The Distinctiveness of Religion as a Jeffersonian Compromise

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ABSTRACT

The idea that religion merits special treatment under the Religion Clauses of the First Amendment has significant intuitive, textual, and historical clout. However, when we try and find or develop a coherent and plausible theoretical justification for the constitutional distinctiveness of religion, we come up empty. Religion, as we commonly recognize it, seems to have no unique attributes, and certainly not ones that justify singling it out from other forms of belief and culture. The firm conviction—often expressed by the Supreme Court—that religion is and should be treated distinctly under the First Amendment seems theoretically inexplicable.

This Article first rejects the standard distinctivist account, which holds that religion should be given special privileges and disabilities because it is a singular phenomenon. It shows that religion is not a uniquely demanding set of beliefs, nor is it a particularly encompassing culture, and finally, that it is not alone in making political arguments that cannot be explained to non-believers. Instead, this Article argues that religion's similarity to state-based political identity is what actually justifies singling out religion. Both religion and the state make overlapping claims for loyalty, truth, and identity that are similar in nature. Both base their authority to make these claims in a system of rituals and symbols grounded in theology. These similarities create a

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constant drive towards conflict between the state and the religious groups living within its borders.

To alleviate and mitigate this potential conflict, the Constitution established a "Jeffersonian Compromise" in which religious adherents accept the exclusion of faith from the political sphere in return for the guarantee of religious freedom. Conceptualizing the distinctive status of religion under the First Amendment as a compromise makes it clear why these protections do not apply to all forms of strong belief or encompassing cultures. Since this compromise is motivated and justified by an overlapping and conflict-prone relationship between state and religious identities, it can only produce duties and obligations for those sides. It simply does not apply to other forms of belief and culture.

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INTRODUCTION

Religion has no unique attributes—or at least not any that clearly warrant the distinct constitutional treatment it so often receives. This is a foundational problem for the Constitution, whose text seems to protect religion above and beyond other forms of belief and practice. If religion is not unique, how can we understand the Establishment Clause of the First Amendment, which states that Congress cannot pass any law respecting an establishment of religion? The clause does not prohibit the establishment of any moral or ethical non-religious views. The same is

true for the Free Exercise Clause, the protections of which do not extend to non-religious practices. This language seems to represent the founders' belief that religion was a unique human activity and culture.[1] Therefore, the first job of any theory seeking to explain or justify the Religion Clauses is to explain what is unique about religion, such that it warrants such distinct disabilities and privileges.[2] If religion is indeed not special in any constitutionally relevant way, we are left unable to make any sense of the vast majority of U.S. law concerning religion.

Religion-Clauses jurisprudence is torn between two poles: On the one hand, the idea that religion should be constitutionally distinct has tremendous intuitive, textual, and historical clout. On the other hand, we have no convincing moral and political theory that explains this distinctiveness. This dynamic plays out in many cases. For example, in *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, the Supreme Court held that religious institutions enjoy a "ministerial exception" from anti-discrimination laws.[3] The government argued that religious groups merit no free speech protections beyond those afforded non-religious associations.[4] The justices responded to this argument with deep puzzlement. During oral argument, both Justice Scalia and Justice Kagan found this position to be "extraordinary" and "amazing,"[5] and the court unanimously rejected the government's arguments, finding them "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[6]

Many scholars in both constitutional and political theory attempted to make sense of the moral and legal distinctiveness of religion.[7] Others

1. *See* Douglas Laycock, *The Remnants of Free Exercise*, SUPREME COURT REV. 1, 16 (1990) ("Religion is unlike other human activities, or at least the founders thought so. The proper relation between religion and government was a subject of great debate in the founding generation, and the Constitution includes two clauses that apply to religion and do not apply to anything else. This debate and these clauses presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.").

2. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. 313, 316 (1996) ("An acceptable explanation of the Religion Clauses must make sense of the ratified text."); Micah Schwartzman, *What If Religion is Not Special?*, U. CHI. L. REV. 1351, 1353 (2012) ("[A]ny theory that seeks to explain the Religion Clauses must provide an account of what is special about religion in terms of both its disabilities and protections.").

3. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 172 (2012).

4. *Id.* at 189.

5. *See* Transcript of Oral Argument at 28 (Scalia, J.), 38 (Kagan, J.), *Hosanna-Tabor*, 565 U.S. 171 (2012), (No. 10-553), https://bit.ly/2XXIAJP.

6. *Hosanna-Tabor*, 565 U.S. at 189.

7. *See, e.g.*, Andrew Koppelman, *Religion's Specialized Specialness: A Response to Micah Schwartzman,* What If Religion Is Not Special*?, 79 U Chi L Rev 1351 (2012)*, 79 U. CHI. L. REV. DIALOGUE 71 (2012); Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free*

sought to explain why religion should not enjoy special legal status.[8] The goal of this Article is to contribute to this conversation by offering a radically different account of why we should treat religion distinctly. In short, my argument is that although religion has no *unique* attribute that justifies it being legally singled out, it exists in a *distinctively* challenging relationship with the liberal state. Both religious and modern political forms of identity overlap and compete over the scarce resources of foundational authority and primary identity. This conflict is resolved by the establishment of a "Jeffersonian Compromise,"[9] which establishes a separation of religion from politics and provides special accommodation to religion. It is this mutually beneficial agreement that justifies the special status of religion in American law.

It is impossible to precisely define how persuasive a constitutional justification must be to be considered valid.[10] Still, accounts arguing for the distinct treatment of religion need to provide good answers to two central questions: What makes religion distinct? And how does the unique legal treatment of religion (mainly free exercise and the non-establishment of religion) follow from this distinction? That is, the rationale must explain why religion "deserves a level of legal protection

Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously, 32 CARDOZO L. REV. 1701 (2010); Avihay Dorfman, *Freedom of Religion*, 21 CANADIAN J. L. & JURIS. 279 (2008); Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QLR 257 (2007); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

8. *See, e.g.*, GIDEON SAPIR & DANIEL STATMAN, STATE AND RELIGION IN ISRAEL: A PHILOSOPHICAL-LEGAL INQUIRY (2019); Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 L. & PHIL. 581 (2015); BRIAN LEITER, WHY TOLERATE RELIGION?: UPDATED EDITION (2014); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2009); Anthony Ellis, *What is Special About Religion?*, 25 L. & PHIL. 219 (2006); William P. Marshall, *What is the Matter with Equality: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND L.J. 193 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 UALR L.J. 555 (1997); Schwartzman, *supra* note 2.

9. This expression is adopted from Richard Rorty, *Religion as Conversation-Stopper*, *in* PHILOSOPHY AND SOCIAL HOPE 170–71 (1994). Rorty explained that "[Jeffersonian-Compromise] religious believers remain willing to trade privatization for a guarantee of religious liberty." Rorty seemed to connect the compromise to Jefferson on the basis of Jefferson's famous letter advocating for a "wall of separation" between religion and state. *See* Daniel L. Dreisbach, *"Sowing Useful Truths and Principles": The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation"*, 39 J. CHURCH & ST. 455, 469 (1997).

10. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 198 (1991) ("Although it is impossible to say just how powerful a constitutional justification needs to be, one can at least describe the general characteristics of a rationale adequate to justify special constitutional protection for religious freedom.").

that most other human interests and activities do not receive."[11] This article challenges the standard accounts on both these levels.

First, this Article turns to lay out the challenge facing the distinctivist position. Part I outlines the ways in which the Supreme Court has historically been torn between a *neutralist*[12] position—holding that the Constitution is trying to protect non-distinct qualities that also exist in religion—and a *distinctivist*[13] position claiming that religion warrants special treatment. Part I then shows how the major hurdle facing the distinctivist position is that it is not backed by a convincing moral or political theory.

In Part II, the Article presents and criticizes several of the most prominent attempts at finding a principled justification for the distinctiveness of religion. It discusses the idea that religion is a special form of belief or culture, or that it is unique in making political arguments that cannot be communicated to nonbelievers. This Article contends that all of these arguments fail because they rely on the idea that religion is a singular phenomenon. That is, they seek to justify the special status enjoyed by religion by arguing that it is actually special.[14] However, this is a tremendously difficult task. Every attribute that can be ascribed to what we commonly call religion can also be found in clearly non-religious beliefs, ideologies, practices, and cultures. Indeed, what we commonly recognize as religion is actually a subset of a broader category that includes other social and cultural institutions that refer to the *ultimate* or *sacred*. These can be generally named *communities of faith*.[15]

Part III tackles the distinctiveness criteria from the opposite direction, arguing that it is not any unique attribute that makes religion worthy of protection, but rather the fact that religious identity is strikingly similar to the primary political affiliation fueling the modern state: national political identity. By adopting the theoretical point of view that sees state-based identity as seeking to establish a community of faith (relying on a civil religion and a political theology), this Article suggests that the relevant distinction of religion in the liberal state is not that it

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11. *Id.*

12. *See, e.g.*, LEITER, *supra* note 8; ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013); JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008); EISGRUBER & SAGER, *supra* note 8; ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992); 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 (1990).

13. *See* sources cited, *supra* note 7.

14. *See infra* Part II.

15. *See infra* Section III.B.

makes a uniquely demanding set of beliefs or tends to make all-encompassing ontological claims, or that it is *sui generis* in making political arguments grounded in the sacred. Instead, religion is distinct because it conflicts with the identity order promoted by the state. Both state and religious forms of authority rely on claims of foundational authority and seek to establish a primary community. The authority to make these claims is supported in both cases by a thick web of myths, rituals, and metaphysics. This Article argues that we should think of the relationship between the state and religious communities of faith as one between overlapping claims. In this case, religion is an excellent category to capture all non-state ideologies and cultures which make arguments and demands that are grounded in the ultimate and are therefore challenged by civil religion and state identity.

To illustrate the intuition behind this argument, consider the following two stories. In the first, a child from a religious community is forced to enter a secular school. Some of the scientific material taught there contradicts her beliefs, and some of the behaviors and opinions she is exposed to run contrary to her religious mores. These challenges are serious and may justify accommodating this child and her community. However, these challenging circumstances are not unique to the conditions of religious groups. Opposition to certain scientific world views and certain modern behaviors is not the exclusive realm of religion. Thus, the liberal need to accommodate this child applies as strongly to non-religious students. Now consider the second story in which a Catholic child is sent to an evangelical Christian school. The religiosity of the school makes the situation far more complex and challenging. Suddenly, both the school and the devout child make demands and arguments that are similarly religious. That is, they ground their authority and validity in the ultimate or sacred. This type of challenge—one in which both the school and religion make overlapping claims[16] for loyalty and identity—applies only to religious school children. Here, the case for accommodation that applies to the secular school is compounded by challenges that apply only in the circumstance where a religious student attends a school promoting a different religion. This Article argues that the modern state is more analogous to the Christian school than to the secular one.

If we accept that non-state communities of faith (consisting mainly of what we understand as religious groups) have a uniquely challenging relationship with the state-promoted identity, that suggests a different

16. A similar term was recently used in the context of the structural conflict between religion and constitutionalism. Ran Hirschl & Ayelet Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, 85 U. CHI. L. REV. 425 (2018).

type of justification for the special treatment of religion in American law. In Part IV, I depart from the tradition of offering principled arguments for the special treatment of religion. I do not attempt to identify the liberal principle that can be used to justify the legal distinctiveness of religion. Instead, I ask how religious and state identities can coexist peacefully in the context of the overlapping claims account. My answer is that we should understand the distinctiveness of religion as part of a *Jeffersonian Compromise*[17] in which religious adherents trade the separation and exclusion of religion from the political sphere for the guarantee of religious freedom. The goal of the compromise is to quell the conflict produced by the overlapping claims of religious and state identity. Adapting contractarian theory,[18] I suggest that the Jeffersonian Compromise compels us because it is both mutually beneficial, as it alleviates the dynamic of overlapping claims, and generally fair. Since the obligations of the compromise apply specifically to the entities that consent to it, the distinctiveness of religion follows naturally from it.

Interpreting the First Amendment as a Jeffersonian Compromise helps us make sense of the powerful intuition that religion not only *is* treated differently but also *should* be.

I. DISTINCTIVENESS AND NEUTRALITY IN THE RELIGION CLAUSES

The question of the constitutional distinctiveness of religion is fundamental for making sense of the debates over the Religion Clauses of the First Amendment.

In the opinion and oral argument in *Hosanna-Tabor*, mentioned above, we find expressed two contradictory positions on the question of the distinctiveness of religion under the Constitution.[19] The first is the government's argument that since religious organizations can protect themselves against discrimination suits by invoking the First Amendment

17. This expression was coined by Richard Rorty. *See* Rorty, *supra* note 9. Its meaning arises from Thomas Jefferson's 1802 letter to the Danbury Baptists. *See* LIBRARY OF CONGRESS, *Jefferson's Letter to the Danbury Baptists*, LIBRARY OF CONGRESS: INFORMATION BULLETIN (June 1998), https://bit.ly/2EemoE0 ("Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State.").

18. Contractarian theory has many nuances and voices. For a good overview, see generally Ann Cudd & Seena Eftekhari, *Contractarianism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2018 ed. 2018) (explaining that, in the broadest lines possible, this position holds that norms derive their authority from the existence of mutual agreement or contract).

