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Master Metaphors and Double-Coding in the Encounters of Religion and State

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I.

A.

The First Amendment contains two religion clauses.[1] But, broadly speaking, it generates three sets of questions.[2] The first concerns the sorts of church-state questions typically understood as raising establishment of religion concerns. The second concerns the individual rights questions typically analyzed under the rubric of free exercise of religion.[3] And the third—which has no clause devoted to it as such, but which in some ways is older and more deeply rooted than the other two—concerns the institutional autonomy of churches and religious communities.[4]

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I, § 1.

2. *See* Perry Dane, *Constitutional Law and Religion*, *in* A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 119, 119–31 (Dennis Patterson ed., 2d ed. 2010) [hereinafter Dane, *Constitutional Law*]. *Cf.* Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1297 (1980) (arguing that religious institutional autonomy is a product of the interaction of the Free Exercise and Establishment Clauses); Ira C. Lupu & Robert Tuttle, *Gianella Lecture: The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 50 (2002) (suggesting that an adequate account of religious entities in our constitutional scheme must be in at least some senses "clause-transcendent").

3. *See* Dane, *Constitutional Law*, *supra* note 2, at 122.

4. *See* Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 60–61 (2013).

I want to propose, without necessarily proving, that all three streams of religion and law jurisprudence flow, at least in substantial part, from a single set of master principles or master metaphors. Those metaphors coalesce around the idea that religion is a sovereign realm distinct from the state, its government, and its claims. In James Madison's words:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[5]

This basic jurisdictional-sovereignty conception of the relation between religion and state is well known and routinely defended,[6] though it has always been and seems increasingly controversial.[7] The conception comes particularly

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5. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS 29, 30 (Jack N. Rakove ed., Lib. Am. 1999). As Michael McConnell has insightfully emphasized, Madison appreciated the reality of "citizenship ambiguity" facing religious believers more clearly than other supporters of church-states separation such as John Locke and Thomas Jefferson. Michael W. McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 90, 92–96 (Nancy L. Rosenblum ed., 2000). In that sense, his account actually echoed that of Jean-Jacques Rousseau, though he sharply differed from Rousseau's statist conclusion that this ambiguity was "manifestly bad." *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 181 (Penguin Books 1968).

6. For some recent defenses, see, e.g., Richard W. Garnett, *Religious Accommodations and—and among—Civil Rights: Separation, Toleration, and Accommodation*, 88 SO. CAL. L. REV. 493, 507 (2015); Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, *in* CORPORATE RELIGIOUS LIBERTY 19 (Micah Schwartzman, Chad Flanders, & Zoë Robinsons eds., 2016). *See also* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 175 (2013); Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 963 (1991) [hereinafter Dane, *Maps*]; Mark DeWolfe Howe, *The Supreme Court, 1952 Term–Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91–93 (1953); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1152 (1990); Max L. Stackhouse, *Religion, Rights, and the Constitution*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 99 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

7. Prominent recent critiques of the sovereignty idea have focused most distinctly, though not exclusively, on the institutional autonomy prong of law and religion jurisprudence. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 919 (2013). But those critiques also rightly recognize that recognizing the "sovereignty" of religious institutions is "the nose of an enormous camel" with profound implications for individual religious rights as well. Andrew Koppelman, "*Freedom*

easily to legal pluralists of various stripes, who refuse to assume that the state holds a monopoly on the phenomenon of law and legal obligation.[8] In my own work, I have taken this basic idea just a bit further, though, suggesting that the relationship between government and religion should be understood as an "existential encounter" in which each side tries to make sense of and decide whether or how to make room for the other.[9]

That term "existential encounter" is meant to convey several important ideas.[10] First, it suggests that what is at stake here is not merely a set of legal doctrines or policy prescriptions, but something deeper and more constitutive. The sovereign nation-state, in some sense, looks out at the world around it and sees other entities that do not easily fit into its own internal sovereign architecture.[11] Some of these are other nation-states.[12] Some might be other types of essentially secular, but non-state, human associations.[13] And others are, or should be, communities—large and small, organized or not, united or splintered—whose normative commitment is to a transcendent source of meaning and obligation. In all these cases, the

of the Church" and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 149 (2013).

8. *See, e.g.*, PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM 4–5 (2012); VÍCTOR M. MUÑIZ-FRATICELLI, THE STRUCTURE OF PLURALISM 3 (2014); Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) [hereinafter *The Supreme Court*]; John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM AND UNOFFICIAL L. 1, 1 (1986). In recent years, at least some of the debate on legal pluralism and its implications has shifted to Europe. For an important recent collection of essays representing various voices in the conversation, see RELIGION AND LEGAL PLURALISM (Russell Sandberg ed., 2015). For a particularly skeptical approach, though not one especially interested in the religious dimension of the question in the context of the European Union, see Lorenzo Zucca, *Monism and Fundamental Rights*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 331, 352–53 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

9. *See, e.g.*, Dane, *Maps*, *supra* note 6, at 970; Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, *in* 4 LAW AND RELIGION: CURRENT LEGAL ISSUES 385, 404 (Richard O'Dair & Andrew Lewis eds., 2001) [hereinafter Dane, *Intersecting Worlds*] ("[T]he impulse to appreciating legal pluralism arises, not merely out of theoretical commitments, but out of a process of existential encounter, as each normative system asks itself precisely what is going on outside the reach of its most solipsistic concerns."); Perry Dane, *"Omalous" Autonomy*, 2004 B.Y.U. L. REV. 1715, 1772 [hereinafter Dane, *"Omalous" Autonomy*].

10. Dane, *Intersecting Worlds*, *supra* note 9.

11. BERMAN, *supra* note 8, at 5.

12. *Id.*

13. *Id.*

sovereign state must step outside a purely internal frame and try to make sense of the existential Other.[14]

Second, though we can try to articulate purposes and justifications for the legal structures arising out of this encounter, they are not at the end of the day reducible to purposes and justifications.[15] On this score, it is useful to compare the existential encounter to the sort of I-Thou relationship described by Martin Buber.[16] That is to say, it is a meeting of selves before it is an analysis of normative structures.

Third, the encounter between church and state, though this piece is not actually required by Buber's description of the I-Thou relationship,[17] is powerfully two-sided.[18] Just as the state needs to make sense of the religious *nomos* and decide how to understand the boundaries of competence and deference between the two realms, religious communities need to make sense of the state and decide to what extent *its* claims can be accommodated within what might otherwise seem the absolute and cosmic claims of divine governorship.[19]

Fourth, while these master metaphors of jurisdiction, sovereignty, and dialogical encounter are by some lights jurisprudentially radical, their practical normative payoff is—at least in the abstract—more complicated and open-ended. Religious traditions can recognize the legitimacy and authority of the state without necessarily subordinating themselves to it in all cases. And, the state can acknowledge the claims of religious communities without necessarily deferring to them.

B.

I also want to propose that only a robust, jurisdictional, legal pluralist account of religion and law—not mine, necessarily, but some such robust

14. Dane, *"Omalous" Autonomy*, *supra* note 9, at 1771–72.

15. *See* Dane, *Maps*, *supra* note 6, at 970 ("The recognition of another sovereign does not serve a purpose, as such, though purposes can be articulated for it. It is more of an existential encounter, a fact—if a socially constructed fact—of the world.").

16. *See generally* MARTIN BUBER, I AND THOU (Ronald Gregor Smith trans., 1958). I discuss the relevance of Buber at greater length in another work-in-progress. Perry Dane, Professor of Law, Rutgers School of Law, Martin Buber and the Existential Encounter of State and Religious Authority, Address at Dialogue in the 21st Century: A Martin Buber Memorial Conference (Apr. 23, 2015) .

17. BUBER, *supra* note 16, at 131 ("Yet there are some *I-Thou* relationships which in their nature may not unfold to full mutuality if they are to persist in that nature.")

18. Nevertheless, as Robert Cover brilliantly explained, the ways in which this mutual encounter lays out on each side will not be identical or neatly symmetric. After all, it remains the state, when all is said and done, that holds most of the levers of sheer physical violence. *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) [hereinafter Cover, *Violence*].

19. Cover, *The Supreme Court*, *supra* note 8, at 28–29.

account—can begin to make sense of the peculiar shape of the distinct problems that arise under the various strands of our constitutional and sub-constitutional conversation on the topic. In particular, only such a conception can begin to respond to the recurring question whether religion is "special."[20] For, of course, if religion is not special, then it is not clear why the government may not establish Presbyterianism even though it can establish a commitment to capitalism or evidence-based medicine, or why it might exempt religious believers but not others from neutral laws of general applicability.[21] Some commentators have tried to defend the specialness of religion by way of a functional account of religion's place in the liberal polity.[22] But that project risks giving away the game. A more apt response, from a jurisdictional, dialogical, and legal pluralist perspective, is to answer the question with a question: What makes the state special?[23] For only by asking *that* question can we overcome the assumption that religion must fit neatly into an account of the liberal polity that already has the state as its Archimedean referee, or, to use a different image, overcome the assumption that religion must find its place, if any, as a character in a drama whose author is liberal political theory and whose

20. For some recent, important skepticism on that question, see, for example, BRIAN LEITER, WHY TOLERATE RELIGION? 3 (2012); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1351 (2012).

21. *See* Schwartzman, *supra* note 20, at 1352–53.

22. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW & CULTURE TRIVIALIZE RELIGIOUS DEVOTION 15 (1993); Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079, 1081 (2014).

23. *See generally* Griffiths, *supra* note 8, at 27; Ralf Michaels, *The Re*-State-*ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1258 (2005) ("We cannot go back to the illusion that the state is the only relevant creator of norms in the world and so continue choice of law as before."); Gordon R. Woodman, *Ideological Combat and Social Observation*: *Recent Debate about Legal Pluralism*, 42 J. LEGAL PLURALISM 21, 22 (1998) (elaborating on the concept of legal pluralism). *See also* Jacob Affolter, *Challenging the State: Teaching Alternative Historiographies in Early Modern Politics*, 46 METAPHILOSOPHY 398, 399 (2015). To be sure, the state is special in certain important respects. For some efforts to make sense of its distinctive characteristics within the framework of legal pluralism, see, for example, Cover, *The Supreme Court*, *supra* note 8, at 11; Cover, *Violence*, *supra* note 18, at 1628; Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC. REV. 869, 879 (1988). *See also* Dane, *Maps*, *supra* note 6, at 963 ("Modern states are not like other communities. No amount of talk will change that. But those differences can be the occasion for, rather than an obstacle to, mutual recognition. Indeed, one of my main themes will be that sovereignty, and the relationship of sovereigns among sovereigns, can take forms more diverse, and subtle, than we usually imagine.")

director is the state. To be sure, answering a question with a question does not settle anything, as such, though it can reframe the dialectical burden.[24] As I suggested at the start, my goal here is not proof. But allowing both questions to sit side by side, without privileging either, does create the opening for genuine dialogical encounter and the possible normative and conceptual fruits of that encounter.

C.

From a jurisdictional, legal pluralist, and dialogical perspective, the three strands of the law of religion and state can then be understood as playing out three different aspects of the fundamental encounter. I have in other writing argued that the establishment clause largely reflects the "wholesale" part of the relationship.[25] It constructs, from the state's constitutional perspective, the general map delineating the competencies and appropriate jurisdictional domains of the state and religion. The free exercise clause—particularly in its consideration of religion-based exemptions—is then the retail piece of the puzzle. It considers adjusting the wholesale map to take into account the particular and often radically differing and even apparently idiosyncratic commitments of particular religious normative systems. Meanwhile, religious institutional autonomy is in some sense both wholesale and retail. On the one hand, it draws very general lines, recognizing the self-governing rights of all religious communities, regardless of their specific religious commitments. But it enforces those lines with respect to the authority claims of particular parties such as churches. That helps explain why religious institutional autonomy seems to straddle the free exercise and establishment clauses and, if the truth be told, should really be treated as a third, distinct if unwritten, religion clause.

D.

All this, though, leaves a major challenge and conundrum: If the three strands of religion and state jurisprudence really do all flow in large part from a single basic idea, and if that idea is as deep, rich, powerful, and

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24. *See* Imran Aijaz, Jonathan McKeown-Green & Aness Webster, *Burdens of Proof and the Case for Unevenness*, 27 ARGUMENTATION 259, 267 (2013). *But cf.* Douglas N. Walton, *Questions-Asking Fallacies*, *in* QUESTIONS AND QUESTIONING 195, 211 (Michael Meyer ed. 1988) ("Generally, it cannot be allowed in reasonable dialogue that an answerer should always have the right to reply to a question with another question.").

25. *See* Dane, *Constitutional Law*, *supra* note 2, at 127; Perry Dane, *The Varieties of Religious Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 117, 120 (Gerhard Robbers ed., 2001).

basic as I have suggested, and if no paler principle will do, then why do the three pieces of religion and state jurisprudence—free exercise, establishment, and religious institutional autonomy—both look so different from each other and, as they have played out, manifest such different levels of intensity and degrees of commitment to the allegedly singular common principle at their heart? And why do they sometimes even seem to clash?

Such tensions appear along each of the seams in the fabric of our jurisprudence of religion and state.[26] The particular puzzle most germane to this symposium, however, is this: How do we explain, as either a matter of doctrinal consistency or historical narrative, what might seem at first glance to be a glaring disjunction in American law between the jurisprudence of free exercise and the jurisprudence of religious institutional autonomy? To wit: For almost 140 years,[27] except for a short golden age of fewer than thirty years between *Sherbert v. Verner*[28] and *Employment Division v. Smith*,[29] the Supreme Court has explicitly rejected the right of religious believers even to make prima facie claims to religion-based exemptions from non-discriminatory, otherwise-applicable, laws.[30] And even though

26. Most dramatically, even those of us who believe that a separationist view of the establishment clause and a robustly exemption-respecting view of the free exercise clause can be harmonized by way of the common thread of the jurisdictional metaphor still have to admit at least some tension between the two. *Cf.* Thomas v. Review Bd., 450 U.S. 707, 719 (1981) ("There is, in a sense, a 'benefit' to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religious Clauses which the Court resolved in *Sherbert* . . . ."); Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433, 445 (1995) ("The pre-1980s Court never explicitly faced up to this contradiction between special solicitude for religious freedom and special, broad prohibitions on any aid to religion."). Such questions, however, are beyond the scope of this Article, and this symposium.

27. The first pivotal case was Reynolds v. United States, 98 U.S. 145 (1879).

28. Sherbert v. Verner, 374 U.S. 398 (1963).

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

30. The classic cases before *Sherbert* included Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."), *overruled on other grounds by*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Reynolds v. United States, 98 U.S. 145, 161–67 (1879). *See also infra* note 129 (discussing history of free exercise jurisprudence prior to *Sherbert*).

