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RELIGIOUS LIBERTY AND THE MORAL STRUCTURE OF CONSTITUTIONAL RIGHTS

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I.

In 1990, in *Department of Employment Services v. Smith*,[1] the Supreme Court announced a new standard to govern Free Exercise claims. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[2] Prior to *Smith*, the Court had applied a test drawn from *Sherbert v. Verner*.[3] In *Sherbert*, the Court had indicated that religiously motivated persons were constitutionally exempt from otherwise valid laws unless the imposition of those laws was necessary to secure "a compelling state interest."[4] Although the Court rejected almost every Free Exercise claim raised under *Sherbert*, the *Sherbert* standard was—in theory if not in practice—remarkably generous to religiously motivated persons, granting them a presumptive right to disobey laws that thwarted their religious commitments.

In past articles, we have defended the *Smith* Court's resistance to the idea that religiously motivated persons are constitutionally privileged to disobey laws that everyone else is obliged to obey.[5] We have argued that principles of equality must provide the core of any theory of religious liberty appropriate to constitutional democracy. While the *Smith* decision is wooden and

1. 494 U.S. 872 (1990).
2. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens concurring)).
3. 374 U.S. 398 (1963).
4. *Id.* at 403 (internal quotation marks omitted).
5. We first articulated our theory in Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994). We have continued to elaborate the theory in subsequent work; *see, e.g.*, Christopher L. Eisgruber and Lawrence G. Sager, *Equal Regard*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY (Stephen Feldman ed., forthcoming 2000), and Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79.

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incomplete, it holds the promise of a jurisprudence of religious liberty that would embrace the Constitution's pervasive concern with both the scope and distribution of individual liberty: Liberty should be generous in scope and fairly distributed among citizens.

Recently, however, some commentators have suggested that *Smith* is driven by—and ought to be evaluated in terms of—still deeper, *structural* features of our constitutional practice.[6] In its strongest form, the suggestion is that substantive moral questions like the best understanding of religious liberty and its connection to equality are beside the point. In a recent article, Professor Matthew Adler advances a provocative version of this claim. Adler argues that American constitutional rights are almost invariably what he calls "rights against rules."[7] Surveying matters of both constitutional procedure and substance, Adler arrives at the interesting and somewhat startling conclusion that it is neither necessary nor sufficient for a constitutional claimant to show that the government's treatment of her was morally wrong. Instead, a successful constitutional claimant must show that she has collided with a governmental rule that has a morally compromised "predicate or history." The blemish on that predicate or history need not directly implicate the moral rights of the claimant at all:

> To say that X's treatment pursuant to a rule R violates X's "constitutional rights," or that the treatment is "unconstitutional," does not entail that the treatment itself is morally wrong, or morally problematic, or that there is moral reason to overturn the treatment ceteris paribus, or that the treatment violates X's moral rights, or that moral wrong has been done to X, or anything like this. All the statement entails is that there exists moral reason to repeal or amend the rule R.[8]

In Adler's eyes, *Smith* is an entirely expectable decision, since it folds religious liberty into the general pattern of American constitutional law. From Adler's perspective, *Smith*'s crucial feature is that it requires constitutional claimants to focus on the applicable rule, rather than on some liberty that they may invoke whenever any rule gets in the way of its exercise.[9]

We do not think that *Smith* can be evaluated, or that a sensible course for the jurisprudence of religious liberty can be charted, without reference to a substantive theory of religious liberty. Nor do we think that the construction of such a theory can be much aided by appeal to formal, value-free claims about constitutional jurisprudence, such as the claim that it consists of "rights against rules." But Adler's observations about the structure of

6. *See, e.g.*, Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 29–30 (1998); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1210–19 (1996); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 258 n.87 (1994).

7. Adler, *supra* note 6.

8. *Id.* at 3.

9. *Id.* at 29–30.

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constitutional law point to an important truth about the moral substance of political justice, and that truth bears in turn on the best account of religious liberty.

II.

Our principal concern in this essay is with observations about the moral substance of political justice that are inspired by Professor Adler's "rights against rules" claim. But first, we want briefly to address and set aside an element of Adler's claim that we think is mistaken. Adler seems to suggest that there is a firm disjunct in our constitutional tradition between constitutional rights and the moral rights of individuals. Adler's defense of this suggestion has both a substantive and a procedural face. We will take each up in turn.

