

## THE RELIGIOUS DIFFERENCE: EQUAL PROTECTION AND THE ACCOMMODATION OF (NON)-RELIGION

[I]t is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however “ultimate” their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope. . . . “[T]o have the protection of the Religion Clauses, the claims must be rooted in *religious* belief.”<sup>1</sup>

The First Amendment provides for specific rules that apply to “religion” without defining the term.<sup>2</sup> This definition seems essential; the prohibition on establishment and the guarantee of free exercise apply by the law’s terms to *religion*,<sup>3</sup> and not to anything that is *not religion*.<sup>4</sup> Although Judge Adams in the epigraph seems to easily explain the distinction as one between mere “strongly held ideologies” on the one hand and “religion” on the other, it is not clear that such a distinction is actually possible.<sup>5</sup> Black’s Law Dictionary, for example, qualifies every factor that it includes in its

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1. *Africa v. Pennsylvania*, 662 F.2d 1025, 1034 (3d. Cir. 1981) (Adams, J.) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

2. *See Reynolds v. United States*, 98 U.S. 145, 162 (1879) (“The word ‘religion’ is not defined in the Constitution.”).

3. U.S. CONST. amend. I, cl. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

4. *See Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) (“Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.”); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–53 (2012) (“The Establishment Clause says that Congress cannot pass any law respecting an establishment of religion. It does not prohibit the establishment of nonreligious ethical or moral views.”); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153 (1991) (“[M]ost aspects of [human] freedom receive only generic protection through provisions designed to ensure, for example, democratic government and due process of law.”).

5. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 825 (2009) (arguing that “choosing among contested conceptions of what is religious . . . is contradictory and self-destructive at its very core”); George C. Freeman, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1548 (1983) (“[T]he very attempt to define ‘religion’ is itself misconceived.”); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N. D. L. REV. 123, 220 (2007) (describing the definition of religion as “a question without an answer” in the post-modern world).

definition of religion, leaving nothing concrete in the concept.<sup>6</sup> Black’s must use such a malleable definition because even among core religions—those beliefs that are unambiguously religious<sup>7</sup>—there is significant diversity.<sup>8</sup> When one expands the term beyond that core, the definition may become even murkier: some scholars have argued that the title of religion should extend to fitness clubs, television shows, or even sports fandoms.<sup>9</sup> Despite Judge Adams’s conviction, it simply does not appear there is any essence of religion, with which a belief becomes religious and without which a belief cannot be religious.<sup>10</sup>

This difficulty ultimately comes from a seemingly insurmountable problem: that “[r]eligion *must* be special, and yet it *is not*.”<sup>11</sup> The First Amendment and various statutes posit religion as meriting special treatment, but there does not seem to be any satisfying normative reason for that treatment.<sup>12</sup> One response is to completely reimagine religious freedom and reduce the concept to another theory which does not distinguish between religious and non-religious motivations, such as the theory of “Equal Liberty” proposed by Professors Eisgruber and Sager.<sup>13</sup> Though the

6. *Religion*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A system of faith and worship [*usually*] involving belief in a supreme being and [*usually*] containing a moral or ethical code; [*especially*], such a system recognized and practiced by a particular church, sect, or denomination.”) (emphasis added).

7. A particularly narrow view could cover “solely the five religions that have an extended history and an overwhelming global membership—Buddhism, Christianity, Hinduism, Islam and Judaism.” Robert Bejesky, *United States Obligations Under International Law and the Falun Gong v. Jiang Zemin Lawsuit: A Justified Reaction to a Threat to Public Security or Genocide? You Decide*, 11 U.C. DAVIS J. INT’L L. & POL’Y 295, 328 (2005).

8. For example, Buddhists are at least arguably non-theistic. See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). This alone distinguishes Buddhism from the other core religions. Though even within those core religions, such as Christianity, there are sects—Catholics, Calvinists, Unitarians, and Lutherans among countless others—all of whom arguably share a god, but differ substantially in their conceptions of that god and humanity’s relation to it.

9. See Mark Oppenheimer, *When Some Turn to Church, Others Go to CrossFit*, N.Y. TIMES (Nov. 27, 2015), <http://www.nytimes.com/2015/11/28/us/some-turn-to-church-others-to-crossfit.html> (summarizing academic opinions on groups that might be treated as religions).

10. See Freeman, *supra* note 5, at 1548 (“There simply is no essence of religion, no single characteristic or set of characteristics that all religions have in common that makes them religions.”); Andrew Koppelman, *Religion’s Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 75 (2013) (“In American law, there is no set of necessary and sufficient conditions that will make something a ‘religion.’”).

11. Schwartzman, *supra* note 4, at 1353; see also Anthony Ellis, *What Is Special About Religion?*, 25 LAW & PHIL. 219 (2006).

12. See Schwartzman, *supra* note 4, at 1401 (“[R]eligion is not morally distinctive as compared with secular doctrines.”).

13. See generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007). “Equal Liberty . . . denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions.” *Id.* at 6. Instead it “insists on a broad understanding of constitutional liberty generally,” *id.* at 52, and “a robust regime of rights not specifically directed at religion,” *id.* at 281; see also, e.g., James W. Nickel,

logic of these positions is in conflict with the plain text of the First Amendment,<sup>14</sup> this view has become standard, if not even “ho-hum,” among legal theorists.<sup>15</sup>

Despite the banality of the position among the legal literati, the idea that religion does not have special significance has not yet directly made its way into constitutional jurisprudence.<sup>16</sup> Certainly, religious liberty remains “the first freedom” in our Bill of Rights, at least literally, if not metaphorically.<sup>17</sup> That freedom does not stop at the Constitution: a 1992 student Note estimated that over two thousand statutes at the state and federal level included religious exemptions.<sup>18</sup> Repeating that student’s methodology today shows a slight uptick in such statutory exemptions to more than 2,200.<sup>19</sup> Chief among those statutes are the Religious Freedom Restoration Act (“RFRA”),<sup>20</sup> the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),<sup>21</sup> and their state-level equivalents,<sup>22</sup> all of which provide religion with generalized special treatment,<sup>23</sup> while making only passing

*Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 942 (2005) (arguing that “religious belief and activity are an application area whose content is adequately covered by more general rights and liberties”).

14. See *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012) (“[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) (arguing for special treatment of religion “[b]ecause the Constitution says so”); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9 (2000) (citing “[t]he very text of the Constitution” in support of “singling out” religion).

15. STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 139 (2014).

16. See *Hosanna-Tabor*, 132 S. Ct. at 706 (finding it “remarkable” and “untenable” that a church would have the same freedom of association claim as a non-religious organization).

17. See, e.g., Michael W. McConnell, *Why is Religious Liberty The “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1243 (2000).

18. James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

19. The original Note searched “religio! w/20 exempt! or except!” in the Lexis file AIIcde. See *id.* at 1445, n.215. Using those same terms on Lexis Advance in “Statutes & Legislation / Codes” returned 2,763 results on October 10, 2016. This total should be reduced by about 1/5th to 2210 to account for the over-inclusiveness of the search. See *id.* (making this same reduction).

20. 42 U.S.C. § 2000bb (2012).

21. 42 U.S.C. § 2000cc (2012).

22. See *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/WR23-SG2N>] (listing 21 states that have enacted state RFRA that “echo” the federal RFRA).

23. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 42 (2013) (“The RFRA laws pervasively single out religion for special treatment in the law. They require courts to consider religious (and only religious) accommodation claims, and to grant them unless there is some very strong state interest to the contrary.”). RFRA allows a governmental burden on religion to exist only if it “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b); see also RLUIPA, 42 U.S.C. §§ 2000cc, 2000cc-1 (same).

attempts at definition.<sup>24</sup>

Recently the District Court for the District of Columbia and the Seventh Circuit have recognized and loosened the tension between religion's potentially undeserved special status and the existing statutory frameworks that seek to privilege it, all while preserving these statutes in their entirety.<sup>25</sup> In *March for Life v. Burwell*,<sup>26</sup> the district court found that equal protection required that a non-religious organization opposed to abortion have access to an existing exemption for religious institutions also opposed to abortion.<sup>27</sup> In its decision, the court relied on a 2014 case from the Seventh Circuit, *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*,<sup>28</sup> which enjoined the state of Indiana from enforcing a law that prohibited a Secular Humanist group from solemnizing marriages, but granted a broad exemption for "[a] member of the clergy of a religious organization."<sup>29</sup> Both cases centered on the understanding that "religiosity 'cannot be a complete answer' where . . . two groups with a shared attribute are similarly situated 'in everything except a belief in [a] deity.'"<sup>30</sup> Thus, the definition of religion and the claimant's<sup>31</sup> place within that definition were irrelevant to their entitlement to the exemption. Simply put: the courts held that, for the purposes of these particular laws, religion was not particularly special.

Part I of this Note will summarize the facts and holdings of *March for Life* and *Center for Inquiry* in order to provide a starting point for analyzing

24. RLUIPA, 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); RFRA, 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in [RLUIPA]."); see also, e.g., Illinois RFRA, 775 ILL. COMP. STAT. 35/5 (2015) ("'Exercise of religion' means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.").

25. Even more recently the District Court for the Middle District of Pennsylvania has partially rejected this holding. See *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419 (M.D. Penn. 2015), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

26. 128 F. Supp. 3d 116 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015).

27. *Id.* at 128; see also 26 C.F.R. § 54.9815-2713A (2015), 29 C.F.R. § 2590.715-2713A (2015), 45 C.F.R. § 147.131 (2015) (the regulations at issue in the case). This is the same exemption at issue in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) and that returned more recently in *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (May 16, 2016) (*per curiam*).

28. 758 F.3d 869 (7th Cir. 2014).

29. IND. CODE §31-11-6-1 (2015).

30. *March for Life*, 128 F. Supp. 3d at 127 n.8 (quoting *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014)). *But see Real Alts.*, 150 F. Supp. 3d at 441 (emphasizing and distinguishing its contrary holding on the phrase "everything except a belief in a deity").

31. Throughout this Note, the term "claimant" will be used to refer generally to the party seeking accommodation. A person can request accommodation either as a plaintiff by suing a governmental actor or as a defendant by arguing that application of the law against them would infringe on their right to be accommodated. See, e.g., RFRA, 42 U.S.C. § 2000bb-1(c) ("A person . . . may assert [violation of RFRA] as a claim or defense in a judicial proceeding . . .").

the issue and the solution provided by the two courts.<sup>32</sup> Part II will explore the modern federal courts' approach to identifying what makes religion distinct from non-religion and some flaws with that approach that are alleviated by the equal protection method of *March for Life* and *Center for Inquiry*. Part III will look towards justifications for religion's special treatment and focus on one possibility that is consistent with the equal protection method by not requiring religion to actually *be* special in order to justify the privileged treatment it currently enjoys in the law. Finally, Part IV will argue that application of religious exemption statutes to cover claims of non-religious sincerely held beliefs, as in *March for Life* and *Center for Inquiry*, is consistent with existing Supreme Court precedent and that such a framework can support rather than detract from the Constitution's special treatment of religion.

## I. THE CASES

### A. *March for Life*

March for Life is a non-profit, pro-life organization based in our nation's capital that seeks to overturn *Roe v. Wade*<sup>33</sup> and "defend the unalienable and paramount right to life."<sup>34</sup> What it is not, however, is a religious organization.<sup>35</sup> Despite being non-religious, one would certainly have difficulty doubting that March for Life and its employees<sup>36</sup> possess a sincere belief regarding the immorality of abortion—a belief shared by many religious people in America.<sup>37</sup>

There exists a process that accommodates employers with similar beliefs regarding abortion who offer health insurance to their employees, but who do not wish to provide the contraceptive coverage legally mandated by the Affordable Care Act<sup>38</sup>—an accommodation that raises continuing

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32. The facts of *Real Alternatives* are not meaningfully distinguishable from *March for Life* for the purposes of this Note. See *Real Alts.*, 150 F. Supp. 3d at 437. Nor does any difference in facts relate to the disparate results, thus the case's facts will not be discussed in detail, despite its holding's clear relevance.

33. 410 U.S. 113 (1973) (finding a constitutional right to not be legally prevented from obtaining an abortion in the first trimester).

34. *History of the March for Life*, MARCH FOR LIFE, <http://marchforlife.org/history-of-the-march-for-life/> [https://perma.cc/95RQ-JASS ] (last visited Oct. 10, 2016).

35. *March for Life*, 128 F. Supp. 3d at 123.

36. *Id.* at 123 ("March for Life only hires individuals who oppose all forms of abortion, including contraceptives that the organization believes are abortifacients.")

37. For example, the two individual plaintiffs who joined the suit to claim RFRA exemptions from the accommodation procedure, see *id.* at 128–33, are a Catholic and an Evangelical Protestant. *Id.* at 123.

38. 42 U.S.C. § 300gg-13(a)(4) (2012). See *Hobby Lobby*, 134 S. Ct. at 2764 (describing the

controversy before the Supreme Court.<sup>39</sup> Per the regulations, this exemption is only available to a religious employer or an organization that “opposes providing coverage . . . on account of religious objections.”<sup>40</sup> The Department of Health and Human Services (HHS) provided two principal justifications for this accommodation to the district court<sup>41</sup>: first, to “respect the religious interests” of the claimants and second, because it only minimally undermined the government’s interest in providing contraceptives to women who desire them.<sup>42</sup>

Because March for Life could not claim a religious exemption under the regulations, being a non-religious institution, it instead sought exemption under the Equal Protection Clause of the Fifth Amendment.<sup>43</sup> The district court noted that the “*sin quo non* [sic] of equal protection is that the government must ‘not treat *similarly situated* individuals differently without a rational basis’ for doing so.”<sup>44</sup> Even under this rational basis test, “the most deferential of lenses,” this regulation failed.<sup>45</sup> The court framed the question precisely as whether “March for Life is *similarly situated* with regard to the precise attribute selected for accommodation,” as opposed to being “‘generally’ similar” to a religious objector.<sup>46</sup> Seen through this tightly-focused lens, March for Life was not only *similarly situated*, it was *identically situated*: the two reasons HHS had provided for accommodation applied equally well, if not *better* to March for Life.<sup>47</sup> The court found that

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accommodation process).

39. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (extending accommodation, through RFRA, to for-profit corporations); *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (May 16, 2016) (per curiam) (remanding the issue of whether the accommodation procedure is itself a burden on religious exercise that is not the least restrictive means of serving a compelling state interest).

40. 45 C.F.R. § 147.131(a), (b)(1) (2012). Such an organization must furthermore “hold[] itself out as a religious organization” or “[have] adopted a resolution . . . establishing that it objects . . . on account of the owners’ sincerely held religious beliefs.” 45 C.F.R. § 147.131 (b)(2)(i)–(ii).

41. Technically these reasons were only given for the religious employer exemption: the broader exemption available to non-profits and closely held corporations was not separately justified and in fact was originally rejected by HHS. See *March for Life*, 128 F. Supp. 3d at 121–122.

42. *Id.* at 121–22. It only minimally undermined the governmental interest because those who receive exemption would be particularly likely to employ people with the same objection to using the offered contraceptive services. *Id.* at 122.

43. This clause does not actually exist. The Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, has been “reverse incorporated” into the Due Process clause of the Fifth Amendment, U.S. CONST. amend. V, thus allowing equal protection claims against the federal government. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

44. *March for Life*, 128 F. Supp. 3d at 125 (quoting *Noble v. U.S. Parole Comm’n*, 194 F.3d 152, 154 (D.C. Cir. 1999) (per curiam)).

45. *Id.* at 128. “March for Life and exempted religious organizations are not just ‘similarly situated,’ they are *identically situated*.” *Id.* at 127.

46. *Id.* at 126.

47. *Id.* at 127. March for Life’s employees are all but guaranteed to not use any contraceptives offered because “[a]nti-abortion advocacy is March for Life’s sole and central tenet.” *Id.* For this reason

the regulation was in fact not targeted toward religion, despite the phrasing of the exemption, but only to a “moral philosophy” that is merely “common among religiously-affiliated employers.”<sup>48</sup> Because this moral philosophy was common to March for Life as well, the exemption had to be extended to it.<sup>49</sup> Since the decision in August 2015, HHS has filed an appeal with the Court of Appeals for the D.C. Circuit.<sup>50</sup>

### B. *Center for Inquiry*

The test used for the equal protection claim in *March for Life*, with its laser-focus on the claimant’s similarity relative to the interest accommodated, originated in a Seventh Circuit case, *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*.<sup>51</sup> In *Center for Inquiry*, the Center, along with its leader and “certified secular celebrant,”<sup>52</sup> Reba Boyd Wooden, brought suit under section 1983<sup>53</sup> to enjoin the enforcement of an Indiana law that prohibits the solemnization of a marriage by an individual not on a list of exceptions.<sup>54</sup> The exceptions include judges, mayors, and clerks of the state as well as a general exception for a “member of the clergy of a religious organization . . . such as a minister of the gospel, a priest, a bishop, an archbishop, or a rabbi.”<sup>55</sup> Other exempt individuals include practitioners of specifically identified religions that would not fit into that broad exemption, including Quakers, German Baptists, Baha’is, Mormons, and Muslims.<sup>56</sup> The court was quick to note that this list was not all-inclusive, even of the plainly religious.<sup>57</sup>

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March for Life may be better situated than, for example, Hobby Lobby. As a retail establishment, Hobby Lobby has no particular reason to hire only or especially employees with similar beliefs regarding abortifacients, and therefore the second justification applies minimally, if at all.

48. *Id.* at 127. The court went further: “it is not the belief or non-belief in God that warrants safe harbor . . . . The characteristic that warrants protection . . . is altogether separate from theism.” *Id.* at 126–127. *But see* *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 438 (M.D. Penn. 2015) (“[I]t is not by their beliefs that the Departments have elected to differentiate the two. Rather, it is by the foundations for those beliefs.”), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

49. *See also Real Alts.*, 150 F. Supp. 3d at 437 (agreeing with the *March for Life* court that HHS’s stance that religious employers were more likely than secular employers to object to contraceptive coverage was “simply inaccurate”).

50. *March for Life v. Burwell*, No. 15-5301 (D.C. Cir. Oct. 30, 2015).

51. 758 F.3d 869 (7th Cir. 2014).

52. *Id.* at 871.

53. 42 U.S.C. § 1983 (2012) (allowing legal and equitable relief against any person who, under color of law, deprives another person of rights secured by the Constitution).

54. IND. CODE § 31-11-11-5 (2015).

55. IND. CODE § 31-11-6-1(1).

56. *Id.* § (6)–(10).

57. *Ctr. for Inquiry*, 758 F.3d at 874 (noting that Buddhists, Rastafarians, and Jainists would not be accommodated under the law); *see also id.* at 872 (comparing the statute to one that would “permit Catholic priests to solemnize weddings while forbidding Baptist ministers to do so”).

The Center for Inquiry is a Secular Humanist organization, and its members expressly refuse the religious label.<sup>58</sup> They do so despite the fact that such recognition is freely available to them under the laws of Indiana, the Seventh Circuit, and potentially even the Supreme Court.<sup>59</sup> The court of appeals held emphatically that this refusal of the label did not weaken their claim: there was no requirement that the Secular Humanists become hypocrites (in their own view) and claim to be both secular and religious simply “to jump through some statutory hoop.”<sup>60</sup> The court ultimately invalidated the law under both the Equal Protection Clause and the First Amendment because it was “irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a ‘religion.’”<sup>61</sup>

The court’s principal holding was that “[a]n accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation.”<sup>62</sup> The Supreme Court had previously recognized that accommodations could be granted to religions without violating either the Equal Protection or Establishment Clauses,<sup>63</sup> but the Seventh Circuit argued that religion could not be “a complete answer” when the plaintiffs were similarly situated in all relevant aspects.<sup>64</sup> Although “[a] state may accommodate religious views . . . this does not imply an ability to favor religions over non-theistic groups that have moral stances

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58. *See id.* at 872 n.† (“The Center . . . refuses to accept the religious organization label or allow its members ‘clergy’ status.”).

59. *See id.* at 871 n.† (noting that another Secular Humanist group, the Humanist Society, was allowed to solemnize weddings in Indiana as a religion with clergy); *Kaufman v. McCaughtry*, 419 F.3d 678, 683–84 (7th Cir. 2005) (holding that the Establishment Clause requires states to treat atheism as favorably as theistic religions); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (including Secular Humanism in a list of non-theistic religions in dictum).

60. *Ctr. for Inquiry*, 758 F.3d at 875.

61. *Id.* This Note will focus on the equal protection aspect of the holding, rather than the Establishment Clause, though the method is fundamentally the same regardless of the clause invoked. *See Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring) (“The implementation of the neutrality principle of [the Establishment Clause] requires . . . ‘an equal protection mode of analysis.’”). The primary reason for this choice is that the Establishment Clause version of the test relies heavily on the Seventh Circuit’s decision in *Kaufman*, 419 F.3d 678, which may be slightly too strong of a holding under the cases discussed *infra* Part IV.C. Equal protection avoids this potential trap by narrowing the standard of review to rational basis rather than some unspecified higher standard under the Establishment Clause. Though, to be clear, it is at least possible that a higher standard could be appropriate. *Cf. Susan Gellman & Susan Looper-Friedman, Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 733 (2008) (arguing that it is not “necessarily the case” that an equal protection claim parallel to a First Amendment claim must apply a “congruent” standard of review). Regardless, there are advantages to an equal protection claim over an Establishment Clause claim. *Cf. id.* at 701–13 (discussing these advantages in the context of government religious expression cases).

62. *Ctr. for Inquiry*, 758 F.3d at 872.

63. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

64. *Ctr. for Inquiry*, 758 F.3d at 872.



that are equivalent to theistic ones except for non-belief in God.”<sup>65</sup> Because Wooden and the Secular Humanists of the Center for Inquiry had all the same interests that Indiana sought to accommodate with its broad grant of solemnization power to various religions, there was no reason to require the label of religion—asking whether Secular Humanism is a religion or not simply “misses the point.”<sup>66</sup> The court thus granted an injunction, giving Wooden’s solemnization legal effect and protecting her from any criminal penalties that might apply.<sup>67</sup>

## II. THE RELIGIOUS DIFFERENCE

### A. Defining Religion

Traditionally, any claim for a religious accommodation must begin with deciding whether the claimant’s beliefs amount to a religion.<sup>68</sup> Both March for Life and the Center for Inquiry explicitly claimed to be non-religious—though such a claim is not always dispositive, even when requesting accommodation and the classification can only be advantageous for the claimant.<sup>69</sup> If the plaintiffs in either case had chosen to frame their objection as religiously motivated, it is clear that they would have had their requests readily granted.<sup>70</sup> Not all claimants can be so lucky; normally a religious exemption requires an explicitly religious basis.<sup>71</sup> This leaves the difficult question of how to distinguish a religious basis from a non-religious basis.<sup>72</sup>

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65. *Id.* at 873.

66. *Id.*

67. *Id.* at 875.

68. *See, e.g.,* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310 (1991) (“Under the exemption analysis, the court must first determine, at a definitional level, whether the belief at issue is ‘religious.’”).

69. *See* *Welsh v. United States*, 398 U.S. 333, 341 (1970) (plurality opinion) (arguing that acceptance of the plaintiff conscientious objector’s adamant rejection of the religious label “places undue emphasis on the registrant’s interpretation of his own beliefs”).

70. *Cf. Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (allowing a closely held for-profit corporation an exemption for religious belief against abortifacients); *Ctr. for Inquiry*, 758 F.3d at 872 (“Indiana states that a humanist group could *call* itself a religion, which would be good enough for the state.”).

71. *See supra* note 4 and the epigraph.

72. In addition to the cases discussed in this Note, there are countless other cases exploring the scope of the term “religion” that may eventually lead to a significant enough circuit split to prompt the Supreme Court to step in and provide clearer guidance. *See, e.g.,* *Cavanaugh v. Bartelt*, No. 4:14-CV-3183, 2016 U.S. Dist. LEXIS 48746, at \*13–19 (D. Neb. Apr. 12, 2016) (deciding that the plaintiff’s professed belief in the Church of the Flying Spaghetti Monster was not a religion because the church was satirical); *Hale v. Fed. Bureau of Prisons*, No. 14-cv-00245-MSK-MJW, 2015 U.S. Dist. LEXIS 132832, at \*16–22 (D. Colo. Sept. 30, 2015) (compiling various district court cases deciding whether the Church of the Creator’s “Creativity” faith is a religion and declining to rule dispositively on the issue); *Sousa v. Wegman*, No. 1:11-cv-01754-LJO-MJS (PC), 2015 U.S. Dist. LEXIS 85208, at \*11–12 (E.D. Cal. June 30, 2015) (finding that “traditional Mexican/Aztec/Mayan beliefs” are religious); *Heap*

This question is so difficult, and so dangerous, that a better method may be to avoid it completely.<sup>73</sup>

Perhaps ironically, the Supreme Court's strongest analysis on the definition of religion did not involve a difficult-to-define group such as the Secular Humanists, but a remarkably simple one: the Amish. The Court in *Wisconsin v. Yoder*<sup>74</sup> applied a strict compelling interest test to Wisconsin's attempt to convict Amish parents for refusing, on religious grounds, to send their teenage children to high school.<sup>75</sup> The Court framed the test as one in which "only those interests of the highest order and those not otherwise served" could prevail for the government.<sup>76</sup> Despite this extraordinarily strong language, the Court noted that the showing of sincerity and centrality that the Amish made was "one that probably few other religious groups or sects could make,"<sup>77</sup> heavily implying the test is not as pro-claimant as it appears on its face.<sup>78</sup> Furthermore, despite the clear intent to shift the burden onto the government to justify its actions,<sup>79</sup> the Court relied heavily on the Amish's long history as a religious group and their "excellent record as law-abiding and generally self-sufficient members of society" to justify the exemption.<sup>80</sup>

The *Yoder* Court focused not only on Amish exceptionalism among religious groups, but also paved the way for a substantive distinction

v. Carter, 112 F. Supp. 3d 402, 438 (E.D. Va. 2015) (rejecting as not clearly established the assertion "that Humanism stands on equal footing to religious belief"); *Coleman v. Hamilton Cty.*, 104 F. Supp. 3d 877, 880 (E.D. Tenn. 2015) (upholding policy of legislative prayer led only by clergy members of "bona fide[]" religious establishments which either appear in the Yellow Pages under "religious institutions" or are eligible for federal tax-exempt status); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1286 (D. Or. 2014) (finding clearly established that Secular Humanism is a religion, and that the First Amendment demands neutrality between religion and non-religion).

73. See, e.g., *United States v. Meyers*, 95 F.3d 1475, 1489 (10th Cir. 1996) (Brorby, J., dissenting) ("The ability to define religion is the power to deny freedom of religion."); Eisgruber & Sager, *supra* note 5, at 811 ("[O]nce you say what religion is, you have undone religious liberty."); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241 (1989) ("The danger in defining religion lies in the possibility of violating the very purpose of the religion clauses . . . . To define religion is to limit it.").

74. 406 U.S. 205 (1972).

75. *Id.* at 207 (describing the facts of the case).

76. *Id.* at 215.

77. *Id.* at 235–36.

78. See EISGRUBER & SAGER, *supra* note 13, at 257 ("The compelling state interest test had always talked tough but performed feebly."); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) ("[A]fter [*Yoder*], the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent.").

79. *Yoder*, 406 U.S. at 236 ("[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.").

80. *Id.* at 212–13.

between religion and non-religion through an illustration in dictum.<sup>81</sup> The Amish were the quintessential group deserving of religious accommodation, but equally obvious to the Court was Henry David Thoreau's status as the exemplary opinionated man whose beliefs did not "rise to the demands of the Religion Clauses."<sup>82</sup> This distinction was based on the assertion that "Thoreau's choice was philosophical and personal rather than religious" without ever specifying how that determination was made.<sup>83</sup> Justice Douglas, dissenting from the ruling primarily on the grounds that the Court should have focused on the children's religious beliefs and not those of the parents,<sup>84</sup> signaled this illustration as a "retreat[]" from earlier Supreme Court precedent which would have recognized Thoreau as sufficiently religious.<sup>85</sup>

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81. *Id.* at 216 ("[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself . . . their claims would not rest on a religious basis.").