Congress[31] and some states[32] responded to *Smith* by enacting various Religious Freedom Restoration Acts (RFRAs), the original consensus behind such legislation has eroded after only about two decades,[33] with some observers questioning the entire allegedly "dubious"[34] or "unsettling"[35] idea of even countenancing claims for such exemptions. Meanwhile, for an even longer period, from at least the nineteenth century to today, the Court has consistently held, albeit with variations and bumps in the road, that principles of religious institutional autonomy essentially immunize churches and similar groups, whether or not they are facing a direct religious conflict, from even non-discriminatory, otherwise-applicable laws trenching on their decision-making with respect to internal affairs and self-governance.[36]

There is no single or simple answer to these puzzles and apparent inconsistencies. The path of normative and doctrinal development is complex. And the analysis will necessarily have both descriptive and prescriptive elements. I have myself chipped away at bits and pieces of these questions in other work.[37]

My goal here is not to offer an entire or comprehensive account. I do, however, want to suggest some broad categories of explanation, provide some examples, and then focus on one distinct theme, which I refer to as the dynamic of "double-coding." I will explicate that idea in more detail below. I will also situate it more precisely in the larger account of pluralism and multivocality that to my mind is just as important as the story of religion and state itself.[38] But suffice it to say for now that (a) legal systems, much like individuals, are bound to be solipsistic, (b) that solipsism will make it particularly difficult to admit explicitly the deeper implications of ideas

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31. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103–41, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 42 U.S.C. § 2000bb-4).

32. *See generally* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475–78 (2010).

33. For a valuable account of the shift in sentiment, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014). *See also* Mark Tushnet, Accommodation of Religion *Thirty Years On*, 38 HARV. J. L. & GENDER 1 (2015) (examining the developments in the consensus of the "accommodation principle" since the publication of Michael McConnell's *Accommodation of Religion*).

34. *See* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 35 (2015).

35. Kelefah Sanneh, *Blessings in Disguise*, NEW YORKER, May 5, 2014, at 19, 20. For my reply, see Perry Dane, Letter to the Editor, *Competing Ethics*, NEW YORKER, June 23, 2014, at 5.

36. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 705–06 (2012); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107–09 (1952); Watson v. Jones, 80 U.S. 679, 727 (1872).

37. *See, e.g.*, *Constitutional Law*, *supra* note 2, at 119–31; Dane, *"Omalous" Autonomy*, *supra* note 9.

38. *See infra* notes 91–120 and accompanying text.

such as "sovereignty" or "existential encounter" with respect to non-state normative systems or communities, (c) but the existential encounter can still occur, even if its explicit recognition is suppressed, (d) one way to reconcile these opposing possibilities is through "double-coding," where a less provocative surface formulation coexists in a sort of simultaneous vision with a more radical principle just below that surface, and (e) the success of such double-coding will depend both on the coherence of the surface formulation on its own terms and on the system's willingness to allow the deeper principle to give it depth, to create a stereoscopic vision that is faithful to both. In making sense of these abstract ideas, I will be telling a very specific story, arguing that where we find ourselves is in some measure the product of contingent doctrinal development and conceptual choices.

Before delving into the complications of double-coding, however, I need to take on two other tasks. The first is simply to explain in a little more detail why, at least given the premises of this Article, the discrepancy between religion-based exemptions doctrine and institutional autonomy doctrine—in shorthand, between *Smith* and *Hosanna-Tabor*—is a problem. The second is to canvass some more straightforward, if incomplete, structural and analytical pieces of the puzzle that might at least begin to explain that discrepancy.

II.

A.

The domains of religion-based exemptions and religious institutional autonomy are different. I have already suggested as much in discussing the "wholesale" and "retail" dimensions of the law of religion and state.[39] I will discuss other important differences further on in this Article.

In addition, both religious institutional autonomy and religion-based exemptions raise complex questions and, for that matter, different complex questions, that even as ambitious a set of master principles or metaphors as jurisdiction, sovereignty, and dialogical encounter metaphor can only very partially resolve. Thus, for example, the separationist impulse that our doctrine of religious institutional autonomy shares with the rough general flow of Establishment Clause jurisprudence is one way of playing

39. *See* discussion *supra* Section I.C.

out the fundamental jurisdictional insight, but not the only way.[40] More generally, in earlier work, I argued that the idea of autonomy contains, even within its own four corners, deep tensions and intractable dilemmas.[41] Autonomy has many dimensions, and respecting some of those dimensions might well require sacrificing others.[42]

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40. A minimal commitment to the jurisdictional idea would exclude treating religion as either simply an instrument of the state or as a merely ordinary association or expression of belief. But it would also be consistent with either a deeply separationist and a more cooperative relationship between church and state. After all, distinct sovereigns can cooperate. For that matter, even an explicitly religious constitution might, depending on its details, be consistent with the basic metaphors of jurisdiction, sovereignty, and dialogical encounter. *See* Perry Dane, *Foreword: On Religious Constitutionalism*, 16 RUTGERS J.L. & RELIG. 460 (2015). The shape of our distinctive American doctrine is deeply influenced by our specific theological heritage and specific historical experiences. And that American separationist commitment has clearly steered both our Establishment Clause jurisprudence and our doctrine of religious institutional autonomy in certain directions rather than others.

41. Perry Dane, *The Varieties of Religious Autonomy*, *in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 117, 118 (Gerhard Robbers ed., 2001).

42. *See id.* at 130. Just to illustrate, that Article contains the following table, which specifically examines how the various approaches to church property disputes (as distinct from the personnel questions at issue in *Hosanna-Tabor*) reflect some of the competing values and meanings within autonomy itself:

		Departure from doctrine	Polity	Neutral Principles of Law
Forms of Abstention	Adjudicative Abstention	N	N	N
	Substantive Interpretive Abstention	N	Y	Y
	Jurisdictional Interpretive Abstention		N	
	Procedural Interpretive Abstention		Y	
Recognition		Y	Y	?
Forms of Deference	Substantive Deference	Y	Y	?
	Decisional Deference	N	Y	N
Subjects of Deference	Constitutive Deference	Y	?	?
	Dynamic Deference	N	?	?

Religious exemptions doctrine is equally multi-dimensional, though in different ways and for different reasons. As I also discuss elsewhere, the full range of religion-based exemptions, including the many exemptions recognized by specific statutes, reveal a variety of forces at work, many of which stand in any uneasy and often dialectical relationship with the jurisdictional principle that has been my focus here.[43]

Despite all this, though, the present challenge, to repeat, is not merely to distinguish between religion-based exemptions and religious institutional autonomy, but to make some sense of the very different receptions they have received in the legal culture, particularly given my claim that—at least in outline—one set of master metaphors can and should undergird the entirety of the law of religion and state.

In *Hosanna-Tabor*, Chief Justice Roberts argued that the religion-based exemption problem in cases such as *Smith* "involved government regulation of only outward physical acts" while institutional autonomy cases, by contrast, concern "government interference with an internal church decision that affects the faith and mission of the church itself."[44] Commentators have criticized[45] and even ridiculed[46] this formulation. Still, the Chief

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I will not try to unpack this table here. I suspect that elements of it are wrong or incomplete, and I would draw it differently today. But my point is simply to illustrate in broad strokes the larger claim that tensions and trade-offs exist even entirely internal to concern for autonomy. Moreover, some of the choices our legal system has made, such as eventually rejecting the "departure from doctrine" approach, even though it might be said to enforce certain dimensions of autonomy, have been influenced by similar choices made in Establishment Clause jurisprudence.

43. *See* Perry Dane, Scopes of Religious Exemption: A Normative Map 11–12 (April 17, 2015) (unpublished paper delivered at the Fifth Bowling Green Workshop in Applied Ethics and Public Policy) (on file with the Bowling Green State University Department of Philosophy) [hereinafter Dane, Scopes of Religious Exemption].

44. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

45. *See, e.g.*, John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 823–24 (2014); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 834–35 (2012); Mark Strasser, *Making the Anomalous Even More Anomalous: On* Hosanna-Tabor, *the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL'Y & L. 400, 444 (2012) ("[S]uch a distinction is unpersuasive . . . ."). For an important effort to reformulate and defend the Chief Justice's distinction, see Christopher C. Lund, *Free Exercise Reconceived*: *The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014).

46. *See, e.g.*, Frederick Marc Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 431–33 (2013) ("The Native American believers in *Smith* would no doubt have been interested to learn that their participation in the ritual that rested at the spiritual center of their personal faith was a mere 'outward

Justice's infelicitous language might capture a deeper instinct that would make sense even to a friend of the jurisdiction-sovereignty conception of the law of the church and state that I have been positing here.

The argument would go something like this: As I have already emphasized, not only religion but also the state can legitimately claim sovereign dignity. And in a genuine dialogical encounter, neither side can necessarily be expected to defer under all circumstances to the other.

The religious *nomos* has a sovereign stake in both the autonomy context and the exemptions context. With respect to the set of issues classically covered by autonomy doctrine, however, the state has no legitimate competing sovereign interest of its own in interfering with purely internal matters of church governance. By contrast, the exemptions context almost always involves a clash of sovereign claims, and while many of us who support robust exemptions would argue that the state should sometimes step back and accommodate the religious interest, it is consistent with the jurisdiction-sovereignty idea in broad outline for it to refuse. In that sense, the difference between *Hosanna-Tabor* and *Smith* could be captured by an analogy to Brainerd Currie's controversial but coherent distinction between "false conflicts" and "true conflicts" in choice of law.[47]

This tempting intuition does not hold up, however. It might be true that, at least in the United States today, the state has no sovereign stake in the "internal" governance of the church *as such*.[48] But it did arguably have a sovereign interest in *Hosanna-Tabor* in assuring the rights of disabled persons. And it has an interest in women's equality,[49] not to mention the orderly functioning of contract law, property law, and the like. Other nations have, not implausibly, claimed secular sovereign stakes that dig even deeper, including an interest in assuring that religious bodies not be

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physical act' that paled in comparison to a Lutheran congregation's 'internal faith and mission.'"); Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html [https://perma.cc/U5TW-G2AM] ("With due respect: huh???").

47. *See* BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183–84 (1963).

48. *But cf.* 8 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY (1648) (articulating and defending the classic Anglican political theology in which the monarch is the supreme governor of the Church of England), *reprinted in* 8 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 128 (Arthur Stephen McGrade ed., 1989); *see* W. J. TORRANCE KIRBY, RICHARD HOOKER'S DOCTRINE OF THE ROYAL SUPREMACY (1990). For an effort to consider Hooker's ideas in the light of more current debates about the continued establishing of the Church of England, see R.R. Williams, *Richard Hooker on the Church and State Report*, 85.2 CHURCHMAN 99 (1970), http://biblicalstudies.org.uk/pdf/churchman/085-02_097.pdf [https://perma.cc/MM58-74XU].

49. *See, e.g.*, Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1053–54 (1996).

subject to "foreign domination."[50] My point here is not to defend these or other intrusions into internal religious governance, of course, but only to reject the simple view that states have no plausible legitimate interest in how religious groups govern themselves, select their leaders, or organize their affairs.[51] Indeed, at least some commentators have suggested, not implausibly, that while autonomy doctrine purports to establish categorical boundaries around the internal affairs of religious groups, it actually defines those boundaries, if only implicitly, through the same familiar weighing of governmental interests that used to be a staple of constitutional free exercise law.[52] If that is so, though, it merely deepens the puzzle of why

50. XIANFA art. 36 (2004) (China) (providing, *inter alia*, that "Religious bodies and religious affairs are not subject to any foreign domination."), http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm [https://perma.cc/JJ65-YMKQ]; Decree of the State Council of the People's Republic of China, No. 426, arts. 3–4 [Regulation on Religious Affairs] (promulgated by the State Council, Nov. 30, 2004, effective Mar. 10, 2005) https://www.purdue.edu/crcs/wp-content/uploads/2014/08/Regulations_on_Religious_Affairs_no426.pdf [https://perma.cc/83Z7-3J8U] (English translation) ("Religious bodies, sites for religious activities and religious citizens shall abide by the Constitution, laws, regulations and rules, and safeguard unification of the country, unity of all nationalities and stability of society . . . . All religions shall adhere to the principle of independence and self-governance. Religious bodies, sites for religious activities and religious affairs are not subject to any foreign domination.").

51. It might be argued that certain forms of interference in internal church affairs would be literally impossible. For example, even if a state could somehow coerce the Catholic church to go through the motions of ordaining women as priests, it could not assure that when she performs the ritual of the Mass, the bread and wine in front of her would actually turn into the body and blood of Jesus Christ, nor could it force the members of the Church to believe that such transubstantiation had occurred. But this argument only goes so far. To begin with, not all religious traditions conceive of ministry in such sacramental terms, and even within traditions that do, not all ministries are sacramental. More important, a sufficiently determined state has available to it any number of sanctions short of attempting the sacramentally "impossible," including fines, damages, and revocation of tax exempt or charitable status.

52. *See, e.g.*, Lund, *supra* note 45, at 1189 ("Before *Hosanna-Tabor*, one criticism of the ministerial exception was that it was absolute, that it involved no balancing. But it would be more accurate to say that the balancing happens categorically rather than case-by-case. Different balances between the governmental interest and the religious interest get struck by drawing the line between ministers and non-ministers in different places.") (citing Jack M. Balkin, *The "Absolute" Ministerial Exception*, BALKANIZATION (Jan, 13, 2012, 8:59 AM), http://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html [https://perma.cc/QZF3-WBCR] ("One of the curious features of the Supreme Court's version of the ministerial exception is that the rule is stated in absolute terms that eschew all attempts at balancing.")).

the Court in *Smith* renounced such tests in the context of adjudicating religion-based exemptions.[53]

The problem is no simpler on the other side of the ledger, for claims for religion-based exemptions can also raise fundamental questions about the jurisdictional boundaries between religion and state. This became particularly evident in the recent dispute over claims to exemptions under RFRA from the contraception mandate promulgated under the Affordable Care Act. While some of the debate, as well as the majority opinion in the *Hobby Lobby* case, simply asked in standard fashion whether the mandate furthered a compelling government interest with the least restrictive means, both dissenters on the Court and some commentators argued that the exemptions should be denied for a more categorical reason—because of the allegedly substantial cost they would impose on third parties.[54] The issues here are complex and beyond the scope of this article.[55] For what it's worth, my own views have evolved.[56] If nothing else, the argument about third party

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53. *See id*. ("This is another way in which *Hosanna-Tabor* aligns better with *Sherbert* and *Yoder* than with *Smith*: it smacks of the old compelling interest test when the Court says that the employment laws are 'undoubtedly important' but still insufficient to outweigh the religious interest." (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012) ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.")).

54. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2790 (2014) (Ginsburg, J., dissenting) ("Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 346, 349 (2014).

55. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2781 n.37; Frederick Marc Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153 (2015); Marc O. DeGirolami, *On the Claim that Exemptions from the Contraception Mandate Violate the Establishment Clause*, CTR. FOR L. & RELIGION F. AT ST. JOHN'S U. SCH. OF L. (Dec. 5, 2013), http://clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause/ [https://perma.cc/388S-VE3Q] .

56. In my student law journal note, which defended religion-based exemptions by analogy to conflict of laws among nation-states, I nevertheless argued that a state could justifiably apply its own law to protect "third parties not subject to the religious authority who would be directly affected by the granting of an exemption." Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 368 (1980), *cited in* Korte v. Sebelius, 735 F.3d 654, 720 (7th Cir. 2013). I emphasized that "[p]rotection of third parties is distinctive, not because it is the most compelling state interest, but rather because in the context of relations with third parties, the religious adherent's claim that his conduct should be deemed to be within the jurisdiction of the religious source of authority becomes untenable." *Id.* at 368. That is to say, even "if a territory for religious concerns has been carved out and the religious proponent is subject to the source of authority for that territory, his action has recrossed the hypothetical

effects prompts the question whether or under what circumstances employees of a religiously-committed employer should be considered "third parties" with respect to that employer's claim for exemptions.[57] But be that as it may, the arguments here about "third party" effects at least echo similar arguments in the institutional autonomy context that try to draw a crisp line between the "inside" and "outside" of the religious nomos.

Indeed, the debate over the contraceptive mandate is doubly interesting because, as it intensified, both sides appealed to the sort of wholesale quasi-jurisdictional arguments that we do not ordinarily associate with religious liberty claims. The religious objectors argued, in effect, that the government was impermissibly commandeering religious charitable activity and religiously-imbued commercial firms to effectuate public policy goals that it was not willing to implement itself. The mandate's defenders pushed back by arguing that it was not the government that was crossing the line, but religious folk themselves, by entering into the world of commerce and contract and employment and then complaining when they were treated like other commercial entities. The objectors argued that the government had intruded into their private business. The defenders argued that when religion steps into the public sphere, it needs to play by the public's rules.[58]

Again, my aim is not to referee these claims. Indeed, it seemed to me throughout the run-up to *Hobby Lobby* that the case could be decided—as

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boundary, and the place of injury should determine the law to be applied." *Id.* (footnote omitted). Today, I am more uncertain on the question, but am inclined to think that, in the calculation required by statutes such as RFRA, the government's interest in vindicating the rights of genuine third parties should generally be treated as potentially but not invariably compelling. *But cf. infra* note 57 and accompanying text. In addition, of course, as turned out to be dispositive in *Hobby Lobby*, the government action from which an exemption is sought must to satisfy the FRRA standard also "constitute the least restrictive means of serving" the government's interest. Hobby Lobby, 134 S. Ct. at 2759, 2761 (citing 42 U.S.C. §2000bb-1(b) (2012)).

57. I argue elsewhere that in cases such as *Hobby Lobby*,

> there is a genuine puzzle as to whether employees of religiously-affiliated nonprofit enterprises and even religiously-committed for-profit firms are best understood as "insiders" or "outsiders" to jurisdictional reach of the religious nomos, whether or not they are members of the religious community itself. The proper test, as in other jurisdictional contexts, is not consent (actual or implied) but a more subtle and difficult metric of community, affiliation, and authority.

Dane, Scopes of Religious Exemption, *supra* note 43.

58. Most of the language in this paragraph is taken, with minor changes, from my short unpublished essay, Perry Dane, *Doctrine and Deep Structure in the Contraceptive Mandate Debate* (2013) (unpublished manuscript) http://ssrn.com/abstract=2296635 [https://perma.cc/NX29-C4AF] [hereinafter Dane, *Doctrine and Deep Structure*].

it ultimately was—in more conventional retail terms and that the resort to categorical arguments on both sides of the mandate debate lent the dispute an apocalyptic air that was unnecessary and destructive.[59] But my point here, as before, is simply that such jurisdictional arguments—the effort to draw sharp boundaries between the domain of the religious community and the domain of the state—are available in the context of exemptions as well as that of institutional autonomy.[60] For that matter, in cases such as *Hobby Lobby*, the two conversations can resonate so deeply as to become rhetorical foils one for the other. Thus, the government's argument that religiously-motivated for-profit corporations such as Hobby Lobby were, in effect, trying to break the proper bounds of religious jurisdiction embraced and even depended on the government's willingness to grant actual churches a broad exemption. The exemption for churches, the government argued, served *Hosanna-Tabor*'s purpose of protecting religious institutional autonomy,[61] even though the exemption was not actually an instance of religious institutional autonomy,[62] while an exemption for for-profit firms would mark an unprecedented[63] and unwise[64] expansion of RFRA, even

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59. *See id.* The Court seemed to reaffirm its impatience with the most categorical arguments on both sides of the contraceptive mandate debate more recently its *per curiam* punt in Zubik v. Burwell, No. 14-1418, 2016 U.S. LEXIS 3047 (U.S. May 16, 2016).

60. *See also* Angela C. Carmella, *After* Hobby Lobby*: The "Religious For-Profit" and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381, 385–86 (2015).

61. The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. As the Seventh Circuit explained, there is a long tradition of protecting the autonomy of a church through exemptions of this kind. The Religion Clauses of the First Amendment give "'special solicitude to the rights of religious organizations' as religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions."

Brief for the Petitioners at 51–52, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486 (citations omitted). *See also, id.* at 20.

62. Among other important differences is that these church exemptions from the contraceptive mandate were only available to organizations with religious objections to contraceptive coverage. 45 C.F.R. 147.131(a). *See infra* notes 68–72 and accompanying text (emphasizing that within its domain, institutional autonomy is present regardless of the specific religious beliefs of the organization asserting it).

63. Brief for Petitioner, *supra* note 61, at 16–18.

64. *Id*. at 18–20. As in the passage cited in note 61 *supra*, the government traded on the distinction between institutional autonomy and broader exemptions:

While Title VII's exemption for religious employers burdens employees whose religion differs from that of their employer, Congress viewed that burden as a cost that was justified to protect "religious organizations[ʻ] . . . interest in autonomy in ordering their internal affairs." That understanding is consistent with the First Amendment's "special solicitude to the rights of religious organizations." By contrast, neither this Court's cases nor pre-RFRA federal employment statutes provided for-profit corporations an exemption from generally applicable law

though those firms also claimed to be legitimate sites of religious normativity.[65] Put another way, the government was trading on the pleasant illusion that the principle of a strictly-limited religious institutional autonomy is easy—though it is not—to undergird its effort to draw negative boundaries around large classes of claims for religion-based exemptions.

B.

The different fates in our legal culture of religion-based exemptions and religious institutional autonomy cannot be rationalized simply by way of some a priori account of religious and state sovereignty. But the two sets of problems do differ, at least in the American imagination, in how easily they fit into the logic of constitutional rights and judicial review.

The key here, as I have argued elsewhere,[66] is Justice Scalia's observation in the majority opinion in *Smith*, which in turn reached back to a similar observation in *Reynolds v. United States*,[67] that a constitutionally guaranteed "private right to ignore generally applicable laws" is (with some exceptions) not a "constitutional norm[]" but a "constitutional anomaly."[68] Specifically, religion-based exemptions are constitutionally anomalous in at least two important respects. First, while judicial review, including most as-applied judicial review, ordinarily identifies something inherently suspicious or defective in a statute or legal rule, the basic fact that religious commitments can take any form whatsoever suggests that *any* statute or legal rule, however generally reasonable and innocuous, could give rise to a claim for exemption. Second, the assertion of constitutional rights does not generally depend on the motivations of the claimant. But claims to religion-based exemptions turn at the outset entirely on the sincere commitments of religious claimants

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> on the premise that the corporation was exercising religion. There is no reason to conclude that Congress intended RFRA to embody a fundamentally different understanding.

Id. at 20 (alteration in original) (citations omitted).

65. *See, e.g.*, Brief for Respondents at 27–28, Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899 ("[For-profit] corporations frequently pursue moral or religious goals alongside profits . . . . Indeed Oklahoma, where Respondents are incorporated, recognizes that general corporations may undertake any 'lawful acts,' including acts inspired by religious belief." (footnote omitted) (citations omitted)).

66. Dane, *"Omalous" Autonomy*, *supra* note 9, at 1723.

67. Reynolds v. United States, 98 U.S. 145, 166–67 (1879).

68. Emp't Div. v. Smith, 494 U.S. 872, 886 (1990).

and the direct conflict between those commitments and a given statute or legal rule.[69]

The doctrines of religious institutional autonomy, by contrast, are not constitutionally anomalous.[70] They provide general carve-outs from certain laws or legal regimes and not others, and their assertion does not depend on the specific religious commitments of particular churches or religious communities.[71] "[R]eligious institutional autonomy is both narrower and broader than . . . religion-based exemptions."[72] But the net effect is to fit much more comfortably into the standard assumptions about when and why specific rights can trump otherwise-applicable laws.

Moreover, while Justice Scalia's "anomaly" argument in *Smith* related specifically to the ordinary logic of constitutional review, it extends more generally into our normative intuitions about the rule of law, intuitions

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69. There is a third respect, which follows from the other two but which is less relevant here, in which claims for religion-based exemptions are distinct: When religious believers seek an exemption from a given law, the appropriate question in a compelling governmental interest analysis "is not whether the government has a strong enough interest in enforcing the law in general," as it would be in other constitutional contexts, but "whether it has a compelling interest in applying the law to religious dissenters. The compelling interest, that is to say, is measured at the margin and not in toto." Dane, *Doctrine and Deep Structure*, *supra* note 58, at 3–4 (footnote omitted).

70. *See* Dane, *"Omalous" Autonomy*, *supra* note 9, at 1732–36.

71. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical" is the church's alone.

Id. (quoting Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 109 (1952)). The story is admittedly a bit more complicated with respect to the church property prong of religious institutional autonomy. Thus, in the traditional "polity" approach to resolving ecclesiastical property and organizational disputes, courts would defer to the locus of authority of the relevant religious community, but would first need to decide for themselves whether the community was organized hierarchically or congregationally. And in the newer "neutral principles of law" approach, which *Jones v. Wolf*, 443 U.S. 595, 600–02 (1979) authorized as an alternative to polity approach, a court's authority to look to "secular" documents such as deeds and trusts to resolve intra-religious disputes is limited by the imperative not to interpret for itself questions of faith or theology that might be contained in those documents. *See also* Dane, *"Omalous" Autonomy*, *supra* note 9, at 1742 (arguing that the "neutral principles of law approach" is best understood, not as a retreat from institutional autonomy but as a vehicle for allowing churches "to resolve the meaning of autonomy for themselves through the instruments of secular private ordering."). Nevertheless, while the precise shape or contour of autonomy in the church property context might well depend on the specific theological or ecclesiological commitments of the faith tradition in question, the *existence* of a right to autonomy does not. Autonomy doctrine, that is to say, never suggests that some religious groups are entitled to a privilege to which others are not. *See id.* at 1735.

72. Dane, *"Omalous" Autonomy*, *supra* note 9, at 1733.

invoked at various times by both conservatives and liberals and by both lawyers and other citizens. As the Court put it *Reynolds,* in language that Justice Scalia cited in his own discussion of "constitutional anomaly," a regime of religion-based exemptions risks permitting a religious dissenter from simply becoming "a law unto himself,"[73] contradicting not only "constitutional tradition" but also "common sense."[74] Thus, when an intelligent commentator notes that there is something "unsettling about a conception of religious freedom that grants some people exemption from laws that others must obey," he is tapping into a feeling that, however incomplete or even misguided it might be, runs deep.[75] In fact, as the juxtaposition between Justice Scalia's opinion in *Smith* and the more recent controversy regarding the contraception mandate and religion-based exemptions more generally make clear, it is a feeling that transcends the usual ideological divisions over both religion and constitutional law.[76]

C.

But that cannot be the end of the story. To begin with, to admit that religion-based exemptions are anomalous is not to concede that they are wrong. Our constitutional and more general legal structure is entitled to include anomalies. The compelling interest test announced in *Sherbert* did,

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73. *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
74. *Id.*
75. Sanneh, *supra* note 35, at 20.
76. A more cynical interpretation of the past few decades, to be sure, would be that for many across the ideological spectrum, general concern for either religious rights or the rule of law matters less than sympathy for specific results. As one commentator has put it,

> There's been an extraordinary reversal of ideological sides on the religious accommodation issue . . . . Over the years we knew which side generally progressives were on and which side conservatives were on—it was the opposite of the current side. When peace churches wanted an exemption from war fighting, it was the progressive position that they should get it, and it was the conservative position to deny it. . . .
>
> While there has been some buyers' regret on the one side, the conservatives who had opposed all these developments in religious accommodation at the time have come to see some merit because it's their own side whose ox is being gored.

Religious Liberty and the Constitution: New Supreme Court Cases Discussed by a Panel of Experts at Columbia Law School, COLUM. L. SCH. (Nov. 23, 2015) (quoting Walter Olson, Senior Fellow, Cato Institute Center for Constitutional Studies, Remarks at Religious Liberty and the Constitution Panel Discussion (Nov. 10, 2015)), https://www.law.columbia.edu/media_inquiries/news_events/2015/november2015/religious-liberty-constitution [https://perma.cc/Z8YD-FCLL].

after all, hold for almost thirty years.[77] And RFRA remains on the books, even if under siege. Justice Scalia's trenchant indictment does suggest that supporters of religion-based exemptions bear a special burden to justify and make sense of them. I happen to believe that this burden is met by something like the sovereignty-based account of the relation of religion and state that I have outlined here. Other arguments might do the trick as well. Thus, Justice Scalia's challenge, however trenchant, should ideally be the beginning of a conversation, not the end of it.

Another problem is that although our doctrines of religious institutional autonomy (in contrast to our doctrines of religion-based exemptions) are not "anomalous" in Justice Scalia's sense of making "an individual's obligation to obey . . . a law contingent upon the law's coincidence with [the individual's] religious beliefs," it is not entirely clear why they turned out that way.[78] Indeed, at least some courts[79] and commentators[80] prior to the Supreme Court's resolution of the question in *Hosanna-Tabor*, did urge that the "ministerial exception" should only apply in the face of a specific religious objection to an otherwise generally applicable law. So why did the general current of opinion, buttressed by even older currents in the church property tradition of religious institutional autonomy, go the other way? That is to say, why did our doctrines of religious institutional autonomy evolve in a way that effectively immunized them from Justice Scalia's critique?