19. *See Hosanna-Tabor*, 565 U.S. at 189.

right to freedom of association, there is "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves."[20] That is, there is no reason to single out religion when it comes to labor and anti-discrimination laws. The so-called Ministerial Exception can be inferred—in a way that is not limited just to religious organizations—from balancing interests under the freedom-of-association doctrine.[21] The same is true for any expressive organization, religious or not. This argument is an encapsulation of the *neutralist* paradigm of the Religion Clauses.[22] Neutralists hold that what the government is interested in (or at least ought to be) is the non-distinctive qualities of religious entities. That is, a government can find that the decisions to hire ministers or, say, college deans are both "so fundamental, so private and ecclesiastical in nature, that it will take an extraordinarily compelling governmental interest to justify interference."[23] Neutralists hold that religious organizations are no more distinctive or important than analogous secular enterprises.

The contrary position, expressed in the unanimous opinion of the Court, is that neutrality is "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[24] Therefore, the Court "cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[25] This is a *distinctivist* paradigm, which supports treating religious institutions as constitutionally special.[26] Distinctivism holds that the Religion Clauses single out religion because it merits special disabilities and privileges.

These two paradigms are in play in virtually all of the theories and legal decisions dealing with the Religion Clauses. Depending on the

20. *Id.*

21. *Id.* ("According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right 'implicit' in the First Amendment.").

22. This distinction between the neutralist and distinctivist positions is based on Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997). Esbeck, however, calls the position holding that religion should be singled out "separationism." *See also* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 50–51 (2002) ("As the labels suggest, Separationism strongly supports an approach to religious institutions that marks them as constitutionally distinctive, while Neutrality supports an approach that undermines any such claims to distinctiveness.").

23. *See* Transcript of Oral Argument, *supra* note 5.

24. *Hosanna-Tabor*, 565 U.S. at 189.

25. *Id.*

26. In the 1940s, when the Supreme Court started dealing with Religion Clause issues, it adopted an explicit distinctivist position. *See* Everson v. Bd. of Ed. of Ewing, 330 U.S. 1, 15–16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'").

battlefield, either paradigm can be fighting uphill. For *neutrality*, as we see in *Hosanna-Tabor*, the difficulty is to overcome the textual, historical, and intuitive weight that the word "religion" holds in our constitutional culture. Those advocating for this position are frequently met with statements of incredulity like those expressed by Justices Scalia and Kagan. How could you say that the fact that the Constitution sought to protect religion has no effect on how the Supreme Court deals with laws that regulate religious organizations?

But the neutralist approach has moments where it holds sway, too. See, for example, *United States v. Seeger*[27] and its successor case, *Welsh v. United States*,[28] both of which concern individuals who refused to serve in the armed forces because of a non-religious conscientious objection. The question was whether the relevant statute, section 6(j) of the Universal Military Training and Service Act—the most explicitly separationist statutory provision imaginable—applied to excuse the objector:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or merely a personal moral code.[29]

In contrast, Justice Clark in *Seeger* argued that the language of the statute applies to all *religions*, even those that do not posit a Supreme Being. He argued that the statute requires only "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[30] To Justice Clark, a conscientious objection to war is "religious" if it arises from an ethical or religious belief that is held with the conviction and strength of traditional religious convictions. Here we find the logic of

27. *See* United States v. Seeger, 380 U.S. 163 (1965) (holding that an exemption from military service can be given according to a belief which is similar to a religious belief in strength and importance).

28. *See* Welsh v. United States, 398 U.S. 333 (1970) (holding that even those who declare their beliefs to not be religious, can enjoy exemptions under the current language of the law).

29. Universal Military Training and Service Act, Pub. L. No. 90-40, § 1(7), 81 Stat. 100, 104 (1967) (codified as amended at 50 U.S.C. app. § 456(j)).

30. *Seeger*, 380 U.S. at 163.

neutrality in its most aggressive interpretative stance.[31] For Justices Clark and Black, what is really worthy of protection is people's conscience, or strongly-held beliefs, and religion acts as merely an illustration of the strength of belief required to justify an exemption from service. It is what is *not* distinctive about religion that warrants protection, a protection that should be applied neutrally between religious and non-religious individuals.[32]

In what remains the most dramatic case in favor of religion clause neutrality, *Employment Division v. Smith*, the Court held that the First Amendment merely prohibits laws that facially discriminate (or aim at discriminating) against religion, but not "neutral, generally applicable" laws even if they substantially burden religious individuals.[33] In *Smith*, the Court considered whether a private employer could fire Native Americans who smoked peyote, a prohibited narcotic, as part of religious ceremonies.[34] The Court rejected the idea that religious actions are special, or merit more distinctive and favorable treatment than prohibited actions taken out of non-religious concerns.[35] That the respondents smoked peyote as part of a religious ritual did not change the status of their labor discrimination claim at all. Here, the Supreme Court declared "that neutrality, rather than religious privilege, had become the guiding force in free exercise adjudication."[36] With seeming inevitability, Congress almost immediately tried to override *Smith* by passing the Religious Freedom Restoration Act, which "[p]rohibits any agency, department, or official of the United States or any State from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability."[37] Thus the intuitive and

31. For a discussion of the dominance of conscience in the Supreme Court's treatment of religion, see Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PENN. J. CONST. L. 313 (2017).

32. *See, e.g.*, EISGRUBER & SAGER, *supra* note 8, at 6 ("Equal Liberty, in contrast, denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions. It insists that, aside from our deep concern with equality, we have no reason to confer special constitutional privileges or to impose special constitutional disabilities upon religion. This puts Equal Liberty in sharp disagreement with the separation-based approach to religious freedom.").

33. Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

34. *Id.*

35. Lupu & Tuttle, *supra* note 22, at 70 ("In *Employment Division v. Smith*, decided in 1990, the Court broadly rejected the concept that religiously motivated action might be entitled to distinctive and more favorable treatment than comparable acts motivated by nonreligious concerns.").

36. *Id.*

37. *Religious Freedom Restoration Act of 1993 (H.R. 1308)*, CONGRESS.GOV (last visited Jul. 13, 2020), https://bit.ly/38TDhyB. *See also* 42 U.S.C. §§ 2000bb-2000bb-4 (2018); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 NYU L. REV. 437, 438 (1994) ("Congress enacted

popular strength of distinctivism reaffirmed the special legal status of religion.

For distinctivists, however, the challenge is to find a coherent legal or political theory that actually makes sense of the special legal status of religion. This usually means finding some liberal principles by which to justify singling out religion. The government's neutralist position in *Hosanna-Tabor* is easy to defend theoretically: certain labor relationships (religious or not) are valuable in a way (in other words, justified according to some basic liberal principle) that outweighs the government's interest in non-discrimination. Since this principle applies generally, it is much simpler to justify. The distinctivist position of the court, however, does not enjoy the advantage of generality and must make a case for why ministers are special in a way that leadership positions in other similar institutions are not. In many cases, like *Hosanna-Tabor*, the Court sidesteps this theoretical difficulty by falling back on the strength of the distinctivist position: the way it coheres with the history and text of the Religion Clauses. This move, however, does not suffice when the project is to give a theoretical justification for the textual and historical weight of distinctivism. We now turn to the distinctivist failure to make theoretical sense of the special status of religion.

II. JUSTIFICATIONS FOR THE DISTINCTIVENESS OF RELIGIOUS FREEDOM

Those who seek to justify the distinctiveness of religious freedom almost invariably rely on the idea that religion is singular in a pertinent way. In this Part, I examine several such accounts and argue that they all fail in their task of explaining how religion is exceptional in any relevant way.

A. Conscience

The most common justification for the principle of religious liberty is that it is a part of the Freedom of Conscience.[38] The basic premise of this account is that religious beliefs are deep, constitutive convictions.

RFRA to counteract the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.").

38. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 291, 310–15 (2005) ("That is, one simply calls attention to the way in which the veil of ignorance combined with the parties' responsibility to protect some unknown but determinate and affirmed religious, philosophical, or moral view gives the parties the strongest reasons for securing this liberty."); WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 45–71 (2005); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65–71 (1998).

Making someone act against her religious faith is akin to forcing her to act against her conscience, against the ideas and values that are at the core of who she is. The affinity of these two concepts—religion and conscience—is so pronounced that in certain jurisdictions, they are united into one concept, such as in the European Convention on Human Rights, with its clause that protects "Freedom of thought, conscience, and religion."[39]

The exact scope of the idea of conscience is a matter of debate. For example, in a recent book, Gideon Sapir and Daniel Statman define conscience as "those normative commitments that define us and whose violation is perceived as unthinkable from our internal point of view."[40] This view emphasizes the inherent impossibility of acting against one's beliefs as the essential attribute of conscience. This definition fits well with a shared understanding of religious beliefs, which believers often experience as originating from external sources of authority (the Divine).

Martha Nussbaum, in her book *Liberty of Conscience*, offers a different view. She defines conscience as "the faculty in human beings with which they search for life's ultimate meaning."[41] For Nussbaum, this is a foundational human capacity and is at the center of what makes us human and worthy of respect and dignity—and thus, most deserving of protection. The special treatment of religion is justified here because it is strongly related to questions about the meaning of life. Limiting religious life is inhibiting the ability of individuals to pursue the search for life's purpose.

Although "freedom of conscience" envelops many religious beliefs, it is biased towards a neutralist view, as it undermines the case for the unique treatment of religion. Why should religious conscience be singled out from other types of conscience? There is little reason to distinguish between the conscientious objector who acts out of a religious motivation from the one who acts from non-religious convictions. For both, serving in an army is unthinkable and violates their deepest beliefs.

Freedom of conscience explains the unique protections afforded to religion only if it can distinguish between religious and non-religious conscience. One distinctivist scholar who defends such a distinction is Michael McConnell.[42] He argues that it is the divine source of the norm that makes religious beliefs deserving of special protections. Unlike secular conscience, which he argues is the result of an autonomous decision, religious conscience comes from deference to the Divine. As

39. European Convention on Human Rights, 3 Sept. 1953, art. 9.

40. SAPIR & STATMAN, *supra* note 8, at 73.

41. NUSSBAUM, *supra* note 12, at 52.

42. *See* McConnell, *supra* note 7, at 3 ("My thesis is that 'singling out religion' for special constitutional protection is fully consistent with our constitutional tradition.").

such, religion deserves special treatment "not because religious judgments are better, truer, or more likely to be moral than non-religious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control."[43] For McConnell, the religious refusenik believes the act of serving in the army is forbidden by a norm that is utterly external to her, and that she has no choice in the matter. In contrast, the secular refusenik is merely making a choice. He can make another.

This distinction is unconvincing. In actuality, the perception of externality is not unique to religious beliefs. In the words of Douglas Laycock:

> The nontheist's belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.[44]

Indeed, this distinction fails in both directions: many modern religious adherents see their religion as very much a matter of choice, a part of their autonomy. At the same time, many secular experiences of justice are perceived as utterly beyond individual choice. In this case, the idea of the moral *good* is as external and outside of the realm of human choice as any norm dictated by *God*.

Freedom of conscience is thus an insufficient explanation for the unique legal status of religion. It may work well as a neutralist critique of the idea of religious freedom as a separate entity, but it is unable to justify the notion of religion's distinctiveness under current law.

B. Culture

The idea of cultural accommodation is the basis for the major alternative justification for religious freedom. The cultural defense of religious liberty is premised on the understanding that human beings operate through, and are embedded in, cultures. A corollary of this premise is that if a person is only able to live her life within a culture, increased autonomy requires multiple cultural options to choose from, which in turn requires the state to protect diverse minority cultures. According to Joseph Raz, the ability of individuals to become authors of their own lives depends on the maintenance of a variety of attractive

43. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990).

44. Laycock, *supra* note 2, at 336.

cultural options within a society.[45] Diversity is thus a prerequisite of meaningful human autonomy. Another type of argument, usually found in the literature addressing multiculturalism, starts with the premise that culture is constitutive of the particular individual. Individuals have little power to exit one culture and integrate into another, and the attempt comes at a high cost (think, here, of the struggles faced by first-generation immigrants). The difficulty of shifting between cultures means that most persons can only flourish when their constitutive culture is respected and protected.[46]

Religion is a cultural system: a repertoire of ideas, traditions, and conventions through which humans make sense of their environment and operate in it. It is also often described as an encompassing culture, one which is related to many parts of a human's life.[47] Thus, the justifications for protecting cultures seem to extend and encompass the protection of religious freedom. Accordingly, religious freedom is justified and made necessary as an instance of the right to culture.[48]

Constitutional rights are interpreted through their perceived goals. If religious freedom is an instance of the right to culture (justified in itself or instrumentally to protect autonomy), then one of its primary goals is "to enable religious groups to form and maintain themselves, and to recruit new members."[49] This makes the question of whether social and political pressures endanger the ability of specific religious groups to maintain their unique culture the key to applying the right. If these groups are not under danger, then the justification for the protection becomes weaker. Thus, a small, reclusive, religious group, which does

45. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986) ("The ideal of personal autonomy holds the free choice of goals and relations as an essential ingredient of individual well-being. The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is [part] author of his own life."); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 178 (1994) ("[Multiculturalism] emphasizes the role of cultures as a precondition for, and a factor which gives shape and content to, individual freedom. Given that dependence of individual freedom and well-being on unimpeded membership in a respected and prosperous cultural group, there is little wonder that multiculturalism emerges as a central element in any decent liberal political programme for societies inhabited by a number of viable cultural groups.").

46. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76 (1995) ("My aim is to show that the liberal value of freedom of choice has certain cultural preconditions, and hence that issues of cultural membership must be incorporated into liberal principles.").

47. *See* Gidon Sapir, *Religion and State–A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 631 (1999) ("In most cases religion is not just a culture, but rather an encompassing culture.").