82. *Id.*

83. *Id.*

84. *Id.* at 244 (Douglas, J., dissenting) ("On this important and vital matter of education, I think the children should be entitled to be heard.").

85. *Id.* at 247–48 (comparing Thoreau with the claimant in *United States v. Seeger*, 380 U.S. 163 (1965)). See *infra* Part IV.D for further discussion of *Seeger* and its potential consistency with *Yoder*.

### B. *Yoder in Action*

The Court has not expanded significantly on the definition of religion in the intervening four decades since *Yoder*.<sup>86</sup> Instead, the complex task has been left to the circuit courts.<sup>87</sup> In *Africa v. Pennsylvania*,<sup>88</sup> the Third Circuit took the only guidance it had from the Supreme Court, the dicta in *Yoder*, and made it a key element in its test of religiosity.<sup>89</sup> The court ultimately found this test dispositive, and held that the plaintiffs concerns were “more akin to Thoreau’s rejection of ‘the contemporary secular values accepted by the majority’ than to the ‘deep religious convictions’ of the Amish.”<sup>90</sup> The plaintiff, Frank Africa, a prisoner in Pennsylvania state prison, was a “Naturalist Minister” for the MOVE organization, a self-professed religion and “revolutionary organization” that sought a “‘natural,’ ‘moving,’ ‘active,’ and ‘generating’ way of life” as opposed to the “artificial” and “systematic.”<sup>91</sup> For the purposes of the suit, this “way of life” boiled down to a belief that one should only eat raw food, a belief with which Africa’s previous prison was willing to comply, but to which his current one objected.<sup>92</sup>

In deciding that MOVE was not a religion,<sup>93</sup> and thus denying the claim, the court relied on a three-factor test originally used in Judge Adams’s concurring opinion in *Malnak v. Yogi*.<sup>94</sup> The first factor is the “nature of the ideas in question,” which must be related to one’s “ultimate concern.”<sup>95</sup> This is the element that *Africa*, building on *Malnak*, reduced to a determination whether the belief was more similar to that of the Amish or Thoreau.<sup>96</sup> The second factor is comprehensiveness; in *Malnak*, Judge Adams argued that a

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86. See Usman, *supra* note 5, at 173 (finding *Yoder* in 1972 to be “the last significant pronouncement[] from the Supreme Court on what constitutes a religion”).

87. *Id.* at 173–76 (surveying the various circuit courts’ definitions). I focus on the Third and Tenth Circuit definitions because they most effectively indicate the problem that the equal protection method solves: the fundamental disconnect between finding that a party is religious and finding that a party should be accommodated. For an excellent, recent discussion of the Fourth Circuit’s approach, see Courtney Miller, Note, “*Spiritual But Not Religious*”: *Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833 (2016).

88. 662 F.2d 1025 (3d. Cir. 1981).

89. See Freeman, *supra* note 5, at 1533 (distilling *Africa* to a requirement that “a belief system . . . have more in common with the belief system of the Amish than with that of Thoreau”).

90. *Africa*, 662 F.2d at 1035.

91. *Id.* at 1025–26.

92. *Id.*

93. *Id.* at 1031–32 (“Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment.”).

94. 592 F.2d 197, 200 (3d. Cir. 1979) (Adams, J., concurring).

95. *Id.* at 208 (quoting PAUL TILLICH, *DYNAMICS OF FAITH* 1–2 (1958)). These ultimate concerns are worth protecting because they are “the most ‘intensely personal’ and important to the believer.” *Id.*

96. *Africa*, 662 F.2d at 1035.

religion is “not generally confined to one question or one moral teaching,” but rather has “a broader scope”<sup>97</sup> as a “ruling science” that purports to answer all questions.<sup>98</sup> In contrast, Africa’s all-encompassing focus on “rawness”<sup>99</sup> was only a “single-faceted” secular belief, and such beliefs must be distinguishable from religions.<sup>100</sup> The court completely rejected the possibility that the “added meaning and importance” of the belief to Africa could cause such a belief to be “declared religious” and be “accorded first amendment protection.”<sup>101</sup>

The final element is the “formal, external, or surface signs” of a religion.<sup>102</sup> The Tenth Circuit, citing heavily to *Africa* in deciding a similar issue in *United States v. Meyers*, referred to these as “accoutrements of religion.”<sup>103</sup> The court provided eleven example features: the existence of a founder or prophet, important writings, gathering places, keepers of knowledge (i.e., clergy), ceremonies and rituals, structure or organization, holidays, a practice of diet or fasting, guidance as to appearance and clothing, and propagation.<sup>104</sup> The *Africa* court found these structural characteristics lacking.<sup>105</sup> MOVE was a non-hierarchical “revolutionary organization,”<sup>106</sup> despite Africa’s title as “Naturalist Minister;” it had no services, no holidays, and no literature.<sup>107</sup> Though the court’s holding was neither “wholly free from doubt”<sup>108</sup> nor “unassailable,”<sup>109</sup> it found that MOVE was too dissimilar from a religion to warrant the protections of the First Amendment.<sup>110</sup>

97. *Malnak*, 592 F.2d at 209.

98. *Id.* (quoting ST. THOMAS AQUINAS, *Prologue to Commentary of IV Books of Sentences*, reprinted in AN AQUINAS READER 411 (M. Clark, ed. 1972)).

99. *Africa*, 662 F.2d at 1027 (“Our [MOVE’s] religion is raw, our belief is pure as original, reliable as chemical free water.”).

100. *Id.* at 1035 (“[W]ere we to conclude that Africa’s views, taken as a whole, satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies—such as economic determinism, Social Darwinism, or even vegetarianism—would not qualify as religions under the first amendment.”)

101. *Id.*

102. *Malnak*, 592 F.2d at 209. Examples include “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations.” *Id.*

103. *United States v. Meyers*, 95 F.3d. 1475, 1483 (10th Cir. 1996).

104. *Id.* at 1483–84 (1996). The court was careful to note that the “threshold for establishing the religious nature of [the] beliefs . . . is low” and that no one factor was dispositive. *Id.* at 1482–83.

105. *Africa*, 662 F.2d at 1036 (“MOVE is not structurally analogous to those ‘traditional’ organizations that have been recognized as religions under the first amendment.”).

106. *Id.* at 1034.

107. *Id.* at 1036.

108. *Id.* at 1033.

109. *Id.* at 1035.

110. *Id.* at 1036 (“[T]he Commonwealth of Pennsylvania is not required under the first amendment to supply Frank Africa with a special raw-food diet.”). The court further narrowed its decision by noting that the holding was only binding with regard to Frank Africa himself and not as to other MOVE

### C. Unique or Special

The analysis that began in *Yoder* and extended to *Africa* and *Meyers* amounts to an external analogy test<sup>111</sup>: comparing the objective qualities of the claimant's beliefs with those of core or "paradigmatic" religions.<sup>112</sup> The fundamental problem with this test is that it never justifies the results that come from the definition.<sup>113</sup> Definitions might help a judge identify what a religion is, and whether a given belief is religious,<sup>114</sup> but never answers the more important question of whether the belief should be accommodated.<sup>115</sup> It explains only what is unique about religion, in a descriptive sense, but not what is special about it in a normative one; treating religion as a "talismán"<sup>116</sup> that by itself results in accommodation.<sup>117</sup> What would meaningfully have changed had Africa and his organization fulfilled the structural and comprehensiveness requirements that the court laid out?<sup>118</sup>

First, it should be noted that many of the features used to dismiss Africa's claim are shared with other groups that are undoubtedly religious.

members, *id.* at 1036 n.22, and that there was still room for an Eighth Amendment claim, *id.* at 1036 n.23.

111. *See id.* at 1032 (referring to the test as "the 'definition by analogy' approach"). *Cf.* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 753 (1984) ("[C]ourts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved.").

112. *See Freeman, supra* note 5, at 1553 (identifying eight features proposed for a "paradigm of a religious belief system" based on "the features common to most traditional Eastern and Western religions").

113. *See Nelson Tebbe, Nonbelievers*, 97 VA. L. REV. 1111, 1115 (2011) ("[W]hen courts ask whether something counts as religion in a particular doctrinal and factual context they are really asking whether it should be protected, which is a substantive matter.").

114. *See Africa*, 662 F.2d at 1036 ("We do not conclude that Africa's sincerely-held beliefs are false, misguided, or unacceptable, but only that those beliefs, as described in the record before us, are not 'religious' as the law has defined the term.").

115. *See Tebbe, supra* note 113, at 1115 (criticizing definitional approaches as "shortcuts past meticulous doctrinal analysis").

116. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015).

117. *Cf. United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) ("The Constitution . . . does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion."). *Kuch* rejected the claims for exemption from controlled substances laws of the Neo-American Church that was clear satire of Abrahamic religion's accoutrements, including its use of a book known as the "Boo Hoo Bible" for its catechism.

118. *See Greenawalt, supra* note 111, at 776 n.97 ("Africa represented himself at the crucial hearing about his beliefs, and one has the sense that these beliefs might have looked different if formulated with professional help."). Counsel for the appeal unsuccessfully argued that Africa was pantheistic; the court simply noted that Africa had not framed his belief as such. *Africa*, 662 F.2d at 1033. Similarly, Africa explicitly contrasted MOVE's tenets with religion in a misguided attempt to argue that they were even more important. *See id.* at 1027 ("Africa contends that 'while religion is seen as a way of life, our religion is simply the way of life, as our religion in fact is life.'"). Perhaps recognizing these rather unsophisticated mistakes, the court qualified its decision when it held that "MOVE, at least as described by Africa, is not a religion," *id.* at 1036 (emphasis added).

The court, at one point, even explicitly compared MOVE's views with a passage from First Corinthians.<sup>119</sup> Nevertheless, it found features lacking.<sup>120</sup> The lack of holidays was considered indicative, though Africa himself argued that it was because "every day of the year is equally important."<sup>121</sup> This lack of holidays is shared with Jehovah's Witnesses, who reject celebrations for a somewhat similar reason.<sup>122</sup> The lack of hierarchy was also deemed indicative of the non-religious nature of MOVE, though that feature is shared with, among many others, the Quakers.<sup>123</sup> Similar distinctions based on the existence of hierarchical clergy were central to the finding of irrationality in *Center for Inquiry*.<sup>124</sup>

What MOVE lacked primarily was a comprehensive system, services, and a scripture.<sup>125</sup> While all of these things might indicate sincerity,<sup>126</sup> they do not answer the important question and explain why the underlying request for a raw food diet would be more worthy of respect by the state of Pennsylvania.<sup>127</sup> Were Africa to have a scripture, or rather had he produced it to the court,<sup>128</sup> what would change? Legally speaking, *could* anything change?<sup>129</sup> If the scripture supports his diet, then all it adds is some level of sincerity; if the scripture does not necessarily support his diet, then the Supreme Court has plainly rejected ruling against the claimant for such a

119. *Africa*, 662 F.2d at 1035 n.20 (quoting 1 *Corinthians* 10:31 ("Whether therefore ye eat, or drink, or whatsoever ye do, do all to the glory of God.")).

120. *Id.* at 1036 ("MOVE lacks almost all of the formal identifying characteristics common to most recognized religions.").

121. *Id.*

122. See *Holidays*, THEJEHOVAHSWITNESSES.ORG, <http://thejehovahswitnesses.org/holidays.php> [<https://perma.cc/GM6T-QMXB>] (last visited Oct. 10, 2016) (rejecting holidays because "God should get all the honor and glory" and recognizing that "the Watchtower organization is honored to excess 365 days per year as God's channel of communication to the world").

123. See *FAQs about Quakers*, FRIENDS GENERAL CONFERENCE, <http://www.fgcquaker.org/explore/faqs-about-quakers> [<https://perma.cc/H2N7-PAHP>] (last visited Oct. 10, 2016) ("Quakers believe that we are all ministers . . ."). This is presumably why the Quakers' Society of Friends received a specific exemption in the Indiana statute at issue in *Center for Inquiry*. IND. CODE § 31-11-6-1(6) (2015).

124. See *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (discussing the inconsistent treatment of various non-clerical religions including Buddhists, Rastafarians, Jainists, Baha'is, German Baptists, and Quakers).

125. *Africa*, 662 F.2d at 1036 ("MOVE cannot lay claim to be a comprehensive, multi-faceted theology . . . MOVE lacks the defining structural characteristics of a traditional religion.").

126. The *Africa* court, like many courts, identified this issue as withdrawn. See *Africa*, 662 F.2d at 1030 ("The requirement of sincerity poses no obstacle to Africa in this case.").

127. See Tebbe, *supra* note 113, at 1140 ("[T]here is little to be gained by asking whether nonbelief 'is' religion in a given legal setting, as opposed to asking whether it should be protected there.").

128. Frank Africa argued that another man, John Africa, had written the general tenets of MOVE as a sort of catechism, but they were not made available to the district court. *Africa*, 662 F.2d at 1036.

129. See *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

reason in *Fraze v. Illinois Department of Employment*.<sup>130</sup> Equally puzzling, if MOVE had conducted weekly services with multiple members and a text, but only Africa believed the text required him to eat raw foods, it could not hurt his claim: the Court likewise rejected such reasoning in *Thomas v. Review Board of Indiana*.<sup>131</sup> To reject MOVE as a religion, while granting Frazee and Thomas's beliefs the label, is to require merely that one *have* these accoutrements indicative of a paradigmatic religion, but leave their contents irrelevant.<sup>132</sup>

The same problem applies to the “comprehensiveness” and “ultimate concerns” tests as applied in *Africa*—to require them is to allow the mere existence of these other beliefs to somehow give his dietary claim value that it would not have in their absence.<sup>133</sup> The court cannot question if a claimant's beliefs, whether dietary or moral or theological, are central,<sup>134</sup> true,<sup>135</sup> or even reasonable,<sup>136</sup> thus we are left with existence as the only relevant remaining factor. This is why the *Center for Inquiry* court was so careful to focus the question on whether claimants were “identical *with respect to the attribute selected for that accommodation*.”<sup>137</sup> It might be true that single-facet ideologues “share only one, albeit vehemently held,

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130. 489 U.S. 829 (1989). *Fraze* involved a non-denominational Christian who refused to work on Sundays. Illinois denied his claim because it was not based on “tenets or dogma” of a recognized “church, sect, or denomination.” *Id.* at 830. The Court reversed, rejecting the idea that “one must be responding to the commands of a particular religious organization” to receive First Amendment protection. *Id.* at 834.

