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Rodney K. Smith

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I. INTRODUCTION

There are those who assert that religious individuals and groups in the United States routinely suffer discrimination at the hands of the government.[1] They argue that courts often find that the establishment provision of the First Amendment requires that the religious be singled out and excluded from the public sector or that religious groups be denied funding or access on equal terms with nonreligious groups and individuals.[2] There are those, however, who respond that religion is not disfavored, based on their reading of recent United States Supreme Court cases.[3] Justice O'Connor recently echoed this view when she asserted, "'The Religion Clauses prohibit the government from fa-

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1. On December 22, 1995, Utah Senator Orrin Hatch asked, "At a time when social values are eroding and family structures are collapsing why should we actively discriminate against religious entities and drive them out of the public square?" 141 CONG. REC. S19,259 (daily ed. Dec. 22, 1995). Concerned about this perceived discrimination, Senator Hatch concluded that a religious equality amendment was needed to "safeguard the right of conscience of religious Americans." *Id.*

2. Senator Hatch argues that we must be "rescue[d] . . . from a misguided Supreme Court jurisprudence and the hostility that jurisprudence has spawned among local, State, and Federal Governments toward the participation of religious institutions in the public square." *Id.*; *see also* Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON U. L. REV. 7 (1993).

3. *See generally* Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution*, 1996 B.Y.U. L. REV. 611.

voring religion, but they provide no warrant for discriminating *against* religion.'"[4]

The preliminary question that must be addressed is whether religious discrimination is in fact a problem. If there is no such discrimination, there simply is no need for a religious equality amendment to rectify nonexistent discrimination. Although recent cases offer some support[5] for those who suggest that a religious equality principle is already solidly in place, there are reasons why these cases and assurances offered by academics are presently unpersuasive to those who fear being publicly discriminated against on religious grounds.

The decisions do not create a robust or a reliable equality principle that will protect against future religious discrimination because it remains underdeveloped and of only limited applicability. For example, just sentences after she asserted that there is "no warrant for discriminating *against* religion," Justice O'Connor acknowledged that, in addition to this principle of equality or neutrality, the Court has long recognized a "prohibition on state funding of religious activities."[6] Thus, the equality principle does not necessarily extend to matters of equal funding, leaving issues like the constitutional permissibility of school vouchers for parents sending children to sectarian schools in doubt. Members of the Court have also required compliance with other tests (e.g., endorsement[7] and noncoercion[8]) that have the effect of further limiting the equality principle in the context of public treatment of the religious. Current doctrine under the establishment provision, therefore, does not provide for a particularly robust notion of equality as to government treatment of the religious.

Even the limited neutrality or nonpreference principle, articulated in recent cases, purporting to ensure religious equality is also quite fragile as a legal doctrine and provides little assurance

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4. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2525 (1995) (O'Connor, J., concurring) (quoting Board of Educ. v. Grumet, 114 S. Ct. 2481, 2498 (1994)).

5. *See infra* text accompanying notes 7, 9, 39.

6. *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring).

7. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2451-57 (1995) (O'Connor, J., concurring, joined by Souter & Breyer, JJ.); *id.* at 2464-73 (Stevens, J., dissenting). Both Justice O'Connor and Justice Stevens utilized the "endorsement test," but each came to a different conclusion.

8. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

for those who oppose discrimination on religious grounds. The coalitions on the Court that have supported this limited religious equality principle are weak, with decisions supporting religious equality often being supported by the slimmest of voting margins.[9] Even a single critical personnel change on the Court, therefore, might upset the fragile balance on the Court that favors the current less-than-robust religious equality position.

