The Political Balance of the Religion Clauses

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When the Supreme Court held in *Employment Division v. Smith*¹ that the Free Exercise Clause does not protect religious practices from otherwise valid laws that incidentally burden those practices, it followed a particular theory of democratic politics. That some laws might unintentionally burden certain religious practices is, said the Court, an “unavoidable consequence of democratic government [that] must be preferred to a system in which each conscience is a law unto itself.”² The Court was certainly right in one sense: To claim that conscientious objection to an otherwise valid law should exempt one from that law is to claim that one’s values should prevail over the values chosen by the majority. Reading the Constitution to require such exemptions as a matter of right would indeed render each conscience a law unto itself. Although not stated explicitly, the Court’s theory of democratic politics recognizes that there will be winners and losers in the political marketplace, where value competes against value for adoption as law. So long as one is able to participate in that competition, one cannot claim a constitutional right to avoid obedience merely because one’s values were defeated by a competing set of values that one finds objectionable. Losers as well as winners are bound by the outcome of an open democratic political process.

By applying this theory of democratic politics in *Smith*, however, the Court revealed that it does not take religious values seriously as a special source of conscientious objection. In fact, neither the Justices nor commentators have articulated a theory of the religion clauses that accounts for the proper role of religion in politics. Without paying much attention to this issue, the Warren and Burger Courts read the Establishment Clause to invalidate legislation with

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1. 494 U.S. 872 (1990) (holding that general state law regarding controlled substances may be applied to sacramental use of peyote in Native American Church, and that state may deny unemployment benefits to people discharged from job for such use).

2. *Id.* at 890.

a predominant religious purpose,³ while reading the Free Exercise Clause to give individuals a *prima facie* right⁴ to exemption from laws that burden their religious practices.⁵ But this doctrine often was accused of being internally inconsistent, on the theory that religious exemptions infringe Establishment Clause values. Some scholars have defended the doctrine.⁶ Others have tried to change it: One group favors a strong reading of the Establishment Clause but opposes Free Exercise Clause exemptions,⁷ while another group supports the exemptions but also argues for a weaker reading of the Establishment Clause.⁸ Neither supporters nor critics of the doctrine, however, have demonstrated that religion is special in a way that invalidates the theory of democratic politics relied on in *Smith*. This failure allowed the *Smith* Court to conclude that there is no good constitutional reason to privilege religious values by requiring an exemption from otherwise valid law for people who hold those values.⁹ Equipped with *Smith*'s implicit predicate that religious values can compete equally with secular values in the political arena, the Rehnquist Court is in position to validate legislation backed by a predominantly religious purpose, thus accomplishing a complete inversion of prior doctrine.

This Article seeks to explain the relationship between the religion clauses in a way that accounts for the proper role of religion in politics, and in so doing offers a new defense of the embattled religion-clause doctrine of the

3. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971); see also *Edwards v. Aguillard*, 482 U.S. 578, 590-91 (1987); *infra* Part I(A)(3).

4. The right is only *prima facie* because the government's interest in universal adherence to the law in question might be strong enough to outweigh the claimant's interest in not obeying the law. Thus, a balancing test is necessary. Throughout this Article, although I refer to "exemptions," I am discussing the *prima facie* right to such exemptions. How the government's interest should be balanced against the claimant's interest is a question I shall not address here.

5. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). There is good, though not undisputed, historical evidence that the Free Exercise Clause was intended to provide religious exemptions from otherwise valid law. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (challenging McConnell's analysis). I take no position on the McConnell/Hamburger debate. Instead, my argument will be based on an interpretation of the religion clauses that fits with a widely accepted premise of liberal democratic theory as embodied in our Constitution, which I discuss briefly in the text below.

6. See, e.g., Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

7. See, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) [hereinafter Marshall, *Defense*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 7 J.L. & RELIGION 363 (1989) [hereinafter Marshall, *Case Against*].

8. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

9. *Smith* left open Free Exercise Clause challenges to laws that seek to burden religion, distinguishing such laws from laws that incidentally burden religion. See *Smith*, 494 U.S. at 877-78. This Term's Free Exercise Clause case, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992), offers the Court an excellent opportunity to invalidate an ordinance that was intended to burden religion.

Warren and Burger Courts.¹⁰ In brief, I argue that the Establishment Clause should be read to forbid enacting legislation for the express purpose of advancing the values believed to be commanded by religion.¹¹ *Precisely because religion should be excluded from politics in this way*, my argument continues, the Free Exercise Clause requires the recognition of religious faith as a ground for exemption from legal obligation. Thus, I reject *Smith's* implicit political predicate that all values may be offered for majority support to be enacted into law. If the Establishment Clause should be read to place a special burden on the role of religious values in politics, then those values should receive special treatment when they conflict with the values adopted by the legislature. Reading the Free Exercise Clause to require exemptions from law neither favors religion nor renders religious conscience "a law unto itself." Rather, these exemptions are merely the appropriate remedy for the damage that precluding religious values from grounding law causes religious people.

This political calculus of the religion clauses rests on what I believe to be a widely accepted premise of liberal democratic theory—namely, that the legitimacy of legal obligation turns, in part, on the ability of citizens to offer their values for adoption as law. Many elements of our Constitution rest on this premise: The Freedom of Speech and Freedom of the Press Clauses, the Petition Clause, and the various provisions regarding voting rights all embody our constitutional commitment to unencumbered political participation as a predicate for legitimate governmental coercion. To be sure, we accept many departures from the norm of full political participation. But to base legislation expressly on a source of value to which some citizens lack access, or to refuse to base legislation on a source of value that some citizens hold dear, is a significant exclusion that undermines the legitimacy of the government's claim to obedience.

10. Some scholars properly have suggested that Free Exercise Clause exemptions do not privilege religion but rather offset the special Establishment Clause hurdle that religion must face. But a theory of how this offset works, and how such an offset might invalidate *Smith's* implicit theory of democratic politics, has not been articulated. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 719, 729 (1992) [hereinafter McConnell, *Update*] (arguing that "the government must 'single out' religion in *both* free exercise and establishment contexts," and that supposed benefits from Free Exercise Clause exemptions "are balanced by the disadvantages to religion from the Establishment Clause"); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 329 (1991) (citing "the symmetrical character of the free exercise and establishment principles" to rebut claim that free-exercise exemptions constitute "favoritism" for religion); Sullivan, *supra* note 6, at 206 (describing the Establishment Clause as placing a "disability" on religion); *id.* at 222 ("The price of this truce is the banishment of religion from the public square, but the reward should be allowing religious subcultures to withdraw from regulation insofar as compatible with peaceful diarchic coexistence.").

11. A note about terminology: Throughout this Article, I use a variety of terms to describe the values believed to be commanded by one's religion. I refer interchangeably to religious values, beliefs, premises, and commands. Although in another essay the differences among these terms might matter, here they do not. Or at least I hope they will not matter to the comprehensibility and validity of the arguments I advance.

Both aspects of this Article address this problem. The Establishment Clause, I argue in Part I, protects against the exclusion of nonbelievers from meaningful political debate by making it unconstitutional to base law expressly on religious faith. This solution, however, excludes religious believers from full political participation. I argue in Part II that the Free Exercise Clause mitigates the effects of that exclusion. Finally, I explain in Part III why the Constitution should not be read to require exemptions for claims of secular conscience.

I. THE ESTABLISHMENT CLAUSE PROSCRIPTION AGAINST ENACTING RELIGIOUS FAITH INTO LAW

My central claim in this Part is that the Establishment Clause, properly understood, prohibits enacting religious faith into law, by which I mean enacting legislation for the express purpose of advancing the values believed to be commanded by religion. Although the Court and many commentators have accepted the notion that laws must have a dominant secular purpose, there is still considerable controversy over the role of religious values in animating the passage of law. I first discuss, in Part I(A), what makes religious values different from secular ones and justifies at least their partial exclusion from the political process. I focus on what seems to be their chief distinguishing characteristic—their reference to an extrahuman source of value. Basing law expressly on values whose authority cannot be shared by citizens as citizens, but only by those who take a leap of faith, excludes those who do not share the faith from meaningful participation in political discourse and from meaningful access to the source of normative authority predicating law. Requiring that secular analogues be found for religious values, and demanding that the secular purpose be dominant rather than merely present and express rather than merely plausible, ensures that political debate remains a discussion of politics and not religion, and hence that nonreligious people have meaningful access to the terms of the political debate. I next seek to explain, in Part I(B), why legislation that accommodates religious practices does not violate the Establishment Clause as I read it. Finally, in Part I(C), I address some important objections to my view of the role of religious values in politics.

A. *The Special Problem Posed by Religious Faith: Reference to an Extrahuman Source of Value*

Under current Supreme Court doctrine, the Establishment Clause is violated if legislation is backed by a “dominant motive to impose or promote

a particular religious view."¹² But the role of religious purpose in the Court's Establishment Clause jurisprudence appears open to question,¹³ and the proper relationship between religious values and political outcomes is hotly debated in the academy. Although they differ significantly over questions of degree, Franklin Gamwell,¹⁴ Kent Greenawalt,¹⁵ Stephen Pepper,¹⁶ Michael Perry,¹⁷ and Kathleen Sullivan¹⁸ all have supported the view that it is improper to enact legislation for a religious purpose. Steven Smith,¹⁹ David Smolin,²⁰ and (to a somewhat lesser degree) Michael McConnell²¹ have taken the contrary view.

12. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 245 (1988); see *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Epperson v. Arkansas*, 393 U.S. 97 (1968). In these cases invalidating legislation under the Establishment Clause, the Court has variously identified the problem as being that of a religious reason, justification, purpose, motive, objective, or intention. I will generally refer to a law's "purpose." See *infra* Part I(A)(3) (discussing these cases).

13. See *County of Allegheny v. ACLU*, 492 U.S. 573, 655-63 (1989) (Kennedy, J., concurring and dissenting); *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting). It is unclear whether Justice Kennedy's views have shifted between *Allegheny* and the recent *Lee v. Weisman*, 112 S. Ct. 2649 (1992), in which he wrote the Court's opinion holding unconstitutional a prayer at a public-school graduation. *Lee* indicates that Kennedy is especially concerned about coercion in the school-prayer setting, a concern that would not carry over to many of the problems I discuss here.