Part of the answer might just be that religious institutional autonomy is "omalous" *because it can be*. Recall the two ways in which religion-based exemptions are "anomalous." First, any law whatsoever can give rise to

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77. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–40 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("[I]t is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972));

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Yoder, 406 U.S. at 220; Leahy v. District of Columbia, 833 F.2d 1046, 1048 (D.C. Cir. 1987); Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984); State v. Hershberger, 444 N.W.2d 282, 285–86 (Minn. 1989), *vacated*, 495 U.S. 901 (1990); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426–27 (N.Y. 1989).

78. *Smith*, 494 U.S. at 885.

79. *See, e.g.*, Petruska v. Gannon Univ., 448 F.3d 615 (3d Cir. 2006), *vacated on grant of reh'g*, 462 F.3d 294 (3d Cir. 2006); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993) (holding that lay teachers could bring an age discrimination complaint against a religious school unless the school could successfully argue that it acted on the basis of a non-pretextual claimed "religious reason").

80. *See, e.g.*, Rutherford, *supra* note 49, at 1107–08; Elizabeth R. Pozolo, Note, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in* Petruska v. Gannon Univiversity, 57 DEPAUL L. REV. 1093, 1117–18 (2008).

an exemption claim. Second, exemption claims depend at the outset on a conflict between a law and an actual religious commitment or obligation. These two dimensions are not entirely independent. A general exemptions regime *must* depend on conflicts with *specific* religious beliefs; to even imagine allowing religious believers to claim exemptions from any laws at all, whether or not the laws conflicted with the specific norms of their faith, would be both entirely anarchic and plain bizarre. Thus, for example, that members of one particular religious group might have the right to drink a sacramental tea laced with a psychedelic substance does not—could not—imply that all religious believers of any persuasion have the right to drink the same tea.[81] Only the sort of regime of religious rights—such as religious institutional autonomy—that limits itself from the outset to carving out exceptions from a well-defined *subset* of laws can then in turn allow itself to provide those carve-outs, in wholesale fashion, to all religions.[82]

That said, three other factors seem to be at work. First, there are eminently practical reasons, including various line-drawing difficulties and problems of proof, to recognize institutional autonomy across the board.[83]

Second, an important force at work here is the very particular, and only imperfectly and sometimes arbitrarily realized, impulse in our legal culture to treat religions the same *even when it would be rational and sensible to treat them differently*. I have called this impulse a species of what I call "analogy of dignity."[84] "Analogy of dignity," in general, is a form of argument that extends a legal rule or institution to a new case, not because the logic

81. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

82. To be sure, the line I am drawing here between specific exemptions and more general carve-outs can be fuzzy. Thus, for example, the traditional "sacramental wine" exception to various alcohol-regulating regimes, including federal Prohibition, *see* National Prohibition Act, ch. 85, sec. 6, Pub. L. No. 66, 41 Stat. 305 (1919), were routinely written to extend to the Jewish purchase and use of kosher wines, even though (1) when wine is called for in Jewish rituals, grape juice is in most instances a religiously permissible substitute, (2) those rituals are in any event not "sacramental" in the Christian sense, and (3) perhaps most important, Jews purchase kosher wine, not only for use in specific ritual contexts, but also to drink at ordinary meals. This was, I think, at least in a constrained sense, an application of the impulse to "analogy of dignity" that I discuss *infra* at notes 84–88 and accompanying text.

83. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 51–57 (2011).

84. Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFF. L. REV. 291, 330–50 (2014) [hereinafter Dane, *Natural Law*].

of the rule or case requires it, but because something about "the status or worth of the person or entity for whose benefit the paradigm rule or institution is being extended" seems to call for it.[85] "Arguments for analogy of dignity thus have something to do with notions of equal worth, but they differ substantially from the usual means-end rhetoric typically identified with constitutional 'equal protection' doctrine."[86]

In the context of religion, the impulse to "analogy of dignity" could not, for the reasons I have just explained, possibly make any sense in the context of general regimes of religion-based exemptions such as RFRA or the pre-*Smith* free exercise clause. But it can and has come into play with respect to certain specific aspects of religious liberty such as, for example, the extension of the clergy-penitent privilege well beyond those faith traditions that actually religiously mandate the secrecy of confession.[87] It also appears in more mundane contexts, as in the so-called "parsonage exemption," whose effect is to treat most clergy, regardless of their specific ecclesiastical traditions, as if they were required to live in church-provided housing.[88] And, as most relevant here, the impulse to respect analogy of dignity helps explain the general refusal, reaffirmed in *Hosanna-Tabor*, to condition religious institutional autonomy on the specific religious beliefs of a given church.

A third explanation, though, goes more directly to the heart of the matter. Sovereignty, within its domain, and particularly with respect to internal affairs, tends toward the plenary.[89] So if we take seriously the juridical and not only the spiritual dignity of internal religious governance, it seems only natural not to limit it to some predetermined set of issues and concerns. And, if that renders the doctrines of religious institutional autonomy constitutionally ordinary rather than anomalous, so much the better.

Of course, there is a certain question-begging here. Why has our legal culture taken seriously the juridical dignity of internal religious governance? And what went awry in its consideration of religion-based exemptions? The discussion so far has made some progress. But a mystery remains.

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85. *Id*. at 334.
86. *Id.* (footnote omitted).
87. *See id.* at 343–44.
88. 26 U.S.C. § 107 (2012). *See* Dane, *Natural Law*, *supra* note 84, at 345–46.
89. *Cf.* Pollard v. Hagan, 44 U.S. 212, 229 ("[S]overeignty of Congress, though limited to specified objects, is plenary as to those objects."); Ole Spiermann, *General Legal Characteristics of States*, in SOVEREIGNTY, STATEHOOD, AND STATE RESPONSIBILITY 144, 145–46 (Christine Chinkin & Freya Baetens eds., 2015) (in principle, states have "plenary competence" over their "internal affairs" (*quoting* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 40–41 (2d ed. 2006))). I am, of course, citing these sources for their resonance rather than their direct authority. Both state sovereignty and religious sovereignty are far too complicated to be captured by a single word or simple slogan.

III.

To proceed further, this Article now needs to shift gears. It will deploy an additional dose of theory, that notion of double-coding to which I referred at the start. But it will also turn toward narrative and even a bit of close reading, leavening normative analysis with a more descriptive account of roads taken and pathways missed.[90]

A.

Let's begin by returning to the claim with which this Article began, that a proper understanding of the legal relationship between religion and the state depends at some level on appreciating the jurisdictional, pluralist, and dialogical nature of the encounter between the *nomos* of the state and the *nomos* of religion. That idea is part of a larger—much larger—commitment to diversity, multivocality, and multidimensionality in our legal and more generally normative discourse. Specifically, I want to propose now that the legal imagination, at its best, will appreciate and even cultivate not only the *substantive* multivocality of a diversity of legal authority, but also a *methodological* multivocality in the structure of legal argument itself.[91]

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90. Narrative, of course, can itself be a normative craft. As I have put it elsewhere,

> central to law and the work of lawyers in all contexts is a subtle combination of textual exegesis, the construction of powerful mythical historical narratives that articulate and motivate legal values, and the necessary if often imprecise work of old-fashioned casuistry. Law, that is to say, including constitutional law, is at crucial points, a form of artificial reason, an artificial reason that both channels and shapes our fundamental commitments and actually helps make them real. And it is the hard craft of lawyering that makes all that possible.

Perry Dane, *Judaism, Pluralism, and Constitutional Glare*, 16 RUTGERS J.L. & RELIG. 282, 290 (2015) (footnotes omitted) [hereinafter Dane, *Judaism*].

91. *Cf.* Dane, *Maps*, *supra* note 6, at 991:

> Sovereignty-talk, at its best, comprehends the willingness and the ability to hold, in tandem, apparently contradictory images of the relationship between self and other. It is the ability to insist on absolute dominion, and yet also recognize the dominion of others, or to comprehend the possibility of equality even while also comprehending a relationship of hierarchy. It is an exercise of craft—legal craft—in which these different images all find their respective places and their appropriate contexts. It is the epistemic courage to see that these images need not be reduced one to the other, or to some single compromise position that is unfaithful to them all.

More generally,

> pluralism comes with a good deal of tension, irony, and unresolved difficulties, but that, it seems to me, is part of its power and glory, and I would hate to be

Legal reality can take a dual form, a superposition of the conventional and the subversive. It is possible, for example, for a court to recognize the sovereignty of religious communities while also disavowing it. And true legal wisdom can reside in understanding the relationship between such apparently divergent or even contradictory visions.

That is what I mean by "double-coding." I borrow the term from some postmodern theorists,[92] and have to fess up to a certain postmodern temptation in my own use of it.[93] But I do not really need such fancy machinery to

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without it. Pluralism, I should not need to emphasize, is not relativism or skepticism. But it is a recognition (and in some contexts a celebration) of multiplicity, complexity, perspective, humility, and the imperatives of encounter.

Dane, *Judaism*, *supra* note 90, at 282. In constitutional and other legal debates at their best and most honest,

> the process of dialogue, recognition, and mutual adjustment is complex, contradictory, and often ironic. Sometimes, the encounter of normative discourses produces simply intractable conflicts. Sometimes there is no principled solution. Sometimes, we just need to make existential choices.

Id. at 289.

92. The phrase, though by no means the idea, seems to have originated with Christopher Jencks's account of post-modernist architecture, in which modernist and traditional elements are often combined in such a way that the design communicates different meanings to different audiences. *See* CHARLES JENCKS, WHAT IS POSTMODERNISM? 14–15 (Academy Editions 1986). *See generally* BRIAN MCHALE, THE CAMBRIDGE INTRODUCTION TO POSTMODERNISM 67–81 (2015). For discussions of "double-coding" in a variety of contexts, see, for example, HENRY BIAL, ACTING JEWISH: NEGOTIATING ETHNICITY ON THE AMERICAN STAGE AND SCREEN (2005) (analysis of popular culture); BRIAN MCHALE, POST-MODERNIST FICTION (Taylor & Francis 2004) (literary analysis); RAYMOND LESLIE WILLIAMS, THE TWENTIETH-CENTURY SPANISH AMERICAN NOVEL 199 (2003) (literary analysis); EDITH WYSCHOGROD, SAINTS AND POSTMODERNISM: REVISIONING MORAL PHILOSOPHY, at xxiii–xxiv (1990) (ethical theory); Loredana Di Martino, *From Pirandello's Humor to Eco's Double Coding: Ethics and Irony in Modernist and Postmodernist Italian Fiction*, 126 MLN 137, 155 (2011); Achim Holter, *Doppelte Optik and lange Ohren—Notes on the Aesthetic Compromise*, in QUOTE, DOUBLE QUOTE: AESTHETICS BETWEEN HIGH AND POPULAR CULTURE 43, 44 (Paul Ferstl & Keyvan Sarkhosh eds., 2014); Tulasi Srinivas, *Building Faith: Religious Pluralism, Pedagogical Urbanism, and Governance in the Sathya Sai Sacred City*, 13 INT'L J. HINDU STUD. 301, 327 (2009) (religious and cultural history); Ravi Sundaram, *Beyond the Nationalist Panopticon: The Experience of Cyberpublics in India*, in ELECTRONIC MEDIA AND TECHNOCULTURE 270, 282 (John Thornton Caldwell ed., 2000) (cultural history). Similar observations about the superposition of conventional and potentially subversive meanings in a single cultural expression have become an important theme in scholarship about African-American art, music, and literature. *See, e.g.*, HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM, at xxv, 50–51, 110–13 (1988); DAVID M. LUBIN, PICTURING A NATION: ART AND SOCIAL CHANGE IN NINETEENTH-CENTURY AMERICA 123–24 (1994).

93. I have in mind, though, what has sometimes been called "constructive" postmodernism, which is not inherently relativistic, and which seeks to support structures of thought rather than deconstruct them. *See, e.g.*, DAVID RAY GRIFFIN ET AL., FOUNDERS OF CONSTRUCTIVE POSTMODERN PHILOSOPHY: PEIRCE, JAMES, BERGSON, WHITEHEAD, AND HARTSHORNE, at viii–ix (1993); MARTIN SCHIRALLI, CONSTRUCTIVE POSTMODERNISM:

make the point. Consider instead several analogies that, together, should help explain what I am getting it. The simplest, but also I think the least interesting, is simply the juxtaposition of a surface structure—which is to say conventional legal doctrine—and its subterranean foundation in more apparently radical ideas. A better comparison, though, is to one of the classic optical illusions, such as that of the vase and the faces,[94] or the duck and the rabbit,[95] in which the trick is to recognize that the expression of a change of aspect—from one image to the other—"is the expression of a *new* perception and at the same time of the perception's being unchanged."[96] Yet another analogy might be to a stereoscopic photograph, in which two images merge into a deeper picture than either one alone.[97]

Perhaps the most pregnant, if still imperfect, analogy, though, is to C.S. Lewis's account of transpositions, such as two-dimensional drawings of a

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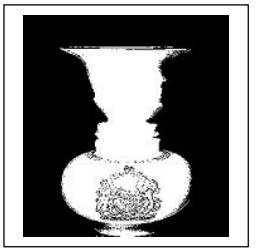
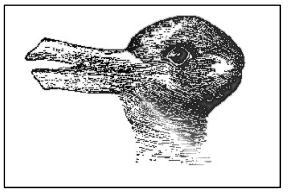
TOWARD RENEWAL IN CULTURAL AND LITERARY STUDIES 3 (1999). *See also* Dane, *Judaism*, *supra* note 90.

94.



95.



96. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 167 (G.E.M. Anscombe trans., 3d ed. 2001) (1953). For a more technical but accessible account of these and other optical illusions, see Donald D. Hoffman, *The Interpretation of Visual Illusions*, SCI. AM., Dec. 1983, at 95.

97. *See* DAVID BLEICH, THE DOUBLE PERSPECTIVE: LANGUAGE, LITERACY, AND SOCIAL RELATIONS 87 (1988) (discussing "cognitive stereoscopy" as a mental schema in which the simultaneity of several perspectives produces a "cognitive depth perception" that, among other things, integrates the "simultaneous sense of the separateness of others . . . and the objectivity of oneself").

three-dimensional world or a piano version of an orchestral composition.[98] The transposition is not merely a counterfeit. It has integrity of its own. But our richest understanding of it requires that we also have some access to the higher form to which it is connected. As Lewis explains,

> The piano version means one thing to the musician who knows the original orchestral score and another thing to the man who hears it simply as a piano piece. But the second man would be at an even greater disadvantage if he had never heard any instrument but a piano and even doubted the existence of such instruments.[99]

Lewis emphasizes his point even more poignantly with a fable—clearly echoing Plato's allegory of the cave in *The Republic*—of a child growing up in a dungeon whose only knowledge of the outside world comes from his mother's pencil drawings.[100] The boy is "dutiful" and "does his best to believe" his mother when she tells him that the

> outer world is far more interesting and glorious than anything in the dungeon. At times, he succeeds. On the whole he gets on tolerably well until, one day, he says something that gives his mother pause. For a minute or two they are at cross-purposes. Finally, it dawns on her that he has, all these years, lived under a misconception. "But," she gasps, "you didn't think that the real world was full of lines drawn in lead pencil?" "What?" says the boy. "No pencil marks there?"[101]

The key here in invoking all these analogies is to uphold the legal imagination, which is to say the power of law as both a constructed reality and a resonant reflection of reality.[102] And it is to lament, when appropriate,

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98. *See* C.S. LEWIS, *Transposition*, *in* THE WEIGHT OF GLORY AND OTHER ADDRESSES 54, 60 (Walter Hooper ed., rev. ed.1980) (1949). Lewis develops his ideas in the context of a discussion of the relation between the natural and the supernatural. My expropriation here makes no effort to do justice to his larger argument.

