the eliminative nature of the RNS view, one can certainly raise critical questions about it. How, for example, should an advocate for the TST think about cases in which a non-religious claim of conscience is, in fact, *really* parallel to a religious one?¹³⁵ Imagine a case nearly identical to *Burwell v. Hobby Lobby*¹³⁶ in which the defendant is a family owned, closely held corporation. But in this case, the owners are not devout Evangelical Christians, like the Green Family of *Hobby Lobby*, but committed atheists, the Blue Family of Diversion Doorway,¹³⁷ who happen to hold the same beliefs about unborn human life held by the Greens. And like the Greens, the Blues oppose the federal government’s mandate that they provide in their employees’ health care plans certain forms of birth control that may result in the destruction of early embryos. The Greens, who claimed that the mandate would force them to cooperate with an act that violates their moral theology,

¹³² LOCKE, *supra* note 6, at 48.

¹³³ LOCKE, *supra* note 6, at 26.

¹³⁴ See, e.g., *supra* note 2.

¹³⁵ See, e.g., the Supreme Court’s holding in *United States v. Seeger* 380 U.S. 163 (1965), a case involving a federal conscientious objector statute that required that the objector’s opposition to war be grounded in his perceived duty to a Supreme Being as a result of religious training. The Court held that several conscientious objectors, who did not hold conventional religious beliefs, were nevertheless covered by the statute: “The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” *Id.* at 176.

¹³⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹³⁷ I first used the “the Blues of Diversion Doorway” illustration in Beckwith, *Gotta Serve Somebody?*, *supra* note 123.

successfully relied on RFRA, which states that “[g]overnment may substantially burden a person’s exercise of *religion* only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹³⁸ The Blues, apparently, cannot appeal to RFRA, since their beliefs about human embryos do not arise from a religious doctrine.¹³⁹

It is not immediately clear how the TST advocate would resolve cases like this, or even whether she ought to try to resolve them. It may be the case that the Blues are entitled to some form of conscience protection (as I indeed believe they are),¹⁴⁰ but not the sort afforded to religious believers like the Greens, since, as we have seen, beliefs arising from what one is convinced is a divine authority are qualitatively different, even if they happen to give the same answers to the same moral questions or produce similar psychological states.

As unbelief continues to grow in Western democracies,¹⁴¹ there will likely be an increasing number of citizens in those nations who do not see religious identity as a normal and integral aspect of human existence,¹⁴² as virtually all non-Westerners do,¹⁴³ and as the Ameri-

¹³⁸ Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb (West 1993) (emphasis added).

¹³⁹ By the way, there are prolife atheists. See Hemant Mehta, *Yes, There Are Pro-Life Atheists Out There. Here's Why I'm One of Them*, PATHEOS: FRIENDLY ATHEIST (Mar. 11, 2014), <http://www.patheos.com/blogs/friendlyatheist/2014/03/11/yes-there-are-pro-life-atheists-out-there-heres-why-im-one-of-them/>.

¹⁴⁰ Think, for example, of the Church Amendments that prohibit “public officials and public authorities from imposition of certain requirements contrary to [the] religious beliefs or *moral convictions*” of individuals and entities that receive any “grant, contract, loan, or loan guarantee” under certain government Acts. 42 U.S.C.A. § 300a–7 (West 2000) (emphasis added). The purpose of the Amendments was to ensure that the receipt of federal government benefits to health care workers and health care facilities not be conditioned on their willingness to perform or assist in abortions or sterilizations. *Id.* But notice that it refers to both religious beliefs *and* moral convictions.

¹⁴¹ See Michael Shermer, *The Number of Americans with No Religious Affiliation Is Rising*, SCI. AM. (Apr. 1, 2018), <https://www.scientificamerican.com/article/the-number-of-americans-with-no-religious-affiliation-is-rising/>.

¹⁴² This was a concern raised by Justice Samuel Alito in a speech he delivered in July 2022 at a conference in Rome sponsored by the University of Notre Dame Law School: “[In economically advanced countries] religious liberty is facing a different challenge . . . This challenge stems from a turn away from religion. Polls show a significant increase in the percentage of the population that rejects religion or thinks that it’s just not all that important. And this has a very important impact on religious liberty because it is hard to convince people that religious liberty is worth defending if they don’t think that religion is a good thing that deserves protection . . . The challenge for those wanting to protect religious liberty in the United States, Europe, and other

can Founders and their successors did.¹⁴⁴ For some of these skeptical compatriots, if religion is indeed special, it is only special in the same way that astrology and superstition are special: it is irrational and thus unworthy of affirmative respect.¹⁴⁵ That does not portend to a very promising future for religious liberty. For this reason, advocates of religious liberty not only have to make a case for its specialness, but also for its normality and reasonableness. But that is a project for another venue.¹⁴⁶

similar places is to convince people who are not religious that religious liberty is worth special protection. And that will not be easy to do.” Samuel Alito, Keynote Address, Notre Dame Religious Liberty Summit, Rome, Italy (21 July 2022) (transcribed by author). <https://youtu.be/uci4uni608E>.

¹⁴³ See Harriet Sherwood, *Religion: Why Faith is Becoming More and More Popular*, THE GUARDIAN (Aug. 27, 2018), <https://www.theguardian.com/news/2018/aug/27/religion-why-is-faith-growing-and-what-happens-next>; PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY 101 (3d ed. 2011); Philip Jenkins, *How Africa is Changing Faith Around the World*, TREND (July 5, 2016), <https://www.pewtrusts.org/en/trend/archive/summer-2016/how-africa-is-changing-faith-around-the-world>.

¹⁴⁴ See THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION 11-12 (2012).

¹⁴⁵ See LEITER, *supra* note 1, at 91. Although Leiter is among those who argue that religion is not rational and thus does not deserve affirmative respect, he does not think that entails that religious conscience is entitled to no legal protections whatsoever. He writes: “I have adopted throughout [this book] what seems to me the clear correct Nietzschean posture—namely, that the *falsity* of beliefs and/or their *lack of epistemic warrant* are not necessarily objections to those beliefs; indeed, false or unwarranted beliefs are almost certainly, as Nietzsche so often says, necessary conditions of life itself, and of considerable value, and certainly enough value to warrant toleration.” *Id.* at 91.

¹⁴⁶ That is exactly what I attempt to do in my book, BECKWITH, TAKING RITES SERIOUSLY, *supra* note 75.

