

THE MULTIPLE SOURCES AND DIMENSIONS OF RELIGION–STATE FRAMEWORKS IN LIBERAL CONSTITUTIONS

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I want to thank the Law and Religion section of the AALS for inviting me to participate in today’s program. It is a privilege to join so many distinguished scholars on this panel.

I think today’s topic—Is Secularism a Non-negotiable Aspect of Liberal Constitutionalism?—is a challenging one. It invites, indeed, it pretty much demands, an inquiry into what liberal constitutionalism requires and whether secularism is the exclusive foundation for satisfying those requirements.

These questions can be examined at several different levels of inquiry. At a fairly abstract level, generalizing above and beyond religion–state relationships, many key aspects of liberal constitutionalism can be justified by religious sources and beliefs.¹ One core idea is that a constitution is an expression by a society of collective self-doubt—of the recognition that “we the people” trust neither government nor ourselves with state power and need some super-majority constraints to hold our worst impulses in check.² That sort of humility in evaluating human nature can certainly be grounded in religion. Similarly, the idea of limited government can have both religious as well as secular roots.³

The protection of fundamental liberty and equality rights required by liberal constitutionalism also can be justified by religious beliefs. The ideas that all people are created equal in the image of G–d and that they are “endowed by their Creator with certain unalienable Rights” are pretty obviously religious beliefs.⁴ While

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1. See Steven M. Tipton, *Republic and Liberal State: The Place of Religion in an Ambiguous Polity*, 39 EMORY L.J. 191, 196-97 (1990).

2. See Gene R. Nichol, *Towards a People’s Constitution*, 91 CAL. L. REV. 621, 622-23 (2003) (describing distrust of the government and a variety of super-majority constraints).

3. See Michael W. McConnell, *Religion and its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL’Y 943, 943-44 (2010).

4. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

religion can be a source of oppression and a justification for massive abuses of power, such as the institution of slavery, it was also the inspiration of union soldiers singing in the Battle Hymn of the Republic, “As [Christ] died to make men holy, let us die to make men free.”⁵

Religion *per se* isn’t incompatible with constitutional constraints to prevent the abuse of power through limited government and the protection of fundamental liberty and equality rights.

We can narrow the inquiry and focus specifically on religion–state relationships while still operating at a fairly abstract level of analysis. What religion–state relationships does liberal constitutionalism require? A commitment to religious liberty can be grounded in religion.⁶ Religious beliefs can acknowledge that the individual has free will and that religious belief is only meaningful to both the individual and to G–d if it is voluntary and uncoerced.⁷ A basic conception of the separation of church and state has had, and can have, both religious and secular foundations.⁸

The hardest two questions at this level of analysis are related. First, can the constitution or the state declare religious truth while acting consistently with liberal constitutional guarantees? Second, can the state speak for the entire community, be it a city, state, or nation with a religious voice—expressing collective religious messages or prayers? I think the answer to these questions in a liberal constitutional regime has to be “no.”

I would argue that these are non-negotiable first principles. Religious truth cannot be determined by a majority vote in the jury

5. Julia Ward Howe, *The Battle Hymn of the Republic*, ATLANTIC MONTHLY, Feb. 1862, at 10, <https://www.theatlantic.com/past/docs/unbound/flashbks/battlehymn-original.htm> [<https://perma.cc/CCN6-8X5F>] (last visited Mar. 18, 2017).

6. See, e.g., ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744); JOHN LOCKE, A LETTER CONCERNING TOLERATION 167 (First Irvington ed. 1979) (1690).

7. See, e.g., KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 84 (2015); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49-51 (1996).