99. *Id.* at 61.

100. PLATO, REPUBLIC *514a-520a (C.D.C. Reeve trans., 2004).

101. LEWIS, *supra* note 98, at 68. Lewis's argument about transposition should, though, be amended (at least for my purposes) in one important respect: The phenomenon he identifies might be said to exist even when the so-called "higher" form arises out of the lower rather than the other way around. I recently heard the talented classical pianist Alexander Gavrylyuk discuss his performances of Modest Mussorgsky's "Pictures at an Exhibition." Interestingly, Mussorgsky originally wrote "Pictures" as a piece for piano, and it was later composers, most famously Ravel, who composed the full orchestrations with which most listeners are more familiar. Yet Gavrylyuk emphasized that his familiarity with the orchestral versions of the piece moved him to try, with the more "limited" resources of the piano, to achieve as much of the full dramatic potential of the piece as its later orchestrations eventually revealed. Alexander Gavrylyuk, Remarks at Chautauqua Symphony Orchestra's Into the Music Series (July 7, 2015).

102. In an earlier article, I similarly suggested that there are two aspects to the legal imagination. "The first aspect is the power of legal words to impart principle, to guide specific decisions, to find in themselves reflections of fairness and justice. The second aspect is the power of legal words to create their own reality, to build a discourse not reducible to any other." Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA

our collective failure fully to appreciate the potential of the legal imagination.[103] Indeed, it takes no particularly fancy intellectual equipment merely to say of the legal imagination what a character in the play *Six Degrees of Separation* said of imagination more generally:

> The imagination [is] . . . our most personal link, with our inner lives and the world outside that world—this world we share. . . . I believe that the imagination is the passport we create to take us into the real world. I believe that the imagination is another phrase for what is most uniquely *us*.[104]

L. REV. 1, 133 (1994) [hereinafter Dane, *Jurisdictionality*]. And I suggested a deep connection between these two aspects:

> To believe in a distinctive legal reality is to posit a world of words, a field of vision—a web of truth—that can stand up to other forms of truth. To believe in the power of words to impart principle and guide decisions is to posit that the legal web is also of a piece, that it can support and inform each of its parts. It is to believe that, strengthened by those internal connections, legal truth can, in its own way, assimilate standards of justice and rationality that are embedded in the wider human conversation.

Id. at 134. Similar concerns have animated much of my scholarship. *See, e.g.*, Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1193 (1987) [hereinafter Dane, *Vestedness*]; Perry Dane, *Sovereign Dignity and Glorious Chaos: A Comment on the Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 173, 174 (1996); Perry Dane, *The Corporation Sole and the Encounter of Law and Church*, *in* SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS 50, 50–51 (N.J. Demerath III et al. eds., 1998) [hereinafter Dane, *Corporation Sole*]; Perry Dane, *The Public, the Private, and The Sacred: Variations on a Theme of* Nomos and Narrative, 8 CARDOZO STUD. L. & LIT. 15, 16 (1996) [hereinafter Dane, *The Public, the Private, and The Sacred*]; Dane, *Maps*, *supra* note 6, at 963; Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFF. L. REV. 291, 374–75 (2014).

103. For a similar project, consider JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990), in which Professor White, after a close and rich reading of a series of cases, concludes that in too many of them "we have seen instance after instance in which a Justice has found ways to avoid the difficulties of judging by turning to false grounds of authority," failing to recognize that judicial authority "must be created rhetorically, in the opinion itself; that it depends upon the informed understanding of the reader and upon his acquiescence, not in the 'result' or even the 'reasoning' by which the result is reached, but in the set of relations and activities created in the opinion itself." *Id.* at 216–17. For an intriguing argument about how the legal modernist aversion to "legal fictions" obscures the inherent role that fiction and imaginative construction plays in legal reasoning, see Mark A. Clawson, Note, *Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant*, 43 DUKE L.J. 845 (1994). Clawson rightly suggests that a modern legal world that "cannot admit its fiction" has locked itself in a "prison of the mind." *Id.* at 878.

104. JOHN GUARE, SIX DEGREES OF SEPARATION 22 (play, 3d ed. 2010). Guare's character thus complains that

And, indeed, that these words are spoken by a character whose own genuineness and identity is the preoccupying puzzle of the play only confirms for me that the faculty of the imagination is central to making sense of the act of encounter, and trying to assimilate the world-creating efforts of others into the picture we construct of the legal world we inhabit.[105]

B.

The power of the legal imagination and the particular possibility of "double-coding" are germane throughout legal discourse. But they are particularly vital in understanding the relationship of religion and the state. The reason is that any legal system is inherently prone to solipsism.[106] Allowing into the surface layers of legal doctrine the juridical dignity of a radically different type of sovereign authority is not impossible—it has even been done—but it is difficult. Better in some sense to leave the jurisdictional, legal pluralist, and dialogical principle below the surface, and speak explicitly through more domesticated doctrines. Moreover, for some of the reasons I have already discussed, the deep jurisdictional, legal pluralist, and dialogical principle is not very determinate in any event. More conventional legal language is necessary, if nothing else, to mediate between

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> The imagination has been so debased that imagination—being imaginative—rather than being the linch-pin of our existence now stands as a synonym for something outside ourselves like science fiction or some new use for tangerine slices on raw pork chops—what an imaginative summer recipe—and *Star Wars*! So imaginative!

Id. In writing this piece of dialogue, Guare undoubtedly had in mind the classical philosophical tradition that treats the "imagination" as a powerful and crucial faculty of human thought. *See generally* Anthony R. Manser, *Imagination*, *in* 4 THE ENCYCLOPEDIA OF PHILOSOPHY 136, 136–39 (Paul Edwards et al. eds., 1967). Recent work I have found particularly evocative includes G.B. MADISON, *The Philosophical Centrality of the Imagination: A Postmodern Approach*, *in* THE HERMENEUTICS OF POSTMODERNITY 178 (G.B. Madison ed., 1988); MARY WARNOCK, IMAGINATION AND TIME (1994); Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CINN. L. REV. 727 (1999).

105. Consider this exchange near the end of the play:

> OUISA: I read today that a young man committed suicide in Riker's Island. . . . Was it Paul? Who are you? We never found out who you are.
>
> FLAN: I'm sure it's not him. He'll be back. We haven't heard the last of him. The imagination. He'll find a way.

GUARE, *supra* note 104, at 70.

106. *See* Dane, *Intersecting Worlds*, *supra* note 9, at 404 ("[T]he impulse to appreciating legal pluralism arises, not merely out of theoretical commitments, but out of a process of existential encounter, as each normative system asks itself precisely what is going on outside the reach of its most solipsistic concerns."); Perry Dane, *The Battlefields of Hobby Lobby*, RELIGIOUS FREEDOM PROJECT (Sept. 12, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/the-battlefields-of-hobby-lobby [https://perma.cc/YUV8-MKTZ].

the deep principle and the particular questions that arise in actual cases and real contexts.

For double-coding to work, however, two conditions must be met. First, the law and the judges who speak for the law must be willing, consciously and explicitly or not, to appreciate the multivocal deep structure of the legal materials. They must, that is to say, be willing to read between the lines, to draw otherwise debatable inferences, and to make connections that might not be immediately obvious. Second, the surface doctrine must at least resonate with, even if it does not fully capture, the deeper layers of meaning. The vase and the faces, or the piano and orchestral arrangements, that is to say, though they remain distinct, must somehow fit together.

Part of the problem in the development of the American doctrine of religion and law, particularly with respect to free exercise, is that these two conditions were not met. That is a purely contingent fact of history. It might easily have been otherwise. And, even if it had been otherwise, other factors and other forces might have intervened. But at least one part of the answer to the puzzle with which I began—the disjunction between free exercise and religious institutional autonomy—can be found in these failures of imagination.

C.

In the broader sweep of things, the story of religious institutional autonomy in American constitutional doctrine is relatively straightforward. And it is as clear an example as one might hope for of double-coding at its best.

From the start, explicit sovereignty talk has always been close to the surface in the institutional autonomy context.[107] That might be partly

107. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("internal governance of the church"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) ("civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."); Watson v. Jones, 80 U.S. 679, 728–729 (1872) (affirming "right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association"); Crowder v. S. Baptist Convention, 828 F.2d 718, 727 (11th Cir. 1987) ("ecclesiastical government"); Smith v. Bd. of Pensions of Methodist Church, 54 F. Supp. 224, 236 (E.D. Mo. 1944) (discussing relationship of "church courts" to "civil courts"); Marsh v. Johnson, 82 S.W.2d 345, 346 (Ky. 1935) ("In such matters

because, from the point of view of secular judges, formal religious authority structures just look more like quasi-legislative or quasi-judicial phenomena than the court of religious conscience at the heart of free exercise claims. It might also be partly because the constitutional doctrine's religious institutional autonomy grew almost seamlessly out of a rich, though by no means uniform, sub-constitutional common law tradition. Those common law origins are sometimes considered incidental or awkward, but they clearly gave courts a vocabulary, freedom, and a set of principles that might otherwise not have been available.[108]

Equally significant to the power of our jurisprudence of religious institutional autonomy, however, is that even if it has not fully committed itself to "sovereignty-talk," the double-coding in which it has engaged has been particularly fruitful. Thus, when Justice Blackmun, in *Jones v. Wolf*,[109] brought to bear norms of private ordering as one way to resolve internal church disputes, the case—correctly understood[110]—also suggested that a church's power to translate its own ecclesiastic doctrines into secular language had to be read much more generously than the constrained right to private ordering that might be available to individuals. And when some of the litigants in the *Hosanna-Tabor* litigation argued for an understanding of the so-called ministerial exception that reduced it to a right of freedom of association, the Court could reject such a doctrinal reduction of religious institutional autonomy while not explicitly rejecting the broader thematic comparison entirely.[111] Indeed, the extra space between freedom

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relating to the faith and practice of the church and its members, the decision of the church court is not only supreme, but is wholly without the sphere of legal or secular judicial inquiry.").

108. *See generally* Bernard Roberts (Trujillo), Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211 (1991). That common law history also helped avoid the problem of "constitutional glare" that, as I will discuss in more detail *infra*, has so bedeviled the consideration of religion-based exemptions. *See infra* Part D.2.

109. Jones v. Wolf, 443 U.S. 595, 603–04 (1979) ("[T]he neutral-principles analysis shares the peculiar genius of private law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate [legal instruments] . . . . a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.")

110. I elaborate on this argument in Dane, *Intersecting Worlds*, *supra* note 9.

111. *Hosanna-Tabor*, 132 S. Ct. at 705–06.

> The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

of association and genuinely robust institutional autonomy, just like the extra space between private ordering and such robust autonomy, is ambiguous and complicated enough that a certain implicit degree of double-coding remains part of the conversation.[112]

D.

The story of religion-based exemptions in American law is much more complicated, difficult, and contentious. For my purposes here, I will focus on only a few cases. I will begin with the two bookend cases—*Reynolds* and *Smith*—that rejected the very idea of a general regime of religion-based exemptions from otherwise-applicable, neutral laws as inconsistent with the bedrock assumptions of the rule of law and constitutional adjudication. Then I will discuss *Sherbert*, the intervening decision that tried—ultimately unsuccessfully—to set in place precisely such a regime of religion-based exemptions, and Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which tried—valiantly but too late—to fix *Sherbert*'s mistake.[113]

1.

Reynolds, which upheld the criminal prosecution of a Utah Mormon polygamist against a constitutional challenge, could have—perhaps only in a different world—been treated as a religious institutional autonomy case. After all, George Reynolds was not charged with fornication or another sexual crime, but with bigamy.[114] And the awkward fact is that Reynolds only married his second wife in a religious ceremony, and did not seek any purely civil recognition of that marriage.[115]

Id. at 706 (citation omitted).

112. *See generally* Richard Schragger & Micah J. Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

113. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559–77 (1993) (Souter, J., concurring).

114. Reynolds v. United States, 98 U.S. 145, 161–68 (1878).

115. *Id.* at 167. I do not want to suggest that this should necessarily have changed the outcome. Even under contemporary law, "purely religious" marriages can have civil consequences, both good and bad. *See* Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1159–68 (2009). *But cf.* Brown v. Buhman, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013) (striking down on various constitutional grounds Utah's current statute that was interpreted to prohibit even unlicensed solemnized "bigamous" marriages), *remanded on other grounds with instructions to vacate judgment and dismiss action*, 2016 U.S. App.

But *Reynolds* was not decided in a different world. In our world, the case needs to be understood in the context of the fierce effort to eradicate what many in the nation felt to be the immoral and oppressive behavior of a dangerous and rebellious sect.[116] Moreover, marriage was a particularly fraught issue, since church and state had been fighting and negotiating over its regulation for many centuries. And so the Court almost could not help but understand the case as being not about a religious right to be left alone, but about the rule of law in a democratic state. And so it held that to "permit" the sought exemption "would be 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."[117]

2.

But what about *Smith*, which virtually put an end to a short experiment with free exercise exemptions in the context of much more sympathetic claimants, and the availability of the compelling interest test that could have denied the exemption on much narrower grounds?[118]

As I have already emphasized, Justice Scalia was correct that religion-based exemptions of the sort possible under the then-governing regime of *Sherbert v. Verner* were a "constitutional anomaly."[119] But that need not have been the end of the matter. Religion-based exemptions might be a "constitutional anomaly." Nevertheless, the appearance of anomaly sometimes dissolves in the light of a different, and more generous, frame of reference.[120]

LEXIS 6571 (10th Cir. Utah Apr. 11, 2016) (holding that case became moot in the light of county attorney's announced policy only to prosecute bigamy in limited circumstances). For my discussion of the original district court opinion, see Perry Dane, *The Polygamy (aka "Religious Cohabitation") Decision*, CTR. FOR L. & RELIGION F. AT ST. JOHN'S U. SCH. OF L. (Dec. 16, 2013), http://clrforum.org/2013/12/16/polygamy/ [https://perma.cc/YV7H-7MYC].