Based on these concerns, and a general desire that religion should not be disfavored but should be accommodated, two versions of a religious equality amendment to the Constitution were introduced in Congress in 1995. On November 15, 1995, Representatives Hyde, Canady, and Goodlatte introduced House Joint Resolution 121, which provides:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination."[10]

On December 21, 1995, Senator Hatch introduced an identical resolution, Senate Joint Resolution 45, in the United States Senate.[11] Representative Istook, in turn, introduced a different version, House Joint Resolution 127, on November 28, 1995. The Istook version provides:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs or traditions of the people or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any prayer or compel joining in prayer, or discriminate against religious expression or belief.[12]

The Istook version is designed to validate certain forms of public prayer or religious activity and to eliminate discrimination on the basis of religious expression or belief.

It is likely that the Istook version, which seeks to deal with public prayer and equality issues, will receive less support in

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9. *See, e.g., Rosenberger*, 115 S. Ct. 2510.
10. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995).
11. S.J. Res. 45, 104th Cong., 1st Sess. (1995).
12. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995).

Congress than the Hyde-Hatch version,[13] which is being proposed by two influential members of Congress. Opposition to the religious equality amendments will no doubt develop as concerns over intended[14] and unintended[15] consequences are raised. As a practical matter, opponents need not fear these changes. It is highly unlikely that the amendments, as drafted, will ever be added to the Constitution. As we learned from the unsuccessful effort to ratify the Equal Rights Amendment, it is exceedingly difficult to add a substantive rights-based amendment to the Constitution. Indeed, as a historical matter, with the exception of amendments expanding the right to vote—the Nineteenth,[16] Twenty-Fourth,[17] and Twenty-Sixth[18]—and possibly the repeal of prohibition, if the consumption of alcohol can be considered a right, no amendment expanding rights has been added to the Constitution in over 125 years. In our pluralistic nation, there are simply too many practical hurdles[19] that stand in the way of enacting a religious equality amendment. There are also substantive policy reasons why an amendment, as opposed to a statute, is less attractive.[20]

Given the apparent futility that attends the amendment process, why have the amendments been introduced? A cynic might

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13. All authors participating in this symposium agree on this issue.

14. The amendments clearly are intended to expand the role of religion in the public sector. This position has always been controversial and will generate opposition.

15. *See* Frederick M. Gedicks, *Introduction: An Ambivalent View of the Religious Equality Amendment*, 1996 B.Y.U. L. REV. 561.

16. U.S. CONST. amend. XIX, § 1.

17. U.S. CONST. amend. XXIV, § 1.

18. U.S. CONST. amend. XXVI, § 1.

19. Article V of the Constitution provides, in pertinent part, that:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V. The congressional route requires two-thirds votes in both houses and the convention/state legislature route requires a positive vote on an application of two-thirds of the states, plus approval within the convention as called. In turn, after an amendment is adopted in Congress or a convention, it must be ratified by three-fourths of the state legislatures or conventions within the states.

20. See *infra* part II for a discussion of substantive reasons why the amendment form is less attractive.

argue that the authors are simply fulfilling a promise they made to their supporters. The cynic might add that the authors have merely introduced the amendments as part of a scheme to take advantage of the political divisions that will necessarily occur as such an amendment is debated and will, therefore, pay electoral dividends in the upcoming elections. Perhaps somewhat less cynically, I am inclined to believe, at a minimum, that the sponsors hope to use the dialogue that will be engendered in conjunction with consideration of the proposed amendments as a way of continuing to nudge the Supreme Court in the direction of interpreting the establishment provision of the First Amendment to permit more religious activity in the public sector. Such a strategy is not unprecedented,[21] and I am sympathetic to it. I believe, however, that the strategy itself can be refined in a way that will maximize the likelihood that the Supreme Court will be receptive to permitting more religious activity in a burgeoning public sector in a manner that respects the pluralistic nature of contemporary America.

