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# The Equivalence of Religion and Conscience

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## THE EQUIVALENCE OF RELIGION AND CONSCIENCE

LUCIEN J. DHOOGHE\*

*“Man worships not himself, but his Maker; and the liberty of conscience which he claims is not the service of himself, but of his God.”<sup>1</sup>*

*“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons.”<sup>2</sup>*

### ABSTRACT

*This Article examines issues posed by the equation of religious liberty with secular conscience, utilizing federal law and the law in those states which have adopted religious freedom restoration acts (RFRA). The Article initially addresses the definition of religion through an examination of applicable literature and federal and state case law. The same approach is utilized to define conscience. The Article then examines similarities between the two concepts and the implications of their equivalence. The Article concludes that religion and conscience are moral equivalents that require equal legal treatment. However, equal treatment should proceed with caution in order to address potential negative consequences.*

### I. INTRODUCTION

There have been significant recent developments potentially impacting religious liberty.<sup>3</sup> Some of these developments have been

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1. THOMAS PAINE, *THE RIGHTS OF MAN*, 65 (Ernest Rhys ed., 1791).

2. *Welsh v. United States*, 398 U.S. 333, 340 (1970).

3. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–2605, 2607–08 (2015) (concluding that same-sex couples may exercise the right to marry pursuant to the Due Process and Equal Protection Clauses of the U.S. Constitution and that there was no lawful basis upon which states could deny recognition to lawful same-sex marriages performed in other states); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding that privately-owned for-profit business associations possess free exercise rights).

characterized as inconsistent with such liberty.<sup>4</sup> One response has been the introduction of Religious Freedom Restoration Acts (“RFRAs”) in legislatures throughout the United States. Although most of these efforts have failed, twenty-one states currently have RFRAs purporting to protect the free exercise of religion.<sup>5</sup> These efforts and the ensuing controversy will undoubtedly proliferate in future legislative sessions in many parts of the country.<sup>6</sup>

This conflict has been further complicated by federal court opinions equating objections based upon religious liberty with those based upon secular conscience. For example, in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, the U.S. Court of Appeals for the Seventh Circuit overturned Indiana’s marriage-solemnization statute on the basis that it allowed solemnization by officials designated by certain religious groups, but prohibited solemnization by equivalent officials of secular groups.<sup>7</sup> More recently, in *March for Life v. Burwell*, the U.S. District Court for the District of Columbia granted an exemption to the so-called “Contraception Mandate” contained within the Patient Protection and Affordable Care Act to a non-profit, non-religious organization

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4. For example, three of the four dissenting justices in *Obergefell* concluded that same-sex marriage endangered religious liberty. See, e.g., 135 S. Ct. at 2626 (2015) (Roberts, C.J., dissenting) (contending that “people of faith can take no comfort in the treatment they receive from the majority today” and condemning the majority’s “apparent assaults on the character of fairminded people”); *id.* at 2639 (Scalia, J., dissenting) (stating that the majority’s decision threatens religious liberty with “potentially ruinous consequences”); *id.* at 2642–43 (Alito, J., dissenting) (concluding that the majority opinion will “vilify Americans who are unwilling to assent to the new orthodoxy” who will “risk being labeled as bigots and treated as such by governments, employers, and schools”). See also *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 276 (Colo. App. 2015) (upholding the Colorado Civil Rights Commission’s determination that the refusal by a bakery to prepare a wedding cake for a same-sex couple violated Colorado’s public accommodation statute); *Elane Photography, v. Willock*, 309 P.3d 53, 62–68 (N.M. 2013) (holding that the refusal of a photography business to photograph a same-sex commitment ceremony violated the New Mexico Human Rights Act).

5. See ARIZ. REV. STAT. ANN. § 41-1493.–.02 (2016) (effective 1999); ARK. CODE ANN. § 16-123-401-407 (2016) (effective 2015); CONN. GEN. STAT. ANN. § 52-571b(a–f) (West 2016) (effective 1993); FLA. STAT. ANN. §§ 761.01–.05 (West 2016) (effective 1998); IDAHO CODE ANN. §§ 73-401–404 (West 2016) (effective 2000); 775 ILL. COMP. STAT. 35/1-99 (2016) (effective 1998); IND. CODE § 34-13-9-.07-11 (2016) (effective 2015); KAN. STAT. ANN. §§ 60-5301–5307 (2016) (effective 2013); KY. REV. STAT. ANN. § 446.350 (West 2016) (effective 2013); LA. STAT. ANN. § 13:5231–42 (2016) (effective 2010); MISS. CODE ANN. § 11-61-1 (West 2016) (effective 2014); MO. REV. STAT. § 1.302.1 (2016) (effective 2004); N.M. STAT. ANN. §§ 28-22-2–5 (2016) (effective 2000); OKLA. STAT. tit. 51, §§ 251–58 (2016) (effective 2000); 71 PA. CONS. STAT. §§ 2401–07 (2016) (effective 2002); 42 R.I. GEN. LAWS §§ 42-80.1-1–4 (2016) (effective 1993); S.C. CODE ANN. §§ 1-32-10–60 (2016) (effective 1999); TENN. CODE ANN. § 4-1-407 (West 2016) (effective 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001–.012 (West 2016) (effective 1999); VA. CODE ANN. § 57-2.02(A)–(F) (2016) (effective 2007). Protection of the free exercise of religion in Alabama is set forth in the state constitution. See ALA. CONST. art. I, § 3.01.

6. See, e.g., *Hobby Lobby Stores*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) (concluding that there is “[l]ittle doubt” that efforts to seek religious exemptions from government regulations will proliferate in the context of the federal RFRA); Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37, 100 (2014) (predicting that “the demands by religious believers for exemptions will increase and this will lead to greater conflict with the larger society”).

7. 758 F.3d 869, 873 (7th Cir. 2014).

on the basis that its moral opposition was the equivalent of a religious objection.<sup>8</sup>

This Article examines issues posed by the equation of religious liberty with secular conscience utilizing federal law and the law in those states which have adopted RFRAs. The Article initially addresses the definition of religion through an examination of applicable literature and federal and state case law. The same approach is utilized to define conscience. The Article then examines similarities between the two concepts and the implications of their equivalence. The Article concludes that religion and conscience are moral equivalents that require equal legal treatment. However, equal treatment should proceed with caution in order to address potential negative consequences.

## II. RELIGION AND FEDERAL AND STATE RFRAS

### A. *What is Religion?*

The First Amendment to the U.S. Constitution provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>9</sup> Defining what constitutes “religion” can be a difficult task.<sup>10</sup> The religious nature of some belief systems and activities are obvious, but the nature of other types of beliefs and practices are not readily apparent.<sup>11</sup> Any definition risks excluding some beliefs and practices and is not without controversy. Given these caveats, one approach is to focus on belief, action, and purpose.

Belief consists of three components. The first component is faith which is a belief in “the ‘mission’ of a certain individual or group - prophet, incarnate god or church - or assent to a particular interpretation of existence.”<sup>12</sup> Beliefs may be illogical, inconsistent, or incomprehensible to others but are “insulated from ordinary standards of evidence and rational justification . . . employ[ed] in both common sense and in science.”<sup>13</sup> Faith manifests itself in worship and training to

8. 128 F. Supp.3d 116, 132–33 (D.D.C. 2015).

9. U.S. CONST. amend. I.

10. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981) (stating that defining religious belief and practice are “more often than not a difficult and delicate task”). *See also* John O. Hayward, *Religious Pretenders in the Courts: Unmasking the Imposters*, 20 TRINITY L. REV. 24, 26–27 (2014) (noting the derivation of the word “religion” from the Latin word *religare* (“to bind fast”) and rejecting the utility of dictionary definitions).

11. *See, e.g.*, Donald Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of “Religion?”* 39 HASTINGS CONST. L.Q. 357, 367 (2012) (discussing the difficulties associated with the determination of whether particular practices are “religious” in nature). *But see* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 7, 128 (2013) (contending that “[c]ourts almost never have any difficulty in determining whether something is a religion or not” as they share a “family resemblance” to one another).

12. Hayward, *supra* note 10, at 28.

13. BRUCE LEITER, WHY TOLERATE RELIGION? 34 (2013).

serve this mission and attain individual or group goals.<sup>14</sup> The second component of belief is the desire to belong and become integrated with a spiritual society which shares the same worldview.<sup>15</sup> This desire for integration may include varying degrees of surrender of individual autonomy in order to conform to religious precepts.<sup>16</sup> The final component of belief is release from daily life, be it the bondage of sin or human existence.<sup>17</sup> This component has been described as “[t]he desire to escape.”<sup>18</sup>

Belief is closely related to action and purpose. Belief is manifested through “categorical demands on action” that require satisfaction regardless of individual desire or societal incentives and disincentives.<sup>19</sup> Beliefs and their implementation through actions serve a purpose, “an otherworldly order of things.”<sup>20</sup> This “order of things” contemplates a “higher good or ultimate end” beyond ordinary human existence.<sup>21</sup> Achievement of these purposes requires consistent striving for personal transformation by the believer through the exercise of transcendent power.<sup>22</sup> Transformation through the exercise of such power provides “existential consolation” by rendering the realities of human life, such as pain, suffering, and death, intelligible and tolerable.<sup>23</sup> Such consolation may involve beliefs regarding an afterlife and eternity.<sup>24</sup>

If these attributes seem somewhat inexact, they are so by design. Fluidity in defining religion is necessary in order to account for “the diversity of human experience with what people take to be the divine, transcendence, or mystery.”<sup>25</sup> Such flexibility encompasses the wide variety of beliefs of so-called “recognized religions,” but also to include within its definition belief systems that were not traditionally accepted as religious in nature.<sup>26</sup> Such systems include the conventional, the unconventional, and the controversial.<sup>27</sup> Such systems are worthy of

14. Hayward, *supra* note 10, at 29 (citing ENCYCLOPEDIA OF THE WORLD’S RELIGIONS 393 (R.C. Zahner, ed. 1997)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (internal quotation marks omitted).

19. LEITER, *supra* note 13, at 34.

20. RUSSELL BLACKFORD, FREEDOM OF RELIGION AND THE SECULAR STATE 6 (Michael Boylan, ed., 2012).

21. Hayward, *supra* note 10, at 30. See also BLACKFORD, *supra* note 20, at 6.

22. Hayward, *supra* note 10, at 30.

23. LEITER, *supra* note 13, at 52.

24. See, e.g., BLACKFORD, *supra* note 20, at 15–20; Hayward, *supra* note 10, at 30.

25. Nathan S. Chapman, *Disentangling Conscience and Religion*, U. ILL. L. REV. 1457, 1477 (2013).

26. By “recognized religions,” the author means Hinduism, Islam, and those faiths within the Judeo-Christian tradition. But see ENCYCLOPEDIA OF THE WORLD’S RELIGIONS, *supra* note 14, at 393 (defining the “major world religions” to include Judaism, Christianity, Protestantism, Islam, Zoroastrianism, Hinduism, Jainism, Buddhism, Shinto, Confucianism, Taoism, and Sikhism).

27. See, e.g., *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (holding that the Church of Wicca is a religion for First Amendment purposes); *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (holding that the International Society for Krishna Consciousness is a religion for First Amendment purposes);

protection despite the views of members of the public, in fact, due to these views, some beliefs are mistaken as “worthless, harmful, weird delusions.”<sup>28</sup>

There are hazards associated with such fluidity. New and different viewpoints regarding imponderable questions should generally be welcomed, but there are costs associated with expansion of religion to encompass new belief systems. An expanded definition carries with it the possibility of expanded exemptions from legal obligations binding upon the community at large.<sup>29</sup> The protection of practices that may be personally burdensome but impose little or no societal cost presents an easy case for accommodation.<sup>30</sup> A more difficult question is presented by those practices that impose costs and burdens on others. That the claimant also suffers a personal burden or incurs economic or reputational costs associated with the practice, although certainly relevant, may be outweighed by the costs and burdens imposed upon others. Thus, a public provider of a vital service who refuses the patronage of a member of the community at the very least imposes a hardship on the prospective patron and possibly a danger to life or property.<sup>31</sup>

An expansive definition of religion also creates room for undeserving claimants. Courts unquestionably have the ability to determine the sincerity of religious beliefs, but it is not an easy task especially given the U.S. Supreme Court’s limitation upon consideration of the truth or falsity of the belief at issue.<sup>32</sup> There is an absence of methods by which to

United States v. Meyers, 906 F. Supp. 1494, 1503–04 (D. Wyo. 1995), *aff’d* 95 F.3d 1475 (10th Cir. 1996) (presuming all belief systems within the Judeo-Christian tradition, Animism, Bantus, Branch Davidians, Buddhism, Confucianism, Druidism, Hinduism, Islam, Krishna Consciousness, mythologies associated with Greek, Norse and Roman religions, Native American faiths, Paganism, Pantheism, Santeria, Satanism, Shintoism, Taoism, the Unification Church, Wicca, and Zoroastrianism to be religious but excluding anarchism, humanism, libertarianism, Marxism, nihilism, pacifism, socialism, utopianism, and vegetarianism as “purely personal, political, ideological, or secular beliefs”); STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 81–118 (2010) (discussing the societal rejection of Deism as a recognized religion in the United States); Beschle, *supra* note 11, at 372 (discussing whether Buddhism, Deism, Mormonism, Transcendentalism, and Universalism are sufficiently religious in nature to qualify for First Amendment protection).

28. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 626 (2015).

29. See Beschle, *supra* note 11, at 372.

30. See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and State*, 53 B.C. L. REV. 1417, 1450 (2012) (utilizing adherence to a kosher diet as an example of religiously-based behavior that imposes no significant cost upon society).

31. See Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 356–58 (2015) (discussing the unworkability of religiously-based exemptions for vital services).

32. See *United States v. Ballard*, 322 U.S. 78, 85–86 (1944) (requiring that sincerity of religious beliefs be determined “without a view as to [their] truth or falsity”). See also WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 3 (2005) (questioning the competence and ability of courts to define religion without establishing “a legal hierarchy of religious orthodoxy”); Beschle, *supra* note 11, at 372 (noting that

measure sincerity, even in circumstances where the claimant has suffered a personal burden or economic or reputational costs.<sup>33</sup> An expansive definition may also serve as a means by which to disguise anti-social behavior or illegal activities.<sup>34</sup> This circumstance creates the risk that accommodation of the beliefs of one sincere individual requires the accommodation of “the angry, revengeful, avaricious, and irreligious feelings of fifty.”<sup>35</sup> The possibility of granting religious status to undeserving claimants who may abuse any accompanying exemptions may have a chilling effect on future recognition efforts by truly sincere claimants.<sup>36</sup> This reluctance may be exacerbated in circumstances implicating public health, safety, and welfare.<sup>37</sup> Sincerity, deserving behavior, clear standards for their determination, and careful judicial review are necessary in order to prevent religious claims from becoming “the first refuge of scoundrels” searching for a justification for otherwise indefensible conduct.<sup>38</sup>

Early U.S. Supreme Court jurisprudence adhered to traditional traits in defining religion, especially the existence of and belief in a supreme being.<sup>39</sup> This requirement was relaxed in subsequent deci-

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“[w]hile not impossible to disprove, sincerity is difficult to challenge, especially under the *Ballard* injunction”); Wilson, *supra* note 30, at 1453 (contending that courts have “institutional competence” to determine the sincerity of religious beliefs but that such determinations are difficult given the limitations imposed by *Ballard*).