14. See Franklin Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIGION 325, 338-39 (1984) (arguing that it is permissible to introduce religious convictions into public debate, so long as those doing so "defend their convictions by appeal to considerations that can be assessed by all members of the public").

15. See GREENAWALT, *supra* note 12, at 16-21 (saying that government may not "directly aim" at furthering religious beliefs); *id.* at 20 (noting that law must "rest on some secular objective").

16. See Stephen Pepper, *A Brief for the Free Exercise Clause*, 7 J.L. & RELIGION 323, 332 (1989) ("The establishment clause makes sense . . . as a guarantor of secular government.").

17. See MICHAEL J. PERRY, *LOVE AND POWER* 105-12 (1991). According to Perry, "public accessibility" is a prerequisite to ecumenical political dialogue, which can include religious as well as secular values. Perry would preclude appeals based on experiences, premises, people, or institutions that have authority only within the confines of a religious community. The Establishment Clause, he says, forbids endorsement of a particular religious faith, and proper ecumenical political dialogue depends on translating religious faith into secular premises.

18. See Sullivan, *supra* note 6, at 197 (arguing that Establishment Clause sets up "affirmative 'establishment' of a civil order for the resolution of public moral disputes"); *id.* at 197-98 ("Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms. Religious grounds for resolving public moral disputes would rekindle inter-denominational strife that the Establishment Clause extinguished."); *id.* at 198 ("Public affairs may no longer be conducted as the strongest faith would dictate. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be.").

19. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991) [hereinafter Smith, *Rise and Fall*]; Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989) [hereinafter Smith, *Separation*].

20. See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (reviewing PERRY, *supra* note 17).

21. See McConnell, *Update*, *supra* note 10, at 738-41. McConnell supports less clearly than Smith and Smolin the view that laws may be enacted to advance religious faith, without the need to find any secular analogues for religious values. In addition to the writings I discuss in Part I(C)(2), McConnell has also written that requiring "a secular purpose for all government action" is "right and proper," and that "[t]he absence of a strong secular justification" might be evidence of a program favoring religion. McConnell, *supra* note 8, at 128, 144.

Two issues are crucial to this debate: whether religious values are different in kind from secular values, and, if so, whether that difference should matter for Establishment Clause analysis. As Sanford Levinson puts the question,

Why doesn't liberal democracy give everyone an equal right, without engaging in any version of epistemic abstinence, to make his or her arguments, subject, obviously, to the prerogative of listeners to reject the arguments should they be unpersuasive (which will be the case, almost by definition, with arguments that are not widely accessible or are otherwise marginal)?²²

Unless religious belief is different from secular belief in a relevant way, we cannot logically exclude religious premises from grounding law unless we wish to exclude secular premises as well.

1. *The Uniqueness of Religion*

Three standard efforts to distinguish religious belief from secular belief stress that religion is divisive, that religion relies on a source of authority other than the state, and that religion is not provable. But each of these arguments proves too much; in each case, secular as well as religious belief appears to fit the criterion.²³ There is a fourth criterion, however, that distinguishes the two

22. Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2077 (1992) (reviewing PERRY, *supra* note 17); see also Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 995 (discussing possibility of "a liberal politics that would acknowledge and genuinely cherish the religious beliefs that for many Americans provide their fundamental worldview," in part by "meeting policy proposals on their own grounds, rather than dismissing them because of the religious motivations of their supporters").

23. Thus, consider: (1) "Religion is divisive." To be sure, religion often has been divisive, leading to sectarian conflict and persecution. But there also have been many divisions over political values not considered religious, and many of these divisions also have caused strife. The organized nature of some religions might make it more likely that groups of people will have power to act against dissenters, but there are plenty of organized nonreligious groups that take controversial political positions.

Now, consider: (2) "Religion is based on an authority that competes with civil authority without being accepted by all as an authority." It is true that for many, religion is not merely a choice but a compelling source of authority that one feels obliged to follow. See, e.g., JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 298, 299 (Robert A. Rutland et al. eds., 1973); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 791 (1986); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 778 (1986); McConnell, *supra* note 5, at 1497; Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 993 (1986). But it is no less true that many holders of secular beliefs feel equally obligated by the force of those beliefs to obey them, even if their injunction conflicts with that of the state. See MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY 98-106 (1968); Garvey, *supra*, at 792-97; Marshall, *Case Against*, *supra* note 7, at 387.

Finally, consider: (3) "Religion is ultimately based on faith, which is nonprovable." As Michael McConnell has explained, one of the reasons the Framers chose to protect religious and not secular conscience was the notion that religious faith is special because incapable of proof. McConnell, *supra* note 5, at 1498. Though this notion may have animated the Framers, Kent Greenawalt and Michael Perry devote substantial portions of their books dealing with religion and politics to rebutting the idea. See GREENAWALT, *supra* note 12, at 63, 65, 146-56; PERRY, *supra* note 17, at 55, 84, 94-95, 120-21. According

sorts of belief, and that is widely accepted by scholars as providing a coherent definition of "religion." After I describe and defend this criterion, I will show why it should matter for Establishment Clause analysis.

Although secular as well as religious belief might be divisive, might rely on a nongovernmental source of authority, and might not be provable, only religious belief involves reference to an extrahuman source of value, of normative authority.²⁴ To be sure, I am defining "religious belief" in this way; I do not purport to divine a "natural" meaning of "religious belief." But there is reason to think that when most people speak of "religion," they are thinking of some such "reference out," some such reliance on a source of normative authority that is not based solely on human reason or experience. By far the most common criterion mentioned by scholars as definitive of "religion" is a reference beyond human experience to an extrahuman source of value.²⁵

to Greenawalt and Perry, we must be radically skeptical of finding provably correct answers, in either the religious or the secular realm. At some point, both religious and secular claims are based on premises accepted as articles of faith. See also DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 76-77 (1986) (summarizing William James's statement of conditions under which it is reasonable to believe something that cannot be proven, and noting that these conditions are "applicable to both secular and nonsecular belief"); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 604 (1982) (calling it "very difficult, if not impossible, to distinguish transcendental ideologies from those commonly considered to be based on secular premises"); Marshall, *Case Against*, *supra* note 7, at 388 (observing that most types of belief and moral values—not just religious ones—have "non-rational components," and adding that "the contentions that practical reasoning leads to an understanding of reality and that morality may be understood through rational processes are themselves ultimately based on no more than their own non-rational, *a priori* assumptions") (footnote omitted); Smith, *Separation*, *supra* note 19, at 1008 (noting that "political decisions are inevitably grounded in evaluative judgments," and often "universally shared 'grounds of decision' do not appear to exist").

24. By "extrahuman source of value, of normative authority," I mean only those sources of value that go beyond the personal and the communal. References to moral categories derived from reason and human experience (including the experience of the natural world) are, by this definition, intrahuman rather than extrahuman. I understand that for some, religion is just as "human" as any other form of belief; that is, what characterizes their religious belief is not a leap of faith to an extrahuman source of value, but a set of inferences derived from human experience. See, e.g., Carter, *supra* note 22, at 992-93. Whether the Establishment Clause prohibits express political reliance on such "intrahuman" religious belief, and accordingly whether the Free Exercise Clause provides exemptions for such believers, are difficult questions that I do not address here. Cf. text accompanying notes 25-28. For purposes of the analysis in this Article, because I am using a commonly accepted definition of religion and am not seeking to prove that this definition exhausts the category "religion," it seems safe to agree with Kent Greenawalt that although some claim their religious convictions are intra- rather than extrahuman, most religious belief rests on "elements that are not subject to reasoned interpersonal evaluation." Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019, 1032 (1990).

25. See, e.g., PERRY, *supra* note 17, at 70-72 (saying that religion involves "[a] set of beliefs about how one is or can be bound or connected to the world—to the 'other' and to 'nature'—and, above all, to Ultimate Reality," and that this Ultimate Reality is "beyond all thought and speech"); George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1520 (1983) (arguing that founders equated religion with theism); Garvey, *supra* note 23, at 792-97, 798-801; Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 678 (1992) ("Religious belief in the Western tradition centers on a transcendent force or belief—that is, a force or belief beyond the material, phenomenal world."); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 805 (1984) (asserting that the "most plausible single-factor approach to religion is one that is based on 'higher reality' in some broad sense"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 240, 285-86 (1989) (identifying key to religion as "the role that a sacred or transcendental reality plays in imposing obligations upon the religious

One might object at the outset that the very act of defining "religion" raises Establishment Clause problems, for there are some people who deem their beliefs "religious" regardless of whether those beliefs would commonly be considered religious or whether those beliefs refer to an extrahuman source of value.²⁶ On this view, any definition of "religion" for First Amendment purposes that excludes what some consider to be "religion" improperly discriminates among religions. An initial and obvious problem with this position is that the religion clauses use the word "religion" and say that it may not be established and that its free exercise may not be prohibited. Barring interpretation of the term "religion" risks negating the Establishment and Free Exercise Clauses as barriers to governmental action, for we would have no way of knowing when such action is legitimate and when it is not. In assessing the argument that each citizen should be the judge of whether her beliefs are "religious," consider how odd it would be to say that each individual claimant could decide whether her behavior is "speech" under the Freedom of Speech Clause, or whether her compensation is "just" under the Takings Clause.