In this Article, therefore, I argue for a refined statutory strategy designed to accommodate increased activity of a religious and conscience-based nature in the public sector in an evenhanded manner. Part II examines the issue of whether a statute would be preferable to an amendment, as a matter of form. Part III, in turn, analyzes a suggested text for such a statute. That preferred text would call for a revision of the Hyde-Hatch amendment to provide for nondiscrimination on the basis of "*conscience or* religious expression, belief, or identity." Part IV examines the political and legal reasons that the term "conscience" should be included in the statutory text. Given the proposed addition of the term "conscience," Part V generally examines the definitional issues that will necessarily arise if such a bill becomes law. Finally, in Part VI, I conclude on a personal note that is intended to illustrate the importance of protecting religion and conscience.

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21. For example, even though the Equal Rights Amendment was never adopted, a significant dialogue was engendered that arguably has increased both legislative and judicial attention to equality based on gender.

II. AMENDMENT OR STATUTE?

As previously noted, it is highly unlikely, as a practical matter, that either of the versions of the religious equality amendment being considered by Congress will ever become the law of the land. As a matter of practical politics, a statute is obviously easier to enact than an amendment.[22] If the sponsors of the proposed amendments want to maximize the likelihood of achieving the goals embodied in those amendments, they should consider using statutory form.

In addition to the practical hurdles which inhibit effectuation of the proposed amendments, as opposed to a statute, institutional justifications also warrant the use of statutory form. Professor Lupu points out that statutes "draft[ed] in tight constitutional orbits"—statutes that build upon existing constitutional case law—have certain advantages.[23] These statutes often produce conceptual continuity and development with an economy of effort and provide a "time-honored way for legislatures to finesse hard [or case-specific] judgments . . . and delegate implementation to others."[24] Finally, they provide "safe harbors," which "minimize the [likelihood of] invalidation on constitutional grounds."[25] Professor Lupu acknowledges, however, that statutes drafted in tight constitutional orbits may present difficulties in the following forms: (1) legislative process problems, if the legislature is not sufficiently engaged in a deliberative dialogue with the judiciary;[26] (2) substantive wisdom problems, because "doctrinal pronouncements torn free of their case law moorings may be both untrue to the 'law' they purport to represent and inadequate to the task of translating policy objectives into positive law";[27] and (3) power allocation consequences, in that judges may

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22. An amendment requires strong support in the states, as well as within Congress. A bill, on the other hand, generally requires a mere majority within each House and signature by the President. It is little wonder, therefore, that Congress has resorted to various statutory means of furthering civil rights (e.g., Titles VII and IX of the Civil Rights Act, the Religious Freedom Restoration Act, etc.), rather than resorting to the amendment process.

23. *See* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 19 (1993).

24. *Id.* at 19-21.

25. *Id.* at 22.

26. *Id.* at 23.

27. *Id.* at 24.

believe that they are being given more discretion than intended by the legislature.[28]

These difficulties can be minimized, however, if Congress takes steps to draw on its institutional strengths and engages the judiciary in a deliberative dialogue, as suggested in this Article.[29] Furthermore, more serious problems would arise with regard to interpreting amendments like those offered, which include indeterminate language and which fail to adequately address differences between the proposed amendments and the religion provisions of the First Amendment.

A new, freestanding amendment,[30] like the Hyde-Hatch or Istook versions, would have to be interpreted in concert with the First Amendment. Senator Hatch and Representative Hyde recognize this and have added language to their proposed amendment providing that "the prohibition on laws respecting an establishment of religion [shall not] be construed to require [religious] discrimination."[31] This language, designed to deal with possible conflicts between the establishment provision of the First Amendment and the text of the new amendment, does not, however, address possible additional conflicts that may arise when the amendment is enforced.

If, under the Hyde-Hatch amendment, nondiscrimination requires that all religions be treated equally, that "equality" might present some difficulties in application. If equality means that all religions, regardless of the number of their members, are to be given the same public access and share of resources, then the members of larger sects will have less access, as an individual matter. For example, if under the amendment as applied, all religions take turns leading prayers at a public gathering, indi-

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28. *Id.* at 25. In the words of Professor Lupu: "A judge who perceives that a legislature has chosen her institutional path rather than its own may erroneously interpret such an enactment as more of an affirmation of judicial discretion than it is meant to be." *Id.* It may also "present accordion problems—that is, the statute may change in its meaning each time courts expand or contract the constitutional concept." *Id.*

29. See *infra* text accompanying notes 37-38 and 130-131 for a discussion of how this dialogue can be facilitated by Congress.