The Importance of the Predicate or History of a Challenged Rule. Adler is at pains to demonstrate that one cannot prevail upon a constitutional claim merely by showing that the government has burdened or diminished some specific aspect of one's liberty or welfare; one must show, in addition, something about the pattern, purpose or context of the government's action that marks that action as unconstitutional. Reasons for governmental action thus matter critically in constitutional law. Adler points out, for example, that it is inaccurate to say that a protestor has a right to burn a flag. The government can prosecute a flag burner for stealing a flag, or for burning it under circumstances that create a danger to others. Only when the government punishes a flag burner because he is trying to convey a message does it run afoul of the Constitution. From doctrinal commonplaces like this one, Adler forms his startling conclusion: American constitutional law is not about the moral rights of constitutional claimants but rather about the moral infirmity of governmental rules.

There is, as we shall see, an important truth in the observation that, as Adler would put it, the "predicate" of governmental rules is critical to most constitutional outcomes. But it is misleading to suggest that a constitutional claimant typically lacks a first-order moral objection to her treatment, and has instead only what Adler calls a "derivative moral claim" to the effect that there exists some moral reason to repeal or amend the rule of which she complains. The flag burner is claiming that it is unjust (or, in Adler's language, *morally wrong*) for government to punish her for communicating in this graphic fashion; so too, the victim of disparate treatment is claiming that it is unjust (or "morally wrong") for government to treat her less well because of her race or gender. Both are correct, and they are typical of successful constitutional claimants.

Overbreadth. Adler reads several elements of constitutional procedure as supporting his claim of a disjunction between constitutional rights and the moral rights of individuals. Chief among these is the First Amendment

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doctrine of facial overbreadth. First Amendment overbreadth doctrine permits some people to prevail on a Free Speech claim even when they have no first-order moral objection of their own to the regulation they are challenging. Overbreadth doctrine might seem to suggest that it is not necessary for a constitutional claimant to demonstrate that she has any moral right to a state of affairs inconsistent with the governmental action she challenges. But to invoke the doctrine in support of that proposition is to confuse the basic moral structure of constitutional doctrine with distinct, institutional questions about who can invoke the authority of the constitutional judiciary. Such issues include (for example) questions about standing, jurisdiction, and the distinction between "facial" and "as-applied" challenges. These doctrines raise pragmatic concerns about how the judiciary can best assist in the implementation of constitutional norms. Institutional questions of this kind will undoubtedly be sensitive to questions about the content of the norms themselves: How best to arrange judicial institutions will depend upon what precisely you want courts to do. But the connection will be a loose one, freighted with all sorts of strategic and empirical considerations.

In overbreadth cases, the basic idea is that when a governmental regulation of speech applies widely in circumstances where it would violate the constitutional norm of free expression, the statute is invalid on its face; as a consequence, the statute cannot be constitutionally applied to anyone, not even to persons whose conduct would ordinarily be vulnerable to regulation.[10] But driving the idea of overbreadth is the finding that the statute in question cuts deeply into protected conduct and deprives anyone attracted or committed to that course of conduct of his moral entitlement to engage in it. This primary, or first-order moral judgment is what speaks to the fundamental structure of constitutional entitlement, not the secondary or derivative consequence of the overbreadth doctrine.

We could imagine, for example, a legal system with a separate constitutional judiciary, a judiciary seized with discretionary authority to hear constitutional challenges from anyone, whatever his connection to the challenged law or acts. Or we could imagine our own system more or less as it is, except that First Amendment overbreadth was abolished or restricted so that only persons whose conduct was itself protected by the First Amendment could bring First Amendment challenges. We could even imagine a legal system that embraced parliamentary supremacy, but provided for articulate and binding statements of principle by the parliament when it was moved to act on certain "constitutional" grounds. Nothing makes it impossible for legal systems as diverse as these to converge on the same precepts of free speech, or for these precepts to be identical to those

10. General discussions of the doctrine include Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991), and Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

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that prevail in our system as it stands, save only the variation in the circumstances of the persons who are entitled to raise questions of constitutional principle and the nature of the forum that is authorized to hear such claims.