But I do not wish to argue that the coverage of the religion clauses is exhausted by beliefs that refer to extrahuman sources of value. For example, there might be reasons to invoke the Establishment Clause if a group that looks, talks, and sounds like a traditional religion seeks government funding for worship services, even if the object of the group's worship is not

faithful," and asserting that "[a]lthough not necessarily bound by any theistic precept, religious duties must be based in the 'otherworldly' or the transcendent"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) ("[A]ny belief about God, the supernatural, or the transcendent, is a religious belief."); McConnell, *supra* note 5, at 1493 & n.430 (describing Madison's view of religion as retaining a "distinction between transcendent authority and personal judgment," and arguing that "[t]he historical materials uniformly equate 'religion' with belief in God or in gods, though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms"); McConnell, *supra* note 8, at 172-73 ("The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole."); Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 191, 195 (James E. Wood, Jr. & Derek Davis eds., 1991) ("A 'secular ground' (or 'secular reason') is one that does not make essential reference to a deity; a religious ground or reason does."); John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIGION 415, 418 (1989) ("From within the faith story . . . the concern is not with religion, as a set of human practices, but with God, whom these practices seek to honor."); *id.* at 423 ("[I]t is inadequate to try to manage free exercise and establishment issues by excising from the picture the concept of divine will which historically made them become issues in the first place.").

26. See *Welsh v. United States*, 398 U.S. 333, 356-61 (1970) (Harlan, J., concurring in result) (arguing that legislation recognizing only theistic religious belief as basis for statutory exemption from military draft violates Establishment Clause because not "neutral"); Marshall, *Defense*, *supra* note 7, at 310-11, 319-23; Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964) ("[A]n attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion."). For other arguments against defining "religion," though not necessarily because such definition itself violates the Establishment Clause, see Freeman, *supra* note 25, at 1565 ("There simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else."); Greenawalt, *supra* note 25, at 762 ("[F]or constitutional purposes, religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion.").

extrahuman. Furthermore, *direct* regulation of beliefs or practices or association of such a group might be thought to violate the Free Exercise Clause. In short, although I claim that the Establishment Clause prohibits enacting religious faith into law and thus provides the predicate for Free Exercise Clause exemptions for adherents to such faith, I do not claim that this calculus exhausts the jurisprudence of either of the religion clauses. My goal here is the narrower one of examining whether the Constitution ever requires exemptions from otherwise valid law for claims of conscience; my contention is that such exemptions are required only when arguments on behalf of those claims are not allowed as the ground of law, and that only references to an extrahuman source of value should be so excluded.²⁷

2. *Why Religion's Uniqueness Matters*

Basing law on an express reference to an extrahuman source of value should matter for Establishment Clause analysis because such reference effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process. Consider a law based on the maxim "you should love your neighbor as you love yourself"—a law enacting some form of Good Samaritan obligation, say. The legislature's reliance on that maxim might be based on express reference to facts about human behavior and conclusions reached about the causes and effects of such behavior. In that case, the law would not be based on a source of value beyond human experience. Although it might be hard or impossible to "prove" these conclusions and to "show" why they should lead to a particular law, at least the door is left open for dissenters to seek to alter the law based on arguments accessible to all involved. In this sense, reference to human experience can be seen as the common denominator for political debate. If, on the other hand, the Good Samaritan law were based expressly on the ground that God (or, more generally, any source of value beyond human experience) commands us to love our neighbors as ourselves,²⁸ then dissenters are left with the options of (a) converting to the relevant faith and thus gaining access to the source of values animating the law, (b) arguing with the religious believers about whether they have properly construed the commandments of their faith, or (c) persuading those believers that their faith is "false." Unless they come to share the faith, dissenters cannot meaningfully compete in the debate over how conclusions from religious faith should be enacted into law.

In other words, although secular as well as religious beliefs might not be provable, there is nonetheless a significant difference between expressly grounding law in premises accessible to citizens as citizens, on the one hand,

27. But see the caveat to this conclusion in Part II(D).

28. See *Luke* 10:25-37.

and only to those with a particular religious faith, on the other hand. It might be hard to show that some person or group should be considered "trustworthy,"²⁹ for example, but we still go about doing so by breaking down the meaning of that term and amassing evidence based on human experience, which we have in common as citizens. Even nonrational secular premises, although perhaps not strictly provable, at least operate through reference inward rather than outward. Basing law expressly on religious faith, on the other hand, involves pointing toward a source of value that people can share not as United States citizens, but only as citizens in the kingdom of the same God. When religious believers enact laws for the express purpose of advancing the values believed to be commanded by their religion, they exclude nonbelievers from meaningful participation in political discourse and from meaningful access to the source of normative authority predicated law.³⁰ They force their "reference out" on others, disempowering nonbelievers. For this reason, it is proper to insist that law be grounded expressly in sources of value accessible to citizens as citizens, not merely to those citizens who happen to share a faith in a separate, extrahuman source of authority.³¹

Some scholars have suggested that a law should withstand Establishment Clause challenge if a plausible secular purpose can be articulated on its behalf.³² Thus, laws requiring school prayer would be held to violate the Establishment Clause because their only plausible purpose is religious, while laws banning abortion would never violate that clause—regardless of the reasons actually advanced in support of the laws. The argument that a law with a plausible secular purpose should be upheld is often packaged with the

29. Cf. GREENAWALT, *supra* note 12, at 63; RICHARDS, *supra* note 23, at 76.

30. See GREENAWALT, *supra* note 12, at 216-17; see also Greenawalt, *supra* note 24, at 1031 ("There is . . . no interpersonal way in which the weight of personal experience is to be assessed. If a law were based largely on religious beliefs that were mainly confirmed by personal experiences, those who had not shared in the experience might understand why the law had been adopted, but to them, there would be no reasoned basis on which they would be able to conclude that the law was sound."); *id.* at 1035 ("If political argument were comprised largely of debate about the meaning of particular biblical passages, those who did not believe in the same kind of authoritativeness for biblical passages would be bound to feel excluded.").

31. See Ingber, *supra* note 25, at 285 ("The obligations imposed by religion are of a different, higher nature than those derived from human relationships; they are not part of the agenda of public debate."); cf. Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1077 (1986) ("Perhaps implicit in the idea of a liberal democracy . . . is an obligation of . . . an official to rely on reasons not that necessarily *are* held by all of the people, but that *could be* held by all of the people. Religious argument, to the extent that it intrinsically appeals to and includes those who share common religious presuppositions while simultaneously excluding those who do not subscribe to certain religious tenets, may very well fail this test. Religious argument may ultimately require addressees of the argument either to disagree or to give up their religious faith, in a way that secular argument in the realm of the nonrational does not. Religious decisionmaking by an official, therefore, may be of a different order than other forms of choosing between courses of action, even on nonrational grounds, and for that reason religious decisionmaking may be inconsistent with the obligations of an official in a liberal democracy.").

32. The reasons advanced for this test vary considerably. Thus, while Steven Smith urges the test as part of an argument to permit religiously backed law, see Smith, *Separation*, *supra* note 19, at 1004-05, Kathleen Sullivan—who builds a case against religiously backed law—urges the test to avoid the perils of inquiry into legislative motivation, see Sullivan, *supra* note 6, at 197 n.9.

argument that individual citizens must be able to rely on their religious values in forming political views.³³ People taking this position stress that so long as a law has a plausible secular purpose, it can be accepted even by those who don't share the relevant religious faith, while the religious believers can still rely in the political process on the religious values that they hold most dear.

I believe this argument to be an important mistake. I have no quarrel with citizens and legislators relying on their religious beliefs when they form political positions or when they decide how to vote (for laws or for representatives). The problem arises when the legislature appears to be captured by adherents to a particular religious faith—more specifically, when a law appears to have been passed because of a sectarian religious concern.³⁴ Even those who argue for sustaining legislation with a plausible secular purpose would agree that a religious sect (I use the term broadly) may not require all citizens to engage in a religious practice that is specific to that sect. A Jewish majority in a town, for instance, cannot require that all citizens light Sabbath candles on Friday night. In my view, it is just as problematic for adherents to a religious faith to forbid abortions, say, if they make clear in the relevant political fora that their reason for enacting the ban is their belief that God condemns abortion.³⁵ A nonbeliever is effectively denied participation in the political process because the nonbeliever cannot discuss the matter on the terms that the religious believers have set; the nonbeliever has no (current) access to those terms, no way of evaluating an argument made on expressly religious terms. For the same reason, however, I see no problem if the religious believers are willing to translate their religious source of value into secular terms, because then the nonbeliever perceives that she can participate in the debate.³⁶

33. See, e.g., Tushnet, *supra* note 25, at 195, 203.

34. See Greenawalt, *supra* note 24, at 1022 (arguing that legislators can rely on religious sources in forming their judgments, but that "[c]ivility and respect for minorities counsel that public advocacy be conducted in the nonreligious language of shared premises and modes of reasoning").

35. Cf. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 565-72 (1989) (Stevens, J., concurring in part and dissenting in part); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 30-33 (1992). In discussing *Roe v. Wade*, 410 U.S. 113 (1973), Laurence Tribe once suggested that the Establishment Clause should be read to invalidate legislation when "the involvement of religious groups in the political process surrounding a subject of governmental control is convincingly traceable, as it is in the case of abortion, to an intrinsic aspect of the subject itself in the intellectual and social history of the period." Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 25 (1973) (footnote omitted). Tribe has since changed his mind, stating that his prior view "appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1350 (2d ed. 1988) (footnotes omitted); see also *id.* at 1211 (criticizing strict secular-purpose requirement).

36. Michael McConnell has made a strong argument that the "no endorsement of religion" test now fashionable among some on the Court is not a workable Establishment Clause test. See McConnell, *supra* note 8, at 147-57. But to the extent that the test is helpful, it is because "endorsement of religion" is precisely what happens when a legislative majority relies expressly on its religious faith to ground law.

Imagine, for example, legislators arguing for the banning of abortions "because they're immoral." If pressed in debate, assume that the legislators explain that they (a) have observed human suffering, (b) distinguish human beings from animals because of the language abilities of the former, (c) are concerned about slippery slopes, and (d) resolve close questions in favor of preserving life. That sort of response is quite different from the response of legislators who say, "We believe in Christ as Lord, and His scriptures say that life is sacred, and therefore abortion is wrong." Nonbelievers can have a dialogue with the former legislators based on sharable observations and conclusions about human experience; with the latter legislators, a nonbeliever might reasonably feel muted by the reference to the legislators' God and the claim of authority based in an extrahuman power.