33. See Kent Greenawalt, Essay, *Religious Toleration and Claims of Conscience*, 28 J. L. & POL. 91, 94 (2013) (noting that claims for exemptions rarely involve significant personal burdens or dire economic or reputational costs).

34. See, e.g., *United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (denying religious status to the Church of Marijuana whose primary rituals were smoking marijuana and advocating for its legality); *United States v. Kuch*, 288 F. Supp. 439, 443–44 (D. D.C. 1968) (holding that groups must not be afforded the protection accorded to the free exercise of religion “merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned” and consequently denying religious status to the Neo-American Church whose principal ritual was the consumption of illegal psychedelic substances such as LSD). See also Beschle, *supra* note 11, at 376–77 (discussing claims of religious status by white supremacist organizations such as the Ku Klux Klan).

35. GREEN, *supra* note 27, at 129 (quoting 2 LYMAN BEECHER, *The Building of Waste Places*, in BEECHER’S WORKS 124–26).

36. See Beschle, *supra* note 11, at 372 (stating that “[e]ven those who are open to creating exemptions for religious believers may hesitate if they fear that undeserving, insincere claimants will abuse the exemption. And this fear can be effectively invoked to oppose the recognition of the exemption itself, even for the sincere.”).

37. See, e.g., *Kuch*, 288 F. Supp. at 443–44 (holding that “[i]n a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must at the very least demonstrate adherence to ethical standards and a spiritual discipline.”).

38. *United States v. Meyers*, 906 F. Supp. 1494, 1498 (D. Wyo. 1995).

39. See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890) (holding that religion “has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”); *United States v. MacIntosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) (stating that “the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”).

sions acknowledging that some belief systems considered to be “religious” in nature do not include belief in the existence of God.<sup>40</sup>

Further broadening of the definition occurred in the 1960s and early 1970s. For example, the draft acts adopted in the context of World Wars I and II and the Vietnam War granted exemptions to members of a pacifist religion or those who objected based upon religious training and beliefs.<sup>41</sup> In *United States v. Seeger*, the Court equated pacifism based upon conscience-based beliefs with religious training despite statutory language requiring belief in a “Supreme Being involving duties superior to those arising from any human relation” and excluding “political, sociological or philosophical views or a merely personal moral code.”<sup>42</sup> Thus, an agnostic belief system in which the existence of a supreme being remained an open question and the adherent’s words and deeds were motivated by a devotion to goodness and virtue for their own sake was sufficient to qualify for an exemption from military service as long as such belief system was sincere, meaningful, and occupied a place in the life of the possessor parallel to that occupied by belief in God in the life of a religious adherent.<sup>43</sup> The effect of the holding in *Seeger* “essentially eroded any distinction between religious and nonreligious claims to conscientious objection.”<sup>44</sup>

The boundary was further blurred five years later in *Welsh v. United States*.<sup>45</sup> Welsh’s claim of conscience was not based upon religion at all but rather derived from history and sociology, grounds specifically excluded from consideration by the Military Selective Service Act.<sup>46</sup> Nevertheless, the Court found the claim of conscience to be “strikingly similar” to that at issue in *Seeger*.<sup>47</sup> The Court thus held that the exemption covered persons “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace” if they acted in a contrary manner.<sup>48</sup> Deeply and sincerely held beliefs

40. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (finding Buddhism, Taoism, Ethical Culture and Secular Humanism qualify as religions despite the absence of a belief in God).

41. See, e.g., Military Selective Service Act, 50 U.S.C. app. §§ 451-473 (2016) (exempting individuals who were opposed to warfare on the basis of “religious training and belief”); Selective Service Act, ch. 720, 54 Stat. 885 (1940) (repealed 1966) (conditioning exemptions from military service upon “religious training and belief” and excluding objections based upon individual moral codes); Selective Draft Act, ch. 15, 40 Stat. 76, 78 (1917) (repealed 1935) (requiring membership in a “well-recognized religious sector organization” based upon a fundamental belief in pacifism).

42. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965). See also Military Selective Service Act, 50 U.S.C. app. § 456(j).

43. *Seeger*, 380 U.S. at 166. But see Hayward, *supra* note 10, at 33 (criticizing the failure of the Court to provide guidance in determining when an agnostic belief system occupies a place in the life of the possessor equivalent to that occupied by belief in God in the life of a religious adherent).

44. Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 909 (2010).

45. *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion).

46. See Beschle, *supra* note 11, at 370 (noting that the belief system at issue in *Welsh* was “more clearly nontheistic” than the beliefs at issue in *Seeger*).

47. *Welsh*, 398 U.S. at 335.

48. *Id.* at 343–44.



derived from purely ethical or moral sources were entitled to protection if they occupied “a place parallel to that filled by God” in religious persons.<sup>49</sup> The blurring of religious and conscience-based claims continued in the years following *Seeger* and *Welsh*.<sup>50</sup>

### B. *Religion in the Federal RFRA*

Signed by President Clinton on November 16, 1993, the purpose of the Religious Freedom Restoration Act (hereinafter “federal RFRA” or “Act”)<sup>51</sup> was to guarantee the application of the compelling interest test in all cases where the free exercise of religion was substantially burdened even if the burden resulted from a rule of general applicability.<sup>52</sup> Persons whose religious exercise was burdened could assert a violation as a claim or defense in a judicial proceeding and obtain “appropriate relief.”<sup>53</sup> The Act left many questions unanswered within its text, including what is religion and what constitutes free exercise.

An initial burden for federal RFRA claimants is to demonstrate that their beliefs are religious.<sup>54</sup> Secular philosophical concerns and a claimant’s purely subjective views with respect to what constitutes relig-

49. *Id.* at 340 (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

50. *See, e.g.*, *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (concluding sincerity of belief was more important than adherence to or membership in an established religious body in order to qualify for protection); *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981) (holding that individual religious beliefs do not need to coincide with the majority view within a religious denomination in order to qualify for protection). *But see* *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (overturning a state compulsory education statute as applied to Amish children and further holding that “to have the protection of the Religion Clauses, the claims must be rooted in religious belief”).

51. 42 U.S.C. §§ 2000bb–4 (2016). The impetus for the Act was U.S. Supreme Court opinions restricting free exercise claims in the context of neutral and generally applicable laws. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 537–39 (1993) (holding that the government need satisfy the compelling interest test only when reviewing laws targeting specific religious practices); *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (refusing to excuse individuals from compliance with “a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)”). For criticism of these decisions, *see, e.g.*, *Beschle, supra* note 11, at 357 (describing *Smith* as “an unfortunate decision reflecting insensitivity to the significance of the free exercise right”); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 471 (2010) (criticizing the conclusion that “[t]o the extent secular law clashes with religious obligation, religious obligation generally loses”); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990) (arguing that religious liberty is subject to special protection from government interference); Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 85 (1999) (describing *Smith* as a perceived repudiation of established precedent and a threat to religious freedom).

52. 42 U.S.C. § 2000bb(b)(1). The Act specifically provided that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . in furtherance of a compelling governmental interest; and . . . [if the law] is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(a–b).

53. *Id.* § 2000bb-1(c).

54. *See, e.g.*, *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007).

ious practices are insufficient.<sup>55</sup> Rather, courts interpreting the Act have defined religion as consisting of five essential elements. These elements are: (1) ultimate ideas regarding life, purpose, death, and other imponderable issues; (2) metaphysical beliefs that transcend the physical and observable world; (3) a moral and ethical system prescribing a particular manner of acting or way of life; (4) a comprehensive system of beliefs; and (5) the accoutrements of religion.<sup>56</sup> No single one of these factors is dispositive, and, if they are minimally satisfied, they “counsel the inclusion of beliefs within the term ‘religion.’”<sup>57</sup>

The determination of whether religious beliefs are protected by the federal RFRA also requires inquiry into the claimant’s sincerity.<sup>58</sup> Sincerity is a factual determination and does not require a finding that the beliefs are central to the purported religion, or acceptable, logical, or comprehensible by others.<sup>59</sup> A claimant’s beliefs need not be shared

55. *Id.* at 853 (holding that the federal RFRA protects practices rooted in religious belief and not “purely secular” philosophical concerns.” (quoting *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981)). *See also* *United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (holding that secular philosophies and ways of living do not qualify as religious beliefs subject to protection pursuant to the federal RFRA); *Guzzi v. Thompson*, 470 F. Supp. 2d 17, 26 (D. Mass. 2007) (concluding that protected practices must be derived from a belief system rather than a claimant’s “purely subjective and isolated construction” of what constitutes a religion or religious practice); *United States v. Quaintance*, 471 F. Supp. 2d 1153, 1156 (D. N.M. 2006) (refusing to extend the federal RFRA to include secular philosophies and ways of living).

56. *See, e.g., Meyers*, 95 F.3d at 1483 (denying religious status to the “Church of Marijuana”); *Quaintance*, 471 F. Supp. 2d at 1155–56 (denying religious status to the “Church of Cognizance”). “Accoutrements of religion” include the existence of a founder, prophet, or teacher; important writings; gathering places for worship; enlightened individuals who serve as keepers and purveyors of knowledge; ceremonies and rituals; a designated structure or organization; holidays; dietary requirements; guidelines regarding appearance and clothing; and efforts to propagate the faith to others. *See Meyers*, 95 F.3d at 1483; *Quaintance*, 471 F. Supp. 2d at 1164–70. For a pre-RFRA example of judicial application of these elements, *see Africa v. Pennsylvania*, 662 F.2d 1025, 1029–36 (3d Cir. 1981) (holding that maintenance of a raw diet was not connected to a recognizable religion).

57. *Quaintance*, 471 F. Supp. 2d at 1156 (quoting *Meyers*, 95 F.3d at 1484).

58. *See, e.g., McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 477 (5th Cir. 2014) (holding that “[s]incerity is an inherent issue in a RFRA case”); *Zimmerman*, 514 F.3d at 853 (remanding an inmate’s claim that providing a blood sample as a condition of probation violated his religious beliefs); *Quaintance*, 471 F. Supp. 2d at 1155, 1174 (denying protection to claimants “adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned.” (quoting *United States v. Kuch*, 288 F.Supp. 439, 445 (D.D.C. 1968)). For a pre-RFRA example of judicial inquiry into a professed believer’s religious sincerity, *see Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974) (holding that the First Amendment does not protect “so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.”).

59. *See, e.g., United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (holding that the district court erred in inquiring into the orthodoxy and sophistication of a claimant’s beliefs and their fundamentality to a particular religion rather than whether the practices at issue were rooted in sincerely held religious beliefs); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (declining to determine the centrality of a practice to a claimant’s religion as “judges are ill-suited to resolve issues of theology in myriad faiths.”); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267, 288 (S.D.N.Y. 2009) (holding that

by all members of the religion in question in order to merit protection.<sup>60</sup> Strict adherence to such beliefs over an extended period of time also is not required as beliefs may “evolve or change based upon life experiences or personal revelations.”<sup>61</sup>

A final question is whether the governmental action in question interfered with the free exercise of religious belief. “Free exercise” is broadly defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>62</sup> This definition includes worship and “most any activity that is tied to a religious group’s mission.”<sup>63</sup> However, not all religiously motivated acts qualify for protection.<sup>64</sup> For example, religiously-motivated speech is subject to time, place, and manner restrictions absent evidence that belief compels adherents to engage in such speech without limitation.<sup>65</sup> Furthermore, as in the case of belief, the activity must be a sincere exercise of religion.<sup>66</sup>

### C. Religion in State RFRA's

The U.S. Supreme Court’s conclusion that the federal RFRA was unconstitutional as applied to state and local governments caused some states to adopt their own versions of religious freedom restoration

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courts may not “judge the merits of various religious practices.”); *Guzzi*, 470 F. Supp. 2d at 27 (stating that it was not the court’s role to “perform Biblical interpretation.”); *Quaintance*, 471 F. Supp. 2d at 1173 (determining that the claimants’ beliefs were an insincere attempt to evade prosecution for narcotics trafficking); *See also* *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 716 (1981) (holding that a belief can be religious even if it is not “acceptable, logical, consistent, or comprehensible to others” and that courts should not act as “arbiters of scriptural interpretation”); *Africa*, 662 F.2d at 1030 (concluding that it is “inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy.”).

60. *See Guzzi*, 470 F. Supp. 2d at 27.

61. *Zimmerman*, 514 F.3d at 853–54.

62. *Id.* at 853 (quoting 42 U.S.C. § 2000cc-5(7)(A)). *See also* *Bikur Cholim, Inc.*, 664 F. Supp. 2d at 275 (further holding that “free exercise” is to be defined “to the maximum extent permitted.” (quoting *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007) (“Westchester Day Sch. III”)); *Guzzi*, 470 F. Supp. 2d at 25; *Meyer v. Teslik*, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006); *Adkins*, 393 F.3d at 567.

63. *Bikur Cholim, Inc.*, 664 F. Supp. 2d at 288 (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006)). *See also* *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) (holding that the free exercise of religion extends “beyond traditional worship services.”).

64. *See Mahoney v. U.S. Marshals Serv.*, 454 F. Supp. 2d 21, 38 (D.D.C. 2006).

65. *See id.* at 38 (refusing to exempt religious adherents from sidewalk closures and restrictions at the annual Red Mass in Washington, D.C.). *See also* *Boardley v. U.S. Dep’t of the Interior*, 605 F. Supp. 2d 8, 14 (D.D.C. 2009) (refusing to exempt religious adherents from distributing printed materials without a permit at U.S. national parks).

66. *See* *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663–64 (10th Cir. 2006) (holding that the denial of a zoning variance to permit the operation of a day care center by a religious organization did not interfere with a sincere exercise of religion).

acts.<sup>67</sup> State RFRA's are diverse despite the previously discussed federal blueprint. This diversity has resulted in numerous unanswered questions in a manner similar to the federal RFRA.

There is little uniformity among state RFRA's with respect to defining protected religious activities. Seventeen states define the exercise of religion by statute.<sup>68</sup> Seven states define the exercise of religion through reference to the First Amendment to the U.S. Constitution or religious protections provided in state constitutions.<sup>69</sup> Four of these states, specifically, Oklahoma, Pennsylvania, Tennessee, and Virginia, have elaborated upon the meaning of these references by statute or case law.<sup>70</sup>

Six states share a more detailed definition. In these states, the "exercise of religion" is defined as "the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious

67. See *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997) (holding that the Act violated Congress' power pursuant to the Fourteenth Amendment by expanding the coverage of the First Amendment in contravention of the states' authority to regulate the welfare of its citizens). See also *supra* note 5 and accompanying text.