8. See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS’ CONSTITUTION, at amend. 1, at 43 (Philip B. Kurkland & Ralph Lerner eds., Univ. of Chicago Press 1987) (1785), http://press-pubs.uchicago.edu/founders/documents/amend1_religions43.html [<https://perma.cc/8XFN-DYDZ>] (last visited Mar. 18, 2017); ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION 3-4, 125 (1644).

box, in the halls of the legislature, or at the ballot box.⁹ My government usurps power that cannot be vested in it under liberal constitutional principles if it asserts the authority to speak to G–d in my name.¹⁰

But I am not sure that these negative answers require a commitment to secularism—although a lot depends on how you define secularism.¹¹

Suppose a constitution’s preamble acknowledges that the sources of the ideas and commitments expressed in the constitution’s language reflect the beliefs of “we the people.” And it goes on to explain that “we the people” are a pluralistic community holding diverse religious and secular beliefs. The ideas and commitments expressed in the constitution are grounded in and resonate with the beliefs of many faith traditions and secular understandings. The constitution’s shared conclusions have diverse roots. The state declares that it is bound by and identifies with core values that are grounded in both religious and secular beliefs.

I do not think a statement to this effect in a constitution expresses a declaration of religious truth. I would not describe it as a commitment to secularism either in that it explicitly acknowledges the legitimate role of religious belief in the development of law.¹² I

9. See, e.g., *United States v. Ballard*, 322 U.S. 78, 90 (1944) (Stone, C.J., dissenting); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002) (“What the state may not do—what [constitutional] doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth.”); IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 163 (2014) (explaining that under our constitutional system, the state “disclaims competence over all religious questions, including the existence or nonexistence of God”).

10. See, e.g., Alan Brownstein, *Town of Greece v. Galloway: Constitutional Challenges to State-Sponsored Prayers at Local Government Meetings*, 47 U.C. DAVIS L. REV. 1521, 1529 (2014).

11. Exactly what is meant by secularism remains unclear and is subject to various definitions, see for example, JEROEN TEMPERMAN, *STATE–RELIGION RELATIONSHIPS AND HUMAN RIGHTS LAW: TOWARDS A RIGHT TO RELIGIOUSLY NEUTRAL GOVERNANCE* 111-13 (2010); W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 121-22 (2010).

12. The distinction between the government claiming to have a religious identity of its own and the government recognizing and acknowledging the diverse religious and non-religious beliefs of the people could be the basis for arguing that the state is secular. Ira C. Lupu and Robert W. Tuttle make that argument explicitly in explaining the United States religion clause jurisprudence in their thoughtful and provocative book. See LUPU & TUTTLE, *supra* note 9, at 1-2. I leave for another day a discussion of their thesis. For now, I simply suggest that there may be more useful

do not think a similar kind of statement in a statute would be a declaration of religious truth or an assertion that the statute could only be explained in secular terms. The statement would be an honest expression of the reality that in a pluralistic polity, law often has multiple sources and is, in fact, negotiated among diverse constituents and their representatives.

Here, the state does not claim to recognize or enforce particular values because they are religious. It recognizes and enforces particular values because they are deemed to be fundamental by the people who created that constitution and accepted it as their governing law. Some, perhaps a majority, of “the people” hold that these values and principles are fundamental because they are religious. Others believe these values and commitments deserve constitutional recognition for other religious or non-religious reasons. All of the diverse sources of values reflecting the varied constituents of a pluralistic society that support the constitution’s commitments are formally acknowledged without hierarchy, even though religion, particularly the majority’s religious beliefs, is in fact determinative of the constitutional text.

We can focus the analysis even more narrowly and ask whether more specific religion–state relationships are necessary to, consistent with, or conducive to the maintenance of a liberal constitutional order. Do those necessary relationships require a commitment to secularism?

My short answer to the question of what kinds of religion–state relationships are required by a liberal constitutional order is that the range of such relationships is quite broad. This is in part because constitutional doctrine in this area often exists to minimize the risk that illiberal decisions will be made. The lack of prophylactic provisions to minimize such risks in particular circumstances may be consistent with liberal constitutionalism if in fact the history and culture of a society demonstrate that the risks are not being actualized. This risk analysis makes the evaluation of various religion–state frameworks highly contextual.