Take another example: Suppose Person A says that the oil companies run the United States and that therefore we should enact law X. Although Person A's premise might appear not based in reason, we can at least try to get to the bottom of it by examining standard sources of information about the influence of oil companies. Now suppose Person B says that Christ is God and taught Y and that therefore we should enact law Z. Nonbelievers can't try to "get to the bottom of it"; precisely because they are not believers, the premise is not currently available to them for evaluation.

Requiring that laws have an express secular purpose rather than merely a plausible one might transform the legislative process in a way consistent with the dictates of the Establishment Clause.³⁷ In some cases, the same laws will be passed that otherwise would have been passed, but pursuant to secular rather than religious argument.³⁸ In other cases, the unavailability of a strong secular argument will mean that a law will not be passed. This transformation of the legislative process will eliminate the Establishment Clause injury of excluding nonbelievers from meaningful participation in the political process. That we see so many laws passed on the basis of secular argumentation, when religious arguments no doubt are stronger in the souls and minds of many

Conversely, one might argue that certain laws are legitimate even though originally based on enacting faith into law, because now most people understand the law's dominant purpose to be secular. In these cases, the original religious purpose becomes embedded, as it were, in the long-standing practice, and the secular purpose rises to dominance. See Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1004 (1986). This is how one can justify *McGowan v. Maryland*, 366 U.S. 420 (1961), in which the Court upheld laws requiring businesses to be closed on Sunday. Central to upholding state action in this category is that the practice at issue be generally perceived today as secular rather than religious. So although Michael McConnell might be correct to state that the pretty lights on Michigan Avenue in Chicago have religious significance, that "most of us do not recognize the symbolism" is the more important observation. See McConnell, *supra* note 8, at 189.

37. Cf. John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 894-95 (1984).

38. This is similar to the administrative-law doctrine requiring remand to an agency if it relied upon an improper reason, but permitting the agency to reach the same substantive result on different grounds. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

legislators, is testament not to the fact that the Establishment Clause proscription on enacting faith into law will have little real-world effect, but rather to the fact that it is already having such an effect.

Let me explain why I have not suggested forbidding laws based on an *underlying* religious purpose as well as those based on an *expressly* religious purpose. One can imagine four different situations: (1) a law is religious on its face; (2) a law not facially religious is enacted for an expressly religious purpose; (3) a law not facially religious is enacted for an expressly secular purpose that appears to be a pretext for the real purpose, which is religious; and (4) a law not facially religious is enacted for an expressly secular purpose that does not appear pretextual, but the real underlying purpose is religious. The first three types of law should be invalid under the Establishment Clause because they foreclose meaningful political participation by nonbelievers. All three laws are, in the terminology I am using in this Article, “expressly” religious. But if religious believers can translate their “true” religious reasons successfully enough to make it appear to nonbelievers that the secular reasons are the real ones, then from the nonbelievers’ perspective, their political participation is meaningful. One might argue that to be consistent, I should condemn even type (4) laws in principle and then acknowledge that the judiciary can’t enforce this condemnation because the true reasons behind the laws will be inaccessible to it. But my Establishment Clause argument does not condemn type (4) laws. It turns not on the underlying reasons for laws, but rather on the reasons that are apparent in the political process. Invalidating type (3) laws will cover all instances in which believers think they have successfully masked their true reasons, but have not. If a religious reason can be successfully translated into a secular one—if a nonbeliever sees the secular argument as one made in good faith, and finds the ensuing debate meaningful—then the concern with exclusion from political participation is eliminated.

We can now return to Sanford Levinson’s question: In a liberal democracy, why aren’t all arguments valid in political debate, subject to the possibility that listeners will reject them (which is likely to occur if the arguments aren’t widely accessible)? The position implicit in this question reflects a misunderstanding of the role of religion in political debate. Religious arguments cannot simply be “rejected” by those who don’t share the faith of the people making the arguments. As a non-Christian, I can’t meaningfully debate with a Christian whether certain values do or do not stem from her faith in Jesus Christ. The model of political debate implicit in Levinson’s question fails to address debates that are dominated by an expressly religious position. In such instances, nonbelievers are not equal participants in the lawmaking process, for they lack access to the source of normative authority that is offered as the basis for the law they are told to obey.

3. *The Dominant Express Purpose Test and the Court's Jurisprudence*

Many laws will be expressly based not on a single religious or secular purpose but on an intertwined set of purposes, some religious and some secular. This is inevitable in a society in which most citizens claim to be religious. Merely showing that a law was expressly based in part on religious faith cannot be sufficient to invalidate that law if we accept the fact that many people are religious and reach conclusions about many issues from religious premises. But accepting the presence of expressly religious purposes for law does not require accepting laws that are dominantly based on express references to religious faith. There is a point at which the mere acknowledgment of the religious values held by many citizens slips into the establishment of those values as the basis of law. That is the line that a legislature may not cross. Thus, I would put the test this way: For a law to be upheld against an Establishment Clause challenge, the law's dominant express purpose must be secular, and any expressly religious purpose for the law must be no more than ancillary and not itself dominant.³⁹

The Court has followed this test, though without stating it clearly and certainly without explaining which characteristics of "religion" forbid religious values from being enacted into law. In *Epperson v. Arkansas*,⁴⁰ which struck down an Arkansas law forbidding the teaching of evolution in public school, the Court examined the historical context of the law's enactment and concluded, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."⁴¹ In *Stone v. Graham*,⁴² the Court summarily invalidated a Kentucky law requiring the posting of the Ten Commandments on the wall of each public classroom. The legislature had required a notation on each posting that stated, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."⁴³ The Court dismissed this notation as pretextual, concluding that the "pre-eminent purpose for [the law] is plainly religious in nature."⁴⁴ Likewise, in *Wallace v. Jaffree*,⁴⁵ the Court struck down an Alabama law authorizing a period of silence for "meditation or voluntary prayer" because it "had no secular purpose";⁴⁶ as in *Epperson*, the Court supported this conclusion with

39. For other formulations, see *Edwards v. Aguillard*, 482 U.S. 578, 590-91 (1987) (finding legislation invalid if backed by "preeminent religious purpose"); *id.* at 599 (Powell, J., concurring) (observing that "religious purpose must predominate" for legislation to be invalid).

40. 393 U.S. 97 (1968).

41. *Id.* at 107-08.

42. 449 U.S. 39 (1980) (per curiam).

43. *Id.* at 41.

44. *Id.*

45. 472 U.S. 38 (1985).

46. *Id.* at 56.

references to the context of the law's enactment, and in particular to the legislative history. Finally, in *Edwards v. Aguillard*,⁴⁷ the Court invalidated a Louisiana statute forbidding the teaching of evolution in public school unless accompanied by the teaching of "creation science." Again after examining the history of the law's enactment, the Court dismissed the proffered secular justification of promoting "academic freedom" as pretextual, concluding that the legislature's "preeminent" purpose was religious.⁴⁸

B. Accommodation of Religion

Many laws that appear to advance religion—laws exempting religious believers from otherwise valid law, for example, or distributing public funds to religious as well as public institutions—are defended as mere accommodations of religious practice. In thinking about how to resolve the "accommodation" dilemma under the Establishment Clause, we should focus on whether the legislature sought expressly to enact faith into law.

Let me begin with the category of nonmandatory legislative exemptions for religious believers—that is, exemptions that legislatures enact but that courts would not have required under the Free Exercise Clause, even before *Smith*. Such exemptions—say, from the military draft or from laws against ingesting peyote—would violate the Establishment Clause if their express purpose were religious. Indeed, some commentators have argued that such exemptions necessarily reveal a religious purpose and hence violate the Establishment Clause.⁴⁹

This argument should be rejected.⁵⁰ A legislative exemption for religion is not necessarily an affirmation of the truth of the religious faith involved. Rather, the exemption might be based on the secular ground of respect for the dilemma that would be faced by certain members of the community were they forced to choose between obeying the commands of law and obeying those of a separate font of authority. In short, the exemption might be enacted not

47. 482 U.S. 578 (1987).

48. *Id.* at 590-91.

49. See *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in the judgment), departing from *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting); Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 180-85 (1990); Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 27 (1961); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 560 (1991); Smith, *Separation*, *supra* note 19, at 991.

50. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 726-27 (1981) (Rehnquist, J., dissenting); *Welsh*, 398 U.S. at 369 (White, J., dissenting); *Sherbert*, 374 U.S. at 415-16 (Stewart, J., concurring in result); McConnell, *Update*, *supra* note 10, at 688, 717; Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990).

because of religious faith but because of toleration for a belief that happens to be based in faith.

Thus, I am somewhat perplexed that despite his analysis elsewhere supporting this position, Michael McConnell suggests in a recent article that accommodation of a religious practice through a legislative exemption "serves no 'secular' purpose," manifests a "religious reason," and may even be comparable to the anti-evolution law at issue in *Epperson v. Arkansas*.⁵¹ Although McConnell still favors permitting nonmandatory legislative exemptions, I don't see how this position (with which I agree) is advanced by claiming that the exemptions serve a religious rather than a secular purpose. Surely the religious purpose that the *Epperson* Court found troubling—the legislature's obvious desire to enact law reflecting the fundamentalist Christian belief that human beings did not evolve from apes—is different from the legislative purpose in the standard toleration-exemption case, in which the legislature accommodates a religious group out of respect for its faith rather than because the legislature is convinced that the faith is true. To claim that toleration exemptions in fact reflect a religious rather than secular purpose seems to me an unhelpful use of the term "religious."