131. 450 U.S. 707 (1981). *Thomas* involved a Jehovah's Witness who worked at a steel mill that began directly machining parts for tanks rather than just producing the raw materials. *Id.* at 709–10. Although his fellow Witnesses found this consistent with their faith, he considered working there “unscriptural” and quit. *Id.* at 711. Based on this divide, the lower court found that quitting was a “personal philosophical choice” rather than religious. *Id.* at 713. The Court reversed, noting that “the judicial process is singularly ill equipped to resolve [intrafaith differences].” *Id.* at 715.

132. See Miller, *supra* note 87, at 836 (“Beyond [the] core category of believers, modern doctrine also protects idiosyncratic versions of traditional religions . . . . In other words, members of recognized religions do not have to subscribe to shared beliefs in order to receive legal protection.”). But see *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) (investigating the Neo-American Church and finding “a conscious effort to assert in passing the attributes of religion but obviously only for tactical purposes,” thus leading to no accommodation).

133. They function as a mere “statutory hoop,” *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014), that a party must jump through before getting to the real question: whether the claim at issue should be accommodated.

134. *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) (“What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is ‘central’ to his personal faith?”).

135. *United States v. Ballard*, 322 U.S. 78, 87 (1944) (finding unconstitutional the possibility that religious individuals “could be tried before a jury charged with the duty of determining whether those teachings [of the gospel] contained false representations”).

136. See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2778 (2014) (“[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.”) (parentheses omitted).

137. *Ctr. for Inquiry*, 758 F.3d at 872 (emphasis added).



opinion” with religious persons that are provided an accommodation.<sup>138</sup> But, without a somehow narrowed definition of religion,<sup>139</sup> that one opinion is the only relevant factor shared among *all* parties with similar claims.<sup>140</sup> A system that requires these irrelevant doctrines treats religion as nothing more than a talisman, a ticket to accommodation, a “shortcut,”<sup>141</sup> and not as justification for the accommodation itself.<sup>142</sup> Even worse, it results in exactly what the Third Circuit desired to avoid: it shows an unjustified “predisposition toward conventional religions,” i.e., those that have these accoutrements, and leaves others “branded mere secular beliefs.”<sup>143</sup> This significant danger in dismissing certain beliefs as non-religious does not affect only idiosyncratic believers like Africa, but is at risk of reaching even obviously core religions under the right (or wrong) circumstances.<sup>144</sup>

It should be noted that the inherent weakness of the factors identified by the court does not necessarily mean it made the wrong decision as to whether MOVE was a religion.<sup>145</sup> As the court repeatedly noted, it was a

138. *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 441 (M.D. Penn. 2015), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

139. A possibility that is normatively undesirable, *see supra* note 73, and almost certainly unconstitutional, *see infra* note 237.

140. To return to the example of the contraceptive mandate, just in the two primary cases that were granted certiorari, we see Catholics—*Geneva College v. Sec’y United States HHS*, 778 F.3d 422, 427 (3d Cir. 2015), *remanded, sub nom.*, *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (May 16, 2016) (per curiam); Mennonites—*Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2764 (2014); and Evangelical Christians—*id.* at 2765. Though these are all Christian denominations, legally speaking we must treat that as a coincidence or else be at serious risk of violating the Establishment Clause by endorsing Christianity. *Cf., e.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687, 706 (1994) (invalidating Hasidic school district because it “singles out a particular religious sect for special treatment”). To the extent the Christian claimants are similar to each other and to a hypothetical Buddhist or Hindu who seeks exemption from the mandate, the distinction against March for Life is arbitrary because there is no discernible common factor among the claimants missing from March for Life.

141. *Tebbe, supra* note 113, at 1115.

142. *See Eugene Volokh, A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510–13 (1999) (critiquing views of free exercise that provide a “broad right to do whatever your religion motivates . . . simply because of your religious motivation”). *But see Real Alts.*, 150 F. Supp. 3d at 438 (“[I]t is not by their beliefs that the Departments have elected to differentiate the two. Rather, it is by the foundations for those beliefs.”).

143. *Africa*, 662 F.2d at 1031; *cf. EISGRUBER & SAGER, supra* note 13, at 55 (“The antithesis of religious liberty is religious persecution; and the essence of religious persecution is the systematic disadvantaging of persons because they are not loyal to the ‘right’ religious beliefs.”).

144. *See Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (“To call [Mormonism’s polygamy] a tenet of religion is to offend the common sense of mankind.”); *EEOC v. Abercrombie & Fitch Stores*, 731 F.3d 1106, 1119 (10th Cir. 2013) (questioning whether the wearing of a hijab is a religious or “purely personal” belief because it does not relate to “ultimate ideas”), *rev’d on other grounds*, 135 S. Ct. 2028 (2015).

145. The “leading substantive definition” of religion is “a system of communal beliefs and practices relative to superhuman beings.” *Tebbe, supra* note 113, at 1134 (citing MERRIAM-WEBSTER’S ENCYCLOPEDIA OF WORLD RELIGIONS 915 (Wendy Doniger ed., 1999), among others). It seems by such a definition MOVE should not qualify: the raw and artificial does not implicate anything explicitly

close call on a difficult question.<sup>146</sup> What these problems really indicate is that the question itself is useless: the unique features of religion do nothing—can do nothing—to support its special status generally.<sup>147</sup> The characteristic that warrants protection is not only “altogether separate from theism,”<sup>148</sup> it is separate even from a broader concept of religiosity. The court feared that recognizing MOVE as a religion would begin the slippery slope to vegetarianism being considered a religion.<sup>149</sup> It is good to be cautious on that point: as much as the courts do not want such an expansive definition that saps “religion” of all meaning, vegetarians too reject the label. Despite this rejection, at least *some* vegetarians will have a belief equally as sincere as *some*<sup>150</sup> religious adherents and desire accommodation.<sup>151</sup> Why then should we privilege only religion and not treat

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supernatural, and it is at least a partially open question as to how “communal” MOVE actually was.

146. *Africa*, 662 F.2d at 1034–36.

147. *Cf. Tebbe*, *supra* note 113, at 1140 (arguing that definitional approaches have “a potential cost, namely distraction from the substantive matters that should be (and perhaps in fact are) driving the analysis”).

148. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015).

149. *Africa*, 662 F.2d at 1035. The court’s parallel fears regarding economic determinism and Social Darwinism were probably the more worrying, however. *Id.*; *accord* *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 441 (M.D. Penn. 2015) (“Allowing adherence to a single moral belief, even one with philosophical underpinnings, to be indistinguishable from religion or an entire moral creed such as Atheism or Buddhism leads us down a slippery slope.”), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016); *see also* *Miller*, *supra* note 87, at 880 (rejecting veganism as a religion through application of the “metaphysical belief” factor” from *Meyers*). *Miller* notes that this factor “highlights the importance of beliefs that are not rationally derived, and thus readily distinguishes deeply held secular beliefs [from religions].” *Id.* In addition to the fact that earlier on the same page she recognizes the functionally equivalent demands of “[b]ona fide religions [that] might require vegan diets,” *id.*, this position also fails to recognize that not all vegans arrived at their position through a rational process, just as not all religious believers avoid rationality in considering their own beliefs. *See generally, e.g.*, RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (Jonathan Bennett, tr. 2007), <http://www.earlymoderntexts.com/assets/pdfs/descartes1641.pdf>.

150. We need not find that all non-religious claimants are as devout as all religious individuals to find the special status lacking. *Cf. Eisgruber & Sager*, *supra* note 13, at 101 (noting that comparison between secular and religious values “does not depend on the idea, which is manifestly false, that religious convictions are comparable to any secular conviction or impulse, however frivolous”). The centrality of a belief has been identified as an imponderable and untouchable question for the courts. *See Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990). Because of this, in theory at least, an inconsistent or apathetic vegetarian who sincerely bases his practice on a religion not known for vegetarianism (e.g. Judaism) would nevertheless have an equivalent claim to a faithful Hindu vegetarian, and a stronger claim than even a particularly ardent non-religious vegan. *Cf. Miller*, *supra* note 87, at 891 (“If she had stated that she was a Christian and *also* drew inspiration from astrology, Tarot, and dancing, the hands-off doctrine would essentially require that her beliefs be designated as religious.”). *But see* *Hall v. Martin*, No. 1:10-cv-1221-PLM, 2015 U.S. Dist. LEXIS 30572, at \*12–14 (W.D. Mich. Feb. 18, 2015) (denying summary judgment for a Messianic Jew who demanded a kosher vegan diet on religious grounds).

151. *See, e.g., Maulding v. Peters*, No. 92 C 2518, 1995 U.S. Dist. LEXIS 11001, at \*15 (N.D. Ill. Aug. 2, 1995) (denying vegetarian prisoner accommodation “absent religious or medical peculiar circumstances”).

non-religious moral beliefs or claims of conscience as equally deserving of the special status?<sup>152</sup>

### III. WHY PROTECT RELIGION?

The first response, and the one relied on by the courts in *Yoder* and *Africa* is simple textualism: the Constitution only protects religion.<sup>153</sup> In the framework at play in those cases, in which the Free Exercise Clause was the pertinent law, pure textualism is a reasonable answer on a legal level, even if it may be unsatisfying on a normative one.<sup>154</sup> The Constitution need not justify itself. However, since the time of those cases the power of the Free Exercise Clause has dwindled.<sup>155</sup> *Meyers*, for instance, was decided instead under the statutory Religious Freedom Restoration Act (“RFRA”) which does require justification.<sup>156</sup> Similarly, the regulatory and statutory exemptions in *March for Life* and *Center for Inquiry* required rational justification for distinguishing between the targets of the exemption and the plaintiffs;<sup>157</sup> a justification that those courts could not find.<sup>158</sup>

152. See Freeman, *supra* note 5, at 1522 (discussing early drafts of the First Amendment that included freedom of conscience); Schwartzman, *supra* note 4, at 1405 (“For reasons unknown, the Framers of the First Amendment rejected language that referred to the ‘rights of conscience’ . . . preferring a narrower formulation in terms of the ‘free exercise’ of religion.”); McConnell, *supra* note 14, at 12 (“The Framers of the First Amendment seriously considered enacting constitutional protection for ‘conscience,’ presumably a broader term, and deliberately adopted the term ‘religion’ instead.”).

153. *Africa*, 662 F.2d at 1034–35 (discussing *Yoder*). See also *supra* notes 1, 3–4 and accompanying text.

154. See Schwartzman, *supra* note 4, at 1426–27 (rejecting the Constitution’s special treatment of religion as morally lacking); SMITH, *supra* note 15, at 146 (finding the Constitution’s guarantee of religious freedom insufficiently protected by textualism).

155. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (rejecting the use of the *Yoder* compelling interest test to invalidate “generally applicable” laws).

156. *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as applied to the states for exceeding Congress’s enumerated powers); see also RLUIPA, 42 U.S.C. § 2000cc(a)(2) (2012) (invoking Congress’s spending and interstate commerce powers to statutorily invalidate portions of *Boerne*). While there is no explicit finding of which power justifies RFRA, it is probably best understood as relying on the powers underlying the particular law from which the claimant seeks accommodation—or rather the absence of power because of the absence of enforcement of that underlying law. See Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1925–28 (2001) (comparing these possibilities and defending the “no power” explanation as rhetorically superior).

157. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (requiring a legislative classification that “neither burdens a fundamental right nor targets a suspect class” to “bear[] a rational relation to some legitimate end”).

158. *But see* *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 438 (M.D. Penn. 2015) (finding “a legitimate interest in protecting religious freedom,” allowing the exemption to “survive rational basis review”), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

### A. Religion as a Proxy

Just because religion is not special does not mean it is not a useful concept on which to “moor” an accommodation.<sup>159</sup> Nor does it mean that the hundreds of statutes that protect religious interests are inherently invalid or even particularly questionable.<sup>160</sup> Professor Andrew Koppelman has proposed that the freedom of religion is not a protection of any particular right, but instead is best understood as a proxy protection for many interests.<sup>161</sup> In so doing, he concedes the point that there is nothing that makes religion particularly special or definable,<sup>162</sup> yet defends the status quo regardless.<sup>163</sup> He compares the approach to a driver’s license: “[I]f ‘people who have passed driving exams’ are not ontologically distinct from those who have not, then there can be no justification for giving ‘people who have passed driving exams’ special treatment . . . . What we should be doing is privileging ‘people who are good drivers.’”<sup>164</sup> That, of course, is impossible; instead, we as a society have decided to use a proxy: the driver’s license. This license is over- and underinclusive—some people could pass the test

159. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 126 (D.D.C. 2015) (“[HHS] has consequently moored this accommodation . . . in the vernacular of religious protection.”), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015). The *March for Life* court found this choice “puzzling.” *Id.* The *Real Alternatives* court, in contrast, held that “the Departments . . . had no reason to treat groups that espouse these views as equivalents to religion.” *Real Alts.*, 150 F. Supp. 3d at 442. This Part seeks to explain why this choice was not puzzling, and why the equal protection method does not impute any specific ill will, or even apathy, towards policymakers who choose to protect religion.

160. *Cf. Real Alts.*, 150 F. Supp. 3d at 439 (arguing that *Real Alternatives*’s equal protection claim is functionally identical to “negating” the regulatory exemption from the Contraceptive Mandate). Though I question, as a factual matter, the claim that a narrowly tailored injunction could actually negate the exemption as a whole, this argument insufficiently recognizes the equal protection claim’s reliance on the exemption’s existence in order for it to be extended (by injunction or otherwise) because there is no discernible ground for the non-religious parties to create the accommodation from whole cloth. See *infra* Part IV.B for further analysis of this point.

161. Koppelman, *supra* note 10, at 75 (“Religion is not a proxy for any other single value . . . . There are many candidates for the replacement position . . . .”). In his book, Koppelman lists some of these interests:

“Religion,” then, denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists), responding to the fundamentally imperfect character of human life (if it is imperfect), courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps), a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps), contact with that which is awesome and indescribable (if awe is something you feel), and many others.