This is not to deny the possibility that the best understanding of the overbreadth doctrine in our constitutional tradition is one that gives overbreadth claimants a substantive right—possibly even a derivative *moral* right—to object to the law in question. The rough idea is this: Our constitutional judiciary views a substantially overbroad law as invalid, as a nullity. Accordingly, anyone to whom that law is applied has a constitutional objection, on the order of "You can't beat me with a dead law!"[11] But this objection is secondary to, and parasitic upon, two prior judicial judgments: first, that the law in question intrudes substantially into the domain of first-order constitutional entitlement; and second, that this intrusion is grounds for declaring the law itself as invalid. The first judgment is a primary judgment of constitutional justice, one that is independent of the second. And the second judgment rests on essentially strategic or empirical grounds. Even on this substantive view of the rights of the overbreadth claimant, overbreadth does not implicate the general structure of constitutional rights in any interesting way.

Of course, it is entirely possible that particular judges might hold positions that link institutional and moral questions of this sort in other ways as well. So, for example, a judge who thought that judicial enforcement of free speech rights was a bad idea might be inclined both to eliminate the overbreadth doctrine and to constrict the category of constitutionally protected speech. One might accordingly ask, as an historical matter, whether (say) the Rehnquist Court has refashioned institutional and substantive doctrines on the basis of premises that are hostile to individual rights (or to some particular subset of individual rights). We do not mean to express any opinion on that question.

III.

It is thus wrong to suppose that constitutional rights are not centrally concerned with the moral rights of individuals. But the force of Adler's underlying observation remains: Constitutional doctrine is highly sensitive to context—to what Adler calls the predicate of governmental action—and constitutional law rarely, if ever, provides absolute protection for specific activities.

We can appreciate the extent to which this is true and gain important insight into the moral structure of constitutional rights if—prompted by Adler's argument—we organize possible claims of constitutional right

11. *See, e.g.*, Monaghan, *supra* note 10, at 1–4; Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 386–95 (1998).

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along a spectrum. Some constitutional claims may focus primarily on the claimant's immediate circumstance, and treat as relatively unimportant the predicate of the governmental action that is complained of; other claims may focus more fulsomely on the predicate of the governmental action and treat as relatively unimportant the claimant's immediate circumstance; and, of course, some claims may be intermediate between these two poles.

This spectrum of possibilities does not recapitulate or depend upon any claim that American constitutional law is unconcerned with the moral entitlement of persons to be treated in a certain way by the government. Even those claims for action that focus heavily on the government's reasons for action can be—and in our view almost invariably are—claims about the moral entitlements of members of our political community. The spectrum we describe does not deny this connection between moral entitlement and constitutional right, but it incorporates a softer observation about the general shape of recognized constitutional entitlements and the circumstances that account for that shape: Successful claims of constitutional right typically depend heavily on the predicate of governmental action; seldom if ever will a successful claim be founded on the claimant's personal circumstance alone.

At one end of the "claimant's-circumstances/government's-predicate spectrum" are cases in which the constitutional claim depends almost entirely upon the government's reasons for action. Many Equal Protection Clause claims have that structure. Principles of equality do not depend upon the idea that certain activities are especially valuable or presumptively immune from regulation. In general, principles of equality insist that whatever activities government may regulate, it may not do so in ways that favor one group at the expense of another. For example, suppose that Jones complains that the government stopped him from dispensing drugs. Jones has thus far given us no reason to presume that the government behaved unconstitutionally. We can imagine plenty of good reasons why the government might prevent somebody from dispensing drugs; we do not suppose that "dispensing drugs" is a basic liberty that every free person should enjoy. On the other hand, if Jones tells us that the government stopped him from dispensing drugs *because he is black*, then Jones will have excited our constitutional attention. The government has no prima facie constitutional obligation to allow people to dispense drugs, but the government is prohibited from acting on the basis of reasons or rules which single out racial minorities for unfavorable treatment.