If *Smith* were overruled or limited, courts would be back in the business of weighing governmental interest against individual interest to decide whether to compel religious exemptions from otherwise valid laws under the Free Exercise Clause. This balancing analysis might resemble the sort of analysis that a legislature considering toleration exemptions would conduct, but legislative exemptions might still be permissible even when a court would not require them under the Free Exercise Clause. For one thing, courts often defer to legislative judgment in striking such balances, in part because legislatures hold an advantage over courts in assessing the strength of governmental interests. In addition, while the legislature may not give a governmental interest more weight than a court would, it may give that interest less weight than a court would. To be sure, there might be some cases in which granting an exemption would be such a heavy and disproportionate burden on the governmental interest in universal obedience to a particular law that the argument that the legislature was merely acting out of respect for certain members of the community might appear pretextual, revealing an illegitimate purpose to advance religious faith. But to say as a categorical matter that legislative exemptions not compelled by the Free Exercise Clause reflect such a purpose is to neglect the distinction between toleration and religious purpose.⁵²

51. McConnell, *supra* note 8, at 128-31 & n.83.

52. In this paragraph, I agree with Michael McConnell, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 31; McConnell, *Update*, *supra* note 10, at 709-12, and disagree with Jonathan Nuechterlein, see Nuechterlein, *supra* note 50, at 1128-29, 1143.

The accommodation issue is not confined to the exemption cases. Legislatures often seek to benefit a particular secular interest and include religious institutions as direct or indirect beneficiaries. In *Everson v. Board of Education*,⁵³ for example, the Court upheld a statute authorizing school districts to expend funds for sending children to school on public buses, whether the children went to public schools or to nonprofit private schools and whether the private schools were secular or religious. Likewise, in *Walz v. Tax Commission*⁵⁴ the Court permitted a state to authorize property-tax exemptions to nonprofit institutions generally, including churches. In both *Everson* and *Walz*, there was no indication that the program was enacted to advance the tenets of a particular religious faith. Rather, these cases involved general legislative programs that were not related to religion, but that included religious institutions incidentally because those institutions shared a relevant nonreligious attribute with secular institutions. I do not discuss here whether and when the mere effect of benefiting a religious institution should be held to violate the Establishment Clause. My point is simply that the core Establishment Clause prohibition on enacting faith into law is not violated in these cases.⁵⁵

C. *Objections to Forbidding Laws from Having a Dominant Express Religious Purpose*

Here, I respond to the following claims: (1) that the inquiry I advocate improperly chills legislators' expression; (2) that we can distinguish laws prescribing religious practices from those dealing with secular subject matter; (3) that the Establishment Clause does not limit the values that may be used to ground law, but requires only institutional separation between government and religion; (4) that forbidding the enactment of religious faith into law implies that the offered faith is false, which is itself a religious position; and (5) that barring religious values as grounds for law improperly disadvantages religion.

1. *Inquiry into Legislative Purpose Improperly Chills Legislators' Expression.*

Steven Smith, who opposes the secularization of law, argues that overturning laws because the legislators who enacted them expressed religious

53. 330 U.S. 1 (1947).

54. 397 U.S. 664 (1970).

55. Cf. *id.* at 696 (Harlan, J., concurring); Greenawalt, *supra* note 25, at 795; Mansfield, *supra* note 37, at 878; McConnell, *supra* note 52, at 14-15; Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 395; Weiss, *supra* note 26, at 617. But see Sullivan, *supra* note 6, at 208-14.

purposes “raises a potentially serious threat to the freedom of expression of legislators who hold religious beliefs.”⁵⁶ Kathleen Sullivan, who supports the secularization of law, similarly contends that “an articulable secular rationale is all that is required; a requirement of secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators.”⁵⁷ Both Smith and Sullivan appear concerned that an Establishment Clause jurisprudence that uses legislative statements as evidence of impermissible purpose will deter legislators from speaking their minds and perhaps induce them to alter their beliefs, thus infringing upon freedom of expression and religion.

These concerns are misdirected. When we use statements as evidence of illegitimate legislative purpose, we are not punishing the speaker for the beliefs or opinions she holds. Rather, we are using the statements in a merely evidentiary fashion. The speaker can believe or speak whatever she wants without fear of punishment. If she explicitly attempts to turn her beliefs into law that will bind her fellow citizens, however, she has gone beyond mere belief or expression.

This analysis is similar to the argument supporting the use of, say, an employer’s racist statements as evidence in a job-discrimination case. An employer is entitled to believe whatever she wants about the race of her employees, and with some exceptions she also is entitled to say whatever she wants about their race.⁵⁸ But if she fires a black employee and the employee brings a race-discrimination suit, the employee may introduce into evidence statements made by the employer that indicate racial bias. The law that gives the employee a cause of action doesn’t restrict the employer’s beliefs or expression, but only the action of firing the employee illegitimately.⁵⁹ Similarly, a rule forbidding laws expressly based on religious faith doesn’t forbid adherence to that faith; it just forbids advancing that faith as the reason for law. If this forces legislators to refrain from advocating a religious purpose for legislation and to find a secular analogue for that purpose—both of which involve masking a reason for which they believe the law should be

56. Smith, *Separation*, *supra* note 19, at 994.

57. Sullivan, *supra* note 6, at 197 n.9.

58. Some lawsuits charging workplace harassment do rely directly on speech. Although the Court in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992), said without serious analysis that such harassment actions do not run afoul of the free-speech guarantee against content-based laws, there is a substantial question whether verbal-harassment actions based on statutes that single out certain attributes for protection (such as race or gender) are consistent with the reasoning in *R.A.V.*

59. It is precisely this evidentiary use of speech that distinguishes the type of hate-speech statute invalidated by the Court in *R.A.V.* from the type of hate-crimes statute improperly invalidated by the Wisconsin Supreme Court in *State v. Mitchell*, 485 N.W.2d 807 (Wis.), *cert. granted*, 113 S. Ct. 810 (1992). Hate-speech laws punish speech directly for its hateful quality; a statement about the race of the addressee is punished because of the harm that the statement itself causes. Wisconsin’s hate-crimes law, by contrast, stepped up punishments for crimes when the victim was selected on the basis of race (or other specified characteristics); a statement about the victim’s race would be used simply as evidence that the defendant selected the victim because of her race.

passed—then the Establishment Clause value of preventing the passage of law expressly based on values available only to some citizens will have been advanced.⁶⁰

2. *We Can Distinguish Laws Prescribing Religious Practices from Those Dealing with Secular Subject Matter.*

The argument for upholding laws that have a plausible secular purpose rather than insisting upon an express secular purpose can be recast as an argument for invalidating only laws that address inherently religious subjects. Thus, a law requiring the wearing of a cross would be invalid while a law banning abortion would not, regardless of the reasons advanced in support of such laws; there is no plausible secular purpose for the former law, while there are plausible secular purposes for the latter law. This argument proceeds from the premise that the central purpose of the religion clauses is to protect religious liberty and to avoid government coercion of religion. As Michael McConnell puts it, “[T]he government may not interfere with a person’s chosen religious belief and practice by prohibiting it or by exerting power or influence in favor of any faith.”⁶¹ So long as the content of a law is not inherently religious, the argument goes, no religious coercion has taken place, even if the majority that approved the law was persuaded by a religious argument.

But religious arguments for otherwise secular laws risk rendering religious both the debate over those laws and their social meaning. When a religious person argues that abortion should be banned because that is God’s will, abortion is no longer secular for her or for those who engage her on her religious terms. Its existence—and its proposed nonexistence—have been transmuted into something religious. If an anti-abortion bill is advanced for the express purpose of enacting a value believed to be commanded by religion, then abortion is a religious matter for the legislators who rely on the religious

60. Cf. Schauer, *supra* note 31, at 1075-76 (observing that Establishment Clause might be read to forbid government officials from doing things as officials that they might be permitted to do as citizens, because officials have “positional duties” that require them to rely on secular rather than religious reasons in carrying out their obligations).

61. McConnell, *supra* note 52, at 1; see also McConnell, *Update*, *supra* note 10, at 690 (noting that religion clauses protect against “two equal and opposite threats to religious freedom—government action that promotes the majority’s favored brand of religion and government action that impedes religious practices not favored by the majority”); McConnell, *supra* note 8, at 117 (“[T]he purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion.”); *id.* at 136 (“The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people.”); *id.* at 169 (defining appropriate judicial inquiry as: “[I]s the purpose or probable effect to increase religious uniformity, either by inhibiting religious practice . . . or by forcing or inducing a contrary religious practice . . . , without sufficient justification? The baseline for these judgments is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government.”).

argument and might therefore become a religious matter for those seeking to defeat the bill. Furthermore, if the bill is enacted pursuant to the religious arguments, then the legal obligations imposed by the new law become endowed with religious significance. As a result, imposing legal duties based expressly on the dictates of a religious faith does amount to "exerting power or influence in favor of [that] faith."⁶²

3. *The Establishment Clause Does Not Limit the Values that May Be Used to Ground Law, but Requires Only Institutional Separation Between Government and Religion.*

Others have maintained that the Establishment Clause was intended only to ensure separation between government and religious institutions, and that enacting law on the basis of religious faith does not threaten institutional separation.⁶³ But these categories collapse. Laws advancing faith tend—albeit insidiously, slowly, and incrementally—to establish government as a religious institution.⁶⁴ In other words, there is more than one way to establish a church. Funneling religious faith into a pattern of legal obligations and rights would, in the extreme case in which all aspects of the faith were turned into law, convert the state into the church. Of course we all agree that the government may not require worship, prayer, and the like. But *partial* establishment should be just as forbidden as complete establishment. When legislation is expressly based on religious arguments, the legislation takes on a religious character, to the frustration of those who don't share the relevant religious faith and who therefore lack access to the normative predicate behind the law. In short, to ensure that law is part of the civil government and not the church establishment, it is crucial that the express purposes for law be secular rather than religious.

62. Also, as Ira Lupu has explained, coercion does not exhaust the content of the Establishment Clause, which protects not only against laws that coerce citizens to follow a particular religion but also against laws that deliberately support some religions and not others. See Lupu, *supra* note 49, at 576-80. This value of "equal religious liberty," as Lupu calls it, *see id.* at 567, is endangered by legislation that is expressly based on the commands of a particular religious faith.