To cite one example, two risks to liberty and equality values commonly associated with government funding of religious institutions are religious preferentialism in the allocation of funds and government intrusions into, and control over, religious

and accurate ways to describe some liberal constitutional regimes in which the state lacks an explicit religious identity while recognizing religious beliefs as a source of its laws, rather than characterizing the state as secular.

institutions receiving state support.¹³ The weight to be assigned to those risks in deciding whether constitutional prohibitions against such aid are necessary in a particular polity surely depends in part on the extent to which one reasonably determines that either abuse is likely to occur.

A second more important reason for recognizing that a broad range of religion–state doctrinal choices are consistent with liberal constitutionalism is that religion–state relationships are multi-dimensional; that is, they implicate several constitutionally cognizable liberal values. Sometimes these values overlap and reinforce each other. Sometimes they are independent and co-exist. And sometimes they are in conflict with each other. All religion–state relationships require the sacrifice and subordination of some of these values. There is no win, win, win solution. The weighing and fitting together of these values is so complicated and is subject to so much reasoned disagreement¹⁴ that it is hard to avoid the conclusion that some reasonable range of frameworks resonates with liberal constitutionalism. Of course, some constitutional regimes may arguably do a better job than others in promoting and protecting liberal values, but that does not warrant characterizing the lesser regimes as illiberal.

Thus, a liberal constitutional regime’s religion–state doctrine will involve something of a patchwork quilt. These various value patches and threads may be woven together in different ways. While some quilts clearly fall outside of the liberal regime category, many

13. See, e.g., Alan Brownstein, *The Souter Dissent: Correct but Inadequate*, in CHURCH–STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 151, 156–58 (Stephen V. Monsma ed., 2002); Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 886–88 (1999) [hereinafter *School Voucher Programs*].

14. See, e.g., *School Voucher Programs*, *supra* note 13, at 886–88 (describing the various constitutional values implicated in religion clause disputes); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 89 (1990) [hereinafter *Harmonizing the Heavenly*] (attributing part of the difficulty courts experience in adjudicating religion clause issues to the multidimensional nature of religion); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 256–57 (1999) [hereinafter *Interpreting the Religion Clauses*] (explaining that religion crosses constitutional boundary lines and implicates personal liberty, group equality, and freedom of speech).

others are consistent with this general characterization. There is no one fixed mandatory pattern that is required.¹⁵

The primary values intrinsically implicated and in play in religion–state relationships are liberty, equality, and speech/democracy rights: the right to exercise religious worship and practice, the right of religious minorities to be free from discrimination, and the right to express a religious voice through prayer, sermons, proselytizing, and the myriad of other religious activities involving speech. Put most simply, religious liberty involves the freedom to decide whether or not to hold and adhere to religious beliefs and the right to practice the requirements of one’s faith.¹⁶ Religious equality values can be analogized to norms of racial and gender equality in that the focus is on religious identity, not belief or conduct.¹⁷ For constitutional purposes, members of different faiths are of equal worth and are entitled to equal treatment and respect.¹⁸ Speech/democracy values include both instrumental and dignitary interests.¹⁹ On the speech side, we recognize the right to engage in authentic expressive conduct and the need to minimize state distortion of the marketplace of ideas.²⁰ On the democracy side, we recognize the right to be part of the consent of the governed needed to legitimate government and the right to participate in political decision-making.

Difficult questions arise with regard to the recognition, affirmation, and protection of all of these values in religion–state relationships.²¹ I could not begin to summarize the permutations in

15. See generally TEMPERMAN, *supra* note 11 (providing an exemplary description and discussion of the range of religion-state relationships that might be deemed consistent with liberal constitutionalism).

16. See, e.g., *Harmonizing the Heavenly*, *supra* note 14, at 95-102; Alan E. Brownstein, *The Right Not To Be John Garvey*, 83 CORNELL L. REV. 767, 807-08 (1998) (reviewing JOHN. H. GARVEY, WHAT ARE FREEDOMS FOR? (1996)).