48. *See id.* at 584 ("Freedom of religion should be understood, therefore, as a derivative of the right to culture and of the freedom of conscience.").

49. Will Kymlicka, *Human Rights and Ethnocultural Justice*, 4 REV. CONST. STUD. 213, 216 (1998).

not have the political wherewithal to establish and protect the institutions (such as schools) that it requires to survive, requires more cultural protection than a more powerful group. An intuitive example is an established religion. Does it make sense to protect the religion that a state actively promotes and funds in the same way as a dissenting faith? It seems like the active support of the state (with its underlying social and cultural force), which is usually accompanied by easy access to political and cultural power, makes the need for constitutional protections less pressing. A similar logic applies to situations in which establishment is not formal, but rather a result of cultural forces. Will Kymlicka argues that "it is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture . . . ."[50] That is, the state necessarily promotes the culture of the majority. The majority culture's ability to maintain its own unique culture is not in any peril and requires no protection. As Halbertal and Margalit put it succinctly, the majority culture "is able to maintain a more or less homogeneous environment without privileges by virtue of its being the culture of the majority."[51] It does not need constitutional protections to survive.

Most scholars who argue for the cultural justification of religious freedom think that religion does not deserve more protection than other forms of encompassing cultures. For example, Jeremy Waldron, when he discusses his theory of cultural accommodation, refers to "religious and cultural exemptions,"[52] indicating that for him, they are the same. Sapir and Statman also clearly state that under their cultural justification, it is unclear why religious groups "deserve more protection than other, mainly ethnic cultural groups."[53]

That said, it is possible to argue that religion is a culture that is especially demanding on its adherents. One could parallel the argument that religious beliefs are a unique form of conscience and say that religious cultures are an exceptionally intense form of encompassing culture. This claim can be grounded in the thick norms produced by many religious cultures, or in the potential vulnerability of religious cultures to secular mainstream culture. However, all of these attributes are also prevalent in ethnic, national, and indigenous communities. This is why advocates for cultural accommodation of religious groups are willing to settle on an over-inclusive justification. Under the prism of

50. *See* KYMLICKA, *supra* note 46, at 111.

51. *See* Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491, 509 (1994).

52. *See* Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 5 (2002).

53. *See* SAPIR & STATMAN, *supra* note 8, at 101.

culture, religion is merely another form of encompassing culture, deserving no more and no less protection than other minority groups.

The idea that the distinctiveness of religion is derived from the fact that it is a unique form of culture is therefore not persuasive. Similar to the idea of conscience, culture can actually function as a neutralist attack on the special status of religion.

C. Public Reason

Finally, some scholars argue that religious arguments should be excluded from the political sphere and that religious accommodation compensates for this disadvantage. The idea here is that a religious argument, because of its *ultimate* or *sacred* logic, cannot be communicated to those who do not share the same orienting point of view. Therefore, if we subscribe to the liberal idea that political arguments should contain themselves to the limits of public reason, then religious arguments should be excluded from the public sphere.[54] The accommodation of religion is thus a way of providing the religious a means of participating in the public sphere.

Avihay Dorfman makes the most sophisticated and convincing version of this argument.[55] His account relies on the uniqueness of religious arguments *vis-a-vis* liberal democratic deliberation generally, and specifically the minimal threshold for justification of political decisions. He bases this threshold on the Rawlsian idea of reasonableness or reciprocity.[56] To make a reasonable or reciprocal argument is to make an argument that can be *explained* while having a reasonable expectation that other citizens will *accept it*. The fundamental idea here is that the argument must, in principle, be accessible to all members of the polity (who are the subject of political decisions). This is "the accessibility condition" for arguments made in the political sphere. Dorfman argues the accessibility condition divides into two possible grounds for political arguments: ones that are based on reason ("accessible to the critical reflection of our fellow citizens") and ones that are not.[57] The exclusion of non-accessible arguments from liberal politics is warranted. Notice that neither Rawls nor Dorfman supports excluding poorly reasoned or

54. *See* RAWLS, *supra* note 38; *see also* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); LARMORE CHARLES, PUBLIC REASON (2002); Jonathan Quong, *On the Idea of Public Reason*, *in* ON THE IDEA OF PUBLIC REASON, A COMPANION TO RAWLS 265 (2014); *infra* Part III.

55. For a similar position, see Dorfman, *supra* note 7; Greene, *supra* note 7, at 1633–39 (arguing that religious views should be singled out for exclusion from the political process and that, to remedy this exclusion, they should receive special legal exemptions).

56. *See* Dorfman, *supra* note 7, at 307.

57. *Id.* at 309.

wrongly reasoned arguments. It is the very attempt to utilize reason itself that satisfies the accessibility condition, not the quality of the reasoning.

Dorfman then turns to religious grounds for political arguments and claims that they, *by definition*, do not pass the threshold of reasonableness and reciprocity. This is because "religious-based grounds have the property of being beyond the reach of explication."[58] The addressees of religious-political arguments lack the tools to evaluate them, not because of the hearer's lack of capacity but because the arguments are grounded in what is beyond human ken. Dorfman names these types of religious arguments *ultimate*. He states that "this sort of grounds, i.e., the Ultimate grounds, represents the antithesis of grounds established on reason."[59] Unlike poorly reasoned arguments, religious arguments claim authority precisely because they are beyond human intellect. The normative force of these arguments is derived "from their inaccessibility to all familiar forms of human intellect."[60] Dorfman cites Max Weber, who famously claimed that religious grounds for political arguments assert themselves "not by means of the intellect but by virtue of a charisma of illumination."[61] These arguments command "the sacrifice of the intellect."[62] This makes religiously-grounded political arguments distinct from all other forms of reasoning—a difference that is the key to understanding the legal uniqueness of religion. Because of their categorical inexplicability, religious arguments cannot participate in the democratic process. They must be excluded. To compensate for this exclusion, and to live up to the republican principle of self-rule, it follows that the state should offer religious adherents exemptions from generally applicable rules.

Dorfman presents a well-reasoned argument, but one that still relies on an unconvincing account of the singularity of religion. The idea that *only* religious arguments are grounded in the ultimate does not seem like an accurate description of modern politics. Ultimate forms of political arguments are utilized quite widely in modern liberal countries, and generally not by adherents of traditional religions. Instead, arguments that demand the sacrifice of the intellect are so frequent as to seem unobtrusive and unproblematic to most deliberators. These arguments are related to another ideology that relies on the ultimate, and which hides in the background of democratic deliberation: civil religion.[63]

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58. *Id.* at 310.

59. *Id.* at 311.

60. *Id.* at 312.

61. Max Weber, *Religious Rejections of the World and Their Directions*, *in* 2 FROM MAX WEBER: ESSAYS IN SOCIOLOGY 352 (1946).

62. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIETY vol. II, 569 (1968).

63. *See infra* Section III.B.

Emile Durkheim was perhaps the original thinker who saw nations as "secular" objects of worship. For Durkheim, these modern institutions came to fulfill the social cohesion functions of the defunct traditional religions. These forms of modern sacrality appeared during the French Revolution, when "things purely laïcal by nature were transformed . . . into sacred things: these were the Fatherland, Liberty, and Reason. . . . [W]e have seen society and its essential ideas become, directly and with no transfiguration of any sort, the object of a veritable cult."[64] Durkheim was a proponent of the idea that traditional religion will ultimately disappear due to its conflict with science. However, he believed that the sacred would necessarily remain central to human society. Without the sacred as a basis for moral respect, society itself is an impossibility. In modernity, the sacred will refer not to the Divine, but to "society," and for Durkheim, the most encompassing functioning society was the "nation."[65]

In a Durkheimian view, the ultimate or sacred is a necessity for the authority that enables modern societies to operate. It is by no means limited to (or definitive of) traditional religions. Instead, inexplicability is an attribute of the sacred, not the religious, and the sacred pervades much of human society. If this is true, then Dorfman's argument for the distinctiveness of religion is unconvincing.

An interesting example can be found in the case of *West Virginia State Board of Education v. Barnette*.[66] Here the court voided the expulsion of children of Jehovah's Witnesses from a public school after they refused to salute the American flag.[67] Under Dorfman's account, we would imagine that the ultimate grounds for the Jehovah's Witnesses' stance would be inaccessible to non-believers, while the school's position is categorically explicable. But in truth, this is a conflict of religious symbols, between the pacifism and non-statism of the Jehovah's Witnesses on the one hand, and the patriotic flag cult on the other. This analogy is explicit in Justice Jackson's opinion, where he argues that the goal of a flag is to "symbolize some system, idea, institution, or personality, [as] a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."[68] This is exactly the argument made by the Jehovah's Witnesses, who see the flag as an "image" or idol they are forbidden to worship.

64. ÉMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 214 (1965).

65. Robert N. Bellah, *Durkheim and History*, 24 AMERICAN SOC. REV. 447, 460 (1959).

66. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

67. *Id.*

68. *Id.* at 632.

What reasonable arguments could those who seek to require flag-saluting provide? They could argue that saluting the flag produces a more unified and patriotic citizenry, which is important for attaining a number of liberal goals. Notice, however, that this is an argument for a sphere of loyalty that transcends logical reason. That sphere may well be beneficial to a liberal society. But its authority does not rely on instrumental benefits and is instead grounded on being a symbol of the sacred, in this case, the nation. The sacredness of the flag parallels that of religious symbols. The justification for exempting Jehovah's Witnesses from saluting the flag is no different from the reasons for exempting Jewish children attending a Christian school from saying mandated prayers.

"Civil religious" arguments, in fact, are common in modern democratic deliberation. Consider the frequently-heard argument that some action is "not American," or that a policy is wrong because "this is not who *we* are."[69] Often, these arguments are used independently of other, more reasoned, claims. But these arguments still appeal to an idea grounded in civil religion—that "the People" have an inherent nature to which some proposal runs contrary.[70] This argument lacks all reasoned substance; it claims authority merely "by virtue of a charisma of illumination."[71]

If one accepts this account of the civil, religious nature of some arguments in modern political deliberation, then it follows that traditional religious arguments are not categorically distinct. If this foundation is undermined, the rest of Dorfman's beautiful structure crumbles. It is possible, in principle, to argue that the idea of public reason should exclude all arguments grounded in the sacred since these are inexplicable to non-believers. However, this would mean the exclusion of a much broader spectrum of beliefs and arguments than merely traditional religious arguments. In such a case, it makes little sense to exclude only religious arguments.

That being said, the notion of civil, religious grounds for political arguments opens up new avenues for an inquiry into the legal distinctiveness of religion. What if part of the reason we protect

69. This argument is used on both sides of the aisle. *See Remarks by the President at Islamic Society of Baltimore*, WHITEHOUSE.GOV (Feb. 3, 2016), https://bit.ly/3iVVuQZ ("We're one American family. And when any part of our family starts to feel separate or second-class or targeted, it tears at the very fabric of our nation."); *Rubio: "We Are a Nation of Haves and Soon-to-Haves"*, SENATE.GOV (Dec. 16, 2011), https://bit.ly/3j0ioGU ("We have never been a nation of haves and have-nots. We are a nation of haves and soon-to-haves, of people who have made it and people who will make it. And that's who we need to remain.").

70. *See infra* Section III.B.

71. *See* Weber, *supra* note 61, at 352.

traditional religions in liberal states is that not doing so is to force them to participate in the rituals and discourse of a competing religion, albeit a civil one? In other words, what if it is the similarity between religious and state identity—and the resulting competition between them—that leads to their distinct legal relationship?

III. OVERLAPPING CLAIMS AND THE NEED FOR COMPROMISE

In this Part, I offer an alternative account for the distinctiveness of religion, which relies on the similarity between traditional religion and the source of collective political identity in modern states: national political identity. I begin by defining nationality[72] and its place in the modern state. I then flesh out the parallels and overlap between nationality and traditional religions. Finally, I explicate some of the potential areas of conflict between these two *ultimate* orders. This account, which focuses on the *overlapping claims* made by religion and state, is meant to explain in what way religion is special in society and politics. This explanation lays the groundwork for the idea of the Jeffersonian Compromise developed in Part IV, which explains and justifies the distinct constitutional status of religion.

A. State Identity

The modern state, first and foremost, is a type of political organization whose monopoly over the use of violence and other repressive forms of force is legitimized through the political ideology of nationality.[73] That is, the state is seen as legitimate because within its borders, "the people" are sovereign.[74] Nationality is not the sole source of legitimacy for political power within modern states. Other sources, such as providing security and justice, however, do not legitimize a

72. The choice of the term "nationality" is intentional. In choosing it, I follow the contemporary lead of the important political theorist David Miller, and the classical lead of John Stewart Mill. *See* DAVID MILLER, ON NATIONALITY (1995), *and* JOHN STEWART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861). The issue with using the more common term, "nationalism," is that it is often interpreted as including moral condemnation and is thought to include positions that are unpalatable from a liberal perspective. Such a connotation does not fit the thrust of this Article, which does not seek to morally condemn either American Civic Nationality or Christian nationality. For this reason, I try to avoid such interpretative baggage by using the term "nationality."

73. The idea of the modern state as being defined by its monopoly over violence was classically iterated by Max Weber. *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (1946) ("[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.").