63. See Smith, *Separation*, *supra* note 19; Smith, *Rise and Fall*, *supra* note 19; Smolin, *supra* note 20.

64. Steven Smith, the primary proponent of the view that the Establishment Clause requires only institutional separation, describes the argument against his view fairly well, without (to my view) sufficiently rebutting it. See Smith, *Rise and Fall*, *supra* note 19, at 184 ("[I]f government relies upon religious beliefs in formulating public policies, the resulting policies require conformity to what some citizens may regard as religious programs or agendas. . . . Such compulsion can be viewed as imposing, at least in one important matter, a kind of compelled religion, and thus as violating the commitment to religious freedom.").

4. *Forbidding the Enactment of Religious Faith into Law Implies that the Offered Faith Is False, Which Is Itself a Religious Position.*

One might argue that all sides in a political debate in which religious values are raised necessarily take a position on the truth of those values and hence of that religion, and that therefore it is impossible to carve the legislative world into religious and secular purposes. According to this argument, if a legislator is apprised of the claim of religious truth animating a particular bill, and if the legislator votes against the bill, the legislator will have taken the position that the religious claim is false. This position, too, is religious, or so the argument goes.

I have two responses. First, the idea that rejection of a political argument based on a claim of religious truth necessarily implies rejection of that claim of truth is relevant only when the claim of religious truth is made known to the nonbelievers; I have already explained why such a claim should not be part of public political discussion to begin with. Second, it is not true that voting against a bill backed by a claim of religious faith necessarily involves taking a position on the truth of that religion. Merely being aware that a position is inconsistent with a particular claim of religious truth doesn't make that position itself religious, just as being aware that there is a secular analogue to a religious claim doesn't make that claim secular. In other words, after rational discourse, when the opponent of a bill proffered from religious faith is made aware that her position is consonant with a particular religious position (i.e., the denial of the truth of that faith), she might still justify her vote with secular arguments, not because she denies the truth of the religious faith. That she is aware of a consistency between her position and a religious position does not necessarily mean that she votes the way she does because of the religious position or that she expresses her position in religious terms. So, although David Smolin might be correct in stating that "government officials cannot act without reliance on implicit moral and factual assumptions that derive from various competing religious views,"⁶⁵ "implicit" and "derive from" are not the same as "explicit" and "are expressly meant to advance." Legislative action for the express purpose of either advancing or denying a claim of religious truth is different from legislative action for the express purpose of advancing or denying a claim that is considered secular.

What about the legislator who does vote a certain way in order to deny a claim of religious truth? "If the establishment clause is understood as barring government from sponsoring claims of truth in the domain of religion," Kent Greenawalt suggests, "then antireligious ideas may be understood as a subset of religious ideas."⁶⁶ But we must be careful to distinguish between

65. Smolin, *supra* note 20, at 1091.

66. Greenawalt, *supra* note 25, at 793 (footnotes omitted). Ned Foley has written to me in a similar

Establishment Clause and Free Exercise Clause concerns. It certainly would violate the Free Exercise Clause for a legislature to harm religion directly by seeking to deny a claim of religious truth—say, by banning religious worship services. Yet banning religious worship services would violate the Free Exercise Clause regardless of why the legislature chose to do so. The Establishment Clause is relevant as a distinct source of limitation on government because it prohibits the use of legislation to impose obligations based expressly on the affirmation of an extrahuman source of values. The relevant question here is whether a predicate such as “God doesn’t exist” could itself be the source of values animating the passage of law. But except when considering a bill that would directly harm religion (which is covered under the Free Exercise Clause), it would be odd for legislators to say: “God doesn’t exist, and so we’re going to enact the following law.” Presumably a law that denies certain religious truths would also accept other values as true, and presumably the dominant express purpose of such a law would be the advancement of those other values rather than the mere denial of the religious ones.

For example, say the federal government enacted a military draft and in doing so expressly denied that any extrahuman source of value prohibits all killing. Such a denial, though it might be an aspect of legislative purpose, could not logically be the dominant express purpose for the draft law. Instead, the dominant express purpose of the draft law presumably would involve secular arguments about the need to provide a national defense, and such arguments are not themselves “claims of truth in the domain of religion.” The imposition of legal obligations stems from the acceptance of a source of value, not from the mere denial that another source of value (extrahuman or not) exists.

5. *Barring Religious Values as Grounds for Law Improperly Disadvantages Religion.*

Finally, a religious person might object that barring her values from being enacted into law improperly excludes her from full participation in politics, for she might derive normative authority solely from her religious faith. The religious person might accept the requirement of finding a secular analogue for her religious values, if doing so permits law to coincide with what she deems the correct values. But if she considers this requirement a restriction on her political participation, then we must recognize that whether we permit or forbid religious values to ground law, someone will be excluded from full political participation: either the secular person, because she lacks access to the faith

vein that perhaps the Establishment Clause “should be understood as precluding the government’s reliance on any beliefs that lie on the plane of theology.”

enacted into law, or the religious person, because her faith has been cordoned off. In either case, it would be appropriate to offset this exclusion by requiring exemptions from law. Strictly speaking, we could try to run a system in which law could be used to advance religious faith, and in which those who do not share that faith could receive exemptions. But this approach seems odd in a nation that forbids government from making any law respecting an establishment of religion. It is more consistent with the Establishment Clause—and it allows us to give full meaning to the Free Exercise Clause, as I discuss in Part II—to bar religion from grounding law but to require exemptions for those whose religions forbid obedience to such law.

II. FREE EXERCISE CLAUSE EXEMPTIONS AS A POLITICAL COUNTERWEIGHT TO ESTABLISHMENT CLAUSE DISABILITIES

The *Smith* position against exemptions implicitly treats religious values as playing a full and uninhibited role in politics. If we insist upon a more limited role for religious values, then we eliminate the predicate for *Smith*'s aversion to Free Exercise Clause exemptions. As I show in Part II(A), if the rules of the political game set by the Establishment Clause place a special disability on religious values—a disability that is not placed on secular values—then there is a powerful case for such exemptions. The religious conscientious objector can now justifiably claim not only that her religion forbids her from obeying the law in question but also that she was excluded from seeking to enact into law the values of that religious faith. Because the person advancing religious faith as a source of value has not been treated as a full participant in the political process, the Free Exercise Clause should be construed to require at least prima facie exemptions from law's obligation. In Part II(B), I discuss how this offset between the Establishment Clause and the Free Exercise Clause works, and explain that merely permitting accommodation of religion as an act of legislative toleration is insufficient to offset the Establishment Clause burden. In Part II(C), I discuss whether Free Exercise Clause exemptions can be justified absent the predicate of an Establishment Clause burden. Finally, in Part II(D), I explain that not every value excluded from politics deserves protection from politics through exemptions.

A. *The Need for an Offset*

In the lawmaking process, we are free to make political, moral, and philosophical arguments to support our positions. But the central point of the Establishment Clause argument made above is that the lawmaking process in a nontheistic government should not involve appeals to religious faith. In fact, one principal feature that distinguishes a country like ours from theocracies is the preclusion of law based expressly on religion. Religious belief goes a step

beyond standard measures of justification for law: It involves a leap of faith to an extrahuman source of value. One can try to persuade others to take the same leap (by evangelizing and proselytizing, say), but the ultimate leap that religious argument calls for is different from what political, moral, or philosophical argument demands. Because of this difference, the latter should be part of public political justification; the former should not.

Enter the Free Exercise Clause. Lawmaking is a "contractual" process in the sense that if the political, moral, or philosophical arguments that we favor fail to attract enough support, we are bound by the resulting law even if it violates our political, moral, or philosophical sensibilities. Part of losing—of being the minority on an issue—is having to obey the law or to suffer the consequences. But precisely because we should exclude religious faith from being the express basis for law, an appeal to faith as the ground for a constitutional right of conscientious objection does not violate the "contractual" premise of obedience once one loses. The person basing a claim of conscience on faith hasn't lost the "faith argument" on the political playing field; if the process went as it should have, that argument was never allowed onto the playing field.

Sometimes the position that religious faith should be kept out of law is understood to forbid all legislative exemptions for religion.⁶⁷ On this view, we separate religion from civil government by denying it recognition as the basis either for law or for exemptions from law. This position secures a sort of facial or formal "neutrality." But if we preclude faith from being the express purpose behind law, then exemptions are required to compensate religious people for the obstacle that this disability poses to their participation in the democratic process. Just as we grant special judicial protection to discrete and insular minorities who are effectively excluded from political power,⁶⁸ and just as we enhance judicial scrutiny when legislation blocks the channels of political change,⁶⁹ so should we recognize the need for religious exemptions from laws created by a process that is closed in an important way to religious people.

Thus, the Free Exercise Clause can be seen as providing a political counterweight to the Establishment Clause. If the latter should be read to prevent law from being based expressly on religious faith, then the former should be construed to make religious faith a ground for avoiding the obligations of law. In other words, a religious person can justifiably say,

67. See Kurland, *supra* note 49, at 7; Marshall, *Defense*, *supra* note 7, at 326; Marshall, *Case Against*, *supra* note 7, at 397. But see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 11, 13.

68. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

69. For an extensive elaboration on this theme, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

"You're keeping my religion out of your politics, now keep your politics out of my religion."

This argument permits "religion" to mean the same thing in the Free Exercise Clause that it means in the Establishment Clause. That is as it should be, for the word appears only once in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁷⁰ The text strongly indicates that "religion" was meant to refer to the same thing in both clauses.⁷¹

The text also indicates that religion was meant to be special. Readings that mush religious values together with secular ones and result in a watered-down Establishment Clause ("all values may compete as the ground of law") or a beefed-up Free Exercise Clause ("secular and religious conscientious objection should be treated the same")⁷² do not take "religion" seriously as something special and different—and thus worthy of two constitutional clauses all its own. Instead, both clauses treat religion as special because it must be separate from normal politics: Just as we should reduce the role of religious faith in imposing legal obligations on those who don't share the faith, so should we expand the role of religious faith in grounding exemptions from otherwise valid laws.