KOPPELMAN, *supra* note 23, at 124.

162. See Andrew Koppelman, “Religion” as a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 SAN DIEGO L. REV. 1079, 1079 (2014) (“Since there is no such thing as religion, if such accommodations are justified, the justification must ultimately depend on some desideratum other than religion. Religion can only be a proxy.”).

163. See Koppelman, *supra* note 10, at 72 (“There is, of course, nothing necessarily privileged about the status quo, but . . . [The United States] has done a fine job of handling [religious] diversity . . .”).

164. Koppelman, *supra* note 10, at 74.

despite being terrible drivers, while others could fail the test yet be wonderful drivers.<sup>165</sup>

Similarly, religion is over- and underinclusive: those interests that it protects are only “more likely to be salient in religious than in nonreligious contexts”—they are not exclusive to religion.<sup>166</sup> For Koppelman, the overinclusiveness is precisely the advantage of the proxy: because there is no true definition of religion, the word covers what we intuitively understand to be religious regardless of the form of the belief.<sup>167</sup> He rejects that there are significant problems of unfairness due to underinclusiveness, except at theoretical peripheries.<sup>168</sup> The non-religious simply do not have an analogous need for the proxy; they rely directly on interests such as conscience or moral conviction.<sup>169</sup> To the extent that these are relevant on the margins, they are often already accommodated within religious accommodations by broader “conscience clauses.”<sup>170</sup>

### B. Supplemental Proxies

One of the problems with the proxy as an ultimate justification for religious accommodation is precisely the fact that it does not rely on any special ontological significance in religion, so there is no particular reason

165. For example, someone who is an excellent driver but has social anxiety might perform poorly with a stranger in the passenger seat carrying a clipboard. Otherwise, a person who is normally an inattentive driver might focus intently for the twenty minutes of the exam and pass despite the danger they pose on the road when unsupervised.

166. Koppelman, *supra* note 10, at 78.

167. *See id.* at 77 (recognizing the religious claims in *City of Boerne v. Flores*, 521 U.S. 507 (1997), [expansion of a church] and *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988), [protection of a sacred forest] as being religious in a sense broader than freedom of conscience); accord Eisgruber & Sager, *supra* note 5, at 809 (“Insofar as definitions of religion are needed at all, conventional, common sense definitions will suffice.”).

168. Koppelman, *supra* note 10, at 79; accord Schwartzman, *supra* note 4, at 1409 (“[O]utside of specific high-stakes contexts, there might be relatively few instances in which nonbelievers seek constitutional exemptions for conflicts with their moral beliefs.”). Schwartzman, however, believes that healthcare law, such as in *March for Life*, is one of these high-stakes contexts. *See* Schwartzman, *supra* note 4, at 1408–09.

169. Koppelman, *supra* note 10, at 79 (quoting Michael W. McConnell, *Accommodation of Religion*, 1985 S. CT. REV. 1, 10–11 (“[U]nbelief entails no obligations and no observances. Unbelief may be coupled with various sorts of moral conviction . . . But these convictions must necessarily be derived from some source other than unbelief itself.”)). *But see* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 976 (2004) (arguing that conscientious objection follows from non-belief in God because “[a]theists or agnostic draft objectors can plausibly assert that the nonexistence of a theistic god or an afterlife means that this life is of utmost importance, and therefore that the worst thing a person can do is end another’s life”).

170. *See* Schwartzman, *supra* note 4, at 1408–09 (discussing many existing accommodations that cover both religious and secular claims of conscience), *see also, e.g.*, 29 C.F.R. § 1605.1 (2015) (including “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views” in the EEOC’s definition of “religious”).

to *stop* at religion.<sup>171</sup> Professor Schwartzman framed this objection as opening up the possibility of “supplemental proxies.”<sup>172</sup> Using the driver’s license analogy again, Schwartzman imagines there was a particular subset of safe drivers who failed the test “in a specific and predictable way.”<sup>173</sup> Ideally, a better test might capture this subset, but that new test might be difficult to create or become unintentionally and dangerously overinclusive.<sup>174</sup> The next best solution would be a second proxy designed to capture specifically those who fell through the cracks of the first proxy.<sup>175</sup> Koppelman likens this possibility to habeas review in the criminal context: a later-applied test that will “rescue” some of those who were wrongly identified by the original proxy.<sup>176</sup>

This is precisely what the equal protection method in *March for Life* and *Center for Inquiry* attempts to be: the secondary proxy to religion.<sup>177</sup> To the extent the legislature has identified room for an accommodation from an existing law, whether it be the contraceptive mandate or the requirement that a marriage be solemnized by an officer of the state, it is using religion as a proxy for some other interest.<sup>178</sup> It frames the accommodation in the form of an exemption for religious believers, even though the interest the legislature is trying to protect is not necessarily unique to the religious.<sup>179</sup>

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171. Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099 (2014) (“[E]ven if religion is a reasonably good proxy for protecting a diversity of goods, it is not sufficient to establish that no other proxy can serve as a global substitute.”).

172. *Id.*

173. *Id.* An example would be the socially anxious drivers discussed in note 165, *supra*.

174. Continuing the example, tests without an examiner in the passenger seat might help those with social anxiety, but also lead to more bad drivers passing due to the reduction in supervision. Given the relative population of these two kinds of people, having the examiner in the passenger seat is better overall—even if not ideal—because it passes more good drivers and fewer bad drivers than the alternative. Similarly, Koppelman believes that religion is an “adequate” proxy for which substitutions would be underinclusive, but denies that it is perfect. Koppelman, *supra* note 10, at 78.

175. Schwartzman, *supra* note 171, at 1099, goes further, arguing that it is “*necessary* to show that there are no feasible supplemental proxies” in order “[t]o rebut the charge of unfairness” (emphasis added).

176. Koppelman, *supra* note 162, at 1083.

177. Despite the precise focus on the interest being accommodated, it is still only a *secondary* proxy and neither a direct proxy nor a direct accommodation of the underlying interest. This is true because the rational basis standard of the equal protection method, requiring that the parties be identically situated, is necessarily an underinclusive subset of a group seeking accommodation. In addition, the analysis relies on existing exemptions and provides no means to create its own accommodation from the application of a particular law, *see infra* Part IV.B. Thus, even if the equal protection method were adopted by the Supreme Court, it would not defeat the value or even the necessity of providing conscience clauses that, by their express terms, extend accommodations beyond religion.

178. Whether that interest be “an employment relationship based in part on a shared objection to abortifacients,” *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015), or something less tangible such as “celebrat[ing] their values,” *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014).

179. *See March for Life*, 128 F. Supp. 3d at 127 (“[W]hat HHS *claims* to be protecting is religious beliefs, when it *actually* is protecting a moral philosophy about the sanctity of human life . . . Where

Recognizing this underlying interest, courts may expand the exemption to the non-religious who are similarly situated in the relevant aspect for which the religious accommodation is a proxy.<sup>180</sup> Because this method does not ever question the basic legitimacy of broad, legislative religious exemptions, but only the irrationality of a specific line drawn, it acts as the exact opposite of the destructive argument that seeks to replace religious freedom with some form of generalized freedom.<sup>181</sup>

The primary advantage of the equal protection method is that it allows courts to accommodate religious and non-religious beliefs that are substantially similar without granting these non-religions the title of “religion” in violation of both the text of the Constitution and common-sense.<sup>182</sup> The framework also removes much of the incentive for non-religious believers to fraudulently or hypocritically reframe their claims as religious.<sup>183</sup> Furthermore, it works to cement the validity of religious exemptions;<sup>184</sup> so long as a religious belief is not being privileged over a similar secular belief, there is no reason to complain of the accommodation.<sup>185</sup> None of these advantages mean anything, however, if this framework is inconsistent with the law. Thus, in the next Part, I will

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HHS has erred, however, is in assuming that this trait is *unique* to [religious] organizations. It is not.”).

180. Cf. Eisgruber & Sager, *supra* note 5, at 830 (arguing that “the Religion Clauses prevent the forms of mistreatment historically associated with religious conflict . . . [including] injuries inflicted on the ground that the targeted activity is viewed as *not* religious” and thus, “we do not have to decide whether [claimants’] reasons for action are religious in character”).

181. Cf. EISGRUBER & SAGER, *supra* note 13, at 95 (“The basic idea [of Equal Liberty] is this: if American law in general respects liberty and accommodates individual needs, then a sufficiently powerful equality principle will ensure that it also respects religious needs in particular.”); *id.* at 96–97 (using “[h]ealth-exemption analogies” as secular accommodations against which religious accommodation requests are compared). The equal protection method, in contrast, finds situations in which religious needs are accommodated, as they often (though not always) are, and expands the accommodation to similar non-religious claims. A sufficiently libertarian individual might even prefer both methods working in parallel to maximize individual freedom.

182. Tebbe, *supra* note 113, at 1136 (noting that “commonsensical understandings of religion” provide a limit to a court’s ability to interpret the term religion); Schwartzman, *supra* note 171, at 1101–02 (finding appealing “[t]he strategy of expanding the definition of religion,” but noting the “significant practical difficulties” in expanding beyond conventional meanings).

183. See Marshall, *supra* note 68, at 326 (“[T]he integrity of religion does not benefit from a system that encourages individuals to characterize their beliefs in religious terms . . . . Religion is not served when it becomes the tool for fraudulent or specious claims.”).

184. Cf. *id.* at 310 (arguing that making religious exemption dependent on the religious nature of the claimant “undermines the constitutional values it purports to protect”); EISGRUBER & SAGER, *supra* note 13, at 55 (tracing the “unfortunate circle” traveled by requiring that a claimant be “‘religious’ in the right way” when one of the primary reasons for religious exemption is that “religious belief is no business of the state”).

185. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (finding a violation of the Establishment Clause when RFRA “provided the Church with a legal weapon that no atheist or agnostic can obtain”). While certainly more religious than non-religious people would profit even under this framework, so long as it does not lead to “no atheist or agnostic” benefiting, Justice Stevens’ argument should wither, if not perish.

show how this method may actually follow from “[t]he long history of precedent” that appears to reject it.<sup>186</sup>

#### IV. EQUAL PROTECTION AND RELIGIOUS-SECULAR EQUIVALENCE

The result of finding that religion is not special, but only a proxy, is that religious and non-religious beliefs, similarly situated with regard to an underlying interest, should be treated equally by the law. But that, by itself, does not lead to any particular result.<sup>187</sup> “As a general matter, the state can treat religious and secular doctrines equally either by granting or by denying exemptions for both.”<sup>188</sup> Since 1990, outside of specific contexts, the latter, low protection approach has applied as a matter of constitutional law.<sup>189</sup> On the statutory level, however, the accommodation for religion has never been higher, most notably through RFRA<sup>190</sup> and RLUIPA,<sup>191</sup> but also through individual statutory exemptions, such as the exemption of religious organizations from most taxes,<sup>192</sup> the right to object to performance of sterilization or abortion,<sup>193</sup> or the exemption of conscientious objectors from the draft.<sup>194</sup>

It is in this statutory model of religious exemptions that non-religious beliefs best share in exemptions: the method does not rely on the text of the

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186. *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 442 (M.D. Penn. 2015) (arguing that precedent supports religious freedom as a legitimate government interest *per se*), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

187. *Cf. Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (“The right invoked is that to equal treatment; and such treatment will be attained if either their competitors’ taxes are increased or their own reduced.”).

188. Schwartzman, *supra* note 4, at 1401; *see also* Tebbe, *supra* note 113, at 1140–41 (“[S]ome argu[e] that free exercise law should be leveled up to include [nonbelievers] and others say[] that the only workable solution is to level down, so that neither religious nor nonreligious people can claim exceptional protection in court.”).

189. These specific contexts include laws that amount to “religious gerrymander,” *see, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan J., concurring)), or involve freedom of a church generally, rather than a specific accommodation, *see Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012) (finding the First Amendment prevents courts from interfering with a church’s internal structure).

190. 42 U.S.C. § 2000bb (2012).

191. 42 U.S.C. § 2000cc (2012).

192. I.R.C. § 501(c)(3) (2012) (granting tax exemptions to organizations “operated exclusively for religious . . . purposes”); I.R.C. § 6033(a)(3)(A)(i), (iii) (2012) (exempting from filing “churches, their integrated auxiliaries, and conventions or associations of churches” and “the exclusively religious activities of any religious order”).

193. 42 U.S.C. § 300a-7 (2012) (prohibiting the “imposition of certain requirements contrary to religious beliefs or moral convictions,” such as courts or public authorities demanding performance of sterilization or abortion procedures in order to receive federal funds).

194. 50 U.S.C. App’x § 456(j) (2012) (granting conscientious objector status to one who “by reason of religious training and belief, is conscientiously opposed to participation in war in any form”).



Constitution, which explicitly and unimpeachably singles out religion,<sup>195</sup> and it only covers those situations in which the legislature has already found room for accommodation from a regulatory scheme.<sup>196</sup> There is no fear of anarchy resulting from individual non-religious demands of conscience that could expand beyond that of the religious persons already accommodated.<sup>197</sup> Nor is there a slippery slope: the “similarly situated” standard expressly avoids modifying the exemption in any significant way.<sup>198</sup> Even if we treat any change in the scope of the exemption as undesirable,<sup>199</sup> the ball remains always in the legislature’s court to modify rights that have expanded too far or are simply flawed.<sup>200</sup>

#### A. Constitutional Lows: *Employment Division v. Smith*

When the Supreme Court issued its landmark decision in *Employment*

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195. See Volokh, *supra* note 142, at 1493 (noting that the “plausible” possibility that exemptions should be limited purely to the religious “doesn’t apply if one rejects the constitutional exemption model” in favor of a statutory model: “[o]ne would have to explain why, as a constitutional matter, such a preference for religion comports with the Establishment Clause, and why, as a policy matter, the preference is morally sound”).

196. Cf. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (finding RFRA exemption for religious use of *hoasca*, a Schedule I hallucinogen, based on the already existing statutory exemption for peyote, another Schedule I hallucinogen); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2759 (2014) (noting that “HHS has already devised and implemented a system that seeks to respect . . . religious liberty” and thus could easily extend it to new claimants).