68. The term "free exercise" is not defined in the Connecticut, Kentucky, or Rhode Island statutes, although free exercise has been defined by one Connecticut court as occurring "in accordance with events that are ceremonial in nature." See *Kubala v. Hartford Roman Catholic Diocesan Corp.*, 41 A.3d 351, 365 (Conn. Super. Ct. 2011). Arkansas' RFRA rather meaninglessly defines "exercise of religion" as "religious exercise." ARK. CODE ANN. § 16-123-403(2) (2016). Kentucky's RFRA lists governmental actions that burden free exercise such as the withholding of government benefits, the assessment of penalties, and exclusion from programs or access to facilities without defining what is meant by the "exercise of religion." See KY. REV. STAT. ANN. § 446.350 (2016).

69. See ALA. CONST. art. I, § 3.01 (reference to the Alabama Constitution); MISS. CODE ANN. § 11-61-1(4)(c) (2016) (reference to the U.S. Constitution); OKLA. STAT. tit. 51, § 252(2) (2016) (reference to the U.S. and Oklahoma Constitutions); 71 PA. CONS. STAT. § 2403 (2016) (reference to the Pennsylvania Constitution); S.C. CODE ANN. § 1-32-20(2) (2016) (reference to the U.S. and South Carolina Constitutions); TENN. CODE ANN. § 4-1-407(a)(2) (2016) (reference to the U.S. and Tennessee Constitutions); VA. CODE ANN. § 57-2.02(A) (2016) (reference to the U.S. and Virginia Constitutions).

70. See, e.g., OKLA. STAT. tit. 51, § 252(7) (NEED DATES FOR THESE STATUTES) (prohibiting governmental inhibition and curtailment of "religiously motivated practices"); PA. CONS. STAT. § 2403 (1–4) (prohibiting governmental constraint, inhibition, curtailment, or denial of expression mandated by a sincerely held religious belief; the reasonable opportunity to engage in activities which are fundamental to a person's religion; and governmental compulsion of conduct or expression which violates a specific tenet of a person's religious faith); TENN. CODE ANN. § 4-1-407(a)(7) (prohibiting governmental inhibition or curtailment of "religiously motivated practices"); VA. CODE ANN. § 57-2.02(A) (prohibiting governmental inhibition or curtailment of "religiously motivated practices"). See also *Congregation Kol Ami v. Abington Twp.*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at \*65 (E.D. Pa. Aug. 12, 2004) (requiring an actual and imminent interference with a "fundamental tenet" of religion in order to violate the state RFRA); *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 809, 821 (Tenn. Ct. App. 2013) (holding that a church's operation of "a permanent, full-scale retail business enterprise" seeking customers from the general public did not constitute a religiously motivated practice). *Contra Barr v. City of Sinton*, 295 S.W.3d 287, 300 (Tex. 2009) (concluding that Texas' RFRA guaranteed "an operation which can be and often is conducted for purely secular purposes [is] entitled to increased protection from government regulation if conducted for religious reasons").

belief.<sup>71</sup> Subsequent case law in Arizona, Idaho, and Illinois has elaborated upon this definition.<sup>72</sup> Louisiana's RFRA includes this language as well as specific references to the First Amendment to the U.S. Constitution and the Louisiana Constitution.<sup>73</sup> Kansas and Texas also utilize this definition but qualify it by reference to sincerity of belief.<sup>74</sup> Subsequent Texas case law has described the sincerity requirement.<sup>75</sup> Sincerity of belief has also been grafted into the Arizona, Florida, and Idaho RFRA's by case law.<sup>76</sup> Finally, New Mexico broadly defines the exercise of religion to include any "act or a refusal to act that is substantially motivated by religious belief" without reference to sincerity of belief or the compulsory or central nature of the purportedly religious activity.<sup>77</sup>

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71. See ARIZ. REV. STAT. ANN. § 41-1493(2) (2016); FLA. STAT. § 761.02(3) (2016); IDAHO CODE ANN. § 73-401(2) (2016); 775 ILL. COMP. STAT. 35/1-5 (2016); IND. CODE § 34-13-9-5 (2016); MO. REV. STAT. § 1.302.2 (2016). Indiana's RFRA not only prohibits substantial burdens upon the exercise of religion, but also actions that are "likely" to result in a substantial burden regardless of whether such actions are engaged in by the government or a private individual. IND. CODE § 34-13-9-9 (2015).

72. See, e.g., *State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009) (interpreting Arizona's RFRA to require that the action or refusal to act be motivated by a religious belief in the context of marijuana use); *State v. Cordingley*, 302 P.3d 730, 767 (Idaho Ct. App. 2013) (interpreting Idaho's RFRA to require that the action or refusal to act be motivated by a religious belief in the context of marijuana use); *Marcavage v. City of Chicago*, 467 F. Supp. 2d 823, 833 (N.D. Ill. 2006) (defining the exercise of religion as "conduct or [an] . . . experience that [a person's] faith mandates"); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 986, 993 (N.D. Ill. 2003) (defining free exercise to include religious observances); *Diggs v. Snyder*, 775 N.E.2d 40, 45 (Ill. Ct. App. 2002) (defining the exercise of religion as "conduct or [an] . . . experience that [a person's] faith mandates").

73. See LA. REV. STAT. ANN. § 13:5234(5) (2016).

74. See KAN. STAT. ANN. § 60-5302(c) (2016) (referencing the U.S. and Kansas Constitutions and requiring that the act or refusal to act be "substantially motivated by a sincerely-held religious tenet or belief"); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (Vernon 2016) (requiring that the act or refusal to act be "substantially motivated by sincere religious belief"). Kansas' RFRA prohibits any direct or indirect governmental constraint, inhibition, curtailment, or denial of the exercise of sincerely held religious beliefs and governmental compulsion of any action contrary to such beliefs. See KAN. STAT. ANN. § 60-5302(a) (DATE NEEDED).

75. See, e.g., *Scott v. State*, 80 S.W.3d 184, 192 (Tex. App. 2002) (holding that beliefs "need not be acceptable, logical, consistent, or comprehensible to others" but cannot be "bizarre" or "clearly non-religious in motivation"). This determination is to be made on a case-by-case basis and is highly fact-specific. See *Barr*, 295 S.W.2d at 301 (addressing the impact of a zoning ordinance upon a pre-existing faith-based halfway house for recently released nonviolent offenders). See also *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) (addressing the impact of a school grooming policy prohibiting male students from wearing long hair on a member of the Lipan Apache tribe); *Merced v. City of Eufless*, 577 F.3d 578, 588 (5th Cir. 2009) (addressing the impact of local ordinances prohibiting animal sacrifice upon an adherent to the Santeria religion).

76. See, e.g., *Hardesty*, 214 P.3d at 1007; *Warner v. City of Boca Raton*, 887 So.2d 1023, 1034 (Fla. 2004); *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 924 So.2d 48, 56-57 (Fla. Dist. Ct. App. 2006); *Cordingley*, 302 P.3d at 767. See also *Romany Church Ministries, Inc. v. Broward County*, 980 So.2d 1164, 1167 (Fla. Dist. Ct. App. 2008) (holding that determinations regarding purported violations of the Florida RFRA are "inherently fact-specific"); *State v. White*, 271 P.3d 1217, 1221 (Idaho Ct. App. 2011) (holding that sincerity is a factual determination).

77. N.M. STAT. § 28-22-2(A) (2016).

Case law interpreting Idaho's RFRA addresses the broader question of what is a "bona fide religion."<sup>78</sup> Idaho courts have closely adhered to the Tenth Circuit's definition of religion in *United States v. Meyers* in undertaking this "difficult and delicate task."<sup>79</sup> In order to be deemed "religious," a belief system must address ultimate ideas regarding life, purpose, death, and other imponderable issues.<sup>80</sup> These beliefs must be metaphysical and transcend the physical and observable world.<sup>81</sup> A third requirement is the existence of a moral and ethical system prescribing a particular manner of acting or way of life.<sup>82</sup> The belief system must also be comprehensive.<sup>83</sup> Finally, beliefs must be accompanied by the accoutrements of religion.<sup>84</sup> Courts are not to consider whether such beliefs are true or false or "acceptable, logical, consistent, or comprehensible to others," and all doubts are to be resolved in favor of a finding of a bona fide religion.<sup>85</sup> However, purely secular philosophical concerns or the melding of teachings from various recognized religions in order to justify otherwise illegal behavior do not merit protection.<sup>86</sup>

78. See *White*, 271 P.3d at 1221, 1225 (requiring a claimant to demonstrate the existence of a bona fide religion which is a question of law).

79. *State v. Cordingley*, 302 P.3d 730, 735–38 (Idaho Ct. App. 2013).

80. *Id.* at 738–39 (citing *U.S. v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996)). The Idaho Court of Appeals further described "ultimate ideas" as including questions of: [L]ife and creation; fear of the unknown; the pain of loss; a sense of alienation; and the inexplicability of the world; or existential or cosmological concerns, such as an individual's existence; his place in the universe; the nature or natural order of the universe; and the origin, structure, and space-time relationships of the universe.

*Id.* at 738 (citing *U.S. v. Quaintance*, 471 F. Supp.2d 1153, 1157 (D. N.M. 2006)).

81. *Id.* at 738–39 (citing *Meyers*, 95 F.3d at 1483). The Idaho Court of Appeals described metaphysical beliefs as those relating to the existence of "another dimension, place, mode, or temporality . . . inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities." *Id.* at 739 (citing *Meyers*, 95 F.3d at 1483).

82. *Id.* at 740 (citing *Meyers*, 95 F.3d at 1483, 1505). Moral and ethical systems "often describe certain acts in normative terms, such as 'right and wrong,' 'good and evil,' or 'just and unjust' . . . [and] may create duties—often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest." *Id.* at 740 (citing *Meyers*, 95 F.3d at 1483).

83. *Id.* at 740–41 (citing *Meyers*, 95 F.3d at 1483). Comprehensive beliefs "provide a *telos*, an overarching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans . . . [and] generally are not confined to one question or a single teaching." *Id.* at 740 (citing *Meyers*, 95 F.3d at 1483).

84. *Id.* at 741–44 (citing *Meyers*, 95 F.3d at 1483–84). "Accoutrements of religion" include: (1) a founder, deity, prophet or teacher who is considered to be "divine, enlightened, gifted, or blessed"; (2) "seminal, elemental, fundamental, or sacred writings" consisting of "creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras"; (3) "sacred, holy, or significant" physical structures and natural places; (4) "keepers and purveyors of religious knowledge" such as "clergy, ministers, priests, reverends, monks, shamans, teachers, or sages"; (5) ceremonies, rituals, liturgy, sacraments, and protocols "prescribed by the religion and . . . imbued with transcendent significance"; (6) a hierarchical organizational structure; (7) holidays; (8) dietary requirements or restrictions; (9) guidelines regarding appearance and clothing; and (10) propagation of the faith to others. *Id.* (citing *Meyers*, 95 F.3d at 1483).

85. *Id.* at 736.

86. See *State v. White*, 271 P.3d 1217, 1227 (Idaho Ct. App. 2011).

The determination of these issues may turn on whether a particular state's RFRA is to be interpreted utilizing precedent applicable to the federal RFRA. Only four state RFRAs expressly permit the utilization of federal precedent either statutorily or by applicable case law.<sup>87</sup> One state, New Mexico, specifically prohibits the utilization of federal precedent in interpretation of its RFRA.<sup>88</sup> The status of federal precedent in the remaining RFRAs is still to be determined.

### III. THE RECOGNITION AND PROTECTION OF CONSCIENCE

#### A. *What is Conscience?*

Creating a workable definition of conscience is as daunting as defining religion.<sup>89</sup> Although by no means an infallible definition, conscience may be defined by its two predominant features: belief and response.<sup>90</sup> Belief refers to individual notions of right and wrong, which in turn influence decision-making and judgments.<sup>91</sup> These beliefs result in an evaluation of the circumstances of individual actions wherein the actor "identifies moral principles, assesses context, and decides whether to do or omit a particular act."<sup>92</sup> Decisions and judgments based upon such evaluations create a moral consciousness for each individual and provide him or her with a sense of self.<sup>93</sup> This

87. See, e.g., ARK. CODE ANN. § 16-123-402(2) (2016) (stating that the act is to be interpreted "consistent[ly] with the Religious Freedom Restoration Act of 1993 . . . federal case law, and federal jurisprudence"); *Westgate Tabernacle, Inc. v. Palm Beach County*, 14 So.3d 1027, 1031 (Fla. Dist. Ct. App. 2009) (applying federal precedent to the interpretation of Florida's RFRA); *Johnson v. Levy*, No. M2009-02596-COA-R3-CV, 2010 WL 119288, at \*5-6 (Tenn. Ct. App. Jan. 14, 2010) (applying federal precedent to the interpretation of Tennessee's RFRA and holding that it was intended to "mirror" the federal statute); *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) (holding that federal court opinions interpreting the federal RFRA are "germane" to applying Texas' RFRA).

88. See *State v. Bent*, 328 P.3d 677, 685 (N.M. Ct. App. 2013) (holding that differences between the federal and New Mexico RFRAs render any guidance from the federal statute "misplaced").

89. See *United States v. Seeger*, 380 U.S. 163, 174-75 (1965) (describing the distinction between conscience and religious belief as difficult due to the fact that "in no field of human endeavor has the tool of language proved so inadequate").

90. See Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 923 (2005) (contending that conscience "involves more than mere belief: it entails acting—*living*—in accordance with central convictions").

91. See Darlene Fozard Weaver, *Conscience: Rightly Formed and Otherwise*, 132 COMMONWEAL 10, 11 (2005) (referring to conscience as "human knowledge of right and wrong . . . our moral consciousness, process of moral decision-making, and settled moral judgments or decisions"). See also Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1526-27 (2012) (discussing the impact of perceptions of right and wrong upon moral decision-making).

92. Sepper, *supra* note 91, at 1527.

93. *Id.* at 1528. See also MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 79 (2008) (describing conscience as the "core of [an individual's] humanity"); Dan W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who is Obligated to Do What, and Why?*, 29 THEORETICAL MED. & BIOETHICS 187, 189 (2008) (contending that conscience-based judgments "define who, at least morally speaking, the individual is, what she stands for, what is the central moral core of her character").

“moral consciousness” and “sense of self” are entitled to respect by others as an affirmation of individual autonomy and personhood.<sup>94</sup> A disconnection between beliefs and decisions, that is, a failure to do right by one’s conscience, whether compelled or voluntarily, generates guilt, regret, shame, and a feeling of loss of personal integrity.<sup>95</sup>

Belief inevitably presents the question of content, specifically, what types of belief may serve as a motivating factor for acts to be deemed those of conscience. For example, are acts purportedly based upon conscience subject to protection only if the motivating belief concerns ultimate questions such as the meaning of life?<sup>96</sup> An affirmative answer presumes that actors are constantly conscious of such thoughts and issues in their daily actions and are consistently motivated by them in all of their responses.<sup>97</sup> This is an impossible burden for even the most mindful of individuals. Such a diminished definition of conscience also promotes fraud and post hoc rationalizations to the extent that actors attribute their behavior to thoughts and issues not present at the time of the responses in question.