74. *See, e.g.*, Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 261 (2004) ("In the modern era, the sovereign is always the people: Every modern state is a 'people's republic.'").

specific state. Only within the ideological and narrative content of a particular nationality do the borders of the state, its political form, and its affinity to a specific group of people make sense as a whole.[75] Some scholars argue, along similar lines, that nationality was a conceptual prerequisite for the rise of the modern state, since unlike pre-modern forms of political authority, the authority of the modern state is impersonal.[76] Liah Greenfeld argues that this type of authority is only possible in a situation in which "sovereignty was separated from the person (and/or lineage) of the Sovereign (or Prince) and became an attribute of the community."[77] This shift of sovereignty was enabled by nationality. However, for the people to be "sovereign," they must be "fundamentally homogeneous (essentially a community of equals) and only superficially divided by the lines of status, class, [or] locality."[78] This imaginary sense of community is a key part of the relationship of citizens to the modern state.

Perfect symmetry between politically-controlled territory and a perfectly-homogeneous nation is impossible. The many centrifugal forces of modern society, with its myriad, multiplying cultures, constantly threaten to pull collective political identities apart. As a result, the modern state is always an *identity-building state*, that is, it is continuously engaged in a project of trying to "unite the people subjected to its rule by means of homogenization, creating a common culture, symbols, values, reviving traditions and myths of origin, and sometimes inventing them."[79] This project of building and maintaining identity is commonly related to a pre-political community that dominates the state. In other words, the state utilizes a pre-existing narrative to create and impose a unified political identity within its borders.[80] This project is never wholly successful, and in all modern states, we find minorities that are alienated from the common political identity.[81] However, regardless

75. On the conceptual and political reliance of liberalism on national identity, see MARGARET CANOVAN, THE PEOPLE (2005), *and* MARGARET CANOVAN, NATIONHOOD AND POLITICAL THEORY (1998).

76. *See* Liah Greenfeld, *Nationalism and Modernity*, 63 SOC. RES., Spring 1996, at 3, 9.

77. *Id.*

78. *Id.* at 11.

79. MONTSERRAT GUIBERNAU, NATIONALISMS: THE NATION-STATE AND NATIONALISM IN THE TWENTIETH CENTURY 47 (2013).

80. *See* CRAIG CALHOUN, NATIONS MATTER: CULTURE, HISTORY AND THE COSMOPOLITAN DREAM 39 (2007) ("Central to nationalist discourse is the idea that there should be a match between a nation and a sovereign state; indeed, the nation (usually understood as prepolitical and always already there in historical terms) constitutes the ground of the legitimacy of the state.").

81. *See* BERNARD YACK, NATIONALISM AND THE MORAL PSYCHOLOGY OF COMMUNITY 112 (2012) ("It is sometimes argued that there are few if any true nation-

of success, the use of state means for identity-building is constant. In an ironic twist, the state, whose legitimacy relies on appearing to represent the will of "the people," is also constantly attempting to produce and shape "the people."

The logic of nation-based state identity does not seek exclusivity; rather, it commonly seeks to establish itself as the primary form of identity.[82] Only in totalitarian societies does the national narrative attempt to completely replace all secondary identities, such as those of religious, ethnic, and local groups. In such a regime, the state sees these identities as sources of resistance and suppresses them as much as possible. However, in most cases, state identity is an ideology concerned only with primary identity. A good citizen is one who is first and foremost a member of the national community, and only then a member of an ethnicity, a religion, or a class. As Greenfeld puts it: "In the modern world, national identity represents what may be called the 'fundamental identity,' the one that is believed to define the very essence of the individual, which the other identities may modify but slightly, and to which they are consequently considered secondary."[83] The effects that this dissemination of a primary identity has on "secondary identities" lies at the heart of the political dilemma of modern states.

The main strategies states employ in the process of nation-building and maintaining include:[84]

1. ***The development and spread of a particular idea of a nation***. This shared conception is commonly based on the most dominant cultural group within the state and is comprised of a standard historical narrative, an emphasis on the commonality of certain cultural artifacts (language, religion, and in the U.S., usually a common "way of life" and a joint political and legal project), and an idea of the national territory.[85] In the U.S., the common narrative often revolves around the War of Independence, The Founding and the Constitutional Congress, the Civil

states in this sense of the term since almost every contemporary state contains significant cultural minorities within their boundaries.").

82. *See* Yonatan Yisrael Brafman, *Neither Privatization nor Politicization: Alternative Social Formations and Norms in Isaac Breuer and Mordecai Kaplan*, 3 J. JEWISH ETHICS 179, 183 (2017) ("[S]tatism attempts to impose a clear hierarchy among sets of social formations, normative orderings, and personal identities. The claim of the state to sovereignty is the assertion that it is the primary social formation and that consequently individuals ought to understand themselves most basically as citizens governed by its normative ordering—state law.")

83. Greenfeld, *supra* note 76, at 10.

84. Adapted from GUIBERNAU, *supra* note 79, at 65–85.

85. *See* YACK, *supra* note 81, at 69 ("[T]he nation is a cultural heritage community. In other words, it is the affirmation of a shared inheritance of cultural artifacts, such as language, relics, symbols, stories of origin, memories of traumatic experiences, and so on, that links the members of nations to past and future generations.").

War, Reconstruction, and the Civil Rights Movement. The exact brew of each national narrative varies significantly, and as we have discussed above, it is often a mixture of ethnic and civil ingredients.[86] What is common to all these narratives is that they are meant to produce a particular intergenerational community among the citizen body (however defined), demarcate the difference between members and non-members, and promote loyalty and affinity towards the state.

2. ***The cultural dissemination of state identity through the use of symbols to reinforce the sense of unity and community among citizens***. All communities use symbols to establish membership. The use of symbols is enabled by the ability of symbols to be both singular (there is only one American flag) and enable multiple meanings and interpretations. These dual attributes are a result of the inherent ambiguity of symbols. In the words of Anthony Cohen:

> Symbols are often defined as things "standing for" other things. But they do not represent these "other things" unambiguously: indeed, as argued above, if they did so, they would be superfluous and redundant. Instead, they "express" other things in ways which allow their common form to be retained and shared among the members of a group, whilst not imposing upon these people the constraints of uniform meaning.[87]

This makes symbols especially helpful for state identity-building because often, the sheer difference and diversity among the citizen body are such that it is not possible to create a unified system of political meanings. Symbols allow for a common form of content to be shared among the community, while not imposing on the members a set of clearly defined uniform meanings. Symbols are, as Cohen states, "ideal media through which people can speak of a 'common' language, behave in apparently similar ways, participate in the 'same' rituals . . . without subordinating themselves to a tyranny of orthodoxy. Individuality and commonalty are thus reconcilable."[88] Through symbols, the empirical reality of difference transforms into an appearance of similarity.

One major way of maintaining the commonality of symbols is through repetitive rituals. In his comprehensive book on political rituals, David Kertzer describes symbols as ways "by which we give meaning to the world around us,"[89] and "instigate social action and define the

86. *See* ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS 149 (1986) ("[A]ll nations bear the impress of both territorial and ethnic principles and components, and represent an uneasy confluence of a more recent 'civic' and a more ancient 'genealogical' model of social cultural organization.").

87. ANTHONY P. COHEN, SYMBOLIC CONSTRUCTION OF COMMUNITY 18 (2013).

88. *Id.* at 21.

89. DAVID I. KERTZER, RITUAL, POLITICS, AND POWER 3–5 (1988).

individual's sense of self."[90] Rituals are a type of symbol, as they "help give meaning to the world . . . by linking the past to the present and the present to the future." Rituals provide continuity both to individuals and societies.[91]

More relevant to this discussion, rituals "also furnish the means by which people make sense of the political process."[92] In Kertzer's view, "modern politics depends on people's tendency to reify political institutions."[93] Central to these rituals are broad organizing narratives; "each society has its own mythology detailing its origins and sanctifying its norms," and "ritual practices are a major means of propagating these political myths."[94] They can do so effectively because they both have a cognitive effect on the common understanding of political reality, and an emotional effect from the satisfaction of participating in them. These rituals and their background mythology serve to make present for participants the "meanings embodied in the culture and its major institutions. They restore ever again the continuity between the present moment and the societal tradition, placing the experiences . . . of society in the context of a history (fictitious or not) that transcends them all."[95] Symbols and rituals enable the nation-state to create a sense of homogeneity and unity among the citizen body.

3. ***The promotion of the legal and political institution of citizenship***. The idea of citizenship—involving a set of legal and political duties and rights—enables state identity to both distinguish between included citizens who are right-bearers and excluded foreigners who are not, and creates a sense of loyalty towards the nation-state.[96]

4. ***The establishment of common enemies, real, potential, or invented***.[97] This both emphasizes and clarifies the borders (both physical and symbolic) of the nation and provides a clear justification for the sacrifices required by the state.

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90. *Id.* at 6.
91. *See id.* at 9–10.
92. *Id.* at 6.
93. *Id.*
94. *Id.* at 12.
95. *Id.* at 14.
96. *See* CALHOUN, *supra* note 80, at 124 ("In both state formation and independence movements, the discourse of nationalism prompts the attempt to secure a satisfactory fit between nation and state. This is made especially important by the political ideologies emphasizing citizenship, for the participation of citizens demands a kind of lateral connection to each other and a kind of exclusive loyalty to the state not required by empires and other older forms of polity.").
97. The idea that us/them or friend/enemy distinctions are essential for modern states originates from Carl Schmitt. *See* CARL SCHMITT, THE CONCEPT OF THE POLITICAL: EXPANDED EDITION (2008).

5. ***The spread of the national narrative through the consolidation of media and education***.[98] These tools are then used to spread the national narrative, together with its symbols and rituals, values and ways of life, and a clear understanding of who is a "good citizen."

We find, therefore, that the modern state—whether liberal or not, and regardless of whether its national project tends towards the civil or ethnic ends of the spectrum—employs multiple tools in its constant project of building and maintaining identity. It does so because this identity legitimizes its monopoly over violence, current borders, and political form. This nation-building effort is an attempt to create an imagined, unified community out of a diverse citizen body. It assertively promotes state identity through the creation of symbols and rituals, and the communal worship of the nation itself. It does so through the formal means of education and state communication and informal ones such as popular culture and media. National identity is meant to be primary; its recipients are expected to be citizens first.

B. Religion and State Identity

Earlier, when criticizing Dorfman's account, I argued that traditional religious groups are not the only ones that make ultimate or sacred arguments in political deliberation. Specifically, I claimed that arguments grounded in the common political identity promoted by the state are also often of the ultimate kind and are necessarily not accessible to non-members. This Section fleshes out that claim by asking what makes arguments ultimate, in the sense that their authority is self-referential and final.

Let us define an ultimate political argument as one that relies on the human response to a reality perceived as sacred. It grounds human experience in a reality that is beyond this world. Social maintenance of this type of ultimate cultural experience is the goal of many of the mechanisms associated with traditional religions. This is why it is common to see religions embrace narratives of the sacred origins of the world, humanity, and the religion; rituals and modes of worship that relate practitioners to the myths and the sacred; and codes of conduct that govern the behavior of adherents.[99] This description is suggestive of the profound ways in which the experience of the sacred regulates, inspires, and influences human society.

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98. *See* Montserrat Guibernau, *Anthony D. Smith on Nations and National Identity: A Critical Assessment*, 10 NATIONS AND NATIONALISM 125 (2004) (describing the importance of mass media for state identity formation).

99. *See* SCOTT R. APPLEBY, THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION 8 (1999).

One additional defining attribute of these religious mechanisms is that they can create the experience of order in the face of an anomic and chaotic human experience. Clifford Geertz, for example, sees religion as attempting to give an ordered coherence to the utter chaos of everyday reality. In fact, it is part of his definition of religion, which for him is:

> (1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.[100]

Peter Berger, in his *Sacred Canopy*, elaborates on this idea, stating that "[r]eligion is the human enterprise by which a sacred cosmos is established."[101] Since the sacred exists beyond the everyday but is still accessible through the means of rituals and symbols, it is experienced as both being beyond humanity and yet being directed at human society. The sacred social world is constructed on the concreteness of sacred social institutions.[102]

A *community of faith* is a group of people who share the same ultimate social institutions. In other words, a community of faith is the human response to a reality perceived as sacred. It grounds human experience in a reality which is beyond this world.[103] Maintaining this type of enterprise requires massive cultural support.[104] It is thus common to see communities of faith embrace: (1) myths of the sacred origins of the world, humanity, and the specific religion; (2) rituals and modes of worship that relate the practitioners to the myths and the sacred; and (3) codes of conduct which govern the behavior of those who belong to the religion.[105] This type of description is suggestive of the profound ways in which communities of faith regulate, inspire, and influence human society.

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100. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 90 (1973).

101. PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 26 (1967).

102. *See id.*

103. *See* GEERTS, *supra* note 100.

104. *See* PETER L. BERGER, THE SOCIAL REALITY OF RELIGION 48–49 (1969) ("Men forget. They must, therefore, be reminded over and over again. Indeed, it may be argued that one of the oldest and most important prerequisites for the establishment of culture is the institution of such 'reminders', the terribleness of which for many centuries is perfectly logical in view of the 'forgetfulness' that they were designed to combat. Religious ritual has been a crucial instrument of this process of 'reminding'. Again and again it 'makes present' to those who participate in it the fundamental reality-definitions and their appropriate legitimations.").

105. *See* SCOTT R. APPLEBY, THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION 8–9 (1999).

For communities of faith, aspects of human society and experience are grounded in a reality which is beyond this world. Religious communities are, or seek to become, communities of faith. This raises the question of whether they are the only such communities. In Dorfman's account, the uniqueness of religion is that the adherents of traditional religions are the only ones who make arguments that are grounded in a community of faith. However, as I suggested above, national communities represent a uniquely modern form of communities of faith.