30. "Freestanding amendment" refers to an amendment that does not merely amend an existing constitutional provision or amendment; rather, it has independent force. In this sense, neither the Hyde-Hatch nor the Istook amendment merely seeks to amend the Establishment Clause of the First Amendment. They both provide for an independent amendment rather than a clarifying amendment.

31. H.R.J. Res. 121, *supra* note 10.

vidual members of larger sects would effectively experience some diminution of their individual rights of exercise because they would not be given opportunities to lead the prayers commensurate with their numbers. On the other hand, if religious individuals belonging to larger sects are permitted more access to the prayer activity, based on their numbers, then members of smaller religious sects might assert that they have been coerced in their religious beliefs, in contravention of their First Amendment rights, because the government has sanctioned greater access and exposure for larger religious sects.

Representative Istook's proffered amendment has even more serious problems in terms of constitutional interpretation and symmetry or consistency with existing First Amendment doctrine because he did not add language designed to deal with possible conflicts between his proffered amendment and the free exercise and establishment provisions of the First Amendment. If conflict occurs between the Istook amendment and the establishment provision, it is not clear which would prevail, and courts would have to strain to reach consistent decisions. Additionally, problems of constitutional interpretation would result as courts and others wrestle with achieving symmetry between a new religious equality amendment and the First Amendment's free exercise and establishment provisions.[32] A statute, on the

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32. For example, if the religious equality amendment is interpreted as requiring that public support be given in the form of vouchers or other financial assistance to sectarian as well as nonsectarian schools, establishment, religious equality, and perhaps even free exercise concerns might be raised.

Establishment concerns might be raised regarding both the idea of giving aid and the amount of aid given to sectarian institutions. The amount-of-aid issue could arise because the courts might be required to limit funding to secular as opposed to sectarian instructional purposes.

Equality issues, in turn, may surface because minority sects may argue that only larger sects can afford to operate schools and are, therefore, being benefited in ways that smaller sects cannot.

Finally, free exercise concerns might arise on the part of those who assert that creation of such support for sectarian institutions is coercive, both in terms of increased taxation for the nonreligious and in terms of pressures that might develop regarding attendance at sectarian institutions. The attendance issue might raise two different free exercise concerns: (1) on the one hand, if sectarian institutions are not required to accept all students and may engage in selective admissions policies that result in schools with better academic reputations, students may be coerced into choosing between their faith and a better educational experience at a sectarian institution; and (2) on the other hand, if sectarian institutions are required to take students, regardless of faith, educational background, or disability, they may assert that such intervention constitutes a violation of their rights of free exercise or association.

other hand, would present fewer problems in cases of direct conflict because the First Amendment would continue to trump the statute.

Proponents of the amendment strategy, however, might respond that permitting the First Amendment to define the limits of the new statute would necessarily render the statute ineffectual, because the issues they are trying to deal with (e.g., prayer in schools), in their view, are being interpreted in an unduly restrictive manner under existing First Amendment doctrine. They might argue that the First Amendment, as currently interpreted by the Court, is insufficient and only a new amendment, which would be of equal force with the First Amendment, could achieve their ends. There is a sense, however, in which use of a statute might not be as deferential to existing case law as might be anticipated. If minor doctrinal conflicts arise, the presence of the statute might prompt wavering Justices to avoid the conflict and accept the apparent legislative judgment in close cases.[33] Additionally, if there are lines of conflicting cases, as there are in the context of judicial interpretation of the establishment provision,[34] the presence of a statute might strengthen the line of