17. See *Harmonizing the Heavenly*, *supra* note 14, at 102-12 (explaining how the Equal Protection Clause can cover religious groups as a suspect class).

18. See, e.g., *Harmonizing the Heavenly*, *supra* note 14, at 103-12, 125-54 (explaining how equality values underlying equal protection principles justify protecting the equality interests of religious minorities); *Interpreting the Religion Clauses*, *supra* note 14, at 256-68 (comparing race and religion for the purpose of explaining why the Establishment Clause should be interpreted to prohibit religious favoritism just as the Equal Protection Clause prohibits racial hierarchy); *School Voucher Programs*, *supra* note 13, at 902-27.

19. See *Interpreting the Religion Clauses*, *supra* note 14, at 268-69.

20. See, e.g., *id.*

21. See Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1351-52 (2012).

fifteen minutes. Instead, I am going to focus on a few illustrative areas where I think the requirements of a liberal constitutional regime are particularly unclear.

One currently open and contested question we can ask is whether and to what extent religion should be considered to be something different—something that requires distinctive treatment—for liberal constitutional purposes.²² That answer depends in significant part on how we choose to characterize various understandings of religion and how we weigh and fit together the values implicated by these characterizations.

The issue comes up in numerous settings. For example, should a liberal constitutional regime impose distinctive constraints on government displays or messages endorsing religious precepts? If we characterize religion as a viewpoint or voice in the marketplace of ideas, the government as a speaker should be free to endorse religious beliefs as freely as it does other messages or perspectives. There is nothing distinctive about religious messages or secular messages as a viewpoint of speech: A religious message is one idea among many in the marketplace of ideas.²³ The analysis changes substantially if we shift our understanding from religion as a viewpoint to religion as an identity and class.²⁴ Here, religious equality concerns support treating religion differently than other ideas or beliefs that we do not recognize as defining a protected class.²⁵ For particular classes, liberal equality norms require equal treatment with regard to access to material goods and benefits and also equality of status and respect. There are arguably expressive constraints on what government can say about the legitimacy and worth of different religious communities.²⁶ Government speech promoting religious hierarchy or supremacy is arguably as constitutionally problematic as speech promoting racial or ethnic hierarchy or supremacy.²⁷

22. This issue is hotly debated today. *See, e.g., id.*; BRADY, *supra* note 7, at 1-2.

23. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263, 282-88 (White, J., dissenting); Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1714-15 (2011) [hereinafter *Mutually Reinforcing Mandates*].

24. *See Harmonizing the Heavenly, supra* note 14, at 95, 104.

25. *See id.* at 97.

26. *See id.* at 110.

27. *See id.* at 102-12.

Should a liberal constitutional regime provide distinctive treatment to private religious expressive conduct or association? The problems here exemplify the complex inter-relationship of the multiple values in play in developing religion–state doctrine. From a freedom of speech and association perspective, religion is arguably indistinguishable from any secular viewpoint, moral perspective, or political ideology.²⁸ As such, it is a voice in the marketplace of ideas and government regulations of religious expression should be subject to the same constitutional constraints applicable to the regulation of any other viewpoint of expression. In a liberal democracy, that would presumably include some limitation on the state’s ability to engage in discriminatory regulations that favor or disfavor any viewpoint of speech.²⁹ Thus, religion should not be favored or disfavored in comparison to the treatment of secular beliefs, speakers, or messages.³⁰

Again, the analysis changes if we characterize religion as an identity or a distinctive liberty interest and examine state regulations through an equality rights or fundamental liberty rights perspective. Part of the problem here is that so many core religious activities are expressive in nature. From a religious liberty perspective, a sermon by clergy during worship services must receive maximum protection against state interference. Regulations denying tax-exempt status to congregations whose clergy endorse candidates during an election seems unacceptably intrusive. Conversely, from a speech perspective, exempting religious organizations expressing religious/political messages from speech regulations that all secular 501(3)(c) non-profits must obey is prohibited viewpoint discrimination.³¹

Indeed, the reality that many religious institutions participate as speakers in public discourse creates an unavoidable conflict between these two characterizations of religion.³² From a religious liberty perspective, exemptions from various general regulations ranging from zoning to anti-discrimination laws may seem reasonable and

28. *See id.* at 120.