We move some considerable distance towards the other end of the spectrum when we take up free speech cases. Speech has great constitutional value because of the contributions it makes both to individual flourishing and to the political system. Accordingly, on most accounts the government is obliged to provide citizens with generous space for communicative activity. If Jones declares, "The government has prohibited me from expressing

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my opinion," his claim has immediate constitutional appeal. It does not follow, of course, that Jones should prevail if he seeks constitutional relief. Perhaps the government prohibited Jones from speaking on the basis of a valid "time, place, and manner" regulation, or because Jones wanted to express his opinion by committing a crime or performing some act which posed an immediate danger to others. To prevail, Jones may have to show that the government prohibited his speech on the basis of a viewpoint-based or content-based regulation. Jones will, in short, have to point to the reason or rule that formed the basis for the government's action. But that is not because our constitutional tradition is primarily concerned about why the government acts, rather than about what individual liberties the government thereby compromises. Free speech jurisprudence rests on the judgment that if the government is precluded from imposing content-based and (especially) viewpoint-based limits on expressive activity, the resulting rights will be sufficiently robust to give individuals meaningful freedom to speak and to audit speech. Indeed, an otherwise valid "time, place, and manner" restriction might become constitutionally impermissible if the regulation left Jones with no other plausible means for communicating his message.[12]

Yet, even when we move away from equal protection, where the predicate of governmental action is more or less everything, to free speech, where the thing the would-be speaker wants to do is at the heart of the constitutional matter, the predicate of governmental action remains important. The government can punish the theft of a flag, its destruction by fire under dangerous circumstances, or even its destruction under circumstances of significant inconvenience, as with a flag burning that badly ties up traffic. Can we imagine claims of constitutional right that take us still further towards the individual-circumstance end of the spectrum?

Looking back at our brief consideration of equal protection and free speech claims, we can describe the rough shape that a constitutional claim would have to assume in order to reduce still further—or possibly even eliminate—the role that the predicate of governmental action would play in assessing the claim. To be maximally focused on the direct circumstance of the claimant, a constitutional right would have to be like free speech, in the sense that it would have to involve an activity which is strongly connected to constitutional values and hence carries with it a moral shield against governmental interference. But its shield would have to be even stronger than that provided by our strong commitment to free speech. The right would have to be a constitutional liberty of roughly the following form: "An adult member of our political community is entitled to do *X*, except under extraordinary circumstances in which an overwhelming and wholly unexpected circumstance intervenes." We probably can never get away from the possibility of some intervening circumstance, but if such a circum-

12. Schneider v. State, 308 U.S. 147, 164 (1939); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981).

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stance is genuinely exceptional, the resulting right would be very far along towards the personal-circumstance pole.

Is there a plausible candidate for the role of *X* in our abstractly specified liberty right? We can make some progress by identifying what could not be *X*. We cannot define *X* to encompass the entire congeries of activities that draw forth deep commitments and in turn help to fulfill the lives of those who engage in them. The idea that the government ought to allow people to make choices, and engage in activities, that will give meaning to their lives is plausible and attractive. But two features of the world make this broad claim a poor candidate for *X*. The first is that everybody shares an interest in doing what is important to himself. We should therefore expect that if a government is truly democratic, it will provide people with substantial opportunities to do what they want; the government would not otherwise be responsive to citizen interests. The second is that these opportunities will be subject to substantial restrictions, since the legitimate interests of other people will inevitably limit the freedom of others to do what they want. We know very little, for example, about what is important to Jones. Perhaps Jones finds it important to read political philosophy and give political speeches. If so, constitutional speech-rights will provide ample protection for the activities that matter most to his personal autonomy. Perhaps Jones thinks it important to drive cars at high speeds, or to walk naked through public parks, or to prevent women from aborting their pregnancies. If so, the government may well have good reasons to prohibit Jones from doing what is important to him—no matter how great the cost to Jones himself.

To qualify as *X* in our liberty right, the claim will have to be narrowed considerably. We will have to find a narrow range of activities that seem vitally important *and* which do not normally conflict with activities or interests that are important to others. The right to choose the person whom one will marry may be such a right. Or, if this is too provocative for some, the right of married persons to engage in fully consensual sexual activities in the privacy of their home almost certainly qualifies as *X*. (But note that even here we have cheated, in a way: We have built into *X* conditions that deprive the state of good reasons to regulate *X*. Consensual, married sex in the middle of a trafficked bridge is even worse than flag burning there.)