An “ultimate issue” requirement also fails to distinguish religion from conscience.<sup>98</sup> Conscience becomes identical to religion to the extent they are required to address ultimate issues.<sup>99</sup> Perhaps the need for such a distinction is overstated if all belief systems, regardless of their secular or religious motivations, are entitled to universal toleration.<sup>100</sup> But a need for some distinction is nevertheless necessary.

94. See, e.g., Yossi Nehushtan, *Secular and Religious Conscientious Exemptions: Between Tolerance and Equality*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 243, 245 (Peter Cane et al. eds., 2008) (describing accommodation of an individual’s conscience as “always reflect[ing] respect for his autonomy and personhood”); Smith, *supra* note 90, at 935 (contending that the most important reason for accommodating conscience is its centrality to personhood). See also NUSSBAUM, *supra* note 93, at 79 (contending that recognition of the value of maintaining individual moral integrity compels people to “value and respect the moral integrity of others”).

95. See Sepper, *supra* note 91, at 1528. See also MICHAEL G. BAYLOR, *ACTION AND PERSON: CONSCIENCE IN LATE SCHOLASTICISM AND THE YOUNG LUTHER* 210 (1977) (stating that conscience serves as a means by which to judge specific actions and the character of the persons engaging in such actions); Charles E. Curran, *Conscience in the Light of the Catholic Moral Tradition*, in *CONSCIENCE: READINGS IN MORAL THEOLOGY* 3, 18 (Charles E. Curran ed., 2004) (discussing guilt and regret associated with failure to follow one’s conscience).

96. See, e.g., NUSSBAUM, *supra* note 93, at 168–69 (describing conscience as involving the search for the meaning of life).

97. See, e.g., Greenawalt, *supra* note 44, at 905 (noting that “people can have strong convictions of conscience that bear only a remote relation to their conceptions of ultimate meaning, if they have such conceptions”).

98. See Chapman, *supra* note 25, at 1476 (noting that “[t]he problem with . . . [an ‘ultimate issue’] definition of conscience is that it is indistinguishable from definitions of religion”).

99. See *id.* See also MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 208–09 (2000) (defining religion to include belief systems that are “religion-like”).

100. See, e.g., DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 138 (1986) (contending that “universal toleration must encompass all belief systems, religious and nonreligious, expressive of our moral powers of rationality and reasonableness”); Chapman, *supra* note 25, at 1476 (stating that “those for whom ‘life’s ultimate meaning’ is



Deeming religion and conscience as identical fails to provide adequate guidance to courts confronted with issues of application and potential limitations in any given case.<sup>101</sup> More fundamentally, this overlap fails to “give liberty of conscience any independent role to play in our scheme of ordered liberties.”<sup>102</sup> To this order of thought, conscience and its exercise are protected because they are similar to religion and religiously-motivated actions.<sup>103</sup> Surely conscience is deserving of protection on account of its own merit. Furthermore, protection of religion and religious acts without protection of their nonreligious equivalents would be unfair.<sup>104</sup>

A different question concerns whether claims of conscience should have a moral basis. For example, an individual may act or refrain from acting in a given manner based upon a moral obligation perceived to have general applicability.<sup>105</sup> This circumstance does not present a difficult question as conscience-based claims are most commonly perceived as having general applicability.<sup>106</sup> Conversely, behaviors based upon inclinations or predispositions lack the seriousness of purpose to qualify as acts of conscience.<sup>107</sup> However, as one commentator has noted, inclinations that lack moral content but reflect personal identity and perceived moral obligations that are not generally applicable present more difficult questions.<sup>108</sup> Nevertheless, these difficulties may be resolved by noting that claims of conscience for which legal protection is sought almost always involve moral content rather than personal predilection.<sup>109</sup>

The identification of principles and assessment of context are crucial to the determination of individual response. “Response” is preferable to “action” as the process of identification and assessment may cause an individual to choose inaction. In any event, a response is required since a claim of conscience is a claim “about what one must do, no

religious and those for whom it is based on nonreligious philosophy or morality ought to enjoy equal liberty to search for that meaning”).

101. See Chapman, *supra* note 25, at 1477.

102. *Id.*

103. *Id.* (contending that equating conscience and religion “fails to give any reason that nonreligious moral or philosophical beliefs or actions ought to be protected besides that they are similar, in some unarticulated way, to religious beliefs and actions”).

104. *Id.* See also Micah Schwartzman, What if Religion Isn’t Special?, U. CHI. L. REV. 1351, 1390–95 (2012).

105. See Greenawalt, *supra* note 44, at 907.

106. *Id.* See also ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 3 (2010).

107. See Greenawalt, *supra* note 44, at 907.

108. *Id.* (citing an individual whose personal identity compels him to be an artist without underlying moral content and individuals called to specific professions such as the clergy, medicine, and teaching as examples). Greenawalt notes that “[e]ven if moral content that relates to other people should be an element of claims of conscience that are treated as rights, drawing the line in practice between individualized claims of this kind and those without relevant moral content will be hard.” *Id.* at 908.

109. *Id.* at 908. See also LEITER, *supra* note 13, at 95 (noting that responses based upon “crass self-interest” are not conscience-based).

matter what.”<sup>110</sup> A conscience-based response is “a kind of moral imperative central to one’s integrity as a person.”<sup>111</sup> There are those who reject the role of conscience as “a blind dictator” for more voluntarist views based upon the exercise of free will.<sup>112</sup> Nevertheless, even a proponent of free will must admit that conscience provides a “moral nudge” toward a response appropriate to the individual and consistent with his or her beliefs.<sup>113</sup>

This definition of conscience presents the issue of whether an individual response is motivated by conscience. As in the case of religion, the assertion of a conscience-based response is insufficient without an accompanying determination of sincerity of belief. But assessment of “the magnitude of moral convictions is usually extremely difficult.”<sup>114</sup> Persons asserting a claim of conscience may not be able to fully articulate the depth of a particular conviction and the importance of that conviction in their lives or in comparison to other beliefs.<sup>115</sup> Furthermore, there is no guarantee that intensive examination of conscience-based responses will result in clear determinations with respect to personal motivations of the actor, sincerity of belief, and establishment of a hierarchy of convictions.<sup>116</sup>

These determinations are made easier when an individual has suffered some negative consequence as a result of his or her response, such as imprisonment, loss of a job or economic opportunity, an adverse health condition, or public condemnation. The willingness of an individual to suffer such consequences demonstrates a degree of sincerity indicative of a conscience-based response.<sup>117</sup> This serves to distinguish such responses from claims in which the individual objects to a particular set of circumstances but “lacks the moral strength to adhere to that conviction.”<sup>118</sup> The unwillingness to suffer “significant adverse consequences” casts doubt upon the honesty and depth of an individual’s convictions.<sup>119</sup>

However, the vast majority of conscience-based responses will not result in such dramatic consequences. And yet, in a manner similar to

110. LEITER, *supra* note 13, at 95. *See also* JOHN RAWLS, A THEORY OF JUSTICE 207 (1971) (describing claims of conscience as “binding absolutely” and non-negotiable).

111. LEITER, *supra* note 13, at 95.

112. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 66 (1996) (describing conscience-based responses as expressions of individual free will rather than efforts to satisfy obligations beyond oneself).

113. Chapman, *supra* note 25, at 1476.

114. Greenawalt, *supra* note 44, at 906.

115. *See* Chapman, *supra* note 25, at 1478 (noting that “[s]ome people are remarkably ‘inarticulate’ about their motivation for acts of moral courage”). *See also* Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 978 n.79 (2010) (discussing the inability of some people to clearly articulate the motivations for their behavior).

116. Greenawalt, *supra* note 44, at 906 (questioning the reliability of even “a fairly intense examination” in distinguishing “genuine claims of conscience from lesser moral objections”).

117. *Id.* at 905–06.

118. *Id.* at 906.

119. *Id.*

religion, federal and state courts and legislatures must not only define conscience but also devise means by which to assess it and determine whether it is subject to legal protection. It is this necessity that requires an examination of conscience in federal and state law.

### B. *Conscience and the Federal Courts*

As previously noted, there is historical precedent for granting conscience-based exemptions to specific legal requirements imposed by federal law.<sup>120</sup> Recent lower court decisions continuing this trend are unsurprising. For example, in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, the U.S. Court of Appeals for the Seventh Circuit overturned Indiana's marriage-solemnization statute on the basis that it allowed solemnization by officials designated by certain religious groups but prohibited solemnization by equivalent officials of secular groups.<sup>121</sup> The Seventh Circuit concluded that neutrality was "essential to the validity of an accommodation" regarding religious practices.<sup>122</sup> Secular beliefs based upon conscience were entitled to the benefit of this neutrality principle, and states were prohibited from favoring or disfavoring religious beliefs vis-à-vis "comparable secular belief systems."<sup>123</sup> "Comparable secular belief systems" are those which "have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions."<sup>124</sup> To conclude otherwise is to engage in "forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives" and to permit discrimination among ethical codes.<sup>125</sup>

More recently, in *March for Life v. Burwell*, the U.S. District Court for the District of Columbia granted an exemption to the so-called "Contraception Mandate" contained within the Patient Protection and Affordable Care Act to a non-profit, non-religious organization on the basis that its moral opposition was the equivalent of a religious objection.<sup>126</sup> The Fifth Amendment's Equal Protection Clause prohibited the government from arbitrarily engaging in different treatment with respect to alike entities.<sup>127</sup> Similarly situated entities were entitled to

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120. See *supra* notes 41–50 and accompanying text. Although this discussion is limited to federal case law, conscience is also protected by federal statutes in limited circumstances. See, e.g., 42 U.S.C. § 300a-7(b-e) (2016) (protecting individuals from discrimination on the basis of their refusal to perform or assist in the performance of any lawful health service or research activity, including, but not limited to, abortion and sterilization on the basis of "religious beliefs or moral convictions").

121. 758 F.3d 869, 873 (7th Cir. 2014).

122. *Id.* at 872.

123. *Id.* at 873.

124. *Id.*

125. *Id.* at 873, 874 (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970); *United States v. Seeger*, 380 U.S. 163, 166 (1965)).

126. *March For Life v. Burwell*, No. 14-cv-1149 (RJL), 2015 U.S. Dist. LEXIS 115483, \*22–23 (D.D.C. Aug. 31, 2015).

127. *Id.* at \*17 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

similar treatment in the absence of a rational relationship between the disparate treatment and a legitimate governmental purpose.<sup>128</sup>

Applying these standards, the issue was not whether secular organizations were identical to their religious counterparts, but rather, whether they were “similarly situated with regard to the precise attribute selected for accommodation.”<sup>129</sup> The “precise attribute” selected for accommodation in this case was “an employment relationship based in part on a shared objection to abortifacients.”<sup>130</sup> This shared objection was a “moral philosophy about the sanctity of human life” shared by organizations regardless of their secular or religious affiliation.<sup>131</sup> This shared moral philosophy rendered March for Life and previously-exempted religious organizations identically situated with respect to the accommodated attribute.<sup>132</sup>

Granting religious organizations an exemption under such circumstances without a parallel exemption for identically-situated secular organizations was nothing less than “regulatory favoritism.”<sup>133</sup> Although religions were entitled to “special solicitude,” governments could not favor them at the expense of secular groups possessing equivalent moral stances with regard to regulated attributes.<sup>134</sup> March for Life’s opposition to the “Contraception Mandate” based upon its objection to abortifacients and its respect for the sanctity of human life was deeply held, sincere, and occupied a central place in the organization’s existence parallel to identical beliefs in religious organizations which had received exemptions.<sup>135</sup> Accommodating this moral philosophy only under circumstances where it was “overtly tied to religious values” swept with “arbitrary and irrational strokes” could not survive rational basis inquiry.<sup>136</sup> The purported distinction thus violated equal protection.<sup>137</sup>

### C. *Conscience in the States*

Conscience and its equation to religion have been addressed in those states that have adopted RFRAs.<sup>138</sup> Eight states, specifically, Alabama, Arizona, Connecticut, Florida, Louisiana, Mississippi, Oklahoma, and South Carolina, provide protection for the free exercise of religion in their constitutions and RFRAs, but have no separate reference to conscience-based protections. The constitutions in each of these states

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128. *Id.* at \*17–18 (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

129. *Id.* at \*19 (citing *Ctr. for Inquiry, Inc.*, 758 F.3d at 872).

130. *Id.* at \*20.

131. *Id.* at \*21.

132. *Id.* at \*22.

133. *Id.*

134. *Id.* (citing *Ctr. for Inquiry, Inc.*, 758 F.3d at 873).

135. *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970)).

136. *Id.* at 128.

137. *Id.*

138. For a comprehensive discussion of protections afforded to the free exercise of religion in state constitutions see Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J. L. & PUB. POL’Y 103 (2013).

mention free exercise, profession of faith, and worship, without a concomitant reference to conscience.<sup>139</sup>

However, the absence of a specific reference may not be determinative of whether conscience-based viewpoints may be granted equivalent status to religious beliefs. Such an outcome is uncertain in Alabama due to the absence of relevant judicial interpretation of the religion clause in the state constitution and accompanying RFRA. The equivalency of conscience and religion-based viewpoints in Connecticut is also uncertain due to the reliance of Connecticut state courts upon federal free exercise precedent in interpreting the religion clause in the state constitution.<sup>140</sup> This reliance creates the possibility that a Connecticut state court may incorporate conscience-based jurisprudence into its reasoning in a future case. A similar possibility exists in Mississippi, Oklahoma, and South Carolina, as their RFRAs specifically reference the U.S. Constitution as a primary source for interpretation of state law,<sup>141</sup> and their state courts have relied upon federal precedent in construing the religion clauses in their state constitutions.<sup>142</sup> Such an outcome is unlikely in Florida where state courts have cited federal free exercise precedent with approval,<sup>143</sup> but whose state RFRA

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139. See, e.g., ALA. CONST. art. I, § 3 (providing that “the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles”); ARIZ. CONST. art. XX, para. 1 (stating that “[p]erfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same”); CONN. CONST. art. I, § 3 (protecting “[t]he exercise and enjoyment of religious profession and worship, without discrimination”); FLA. CONST. art. I, § 3 (declaring unconstitutional any law “prohibiting or penalizing the free exercise [of religion]”); LA. CONST. art. I, § 8 (declaring unconstitutional any law “prohibiting the free exercise [of religion]”); MISS. CONST. art. III, § 18 (providing that “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred”); OKLA. CONST. art. I, § 2 (stating that “[p]erfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship”); S.C. CONST. art. I, § 2 (declaring unconstitutional any law “prohibiting the free exercise [of religion]”).