29. *See id.*

30. *See, e.g., Mutually Reinforcing Mandates, supra* note 23, at 1714.

31. Alan E. Brownstein, *Free Speech vs. Religion Clauses*, LIBERTY MAG., <http://www.libertymagazine.org/contributor/free-speech-vs.-religion-clauses> [<https://perma.cc/X6BJ-NEUH>] (last visited Mar. 18, 2017).

32. *See id.* (discussing the tension between the Establishment Clause and the freedom of speech).

defensible.³³ But from a freedom of speech perspective, exempting religious organizations from burdensome regulations that their secular counterparts must obey is as unacceptable as exempting liberal organizations from regulations that their conservative counterparts must obey.³⁴ Distinctive religious accommodations are justifiable if religion is a particularly valued liberty interest.³⁵ It is in the nature of liberty rights that some freedoms receive more protection than others.³⁶ If religion is an idea and a viewpoint, then providing more favorable protection to religious beliefs than secular ideas is much more problematic, if not completely prohibited.

Similar conflicts arise when religion is conceptualized as an identity or class and equality concerns are taken into account.³⁷ United States civil rights laws prohibit discrimination on the basis of religion but extend no similar protection to adherents of secular beliefs.³⁸ Is this distinction permissible? Prohibiting discrimination in employment on the basis of religion but not on the basis of secular beliefs treats religion as a distinct identity and is defended as furthering equality values.³⁹ Free speech review would require comparable protection for adherents of secular beliefs.⁴⁰

Similarly, distinctive exemptions for religious institutions from laws prohibiting employment discrimination may be accepted as legitimate, if not necessary, from a religious liberty perspective.⁴¹ However, members of minority faiths denied access to job opportunities, some of which may be subsidized by public funds, may certainly experience such exclusions as a denial of basic equality rights.⁴² The weight to be assigned to these competing

33. See *Interpreting the Religion Clauses*, *supra* note 14, 268-78 (discussing religious organization exemptions and the discrimination that results from such accommodations).

34. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 164-69 (2002) [hereinafter *Protecting Religious Liberty*]; *Interpreting the Religion Clauses*, *supra* note 14, at 268-78; *Mutually Reinforcing Mandates*, *supra* note 23, at 1711-16.

35. See *Protecting Religious Liberty*, *supra* note 34, at 164-69.

36. See *id.*

37. See e.g., William P. Marshall, Smith, Christian Legal Society, and *Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1939-42 (2011).

38. See *Protecting Religious Liberty*, *supra* note 34, at 164-69.

39. See Marshall, *supra* note 37, at 1937-42.

40. See, e.g., *id.*

41. See *id.*

42. See, e.g., *Interpreting the Religion Clauses*, *supra* note 14, at 257-67; see also *School Voucher Programs*, *supra* note 13, at 909-20.

liberty and equality dimensions of religion is contested and uncertain.⁴³

From a political rights perspective, religion and secular beliefs and action might be largely indistinguishable. Accordingly, religion would be an acceptable source of political values, a permissible language of political discourse, an allowable motivation of voter choices, a tolerated basis for political organizations, and a legitimate basis of legislative decision-making and the enactment of law. Substantive value constraints would limit the content of law from religious sources. For example, religious liberty values would prohibit mandatory adherence to particular beliefs and forms of worship; equality and liberty values would preclude the official declaration of religious truth and falsehood. Consistency with religious values, however, would be as acceptable a basis for defining ethical duties between individuals as secular values. A state determination regarding the moral standing of a fetus, for example, might be based on secular normative principles or religious belief.

There is some internal tension here with regard to political rights. Debate over legislation couched exclusively in majoritarian religious terms arguably limits political participation by religious minorities. If the only arguments acceptable to the legislative majority are based on the interpretation of scripture, non-adherents of the majority's religious beliefs are relegated to making arguments based on premises they consider false and the acceptance of which they consider apostasy.