It is thus difficult to contrive a plausible claim of constitutional right that does not depend importantly on the history or reasons behind a government action—on what Adler calls "the predicate of governmental action." It is hard to contrive such a claim of right because:

(1) Claims of equality, which reflect an important core of constitutional value in any just society, are by their very nature grounded in the predicate of governmental action.
(2) In a dense, modern society, the legitimate concerns of the government on behalf of its citizens limit the field over which entitlements can sensibly be

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permitted; and so the government is obligated to provide citizens with substantial space for the enjoyment of basic liberties, not to ensure that such liberties are free from all interference, burden, or constraint.

(3) Thus, insofar as we can identify rights that hold virtually without regard to the predicate of governmental action, we will likely find that the concerns of the preceding proposition have been built into the definition of the right.

Indeed, these observations apply far beyond the domain of American constitutional law. Moral judgments about rights and duties are, in general, sensitive to reasons for action. Consider, for example, the fundamental and comparatively sweeping obligation not to kill people. It is hard to imagine an obligation that is more basic and unyielding. But even this obligation is sensitive to reasons: We think it morally permissible to kill people in self-defense or in the context of a just war. Some moral theories may define some moral duties in terms that are utterly absolute. One might, for example, believe with Kant that lying is utterly impermissible under any circumstances. And some pacifists may believe that it is always impermissible to kill another human being—even if the killing is done to defend one's self or one's innocent child. But it is hard to define many duties in this absolute fashion, and reasons for action will often be critical to our moral judgment.

This is especially true in the domain of our collective, political lives. Even Kant assumed a prudential, contingent attitude when he shifted attention from simple moral duties to political ones. When people come together in a political society, their liberties are inevitably limited by their obligation to respect the rights and needs of others. Their liberty to engage in particular activities must therefore be defined in part by the impact which these activities have on other people. You may have the right to live your own life, and to express your political views, and indeed to express those views by burning a flag; but if you burn the flag in a way that imperils my safety, you deny me *my* right to live my own life, express my views, and so on. The rights we have within political society must be sensitive to the rights and needs of others, and hence the rights we have against the government must be sensitive to the government's reasons for actions—if the government is limiting your liberty because it has a well-justified belief that these limits are necessary in order to protect the liberty of other persons, then your claim against the government will fail. And it will fail, we stress, as a matter of political theory rightly understood, not just because of contingent features of American constitutional law.

These reflections suggest that rights and liberties can be absolute only if they are defined so as to take into account all the countervailing interests that might otherwise justify governmental action. The range of such rights is narrow indeed. It cannot include, for example, the freedom to make truthful criticisms of public officials. That right is in many respects narrowly defined: It is, for example, much narrower than some general guarantee of "the freedom of speech." As such, it is relatively uncontroversial. But equally

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uncontroversial is the claim that the government may limit your right to criticize public officials if (for example) you make the criticism in a courtroom in the midst of a trial, or if you declare it while trespassing on somebody else's property, or by writing it in red paint on the Washington Monument, and so on.

The general conclusion is this: In American constitutional law, in law more generally, and, indeed, in the field of obligation (legal or not), rights and duties will show varying degrees of sensitivity to the government's reasons for action. But although these variations exist, beneficiaries of constitutional norms will seldom (if ever) enjoy a simple right to engage in particular activities regardless of the government's reasons for regulating these activities.

IV.

And now we return to our point of departure: What can this analysis teach us about the constitutional treatment of religious liberty and, more specifically, the debate over *Sherbert* and *Smith*? We may begin by dismissing one possibility. We cannot choose between the *Sherbert* and *Smith* standards on the basis that one or the other is more consistent with the principle that rights will, in general, be sensitive to the government's reasons for action. Both *Sherbert* and *Smith* refer to the government's reasons for action. *Sherbert* asks whether the government's action is justified by a "compelling state interest." *Smith* asks whether the government has acted on the basis of a "neutral and generally applicable law." Both *Sherbert* and *Smith,* therefore, describe rights that are sensitive to the predicate of governmental action. That is hardly surprising: As we have seen, this feature holds for almost every right in the American constitutional corpus. Indeed, we have suggested that it is true more generally—that most moral obligations make reference to reasons for action.