197. See Schwartzman, *supra* note 171, at 1097 (“[T]he ‘welfare monster’ objection [to freedom of conscience] . . . applies with equal force to claims for religious accommodations.”). To the extent we fear allowing Africa to overburden the prison cafeteria, a religious exemption for Jewish, Muslim, or Hindu prisoners can do the same. If such a claim were too extreme, say, a religious requirement that one only eat caviar-encrusted filet mignon, it should be equally rejected whether it is Kuch, Africa, Yoder, or Pope Francis requesting the exemption under his respective religion.

198. *Contra Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 441–42 (M.D. Penn. 2015) (discussing the “[d]eleterious effects” of the equal protection method, including the slippery slope that leads to finding “all such exemptions should fail”), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016). If anything, the result would effectively be an elimination of the underlying law and not the exemption if it were to cover too many objecting parties. In the extreme, if an “actual” majority objected to a law, then perhaps that law should not exist. Cf. *McConnell*, *supra* note 78 at 1148 (“Who can doubt that there would be exceptions to social security (or, more likely, no social security at all) if mainstream Christians were forbidden by their religion to participate?”); *Marshall*, *supra* note 68, at 316 (“A society is never likely to find a strong regulatory interest in a measure that is hostile to the majoritarian tradition, and accordingly is unlikely to pass such a measure in the first place.”).

199. A position that has serious problems if we simply replace the non-religious claimant with an unknown or idiosyncratic religious claimant that was equally unanticipated by the legislature. In some cases this view avoids the exact advantage of using the broad concept of religion as the interest to be accommodated. See Volokh, *supra* note 142, at 1477 (arguing that judicial determination of ambiguous statutory exemptions in general depends on, among other things, the legislature’s expectation “that it was unlikely to anticipate adequately” those situations in which the statute should not apply); *supra* Part III (arguing for the stronger claim that religion is an intentionally vague proxy for other interests).

200. See Volokh, *supra* note 142, at 1474–75 (noting that the statutory exemption model, unlike the constitutional exemption model, “leave[s] the final decision to legislative discretion” rather than to the courts).

*Division v. Smith*,<sup>201</sup> it came as a shock.<sup>202</sup> The facts were quite simple and almost completely indistinguishable from a long line of cases that had been affirmed unanimously only one year prior.<sup>203</sup> The two plaintiffs were members of the Native American Church who were fired from their jobs as drug counselors for their sacramental use of peyote,<sup>204</sup> an illegal hallucinogen under Oregon law.<sup>205</sup> All but ignoring precedent,<sup>206</sup> and even potential issues of jurisdiction,<sup>207</sup> the Court denied their First Amendment claim for unemployment compensation.<sup>208</sup>

Justice Scalia, writing for the majority, stated plainly that the Court “ha[d] never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>209</sup> Four Justices resoundingly rejected this descriptive statement,<sup>210</sup> and scholars referred to the holding as a “revision” of free

201. 494 U.S. 872 (1990).

202. See Ryan, *supra* note 18, at 1409–10 (surveying the “hostility generated by *Smith*” and noting that “[o]f the sixteen law review articles and notes written on the case, all but one [Marshall, *supra* note 68] condemned the result”); RFRA, 42 U.S.C. § 2000bb(a)(4) (2012) (finding that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”).

203. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the Free Exercise Clause requires a compelling state interest for a state to deny unemployment benefits to an employee who quit their job for religious reasons); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (applying *Sherbert* to a claimant with religious beliefs idiosyncratic to his particular sect); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (applying *Sherbert* to a claimant who converted to a religion incompatible with her pre-existing employment); *Frazer v. Ill. Dep’t of Emp’t*, 489 U.S. 829 (1989) (applying *Sherbert* to a claimant with religious beliefs unrelated to any particular sect).

204. Interestingly enough for this Note, though completely unexplored by the Court, there is a question as to whether the use of peyote was, strictly speaking, religious. See KOPPELMAN, *supra* note 23, at 134 (“[N]either of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.”).

205. See *Smith*, 494 U.S. at 874.

206. See McConnell, *supra* note 78, at 1122–24 (criticizing *Smith* for a lack of a “coherent distinction” from the unemployment cases). Notably, the Court completely failed to mention *Frazer* in its decision, instead stating that there were only three unemployment compensation cases. See *Smith*, 494 U.S. at 883 (citing *Sherbert*, *Thomas*, and *Hobbie* as the “three occasions” on which the Court has applied the *Sherbert* test); McConnell, *supra* note 78, at 1122 n.56 (offering “no explanation for this omission”).

207. The Court attempted to distinguish the *Sherbert* line of cases on the grounds that peyote was criminally prohibited. *Smith*, 494 U.S. at 876. However, the Oregon Supreme Court had foreclosed that distinction as a matter of “Oregon’s unemployment compensation law,” (i.e., state law) finding the potential for criminal sanctions “immaterial.” *Smith v. Emp’t Div.*, 763 P.2d 146, 147 (Or. 1988) (per curiam). See also McConnell, *supra* note 78, at 1111–14 (detailing the myriad reasons why “*Smith* was an unlikely vehicle” for its result).

208. *Smith*, 494 U.S. at 890 (“Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation . . .”).

209. *Id.* at 878–79.

210. *Id.* at 891 (O’Connor, J., concurring) (“[T]oday’s holding dramatically departs from well-settled First Amendment jurisprudence . . .”); *Id.* at 908 (Blackmun, J., dissenting) (“Until today, I thought [the compelling interest test] was a settled and inviolate principle of this Court’s First

exercise jurisprudence.<sup>211</sup> In its holding, the Court had reverted back to an earlier, narrower reading of the religion clauses, made abundantly clear by the citations chosen in the opinion.<sup>212</sup> Justice Scalia justified this shift by speaking in apocalyptic terms, claiming that broad religious exemptions were “courting anarchy.”<sup>213</sup> Most tellingly was his reliance on the language of the 1878 case of *Reynolds v. United States*<sup>214</sup> that rejected any particular freedom to act religiously in favor of freedom of “mere religious belief.”<sup>215</sup> Religion had lost much of its special status as a result of the *Smith* ruling, dismissed haphazardly as a “constitutional anomaly”<sup>216</sup> and a “luxury.”<sup>217</sup>

While this was certainly a loss for religion, the holding in *Smith* could be read to bring about *constitutional* equivalence between religious and secular motivations through that loss.<sup>218</sup> It does so by reducing the constitutionally mandated accommodation of religion to be equal to that of secular interests.<sup>219</sup> In regards to both types of beliefs, the government must only meet the low bar of the rational relationship standard<sup>220</sup> and the claimants, whether more like the Amish or more like Thoreau, are left at the mercy of the “political process.”<sup>221</sup> The Court essentially decided that the complex constitutional tension of religion’s special status was best solved

Amendment jurisprudence.”).

211. McConnell, *supra* note 78; Marshall, *supra* note 68; accord Volokh, *supra* note 142 at 1473 (“*Smith* largely overruled *Sherbert* and reinstated the old statutory exemption model.”); Tebbe, *supra* note 113, at 1154 (calling *Smith* a “controversial turnabout”); sources *supra* note 202.

212. See McConnell, *supra* note 78, at 1124–27 (criticizing the Court’s choice of precedent, particularly its lengthy citations to *Minersville Sch. Dist. v. Gobbitt*, 310 U.S. 586 (1940)); Marshall, *supra* note 68, at 309 (conceding that the *Smith* opinion’s “use of precedent borders on fiction”).

213. *Smith*, 494 U.S. at 888.

214. 98 U.S. 145, 167 (1878) (claiming that the exemption of Mormons from laws against polygamy would “permit every citizen to become a law unto himself”); see *Smith*, 494 U.S. at 879, 885, 890 (repeating this language).

215. *Reynolds*, 98 U.S. at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

216. *Smith*, 494 U.S. at 886.

217. *Id.* at 888.

218. See *id.* at 878 (rejecting that “religious motivation . . . places [claimants] beyond the reach of a criminal law . . . that is concededly constitutional as applied to those who [act] for other reasons”).

219. See Nelson Tebbe, *Smith in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2063 (2011) (comparing the Equal Liberty theory of Eisgruber & Sager to “the *Smith* regime”). The basics of the Equal Liberty theory are discussed *supra* note 13.

220. *Smith*, 494 U.S. at 885 (comparing “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct” to “its ability to carry out other aspects of public policy”). The judicial review given to such policy preferences guarantees “only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.” *Nebbia v. New York*, 291 U.S. 502, 525 (1934). See also John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 819 (2014) (“[T]he Court [in *Smith*] concluded that neutral laws of general applicability need only pass rational basis scrutiny to survive constitutional challenge.”).

221. *Smith*, 494 U.S. at 890.

by a “retreat from the effort to construe or enforce the clauses at all.”<sup>222</sup>

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222. Smith, *supra* note 4, at 231.

*B. Statutory Highs: RFRA and RLUIPA*

Despite all that can be said about *Smith* as a decision and its treatment of religious motivation, in practice, it “changed remarkably little.”<sup>223</sup> As Judge Michael McConnell noted: “Even before *Smith*, legislative accommodations were far more important to the protection of religious exercise than the First Amendment. This fact is even more true today.”<sup>224</sup> Legislative accommodations are desirable not only because they, unlike the constitutional system pre-*Smith*, are controlled by policy-makers,<sup>225</sup> but also because they tend to have “an identifiable burden . . . that can be said to be lifted.”<sup>226</sup> Such a system easily avoids the anarchy warned about in *Smith* by not allowing a person to become a law unto himself—instead, the law merely exists as it is written.<sup>227</sup>

This sort of statutory exemption model cleanly opens the way for the equal protection method of *March for Life* and *Center for Inquiry* in several ways. First, it identifies, either implicitly or explicitly, the interest for which religion is acting as a proxy.<sup>228</sup> This functions as the interest against which the court can determine whether the claimant is similarly situated when extending the already-existing accommodation.<sup>229</sup> This helps separate religiosity from the claimant’s worthiness of accommodation. Second, the fact that it is legislative rather than constitutional allows constitutional

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223. EISGRUBER & SAGER, *supra* note 13, at 257; *accord* Ryan, *supra* note 18, at 1412 (predicting that the impact of *Smith* “will likely be insignificant”); Tebbe, *supra* note 219, at 2056 (“[T]he controversy [of *Smith*] is actually more limited than many non-specialists recognize.”).

224. McConnell, *supra* note 14, at 5.

225. *See Smith*, 494 U.S. at 890 (preferring to leave accommodation to the political process and democratic government rather than to a system in which judges weigh the social importance of laws); *see* Volokh, *supra* note 142, at 1522–24 (comparing constitutional religious exemption to substantive due process and arguing that the scope of rights and determination of harms must be left to the legislature).

226. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring).

227. *See* Magarian, *supra* note 156, at 1925 (comparing a situation where “Congress affirmatively states that [a] statute shall not apply” to a given group with a contrary situation in which a statute applies to a particular set of people that does not include that group).

228. In *March for Life*, the HHS did much of the work in identifying the interest as “an employment relationship based in part on a shared objection to abortifacients.” *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015). The *Center for Inquiry* court had to rely on the context of the underlying law and its relation to marriage to determine that the interest protected by allowing churches to solemnize marriage was the ability for individuals to “celebrate[] their values.” *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014).

229. *Cf.* EISGRUBER & SAGER, *supra* note 13, at 255–56 (arguing that “the Court can easily supply a remedy for [a group] by demanding that it have access to the system” already designed by the state when “institutional limits on the judiciary’s capacity to enforce” those rights would otherwise prevent such an action in the absence of that system).

avoidance<sup>230</sup> to perform much of the work in broadly construing the statute to reach unforeseen claimants.<sup>231</sup> Unlike a decision made purely by interpreting the Constitution, the legislature must comply with the Establishment Clause.<sup>232</sup> Third, the scope of the right remains with the legislature even after judicial expansion. The equal protection method relies on the fact that the legislature was shortsighted in creating the exemption in the first place, thus the court performs the work of extending it to its proper scope.<sup>233</sup> If the legislature did not understand its shortsightedness and at any point regrets the accommodation, it is free to remove it.<sup>234</sup> This would return both religious and non-religious similarly situated parties to the status quo.<sup>235</sup> If the legislature decries the slight expansion of the right,<sup>236</sup> but

230. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247–251 (2012). Scalia and Garner consider constitutional avoidance to consist of two rules. The “Constitutional-Doubt Canon” states that “[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.” *Id.* at 247. The second rule requires that “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Id.* at 251 (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). This method applies whenever a possible construction would “raise serious questions of constitutionality,” *id.* at 248, and thus does not rely on a finding that a statute actually violates the Constitution.

231. See *United States v. Seeger*, 380 U.S. 163, 166, 176 (interpreting the term “religious beliefs” to include a claimant who follows the ethics of Plato, Aristotle, and Spinoza in order to “avoid[] imputing to Congress an intent to classify different religious beliefs”).

232. By its explicit terms, the First Amendment states that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I, cl. 1 (emphasis added). The Court nevertheless sought to make clear the ways in which its jurisprudence did not violate the Establishment Clause by essentially ordering another governmental entity to do so. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (arguing that religious accommodation fulfills duties of neutrality and does not foster establishment); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 665–66 (2001) (“[A]ccording to the authoritative case law . . . it is not just ‘Congress’ but all three branches of the national government that may not prohibit the free exercise of religion . . .”).

233. See *Seeger*, 380 U.S. at 192 (Douglas, J., concurring) (imputing “tolerance and sophistication to the Congress” in order to extend the law beyond its explicit terms).

234. See *Volokh*, *supra* note 142, at 1476 (“When the legislature concludes that a court was too generous, it will specifically provide that the statute has no exemption.”); accord RFRA, 42 U.S.C. § 2000bb-3(b) (leaving the possibility that a law “explicitly excludes [application of RFRA] by reference to this chapter”). *But see* *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 644–45 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) (arguing that legislative abrogation of RFRA protection is not neutral and generally applicable because only religious parties are originally provided such protections, and therefore abrogation violates the Free Exercise Clause).

235. Some have argued that this undesirable result should caution against broadening exemptions. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1493 (1990) (“[I]f the exercise of religion extends to ‘everything and anything,’ the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight. To protect everything is to protect nothing.”). Where one lands on this issue likely depends on one’s relative weighting of equality and liberty, like so many issues of government.