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33. Such a strategy would be particularly appealing to those Justices who espouse a deferentialist theory of constitutional interpretation and who believe that the Court should only reluctantly overrule the will of the majority. *See* RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 267-71 (1987). The strategy would also appeal to Justices concerned with the Court's capacity to avoid public censure in the form of disrespect for its decisions or, more critically, in terms of jurisdiction-limiting efforts. As to jurisdiction-limiting efforts, it is important to recall that at one time in the 1980s a majority of the United States Senate actually voted to support a proposal that would have limited the jurisdiction of the Court to hear abortion and prayer cases. Such a confrontation between the Court and Congress has historically been of significant concern to members of the Court. See *id.* for a discussion of jurisdiction-limiting issues.

34. See, for example, the discussion of Supreme Court cases regarding government aid to religious schools, institutions, and individuals in JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1223-66 (5th ed. 1995). After examining cases dealing with aid to students at religiously affiliated schools in some detail, Professors Nowak and Rotunda note that "results in the cases have varied with the views of Justices concerning the purpose of the establishment clause." *Id.* at 1250. They recognize that the government-aid cases are not consistent and with some tentativeness conclude:

> There is no basis apart from one's view of the history and functions of the religion clauses for determining which of these Justices are correct in their approach to establishment clause cases but it appears at this time that those Justices who would focus on neutrality and allow a wider range of government aid to students in religiously affiliated schools constitute a majority of the Supreme Court. Because of the close division of the Justices in the school aid cases, however, one cannot predict with any certainty how

cases preferred by the terms of the statute.[35] Even if the Court declines to follow the legislative lead in developing its doctrine under the First Amendment, a newly amended statute could be penned after further deliberation to deal with new problems; if this failed, the stage would be set for an amendment. In short, a statute might avoid problems of symmetry with the First Amendment and encourage a deliberative dialogue between the Court and Congress about maximizing religious liberty, although separation of powers and related concerns of a constitutional magnitude may arise as a result of such a dialogue.[36]

> the Court will rule on precise forms of aid to students in religiously affiliated schools that may be challenged in the years ahead.

Id. at 1251.

35. For example, if the school voucher issue were raised, the Court might use the equality statute to reinforce the recent line of aid cases that recognize that neutral or nonpreferential aid to religious institutions and individuals is permissible, *see, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995); Walters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983), and to distance itself from the more separationist or anti-aid principles articulated in the earlier line of aid cases, *see, e.g.*, Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973), thereby permitting the Court to uphold a carefully drafted school voucher program.

36. There are, of course, potential separation of powers, federalism, and related problems with using statutes to help resolve constitutional issues. These problems have been raised in the context of the Religious Freedom Restoration Act ("RFRA"), codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996); Symposium, *The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995).

In the separation of powers debate over RFRA, I am persuaded by Professor Laycock, who argues that:

> Separation of powers makes it difficult to sustain a campaign of repressing liberty unless all three branches at least acquiesce. So when the Court fails to protect our liberties, it is perfectly consistent with the original theory of separation of powers that Congress can step in. It is not inconsistent; it is not odd; it is not an anomaly; it is why powers are separated. The ratchet theory [which permits Congress to act to further liberty in the constitutional realm, but not to limit it] is a simple function of the Constitution's bias in favor of protecting liberty against the abuses of government.

Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 162 (1995).

Professor Laycock adds, however, that "[i]f the Court were willing to say that RFRA violates the Establishment Clause in some of its applications, then those applications would be unconstitutional and Congress would be bound by the Court's judgment." *Id.* at 163. This would certainly be true relative to a religious equality act,

Using the statutory form also draws on institutional strengths of the judicial and legislative branches, inviting a pragmatic dialogue. Congress, as a legislative body, can call witnesses from a wide variety of disciplines to deal with complex definitional and related issues (e.g., the definition of "religion" or "conscience"). As a democratically elected body, Congress, to-

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like that envisioned in this Article, as well. That is why I argue for a religious equality act that would be consistent with the fragile line of cases supporting religious accommodation and equality in the public sector. *See infra* notes 59-73 and accompanying text. So long, however, as it can be argued that the religious equality act functions as a ratchet and increases liberty, the act should be permissible, assuming that the establishment provision is itself grounded in notions of liberty. Indeed, given that the Court in Board of Education v. Mergens, 496 U.S. 226 (1990), upheld a more limited version of a religious equality act, the Equal Access Act, it is likely that a more expansive equality act would be upheld as well.