But the lesson we took from our attempt to contrive a constitutional entitlement that did not concern itself critically with the predicate of governmental action does have important consequences for the shaping of an attractive view of the constitutional protection of religious liberty. Suppose a constitutional claimant—Jones, again—objects to a governmental regulation on the grounds that it substantially interferes with his practice of his religion. The first thing we should notice is that on this basis Jones could claim constitutional license to do almost anything. Jones might have had religious reasons for ingesting or dispensing drugs; for refusing to make court-ordered child support payments; for slaughtering chickens; for wearing a special kind of hat; for running a soup kitchen in a residential neighborhood; for withholding medical assistance from children; for saying a prayer quietly in his own home; or even for committing a

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violent crime. As we have written elsewhere, "Religious belief need not be founded in reason, guided by reason, or governed in any way by the reasonable."[13]

As a result, both of the observations that we made earlier with regard to general autonomy rights are also relevant here, where we deal with the only slightly more specific topic of religious autonomy. First, a liberal democracy will in various ways provide space for people to do things that are important to them, including things that are important to them for religious reasons. To some extent, this space will be secured by judicially enforceable rights that attach to particular activities such as speech. People will be free to express their opinions (including religious opinions) and engage in conversations (including religious conversations). To some extent, the space will result from incentives that lead a well-functioning legislature to respect the desires of citizens. In general, people in a democracy will be free to choose what foods to eat and what clothes to wear, and this freedom will obviously matter to people who have religious reasons for eating (or not eating) particular foods, or for wearing (or not wearing) particular clothes.

Second, the range of activities which might be important to people for religious reasons is so broad and so varied, and hence so capable of conflicting with other people's interests, that it is simply not plausible to suppose that religious conduct is presumptively immune from government regulation. That, of course, is a controversial claim. Prominent commentators sympathetic to the *Sherbert* standard have maintained that anytime the government imposes a burden upon religious practice, it has done something presumptively unconstitutional. Do these commentators have any way to distinguish the case of religious autonomy from the more general case of personal autonomy? Or are they obliged, if they resist the argument offered here, to resist with equal force the one we offered with regard to the very general right discussed in the preceding section? Suppose the commentators make an argument of the following kind: "Religious interests are a subset of personal commitments. It is, therefore, meaningful to recommend that society single such interests out for special treatment, even if it would be unilluminating to recommend that society single out all important personal interests for special treatment." Let us assume, for purposes of argument, that this claim is true. Even if true, the claim discriminates among the important interests of citizens by preferring religious commitments to equally important secular commitments. As stated thus far, that discrimination has been offered without justification. Unless some justification for the discrimination is available, it would be unfair to treat religious interests better than secular interests when all of the interests are (by hypothesis) important ones.

Suppose, therefore, that the commentators elaborate their argument

13. Eisgruber and Sager, *The Vulnerability of Conscience*, *supra* note 5, at 1256.

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further. They insist not only that it is possible for the state to single out religious interests for special treatment, but that religious commitments are more important to people than are conscientious secular commitments, or that religious commitments are more beneficial to society than are conscientious secular commitments. So, the argument would go, there is something more important or more beneficial about the conduct of a person who runs a soup kitchen for religious reasons than about the conduct of one who runs an identical charity for secular reasons. And there is something more important or beneficial about the conduct of somebody who dons religious garb for religious reasons than about the conduct of somebody who wears an armband for expressive reasons. And there is something important or beneficial even about the conduct of persons who refuse for religious reasons to support or care for their children, but not about the conduct of a secular mother who adopts extreme measures in order to obtain a drug that will ease the pain of a suffering child.

This argument calls for the constitutional privileging of religion—for treating religious commitments better than comparable secular commitments. We think that this claim is patently inconsistent with principles of equality that underlie not only the American commitment to religious liberty, but also this country's more general commitment to constitutional democracy. In our view (which we have elaborated at length elsewhere), it is indefensibly partial to suppose, in a country where not everybody is religious, that conscientious commitments become more valuable simply by virtue of being religious.