A successful state identity-building project establishes not only a dominant political ideology but also a community of faith that is oriented towards the ultimate. Anthony D. Smith, for example, asserts that nationality is a system of faith as "binding, ritually repetitive, and collectively enthusing" as any traditional religion. It also involves a "system of beliefs and practices that distinguishes the sacred from the profane and unites its adherents in a single moral community of the faithful."[106] As Mark Juergensmeyer explains, both religion and nationality "are expressions of faith, both involve an identity with and a loyalty to a large community, and both insist on the ultimate moral legitimacy of the authority invested in the leadership of the community."[107]

The object of faith in nationality is the people themselves; not the concrete citizens of the present, but the people as a nation: a unified intergenerational community with a single will. One way of looking at the relationship between these two discrete understandings is as "the people's two bodies."[108] That is, alongside the concrete people who are actually participating in democratic politics, the doctrine of popular sovereignty also relies on an idea of a mythical unity of "the people," which has the final say in the legitimacy of the state. Under this conceptualization, it is the transtemporal unity which is "the people," not just the current, concrete generation. It is this latter, mysterious conception of the constituent sovereignty of the people as transtemporal unity that "is now accepted in all [liberal democratic] constitutional

106. ANTHONY D. SMITH, CHOSEN PEOPLES: SACRED SOURCES OF NATIONAL IDENTITY 26, 40 (2003).

107. MARK JUERGENSMEYER, THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE 16 (1993).

108. Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517, 519 (2001). *See generally* ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (2016) (explaining the idea of the "King's Two Bodies"—one celestial and eternal and one corporal).

systems. . . . It may even appear obvious."[109] Some go as far as suggesting that the "people as a single subject are the source of ultimate meanings in and for the Western state."[110] In this sense, the sovereignty of the people—in other words, nationality—is the foundational answer for the question of state power in the eyes of the citizen. The fact that the Constitution begins with "We the People" as those who "ordain and establish"[111] is an explicit instance of this type of popular sovereignty.

As I discussed above, Durkheim called this type of faith, which is promoted by state identity-building projects, the "civil religion." Other theorists of civil religion also relate it closely to nationality. Philip E. Hammond, for example, defines civil religion as a "set of beliefs and ritual, related to the past, present and/or future of a people ('nation') which are understood in some transcendental fashion."[112] Similarly, Robert Wuthnow defines it more bluntly as "the use of God language with reference to the nation."[113] Civil religion can be defined as a "collection of beliefs, symbols, and rituals that sanctif[y] the national community and confer[] a transcendental purpose to the political process."[114] Durkheim's idea that nationality is a type of "religion" also permeates the work of some of nationality's chief theorists. Smith, quoting Durkheim, argues that:

> [N]ationalism itself . . . becomes a novel kind of anthropocentric, intra-historical, and political "religion," a . . . functional equivalent of the old, transhistorical religions, but one that like them fulfills many of the same collective functions. . . . As Durkheim remarked of French nationalism during the Revolution: "A religion tended to become established which had its dogmas, symbols, altars and feasts."[115]

Ernest Gellner, also mentioning Durkheim, states that "the religious symbols through which, if Durkheim is to be believed, it was worshiped,

109. Yack, supra note 108, at 522. *See also* JULIAN H. FRANKLIN, JOHN LOCKE AND THE THEORY OF SOVEREIGNTY: MIXED MONARCHY AND THE RIGHT OF RESISTANCE IN THE POLITICAL THOUGHT OF THE ENGLISH REVOLUTION 124 (1981).

110. PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 90 (2005).

111. U.S. CONST. pmbl.

112. Phillip E. Hammond, *The Sociology of American Civil Religion: A Bibliographical Essay*, 37 SOC. ANALYSIS 169 (1976).

113. ROBERT WUTHNOW, AFTER THE BABY BOOMERS: HOW TWENTY- AND THIRTY-SOMETHINGS ARE SHAPING THE FUTURE OF AMERICAN RELIGION 164 (2010).

114. Jose Santiago, *From "Civil Religion" to Nationalism as the Religion of Modern Times: Rethinking a Complex Relationship*, 48 J. FOR SCI. STUDY RELIGION 394, 396 (2009) (quoting Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1, 8 (1967)).

115. Anthony D. Smith, *The 'Sacred' Dimension of Nationalism*, 29 MILLENNIUM 791, 811 (2000).

cease to be serviceable. So—let culture be worshiped directly in its own name. That is nationalism."[116]

Several scholars suggest that national civil religion is grounded in sacrifice and blood.[117] They believe that the cohesive social force of civil religion is found in the fact that "[t]he underlying cost to all society is the violent death of its members. Our deepest secret, the collective group taboo, is the knowledge that society depends on the death of these sacrificial victims *at the hands of the group itself*."[118] They continue to assert that "[i]n our scheme, civil religion and nationalism are synonymous terms for the sacralized agreement that creates killing authority and specifies the relationship of group members to sacrificial death."[119] Sacrifice is also prominently featured in the work of another theorist of the modern state, Paul Kahn. In his words:

> In a crisis, it remains true today that the secular state does not hesitate to speak of sacrifice, patriotism, nationalism, and homeland in the language of the sacred. The state's territory becomes consecrated ground, its history a sacred duty to maintain, its flag something to die for. None of this has much to do with the secular; these are matters of faith, not reason.[120]

In this way, the civil religion of the state relies on political theology. It is important to be clear that my account of the conflict between state and religious identities does not rely on any particular version of political theology. It is invested in the idea that modern states and politics are deeply imbued with the sacred. This immersion in the sacred can take many shapes and forms.

Like most analogies, the analogy between religious and state identities has its limits. It is most illuminating to treat both traditional religions and nationality as constituting different types of imagined intergenerational communities of faith: a "national" community of faith and a "religious" community of faith. This conceptualization illuminates both what these phenomena share while not imposing on them a more strict analogy (such as the one suggested by Schmitt when he said that "all significant concepts of the modern theory of the state are secularized theological concepts"[121]). For example, although the "popular sovereign" is a transtemporal and perhaps transcendental entity, it is rarely seen as

116. ERNEST GELLNER, CULTURE, IDENTITY, AND POLITICS 16 (1987).

117. *See, e.g.*, CAROLYN MARVIN ET AL., BLOOD SACRIFICE AND THE NATION: TOTEM RITUALS AND THE AMERICAN FLAG (1999).

118. *Id.* at 21.

119. *Id.* at 11.

120. PAUL KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 23 (2011).

121. SCHMITT, *supra* note 97.

eternal (certainly not in civic-type nationalism) or all-powerful, which are attributes more associated with the Divine. That being said, the authority of both types of communities and the political and social institutions legitimated by them is of a similar, ultimate kind. This opens the door to thinking of them as competing over the same type of limited resource: loyalty and authority, which are grounded in what is beyond human reason.

C. The Dynamics of the Conflict

Imagine the life of X, a devout religious group living within the context of a non-liberal state, which is strongly identified with religion Y. State power will imbalance the interaction between these two religions: One has the power of the state to promote its claims for truth, its culture, its rituals, and its values; while the other will constantly need to cope with this pressure, and its attempts to attract adherents and access power and resources will likely require an acknowledgment of the superiority of the state religion. This is doubly so if the relationship between the two religious traditions is one of historical and theological opposition. Consider St. Augustine's doctrine of the Jewish Witness, which "called for the preservation of Jews and Judaism in Christendom so that they might testify to the truth of Christianity."[122] For him, Jews should be permitted to exist in Christendom because they serve as constant witnesses to the victory and truth of Christianity, Judaism's inheritor religion. For a more contemporary example, one can look at the writings of some Hindu-nationalist ideologues, who often proclaim that although religious minorities need not convert to Hinduism to be members of a Hindu nation, they still "must assimilate, not maintain their distinctiveness. Through Ekya (assimilation), they will prove their loyalty to the nation."[123] In both examples, the religious minority in particular is the target of the dominant religious ideology. As was discussed above, communities of faith make claims for loyalty, identity, and truth. Whenever one community of faith has political control over the other, these claims come into direct conflict. The example of a non-liberal state that actively promotes a particular religion makes it clear that religious minorities are uniquely vulnerable to the pressures of the religious faith promoted by the state.

What does this mean for the relationship between liberal, secular states and religious minorities? Not much, if one holds on to the idea that modern politics has nothing to do with the sacred and is within the realm

122. Jeremy Cohen, *Revisiting Augustine's Doctrine of Jewish Witness*, 89 J. RELIGION 564 (2009).

123. Ashutosh Varshney, *Contested Meanings: India's National Identity, Hindu Nationalism, and the Politics of Anxiety*, 122 DAEDALUS 227, 231 (1993).

of rationality and not of faith. However, the analogy to X becomes compelling by the fact that, as we have seen above, the modern state does establish civil religion and promote a political theology.

In this Section, I discuss two attributes that shape this potential conflict. The first attribute is the clash between the exclusive claims of authority and truth that flows from the opposed concepts of Divinity and Sovereignty. The second attribute is that these claims of authority and truth rest their claim for legitimacy on the fact that they afford adherents a type of primary identity. In the clash of these two identities, the modern nation-state seeks to relegate religion to a secondary identity.

1. Communities of Faith

The idea that a conceptual conflict between sovereignty and divinity lies at the heart of state-religion conflicts is prominent in the work of Thomas Hobbes. He saw independent religion as a serious danger to civil order and peace. Since religious observance and faith demand final authority under threat of eternal sanctions, it potentially interferes with the supreme authority of the sovereign to maintain peace and order through temporal sanctions.[124] He famously stated, "It is impossible a Common-wealth should stand, where any other than the Sovereign, hath a power of giving greater rewards than Life; and of inflicting greater punishments, than Death."[125] Religion and the state conflict because of what they have in common: they both demand final, supreme authority, and require absolute adherence to a set of prescribed norms.[126] Hobbes's solution to this problem is the establishment of a state church that will be controlled directly by the sovereign.[127] By controlling the religious practice of the citizenry, the sovereign resolves the potential clash of authorities.

The challenge of national sovereignty for traditional religions existing within nation-states becomes even starker if understood through

124. *See generally* Lodi Nauta, *Hobbes on Religion and the Church Between the Elements of Law and Leviathan: A Dramatic Change of Direction?*, 63 J. HIST. IDEAS 577, 586 (2002) ("Because the claim by the Church to represent the Kingdom of God on earth formed the most direct threat to Hobbes's idea of the absolute power of the civil sovereign, it is not surprising that Hobbes attacked this claim in all its guises with great vehemence.").

125. THOMAS HOBBES, LEVIATHAN II, vii, 10 (Richard Tuck ed., 1991).

126. *See* THOMAS HOBBES, MAN AND CITIZEN (DE HOMINE AND DE CIVE) 258, 385 (Bernard Gert ed., Hackett Books 1991) ("[F]or every man, if he be in his wits, will in all things yield to that man an absolute obedience, by virtue of whose sentence he believes himself to be either saved or damned.").

127. Devin Stauffer, *"Of Religion" in Hobbes's Leviathan*, 72 J. POL. 868, 868 (2010) ("Hobbes argues for a mighty sovereign to whom he would give the right to control the public teaching of 'doctrines,' and he indicates that certain religious views are among the first doctrines whose teaching he would have the sovereign prohibit.").

the lens of political theology. As Paul Kahn describes, "In the politics of the nation state, man—understood as the popular sovereign—has become divine. The source of the state's creation is the will of the popular sovereign."[128] In this story, the body of Christ is replaced by the body of the nation; the church is replaced by the political community of faith.[129] In a way, the manner in which nation-states overcame the political power of religion is not by controlling it, but by replacing it. Unification resolves the tension of religion and state described by Hobbes.

The *Overlapping Claims* account of religion's legal distinctiveness is not reliant in any way on Hobbes's empirical claim that the authority of the sovereign must be unified with religion for the state to survive. The reality of the modern state has taught us otherwise. What is far more plausible is that the claims for loyalty and authority inherent in both traditional religions and civil religion are similar and competing. It does not follow that this conflict or competition is unmanageable; rather, it needs to be managed constantly. Consider the critique, made above, of Dorfman's account of the distinctiveness of religiously-grounded political claims. He claimed that religious arguments claim authority because they are ultimate—beyond human reason. However, as discussed above, this attribute is not unique to traditional religions but is shared by all claims whose signifier is the sacred. In fact, the defining feature of the sacred is that it is beyond human comprehension. Rudolf Otto famously described the sacred as the experience of the ultimate other, which both fascinates and terrifies.[130] It is exactly the fact that this experience is beyond human reason and language that makes it *ultimate*. The authority claimed by the popular sovereign and by the Divine is both beyond human ken, and directly addresses themselves to human institutions: they are both authoritative and incomprehensible.[131] Peter Berger describes this phenomenon sociologically, by arguing that religion provides legitimate authority to social institutions by "bestowing upon them an ultimately valid ontological status, that is, by *locating* them within a sacred and cosmic frame of reference."[132]

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128. Paul W. Kahn, *Political Time: Sovereignty and the Transtemporal Community*, 28 CARDOZO L. REV. 259, 268 (2006).

129. For the classical treatment of the mystical body of the king and its transfer to the modern state, see KANTOROWICZ, *supra* note 108, *and* Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 UNIV. TORONTO L.J. 185 (2006).

130. *See* RUDOLF OTTO, THE IDEA OF THE HOLY 12–40 (1958).

131. *See* BERGER, *supra* note 101, at 26 ("The sacred cosmos is confronted by man as an immensely powerful reality other than himself. Yet this reality addresses itself to him and locates his life in an ultimately meaningful order.").