These tensions are exacerbated when liberty and equality values are added to the analysis. Religious liberty is burdened when religious minorities and non-religious political actors must sacrifice their integrity and argue inauthentically in the language of a different faith in order to have any influence on lawmaking. Religious equality values are also burdened if religious minorities cannot engage in meaningful participation in political decision-making. Yet speech and political participation values support the right of members of the religious majority to base their expression and political conduct on the beliefs that most accurately and meaningfully support their judgments—as do adherents of secular political ideologies.

Often, the clash between values is stark. Consider the question of whether religious political parties are constitutionally permissible.

43. See *School Voucher Programs*, *supra* note 13, at 878 (discussing the complexity of competing liberty and equality dimensions with regard to school vouchers).

In the United States, as a constitutional matter, political parties are largely free to limit membership on the basis of basis of political or ideological belief and access to primaries on the basis of membership.⁴⁴ Also, as a constitutional matter, a series of state-action decisions hold that political parties cannot limit access to primary elections on the basis of racial identity.⁴⁵ To do so would violate constitutional equality mandates.⁴⁶

How then should we evaluate religious political parties that exclude religious minorities from membership and participation in primary elections? If we characterize religion as a viewpoint of political speech and evaluate these restrictions on access under free speech and freedom of association principles, religiously limited primaries would be unexceptional. If we characterize religion as an identity and evaluate access restrictions under equality mandates designed to protect the rights of minorities, religious exclusions are much more suspect.

In the United States, and I think this is generally true of liberal constitutionalism, there is no uniform framework for reconciling these conflicting values. Sometimes speech values, sometimes equality values, and sometimes liberty values control religion clause analysis. Problematically, there are no criteria available to determine which characterization of religion and which values and doctrinal frameworks should apply in particular circumstances.⁴⁷

I am not sure that liberal constitutionalism in the abstract provides that much direction in deciding how these different characterizations of religion and corresponding values should be reconciled. Characterizing religious belief and practice as a liberty right and religious identity as an equality right may justify distinctive

44. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (recognizing that the First Amendment protects the freedom to associate in furtherance of political beliefs and to limit that association to certain people).

45. See, e.g., *Terry v. Adams*, 345 U.S. 461, 465, 470 (1953) (holding that barring participation on the basis of race in private organizations that influenced party primary elections operated as improper voter discrimination); *Smith v. Allwright*, 321 U.S. 649, 662 (1944) (noting that the Fifteenth Amendment bars voter discrimination in state primaries on the basis of race).

46. See *Terry*, 345 U.S. at 467 (“The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation.”).

47. See, e.g., *School Voucher Programs*, *supra* note 13, at 887 (“Applying [the] multi-factor criteria [of liberty, equality, and speech] requires the exercise of judicial discretion and it will inevitably result in disputes about how these different and sometimes conflicting interests are to be evaluated in the context of specific facts.”).

protection for religious minorities that would be unavailable if religion was considered as a viewpoint of speech and expressive association. Is distinctive protection of religion and religious minorities the hallmark of religion–state relationships in a liberal constitutional regime? Or does liberal constitutionalism require treating religious and secular beliefs and expressive conduct as comparable viewpoints of speech and expressive association?

Can these questions be answered without regard to context? A country with a dominant religious majority might choose a constitution emphasizing religion as speech and association and characterize its laws as grounded in secular, democratic principles. A religiously pluralistic society might insist on recognizing the distinctive nature of religious belief and practice and religious identity and characterize its laws as grounded in religious principles of religious freedom and equality before G–d. Alternatively, one might argue that liberal constitutionalism requires differently packaged, mix-and-match patterns of value patches in a jurisprudential quilt tailored to a particular country’s history, culture, and demography. It is unclear to me that either religious belief or secularism provides necessary, non-negotiable direction for the quilters of these products.