236. This possibility, as a practical matter, is unlikely because extension generally does no harm to the original accommodation that the legislature sought. See *Magarian*, *supra* note 156, at 1983 (arguing that extension of RFRA to “nontheistic conscientious claims would be at worst irrelevant to the policy

wishes to keep it for the intended parties, then that can be circumstantial evidence that the law itself could have an invidious intent to promote specific religions in violation of the Establishment Clause.<sup>237</sup> Simply because there is no rational reason for differently treating parties that are identically situated, the only possible motives for a legislature to affirmatively privilege religion in such a case must be “unreasonable, arbitrary or capricious.”<sup>238</sup>

This system of precise statutory exemptions was likely the intended result of *Smith*.<sup>239</sup> Congress, however, chose a different method and attempted to legislatively overrule the Court.<sup>240</sup> In so doing, it passed a generalized law—the Religious Freedom Restoration Act—which applied the compelling interest test to “all Federal law, and the implementation of that law, whether statutory or otherwise.”<sup>241</sup> This sort of system applies “blindly and en masse”<sup>242</sup> and thus does not have the first advantage of statutory religious exemptions: identification of the proxy interest.<sup>243</sup> Because RFRA, and its “sister statute,” RLUIPA, protect religion in the broadest terms possible,<sup>244</sup> it is not entirely clear what interest is actually

of the statute” because there is nothing to indicate that “Congress affirmatively wanted to privilege religious exercise to the exclusion of other conscientious practices”).

237. This explains why much of *Center for Inquiry*’s reasoning was based on arguments involving other paradigmatic religions, such as Buddhism, rather than the Secular Humanists directly. *See also* *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014) (comparing the Indiana statute with one that permits Catholics but not Baptists from solemnizing weddings). Promotion of a particular religion is a much clearer violation of the Establishment Clause than promotion of religion in general. *See Larson v. Valente*, 456 U.S. 228, 252 (1982) (applying strict scrutiny to laws that “discriminate among religions,” but the lower scrutiny *Lemon* tests to laws “affording a uniform benefit to all religions”). The equal protection method, as I have framed it, seeks to blur the line between these two questions based on the impossibility of adequately defining religion, such that denying a benefit to a claimant because they are ostensibly non-religious is discriminating among religions.

238. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

239. *See Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (explicitly permitting “a nondiscriminatory religious-practice exemption,” but requiring that it be left “to the political process”).

240. *See* RFRA, 42 U.S.C. § 2000bb(a)(4), (b)(1) (2012) (declaring the purpose of RFRA to be “to restore the compelling interest test” that Congress found to have been “virtually eliminated” in *Smith*); *see also* Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993) (invoking “[t]he power to reverse . . . by legislation, a decision of the United States Supreme Court” and claiming that “this act reverses the Supreme Court’s decision *Employment Division against Smith*”).

241. RFRA, 42 U.S.C. § 2000bb-3(a).

242. Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 11 (1998) (emphasis omitted). *But see* Volokh, *supra* note 142, at 1491 (“Nothing in either the relationship of the three branches of government . . . or in the Establishment Clause stands in the way of this sort of delegation.”).

243. Instead, this system acts only as a general proxy for many interests. *See supra* note 161 for Professor Koppelman’s examples of such interests. The fact that this list of interests is undefined in scope is the precise advantage of the proxy from the point of view of protecting religious liberty.

244. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (“RLUIPA and its sister statute, [RFRA] . . . provide very broad protections for religious liberty.”) (citing *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751,

being protected.<sup>245</sup> Religious motivation by itself cannot adequately provide that interest.<sup>246</sup> This creates a problem for the equal protection method: when there is no particular interest, there is nothing towards which a claimant can be similarly situated; instead we will end up asking whether a party is “‘generally’ similar” to a religious claimant,<sup>247</sup> bringing us right back to the dangerous, misguided, and ultimately impossible task of defining religion.

Though the second advantage of statutory religious exemption—the ability to use constitutional avoidance—remains,<sup>248</sup> if we were to allow strict scrutiny for any claimant that has a belief that is similarly situated to any plausible religious belief we would have actual anarchy.<sup>249</sup> The only proper way to apply RFRA and RLUIPA under the equal protection method cannot enable an admittedly non-religious claimant to create a particular accommodation through the statutory remedies.<sup>250</sup> Such a possibility would be even more absurdly expansive than the two statutes already are.<sup>251</sup> Instead, the method should treat a pre-existing paradigmatic religious objector’s RFRA accommodation as if it were a particularized statutory

2760 (2014)).

245. *Cf.* EISGRUBER & SAGER, *supra* note 13, at 270 (criticizing RLUIPA’s “broad sweep, which gives every church (powerful, mainstream ones along with upstart outsiders) a presumptive exemption from every land use restriction . . . [including] ones that limit churches’ ability to expand parking lots, build on wetlands or in green belts, erect broadcasting antennas, and so on”).

246. *See* Volokh, *supra* note 142, at 1510 (“Taken literally, such a claim is clearly too broad. Surely no court would immunize, for instance, murder or rape simply because the perpetrator acted out of religious conviction.”); *accord* Reynolds v. United States, 98 U.S. 145, 166 (1878) (“Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”).

247. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 126 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015).

248. *See* Volokh, *supra* note 142, at 1493 (noting that “making the exemption available to anyone who has a deeply held conscientious belief” is equally available under “RFRA-type” regimes and statutory exemption regimes).

249. *See* Magarian, *supra* note 156, at 1986 (“The major disadvantage of this broad construction . . . is that a Federal RFRA construed to protect all manner of conscientious claims could shield masses of people from the reach of generally applicable laws.”). For instance, a business could argue that it is similarly situated in its “employment relationship based on an aversion to minimum wage” to a hypothetical religion. Or even a real one. *See* Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985) (involving a religious objection to minimum wage). Assuming sincerity, and *ceteris paribus*, there would be little reason to distinguish between such a business and the foundation. If one were granted accommodation (the actual foundation was not), both should be.

250. *See* Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (“[O]f course, a prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation . . .”).

251. I am of the personal opinion that RFRA enables courts to implement actual policy and create new systems to accommodate religious objections. *See* Univ. of Notre Dame v. Burwell, 786 F.3d 606, 630 (7th Cir. 2015) (Flaum, J., dissenting) (“RFRA may require the government to start over and ‘creat[e] . . . entirely new programs’ . . .”) (citing *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2781 (2014)).



exemption from the legal burden.<sup>252</sup> This is consistent with how RFRA has been applied by the Supreme Court in practice.<sup>253</sup> If one views March for Life as more similar to Hobby Lobby than to a church, then it is arguably exactly how equal protection applied in *March for Life*.<sup>254</sup> This distinction narrows the scope of the equal protection method to only expanding existing rights,<sup>255</sup> where it belongs, and keeps it squarely in the rational basis standard that justifies its existence.<sup>256</sup> This low standard is required, rather than strict scrutiny, because a “nondiscriminatory religious-practice

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252. See Magarian, *supra* note 156, at 1926–27 (summarizing the “super-amendment” view of Federal RFRA which treats RFRA as individually amending every law to which it is applied).

253. So far the Court has focused on expanding existing accommodations for similarly situated claimants, despite the fact that the least restrictive means test imposed by RFRA and RLUIPA is “broader” than even “the pre-*Smith* jurisprudence RFRA purported to codify.” *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (comparing a requested exemption for religious use of *hoasca* to a regulatory exemption for religious use of peyote); *Hobby Lobby*, 134 S. Ct. at 2759 (reaching its conclusion based on the existence of the “already devised and implemented” system for accommodation); *Holt*, 135 S. Ct. at 860 (discussing already existing “exemption for prisoners with medical needs”). *Zubik*, had it not been remanded essentially without decision, see *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 U.S. LEXIS 3047 (May 16, 2016) (per curiam), may have changed this focus. Petitioners had claimed that the accommodation itself violated RFRA, though again, the petitioners framed their argument as an expansion of an existing accommodation—the accommodation for churches rather than for religious non-profits. See *Petition for Writ of Certiorari* at 5–6, *Zubik v. Burwell*, No. 14-1418 (May 29, 2015). We will simply have to wait for the issue to return to the Court in the next few years, either through the cases remanded or in the countless similar cases winding their way through the federal courts, including of course *March for Life* and *Real Alternatives*.

254. If March for Life is more similar to a church, then the method simply expands an existing regulatory exemption. If it is more similar to Hobby Lobby, then it is taking the existing regulatory exemption for churches—which was expanded to closely held corporations through RFRA in *Hobby Lobby*, 134 S. Ct. 2751—and then expanding that exemption *again* to similarly situated non-religious corporations in *March for Life*. I would argue that the March is more similar to Hobby Lobby, if only because it is in the same broad class of claimants originally denied accommodation, see *supra* note 41. 255. Cf. *Cavanaugh v. Bartelt*, No. 4:14-CV-3183, 2016 U.S. Dist. LEXIS 48746, at \*20 (D. Neb. Apr. 12, 2016) (“The primary focus of Cavanaugh’s complaint . . . is that he is being discriminated against . . . He says very little about how his exercise of [Pastafarianism] has been significantly burdened by that alleged discrimination.”). The court in *Cavanaugh* rejected the plaintiff’s claim as not constituting a religion. See *id.* at \*19. Despite this similarity to *Africa*, Cavanaugh is a perfect example of a claimant who would not find any solace in the equal protection method and helpfully demonstrates the distinction between the equal protection method and a broadened definition of religion. Cavanaugh’s failure to identify a particularized situation in which he was being denied equal treatment, rather than a generalized feeling of ostracization, would mean that there is nothing for the equal protection method to compare against to determine whether he was similarly situated.

256. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 126 (D.D.C. 2015) (“[T]he equal protection clause does not impose on lawmakers a requirement of perfect parity . . . . Rational basis review . . . demands that agency line drawing, however inartful, rationally relate to its purported objective.”), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015). Reading RFRA to allow non-religious claimants to create accommodations would essentially use rational basis review to trigger strict scrutiny review, an absurdity no matter how inartful one thinks the blind protection of religious motivation may be. This absurdity may, of course, be an extension of a more fundamental problem with the idea of a statute imposing a certain standard of review on courts.

exemption” is generally permitted and is often desirable.<sup>257</sup>

### C. *Playing in the Joints: Permissible Religious Solicitude*

As all three courts recognized in approaching the equal protection method,<sup>258</sup> the Supreme Court has been clear that there is generally “no reason to require that [religious] exemption come packaged with benefits to secular entities.”<sup>259</sup> A legislature does not violate the Establishment Clause simply by creating an accommodation for religion; “there is room for play in the joints” between the minimum guarantee of the Free Exercise and the upper limit of the Establishment Clause.<sup>260</sup>

In *Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court upheld a broad statutory exemption for religious employers from the prohibition of employment discrimination on the basis of religion.<sup>261</sup> The case involved the dismissal of an employee from his job as an engineer at a public gym run by the Mormon Church for his failure to properly receive certification of his status as a Mormon.<sup>262</sup> The Court validated the statutory accommodation even in this arguably non-religious context as permissible congressional recognition of “the ability of religious organizations to define and carry out their religious missions.”<sup>263</sup> The Court also explicitly rejected strict scrutiny under equal protection for laws that uniformly benefit all religions vis-à-vis secular entities.<sup>264</sup> More recently in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the Court expanded on this understanding and held that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its

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257. *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

258. See *March for Life*, 128 F. Supp. 3d at 127 n.8; *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014); *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 442–43 (M.D. Penn. 2015), *appeal filed*, No. 16-01275 (3d Cir. Feb. 10, 2016).

259. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987).

260. *Walz v. Tax Comm’r of New York*, 397 U.S. 664, 669 (1970). An upcoming case next term, *Trinity Lutheran Church of Columbia v. Pauley*, 136 S. Ct. 891 (2016) (granting certiorari), will further explore this room for play, but from the opposite direction (a church fighting against Missouri’s more stringent Establishment Clause) and with an explicit equal protection claim involved. See *Petition for Writ of Certiorari at 28–32*, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (Nov. 4, 2015). Though the Court will likely decide the case strictly on First Amendment grounds, there is certainly room for the Court to expand on the intersection between equal protection and the First Amendment that is the basis for this Note.

261. *Amos*, 483 U.S. at 329–30.

262. *Id.* at 330.

263. *Id.* at 339. See also *id.* (“The statute . . . avoids . . . intrusive inquiry into religious belief”). The district court had found that “none of [the employee’s] duties at the Gymnasium are ‘even tangentially related to any conceivable religious belief or ritual or the Mormon Church or church administration.’” *Id.* at 332.

264. *Id.* at 338–39.

ministers.”<sup>265</sup> The purpose of this “ministerial exception” is to ensure that the “strictly ecclesiastical” issue of who should minister is decided solely on the church’s terms.<sup>266</sup>

The reasoning in *Amos* and *Hosanna-Tabor*, despite focusing on the special nature of religion,<sup>267</sup> not only coincides with the equal protection method but directly supports it. Both the *Amos* and *Hosanna-Tabor* holdings and the equal protection method are fundamentally based on the same thing—a desire to avoid the definitional game in *Africa* and *Yoder* and to focus instead on protecting the important underlying interest *from* such definitional attacks. The question whether a belief is religious can be just as dangerous as deciding an employee’s minister status or their relevance to a church’s religious mission and all should be treated similarly and removed from the equation.<sup>268</sup> To the extent these rules discriminate, the rational basis for granting exemptions to religious groups over secular groups is based on aspects that are to some degree *unique* to religion.<sup>269</sup> Such an accommodation does not irrationally rely on the religious motivation of a particular belief or action to justify it,<sup>270</sup> but rather focuses on the nature of the religious group—on the accoutrements, as such. That right is not freedom of religion, in the absolute broadest sense, but rather freedom of the church.<sup>271</sup>

It should, of course, be noted that shifting the focus to the church does not solve the problem of specialness.<sup>272</sup> Furthermore, defining a church is just as difficult as defining a religion.<sup>273</sup> However, unlike the broader

265. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 702 (2012).