It does not follow that a workable and normatively attractive view of religious liberty is out of constitutional reach, however. Again, our spectrum, which arrays rights on the basis of their relative sensitivity to claimant circumstances and governmental predicate, is instructive. One possibility is to narrow the autonomy-based claim to the point where the behavior really begins to be "private"—to the point, in other words, where legitimate governmental regulatory interests have been defined out of the picture. Consider what is in many ways at the heart of religion: the formation and maintenance of faith communities, communities in which people come together to worship, profess their faith, share their experiences, and choose leaders. Communities of this kind project typically private associational concerns into public space: They serve purposes akin to friendships and families, but they extend over much greater numbers of people and are subject to significantly different membership norms. If Jones claimed that the government had prohibited him from forming a church, he would have appealed to a constitutionally privileged activity. We are inclined to believe that the principle in question is best stated in terms of associational freedom and/or privacy, and that its application to religious associations is simply one application among many. But other people might believe that there are features that distinguish religious faith communities from secular public associations (such as political parties, interest groups, fraternities,

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colleges, and civic societies), and if so, one might recognize religious communities as a distinct topic of constitutional concern. Of course, regardless of whether one treats religious communities as sui generis or whether one assimilates them within the broader category of consensual public associations, one must still do an enormous amount of theoretical work to arrive at a constitutional doctrine—just as the identification of speech as a constitutionally privileged activity begins, rather than ends, the work of deciding what sorts of regulations should be deemed constitutionally permissible.

A second promising ground upon which to found a constitutional conception of religious liberty is equality-based. Suppose that Jones is able to demonstrate that at the same time that the government has ignored or devalued his religious needs it has made allowances for comparable secular or mainstream religious interests. Suppose, for example, Jones complains that while the slaughter of animals for some purposes is permitted, religious slaughter is prohibited; or that Sunday Sabbath observers are given legal license that Saturday observers are refused; or that use of wine in Christian sacraments is exempted from dry laws while the use of more exotic substances in the sacraments of Jones' well-established-but-more-exotic religion is barred; or that the Forest Service has callously located a road on federal lands making inaccessible a site crucially important to Jones' religious faith, and done so under circumstances that make it unimaginable that the Forest Service would wreak comparable harm on a site revered by a mainstream religion.[14]

Now Jones' claim has changed in three ways. First, we have moved from one end of our spectrum to the other. Jones now calls attention not to the unique importance of his activity, but to the predicate of the government's impulse to regulate it. Second, Jones is no longer asking for indefensible favoritism or for the license to do something that would seriously compromise a legitimate and reasonable state concern. Third, Jones instead enlists the support of principles of equality: He appeals to the judgment that the state has already made (or in the case of the Forest Service road, surely would make) that whatever regulatory concerns the state has should yield to the important interests or commitments of its more mainstream citizens. His claim is for just these reasons far more powerful.

V.

Constitutional claims about religious liberty ought to be framed in ways that track, rather than resist, principle of equality. We have elsewhere developed this point by distinguishing between two modalities of constitutional justice, which we call "privilege" and "protection."[15] Speech is a practice that is

14. All these examples are drawn from Supreme Court cases. For enumeration and discussion of the pertinent cases, *see id.* at 1284–91, 1302–04.

15. *Id.* at 1250–54.

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privileged in our constitutional tradition. The state is often barred from restricting speech because of its content, even when there is reason to suppose that important concerns would be advanced if the speech in question were suppressed. In contrast, African-Americans are not privileged, but rather protected. Constitutional law struggles to abolish caste and its residue, to secure for African-Americans treatment as full and equal citizens of our national community.

Both speech and racial equality are thus treated distinctly and favorably by virtue of their inclusion in the agenda of judicial enforcement of the Constitution, while other claims of political justice—most prominently those diverse claims we lump into the broad category of "economic rights"—are excluded. But only speech is privileged by the substance of the norms upon which the constitutional judiciary draws when it acts. Put another way, privilege and protection refer not to the fact of constitutional (or judicial) priority, but to the grounds for such priority. A claim for constitutional privilege requires a showing of virtue or precedence, while a claim for constitutional protection requires a showing of vulnerability or victimization. The distinction between privilege and protection is therefore ultimately a distinction in constitutional objective. From the recognition of victimization, and of vulnerability to future victimization, flows the constitutional objective of protection; while from the recognition of virtue or precedence flows the constitutional objective of privilege.