As to the federalism issue, a religious equality act of the sort envisioned would only require that when states act in ways that affect the religious, and others, they must do so in a manner that does not discriminate against the religious or against certain matters of conscience. This is but a clarification or extension of existing doctrine.

As is the case with RFRA, establishment arguments may also be raised against a religious equality act. Those concerns would largely be based on the argument that it provides a benefit to religion that is not neutral or nonpreferential, in that it prefers religion over conscience that is not religiously based. This preference for religion might be held to be unconstitutional on establishment grounds, although the better choice for a court would be to uphold the act by reading the statute to include protection for conscience as well as religion. See *infra* text accompanying notes 65-73 for a discussion of the *Welsh* case, which presented a similar interpretive challenge for establishment purposes, and *infra* text accompanying notes 84-85, describing the conceptual conflict between free exercise exemptions and establishment limitations in greater depth.

Bonnie I. Robin-Vergeer responds thoughtfully to the contention that exemptions for religious exercise under the RFRA would somehow violate the establishment limitation. Robin-Vergeer, *supra*, at 754-56. She acknowledges, but does not resolve, however, the tension between free exercise, which exempts religion and not other forms of conscience, and establishment, which requires that religious accommodations in other contexts be part of a broader accommodation, including, at a minimum, matters of conscience. Courts might not always be able to avoid the tension between free exercise or RFRA and establishment (nonpreference as to matters of conscience). After an exemption is granted for a particular purpose, on religious grounds for example, a subsequent party might argue, as the conscientious objector did in the *Welsh* case, that the exemption must be drawn broadly enough to include her exercise of conscience because to fail to do so would violate the establishment requirement. Such an assertion could not be avoided on the ground that it is a mere facial challenge to RFRA, and would force the Court to either vitiate RFRA or vitalize it by including matters of conscience. In short, until RFRA or an equality amendment of the type envisioned in this Article is read broadly enough to include matters of conscience, the conceptual tension between free exercise and establishment will remain. For an extensive and thoughtful analysis of this subject, see Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995).

gether with the executive branch,[37] also aids the judiciary in avoiding counter-majoritarian claims because the will of the majority is manifest in the statute. In a sense, when they take their constitutional responsibility seriously, the legislative and executive branches mediate between the will of the majority and the rights of individuals and groups. On the other hand, the judicial branch has a particular competency in developing principled doctrine in the context of specific cases. Working together in a complementary and pragmatic way, Congress, the executive branch, and the Court are not "foreordained to failure," as they might be when they work in opposition to each other.[38] Such a deliberative dialogue between the branches of government has the added virtue of enhancing public understanding of constitutional issues by focusing public attention on broad issues rather than on occasional fact-specific cases.

Finally, a constitutional amendment should only be added when it is clearly necessary. As a substantive policy matter, it is not clear that a constitutional amendment on religious equality is necessary. A well-crafted statute would ultimately permit us to determine whether an amendment is actually needed or whether a mere clarification of existing First Amendment doctrine is in order. A constitutional amendment to provide nondiscriminatory religious access to the public sector and coffers remains premature, especially after the Supreme Court's recent decision in the *Rosenberger* case,[39] at least until its necessity is confirmed. The practical difficulties that attend adoption and ratification of an amendment,[40] coupled with the premature na-

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37. In addition to the role of the President, who, in signing or vetoing legislation, represents a national constituency, the Executive Branch is involved in making determinations regarding when a particular matter should be litigated. When the Executive Branch chooses to litigate, it places substantial resources in the hands of those who prefer a particular resolution of the issues before the judiciary. In addition to financial resources, when the Solicitor General's Office decides to pursue a constitutional matter before the Supreme Court, the Office's reputation and quality staff make it more likely that the matter will be heard and decided in behalf of the party or governmental entity it is representing.