266. *Id.* at 709. *See also id.* at 710 (Thomas J., concurring) (“The question whether an employee is a minister is itself religious in nature . . .”).

267. *See id.* at 706 (majority opinion) (finding “special solicitude to the rights of religious organizations” in the First Amendment).

268. *Cf. Eisgruber & Sager, supra* note 5, at 809 (arguing that whether a claimant is religiously motivated or not “is entirely irrelevant to the administration of a well-formed regime of religious liberty”).

269. *Cf. Eisgruber & Sager, supra* note 13, at 63 (describing the Catholic Church as a “structural anomaly” due to the “amalgam” of functions that priests serve, thus justifying a stricter freedom of association).

270. *See Volokh, supra* note 142, at 1512 (“The communicative reasons for your actions . . . generally can’t justify the noncommunicative harms that the actions may inflict on me. Likewise, the religious reasons for your actions can’t, by themselves, justify harms to others.”).

271. *See, e.g.,* John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. L. ISSUES 335, 336 n.2 (2013) (compiling post-*Hosanna-Tabor* discussions on freedom of the church).

272. *See id.* at 340–41 (“These conceptual challenges do not disappear simply by shifting the locus of the inquiry from ‘religion’ to ‘church.’”).

273. Richard Schrager & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 954 (2013) (“[T]here seem to be no good or even generalizable criteria for determining which institutions count [as churches] and which do not.”).

concept of religion,<sup>274</sup> the freedom of the church, much like a statutory exemption, has a relatively narrow underlying interest: expressive and institutional freedom.<sup>275</sup> This interest is protected for non-religious individuals by the freedom of association approximately to the degree the association is similarly situated to a church.<sup>276</sup> Certainly, insofar as a secular group such as the Center for Inquiry is similarly situated in regards to having a “minister,” the holding in *Hosanna-Tabor* seems to counsel against interference regardless of the group’s religious status.<sup>277</sup> For a group that is less like a religion, but with a similar expressive interest in choosing its leaders and its mission, there is the freedom of association as a bare claim.<sup>278</sup> Other non-religious groups are simply not similarly situated in regards to the interest.<sup>279</sup>

Besides the employment cases, there is one other major case discussing the permissible preference for religion: *Cutter v. Wilkinson*,<sup>280</sup> in which the Court held that RLUIPA did not violate the Establishment Clause by impermissibly benefitting religion over secular interests.<sup>281</sup> The Court

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274. See *supra* note 167.

275. See generally Schragger & Schwartzman, *supra* note 273 (discussing different views of religious institutionalism and church autonomy as an expressive association). Schragger and Schwartzman spend most of their article criticizing the “jurisdictional” view of religious institutionalism. This view is considerably broader than both of these associational interests and the Court’s holdings in *Hosanna-Tabor* and *Amos*. To the extent that this view is a true understanding of the freedom of the church, it would push towards a true libertarian freedom of association in order to fulfill the goals of the equal protection method. Again, generally speaking, allowing such a strong freedom-right has identical costs regardless of *who* is exercising the freedom, religious or otherwise, and thus under such a regime, I would have to extend this theory to an almost insurmountable right to expressive association. To whatever extent there is a bad result, there is just as much so without an extension.

276. That is not to say that the freedom of association and the freedom of the church are coterminous. See Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515 (2007); Tebbe, *supra* note 113, at 1144–47 (criticizing Eisgruber and Sager for falsely equating freedom of association and freedom of the church). The equal protection method is also less than equivalent to the stronger religious protections of the pre-*Smith* Free Exercise Clause or RFRA. Again, it should be noted that there is room for religious accommodation; the equal protection method seeks only to prevent strictly limiting the accommodation to the religious when a non-religious claimant is identically situated.

277. See *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (citing *Hosanna-Tabor* to further question the validity of the Indiana statute’s exception for clergy).

278. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (finding that the Boy Scouts could not be required to employ a homosexual scoutmaster because of the freedom of association interest in selecting the organization’s expressive leaders).

279. Cf. EISGRUBER & SAGER, *supra* note 13, at 239 (finding it “hard to see what would count” as a secular analogue to a minister and hypothesizing “a cultural group that wants guidance from certain ‘elders’”); *id.* at 249 (supporting *Amos* and the Title VII exemption on the grounds that “there is no comparable reason for, say, McDonald’s to scrutinize the religious beliefs of its short-order cooks”).

280. 544 U.S. 709 (2005).

281. *Id.* at 724 (“[RLUIPA] confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.”).

attempted to defuse the fears of the Sixth Circuit that an irreligious prisoner who had his white supremacist literature confiscated would get rational-relationship review whereas a member of the Church of Jesus Christ Christian would get RLUIPA's compelling interest standard.<sup>282</sup> The Court did so by noting that both hypothetical claimants would have their request rejected due to the "countervailing compelling interest in not facilitating inflammatory racist activity."<sup>283</sup> This easy case, however, misidentifies and ultimately dodges the problem: the benefit to religion is not the right to keep the literature, necessarily; rather it is receiving the higher standard of review, regardless of the result.<sup>284</sup> A non-religious claimant that is similarly situated to a religious party that *would* receive accommodation is necessarily a more difficult case to justify with such an argument.<sup>285</sup> The better solution to the Sixth Circuit's problem is to deny the right of the non-religious to that higher burden, as both courts did in *Cutter*, but nevertheless grant the similarly situated irreligious person access to the resulting accommodation if it should exist—exactly as the equal protection method does.

#### *D. A Similar Place: Equal Protection by Another Name*

Despite the Court's general rejection of the principle, it has provided some support for the equal protection method. As Professor Koppelman identified,<sup>286</sup> in the only situation in which non-religious parties actually made it to the Supreme Court with a request for use of a religious

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282. *Id.* at 723 n.11.

283. *Id.*

284. *See* *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain."). *But see* McConnell, *supra* note 14, at 7–8 (criticizing Justice Stevens' argument and claiming that a museum or art gallery owned by either an atheist or a Catholic, Buddhist, or Jew would not receive accommodation under RFRA because owning a museum is not religious exercise). When the principle of *Amos* is combined with that of *Cutter*, we see the flaw here: religious individuals are specifically protected from the question whether the art gallery, like the gym in *Amos*, is or is not a part of their religious mission and thus the individuals do not receive equal treatment in the end.

285. Professors Eisgruber and Sager like to make a similar point with an example using instead the "LU" of RLUIPA. *See* Eisgruber & Sager, *supra* note 5, at 807–08 (providing an illustration of two women named Ms. Campbell, one religious and the other not, both of whom own soup kitchens and noting that, hypothetically, only the first can claim RLUIPA's protection from zoning laws closing her kitchen). Like the decision in *Amos*, this example relies on the dangers of defining the respective Ms. Campbells' religious missions. *See id.* at 823–24 ("Suppose it is clear that she is religious and that religion requires her to care for the poor. Does it require her to operate a soup kitchen, or does she have other choices?").

286. Koppelman, *supra* note 10, at 78 (arguing that "the only examples" of comparable secular claims, the selective draft cases, were "resolved by deeming the objectors to be 'religious' in the pertinent sense").

accommodation, that request was granted.<sup>287</sup> The accommodation at issue was the exemption from the Vietnam War draft for conscientious objectors, a statute that, by its own terms, applied to a group even narrower than the “religious.”<sup>288</sup> The method by which the Court chose to extend the accommodation was remarkably similar to that of the equal protection method in all of the details discussed over the course of this Note.

In the first case, *United States v. Seeger*,<sup>289</sup> the lead claimant, Seeger, based his objection to war on “such personages as Plato, Aristotle and Spinoza” and argued that his moral integrity existed “without belief in God, except in the remotest sense.”<sup>290</sup> The Court was intimately aware of the complexity of the issue of defining religion: “[I]n no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgement and retribution.”<sup>291</sup> Ultimately it decided that the test to define religion for the purposes of the statute was whether a belief “occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying.”<sup>292</sup> Justice Douglas in his concurring opinion, like the *Center for Inquiry* court, noted the statute’s effect on paradigmatic religions in supporting its extension to the less-clear Seeger.<sup>293</sup> The Court was quite open about the fact that this broad construction was an effort of constitutional avoidance, intended to “avoid[] imputing to Congress an intent to classify different religious beliefs.”<sup>294</sup>

The limits of this construction were tested only five years later in *Welsh v. United States*.<sup>295</sup> The problem: Welsh was “far more insistent and explicit

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287. *Welsh v. United States*, 398 U.S. 333 (1970). *See also* *United States v. Seeger*, 380 U.S. 163 (1965).

288. 50 U.S.C. App’x § 456(j) (2012) (granting conscientious objector status to “any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form”). “Religious training and belief” is defined to explicitly exclude “essentially political, sociological, or philosophical views, or a merely personal moral code.” *Id.* At the time of these cases, exemption also required “belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.” *Seeger*, 380 U.S. at 165.

289. 380 U.S. 163 (1965).

290. *Id.* at 166. *But see id.* at 173 (“No party claims to be an atheist or attacks the statute on this ground.”).

291. *Id.* at 174.

292. *Id.* at 176.

293. *Id.* at 189–91 (Douglas, J. concurring) (using Hinduism and Buddhism to illustrate the “fluidity and evanescent scope” of the concept of a Supreme Being in religion).

294. *Id.* at 176 (majority opinion). *See also id.* at 192 (Douglas, J., concurring) (“I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities.”).

295. 398 U.S. 333 (1970).

than Seeger in denying that his views were religious.”<sup>296</sup> Because of this, four of the eight Justices deciding the case agreed with the lower court and found the statute did not cover Welsh when he claimed conscientious objection without a religious basis.<sup>297</sup> However, five Justices found Welsh entitled to objector status.<sup>298</sup> Justice Harlan, writing alone, argued that to hold otherwise would violate the Establishment Clause by impermissibly privileging religious beliefs.<sup>299</sup> The plurality continued to base its holding on constitutional avoidance, expanding the statute as in *Seeger* to include any beliefs that “play the role of a religion and function as a religion in the registrant’s life.”<sup>300</sup> Predating *March for Life* by forty-five years, the Supreme Court asked whether Welsh’s beliefs were similarly situated to a belief in a Supreme Being and determined that they were.<sup>301</sup> Decided only two years prior to *Yoder, Welsh*, with its predecessor, *Seeger*, lends significant support not only to the equal protection method as a concept but also to the underlying distinction between constitutional and statutory religious accommodation that supports it. In the end it seems that Judge Adams was absolutely correct in the epigraph quote: the First Amendment has never been interpreted to cover non-religious ideologies. But statutes have been and so they should be.

### CONCLUSION

Religion is an important part of American life; it is the first right guaranteed in the Bill of Rights and as such it has received special treatment throughout our country’s history. In a situation unfortunate for the religious

296. *Id.* at 341. Seeger had put quotation marks around the word “religious”; Welsh had actually crossed the word out. *Id.*

297. *See id.* at 347 (Harlan, J., concurring) (“[I]t is apparent . . . that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.”); *id.* at 368 (White, J., dissenting) (“[I]t is contrary to the express will of Congress to exempt Welsh . . .”). Justice Blackmun took no part in the case, making this a 4-4 decision on this narrow issue.

298. *Id.* at 341 (plurality opinion) (finding Welsh to be religious and that relying on his explicit denial “places undue emphasis on the registrant’s interpretation of his own beliefs”); *id.* at 361–62 (Harlan, J., concurring) (concurring on Establishment Clause grounds).

299. *See id.* at 362. In Justice Harlan’s mind, that approach requires an “equal protection mode of analysis.” *Id.* at 357.

300. *Id.* at 339 (plurality opinion).

301. The only disadvantage of the *Welsh* version of this test is that it seeks to expand the concept of religion to capture the admittedly non-religious rather than simply recognizing that the label is irrelevant to whether the claimant is similarly situated. This of course opens the way to the “common-sense” attack discussed *supra* note 182, as indicated by Justice Harlan’s vitriol at the plurality’s “lobotomy” of an interpretation, *Welsh*, 398 U.S. at 351 (Harlan, J., concurring). The equal protection method follows Harlan’s position more closely than the majority for that reason, but they are still remarkably similar methods that reached the same result in this case, and would do so in most other cases.

and non-religious alike, there is not always much that is distinct about religion to justify this special treatment. At best, religion is an imperfect proxy for some broad array of more fundamental interests. Some people, such as the plaintiffs in *March for Life* and *Center for Inquiry*, find themselves in an identical position in relation to those interests as religious individuals, but unable to claim the privileged treatment granted by statute only to those beliefs that can carry the mantle. Often these people could reframe their beliefs as religious without impeachment, simply by claiming as such, but that only makes the problem worse: it gives exemptions to hypocrites and risks giving them to fraudsters, but denies the right to sincere, honest, non-religious individuals. There is simply no reason for this arbitrary distinction. Insofar as the religious and non-religious are similarly situated as to that underlying interest, they should both be granted an exemption from the law that infringes upon that interest. That is exactly what has been done in the Seventh Circuit, and now in the District of Columbia, and exactly what was done forty-five years ago by the Supreme Court.

Through this equal protection method, the rights of the non-religious have been recognized and the rights of the religious have been further cemented in their legitimacy and security. This analysis bridges the gap between esoteric legal theory and the actual practices of our Congress, Executive, and Judiciary. Building on decades-old precedents and newly minted case law, it recognizes the dangers inherent in a narrow, judicially-imposed definition of religion, but avoids the nonsense that results from a broad, amorphous one. By its incremental scope, it corrects the Legislature without ever chastising it and slides inoffensively into the mechanisms by which religious freedom is protected, without modifying or invalidating them. Ultimately this is a small step for freedom, whether religious or non-religious, but it is an important step for both.

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\* J.D. Candidate (2017), Washington University School of Law; B.A. (2014), DePaul University. Thank you to Professor John D. Inazu for his constant support and help in researching and producing this Note, which originated as a paper for his seminar on Religion, Law, and Politics in fall of 2015. I would also like to thank Professor David S. Law for his continuous support throughout my time at Washington University. Finally, thank you to the excellent editors of the *Washington University Law Review*: Jesus Osete for his helpful research leads and Austin Elder, Jacob Franchek, Courtney Hawkins, Caroline Spore, and Brittany Sanders for all their hard work editing this Note for publication.