In our constitutional jurisprudence there is no privileging of persons; indeed, opposing caste or subordination is one of the most robust projects of modern constitutional law. One might think that the converse is also true: Because protection flows from a concern about vulnerability or victimization, it might seem that only persons or groups, rather than activities, may be the object of constitutional protection. But as religion itself vividly illustrates, persons and groups can be vulnerable to victimization by virtue of their shared commitments and practices. The bitter divisions of humanity along religious lines, and the global persecution of religious minorities throughout most of recorded history, make the victims of religious intolerance the ultimate and tragic exemplars of vulnerability.

Much modern commentary has proceeded on the assumption that the constitutional status of religious exemptions rises or falls on the degree to which religious practices are constitutionally privileged—privileged in the way, for example, that speech is privileged. If religiously motivated people are to be exempt from the application of laws that they would otherwise be required to obey, it is assumed that this must be because religion is esteemed by the Constitution in a way that most other human commitments, however intense or laudable, are not. We, by contrast, advocate an approach to the question of religious liberty founded on protection rather than privilege. In our view, protection can explain and justify the distinct status of religion in our constitutional tradition, offer a workable and attractive

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approach to religious exemptions, and make sense out of the patchwork of precedent regarding religious exemptions.

In the years since we first published this argument, we have received many helpful and challenging responses to it. Occasionally, however, our argument is misunderstood in ways that, with the help of the argument advanced here, we hope now to clarify. First, people sometimes suppose that we mean to deny that religion should receive any special constitutional attention, since such attention would count as a "privilege." That view misreads our use of the word "privilege." By no means do we wish to deny that religious conduct will often be entitled to special constitutional solicitude. On the contrary, we offer "privilege" not as synonymous with "constitutional solicitude," but as one of two modes of such solicitude. The modality of "protection," which we endorse as the proper modality of justice in the field of religious liberty, may generate a rich set of judicially enforceable liberties. Indeed, we believe that a jurisprudence grounded in "protection" can and should afford religious conduct greater protection that it ever received in the *Sherbert* era.

In terms of the argument made in this essay, we can put the point in the following way. The point of our argument is not to diminish, reduce, or eliminate rights of religious liberty, but rather to relocate them on the spectrum we described earlier. We mean to suggest that rights of religious liberty are most powerful and most defensible when analogized to Equal Protection Clause rights, which depend heavily on the government's reasons for action, rather than to speech rights, which depend upon the idea that one particular activity should enjoy presumptive immunity from governmental regulation.

The second misunderstanding is more interesting. People sometimes suppose that we mean to deny that religious commitments are important in comparison with the ordinary run of interests and commitments. After all, if religion is important, then why not privilege it—just as we privilege speech? Religion need not, of course, be the only thing privileged; various kinds of secular commitments might also be privileged. But surely if one recognizes that religion is specially important to some people (just as speech is specially important to some people), that might provide a reason to privilege it over, say, ordinary economic and material interests.

Our analysis of the relationship between individual rights and governmental reasons helps to answer this concern. We should now be able to see that the fact that an activity or state of affairs is very important to some persons is far from a sufficient basis upon which to decide that they are constitutionally entitled to that activity or state of affairs. Among the additional judgments that must be made is an assessment of the competing interests that the government is legitimately entitled—or possibly even obliged—to protect. That is why it is impossible to develop any coherent and attractive doctrine that would embody a general constitutional privilege

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for individual autonomy, or an only slightly less general constitutional privilege for religious autonomy. Autonomy and religious autonomy both attach importance to a virtually limitless range of activities.

VI.

Our concerns in this essay have been exceedingly abstract. They have crucial implications, however, for issues that are vividly practical. Indeed, in recent years, both Court and Congress have had to make important choices about religious liberty. Justices and legislators alike have often framed that choice in terms that we might describe as "privilege or nothing": Either religion gets special benefits, or it gets no special constitutional and judicial solicitude. We have said many times before, and will say again now—that way of thinking reflects a huge and regrettable error. If we are appropriately sensitive to the varying structure of constitutional rights, we should see that there are at least two different ways to conceptualize rights of religious liberty—on analogy with the structure of speech rights, and on analogy with the structure of equality rights. The latter fit is not only better, but much more likely to produce a judicial practice that is solicitous of religious liberty.

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