Thus, although I agree with Steven Smith that "religion's truly distinctive qualities inhere . . . in its *religious* or *spiritual* dimensions,"⁷³ I disagree with him that we must therefore treat religious faith as a source of normative authority for our politics that can play a full role in grounding law. Unlike the religionists, who deem all sources of value equally part of politics, my claim is that "references out" have an (often unintentional) effect similar to children's taunts of "I know something you don't know," and should be given a reduced role in politics because of the way in which they exclude nonbelievers. On the other hand, unlike the secularists, who argue that Free Exercise Clause exemptions would unjustifiably privilege religion,⁷⁴ I take religion seriously as special here, too, and would require exemptions precisely because the premise of the no-exemptions position—that one must obey the result of politics in which one has been given full opportunity to participate—should no longer apply.

70. U.S. CONST. amend. I.

71. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting). But see RICHARDS, *supra* note 23, at 145.

72. On the latter point, see *infra* Part III.

73. Smith, *Rise and Fall*, *supra* note 19, at 219.

74. See Kurland, *supra* note 49, at 7; Marshall, *Defense*, *supra* note 7, at 326; Marshall, *Case Against*, *supra* note 7, at 397.

B. *How the Offset Works*

It might seem that exemptions are necessary only when religious arguments actually are advanced and excluded from legislative debate. But if we take seriously the exclusion of religious arguments from politics, then we have altered a religious person's ability to participate in politics across the board and not just in specific instances. In response to this wholesale exclusion of expressly religious arguments from politics, a religious person may legitimately claim exemption from laws that burden her religious practice, regardless of whether she was in fact precluded from making a religious argument in the debates that led to the particular law that is now seen as burdensome. So, for example, even if the members of the Native American Church in *Smith* did not actually participate in the debate leading to Oregon's controlled-substance laws, they should still be able to claim a *prima facie* exemption from those laws as applied to the sacramental ingestion of peyote. This result holds in part because of a counterfactual: Had those practitioners of Peyotism entered the legislative debates, they should have been precluded from urging their religious values as a source of law. Even apart from the counterfactual, the members of the Native American Church may legitimately argue, "You have precluded us generally from urging our religious values as a source of law; therefore, you should generally permit us to claim exemptions from laws that burden our religion."

It is easy to see how a religious minority might be burdened by an otherwise valid law: Because the incidental, unintended effects of the law do not burden the majority, members of the majority are less likely to tailor the law to prevent such incidental burdens on the minority. But one might suggest that we sufficiently compensate minority religions for any Establishment Clause burden by giving legislatures the discretion—not the obligation—to enact toleration-based exemptions. If we exclude religious faith from grounding law, the argument would go, then we offset this burden by permitting the burdened group to argue for an accommodation of its religious practice.

The ability to argue for a toleration-based exemption is insufficient compensation for the Establishment Clause burden because members of the minority religion still are prevented from urging more general legislation to advance their beliefs. Consider a state in which marijuana use is a crime. As noted above, a decriminalization law could be based on the desirability of tolerating a religious group whose faith compels such use. But it could not be based expressly on the idea that the faith of that religion is true and that therefore marijuana use should not be criminal.⁷⁵ This exclusion removes

75. Although there might be no plaintiff with standing sufficient to challenge such a law, I am assuming that legislators will act pursuant to proper constitutional norms and that the Establishment Clause argument made in Part I is a proper constitutional norm.

some arrows from the religious group's quiver; religious faith as such has been disabled as an express source of law. The disability is sufficiently substantial that if marijuana use is not decriminalized, the fact that the members of the religion may still ask for an exemption from the criminal law isn't sufficient to compensate for the burden of not being able to urge the truth of their faith itself as a reason to decriminalize the drug. There are situations in which a general repeal of the law might be the religious group's only shot, because a more limited exemption would not pass.

The facts of *Smith* and of this hypothetical case, however, suggest another objection. Are we really disabling the members of the minority religion by excluding religious faith from grounding law? If there was no chance that the minority could have enacted its faith into law, isn't the disability ephemeral?

It is true that many cases about Free Exercise Clause exemptions involve minority religions that would have been hard pressed to garner majority support for enacting their faith into law. But the Establishment Clause argument advanced here still excludes certain values from grounding law, and in particular it prohibits a minority religion from seeking to persuade the majority that it should enact a law because the minority faith is the true one. Furthermore, legislation often passes even if backed by less than "the majority"; smaller groups often capture the legislature for particular programs, and the arguments of such small groups—although insufficient to carry the day alone—might in some cases be enough to tip the legislative balance. If we are forbidding religious faith from playing even this incremental role, then the proper compensation is to construe the Free Exercise Clause as requiring exemptions from laws that burden religion.

So far my examples have focused on minority religions. But suppose that a member of a religious majority in the relevant jurisdiction claims a Free Exercise Clause exemption from an otherwise valid law. Here, it is easy to see how the Establishment Clause disability might have harmed members of the majority religion by shifting the way in which favored legislation could be enacted. But one might wonder how it is possible that a law could have the incidental effect of burdening the majority. Wouldn't the majority have prevented the enactment of such a law, or secured the law's repeal?

Again, this view of the legislative process is too simple. Many laws might impose on religious practice burdens not initially recognized as such or simply unanticipated; furthermore, legislation might be passed by a small faction capturing the legislature. For a variety of reasons, members of the majority religion might have insufficient legislative capital to alter such laws, which might be seen as producing good results apart from the burden on religious practice. Arguing that majority religions would never enact law that burdens their faith, like arguing that minority religions could never enact their faith into law, takes too simple a view of a process that often results in laws enacted

because of a strong push by a small group and in laws with unintended effects that prove hard to undo because of the laws' concomitant benefits.

Let me offer some more specific examples of how the offset might work. (Note at the outset that under *Smith*, Free Exercise Clause exemptions would not be required in any of the following situations.) First, consider *Epperson v. Arkansas*,⁷⁶ in which the Court invalidated a law forbidding the teaching of evolution in public school. There wasn't much of a secular argument for banning such teaching; the obvious purpose of the law was to advance the religious faith of those who believed in creationism rather than evolution. By striking the law down, the Court sent a signal that law cannot be grounded in express or otherwise obvious religious purposes. But what if the parents who supported the law sincerely claimed that their religious faith prohibited their children from being taught evolution in the science portion of their public school classes? Under my calculus, they should be entitled to a Free Exercise Clause right (at least *prima facie*)⁷⁷ to remove their children from class during the portions of instruction that violate their religious principles. This *prima facie* exemption would arise precisely because parents are not allowed to rely on their religious faith to dictate the curriculum of the public schools.⁷⁸

Next, assume a world without *Roe v. Wade*,⁷⁹ and imagine a state with a Catholic majority. Under the view of the Establishment Clause advanced above, the legislature may not ban abortion if the express purpose is to reflect a Catholic view of when life begins. Suppose that abortion remains legal. Now assume that there is a general law compelling doctors to treat indigent patients for all legal medical procedures. Catholic doctors whose religious faith condemns abortion should be exempt from having to perform abortions under this law, because their faith has been removed from the realm of arguments that may be advanced to outlaw abortion.

Now assume that a state has a law against polygamy, and that under the Establishment Clause it is improper to repeal the law for the purpose of advancing a religious faith that requires polygamy (although it would be permissible to repeal it out of toleration for that faith). Because the Establishment Clause has altered the political rules in a way that forecloses one route to removing the legislative burden on that faith, a religious practitioner of polygamy should receive a *prima facie* right to exemption from the law.

Finally, assume that a state makes workers who are fired for good cause ineligible for unemployment compensation. Under my view of the

76. 393 U.S. 97 (1968).

77. Here and in the examples that follow, the right to exemption is only *prima facie* and might be outweighed by other interests. I do not address how the balance between governmental and individual interests should be struck. See *supra* note 4.

78. Cf. *Mozert v. Hawkins County Pub. Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd and remanded*, 827 F.2d 1058 (6th Cir. 1987).

79. 410 U.S. 113 (1973).

Establishment Clause, a law requiring employers to give employees the Sabbath off cannot be passed for the express purpose of advancing a particular religious faith or faiths.⁸⁰ As a result, a person who is fired for refusing to work on her Sabbath should be entitled to a *prima facie* exemption from the eligibility requirement.⁸¹

C. *Do Free Exercise Clause Exemptions Make Sense Without an Accompanying Establishment Clause Burden?*

The standard argument for Free Exercise Clause exemptions has nothing to do with offsetting an Establishment Clause burden. Rather, the argument is that because members of a majority religion are likely to protect their own religious practices when writing laws but to ignore (not necessarily intentionally) the harm that otherwise valid laws cause minority religions, the Free Exercise Clause should be read to protect minority religions against this flaw in the political process.⁸²

I have two responses to this argument. First, the Court has rejected precisely this approach to protecting minority interests in the race area.⁸³ Although the white majority often passes laws that cause unintended disproportionate harm to blacks, the Court has held that the Equal Protection Clause requires a showing of discriminatory intent and does not forbid unintended disparate impact.⁸⁴ This is not the place to discuss the virtues and vices of this rule. But so long as the rule is on the books, adopting a different rule for religion requires an argument that religion is different from race in such a way that disparate impact should be policed. By showing how religion is special for Establishment Clause purposes, the argument that I advance in this Article explains why the Free Exercise Clause should be read to require exemptions from unintended harm without relying on the mere existence of disparate impact.

Second, and more important, it is unclear why religion deserves special exemptions from otherwise valid law unless religion must bear an accompanying burden under the Establishment Clause. What makes religion special—its reference to an extrahuman source of value—does not of itself argue for exemptions. That one person's imperative comes from an extrahuman source of value doesn't distinguish her from a person whose imperative comes from intrahuman experience, if both are able to urge those values as grounds

80. *Cf. Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

81. *Cf. Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

82. *See Laycock, supra* note 25, at 1014; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1130-36 (1990); Pepper, *supra* note 16, at 353; Sullivan, *supra* note 6, at 216.

83. *See Marshall, Defense, supra* note 7, at 320.

84. *See Washington v. Davis*, 426 U.S. 229 (1976).

for law.⁸⁵ The "reference out" that makes religion special becomes relevant to the Free Exercise Clause calculus only if one sees it as a reason to disable religion under the Establishment Clause.