38. See STEVEN D. SMITH, FOREORDAINED FAILURE 1 (1995) for a critique of substantive efforts to give meaning to the religion provisions of the First Amendment. The dialogical and definitional approach suggested in this Article, however, may create a process that can overcome some of the doctrinal difficulties perceived by Professor Smith.

39. *Rosenberger*, 115 S. Ct. at 2510 (holding that Virginia could not refuse aid to a religious student group when other student groups received such aid).

40. *See supra* notes 14-19 and accompanying text.

ture of such an amendment and difficulties of interpretation,[41] make the amendment strategy unwise at this time. As discussed in the following section, there are additional policy reasons why a revised statute is preferable.

III. "CONSCIENCE" AND A PREFERRED STATUTORY TEXT

The essence of a preferred statutory text could be formulated with only slight modifications to the Hyde-Hatch amendment. The statute should provide: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of *conscience or* religious expression, belief, or identity." Thus, in drafting the statute, the language "conscience or" should be added[42] and the language "nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination" should be deleted.

Given that the statute would have to be interpreted in conjunction with existing or future statutes, a provision indicating priority, like that included in the Religious Freedom Restoration

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41. *See supra* notes 30-32 and accompanying text.

42. The inclusion of "conscience," as well as "religion," in a statute of this sort is not without precedent, at least internationally. Professor Michael Perry documents "the breadth of the freedom of conscience protected by the international law of human rights" when he states that:

> The International Covenant on Civil and Political Rights, which the United States ratified in 1992, provides, in Article 18, that:
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> > Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> Article 18 then states: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Virtually identical provisions inhabit the Universal Declaration of Human Rights (Articles 18 and 29), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or on Belief (Article I), the American Convention on Human Rights (Article 12), and the European Convention on Human Rights (Article 9). According to each of these instruments, government must not only not discriminate against religious or other conscientious practice but must also avoid interfering with such practice except to the extent "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

MICHAEL J. PERRY, RELIGION IN POLITICS 28 (forthcoming 1997) (footnotes omitted).

Act ("RFRA"), should be added.[43] The added provision in the proposed equality act would provide:

> (a) This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
>
> (b) Federal statutory law adopted after the date of the enactment of this Act is subject to the Act unless such law explicitly excludes such application by reference to this Act.

Furthermore, since such a provision appears in RFRA, and it is conceivable that a judge might find some conflict between RFRA and the proposed equality act, the statute might specifically provide which act should prevail in cases of conflict. I do not favor the addition of such a provision at this time, however, because it is premature and might ultimately limit religious liberty. I would prefer to wait until actual conflicts arise before adding such a provision. Such conflicts could then be considered and resolved in a manner that maximizes rather than diminishes religious liberty.

As previously suggested, there are other statutory strategies that might be used to protect conscience as part of a religious equality act without adding it to the primary text. For example, the term "conscience" could simply be added in a definitional section as a part of a definition of the term "religion." Choosing the definitional route might be preferable if "conscience" operates as an explanatory, justificatory, or interpretive term, rather than as a term of the first order. I remain convinced, however, that "conscience" needs to be included in a manner that reinforces its independence as a concept and that confirms that it is not merely explanatory, justificatory, or interpretive in its nature. Even though it is analogous to religion, it is an independent concept.[44]

Even if a reference to the term "conscience" is not added to the primary text of the statute or in a definitional section, it might be implied by a court to avoid establishment objections, as in *Welsh v. United States*.[45] However, since contemporary courts

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43. *See* 42 U.S.C. § 2000bb-3 (1994).