116. *See generally* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (Thomas A. Green & Hendrik Hartog eds., Univ. of N.C. Press 2002).

117. *Reynolds*, 98 U.S. at 167.

118. *Cf.* Emp't Div.. v. Smith, 494 U.S. 872, 903–07 (1990) (O'Connor, J., concurring in the judgment) (concluding that allowing religious claimants an exemption from state drug laws would "seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens.")

119. *Id.* at 886.

120. "We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 281 (C. O'Brien ed. 1969).

To begin with, religion-based exemptions might be "constitutionally anomalous." But they are not completely legally anomalous. Justice Scalia might have looked for parallels, not in the standard norms of individual liberty rights found elsewhere in the Bill of Rights, but to other sources. He might have considered the Establishment Clause, in either its more separationist or more accommodationist readings, as suggesting the wholesale framework to which the retail exceptions of free exercise are a partial corrective.[121] He might have looked further afield, to conventional choice of law doctrine or even to the full faith and credit clause, as a touchstone.[122] He might have plumbed the larger power in the forms of religion-based exemptions that he was willing to consider—exemptions claimed in the face of laws that were not neutral or generally applicable, or those arising out of what have to be called "hybrid" claims. He might have considered the long history of legislatively-granted exemptions as shedding light on the sorts of legal values that might also be instantiated in the free exercise clause.[123]

Or Justice Scalia might have considered more fully the body of cases on religious institutional autonomy that he explicitly upheld even as he effectively negated *Sherbert*. As I have emphasized, those cases present a bit of a mystery themselves, to which I will need to return. Nevertheless, a more sympathetic analysis might have found in institutional autonomy, and in the larger historical and legal context out of which it arose, some friendly support for a more vigorously understood free exercise jurisprudence.

Would all this require a full-throated commitment, or capitulation, to the jurisdictional, legal pluralist, and dialogical principle? The way I have put it here, perhaps. But more domesticated, rough-edged, and jerry-rigged comparisons and connections might have been found.

That Scalia and the Court's majority did not see such possibilities was largely a matter of ideology and what would have been thought of at the time as judicial conservatism—though that characterization seems almost quaint now. But also at fault, to what extent I will not try to measure, was a cognitive prejudice in Scalia's and the Court's understanding of constitutional law.

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121. U.S. CONST. amend. I.
122. U.S. CONST. art. IV, § 1.
123. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

That bit of blindness is a phenomenon I have called "constitutional glare." In an earlier article, I discussed the temptation

> to assume that the truly important, truly intense locus of values in our legal culture can only be found in the Constitution. There is much talk in the legal academy of "constitutional fate" and "constitutional faith." . . . But too little notice is paid to the prevalence of "constitutional glare," the tendency of constitutional talk to obstruct the normative work done by the rest of law, and to obscure the degree to which constitutional law itself is embedded in larger narratives and traditions.[124]

In that article, and elsewhere,[125] I focused on the aspect of constitutional glare that blinds us to the importance and interest of sub-constitutional, nitty-gritty questions in the relation of religion to secular law.[126] Here, though, I want to suggest a related effect of constitutional glare: the tendency to see constitutional law itself as a specially constructed analytic machine, whose fundamental theoretical infrastructure is self-contained and unique.[127] This illusion that constitutional law is or should be self-contained cuts off points of imaginative connection between constitutional doctrine and the

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124. Dane, *The Public, the Private, and The Sacred*, *supra* note 102, at 21 (footnotes omitted).

125. *See, e.g.*, Dane, *Jurisdictionality*, *supra* note 102, at 122–23; Dane, *Corporation Sole*, *supra* note 102, at 51–53, 55–57; Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFF. L. REV. 291 (2014); Dane, *Judaism*, *supra* note 90, at 286–89.

126. Constitutional doctrine, after all, is necessarily self-referential, even solipsistic. It is about what government can and cannot do, or what it must and must not do. . . . None of this is meant as a criticism of the Constitution, or of constitutional discourse. It would only be so if the Constitution were all of law, or even the only transcendently significant law. But the Constitution is neither of these, and it is only constitutional glare that makes us think it might be.

Dane, *The Public, the Private, and The Sacred*, *supra* note 102, at 26. Notice again the reference to solipsism—here not the solipsism of the state confronting other legal orders but the solipsism of constitutional law confronting the rest of law.

127. It might seem odd that I am accusing Justice Scalia, of all the members of the Court, of suffering from "constitutional glare." But, to avoid such glare, it is not enough, or even satisfactory, to suggest, as Scalia often does, that legal tradition can fix the meaning of constitutional rights. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2736 (2011); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting); Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 448–61 (1996) (Scalia, J., dissenting); Montana v. Egelhoff, 518 U.S. 37, 43–51 (1996) (Scalia, J., plurality opinion); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24–40 (1991) (Scalia, J., concurring); Burnham v. Super. Ct., 495 U.S. 604, 622–28 (1990) (Scalia, J., plurality opinion); Michael H. v. Gerald D., 491 U.S. 110, 121–24 (1989) (Scalia, J.). *See also* J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19 (2000); Gregory P. Magarian, *The Marrow of Tradition: the Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1350–51, 1355–57 (2015).

Completely escaping the effect of constitutional glare would require recognizing a more dynamic and evocatively rich connection between the Constitution and the rest of the legal landscape. *Cf.* JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 65 (Yale Univ. Press 1984) ("Tradition is the living faith of the dead, traditionalism is the dead faith of the living.").

rest of law. Thus, Scalia could only think of comparing religion-based exemptions to other constitutional rights, and did not trouble to wonder whether there might be other frames of reference by whose measure such exemptions might seem less "anomalous." Indeed, this aspect of constitutional glare even makes it more difficult to draw connections *within* constitutional doctrine—such as the connection between religion-based exemptions and institutional autonomy—by closing off access to the overarching categories or metaphors that would make those connections intelligible. And, as I discussed above, Scalia's argument has then had the paradoxical effect—though one still consistent with the pernicious effects of constitutional glare—to reach out beyond the realm of purely constitutional logic to our more general legal normative intuitions.[128]

3.

It would be unfair, however, only to blame the *Smith* Court in 1990 for being blinded by "constitutional glare" and failing to see that religion-based exemptions could best be understood, not by reference to typical constitutional analysis, but by some richer and deeper set of arguments. For, in fact, *Smith* only brought to the surface a gap that had plagued the Court's religion-exemption cases from their start in *Sherbert*. For those cases never admitted, let alone tried to make sense of, the constitutionally "anomalous" character of the free exercise doctrine they were propounding. And while it would be ascribing too much force to mere argument to suggest that *Smith* would have come out the other way had those earlier cases been more forthright, coherent, and convincing, Scalia and the rest of his majority would at least have had a harder time tearing down the edifice.

Of the cases that established and defined the modern pre-*Smith* doctrine of religion-based exemptions, none was as important, or as blind to the "anomaly" challenge, as the first in the series, *Sherbert*, written by Justice William Brennan. Indeed, *Sherbert*'s failure is, in some ways, a more deeply emblematic part of the story than *Smith*'s failure.

The legal discussion in *Sherbert* included a brief review of prior law. Free exercise law before *Sherbert* had traversed a muddy path.[129] Brennan's

128. *Supra* Section II.B.

129. As discussed earlier, *Reynolds v. United States*, the first significant free exercise case, had rejected the notion of religion-based exemptions, warning that they would "permit every citizen to become a law unto himself." Reynolds v. United States, 98 U.S. 145, 166–

opinion, however, put the best possible spin on it.[130] His masterful rereading of precedent was not as outrageous as Scalia's in *Smith*, though an observer could be forgiven for thinking that they deserved each other.

More important than Justice Brennan's reading of history, however, was his framing of the basic question. Tellingly, he subtly downplayed the recognition of genuine conflict of normative authority between religion and state that had led the *Reynolds* Court to its conclusion that to allow a religion-based exemption would "permit every citizen to become a law

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67 (1878). The *Reynolds* Court also asserted, in what by any account would be an oversimplification, that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. By the 1930's, however, the Court had in *Cantwell v. Connecticut*, taken some of the edge off *Reynolds*'s purported distinction between belief and action. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940). The Free Exercise Clause, *Cantwell* declared, "embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id. Cantwell* upheld the right of Jehovah's Witnesses to proselytize and solicit contributions on public streets. *Id.* at 300, 310. It and its direct progeny, however, including *Murdock v. Pennsylvania*, 319 U.S. 105, 106–07, 116–17 (1943) (striking down, as applied to religious proselytizers, ordinance imposing flat tax on privilege of canvassing or soliciting in a municipality); and *Follett v. McCormick*, 321 U.S. 573, 576–78 (1944) (striking down, as applied to evangelist who sold religious books door-to-door, ordinance imposing flat license tax on book agents); and *Fowler v. Rhode Island*, 345 U.S. 67, 67, 70 (1953) (striking down ordinance prohibiting religious or political meetings in public parks), were not genuine cases of religion-based exemptions, for two connected reasons. First, the religious rights involved overlapped, perhaps completely, with rights of free speech, press, or association. Second, and more to the point, the rights that these cases vindicated did not depend on the particular religious beliefs of the persons asserting the rights—they were, in short, about the typical stuff of defining a constitutionally protected general zone of liberty. Meanwhile, in several other cases, the Court expressly rejected claims for true religion-based exemptions. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 600–02, 609 (1961) (rejecting a religious-based exemption for Sunday closing laws); Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (rejecting allowing religious-based exemptions for child labor); Jacobson v. Massachusetts, 197 U.S. 11, 38–39 (1905) (rejecting religious- based exemptions for immunization in consideration of public health and safety). *Braunfeld* is particularly interesting here, both because Brennan's dissent in that case presaged his majority opinion in *Sherbert*, and because the case, involving as it did an "indirect" clash between religion and secular law, would probably have come out the same way even under the Court's post-*Sherbert*, pre-*Smith*, doctrine.

130. The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, *Cantwell*, 310 U.S. at 303. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." *Braunfeld*, 366 U.S. at 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order. *See, e.g.*, *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *Prince*, 321 U.S. at 171; *Jacobson*, 197 U.S. at 39; *Reynolds*, 98 U.S. at 168.

Sherbet v. Verner, 374 U.S. 398, 402–03 (1962).

unto himself."[131] Thus, while the *Reynolds* Court referred to George Reynolds' sense of "religious duty,"[132] Justice Brennan in *Sherbert* simply referred to Adele Sherbert's religious "precepts"[133] and religious "practice"[134] and her "conscientious objection"[135] to the requirement of the state's unemployment compensation law.

By itself, of course, the reticence of the language in *Sherbert* would not necessarily be consequential, though the contrast with similar discussions in both earlier and later cases is striking.[136] The crucial doctrinal step in the opinion, however, appears in the paragraph that directly follows Justice Brennan's review of the free exercise law:

> Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' *NAACP v. Button*, 371 U.S. 415, 438.[137]

The key to this paragraph is the citation to *NAACP v. Button*. *Button* was a First Amendment speech case decided only five months before *Sherbert*. It struck down state restrictions on legal solicitation, as applied to organizations like the NAACP that engaged in litigation as an instrument of "political expression."[138] Thus, having spent the potential of the free exercise cases, Brennan broadened his perspective to the rest of the First Amendment. The import of this move was to suggest that the problem of religion-based exemptions was only an example of the broader principle that the government could not infringe on a First Amendment

131. *Reynolds*, 98 U.S. at 153, 167.
132. *Id.* at 162.
133. *Sherbert*, 374 U.S. at 404.
134. *Id.* at 403–04.
135. *Id.* at 403.
136. The *Sherbert* opinion did recognize that the State was forcing Adele Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. And Justice Brennan did eventually come around to speaking more explicitly about "religious duty." *See* Goldman v. Weinberger, 475 U.S. 503, 514 (1986) (Brenann, J., dissenting).
137. *Sherbert*, 374 U.S. at 403.
138. *Button*, 371 U.S. at 429.

liberty without a "compelling interest." Indeed, the opinion returned to free speech precedents at subsequent crucial points, in spelling out the stringency of the "compelling interest" test[139] and in insisting that even an otherwise compelling interest could not justify an infringement unless there were "no alternative forms of regulation."[140]

Sherbert's assimilation of religion-based exemption claims into standard First Amendment doctrine was a deft rhetorical move. Building on the opinion's more general rhetorical reticence about the very nature of the problem at hand, it domesticated religion-based exemptions, rendering them a normal product of constitutional analysis. Indeed, this move was so deft that the Resolution of the Supreme Court Bar memorializing Justice Brennan could, with real admiration and no trace of irony, find in *Sherbert* the perfect segue from speech to religion in the Justice's jurisprudence: "Justice Brennan treated religious freedom as an integral aspect of his First Amendment vision. In *Sherbert v. Verner*, . . . he laid the foundation for modern protection of the free exercise of religion by requiring government to establish a compelling interest before interfering with religious conscience."[141] More important, *Sherbert*'s rhetoric was so deft that, in *Smith* itself, Justice O'Connor's opinion demurring from the Court's rejection of the compelling interest test could invoke free speech law to try to refute the claim that religion-based exemptions were "anomalous."[142]

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139. *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). *Thomas* was a free speech and free assembly case striking down state restraints on union organizing, for the proposition that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas*, 323 U.S. at 530

140. *See Sherbert*, 374 U.S. at 407–08. The opinion supported this proposition with four unadorned citations preceded by a "*Cf.*" *Id.* Each of the cases in the list was decided squarely on free speech, free press, or free association—and not free exercise—grounds, though one of them (*Struthers*) arose in the context of religious proselytizing. *See* Shelton v. Tucker, 364 U.S. 479, 480, 490 (1960) (striking down requirement that public school teachers disclose organizations to which they belonged or contributed); Talley v. California, 362 U.S. 60, 64 (1960) (striking down ordinance forbidding distribution of any handbill that did not include the name and address of the person who prepared, distributed, or sponsored it); Martin v. Struthers, 319 U.S. 141, 141–42, 149 (1943) (striking down ordinance forbidding any person from knocking on doors or ringing doorbells to distribute handbills or circulars); Schneider v. State, 308 U.S. 147, 165 (1939) (striking down ordinances forbidding distribution of literature on streets or other public places).

141. Proceedings in the Supreme Court of the United States in Memory of Justice Brennan, 523 U.S. v–xlix, xxix (1998).

142. Emp. Div. v. Smith, 494 U.S. 872, 901–02.

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result

But the slide from free speech doctrine to a defense of religion-based exemptions was, in fact, misguided.[143] The intellectual foundation established for exemptions doctrine was therefore brittle from the start.[144] And while, as noted, it might accord too much weight to the intellectual force of precedent to suggest that this is why a majority in *Smith* finally came to reject religion-based exemptions, the hole in the heart of the doctrine made their task that much easier.