132. *Id.* at 33.

What happens when two *ultimate* claims make demands on one person or group? They are, at least conceptually, impossible to reconcile because they are, again, beyond words and reason. Sociologically, this impossibility of reconciliation means that often, the more socially powerful, prestigious, and prevalent "ultimate" will dominate the interaction, while its lesser counterpart will utilize different strategies to either avoid the interaction or change the power dynamics.

This clash of supreme or ultimate authorities can be witnessed in many of the free-exercise cases that come before the Supreme Court. Often, when asking to exercise their religious freedom, adherents argue that they are obligated to do so by a higher authority. In parallel, and regardless of whether they decide to provide relief, the Court often emphasizes the superiority of the constitutional order. For example, in *Minersville School District v. Gobitis*,[133] the child of a Jehovah's Witness refused to salute the flag, claiming that "I do not salute the flag because I have promised to do the will of God."[134] The Court in this case refused to provide relief, arguing that the state's interest in "national cohesion" is "inferior to none in the hierarchy of legal values."[135] To the Court, this interest in promoting patriotism overwhelmed the free-exercise claim. Justice Frankfurter explicitly related this result to the need to maintain a political community, declaring that:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.[136]

Gobitis was later overturned in *Barnette*, mentioned above. Although reaching the opposite conclusion, Justice Jackson also emphasized the fact that the Witnesses believe "that the obligation imposed by law of God is superior to that of laws enacted by temporal government."[137] While for Frankfurter in *Gobitis* this meant that the state should impose patriotic rituals in schools, for Jackson this was a good reason to accommodate the Witnesses.

This clash of ultimates does not limit itself to the refusal to participate in explicitly-patriotic rituals. It is also central in the long chain of polygamy cases involving the Church of Latter-Day Saints (the

133. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

134. *Letter from Billy Gobitis to Minersville, Pennsylvania, School Directors, Nov. 5, 1935*, U.S. Capitol Visitor Center.

135. *Gobitis*, 310 U.S. at 595.

136. *Id.* at 596.

137. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

Mormon Church), which tells the story of the aggressive imposition of constitutional authority and eventual adaptation by the Mormons. In these cases, the Court (and Congress) sought to establish the superiority of the constitutional order to the religious claims of the Mormons. In *Reynolds v. United States*, the Court reasoned that to allow a religious exemption from the federal antipolygamy statute is to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[138] The issue was not simply moral abhorrence of polygamy, the Court made clear, but the question of who has the authority to sanction such behavior. Conceptually, this parallels what one of the Mormon defendants put simply: "I very much regret that the law of my country should come in conflict with the laws of God; but whenever they do, I shall invariably choose the latter."[139] As discussed below, the dynamics of this clash of authorities were quite different in the case of Jehovah's Witnesses versus that of the Mormons.

The purpose of these examples is to show that the clash of ultimates runs parallel to the *value* disagreements that fuel free exercise cases, at least in how the opposing sides view the conflict. Value conflicts are not distinctive to the relationship between the liberal state and religious groups, but the question of authority does seem to be. This potential clash seems to exist within all non-state communities of faith (for which "religion" is a good proxy). However, it becomes prominent when the beliefs and practices of a religious group—like the Mormon Church and Jehovah's Witnesses—are outside of the mainstream.

The theological or conceptual conflict between state and religion as sources of ultimate authority is meaningful when it is paralleled by a social and political struggle between identities.

2. Primary Identities

Both religion and the nation-based state identity are order-creating cultural systems. Both are frameworks that conceive of the world in coherent, manageable ways; they both suggest that there are levels of meaning beneath the day-to-day world that give coherence to things unseen, and they both provide the authority that gives the social and political order its reason for being. In doing so, they define for the individual the right way of being in the world and relate persons to the

138. Reynolds v. United States, 98 U.S. 145, 167 (1879).

139. ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER 79 (2000).

social whole.[140] This dynamic creates the potential for functional conflict between these two orders.

With the rise of state identity, we see the emergence of a new ideology concerning primary identities. This ideology seeks to displace other potential sites of primary identity, such as localism, family, tribes, and religion. Citizens are meant to be American first, and Jewish, Christian, Muslim, or Hindu second. Nationality, a type of secular faith that advocates for the primacy and sovereignty of the people, competes directly with the functional roles of traditional religion.[141]

Unlike liberalism, both religion and nationality are deeply concerned with establishing a common identity. Greenfeld explores this when she says that they both represent a "framework of the type of identity characteristic."[142] For her, in the modern world, nationality has replaced religion as the most prevalent basis for collective identity. Identity locates and delimits an individual in the social world. It carries a set of implicit understandings and norms that orient members' lives. The most foundational (or least specialized) forms of identity shape behaviors and thinking in a wide variety of social contexts. In the pre-modern world, religion was such a foundational identity for most people that it "formed the framework of social consciousness."[143] But now, state identity has become the dominant social identity. The victory of state identity is in no way static or inevitable. As we have described, it is constantly maintained by powerful cultural and political mechanisms. State identity is forever imposed on all minority communities.

The pressure for homogenized national unity is one of the major challenges facing all communities existing within nation-states. Under the logic of state identity:

> Only the properly national interests could be legitimate or authoritative in the public realm: more specific identities—e.g., those of women, or workers, or members of minority religions—could at best be accepted as matters of private preference with no public

140. *See* MARK JUERGENSMEYER, GLOBAL REBELLION: RELIGIOUS CHALLENGES TO THE SECULAR STATE, FROM CHRISTIAN MILITIAS TO AL QAEDA 31 (2008).

141. *See* CALHOUN, *supra* note 80, at 48 ("[N]ationalism constituted a new ideology about primary identities. In this it competed not only with localism and family, but with religion. In fact, nationalism was often furthered by religious movements and wars—notably in the wake of the Reformation—and national self-understandings were frequently religiously inflected (as in the Catholicism of Poland or the Protestantism of England). But nationalism involved a kind of secular faith, and a primary loyalty to the nation that was and is distinct from any religion that may intertwine with it.").

142. Liah Greenfeld, *The Modern Religion?*, 10 CRITICAL REV. 169, 170 (1996).

143. *Id.*

> standing. Too often, the pressure for national unity became a pressure for conformity even in private life.[144]

The effect of this dynamic over non-state communities has been aptly described by Yonatan Brafman:

> Individuals must understand themselves primarily as citizens of the state and secondarily as members of other social formations. These other social formations, whether now understood as familial, ethnic, cultural or religious, must fit within the framework of the state. . . . [This] is also expressed in less extreme fashion through the assertion that state law is supreme and thus that the normative orderings of other social formations are subordinate to it.[145]

They must now be understood as "mere" ethics, traditions, or rituals. States are always engaged in the production of national culture, in advancing that culture's beliefs while marginalizing those of non-ruling communities.[146] This marginalization encourages the minority group to adapt and react; that is, they must now reconfigure their beliefs and practice to fit within the normative ordering of state identity.

Robert Cover's theory of legal pluralism[147] is useful to comprehend the dynamic of clashing primary identities. Hand in hand with the promotion of a unified state identity comes the ideology of legal centralism, which holds that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."[148] It follows that all other sets of norms within a society "ought to be and in fact are hierarchically subordinate to the law and institutions of the state."[149] In Cover's terms, the building and maintenance of state identity is a form of "world maintenance,"[150] and is an imperial system of nomos (in other words, it is embedded in rules that are enforced by state institutions and backed by state sanctions). Imperial norms are maintained through institutions that advocate and enforce (through potentially coercive means) a universal set of norms. Imperial law is also, in a similar vein to the project of state identity of which it is a part, hostile to other systems of norms. In Cover's terms, it is jurispathic (law killing). In the words of another

144. CRAIG J. CALHOUN, NATIONALISM 79 (1997).

145. Brafman, *supra* note 82, at 186.

146. *See generally* GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES (2010) (analyzing the dynamics of non-ruling communities with constitutional law).

147. *See generally* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

148. John Griffiths, *What is Legal Pluralism?*, 18 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 3 (1986).

149. *Id*.

150. Cover, *supra* note 147, at 16.

scholar, "State law is . . . paternalistic, coercive, and destructive toward the alternative hermeneutics proffered by rival communities."[151] In contrast, non-ruling communities develop law through a more paideic process—an organic process that grows from a shared cultural repertoire of narratives and is sustained by the process of community education and personal initiations. Jewish Law, or *Torah*, is an example of such a paideic system of law. In the words of Cover:

> Law as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses. Such a vision, of course, is neither uniquely rabbinic nor ancient. The vision of a strong community of common obligations has also been at the heart of what Christians conceive as the Church.[152]

The normative demands of paideic law end where the community ends. Existing within a nation-state necessitates the development of communal laws and narratives that deal with the ever-present pressure of nation-building and maintenance. In this process, "each non[-]ruling community develops alternative interpretive meanings of hegemonic state narratives and state law."[153] While the narratives of state identity legitimize the "historic illegality of the state's inception," often with tales of justice, sacrifice, and liberation, "communal interpretations of these narratives confer other ideological, political, and practical meanings on these narratives."[154] Take, for example, the Christian abolitionist movement in the United States. While most of the population was willing to accept slavery as the price of unity, the abolitionists maintained a point of view which saw the Constitution and the great compromise as instances of great evil.[155]

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151. BARZILAI, *supra* note 146, at 50.

152. Cover, *supra* note 147, at 13 (internal citations omitted).

153. *Id.* at 28.

154. *Id.*

155. Ronald Osborn, *William Lloyd Garrison and the United States Constitution: The Political Evolution of an American Radical*, 24 J. L. RELIGION 65, 80 (2008) (describing one of the leaders of the abolitionist movement, who argued that the "the first duty of every citizen . . . [is] to devote himself to the destruction of the Union and the Constitution, which have already shipwrecked the experiment of civil liberty . . . assured that out of the wreck, we may confidently expect a State which will unfold, in noble proportion, the principles of the Declaration of Independence.").

Cover's theory is useful to see the relationship between communal identity (whether statist or sub-statist) and norms. It also makes clear the struggles of maintaining a communal identity and norms in the face of the pressures of state law with its jurispathic tendencies. Although he does not use the framework of nationality, his theory illuminates aspects of the theory of the overlapping claims. It also emphasizes the political potency of state identity, that is, of a state seeking to impose a relatively uniform communal identity over its citizen body. In terms of *nomos* and *narrative*, this has tremendous jurispathic potential. However, Cover also enables us to understand the ability of some communities (in his case, religious ones) to adapt and withstand the pressure of state identity and law. The fact that law emerges independently of the dynamics of state power establishes paideic communities as potential sites for resistance to the state.

The overlapping claims for primary identity in the United States had major ramifications for the way religious minorities and the state, usually represented by the Supreme Court, related to one another. In his book *The Americanization of Religious Minorities*, Eric Mazur argues that when religious minorities confront the American constitutional order (or in terms of this Article, the constitutional aspect of the state-based community of faith) they must "subordinate their distinct theological beliefs to the transcending principles of the majority articulated by the constitutional order, or they are forced to do so by the physical powers of the government."[156] That is, the constitutional order pressures these communities to accept state law, identity, and authority as superior (or ultimate). This is part of the constant nation-building that all the organs of the state—including the judiciary—are engaged in.

Mazur describes three ideal-type reactions by religious groups to the pressure put on them by the constitutional order. The first is "constitutional congruence,"[157] where the religious minority succeeds in convincing the dominant authority that its claims are generally congruent with the majority. Mazur shows how, through a long series of legal battles over proselytizing and respect for patriotic rituals and symbols, Jehovah's Witnesses learned to frame their lawsuits within the confines of the constitutional order, implicitly accepting its superiority. Through this acceptance, they can co-exist with the American constitutional order without actually integrating into it. In my discussion below, I call this a "reclusive" strategy, where a religious group seeks to separate as much as possible from the political sphere, engaging only to maintain its reclusiveness.

156. MAZUR, *supra* note 139, at xxv.
157. *Id.* at 28–61.

The second strategy is "constitutional conversion."[158] Here, the minority group changes its behavior, sense of identity, and ideology to resolve the pressure put upon it by the American constitutional order. This is a strategy of Americanization, of removing the elements of faith and practice that prevent integration into the mainstream community of faith. Mazur points to the Mormons as an example. He tells the story of how the practice of polygamy and the attempt to establish a theocratic government in the Utah Territory brought the Latter-Day Saints into direct conflict with the United States. Over 40 years, the Mormon church sought to resist federal demands over polygamy and the form of government for the Utah Territory. Under the threat of the church being outlawed (including seizure of temples and other property) the Mormons agreed to disavow plural marriage and include non-Mormons in the territorial government. Following this surrender, in short order Utah became a state and the Mormons (over a period of some years) completed their conversion into the American community of faith.

Finally, there is the strategy of "constitutional resistance."[159] Here, the minority religion simply rejects and refuses to comply with the dominant culture. Mazur points to Native American antagonism to the American constitutional order, which simply tramples over religious orders that refuse to cooperate.

In all three of these ideal-types, we see how the establishment and maintenance of a state-based community of faith, with its claim for ultimate authority and its drive towards becoming the primary identity, puts significant pressure on religious groups who dare challenge it. Crucially, this pressure is completely independent of the language of conflict over values in which it is represented in the legal arena. All of these strategies are simply responses to the conflict that inevitably develops between religion and the identity order promoted by the liberal state. In this case, religion becomes something of a catch-all to capture all non-state ideologies and cultures that make arguments and demands that are grounded in the ultimate and are therefore challenged by civil religion and state identity.