140. See, e.g., *Cambodian Buddhist Soc’y of Conn. v. Plan. & Zoning Comm’n*, 941 A.2d 868, 881–82 (Conn. 2008) (deeming federal free exercise precedent to be “persuasive” in interpreting the state constitutional religion clause); see also WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE* 44 (1993) (concluding that the Connecticut courts have failed to give the state constitutional guarantee of free exercise of religion a “significant independent meaning”).

141. See *supra* note 69 and accompanying text.

142. See, e.g., *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 754 (Miss. 2004) (describing the religion clause in the Mississippi Constitution as “a counterpart to the First Amendment”); *Wahid v. State*, 716 P.2d 678, 680 (Okla. Crim. App. 1986) (distribution of controlled substances does not constitute the free exercise of religion); *Lewellyn v. State*, 592 P.2d 538, 539–40 (Okla. Crim. App. 1979) (distribution of controlled substances does not constitute the free exercise of religion); *State ex rel. Roberts v. McDonald*, 787 P.2d 466, 468–69 (Okla. Civ. App. 1989) (operation of a licensing statute with respect to a faith-based child care facility does not constitute interference with the free exercise of religion); *Hunt v. McNair*, 187 S.E.2d 645, 648 (S.C. 1972) (holding that the free exercise language within the U.S. Constitution and state constitution are “for all intents and purposes, the same”).

143. See, e.g., *Warner v. City of Boca Raton*, 887 So.2d 1023, 1030 (Fla. 2004) (challenging an ordinance prohibiting vertical grave decorations in local cemeteries and con-

only protects acts and refusals to act substantially motivated by religious belief.<sup>144</sup> A similar outcome is likely in Arizona and Louisiana for the same reason.<sup>145</sup>

The remaining thirteen states protect conscience by constitutional provision, but protection is linked to religion.<sup>146</sup> However, such linkage may not be determinative of whether conscience may be granted equivalent status to religion. Such an outcome is uncertain in Kentucky and Rhode Island, as neither explicitly defines religion or conscience, but does rely upon federal free exercise precedent in interpreting the religion clauses in their state constitutions.<sup>147</sup> It is possible

cluding that the federal and state constitutional protections of free exercise are “coequal”).

144. See *supra* note 71 and accompanying text.

145. See *supra* notes 71–72 and accompanying text. See also *State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009) (interpreting Arizona’s RFRA to require that the action or refusal to act be motivated by a religious belief in the context of marijuana use); *but see Seegers v. Parker*, 241 So.2d 213, 216 (La. 1970) (stating that the free exercise provision of the Louisiana Constitution “embodies . . . in full” that contained in the U.S. Constitution).

146. See, e.g., ARK. CONST. art. II, § 24 (providing that “[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences”); IDAHO CONST. art. I, § 4 (referring to the “exercise and enjoyment of religious faith and worship” as “the liberty of conscience”); ILL. CONST. art. I, § 3 (referring to the “free exercise and enjoyment of religious profession and worship” as “the liberty of conscience”); IND. CONST. art. I, §§ 2–3 (securing for all people the “natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences” and prohibiting laws which seek to “control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience”); KAN. CONST. BILL OF RIGHTS § 7 (securing for all people the “right to worship God according to the dictates of conscience” and prohibiting any control of or interference with such dictates); KY. CONST. §§ 1, 5 (securing the “right of worshipping Almighty God according to the dictates of . . . consciences” and prohibiting laws which seek to “control or interfere with the rights of conscience”); MO. CONST. art. I, § 5 (stating that “all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences [and] that no human authority can control or interfere with the rights of conscience”); N.M. CONST. art. II, § 11 (providing that “[e]very man shall be free to worship God according to the dictates of his own conscience”); PA. CONST. art. I, § 3 (stating that “[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . [and] no human authority can, in any case whatever, control or interfere with the rights of conscience”); R.I. CONST. art. I, § 3 (providing that “every person shall be free to worship God according to the dictates of such person’s conscience”); TENN. CONST. art. I, § 3 (stating that “all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . [and] no human authority can, in any case whatever, control or interfere with the rights of conscience”); TEX. CONST. art. I, § 6 (stating that “[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . [and] no human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion”); VA. CONST. art. I, § 16 (protecting the free exercise of religion “according to the dictates of conscience”).

147. See, e.g., *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 529 (W.D. Ky. 2001) (finding that Kentucky state courts have utilized U.S. Supreme Court precedent to interpret the religion clause within the state constitution); *Gingerich v. Commonwealth*, 382 S.W.3d 835, 840 (Ky. 2012) (concluding that it was “linguistically impossible” to separate the free exercise of religion protections set forth in the U.S. and Kentucky Constitutions); *Triplett v. Livingston County Bd. of Educ.*, 967 S.W.2d 25, 31–33 (Ky. Ct. App. 1997) (relying upon U.S. Supreme Court precedent in the interpretation of the religion clause

that federal precedent could serve as a means of granting equal protection to conscience-based beliefs under these state constitutions. A similar possibility exists in Pennsylvania, Tennessee, and Virginia, as these states define religion in their RFRA's by reference to their respective constitutions which, in turn, have been interpreted utilizing federal precedent.<sup>148</sup> Such a result may be less likely in Arkansas, Illinois, and Missouri, which have utilized federal precedent to interpret the religion clauses in their respective constitutions, but whose RFRA's are specifically tied to religious beliefs.<sup>149</sup> The law in Texas is similarly situated.<sup>150</sup> However, while adhering to federal precedent, Texas state courts have dispensed with belief in a supreme being as a requirement for the existence of a religion at least in the context of determining tax-exempt status.<sup>151</sup>

The outcome of potential cases in Idaho and New Mexico are more difficult to discern. Case law interpreting the religion clause in the Idaho Constitution has noted that the clause "bear[s] no resemblance to those found in the First Amendment [but rather] appear[s] to be the product of Idaho's unique religious history."<sup>152</sup> There is also the suggestion in at least one opinion that the state religion clause may be "an even greater guardian of religious liberty" than the U.S. Consti-

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within the state constitution); *In re Philip S.*, 881 A.2d 931, 935 n.9 (R.I. 2005) (stating that the U.S. and Rhode Island Constitutions provide "similar protection" of religious freedom); *Church of Pan, Inc. v. Norberg*, 507 A.2d 1359, 1363 (R.I. 1986) (concluding that the claimant lacked sufficient accoutrements of religion in order to be entitled to tax-exempt status and was primarily secular in nature).

148. See, e.g., *Wiest v. Mt. Leb. School Dist.*, 320 A.2d 362, 366-67 (Pa. 1974) (holding that the rights and freedoms secured by the religion clause in the Pennsylvania Constitution do not "transcend" similar protections contained within the U.S. Constitution); *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001) (concluding that the religion clauses in the Tennessee Constitution are subject to interpretation utilizing the "same principles" as those employed to interpret similar clauses within the U.S. Constitution); *State v. Loudon*, 857 S.W.2d 878, 883 (Tenn. Crim. App. 1993) (concluding that the free exercise clauses contained within the U.S. and Tennessee Constitutions were "practically synonymous"); *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 515 (Va. 2001) (reaching an identical conclusion regarding the application of the free exercise provisions of the Virginia and U.S. Constitutions). See also *supra* note 70 and accompanying text.

149. See, e.g., *Viravonga v. Samakitham*, 279 S.W.3d 44, 48-49 (Ark. 2008) (construing the free exercise provisions of the Arkansas and U.S. Constitutions uniformly); *Mefford v. White*, 770 N.E.2d 1251, 1260 (Ill. App. Ct. 2002) (construing the free exercise provisions of the Illinois and U.S. Constitutions uniformly); *Oliver v. State Tax Comm'n*, 37 S.W.3d 243, 247-52 (Mo. Ct. App. 2001) (construing the religion provisions of the Missouri and U.S. Constitutions uniformly).

150. See, e.g., *Scott v. State*, 80 S.W.3d 184, 191 (Tex. App. 2002) (concluding that the free exercise clauses contained in the U.S. and Texas Constitutions are "comparable").

151. See, e.g., *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 468-72 (Tex. App. 2003) (concluding that the requirement of a belief in a supreme being was underinclusive and that the Ethical Society of Austin otherwise met the requirements of a religion entitled to tax-exempt status) (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) and *Malnak v. Yogi*, 592 F.2d 197, 207-10 (3d Cir. 1979) (Adams, J., concurring)).

152. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 450 (9th Cir. 1994).

tution.<sup>153</sup> However, there is also precedent for the conclusion that interpretation of the state religion clause will hew closely to that utilized by the U.S. Supreme Court with respect to the First Amendment.<sup>154</sup> What is clear is that equation of religious and conscience-based beliefs will not be based upon Idaho's RFRA which has been judicially limited to bona fide religions to the exclusion of purely secular philosophical concerns.<sup>155</sup> A similar conclusion may be drawn with respect to New Mexico as interpretation of the state constitution's religion clause follows U.S. Supreme Court precedent, but its RFRA is limited to acts or refusals to act substantially motivated by religious belief without the benefit of federal precedent.<sup>156</sup>

It is unlikely that any attempt to protect conscience based upon the state constitution or RFRA will succeed in Indiana or Kansas. Both states have rejected use of federal precedent in the interpretation of their constitutions' religion clauses.<sup>157</sup> The Indiana Court of Appeals has restricted conscience-based rights to the right to hold beliefs but not to exercise such beliefs in disregard of the law.<sup>158</sup> Additionally, both states' RFRAs focus upon acts and refusals to act motivated by religious belief.<sup>159</sup> A final barrier to the recognition of the right to conscience in Kansas may be found in a 2012 opinion of the state's attorney general interpreting the reference to conscience in the state constitution as limited to "religious conscience" and excluding beliefs that are secular in nature.<sup>160</sup>

If a right to conscience exists and is protected in those states with RFRAs, the definition of conscience then becomes important. Workable definitions may be derived from state statutes providing for conscience-based protections for individuals and entities in the healthcare profession. Five states expressly define conscience in their statutes granting protections in this context. These definitions are remarkably uniform and broad in their reach. Three states define conscience to mean religious, moral, or ethical principles sincerely held by any per-

153. *Osteraas v. Osteraas*, 859 P.2d 948, 953 (Idaho 1993) (holding that barriers to the free exercise of religion may violate the religion clause within the Idaho Constitution even if such barriers do not violate the U.S. Constitution).

154. *See State v. Fluewelling*, 249 P.3d 375, 377-78 (Idaho 2011).

155. *See supra* notes 71, 78-86 and accompanying text.

156. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-67 (N.M. 2013). *See also supra* notes 77, 88, and accompanying text.

157. *See, e.g., City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 450-51 (Ind. 2001) (declining to apply federal free exercise jurisprudence to an eminent domain proceeding concerning property utilized by a ministry for religious purposes); *Stinemetz v. Kan. Health Pol'y Auth.*, 252 P.3d 141, 156-57 (Kan. Ct. App. 2011) (citing with approval earlier Kansas appellate decisions declining to utilize federal free exercise precedent in interpreting the state constitution).

158. *See Gul v. City of Bloomington*, 22 N.E.3d 853, 858 (Ind. Ct. App. 2014) (finding that a contrary holding would be "tantamount to declaring nearly every statute and ordinance on the books in Indiana unconstitutional, as it is possible to find someone, somewhere, with a sincere belief that contravenes every law").

159. *See supra* notes 71, 74 and accompanying text.

160. *See Kan. Att'y Gen. Op. No. 2012-19*, 2012 WL 3782384, at 2 (Aug. 28, 2012).



son.<sup>161</sup> Two states include religious beliefs and non-religious beliefs in their definition of conscience as long as secular beliefs occupy a place in the life of the possessor equivalent to that filled by a deity among adherents to religious faiths.<sup>162</sup>

An additional eleven states protect conscience in the context of healthcare services but do not expressly define the term.<sup>163</sup> However, the definition may be determined utilizing the common and accepted meaning of the word as all but three of these states require such usage with respect to undefined statutory terms.<sup>164</sup> Thus, conscience may be defined as “a knowledge or sense of right and wrong, with an urge to do

161. See, e.g., IDAHO CODE ANN. §§ 18-611(b), 613 (2016) (defining conscience as “the religious, moral or ethical principles sincerely held by any person” in the context of refusals to perform, assist, or participate in an abortion); LA. REV. STAT. ANN. §§ 40:1061.20(A)(1), (B)(1) (2016) (defining conscience as a “sincerely held religious belief or moral conviction” in the context of refusals to participate in the provision of any health care service); MISS. CODE ANN. §§ 41-107-3(h), 107-5(1-3), 107-7(1-3), 109-7(1-3) (2016) (defining conscience as “religious, moral or ethical principles” in the context of refusals to participate in the provision of any health care service). *But see* IDAHO ADMIN. CODE r. 16.03.09.235 (2016) (creating a conscience-based exemption from compliance with living wills and durable powers of attorney for health care without defining conscience); LA. REV. STAT. ANN. § 29:764(A)(2)(h) (2016) (permitting persons to refuse medical examination, testing, vaccination, or treatment for religious or conscience-based reasons without defining conscience).

162. See, e.g., 745 ILL. COMP. STAT. 70/3(e) (2016) (defining conscience as “a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths” in the context of refusals to perform, assist, counsel, suggest, recommend, refer, or participate in the provision of any health care service); 18 PA. CONS. STAT. §§ 3202(d), 3203, 3213(d) (2016) (defining conscience as “[a] sincerely held set of moral convictions arising from belief in and relation to a deity or which, though not so derived, obtains from a place in the life of its possessor parallel to that filled by a deity among adherents to religious faiths” in the context of refusals to perform, provide, aid, abet, or facilitate an abortion).

163. See ARIZ. REV. STAT. ANN. § 36-3205(C)(1) (2016) (living wills and health care directives); ARK. CODE ANN. § 20-6-109(b)(1) (2016) (individual instructions and health-care decisions); CONN. GEN. STAT. § 19a-131e(b) (2016) (vaccinations); FLA. STAT. § 381.00315(1)(c)(4) (2016) (vaccinations); N.M. STAT. ANN. §§ 12-10A-13(D)(3), 24-7A-7(E) (2016) (vaccinations, individual instructions and health care decisions); OKLA. STAT. tit. 43, § 7.1(A) (2016) (solemnization and recognition of marriage by religious officials and organizations); 23 R.I. GEN. LAWS § 23-8-4 (2016) (vaccinations); S.C. CODE ANN. § 44-4-520(A)(3) (2016) (vaccinations); TENN. CODE ANN. §§ 32-11-108(a), 68-11-1808(d)(1) (2016) (living wills, individual instructions and advance directives for health care); TEX. EDUC. CODE ANN. §§ 38.001(c)(1)(B), 51.933(d)(1)(B) (2016) (immunizations); 25 TEX. ADMIN. CODE ANN. § 97.62 (2016) (immunizations); 12 VA. ADMIN. CODE § 30-20-240(5) (2016) (advance directives for health care).