D. How Should We Treat Other Values that Are Not Allowed to Back Law?

And now, a clarification. I have argued that when we exclude religious values from being enacted into law, we should require a compensating exemption from laws that conflict with those values. This does not mean that we should require an exemption from an otherwise valid law that conflicts with racist values (for example) because we have forbidden laws passed with an expressly racist purpose. The only kind of value that we should protect from legal obligation because we have excluded it from grounding such obligation is a value that we otherwise seek to foster when held privately. In contrast to racist values, we exclude religious values from grounding law not because we consider the values bad in and of themselves, but because we consider religious values to be both (a) good things to hold and (b) permissible as the ground of private decisionmaking but not of law. In this way, the religion clauses can be seen as establishing the prototypical public/private line: We exclude religious values from grounding law while including them in the development of the private self.⁸⁶ I do not mean to suggest that religious values cannot be public; they simply cannot be public in the sense that they provide the express purpose behind law.

III. DOES THE CONSTITUTION REQUIRE EXEMPTIONS FOR CLAIMS OF SECULAR CONSCIENCE?

Finally, I want to address the following question: What if someone asks for an exemption from an otherwise valid law based not on religious faith but on moral, political, or philosophical values? In this Part, I explain that although the Constitution should be read to require exemptions for religious conscience, exemptions for secular conscience should receive no such protection. Unlike religious values, secular values may be the express source of law. Because secular values are not excluded from politics, one has no constitutional right to be exempt from laws based on values that differ from one's own.

85. One could, of course, recast the argument for exemptions to include both religious and secular conscience. I address this argument in Part III.

86. John Garvey has argued that religion is somewhat like insanity, for in both cases we exempt someone from legal obligations because of the inaccessibility to others of the agent's reasons for action and because of the special compulsion felt by the agent in acting contrary to law. *See* Garvey, *supra* note 23, at 798-801. We exempt the insane from legal obligation, however, not because we wish to protect their private values, but rather in spite of the fact that we wish their private values (i.e., their insanity) would go away.

On several occasions, the Court has indicated that the Free Exercise Clause does not extend to secular claims of conscience. In *United States v. Seeger*,⁸⁷ for example, the Court construed a statute granting conscientious-objector status to those with religious opposition to war in any form, but not to those who relied solely on political, sociological, or philosophical considerations. "These judgments have historically been reserved for the Government," the Court said, "and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state."⁸⁸ Likewise, in *Wisconsin v. Yoder*,⁸⁹ the Court stressed the limits on its decision that the Free Exercise Clause requires that Amish parents and their children be exempt from compulsory-education laws: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."⁹⁰ The Court then stated that merely philosophical claims—such as Thoreau's—could not serve as a basis for exemptions under the religion clauses.⁹¹ In *Thomas v. Review Board*,⁹² part of a line of cases requiring Free Exercise Clause exemptions from certain requirements in unemployment-compensation laws for people whose unemployment was caused by their religious faith,⁹³ the Court added: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."⁹⁴ Quoting from *Seeger*, *Yoder*, and *Thomas*, the Court reached a similar conclusion in *Frazee v. Illinois Department of Employment Security*.⁹⁵

These statements, however, came as dicta, for none of these cases involved a Free Exercise Clause challenge based on avowedly secular belief.⁹⁶ Although the Free Exercise Clause refers only to "religion," perhaps the text merely begins to answer the interpretive question whether the Constitution—either in the Free Exercise Clause or elsewhere—requires an exemption from otherwise valid law for conscientious objectors regardless of the source of their values. Perhaps the Free Exercise Clause is merely the marker of a constitutional value that extends beyond the text; perhaps a structural argument can yield a broader right.⁹⁷

87. 380 U.S. 163 (1965).

88. *Id.* at 173.

89. 406 U.S. 205 (1972).

90. *Id.* at 215.

91. *Id.* at 216. *But see id.* at 247-49 (Douglas, J., dissenting in part).

92. 450 U.S. 707 (1981).

93. *See, e.g.,* *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963).

94. *Thomas*, 450 U.S. at 713.

95. 489 U.S. 829, 833 (1989).

96. *But cf. Welsh v. United States*, 398 U.S. 333 (1970).

97. For ways of interpreting the Constitution structurally to find values beyond the text, see CHARLES

For instance, one might argue that the Framers referred to religion in the First Amendment because that was the type of belief then being persecuted and hence in need of protection. The broader concept behind the specific conception of protecting "religion" could then be seen as the need to protect all beliefs that are persecuted, and one might base an argument for exemptions on this sort of concept or principle.⁹⁸ The most sophisticated effort at such an argument is that of David A.J. Richards in *Toleration and the Constitution*. Richards maintains that toleration is the central constitutional ideal. "[T]he state must guarantee and secure to persons a greatest equal respect for the rational and reasonable capacities of persons themselves to originate, exercise, express, and change theories of life and how to live it well," he writes. "Thus, the concerns of the religion clauses are instantiated at every stage in which the state may bear upon the process of forming such conceptions, the exercise and expression of such conceptions once achieved, and the changes and revisions in such conceptions."⁹⁹ For Richards, "religion" must be broadly defined, to include the nontheistic. In fact, to implement fully the concept of government keeping its hands off the "self-determining moral powers of conscience,"¹⁰⁰ religion should be defined relatively "vague[ly]," to include "everything and anything."¹⁰¹

The answer to this argument follows from the theory developed in Parts I and II. We ordinarily think of "religion" as including a reference to an extrahuman source of value. That is what makes religion special. And it is precisely because of this reference to a source of normative authority that

L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992).

98. See RONALD DWORKIN, *LAW'S EMPIRE* 70-72 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 218-21 (1980); Lawrence Lessig, *The Fidelity in Translation*, 71 TEX. L. REV. (forthcoming April 1993).

99. RICHARDS, *supra* note 23, at 136. For similar arguments in the free-speech context, see JOHN STUART MILL, *ON LIBERTY* (Currin V. Shields ed., 1956) (1859); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

100. RICHARDS, *supra* note 23, at x.

101. *Id.* at 141. For other efforts at protecting secular as well as religious claims of conscience, see *Gillette v. United States*, 401 U.S. 437, 464 (1971) (Douglas, J., dissenting); KONVITZ, *supra* note 23, at 53, 104; Nuechterlein, *supra* note 50, at 1136 n.54. Whether Richards' concern extends beyond direct regulation of conscience and to exemptions from laws that only incidentally affect conscience is not clear. There is great force in Richards' argument that direct governmental interference with conscience, religious or otherwise, violates basic constitutional norms. Richards bases his objection to such infringement in the Free Exercise Clause. It might be better, though, to prevent interference with nonreligious conscience under the Freedom of Speech Clause rather than the Free Exercise Clause. Cf. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983). The First Amendment pairs the Free Exercise Clause with the Establishment Clause, and the text suggests that what is "religion" for the former is "religion" for the latter. See *supra* note 71 and accompanying text. Reading "religion" broadly to encompass secular claims of conscience risks turning most laws into violations of the Establishment Clause; if it is improper to base a law on "religion," and "religion" includes secular values, then how can any law stand? Richards recognizes this problem and avoids it by arguing that "religion" should be construed more narrowly for Establishment Clause purposes than for Free Exercise Clause purposes. RICHARDS, *supra* note 23, at 130, 145. This argument seems to do unnecessary violence to the First Amendment text.

cannot be shared by citizens as citizens that we exclude religious faith from being enacted into law. In turn, it is because of that exclusion—which is special to religious values—that the holder of such values can claim religious exemptions.

Secular values are not so disabled from politics. It is proper, therefore, to insist that holders of such values learn how to lose as well as win in politics. The *Smith* baseline holds for secular values as it does not for religious ones. Because secular values could have been invoked to ground law, one whose values lose out in the legislative process must accept defeat and either obey or become a civil disobedient. Otherwise, laws passed through the democratic process would be merely hortatory.

Of course, there are many reasons why a civilized society, as a matter of legislative grace, might wish to grant exemptions fairly readily for claims of conscience. There is no reason to inflict serious harm (albeit unintended) on members of the community if exemptions from the offending laws can be granted without serious disruption to the community as a whole. Moreover, the community might wish to decrease civil disobedience, and might wish to do so by granting exemptions rather than expanding the prison population. But all of these concerns are properly addressed to legislatures; values that may ground law should not be protected by a constitutional right to an exemption. Both the legislative and executive branches of government, through exemptions and through prosecutorial discretion, can be quite tolerant of conscientious objectors in many contexts and based on many different values. Whether they ought to be so tolerant should be a political question only.

IV. CONCLUSION

Sometimes we win and sometimes we lose in politics. But so long as we may participate fully—so long as we are permitted to enact our values into law—we may not insist on being excused from law's obligation if our arguments fail. A general scheme of constitutionally compelled exemptions for claims of conscience would subvert a key predicate of democratic politics—that losers as well as winners are bound by the values chosen by the majority.

No doubt operating with this principle in mind, the Court in *Employment Division v. Smith* lumped religious values together with secular ones and permitted no conscience to trump the political process, to become “a law unto itself.” This Article has been an attempt to reveal the fallacy of mixing religious values together with secular ones, and thus to provide a theory of constitutionally compelled exemptions for religious conscience. Under the Establishment Clause, I have argued, law may not be enacted for the express purpose of advancing the values believed to be commanded by religion. For religion involves a reference to an extrahuman source of value, which can be

shared only by believers in the same faith, not by citizens as citizens. Enacting religious faith into law excludes nonbelievers from the legislative process in a real and significant way. But if we construe the Establishment Clause to prohibit legislation enacted for the express purpose of advancing religious values, then the predicate for universal obedience to law has been removed. A religious conscientious objector may legitimately claim that because she was thwarted from offering her values for majority acceptance as law, she should have at least a *prima facie* right of exemption from law that conflicts with her religion. The Free Exercise Clause works as a counterweight to the Establishment Clause; it gives back what the Establishment Clause takes away.