To summarize Part III, this account of the *overlapping claims* made by religious and state-based communities of faith establishes that they have a *unique* relationship. When religious groups use ultimate arguments in the public sphere, they are met not by rational deliberation, but by another set of *ultimate* arguments and demands for loyalty and authority that are promoted by the political and symbolic mechanisms of the state. The establishment of a religious community of faith clashes

158. *Id.* at 62–93.
159. *Id.* at 94–121.

with the establishment of a national community of faith. Such a clash acts as a constant drive towards competition and conflict between states and religious groups. However, how does the account of overlapping claims relate to the question of the constitutional distinctiveness of religion? That question is the subject of Part IV.

IV. THE JEFFERSONIAN COMPROMISE AND THE DISTINCTIVENESS OF RELIGION

Let me now revisit X, the devout religious minority I mentioned briefly above, who lives in a state that is dominated by a majority religion. Imagine that a secular nationalist revolution takes place in the country where they live. They now reside within a secular, illiberal state. Does this revolution improve their situation? If my account of the overlap and competition between state identity (which is reliant on civil religion and a political theology) and religious identity is convincing, then it follows that the situation facing the members of X may not have changed much. Although political circumstances may shift in favor of X, the theological and ideological challenges facing them remains much the same. State identity still challenges X both on the level of foundational authority and that of the primary identity. Is there a way for X and Y to coexist in relative peace? One possibility is to create separate spheres for both phenomena, and make sure that neither sphere interferes with the other. State identity becomes primary in the political and national spheres, while religion is protected but limited to the private and communal spheres. In imagining this imperfect solution, both ideologies would agree to limit their ambitions and their reach so that they mitigate the drive towards conflict through separation. In this case, both X and Y will need to make significant adjustments. X will need to create a religious ideology that accepts, implicitly or explicitly, the primacy of state identity as the foundation of politics and state power. Y, however, will need to develop a tolerant protection of religion to maintain its side of the bargain. If Y and X maintain the separation and non-interference norms, they can maintain a peaceful coexistence.

The idea that religious freedom is a part of a Jeffersonian Compromise of separation and noninterference is not new. In one famous modern iteration, Richard Rorty described it as a "Jeffersonian Compromise," which "consists in privatizing religion—keeping it out of . . . 'the public square.'"[160] This is a compromise because "religious believers remain willing to trade privatization for a guarantee of religious liberty."[161] Rorty supports the Jeffersonian Compromise because religion

160. Rorty, *supra* note 9, at 171.
161. *Id.*

is a "conversation stopper." By this, he means that religious arguments work from assumptions that are not shared by all and that therefore are inappropriate for democratic deliberation in deeply pluralist societies. As is clear from my critique of Dorfman's account, I am skeptical of the vision of democratic deliberation in which religion is seen as the only conversation stopper. State identity, which often defines the borders and values which precede democratic deliberation, is also a complete conversation stopper. Try, in the U.S., to enter a political argument with a person who fully embraces a Chinese or Russian national identity. You will be as shunned as any religious believer.

Viewing various regimes of religious freedom through the prism of a mutual compromise, made necessary by the dynamics of conflicting orders, allows us to understand why most liberal regimes maintain a distinct freedom of religion. This distinctiveness of religion is easy to understand if we accept that there is a particular compromise between state and religious identities. The obligations and privileges that follow from the compromise do not apply to forms of belief and culture that fall outside its purview.

The normative strength of a compromise is derived from an agreement between the sides. What does it mean to say that the distinctive treatment of religion is a part of a compromise? Who consented to such an arrangement? This Article is *not* making any historical claim about who agreed to the compromise between national and religious identity, when, or on what terms. No actual agreement has ever been signed and agreed to by all or some of the religious groups. If no living person gave consent to such a compromise, why should we be committed to such an arrangement?

In order to see the Jeffersonian Compromise as normatively meaningful, this Article adopts a contractarian position of political obligation.[162] This theoretical position fits most closely with the intuition behind the Jeffersonian Compromise account. It also seems to be implicit in Rorty's position discussed above. Since it is clearly beyond the scope of this Article to delve into the debate surrounding contractarian moral theory, I treat it as an assumption. That is, if one adopts a contractarian position, then my general argument holds. In a good summary of this position, Daniel Statman and Yitzhak Benbaji state that under contractarianism:

> The social norm does not have to be endorsed for it to reshape the distribution of moral rights and duties in the society in question. Such

162. Contractarian theory has many nuances and voices. For a good overview, see generally, Ann Cudd & Seena Eftekhari, *Contractarianism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2018 ed. 2018).

> redistribution can stem from the mere act of non-coercive habitual obedience to the rule. Acceptance of the rule is very close to the knowledge that people "around here" follow this rule, and that one is a member of the community in question. The contractarian view that we offer here implies that, in some cases, a person loses her rights just by being an active member in the society. If an arrangement is good and fair, one may presume that *all* members of the society in question accept it, even if they are reluctant and somewhat resentful of the social rule in question.[163]

In other words, their position is that in a situation in which a rule is *sufficiently good* and *habitually obeyed*, we can presume that all sides of the arrangement accept it. Forms of the Jeffersonian Compromise are habitually obeyed in most liberal constitutional regimes. The popularity and permanence of the Religion Clauses are the leading case in point. This leaves us with the question of whether the compromise is sufficiently good. Benbaji and Statman suggest that for a system of social rules to be sufficiently good, it must be:

- ***Mutually beneficial***, in that acceptance of the norm will likely bring about a better outcome than in a pre-norm world—the only outcome that would induce the sides to enter into the compromise freely. Without likely mutual benefit, one cannot presume passive consent.
- ***Fair***, in that the compromise "neither creates nor solidifies unfair or disrespectful social relationships."[164] The criteria of fairness acknowledges that there are some goods that contracts cannot surpass, for example, rights that are based on a universal, non-contractarian foundation.

If the Jeffersonian Compromise satisfies these two requirements, it is sufficiently good, and we can then presume that all citizens—religious and not—agreed to single out religion for extra legal protection or a singular legal status.

In this Section, I show how under the framework of the overlapping claims I set out above, the compromise-based explanation of the legal distinctiveness of religion is sufficiently good. I proceed in two stages. First, to establish the mutual benefit of the Jeffersonian Compromise, I argue that the mutual acceptance of the norms of non-interference and separation has diminished the conflict between state and religious identity. I flesh out this compromise by examining a few ideal types of religious responses to the advent of state identity, and how these

163. YITZHAK BENBAJI & DANIEL STATMAN, WAR BY AGREEMENT: A CONTRACTARIAN ETHICS OF WAR 49 (2019).

164. *Id.* at 69.

implicitly or explicitly rely on the compromise. Second, I argue that for the compromise to be *fair*, it must apply equally to all religious groups and not limit the freedom they should enjoy under other constitutional rights.

A. The Mutual Benefit of the Compromise

The conception of the compromise presented in this Article is grounded in my account of religious and state identities as overlapping claims. That is, the critical question is not how to enable a more reasonable democratic debate, but how to permit two competing identity orders to exist in the same social space. The drive towards conflict is mitigated through "agreements of mutual noninterference and the confinement of religion and nationalism to separate spheres."[165] This compromise can take different forms in different political circumstances; it can be very formal, as in American non-establishment doctrine, or rest on informal norms, or both. However, the basic dynamic remains the same: state identity is promoted as the common political identity, while religion becomes a part of the communal and private spheres.

The argument developed above is that the constant promotion of state identity as a primary identity is a significant challenge that religious communities of faith need to deal with. Conflict with religion is almost inevitable; state-identity promotion crystallizes the co-existence of two *orders*, each making a claim for foundational authority and grounding their legitimacy in an ideology of primary identity. In this Section, I flesh out my conception of the compromise by examining two ideal-types of religious responses that fit within the compromise, and one which does not. Crucially for the idea of the compromise, the adjustments made by religious ideologies are reliant on those made by the state; that is, both sides adhere, in their own ways, to the separation and noninterference norms that comprise the Jeffersonian Compromise.

Famously, Charles Taylor, in *A Secular Age*, distinguishes between three kinds of secularization.[166] The first is the removal of religious authority from many spheres of human interaction, especially the political sphere and the state. In the pre-modern world, all political organization "was in some way connected to, based on, guaranteed by some faith in, or adherence to God, or some notion of ultimate reality."[167] The modern state "is free from this connection."[168] The political or national society unites believers (of many kinds) and non-believers. The second kind of secularization is the "falling off of religious belief and

165. Greenfeld, *supra* note 142, at 169.
166. *See* CHARLES TAYLOR, A SECULAR AGE 1–2 (2009).
167. *Id.* at 1.
168. *Id.*

practice, in people turning away from God, and no longer going to Church."[169] The third focuses on the conditions of religious faith. A society becomes secular, in the third sense, if it moves "from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace."[170] The latter two are members of the same family. My account of overlapping claims is that state identity challenges religion in all three meanings of secularization. First, it displaces religion from its position as the source of foundational authority and meaning. Second, its insistence on the primacy of state identity and the state as the foundational authority for producing norms challenges religious ideologies that have naturally always seen their subject, the sacred, as ultimately meaningful. Different religious groups have met these challenges in varying ways.

In simplified terms, the rise of the modern state was met by three ideal types of religious coping mechanisms: some religions retreated to the *private sphere* (or, accepted the secondary status of religion in the political sphere); some became *reclusive* (or, they did not withdraw from political life, but instead sought to create some public sphere in which religion is the unchallenged primary identity); while others sought to *reunify* the spheres of religion and political identity.

The privatization of religion means the acceptance of the state as the primary form of identity, and as the unitary source of political legitimacy. The state's success in privatizing religion equals the success of secular nation-building efforts. In the terms offered by Brafman above, a privatized religion fits comfortably within the framework of the state. [171] Privatized religions reconfigure their beliefs and practices to fit within the normative ordering of state identity. The divine is still a source of identity, authority, and meaning, but these are limited to the communal and private spheres; they do not belong to the political and national spheres. American Jewry, for one, is replete with examples of this kind. The ideology of the Reform and Modern Orthodox movements in the United States explicitly advocated being Jewish at home and American in the street.[172] This included adopting the ideals of the American Dream and dressing, looking, and speaking like average "Americans." In France, the French National Assembly in 1789 stated that "the Jews should be denied everything as a nation, but granted

169. *Id.*

170. *Id.* at 2.

171. *See* Brafman, *supra* note 82, at 183–84.

172. One of the ways of adopting Americanness in public was through adopting the mainstream norms of dress. *See* ERIC SILVERMAN, A CULTURAL HISTORY OF JEWISH DRESS (2013).

everything as citizens."[173] The Parisian Sanhedrin embraced this ideology in 1807 when it claimed that "the divine law . . . contains within itself dispositions which are political and dispositions which are religious; . . . their political dispositions are no longer applicable since Israel no longer forms a nation."[174] This privatization was also successful with regard to the major Christian denominations, which slowly but surely retreated from the public sphere and into their churches and homes. In fact, in most Western states (and in many post-colonial states), "[c]hurches are now separate from political structures . . . [and religion], or its absence is largely a private matter."[175] It must be emphasized that the privatization of religion does not necessitate secularization in the sense of the diminishing rates of belief and practice. In fact, the "United States is rather striking in this regard. One of the earliest societies to separate Church and State, it is also the Western society with the highest statistics for religious belief and practice."[176] India is another example where there was a (possibly failed) attempt to separate religion from state in a very religious society.[177]

If privatization means giving up some of the scale and reach of religion, insularity seeks to maintain a public sphere in which religion remains axiomatic, and adherents can practice without interference. To do so, insular religious groups often maintain their social and cultural integrity through a complete rejection of secular and national culture. They usually seek to educate their own children in religious schools, they often dress in ways that easily distinguish them from the mainstream, and most importantly, they maintain strict sets of elaborate norms and ideologies which reject the "outside" world as profane and unimportant. The main benefit of this strategy is that it has the potential to, at least partially, revert these groups to the pre-modern world, where their beliefs and practices are unproblematic and unchallenged. This attitude is epitomized in what may be called the foundational legal principle of Ultra-Orthodox Judaism: *ḥadash 'assur min ha-torah*: the new is forbidden by the Torah.[178] This motto calls for the preservation of Jewish law and practice against any modern attempt to change, meld, or reform it. This reactionary ideology, itself a modern phenomenon, sought to

173. PAUL R. MENDES-FLOHR & JEHUDA REINHARZ, THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 115 (2d ed. 1995).

174. *Id.* at 135.

175. TAYLOR, *supra* note 166, at 1.

176. *Id.* at 100.

177. *See generally* GARY J. JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2009) (arguing that the social thickness of religion in India is in tension with its secular constitutional commitments).

178. *See* Gideon Aran, *On Religiosity and Super-Religiosity (II): The Case of Jewish Ultra-Orthodoxy*, 60 NUMEN 371, 396 (2013).

establish strict legal insulation between what will become the "ultra-Orthodox" and the Jews who participated in the "privatization" of Judaism. Insularity, of course, comes in different levels. The most intense cases are found in groups like the Hutterites, Old Order Amish, and certain groups within ultra-Orthodox Judaism.[179] However, less intense insular strategies can be found among Protestants (often of the fundamentalist or evangelical variety), orthodox Catholics, Mormons, and the full spectrum of Orthodox Jewry.[180]

Before I turn to the third strategy, let me clarify: the fact that a specific religion (say, mainline Protestantism) has taken the path of privatization does not indicate that its members cannot pursue political goals, even in the name of religious values and interests. The same is true for insular groups; these groups almost always zealously seek to protect their insularity through litigation and political clout.[181] The *sine qua non* of the compromise is to accept that religion does not play a foundational role in politics, but this does not mean that only societies in which religious groups do not engage in politics accede to the compromise.