164. For those states that require utilization of the common and accepted meaning of words by statute, see ARIZ. REV. STAT. ANN. § 1-1-213 (2016) (“common and approved use of the language”); CONN. GEN. STAT. § 1-2z (2016) (“plain and unambiguous” meaning); N.M. STAT. ANN. § 12-2A-2 (2016) (“common usage”); OKLA. STAT. tit. 25, § 1 (2016) (“ordinary sense”); TEX. GOV’T CODE ANN. § 311.011(a) (2016) (“common usage”). For those states that require utilization of the common and accepted meaning of words by case law, see *State v. V.H.*, 429 S.W.3d 243, 247 (Ark. 2013) (“ordinary and usually accepted meaning”); *Roe v. Gelineau*, 794 A.2d 476, 484 (R.I. 2002) (“plain, ordinary meaning”); *Alger v. Commonwealth*, 590 S.E.2d 563, 565 (Va. 2004) (“plain meaning”).

right . . . [and] feelings of guilt if one violates [an ethical] principle.”<sup>165</sup> One additional state, specifically Alabama, has adopted the common and accepted meaning of conscience through case law.<sup>166</sup> However, this approach is inapplicable to those statutes which purportedly protect conscience rights but do not expressly utilize the term in their body.<sup>167</sup>

#### IV. THE EQUIVALENCY OF RELIGION AND CONSCIENCE

##### A. *Conscience as the Moral Equivalent of Religion*

The interrelationship of religion and conscience raises the issue of their equivalency. On one side of the equation are commentators who differentiate between religion and conscience, with the latter receiving less protection.<sup>168</sup> Other scholars equate conscience and religion but have offered differing rationales for their conclusions.<sup>169</sup> How should

165. WEBSTER'S NEW WORLD DICTIONARY 296 (1988). *See also* *Conscience*, BLACK'S LAW DICTIONARY (5th ed. 1979) (defining conscience as “[t]he moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's . . . own conduct [and] in a wider sense, denoting a similar application of the standards of morality to the acts of others”).

166. *See* *Ridgeview Health Care Ctr. v. Meadows*, 590 So.2d 243, 245 (Ala. 1991) (adopting the definition of conscience from the *American Heritage Dictionary of the English Language*, specifically, “[t]he faculty of recognizing the distinction between right and wrong in regard to one's own conduct”).

167. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2154(A-B) (2016) (objection to abortion on “moral or religious grounds”); ARK. CODE ANN. § 20-16-601(a) (2016) (objection to termination of pregnancy for any reason); FLA. STAT. § 390.0111(8) (2016) (objection to termination of pregnancy for any reason); KAN. STAT. ANN. § 65-443 (2016) (objection to termination of pregnancy for any reason); KY. REV. STAT. ANN. § 311.800(4) (2016) (objection to abortion on “moral, religious or professional grounds”); MO. REV. STAT. § 197.032(1) (2016) (objection to abortion on “moral, ethical or religious beliefs”); N.M. STAT. ANN. § 30-5-2 (2016) (termination of pregnancy on “moral or religious grounds”); OKLA. STAT. tit. 63, § 1-741(A) (2016) (objection to abortion for any reason); 23 R.I. GEN. LAWS § 23-17-11 (2016) (objection to abortion or sterilization on “moral or religious grounds”); S.C. CODE ANN. §§ 44-41-40–44-41-50 (2016) (objection to abortion without the necessity of specifying the reason); TENN. CODE ANN. § 39-15-204 (2016) (objection to abortion for any reason); TEX. OCC. CODE ANN. § 103.001 (objection to abortion for any reason); VA. CODE ANN. §§ 18.2-75, 63.2-1709.3 (2016) (objection to abortion for “personal, ethical, moral or religious grounds” and objection to placement of children in foster care or for adoption on “religious or moral convictions”).

168. *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 54–55 (1996) (supporting exemptions from civil obligations solely for religious beliefs and practices); Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 234–36 (2009) (supporting a broad definition of religion and accompanying protection with weaker protections for claims of conscience); McConnell, *supra* note 51, at 1499–1500 (1990) (supporting exemptions from civil obligations solely for religious beliefs and practices); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 357 (2005) (supporting a broad definition of religion and accompanying protection with weaker protections for claims of conscience).

169. *See, e.g.*, NUSSBAUM, *supra* note 99, at 208–09 (equating religious freedom and liberty of conscience and contending that fairness requires equal accommodation of both); SANDEL, *supra* note 112, at 65–71 (advocating conscience-based exemptions in a manner similar to those available to religious beliefs); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little “Conscience,”* 1996 BYU L. REV. 645,

these differing points of view be reconciled in a rapidly changing and secularizing nation with increasingly diverse belief systems?

Conscience does not appear in the text of the U.S. Constitution.<sup>170</sup> This is not due to lack of effort as drafts of what would ultimately become the Free Exercise Clause included protections for the full and free exercise of both religion and conscience.<sup>171</sup> Determining the reason for the ultimate exclusion of conscience—be it accidental or intentional—remains a topic of speculation.<sup>172</sup>

However, “religion” and “conscience” were interchangeable in times past.<sup>173</sup> This interchangeability renders the exclusion of conscience from the Free Exercise Clause and the reasons, therefore, of lesser importance as the terms were synonymous. Calls for freedom of religion were understood to be based upon freedom of conscience, which had a decidedly religious connotation.<sup>174</sup> The primary argument for religious freedom, whether at the federal or state levels, was the inviolability of conscience.<sup>175</sup> This argument was not shared by all members of society.<sup>176</sup> Nevertheless, this interchangeability has continued into the present time, the end result of which is the current “conceptual muddle.”<sup>177</sup>

The continued interchangeability of these terms in modern times is suspect. Conscience has become secularized far beyond eighteenth-century understandings. Liberty of conscience is no longer exclusively bound to freedom to subscribe to particular religious beliefs or engage in religious actions consistent with faith-based views regarding salva-

662–74 (1996) (advocating conscience-based exemptions in a manner similar to those available to religious beliefs).

170. See, e.g., Smith, *supra* note 90, at 911.

171. See, e.g., GREEN, *supra* note 27, at 66 (discussing the initial approval of language prohibiting the U.S. Congress from infringing on the right of conscience); Beschle, *supra* note 11, at 381 (discussing earlier drafts of the First Amendment referring to “‘the full and equal rights of conscience,’ rather than the ‘free exercise’ of religion” and the ultimate exclusion of conscience from the final document); Chapman, *supra* note 25, at 1468 (discussing drafts of the Free Exercise Clause that included the free exercise of religion and the rights of conscience).

172. See, e.g., Smith, *supra* note 90, at 911 (contending that the absence of conscience from the U.S. Constitution is “probably a historical accident”). But see McConnell, *supra* note 51, at 1495 (concluding that the exclusion of conscience was deliberate and designed to protect religion as a subset of conscience).

173. See, e.g., Smith, *supra* note 90, at 912 (contending that the framers of the U.S. Constitution viewed religion and conscience as “virtually interchangeable concepts”). See also Chapman, *supra* note 25, at 1460 (contending that “[t]he drafters and ratifiers of the First Amendment . . . used religious freedom and liberty of conscience interchangeably”).

174. See Smith, *supra* note 90, at 912.

175. See Chapman, *supra* note 25, at 1466 (discussing the primacy of this argument during debates regarding the U.S. Constitution and colonial and state constitutions and bills of rights).

176. *Id.* at 1464–66, 1481–84 (comparing the religious nature of conscience in the teachings of the Apostle Paul and the Catechism of the Roman Catholic Church with the separation of the concepts in the Scottish Common Sense Movement and the sermons of Simeon Howard).

177. *Id.* at 1461.

tion.<sup>178</sup> Instead, conscience grants freedom from coercion regarding beliefs and actions that violate an individual's principles.<sup>179</sup> The result is that protection of religious liberty is only partially protective of conscience. Secular conscience, standing outside the shield afforded to religion, is, without more, unprotected.

This discussion is to make but one simple point—that while there is overlap between religion and conscience, they are not entirely the same. A moral judgment is all that is required to deem a belief or response conscience-based.<sup>180</sup> Of course, beliefs and responses may have strong religious components, but such are not required.<sup>181</sup> Conversely, religious beliefs and actions require no moral judgment and may, in fact, run counter to such judgments, that is to say, conscience.<sup>182</sup> For example, a religious person may encounter circumstances pitting their religious convictions against their conscience.<sup>183</sup> In such circumstances, a religious person may feel compelled to engage in a course of action outside of his or her faith-based convictions.<sup>184</sup> These examples demonstrate that religion and conscience overlap but do not overlay one another.<sup>185</sup> To conclude otherwise leaves religion with very little independent meaning.<sup>186</sup>

Interchangeability also fails to recognize that religious beliefs may merit greater status than moral beliefs. Religion, in the words of one commentator, is “a cluster of ideas meant to encompass the variety of beliefs and actions, personal and social, [which] respond to the experiences of birth, learning, failure, love, death, and the awe of being small in a grand universe.”<sup>187</sup> These ideas emanate from a higher power, are part of a belief system shared with others, and impose categorical demands upon adherents without regard to personal consequences.<sup>188</sup> These elements may be absent from responses based upon conscience, which may concern lesser issues rather than grand questions of ultimate meaning and whose accompanying duties more often reflect individual

178. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 424–25 (2002).

179. See *supra* notes 89–119 and accompanying text. See also Feldman, *supra* note 178, at 424–25.

180. See Chapman, *supra* note 25, at 1491.

181. *Id.* at 1461.

182. See 6 DIETRICH BONHOEFFER WORKS: ETHICS 278, 283 (Ilse Tödt et al. trans, Clifford J. Green ed., 2005). See also Chapman, *supra* note 25, at 1491.

183. See Chapman, *supra* note 25, at 1484 (discussing such moral dilemmas in the context of the teachings of the Roman Catholic Church).

184. See Greenawalt, *supra* note 44, at 911 (noting that “many sincerely religious people experience strong obligations that they do not perceive as flowing from their religious convictions and practice”).

185. See Chapman, *supra* note 25, at 1491.

186. *Id.* at 1471–72 (criticizing Rawls’ failure to distinguish between religion and morality, the net result of which was to render “conscience so vague that it could encompass virtually any strongly held belief about anything, leaving religion with little independent meaning”).

187. *Id.* at 1461. See also *supra* notes 12–24 and accompanying text.

188. See *supra* notes 19–24 and accompanying text.

autonomy rather than obedience to a higher power.<sup>189</sup> These differences may justify greater respect for and deference to religious belief.<sup>190</sup>

But must conscience address grand questions of ultimate meaning in order to merit protection? Such requirement is to return to the eighteenth-century concept of interchangeability, thereby failing to extend protection to conscience independent of its similarity to religion. Conscience and responses based thereupon deserve better.

Conscience may address the same issues as religion. The exercise of conscience is simply different from the exercise of religion. Religious belief and actions are individual and group experiences.<sup>191</sup> These beliefs and actions involve some degree of surrender of individual autonomy based upon their shared nature.<sup>192</sup> Conscience-based beliefs and responses are expressions of autonomy exercising a universal faculty possessed by all and drawing upon each individual's pool of moral knowledge.<sup>193</sup> Conscience applies individual moral knowledge to specific situations whereas religion is a source of universal moral law.<sup>194</sup> Is religion so much more deserving as to merit more protection than conscience?

Protection of communal religious beliefs and acts without protection of their individualized and nonreligious equivalents is unfair.<sup>195</sup> Conscience becomes a second-class right if the primary foci are content and the manner in which the belief is exercised rather than the integrity of the individual.<sup>196</sup> This demotion results in the government singling out particular moral perspectives for protection based exclusively upon their religiosity.<sup>197</sup> Such disparate treatment and resulting favor-

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189. See Smith, *supra* note 90, at 922–26 (citing “higher duty” as a rationale for affording greater protection to religious belief in comparison to secular conscience). Greenawalt adds the element of sincerity to this distinction as it is easier to determine the sincerity of religious beliefs due to their attachment to like-minded organizations. Greenawalt, *supra* note 44, at 915. While this may be true with respect to “mainstream religions,” it is questionable with respect to unfamiliar or unconventional faiths. See *supra* notes 26–28 and accompanying text. Furthermore, as Greenawalt concedes, there are circumstances when a claim of conscience is unlikely to be insincere due to the potential harm that may be suffered by the claimant or the absence of an advantage to be gained by asserting the claim. See Greenawalt, *supra* note 44, at 915 (citing conscience claims in the health care industry). See also *supra* notes 120–22, 167–73 and accompanying text.

190. See Smith, *supra* note 90, at 936.

191. See *supra* notes 14–15 and accompanying text.

192. See *supra* note 16 and accompanying text.

193. See Chapman, *supra* note 25, at 1490. See also Greenawalt, *supra* note 44, at 915 (noting that “nonreligious claims of conscience” more likely reflect individualized reactions).

194. See Chapman, *supra* note 25, at 1490 n.223 (citing John Locke for the proposition that while conscience serves as “a witness to a ‘universal moral law’ or ‘rule of right,’” it does not serve as a witness to the “law [as] delivered by Moses”).

195. See *supra* note 104 and accompanying text.

196. See Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1448 (2012).

197. See Sepper, *supra* note 91, at 1531 (contending that “[f]ocusing on the content of a conviction rather than the integrity of the individual simply amounts to legislating a particular moral perspective, rather than dedication to freedom of conscience”).

itism lack adequate justification assuming secular conscience is worthy of protection.<sup>198</sup> Recognizing and remedying this disparity was the basis for recent judicial opinions extending equal protection to conscience-based beliefs and responses.<sup>199</sup>

This disparity also fails to recognize that protection of religion and conscience constitutes respect for personhood owed to individuals by their governments.<sup>200</sup> If religion and conscience are central to individual identity, it follows that governmentally-compelled violations infringe upon personhood.<sup>201</sup> Infringements detract from personhood by inflicting upon affected individuals the distressing choice between adhering to one's beliefs and suffering possible legal repercussions, and deviating from beliefs with accompanying loss of identity.<sup>202</sup> Such deference is not absolute lest government become a hostage to individual prerogatives and cease functioning for the greater good.<sup>203</sup> The government also retains the power to cajole, influence, and persuade.<sup>204</sup> But absent these circumstances, governments must respect individual personhood which includes beliefs, actions, and responses based upon religion and conscience.<sup>205</sup>

There remain practical problems associated with recognition of freedom of conscience. Free belief and exercise of religion are well protected in the U.S. Constitution, federal statutes, and case law. The same is true at the state level. Similarly, no one could seriously argue for lesser protection for one's inner beliefs based upon the pool of one's moral knowledge, i.e. conscience. But the question remains whether there should be a right to free exercise of conscience complementary to the free exercise of religion. Are we willing to live with the consequences if such a right is recognized and broadly exercised? It is thus necessary to further explore the legal implications of equating conscience and religion in action.