The next question then becomes why Brennan wrote *Sherbert* the way he did. Too much intellectualizing would again be a mistake. Part of the reason was surely that looking to established free speech precedents was the path of least resistance. Moreover, *Sherbert* needs to be understood in the context of a general tendency in the legal and academic culture of the time, and perhaps still, to treat free speech as the paradigmatic First

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> in a "constitutional anomaly," *ante*, at 886, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." *Ibid.* . . . As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. . . . A law that makes criminal such an activity therefore triggers constitutional concern–and heightened judicial scrutiny—even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986); *cf. Anderson v. Celebrezze*, 460 U.S. 780, 792–94 (1983) (generally applicable laws may impinge on free association concerns).

Id. (O'Connor, J., concurring in the judgment).

143. Indeed, one need look no further than *Button* itself to make the point. *Button* was decided before *O'Brien*, which first fully articulated the notion of expressive conduct. *See* United States v. O'Brien, 391 U.S. at 376. Therefore, the first challenge in *Button*, which Brennan's opinion met with force and flair, was to demonstrate that, under anything but the "narrow, literal conception of freedom of speech, petition or assembly," the litigation activity in which the NAACP engaged was a form of protected political expression and association. *Button*, 371 U.S. at 430. The Court did not do this by looking merely to the subjective convictions of the NAACP itself, or by carving out an exemption that applied only to organizations with similar convictions. Rather, it decided, as a matter of history and objective social fact, that litigation was on a par with political campaigning as a means of spreading an ideological message and effecting social change. *See id.* at 429–31.

144. Even some contemporary commentators noticed the shallowness of the opinion. *See* JAMES E. CLAYTON, THE MAKING OF JUSTICE: THE SUPREME COURT IN ACTION 284 (1964) (claiming that the *Sherbert* opinion, unlike Justice Brennan's landmark concurrence in Abington School District v. Schempp, 374 U.S. 203 (1963), "left conspicuous holes"), *quoted in* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 174 (2010). *Cf. id.* ("his *Schempp* concurrence was uniquely Brennan's own.")

Amendment right to which consideration of questions of religious liberty was at best a poor relation.[145]

Nevertheless, I want to venture one more explanation: Justice Brennan's views on freedom of speech and freedom of religion genuinely were instantiations of a single constitutional conviction. One sympathetic antagonist has said:

> No justice, with the exception of John Marshall, has made as large a mark on the law of this country as William Brennan. It is not just through his length of service but through the coherence and distinctiveness of the vision that he imposed over those years in a large array of apparently disparate fields of law: speech, religion, equal protection, criminal procedure, federal jurisdiction, statutory interpretation. . . . [Brennan] had a clear and comprehensive conception of what our society should be. . . . His vision was that of an open, democratic, society, with no great disparities of wealth or power, where there was little privilege and only that suffering and deprivation that organized social effort could not remove. Government power should be restrained, modest, limited—except where, in the pursuit of equality or the alleviation of suffering, government responds to significant accumulations of private power.[146]

Another commentator—a former clerk—has even more extravagantly described Justice Brennan as a "romantic" liberal whose comprehensive

> vision of a constituted society [was] one of individuals enabled (insofar as institutional arrangements can enable them) to choose and shape their own identities and lives (in part through contention over aims for the institutions they share) through vistas of possibility opened by . . . "critically interactive" social engagements, thriving on difference, dissent, and even disturbance.[147]

Thus, freedom of expression was for Brennan "both an individual right of self-presentation—of efficacious participation or citizenship—and a social-

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145. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 545–46 (1991) ("To most contemporary lawyers, it seems fair to say, the mention of the First Amendment evokes, first and foremost, free speech. . . . Some commentators have conflated the freedom of religion with other First Amendment rights as a form of expression, or referred to it obliquely as freedom of conscience. The scant space accorded to First Amendment religion issues in constitutional law texts and casebooks provides further evidence of an implicit ranking of constitutional values in which protection of religious freedom does not enjoy high standing."). *Cf.* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642, 1643–45 (1988) (lamenting lack of coverage of religious liberty questions in most constitutional law casebooks) (book review).

146. Charles Fried, Remarks at the Meeting of the Supreme Court Bar Adopting Resolutions in Memory of William J. Brennan, Jr. 1–2 (May 22, 1998) (typescript on file with author).

147. Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1266 (1991) (quoting Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 638 (1990)).

structural provision for imbuing social life with frictional contact with human 'otherness.'"[148] Moreover, the principle of freedom of expression, in the larger context of a "romantic" constitutionalism, included an "exceptional regard for agitation and eccentricity, even at some cost to public order, as a vital matter of both personal liberty and democratic social structure."[149] Seen in this light, *Sherbert*'s reliance on free speech precedent suddenly clicks.

I find much of Justice Brennan's constitutional vision stirring and intellectually compelling. Having clerked for him, I can also testify to the force and integrity of the spirit behind that vision. But, as applied to the problem of religion-based exemptions, it was inadequate. First, while many aspects of Brennan's constitutional legacy could survive even when the grand sensibility that forged them lost its majority on the Court, his doctrine of religion-based exemptions was left stranded, without its own intellectual foundation, as a constitutional anomaly. Second, because Brennan's views about free exercise were part of a larger account of human flourishing, he did not always pay enough heed to the specific demands of the religious *nomos*. Thus, for example, he sometimes did not see the real stakes in claims of religious institutional autonomy.[150] And when religious norms clashed, not with a routine law, but with a basic assumption of his vision of a just society, he sometimes gave them short shrift.[151] One practical result was an inconsistency that further weakened

148. *Id.* at 1268.

149. *Id.* at 1275.

150. This might help explain, for example, Brennan's approval of the "neutral principles of law" approach to intra-religious disputes. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) (majority opinion by Blackmun, J., joined by Brennan, Marshall, Rehnquist, and Stevens, JJ.); Md. and Va. Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

151. I am thinking here in particular of *Bob Jones Univ. v. United States*, 461 U.S. 574, 577, 604 (1983) (upholding denial of tax-exempt charitable status to educational institutions that engaged in religiously-motivated racial discrimination). For legal-pluralist critiques of *Bob Jones*, *see, e.g.*, Cover, *The Supreme Court*, *supra* note 8, at 60–68; Dane, *The Public, the Private, and the Sacred*, *supra* note 102. I clerked the year that *Bob Jones* was decided, and discuss my evolving views about that difficult and troubling case in Dane, *The Public, the Private, and the Sacred*, *supra* note 102, at 44–45 & n.153. *See also* Gillette v. United States, 401 U.S. 437, 447 (1971) (Marshall, J., joined by Brennan, J.) (upholding denial of conscientious objector status to draftees with religious objections to particular wars, but not to "war in any form"); *cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring) (agreeing that limited exemption of non-profit religious organizations from reach of civil rights laws does not violate establishment clause, but emphasizing

the doctrine of religion-based exemptions and prepared it for Scalia's effort at deconstruction.

There was, in sum, a splendid seamlessness to William Brennan's constitutional vision. But the problem of religion-based exemptions is all about seams. Like other problems of sovereignty, it is about the effort to stitch together, or at least make legal sense of, competing and often contradictory normative worlds. Brennan's constitutional vision, committed as it was to diversity, agitation, and the transformative potential of liberty, accommodated and even welcomed religious difference. But the real task at hand, which Brennan avoided in *Sherbert*, was not to fit religion into a coherent constitutionalism, but to mediate an encounter between two forms of constituted authority. In the end, Brennan's comprehensive constitutional vision became, in this context at least, a gloriously dazzling example of constitutional glare.

4.

I have criticized both Scalia's opinion in *Smith* and Brennan's opinion in *Sherbert* for remaining trapped in the discourse of ordinary constitutional analysis. Though the opinions reach opposite conclusions, neither recognized that claims to religion-based exemptions might be *both* compelling *and* constitutionally "anomalous." One might suppose, therefore, that I would now argue that the only way for the Court to articulate the case for constitutionally-required exemptions would be by squarely recognizing that religious communities are genuine sovereigns analogous to foreign states. Indeed, the Court *could* have adopted an exemptions doctrine grounded in a language of jurisdictional recognition. But that, as I have discussed, might have been even more difficult. Asking the courts to adopt a fully-articulated discourse of religious juridical authority might be asking too much. And, under the right circumstances, it might legitimately be unnecessary.

Legal argument, as others have pointed out, is a practice of discourse, not an algorithm.[152] It operates within certain constraints, even as it re-evaluates and revises the very constraints within which it operates.[153]

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that these "cases present a confrontation between the rights of religious organizations and those of individuals.").

152. *Cf.* DENNIS PATTERSON, LAW AND TRUTH (1996) (analyzing what is involved in saying something is true or false as a matter of law); Meyer, *supra* note 104, at 743; James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367–68 (1995).

153. *See* Perry Dane, *Spirited Debate: A Comment on Edward B. Foley's Jurisprudence and Theology*, 66 FORDHAM L. REV. 1213, 1220–21 (1998). In fact, this is probably a characteristic of all discourse, and not only legal argument. *Cf.* HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 34–35, 46–47, 68–69 (1995) (describing how the meaning of the

Doctrinal arguments often stretch their meaning, and find their compelling force, through allusion and subtextual complication. From a certain distance, we are entitled to characterize a species of legal argument as "sovereignty-talk" or "rights-talk" or some combination of the two. But inside legal argument itself, such labels might be superfluous.

This is the place, then, to return to my earlier allusion to double-coding. As understood here, double-coding occurs when a work of the legal imagination manages to convey, at the same time, two different meanings that are both complementary and in tension. Often, one meaning is carried by the explicit line of a legal text or argument, and is relatively restrained or conventional, while the other meaning is implicit or embedded, and is also more radical and expansive.[154]

Double-coding is a powerful and coherent resource of the legal imagination, not a symptom of indeterminacy or vacuity. Identifying double-coding, therefore, bears only the slightest resemblance to the unearthing of contradictions in the spirit of "critical legal studies."[155] It is also different, in two respects, from the typical reductionist move that simply displaces the self-understanding of doctrine in favor of an allegedly deeper, truer explanation of legal results.[156] First, paying heed to double-

"language games" we use is influenced by social experience and is not algorithmic). But I leave to Part IV a more explicit effort to make those connections.

154. *Cf.* DAVID PENCHANSKY, WHAT ROUGH BEAST? IMAGES OF GOD IN THE HEBREW BIBLE 15 (1999) (discussing how "traditional" and "seditious" stories simultaneously "inhabit the space" of some Biblical texts). For important discussions, which resonate to varying degrees with my own, celebrating the multi-layered potential of legal discourse, see, for example, JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107, 119–33 (1985); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM, at xi (1990); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2294 (1989); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 858 (1986); Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1594 (1990); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447–48 (1995); Steven Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1387 (1988).

155. *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 627 (1988).

156. *See, e.g.*, BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 5 (1984); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 9 (1987); Donald H. J. Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL.

coding does not imply that one layer of legal meaning is more real than the other, only that they coexist. Second, while reductionism often treats conventional legal doctrine as mere verbiage, a hypothesis of double-coding posits that a doctrinal formula, *by its own terms*, points to, or has embedded within it, or stands in a dialectical relationship with, its more subversive and implicit re-formulations. Or, to put it another way, while reductionism often has little use for close reading, the analysis I have in mind cannot do without it.

To see the potential power of double-coding at work in the debate over religion-based exemptions, one might look to *Wisconsin v. Yoder*. Even commentators sympathetic to its result have often criticized the tone of *Yoder*.[157] But *Yoder* did expressly recognize the communal, often insular, character of religious normativity, and thus, unlike *Sherbert*, at least hinted at a discourse of sovereignty-talk. On the other hand, *Yoder* is permeated by a romanticization that not only damages its credibility overall, but is directly at war with a genuine effort at juridical respect.[158]

A more interesting and powerful example of the potential of double-coding does, however, exist in the Supreme Court's conversation about religion-based exemptions. Unfortunately, it only appeared after *Smith*, in the lonely and stillborn opinion of Justice Souter, concurring in the

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L. REV. 1131, 1192 (1975). For general critiques of such reductionism, see, for example, DENNIS PATTERSON, LAW AND TRUTH 179 (1996); ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 21 (1995); WHITE, *supra* note 152, at xi–xii.

157. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1259 (2d ed. 1988); James D. Gordon III, *Wisconsin v. Yoder and Religious Liberty*, 74 TEX. L. REV. 1237, 1238 (1996); *cf.* Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 805 (1996) ("I admire Yoder because it is an unprincipled, religiously discriminatory decision presented in an opinion by Chief Justice Warren Burger.").

158. *Cf.* Robert Douglas Chesler, *Images of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. L. REV. 457, 479 (1983) ("Despite Burger's use of communitarian imagery, he in fact supports traditional majoritarian values and the officials and structures entrusted with their preservation."); Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith: *Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 55–56 (2001) ("It was bad enough that Chief Justice Burger needlessly favored religion over non-religion in finding an exemption from compulsory school attendance laws. Even worse, the Chief Justice expressed a strong preference for some religions over others."); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U.L. REV. 1189, 1225–27 (2008). The profound danger that romanticism poses to genuine sovereignty-talk has also been noticed in the American Indian law literature. *See, e.g.*, Philp S. Deloria, *The Era of Indian Self-Determination: An Overview*, *in* 4 INDIAN SELF-RULE 191, 201–04 (Kenneth R. Philip ed., 1986); Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1979 & n.21 (1996) (book review).

judgment in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[159] In *Lukumi Babalu Aye*, the Court sought to demonstrate that the Free Exercise Clause still had some bite even after *Smith*, by striking down a local ordinance banning animal sacrifice.[160] The entire Court agreed that the case did not directly raise the question of religion-based exemptions, but instead went to the facial validity of the ordinance—in the Court's formulation, whether the ordinance was "neutral" and "of general applicability" in the first place.[161] Justice Souter, however, used his opinion as an occasion to urge that the Court reconsider *Smith*, and, more important, to begin to articulate, in a self-consciously exploratory way, a more cogent defense of the idea of religion-based exemptions.

The first thing to note about Souter's opinion in *Lukumi Babalu Aye* is that unlike the dissenting opinions in *Smith*, it finally abandons the effort to assimilate religion-based exemptions into the mold of other First Amendment liberties. Instead, it looks to the rubric of "neutrality" among religions—the same idea that in different form animated the majority in *Smith*.[162]

Souter's argument from "neutrality" is not original, as he recognizes. It had appeared in recent scholarly articles, which he cites.[163] The argument was even present, though rarely stressed, in earlier cases including *Sherbert*.[164] But Souter's formulation is particularly focused. He observes that a "law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids."[165]

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159. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in the judgment).