Both the strategies of insulation and privatization rely on state tolerance and accommodation. Privatization and insularity rely on implicit or explicit mutual "hands-off" agreements. If a modern state does not minimally respect this mutual understanding, then these strategies become almost untenable. This means that the state must also respect the norms of separation and non-interference for the compromise

179. JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP 93 (2000) ("Some might object to my example of the Hutterites and claim that they are an odd group that few will replicate. I agree that in many ways this is the case. But there are other groups that are less insular but still try to shield their members, particularly their children, from outside influences. Many fundamentalist churches typically shun cooperation with others. They won't join interfaith councils, for example, or even organizations for different Christian churches.").

180. *Id.* at 100 ("The real problem comes with less-insular conservative religions: some Hasidic and Ultraorthodox Jews, Protestant fundamentalists, and some Mormons and Catholics. Members of these groups do withdraw from mainstream life, but often only in a partial manner. Unlike the Hutterites and the Amish, these groups actively recruit new members and try to influence the political process.").

181. *See, e.g.*, *id.* at 153–54 ("The best way for exclusive groups to protect their boundaries and identity is to remain exclusive, something that insular groups understand. Few groups, however, can completely shun the outside world. Those insular groups that want to shy away from the inclusive world around them often have leaders who are 'bicultural' and 'bilingual'— they act as mediators and translators between their community and the outside world. They talk to the national media, and visit with politicians. They might read secular newspapers and magazines. Most members of their communities, however, stay within the confines of their community. Hasidic leaders, for example, often meet with politicians, and then direct their followers how to vote. Certain Hasidic leaders may play a role in local politics, or regularly negotiate with leaders of other communities. These mediators and translators protect the majority of Hasidim, who have a more limited engagement with the outside world.").

to remain viable. The Jeffersonian Compromise is much the same as what Rorty describes, although the reason behind it, which is informed by the overlapping claims account, is quite different.

However, not all religious believers, nor all states, accept the compromise. In recent decades, we find many influential religious movements who reject the compromise outright and seek to reunify politics with religion. This action takes two forms. The first can be named "religious nationalism." State identity challenges the primacy of religion as the primary form of human identity and as the foundational authority. Religious nationalism resolves this by seeking to unify the national political sphere with the religious one. Religious nationalist ideologies are two-pronged: first, the nation is defined by religious affiliation; second, the nation is seen as having significant religious meaning.[182] In the contemporary world, examples of religious nationalism abound: Hindu-nationalism in India, Sinhalese Buddhist nationalism in Sri Lanka, religious-Zionism in Israel, and Christian-nationalism in the United States are merely the most successful examples. Many more exist. The second form is transnational political-religious movements, which reject the relevance of national political affiliation. The most extreme example here is ISIS, but traces of this ideology can be found in many of the global religions.

Breaking the Jeffersonian Compromise endangers both sides. The lack of state accommodation, let alone active state antagonism, has the potential to hamper and harm religious groups greatly; at the same time—as we see in India,[183] Israel,[184] and Turkey,[185] as elsewhere—the politicization of religion threatens the fragile institutional and cultural balance that is the basis of liberal constitutional states. Given the instability, even violence, that is to be found in states that reject the compromise, the compromise is likely *mutually beneficial*.

182. *See* R. Friedland & K.B. Moss, *Thinking Through Religious Nationalism*, WORDS 423 (2015); Roger Friedland, *The Institutional Logic of Religious Nationalism: Sex, Violence and the Ends of History*, 12 POL. RELIGION & IDEOLOGY 65 (2011); Roger Friedland, *Money, Sex, and God: The Erotic Logic of Religious Nationalism*, 20 SOC. THEORY 381 (2002); Roger Friedland, *Religious Nationalism and the Problem of Collective Representation*, 27 ANNUAL REV. SOC. 125 (2001). For my treatment of Religious Nationalism and the Establishment Clause, see Gilad Abiri, *Divisiveness, National Narratives, and the Establishment Clause*, 40 PACE L. REV. 396 (2020).

183. *See generally* PETER VAN DER VEER, RELIGIOUS NATIONALISM: HINDUS AND MUSLIMS IN INDIA (1994).

184. Roger Friedland & Richard Hecht, *The Bodies of Nations: A Comparative Study of Religious Violence in Jerusalem and Ayodhya*, 38 HIST. RELIGIONS 101 (1998).

185. *See* Jeffrey Haynes, *Politics, Identity and Religious Nationalism in Turkey: From Atatürk to the AKP*, 64 AUSTRALIAN J. INT'L AFFS. 312 (2010).

The notion of a compromise between different orders is a different type of justification for religious distinctiveness than the arguments presented in Part II. Those arguments start from various normative liberal perspectives and argue that they, when understood properly, justify and require a unique treatment of religious beliefs. The Jeffersonian Compromise, in contrast, is not derived from ideal liberal theory, nor is it necessarily *fair*. Establishing that a compromise is a reasonable way of understanding the current landscape does not mean that the status quo should be maintained. The idea of compromise does not do the same justificatory work as deriving it from an idea of human autonomy or other liberal principles. For example, we can easily imagine a society in which religious freedom is given only to the religion of the majority, which represents the clearest competition to state identity. This potentially maintains the norms of separation and noninterference to a sufficient degree to enable a *modus vivendi* and thus satisfies the mutual benefit criteria. It is not, however, a liberal and fair compromise. In the next Section, I offer a minimal threshold that compromises must meet to be fair. Whenever a compromise exceeds this threshold, it justifies the distinctive nature of religious freedom.

B. The Fairness of the Compromise

The establishment of a religious community of faith clashes with the establishment of a state-based community of faith. This clash, however, does not entail the end of religious cultures within modern liberal states. Rather, a nation may form a Jeffersonian Compromise, in which religion is excluded from the political realm in exchange for a regime of religious freedom. The idea of the compromise, motivated by the overlap and competition between state and religious identity, allows us to make sense of the legal distinctiveness of religious freedom. Crucially, as I mentioned above, this distinctiveness is *not* derived from an account of justice but is rather based on hypothetical consent and shared interests in maintaining the *modus vivendi*. However, although my account of the distinctiveness of religious freedom is not derived from an account of justice, to be satisfactory, it still must be fair and morally acceptable.

What makes a regime of law and religion a sufficiently good one is not a simple question. To start, the legal relationship liberal states have with religion varies tremendously. On the one hand, there are constitutional democracies such as the United Kingdom and Sweden that have an established Church; others subsidize and support some religions while not supporting others; and others, such as France and the United

States, have strong forms of non-establishment.[186] Much of the normative work on religious freedom fails to make sense of the fact that we intuitively consider all of these regimes morally acceptable. However, the idea of a liberal Jeffersonian Compromise can actually make sense of this intuition.

Here, it is perhaps appropriate to offer a very concise distinction between two types of liberal arguments. The first is a type which demands principled justifications for legal and political institutions and decisions. This is the type of reasoning in *A Theory of Justice*,[187] where the political order is built from the bottom up, step-by-step, by building justification upon justification. Applied to the issue at hand, the question is: What liberal principle justifies the distinctiveness of religious liberty? This is the type of argument that I examined in Part II. The second type of argument is based on what can be called *modus vivendi liberalism*, which sees the liberal state as an acceptable political compromise. Here, the relevant question is: How can the liberal state and religious groups coexist peacefully in the context of the overlapping claims account? The answer here does not necessarily need to meet an ideal. Rather, it needs to surpass some minimal threshold of acceptability.

That being said, I will now offer a version of this minimal threshold, above which the Jeffersonian Compromise becomes fair, and therefore sufficiently good.

The simple answer here is that the *modus vivendi*, or compromise, is liberal if the state does not seek to overwhelm *any* religious group which adheres to the compromise but rather seeks to manage the separation of religion and politics while allowing religion to thrive in public/communal spheres. This can be unpacked into two propositions:

A. Any liberal compromise must include a minimal measure of religious freedom. Therefore, countries that seek to overwhelm religion out of existence cannot be justified as liberal compromises. Thinking of the relationship between China or North Korea to religion makes this point evident.[188] Since a minimal measure of religious freedom (not the distinctiveness of it, but just some measure of the freedom itself) is justified as a part of the freedom of

186. *See* Cécile Laborde, *Secular Philosophy and Muslim Headscarves in Schools*, 13 J. POL. PHIL. 305 (2005) (discussing the constitutional commitment to secularism in France and comparing it to U.S. non-establishment).

187. JOHN RAWLS, A THEORY OF JUSTICE (2009).

188. *See generally* FENGGANG YANG, RELIGION IN CHINA: SURVIVAL AND REVIVAL UNDER COMMUNIST RULE (2011) (discussing the extreme suppression of religion under the Chinese Communist Party); Kenneth M. Wells, THE PLACE OF RELIGION IN NORTH KOREAN IDEOLOGY, IN KOREA 248 (2008) (discussing the replacement of all local *religions* with the worship of the Kim family).

conscience and culture, outright antagonism toward religion is not consonant with liberal values.

B. The minimal measure of religious freedom needs to apply to religion as a general category and cannot be limited to just one religious group. Since the minimal measure is justified according to general liberal rights, and not as a direct result of the particular Jeffersonian Compromise, it must apply to all religious groups equally. One can imagine a state in which there is a minimal measure of religious freedom for a select group, while the religious practice of others is brutally repressed. However, this does not mean that all aspects of a particular compromise must apply equally to all religious groups. For example, some countries provide robust religious freedom to all their citizens while still establishing one specific church or religion. The Church of England is a good example.[189] The specific compromise or *modus vivendi* can shape up in a way that favors a specific religion while still treating all others decently.

C. The First Amendment as a Compromise

Are the Religion Clauses, as they have been interpreted by the Supreme Court, sufficiently good and fair under the terms of the Jeffersonian Compromise?

The idea of a Jeffersonian Compromise acts as a threshold justification. As long as a regime is mutually beneficial, fair, and seeks to mitigate the conflict between religious and state identity by maintaining the norms of separation and non-interference while providing religion with special accommodations, it is justified. As I said above, many types of regimes can exceed these threshold requirements. It also follows that the Jeffersonian Compromise cannot explain *all* of the details of each and every justified variant. Rather, justifiable compromises vary significantly according to local historical, political, and ideological circumstances. It follows that the details of the constitutional doctrines that fall under the Religion Clauses cannot be inferred or deduced from my account. While the broad brushstrokes of non-establishment and free exercise are justified according to the compromise, the details are a result of factors that are outside its purview.

189. EDWARD J. EBERLE, CHURCH AND STATE IN WESTERN SOCIETY: ESTABLISHED CHURCH, COOPERATION AND SEPARATION 2 (2016) ("The Church of England later became the official state Protestant church, with the monarch supervising church functions.").

The Religion Clauses clearly maintain both the separation and religious freedom aspects of the Jeffersonian Compromise and are therefore mutually beneficial. Many of the settled rules of the non-establishment clause clearly support the goal of separating state and religious identity. The state, for instance, is not permitted to engage in any speech that endorses or promotes religion.[190] This forbids government officials and institutions from endorsing and promoting religion in their official capacity. In a concurrence in *Lynch v. Donnelly*, Justice O'Connor made the connection between formal endorsement and political identity explicit, stating that "[t]he Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community."[191] Religion cannot be a threshold condition for membership in the political community. This also encompasses the rule stating that the state may not use a religious test as a condition for public office.[192] Another type of rule that fits well within the Jeffersonian Compromise is one that requires that laws have a secular legislative purpose.[193] This cuts off at the root any attempt to promote legislation that could only be understood in accordance with religious norms. While excluding religion from the political sphere, the non-establishment clause is also "a means of maximizing religious liberty, of minimizing government interference with religion."[194] This noninterference norm is complemented by a quite thick conception of religious freedom under the Free Exercise Clause. Since the time of the Warren Court, the Free Exercise Clause has been interpreted to require the government to accommodate religiously-motivated acts, absent any compelling state interest, and to require the use of means that reduce the burden on religious practices as much as possible.[195] This means that the Religion Clauses also satisfy the fairness requirement, as they clearly surpass a minimal level of religious freedom,

190. *See, e.g.*, Cty. of Allegheny v. ACLU, 492 U.S. 573, 601 (1989).

191. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

192. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

193. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95–98 (2002), *and* cases discussed therein.

194. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46 (1997).

195. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411–12 (1990) ("[D]oes the freedom of religious exercise guaranteed by the constitutions of the states and United States require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? . . . This resolution of the conflict between generally applicable law and religious conscience had deep roots in the practices of the American states both before and after independence. But it was not until the full flowering of the Warren Court that the United States Supreme Court so interpreted the free exercise clause of the first amendment.").

and this freedom applies to all religious believers, no matter the religious affiliation.

CONCLUSION

The constitutional distinctiveness of religion is explained and justified as part of a Jeffersonian Compromise in which religious adherents accept the right to the free exercise of religion as a worthy trade for the non-establishment of religion. Under contractarian theory, one can reasonably assume the tacit consent of the sides to the compromise because it is both mutually beneficial and fair. The compromise is beneficial to all sides, since by limiting their aspirations and capacities, both sides avoid direct confrontation over the scarce political resources of foundational authority and primary identity. The compromise encapsulated in the Religious Clauses is fair because it applies to all religious believers and organizations equally.