### B. *Conscience as the Legal Equivalent of Religion*

The law does not require absolute precision in order to create and enforce legal rights. Courts have found conscience clear enough to support a legal right despite the absence of a universally agreed-upon definition.<sup>206</sup> The lack of cases with respect to this right as compared to religion reflects nothing more than the increased frequency in which religion has been litigated. This difference may also be due to the sub-

198. See, e.g., Schwartzman, *supra* note 104, at 1355.

199. See *supra* notes 121–37 and accompanying text.

200. See Smith, *supra* note 90, at 935–36.

201. *Id.* at 935.

202. *Id.*

203. *Id.* (contending that conscience is not “some sort of absolute value that government must never contravene . . . [as] sacrificing one individual’s personhood may serve to promote other peoples’ interests: these are tradeoffs that we sometimes knowingly make”).

204. *Id.*

205. *Id.* at 936–37 (contending that the government should avoid “undermining personhood by injuring the belief-action integration that helps to constitute the person”).

206. See *supra* notes 41–50, 121–37 and accompanying text.

suming of claims of conscience within religious freedom claims. Regardless, claims of freedom of conscience and religious liberty share sufficient characteristics to warrant comparable treatment and protection.<sup>207</sup>

Comparable treatment has the beneficial effect of removing advantages for religious objectors who could then “escape burdens or receive benefits that have significant secular value” otherwise unavailable to non-religious persons who have similar beliefs but which lack attribution to a divine source.<sup>208</sup> A lack of comparable treatment may provide an unfair advantage to religious persons over nonreligious persons operating without the benefit of an accompanying exemption.<sup>209</sup> The result may be a distortion of the marketplace of ideas in favor of religious messages.<sup>210</sup> Fairness and the possibility of distortion were clearly considerations motivating recent judicial decisions equating religious and secular beliefs.<sup>211</sup>

Comparable treatment also relieves courts of a potentially difficult evidentiary burden. Free exercise claims obviously have a foundation in and connection to religious belief. The same may be true for an unknown number of conscience-based claims. However, if such claims are not afforded equal treatment to those based upon religion, courts will be required to sift through the motivations of the claimant and the religious versus secular nature of the underlying beliefs. Beliefs and accompanying actions may be protected if the court deems them to be religiously motivated. By contrast, purely secular beliefs and responses,

207. See Greenawalt, *supra* note 44, at 916 (contending that religious and conscience-based claims are “similar enough to warrant comparable treatment . . . even when they are demonstrably mistaken”). See also *supra* note 129 and accompanying text.

208. Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 71 (2006). “Secular value” refers to any cost savings associated with an objection and consequent exemption from legal obligations including facilitation of communication and reduction of operational costs. *Id.* at 64, 71. See also Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 123 (2006) (contending that “it is essential that we not privilege moral beliefs that are religiously based over other sincerely held core, moral beliefs”); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591, 613–23 (1990) (contending that religious exemptions lack legal justification as there is nothing distinctive about religion that justifies granting its privileged status over other rights).

209. Brownstein, *supra* note 208, at 71. See also West, *supra* note 208, at 601 (stating that “exemptions to certain persons because of their religion . . . may give those religions . . . an unfair advantage over other religions, secular ideologies, churches, nonprofit organizations, or businesses with which they compete for members and money”). Alvin Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 750 (2001) (contending that religious objectors possess “a tool to bypass the effects of neutral, generally applicable laws on the basis of religious reasons that are unavailable to objectors with nonreligious reasons”).

210. Brownstein, *supra* note 208, at 64–65. See also Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don’t Work*, 31 LOY. U. CHI. L.J. 153, 196 (2000) (contending that religious objectors occupy a privileged position with respect to every state and local law or policy).

211. See *supra* notes 122–25, 133–37 and accompanying text.

and those lacking a sufficient connection to religious motivation would be unprotected.

The determination of underlying motivations is essential in the absence of equivalence as every claim of protected activity turns upon its resolution. Courts must make this determination despite difficulties associated with judging the magnitude of convictions.<sup>212</sup> This prospect is all the more difficult if the claimant is unable to completely describe his or her convictions, articulate their depths, and explain their centrality to his or her life.<sup>213</sup> Even an intensive examination of the claimant, his or her beliefs, and the relationship of those beliefs to the response at issue cannot guarantee a clear determination with respect to personal motivations and sincerity.<sup>214</sup>

Equivalent treatment for religion and conscience eliminates these burdens as courts would no longer need to differentiate between religious and secular motivations. All such beliefs, whether religious or secular, would be protected as long as they are sincerely held.<sup>215</sup> Government restriction of conscience-based responses would be subject to the same limitations as those imposed upon the free exercise of religion. This would include application of the substantial burden, compelling governmental interest, and least restrictive means tests.<sup>216</sup>

Equivalency would relieve courts of the obligation to engage in “armchair social theory” in order to determine whether a claim of conscience had an adequate religious foundation to merit protection.<sup>217</sup> That said, equivalency raises a different set of evidentiary issues. For example, secular conscience claims generally cannot cite to supporting “texts, doctrines, and commands, either written or passed down orally among many adherents.”<sup>218</sup> Courts confronted with such claims would

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212. See *supra* note 114 and accompanying text. See also Greenawalt, *supra* note 44, at 912 (noting “how hard it may be to draw a line between nonreligious and religious claims when people are somewhat religions [sic] and the connection of conscience to religious convictions is weak or remote”).

213. See *supra* note 115 and accompanying text.

214. See *supra* note 116 and accompanying text.

215. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (in which the Court affirmed its previous determination that “[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*” and that the government “may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to the authorities”) (citing *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); and *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

216. *Id.* at 403–07 (holding that religiously-motivated acts, as contrasted with beliefs, were “not totally free from legislative restrictions” but striking down substantial burdens upon free exercise unless the government could demonstrate the presence of a compelling interest accomplished through utilization of the least restrictive means). See also *supra* note 52 and accompanying text. The standards may be different in those states without a RFRA or case law extending enhanced protection to free exercise. See *supra* note 51 and accompanying text.

217. Chapman, *supra* note 25, at 1493. See also Greenawalt, *supra* note 44, at 912 (contending that “[t]he occasional difficulty of drawing the distinction in practice [between nonreligious and religious claims] is one reason to treat religious and nonreligious claims equally”).

218. LEITER, *supra* note 13, at 95.



be required to “peer into the depths of a man’s soul.”<sup>219</sup> But courts are called upon to peer into these depths on a routine basis in any case in which subjective intent is at issue.<sup>220</sup> The determination of the presence of scienter in fraud, mens rea in a criminal prosecution, corrupt intent in a Foreign Corrupt Practices Act case, or impermissible discriminatory animus in wrongful discharge litigation are but some examples. Furthermore, as previously noted, these determinations are easier when an individual has suffered some negative consequence as a result of his or her response.<sup>221</sup>

Similarities, fairness and evidentiary issues aside, future efforts equating conscience and religion, judicial, statutory or otherwise, should proceed with considerable caution. The introduction of a broad-based conscience right and accompanying exemptions may be thought of as across-the-board simultaneous amendments of every federal and state statute that imposes some obligation to which a person may have an objection.<sup>222</sup> There is a further risk that equivalence and accompanying accommodations and exemptions will become permanent. Courts are unlikely to invalidate a legislatively-recognized right to conscience and accompanying privileges. Legislatures are also unlikely to repeal such enabling legislation or overturn a judicial opinion recognizing a constitutional basis for such a right. In a manner similar to the free exercise of religion and accompanying accommodations and exemptions, any such effort would not be neutral as it would target persons who conscience rights were previously recognized.<sup>223</sup>

As a result, it is probable that the government would never eliminate or narrow a previously-recognized right to conscience even in response to changes in public opinion. After all, if the free exercise of religion is not subject to restraint based upon public opinion or the acceptability of the beliefs and practices associated therewith, then the same must hold true for its doctrinal counterpart. Any recognized right to conscience may become a permanent part of constitutional jurisprudence. This possibility would include the recognition of conscience rights with unknown and unknowable consequences. The boundaries of such rights would be tested, interpreted, and expanded perhaps beyond those circumstances serving as their original justification. These possibilities merit a cautious approach by courts and legislatures in addressing conscience-based issues.

One possible unforeseen consequence of equivalence is the identity of persons able to assert conscience rights. In *Burwell v. Hobby Lobby Stores, Inc.*, the U.S. Supreme Court recognized free exercise rights for

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219. *Id.*

220. See Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion is Special or Not*, 127 HARV. L. REV. 1395, 1414 (2014) (reviewing BRIAN LEITER, WHY TOLERATE RELIGION? (2013)).

221. See *supra* notes 117–19 and accompanying text.

222. See Lund, *supra* note 51, at 493 (describing such amendments in the context of state RFRA's).

223. *Id.* at 495.

close corporations.<sup>224</sup> If close corporations possess free exercise rights, do they not also possess conscience rights? The answer to this question would appear to be positive given that current statutory and case law have extended conscience rights to non-natural persons.<sup>225</sup> If not, on what basis might such entities be denied these rights? It is fair to conclude that conscience rights extend to non-natural persons to the same extent as the right to free exercise of religion. Caution is once again warranted as the full implications of *Hobby Lobby* have yet to be determined.

Furthermore, as noted in Justice Ginsburg's dissent in *Hobby Lobby*, the logic of the majority opinion extends free exercise rights to "corporations of any size, public or private."<sup>226</sup> Whereas the harm that a conscience-based claim by a truly "small business" may be limited, this harm would be magnified should such a claim be made by a larger entity. If conscience rights are limited to "small businesses," on what legal ground should such limitation rest? The clear implication from the majority opinion in *Hobby Lobby* is that ownership structure rather than size is an important factor. But "close corporations" can be quite large.<sup>227</sup> The extension of free exercise rights to all businesses regardless of revenues, number of employees, or market impact also undercuts the argument that the relationship between an individual's religious and moral principles and the operation of his or her business becomes attenuated as a result of growth.<sup>228</sup> It is naïve to assume that the bigger the business, the less likely it is to assert religious or conscience rights. *Hobby Lobby's* assurance that it is "improbable" that large, publicly traded companies will avail themselves of such rights remains to be determined.<sup>229</sup>

If size is not determinative, should the presence or absence of conscience rights be based upon the nature of the commerce in which the business is engaged? For example, personal service providers tend to be "the embodiment[ ] of the owner's identity."<sup>230</sup> But making a

224. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

225. See *supra* notes 121–25, 133–37, 161–62 and accompanying text.

226. *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting).

227. *Id.* at 2797 n.19 (citing Mars, Inc. (\$33 billion in revenues and 72,000 employees) and Cargill, Inc. (\$136 billion in revenues and 140,000 employees) as two examples of family-owned or closely held businesses).

228. This argument contends that the larger a business becomes, the less justification exists for personal identification of the owner's religious beliefs with the business' operations. See, e.g., Kelly Catherine Chapman, *Gay Rights, The Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1810 (2012) (contending that "[o]nce an entity reaches a critical mass, the justification for an owner's feeling that his or her religious freedoms have been infringed upon through a personal identification with his or her business . . . becomes less credible"); DOUGLAS LAYCOCK, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 199 (Douglas Laycock et al. eds., 2008) (arguing that "[l]arge businesses take up more market share, and an owner's claim of personal responsibility for everything that happens in his business grows more attenuated as the business expands.").

229. *Hobby Lobby*, 134 S. Ct. at 2774.

230. Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 227 (2010).

broad-based right such as conscience contingent upon the type of commerce at issue appears arbitrary and lacking in clear guidance from legislatures and courts. Such attempts have also been rejected in the context of free exercise as it relates to public accommodation statutes.<sup>231</sup> These failed efforts to carve out a religious exemption in the context of personal services establish a strong precedent weighing against conscience-based attempts.

Considerable care is also necessary in order to blunt criticism that recognition of conscience rights is “tantamount to constitutionalizing a right to civil disobedience”<sup>232</sup> or creating “an individual right of nullification.”<sup>233</sup> Regardless of how it is characterized, the concern is that recognition without clear limitations would be equivalent to the “legalization of anarchy.”<sup>234</sup> Such circumstances, should they come to pass, cast significant doubt upon the ability of government to perform its basic functions lest it encroach upon one or more citizens’ sincerely-held, but non-religious, beliefs.<sup>235</sup>

Recognition may also impose burdens on others. Individuals may be burdened to the extent that they are required to bear the costs associated with an exercise of conscience rights, be it through a denial of access to desired goods and services, increased financial and time costs, or other potential injuries and inconveniences.<sup>236</sup> These costs may be shared with others as recognition potentially interferes with government’s obligation to determine, secure, and promote general welfare and the common good.<sup>237</sup> Collective obedience to generally applicable laws are necessary to achieve these outcomes.<sup>238</sup> The recognition of conscience rights is an “objectionable injury to the general welfare” if it results in selective exemptions from such laws.<sup>239</sup> The recognition of a

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231. See *supra* note 4 and accompanying text.

232. LEITER, *supra* note 13, at 94.

233. Beschle, *supra* note 11, at 382.

234. LEITER, *supra* note 13, at 94.

235. See Feldman, *supra* note 178, at 426.

236. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (noting that absent robust legal protections, discrete groups could be excluded from an “almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”); See also Brownstein, *supra* note 208, at 128 (discussing injury to individuals resulting from the recognition of free exercise rights and specifically noting that religious exemptions are difficult to justify if they cause “significant harm to specific individuals or the members of a discrete class” and force such individuals and groups to bear the entire cost of any exemption while others to whom there is no religious objection enjoy the full benefits and protections of the law); Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622 (2000) (contending that religious beliefs and practices are unreasonably privileged when they cause harm to and impose unequal burdens upon individuals and groups and that courts are less deferential to such beliefs and practices when they “perceive third parties to be at risk of harm”).

237. LEITER, *supra* note 13, at 118; See also *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 64 (N.M. 2013) (discussing the role of the government to ensure opportunities for full and equal participation in the market by all persons and protect individuals from humiliation and dignitary harm).

238. LEITER, *supra* note 13, at 99.

239. *Id.* But see Rienzi, *supra* note 220, at 1415 (contending that the granting of exemptions based upon free exercise considerations advances the common good and is

right to conscience and its equivalency with religion may promote greater individual freedom to the extent that it restrains government from forcing individuals and institutions to violate deeply and sincerely held beliefs.<sup>240</sup> The desirability of this outcome in comparison to “a system in which the coercive power of government can be employed by the majority to stifle differences and force conformity even without a particularly strong reason” is unquestioned.<sup>241</sup> The issue is rather who should bear the burdens that accompany this enhanced personal freedom.