160. *Lukumi Babalu Aye*, 508 U.S. at 542–47.

161. *Id.* at 531–32.

162. *Id.* at 559–64.

163. In particular, Souter cited two important and influential articles: Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) and Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

164. Sherbert v. Verner, 374 U.S. 398, 409 (1963) ("[Exemption] reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ."); *see also, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 142 & n.7, 145 (1987); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

165. *Lukumi Babalu Aye*, 508 U.S. at 561 (Souter, J., concurring in the judgment).

Souter knows that his invocation of neutrality is only the beginning of an argument. Whether the First Amendment actually requires religion-based exemptions "depends on the meaning of neutrality as the Free Exercise Clause embraces it."[166] At least at first glance, though, looking to neutrality seems a particularly inauspicious beginning for several reasons.

First, neutrality, like its cousin equality, is a notoriously content-free idea.[167] The relevant question is always neutrality with respect to what good or value or ideal.[168] Souter recognizes this problem, and tries to deal with it by labeling the neutrality required in *Smith* "formal" and the neutrality that might entail religion-based exemptions "substantive."[169] This will not do, however. The use of the label "formal" here has a conclusory, bogeyman quality to it.[170] To the opponent of religion-based exemptions, the neutrality such exemptions violate is "substantive," as is the interpretation of neutrality under which they would be denied.[171]

Second, the form of neutrality that Souter invokes—"substantive neutrality"—closely resembles what some have called "equality of effect" or outcome or result.[172] The problem is that the debate over equality of effect, in distinction to equality of "treatment," is among the most contentious in

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166. *Id.*

167. *See* Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1212, 1218 (1997); Cass R Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 129–30; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

168. This basic point is conceded even by many of those who nevertheless believe that the ideal of equality is central to American public values. *See, e.g.*, Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1169–70 (1983).

169. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 561–62 (1993) (Souter, J., concurring in the judgment).

170. *Cf.* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 3 (1994); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988) ("Even a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good."); Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 121–22 (1985) (providing criticisms of the formalist legal style).

171. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 52–55 (1985)) (arguing that certain religious exemptions demonstrate a governmental preference for religion and thus violates the First Amendment); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. 357, 358–59 (1990) (arguing that exemptions can favor religion in violation of the Establishment Clause); Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 124 (1993) (describing the Constitutional problems that arise due to the tension between the Free Exercise Clause and the Establishment Clause).

172. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 223–27 (1978); Anne Phillips, *Defending Equality of Outcome*, 12 J. POL. PHIL. 1, 6 (2004).

moral and political philosophy as well as law.[173] And the specific difficulty for Souter, which he never addresses directly, is that the Court has in a variety of contexts rejected equality of effect as a guiding principle of constitutional law.[174] In a sense, Souter has gone from the frying pan of a facile analogy with free speech to the fire of a disadvantageous analogy with equal protection.

Finally, even as an argument for equality of effect, Souter's position is vulnerable. Most such arguments, after all, have at their core some claim of distributive injustice.[175] Consider, for example, Anatole France's caustic observation that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[176] The bite of this attack on "formal" equality is that it is also, inextricably, an attack on economic deprivation. But it is not obvious what distributive claim, if any, underlies Souter's argument for "substantive" neutrality. The legal scholars who were promoting "substantive neutrality" at the

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173. *See, e.g.*, DWORKIN, *supra* note 172, at 224; DOUGLAS RAE, EQUALITIES 132–33 (1981); THOMAS NAGEL, EQUALITY AND PARTIALITY 4–5 (1991); JOHN RAWLS, A THEORY OF JUSTICE 65 (1971); AMARTYA SEN, INEQUALITY REEXAMINED 1 (1992); C. Edwin Baker, *Equality of Income or Equality of Respect, The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 933–34 (1983); Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 564 (2000); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185–86 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 288 (1981); Stephen O'Hanlon, *Equality, Entitlement, and Efficiency, Dworkin, Nozick, and Posner, and Implications for Legal Theory*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 31, 45–52 (2009); Ann Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 427 (1980–81). For a specific critique of robust religious accommodations on the basis that they reinforce religious hierarchies and perpetuate other forms of inequality, see Aileen McColgan, *Class wars? Religion and (In)equality in the Workplace*, 38 INDUS. L. J. 1, 23–24 (2009).

174. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); McCleskey v. Kemp, 481 U.S. 279 (1987); City of Mobile v. Bolden, 446 U.S. 55 (1980); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam). *See generally* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011); Stephen F. Ross, *Charter Insights for American Equality Jurisprudence*, 21 WINDSOR Y.B. ACCESS JUST. 227 (2002) (distinguishing the more formal equality jurisprudence of the United States Supreme Court with the more substantive approach of its Canadian counterpart).

175. *See generally* Philip W. Blumstein & Eugene A. Weinstein, *The Redress of Distributive Injustice*, 74 AM. J. OF SOC. 408 (1969) (discussing distributive injustice through social experiments).

176. ANATOLE FRANCE, THE RED LILY 87 (1894).

time Souter was writing appreciated this problem, suggesting various "baselines" against which to measure unequal effects.[177] But these efforts have proven notoriously hard to defend.[178] Moreover, these difficulties are really just another symptom of the apparently subjective, "anomalous," character of religion-based claims. As the philosopher Thomas Nagel has observed, reconciling subjective and objective values in a scheme of equality is a particularly challenging, maybe intractable, problem.[179] Indeed, it is not surprising that some of the leading philosophical accounts of a liberal conception of equality are unsympathetic, or lukewarm, to generalized arguments for religion-based exemptions.[180]

Nevertheless, Souter's opinion—understood in its full texture—could have been a genuine and powerful advance. Whatever the precise details of the argument, neutrality-talk is an effective bridge between the general conventions of constitutional discourse and the distinctive claims of religion. This was apparent, not only to Souter and contemporary scholars, but to the founding generation as well. In the words of the Virginia

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177. *See, e.g.*, Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986); McConnell & Posner, *supra* note 163, at 10–14. *See also* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 84–85 (2007).

178. *See* Kent Greenawalt, 2 Religion and the Constitution 451–56, 462–79 (2009); Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 358 (1995) (arguing that Laycock's and McConnell's efforts to construct a constitutional baseline for religious neutrality are "hopelessly speculative"); Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 319–21 (1990); Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215, 227–28 (2002); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 710–23 (2005). *See generally* Laura S. Underkuffler-Freund, Yoder *and the Question of Equality*, 25 CAP. U.L. REV. 789 (1996).

179. *See* NAGEL, *supra* note 173, at 4–5.

180. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 190–200 (1996 ed.); NAGEL, *supra* note 173, at 166–67; Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1377–403 (2012). *See generally* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM & THE CONSTITUTION (2010). *See also* BRIAN LEITER, WHY TOLERATE RELIGION? (2012). For an effort to ground distinctive religious rights on an account of religion as a "proxy" for other goods recognized within the liberal philosophical framework, see Koppelman, *supra* note 22.

Particularly interesting and revealing in this regard is the account of Ronald Dworkin, who combines a coolness to religion-based *exemptions* from otherwise applicable laws with the expansive, probably implausible, view that certain specific freedoms, such as the right to abortion or euthanasia, are *inherently* and *objectively* matters of the free exercise of religion. *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 165–66 (1993, Vintage ed. 1994); Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381, 413–15, 419–25 (1992). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 200–01 (1977). For an important reflection of Dworkin's attitude to religion and religious rights, see Paul Horwitz, *"A Troublesome Right": The "Law" in Dworkin's Treatment of Law and Religion*, 94 B.U. L. REV. 1225 (2014).

Declaration of Rights, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[181]

More to the point though, Souter rightly saw that the argument about religion-based exemptions is partly an argument between different conceptions of neutrality. The real choice, however, is not between "substantive" and "formal" neutrality, but between neutrality *within* a normative system and neutrality *among* normative systems. This, in fact, is the same dilemma that faces regular choice of law.[182] Moreover, the key to resolving this dilemma must lie, not in picking a given distributional metric or baseline against which to measure neutrality or equality, but in being willing to accommodate a plurality of metrics. Thus, for example, the philosopher Michael Walzer, in a book devoted significantly to articulating a "pluralistic" and "complex" theory of equality, gives this account of one of the oldest of religion-based exemptions, conscientious exemption from military services. The religion clauses, Walzer argues, bar

> any attempt at communal provision in the sphere of grace. . . . [T]his is called religious liberty, but it is also religious egalitarianism. The First Amendment is a rule of complex equality. It does not distribute grace equally; indeed, it does not distribute it at all. Nevertheless, the wall that it raises has profound distributive effects. . . .
>
> The willingness to tolerate (religious) conscientious objection has its origin in . . . sensitivity [to this proposition]. . . . People who believe that the safety of their immortal souls depends upon avoiding any sort of participation in warfare are exempt from the draft. Though the state cannot guarantee immortality, it at least refrains from taking it away.[183]

To be sure, Souter's opinion does not put the matter this way. But my claim—what I mean by double-coding—is that it points there. By stating

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181. Virginia Declaration of Rights, Art. XVI (1776), *in* 10 SWINDER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 50.

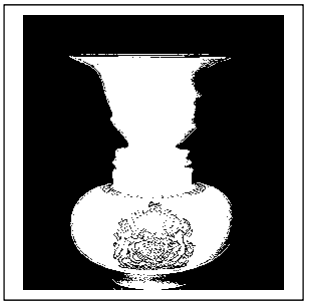
182. *See* Mark Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 902 (1988) ("Unequal treatment of people is inevitable in the conflict of laws. The only way it could be avoided is for states to take jurisdiction and apply their laws in every case brought in their courts. This treats people equally, but at the cost of discriminating against other states."). *See also* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1215–16 (1987) ("The norm of equality seems violated when the fortuity of where a case is brought determines the outcome. But it also seems violated when a single forum treats two cases differently simply because of the fortuity of where some . . . party is domiciled.").

183. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 245–46 (1983).

the problem as he does, Souter maps the discourse of neutrality as a location for the encounter and adjustment of normative worlds.

5.

Neither Justice Brennan's majority opinion in *Sherbert* nor Justice Souter's separate opinion in *Lukumi Babalu Aye* squarely embraces sovereignty-talk. It is a fair question, then, why I have treated Brennan's opinion as a doctrinal dead-end and Souter's opinion as a piece of imaginative double-coding. There is, however, a genuine difference between the two. Souter's argument opens itself to a further layer of meaning in a way that Brennan's opinion does not. The assimilation of free exercise to free speech is a closed circuit. But, as Souter recognizes, the slogan of neutrality is necessarily incomplete.[184] It can point in several directions, and it is in the implications of those choices, whether explicitly articulated or not, that true meaning resides.



To see my point more clearly, return for a moment to one of the metaphors I used earlier to describe double-coding—the optical illusion of the vase and the faces. A feature of this and other ambiguous or "multistable" pictures is that each of its images is formed from the other.[185] The vase arises out of the faces. More precisely, when we see the vase, we treat it as a figure against a "poorly delineated, more amorphous" ground, by my analogy as an explicit text against a set of implicit assumptions.[186] But, with a little attention, the ground can become a figure in its own right, and help us more fully discern the nature of the construction.

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184. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. at 561–62.

185. *See* MARK FINEMAN, THE NATURE OF VISUAL ILLUSION 109–22 (1981, Dover ed. 1996).

186. *Id.* at 111.

Ultimately, Souter seems partly aware of this himself. With the luxury of writing an opinion concurring in the judgment, he comes to no firm conclusions. But the ground of his analysis peeks through. Souter's opinion does not end with a paean to neutrality. Instead, in language noticeably—resoundingly—more direct and forthright than any of Justice Brennan's formulations in *Sherbert*,[187] he write poignantly and powerfully of the clash of religious and state authority and the individual believer's normative dilemma:

> The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.[188]

Thus, he juxtaposes the discourses of equality, liberty, and normative pluralism, and suggests, if only tentatively, a way to combine them.

6.

The notion of substantive equality that Justice Souter embraced, with its overtones of something much deeper, did not prevail on the Court. But it did find its way into RFRA.[189] And RFRA has held the fort of religious exemptions for more than twenty years, filling at least some of the gap created by *Smith*. But our normative discourse almost cannot help but see even that exercise as "anomalous." Much like C.S. Lewis's child in the dungeon, we cannot but help assume that there must be "pencil marks there."[190]

187. *See* discussion *supra* Section III.D.3.
188. Lukumi Babalu Aye, 508 U.S. at 577 (Souter, J., concurring in the judgment).
189. 42 U.S.C. § 2000bb(a)(2) (2012) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").
190. LEWIS, *supra* note 98, at 68.

IV.

The differences between claims for religion-based exemptions and claims for religious institutional autonomy are to some extent built into the logic and structure of the religion-state relationship. As I have emphasized though, the particular course of American doctrinal development has had a good deal of contingency about it. One might have imagined an alternative story in which our free exercise doctrine would have been expansive and robust while our institutional autonomy doctrine would have been crabbed and pallid. The passage of RFRA, a part of the story that I have not discussed very much, restored some of the substantive rights and doctrines evacuated by *Smith*. But it also might have unintentionally helped to cut off further productive conversation by giving judges and lawyers a collection of specific words to chew on.

The causes of our current situation are, to sum up, partially substantive, related both to the politics of the moment and a larger-scale increasingly skeptical attitude toward religion, its normative claims, and its juridical dignity. But they are also the product of specific interventions by courts, legislatures, scholars, politicians, litigants, and citizens. And, not least of all, which is the point I have argued most strenuously in this Article, they are the product of a failure of imagination—an inability or unwillingness to appreciate the role of double-coding in legal thought and its power in the context of the state's encounter with religion to draw on and render invisibly visible the master metaphor of existential encounter. That failure is the most consistent part of the story, if for no other reason than that it appears so starkly in both Justice Brennan's opinion in *Sherbert* and Justice Scalia's opinion in *Smith*. It also points to a larger failure of the contemporary legal imagination whose full scope is well beyond the scope of this Article. We live in an age of flattened legal, constitutional, and normative discourse, an age reluctant to appreciate complexity, plurality, multivocality, and multidimensionality.[191] The consequences are in odd ways both statist and libertarian. The reaffirmation of religious institutional autonomy—at least in the context of the ministerial employment problem found in *Hosanna-Tabor*—might stand out as a sort of exception. Or perhaps religious institutional autonomy is, in some sense, and uniquely among the three strands of religion and state jurisprudence, just flat enough to survive the bulldozer.

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191. Trends in legal scholarship have by no means been immune from the current mood. I wonder, for example, how many leading contemporary legal scholars would or could write an article that read anything like Robert Cover's *Nomos and Narrative.* *See* Cover, *The Supreme Court*, *supra* note 8.