One potential response to these concerns is to deny their legitimacy. The record to date with respect to free exercise rights and accompanying exemptions is hardly one of anarchy. The federal RFRAs and many of the state RFRAs are now more than twenty years old.<sup>242</sup> The enforcement of these statutes has not created anything close to chaos. In fact, the statutes have been widely criticized as ineffective and largely irrelevant.<sup>243</sup> Conscience exemptions also have been engrained in the U.S. legal system with respect to a wide variety of circumstances without accompanying anarchy.<sup>244</sup> It is unlikely that the recognition of additional conscience claims would have a dramatic impact given that most claims are at least in part religious rather than entirely secular in nature and thereby already qualify for protection under preexisting RFRAs or constitutional provisions.<sup>245</sup> Limitations upon utilization of state RFRAs and constitutional provisions to advance purely secular claims also may limit the impact of equivalency.<sup>246</sup> Societal and individual burdens that may result from the recognition of such claims are likely to be minimal if not non-existent.<sup>247</sup>

Nevertheless, there remains an issue regarding under what circumstances, if any, should such conscience rights yield to other interests. For example, should a conscience-based objection give way if its assertion would impose a heavy burden upon an individual perhaps by limiting access to a good or service or substantially increasing its cost? Such

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not “necessarily injurious to the general welfare”). According to Rienzi, exemptions would be legislatively abolished if they were determined to threaten the common good. However, the likelihood of abolition is perhaps more difficult than anticipated by Rienzi. See *supra* notes 222–23 and accompanying text.

240. See Rienzi, *supra* note 220, at 1410 (stating that “[a]s a general rule, in a free and pluralistic society, the government should not force people and institutions to violate their deeply held beliefs unless it has a particularly strong reason to do so”).

241. *Id.* (further contending that such a system is “incompatible with the nation’s aspiration to be welcoming, inclusive, and pluralistic”).

242. See *supra* notes 5, 51, and accompanying text.

243. See, e.g., Lund, *supra* note 51, at 468, 479–80 (contending that RFRAs “simply have not translated into a dependable source of protection for religious liberty at the state level” and that there is “reason to doubt that state RFRAs provide meaningful protection for religious observance” given the almost complete absence of litigated claims).

244. See *supra* notes 161–67 and accompanying text; see also Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 134–35, 139–41, 145 (2012) (discussing conscience-based objections to military service, capital punishment and assisted suicide).

245. See Rienzi, *supra* note 220, at 1412.

246. See *supra* notes 152–60 and accompanying text.

247. See Rienzi, *supra* note 220, at 1415.

an exemption has been proposed for religious objectors to same-sex marriage.<sup>248</sup> Should such an exemption be available for secular-based objections as well and, if not, why not assuming religion and conscience merit equal protection?

There are several difficulties with a hardship exemption assuming that it is available for conscience-based objections. An initial difficulty is the determination of what constitutes a hardship. One method of defining hardship in the context of access to goods and services is whether there are alternate providers.<sup>249</sup> However, this method of determining hardship places burdens upon objectors with respect to determining the identity of alternate providers and whether goods or services offered by such providers are adequate substitutes.<sup>250</sup> Measurement of hardship is also problematic. Possible measures include cost increases, the financial ability of the affected party to bear such costs, and the geographic availability of substitute goods and services.<sup>251</sup> A satisfactory legislative balance readily adaptable to the myriad of circumstances in which it would arise is improbable.<sup>252</sup> Reliance upon courts presents these same problems as well as introducing additional costs and uncertainty associated with litigation.<sup>253</sup> An unfair resolution would result from either approach given that the valid exercise of conscience rights in either case would turn upon the location of the objector, cost, and other factors apart from what should be the determinative factors, specifically, the belief in question and the sincerity in which it is held.<sup>254</sup>

Another issue is whether providers of “vital goods or services” should be permitted to deny access to members of the public for conscience-based reasons. Exceptions to the right to exercise conscience under such circumstances would be controversial and risk either overbreadth or underinclusiveness.<sup>255</sup> This assumes that there is an accepted definition of “vital goods and services,” which is unlikely to occur given the wide variety of definitions contained within state law.<sup>256</sup>

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248. See, e.g., Berg, *supra* note 230, at 208; Laycock, *supra* note 228, at 200.

249. See Kelly Catherine Chapman, *Gay Rights, The Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1814 (2012).

250. *Id.* at 1814 (noting that this definition of hardship would require the cataloging of every business in order to keep an accurate account of additions or losses to the market thereby placing a “great burden on the business to remain cognizant of every new move, as well as to rely on its own judgment about whether a service or business is substantially similar enough to be considered a substitute”).

251. *Id.*

252. *Id.* at 1815.

253. *Id.* at 1814.

254. *Id.* at 1815.

255. For example, vague platitudes about “preservation of life, health, and public safety” are meaningless without further specificity which would most likely be acquired through judicial precedent over an extended period of time. Conversely, a specific “laundry list” of goods and services deemed “vital” could not possibly be all-inclusive and anticipate every future circumstance.

256. For a discussion of the definition of “vital services” in the context of sexual orientation discrimination, see Dhooge, *supra* note 31, at 357 n.169.

These varying definitions have the potential to create differences between jurisdictions. Such variations create an impression of arbitrariness which may serve as grounds for future judicial challenges. Enforcement of access rights through the threat of administrative action or litigation would prove unpopular although perhaps to a lesser degree than if the enforcement action was directed against persons asserting free exercise rights.

Another potential difficulty relates to indirect violations of conscience. If direct government restrictions are subject to the same limitations as those imposed upon the free exercise of religion, what standards should govern potential indirect violations? Should conscientious objectors be able to block governmental actions that facilitate objectionable behavior?

Same-sex marriage, the impetus underlying many state RFRAs, is but one such example.<sup>257</sup> Conscience-based objections to facilitating same-sex marriage go well beyond merely providing a venue, invitations, flowers, and a cake. As noted by the Becket Fund for Religious Liberty, many other actions could facilitate same-sex marriage.<sup>258</sup> Should a conscience-based objection to same-sex marriage permit a landlord to refuse to rent an apartment to a same-sex couple? Should such an objection allow an employer to threaten an employee with termination should he or she have a same-sex partner, let alone marry them? The answer to these questions must be “yes” if such exemptions are provided to religious objectors. Any action that makes living arrangements and financial stability easier for same-sex couples potentially facilitates marriage regardless of whether the objection is religious or secular. But if this proposed exemption is too vague and capable of abuse in a religious context, then it is most certainly so in the context of conscience.<sup>259</sup>

It is unlikely that a conscience-based exemption would be limited to same-sex marriage. If the basis for the objection is homosexuality rather than the institution of marriage, then the proponent should be able to assert an objection to all members of the LGBT community, married or not.<sup>260</sup> If the purpose of equivalency is to recognize and protect sincere conscience-based beliefs and responses, then why should any potential exemption from antidiscrimination laws be limited to homosexuals? If this is the true purpose of equivalency, then any accompanying exemption should permit different treatment of any group, individual, or conduct upon which there is a sincerely-held

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257. See *supra* notes 3–6 and accompanying text.

258. See THE BECKET FUND FOR RELIGIOUS LIBERTY, SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (Jan. 2009) (listing employment of a person in a same-sex marriage, the extension of benefits to same-sex spouses, and providing housing to same-sex couples as examples).

259. See Michael Kent Curtis, Essay, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 194 (2012) (contending that a religion-based “facilitation” exemption to same-sex marriage is too vague and capable of abuse to serve as a serious basis for legislation).

260. *Id.* at 183, 194.

moral viewpoint.<sup>261</sup> This may include unmarried heterosexual couples who cohabit, members of particular ethnic groups, women, and even religious believers. Differing treatment may be prohibited by federal law in some circumstances.<sup>262</sup> However, such results are arguably permissible from the Court's decision in *Hobby Lobby*, which only expressly prohibited race discrimination on religious grounds.<sup>263</sup> Presumably this limitation would be identical for equivalent conscience-based objections.

There should be no blanket exemptions for conscience-based responses in the same manner as there are no such exemptions for free exercise.<sup>264</sup> The protections afforded to free exercise by the federal RFRA would be applicable to claims of conscience at the federal level.<sup>265</sup> Applying this statute, the government would be prohibited from imposing substantial burdens upon a person's exercise of conscience even if the burden resulted from a rule of general applicability unless it was acting in furtherance of a compelling governmental interest and utilizing the least restrictive means of furthering such interest. Similar results may obtain in those states with RFRAs although slight variations between states may lead to different results across jurisdictions.<sup>266</sup> Conscience-based claims may be subject to the limitations applicable to their religious equivalents through application of the U.S. Supreme Court's opinion in *Employment Division v. Smith* in states without RFRAs or whose RFRAs are restricted to purely religious claims.<sup>267</sup> Conscientious objectors would be required to comply with neutral laws of general applicability without requiring the government demonstrate

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261. *Id.* at 194 (advancing such a contention in the context of religion).

262. *See, e.g.*, 42 U.S.C. §§ 2000a(a), 2000e-2(a)(1) (2016).

263. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014) (stating that the Court's opinion did not provide a "shield" for racial discrimination on the basis of religion as "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal").

264. *See* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 676-77 (1999) (stating that, in the context of free exercise, if such claims "sweep too broadly, it is virtually impossible to avoid situations where most reasonable people would agree that secular concerns trump arguably religious claims" and that there are "many situations where it is reasonable to expect religious groups to respect and be willing to accommodate the needs of surrounding society"). Professor Brownstein summarized the need for acceptance of limitations as follows: "Broadly defined rights cannot always receive rigorous protection because doing so would unreasonably interfere with the government's ability to further the public good. No democratic society will surrender its power to pursue interests that conflict with rights so completely and irrevocably. Insistence on a rigid commitment to rigorous review risks an obvious response: the scope of the right will be limited to only those situations in which it does not conflict with any interests the society values or cares about." Brownstein, *supra* note 208, at 82.

265. *See supra* notes 52-53 and accompanying text.

266. *See* Lucien J. Dhooze, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 U. FLA. J.L. & PUB. POL'Y 1 (2016) (discussing variations among state RFRAs with respect to definitions, the determination of substantial burdens, and application of the compelling interest and least restrictive means tests). *See also supra* notes 68-88 and accompanying text.

267. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). *See also supra* note 51 and accompanying text.

an underlying compelling interest.<sup>268</sup> Significantly fewer conscience-based claims would be successful applying this more exacting standard.<sup>269</sup> While imperfect and non-uniform, these three standards have proven durable, workable, and consistent with settled values.<sup>270</sup>

The outcome of any given case will vary assuming that the recognition of conscience claims is so limited. Claims will be well-justified in some circumstances. In other cases, such claims may inject ill-advised “morality determinations” into decision-making thereby inviting arbitrary, unpredictable, and discriminatory results.<sup>271</sup> Regardless of the type of case, it will be necessary to balance the desirability of protecting individual conscience-based beliefs and responses with outcomes that serve the greater good by enhancing communal “equality and practical liberty.”<sup>272</sup> As in the case of free exercise claims, this is a determination that we must trust to the courts if conscience is to be granted equivalence with religion.

## V. CONCLUSION

The protection of religious belief and its free exercise have a long history in the United States. The focus on RFRA at the state level is but the most recent chapter in this saga. Protection of beliefs rooted in conscience often have been overlooked given their historical synonymy with religion. Although lacking an equally long pedigree, responses arising from secular-based conscience in discreet areas such as military service, medicine, and capital punishment have been protected.

268. See *Smith*, 494 U.S. at 879, 888 (holding that the undiluted application of the compelling interest test would invalidate every regulation that did not protect “an interest of the highest order” and “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”).

269. See *id.* at 879, 885 (noting that the creation of “a private right to ignore generally applicable law” would “permit every citizen to become a law unto himself,” invite anarchy, and contradict “constitutional tradition and common sense”).

270. See, e.g., *Durham*, *supra* note 264, at 677 (accepting the balancing aspect of any case involving a perceived clash between free exercise rights and governmental interests but also noting that “the balancing occurs on scales that are at best metaphorical and that lack any metric for quantifying what is being measured on a common scale”); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1301 (1996) (contending that the balance between individual rights and the public interest in the context of free exercise rights is not an outlier but rather is “in accord with current settled values”).

271. See, e.g., *Dhooge*, *supra* note 31, at 363–64 (identifying public accommodation statutes as area in which “morality determinations” are ill-advised and further contending that “[p]ublic accommodation statutes by their nature are free from moral judgments. All persons are permitted to access and enjoy public accommodations regardless of their physical characteristics or beliefs. In permitting such access and enjoyment, these statutes separate the issue of discrimination from moral or social acceptance”). See also *Chapman*, *supra* note 249, at 1792 (advancing the same contentions with respect to “human rights”); *Curtis*, *supra* note 259, at 176–77 (advancing the same contentions with respect to laws prohibiting race and gender discrimination); *West*, *supra* note 208, at 604–08 (contending that conscience-based considerations may invite discriminatory results in certain instances).

272. *Curtis*, *supra* note 259, at 180.



Recent judicial decisions equating conscience and religion are unsurprising given the close, sometimes overlapping, doctrinal relationship between these concepts. What is surprising is the potential for the recognition of a broad-based right of conscience and accompanying expanded protection beyond discreet areas. Although they are not identical, considerations of fairness and respect for personhood nevertheless support similar legal status for conscience and religion.

There are tangible benefits arising from equal status. Equivalence removes advantages for religious objectors who would otherwise escape burdens or gain advantages unavailable to non-religious objectors. Equivalent treatment also relieves courts of difficulties associated with determinations regarding whether beliefs and associated actions are religiously motivated and thereby worthy of protection, or secular and thus subject to some lesser degree of protection if any. All beliefs, whether religious or secular, would be protected. The free exercise of these beliefs would be subject to the same limitations, and government interference would be required to satisfy well-established and understood standards.

Potential problems associated with equivalence warrant a slow approach with considerable care exercised to identify and address possible negative consequences. This article has addressed some of these consequences. A cautious approach is appropriate given these consequences and that true equivalence requires the extension of conscience rights to non-natural persons pursuant to the holding in *Hobby Lobby*. Such an approach is further justified by the likelihood that, once established, equivalent protection of conscience-based objections is likely to become a permanent part of the legal landscape.

Equivalent treatment of religion and conscience is appropriate in an increasingly secular age. Careful and deliberate consideration is necessary in order to dispel concerns about legitimizing bad faith claims, constitutionalizing civil disobedience, interfering with government functions, and other deleterious consequences. Skillful management by legislatures and courts can foster equality without anarchy, and a parade of progress rather than one of horrors.<sup>273</sup>

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273. See Smith, 494 U.S. at 889 (listing challenges to compulsory military service, the payment of taxes, health and safety regulations, compulsory vaccination requirements, drug laws, traffic laws, certain types of social welfare legislation, child labor laws, prohibitions upon animal cruelty, environmental protection laws, and laws prohibiting racial discrimination as part of a “parade of horrors” should the compelling interest standard be applicable to all actions believed to be religiously commanded).