44. See *infra* notes 54-56 and accompanying text for a discussion of the conceptual distinctions between religion and conscience.

45. 398 U.S. 333 (1970). See *infra* notes 65-73 and accompanying text for a

appear disinclined to engage in dynamic statutory interpretation,[46] it is doubtful that courts would interpret "religion" so broadly. Justice Harlan, however, who has been known as a judicial conservative, did read "conscience" into the statute under review in *Welsh*. In his concurrence in *Welsh*, Justice Harlan interpreted the draft exemption statute broadly on establishment grounds, not as a form of dynamic statutory interpretation.[47] Since *Welsh* remains in force as precedent, it would have to be considered by a court in deciding the constitutionality of a religious equality act.[48] Since the Istook amendment expressly includes the term "conscience,"[49] it would be even more likely, if converted to a statute, to be interpreted to protect "conscience," in some form, as well as "religion."

Nevertheless, there are three additional drafting reasons for placing the term "conscience" in the primary text. First, if a section is added defining "religion" to include "conscience," it could be interpreted in a fashion that would limit not only "religion" but also "conscience," because the terms included in definitions often are interpreted restrictively and must be carefully drafted to avoid such a restrictive reading.[50] Second, if the term "reli-

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discussion of the *Welsh* case.

46. *See* John C. Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2220-36 (1995).

47. Justice Harlan's opinion is particularly significant because it constituted the decisive fifth vote in favor of a broad reading of the statute in *Welsh*.

48. For example, if the Hyde-Hatch amendment were converted to a statute, without adding protection for conscience in some form, the *Welsh* precedent could not be avoided and might be read as implying protection for "conscience," as a means of saving the statute from being held unconstitutional under the establishment provision of the First Amendment.

49. H.R.J. Res. 127, *supra* note 12.

50. James Madison made just such an argument in opposing an assessment bill in early Virginia. The bill would have provided an assessment to benefit Christian churches in Virginia. William Cabell Rives, a friend and early biographer of Madison, noted how Madison expressed his opposition to the assessment bill:

> [Since] the benefits of the proposed provision were to be limited to Christian societies and churches, it would devolve upon the courts of law to determine what constitutes Christianity, and thus, amid the great diversity of creeds and sects, to set up by their fiat a standard of orthodoxy on the one hand of heresy on the other, which would be destructive of the rights of conscience.

WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 604 (1859). Later, in his *Memorial and Remonstrance* opposing the general assessment for the benefit of Christianity, Madison opined, "Who does not see that the same authority which can establish Christianity to the exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" JAMES

gion," which appears throughout case law, is included in a definitional section, it could be necessary to include other commonly used terms, which are better defined in their context, as disclosed in litigation. Third, if religion is defined to include "conscience," it might necessitate an additional section to define the terms used in that definition, including "conscience," which would further compound the problems that attend the definitional process at the legislative level.

"Conscience," on the other hand, is a less common term than "religion" and might profitably be defined as a means of commencing the dialogue necessary to clarify its intended usage. Because "conscience" is susceptible to a wide variety of interpretations, some of which are so broad that they would attenuate the term to the point that it would render the statute ineffectual or unacceptable as a political matter, the need for some initial legislative clarification (and limitation) is particularly significant.[51] In providing such a definition, Congress should develop an eclectic definition,[52] partially tracking existing language in the draft exemption cases, which are largely based on the Tillichian notion of central or ultimate concern.[53] In doing so, Congress should hold hearings and draw on the testimony of witnesses with expertise in theology, philosophy, psychology, and law.

Another drafting alternative would be to add the term "conscience" and delete the language regarding "religious expression, belief, or identity," on the ground that "conscience" includes "religious expression, belief, or identity." This alternative is not as attractive as merely adding "conscience" because it might have the effect of limiting "religious expression," since not all "reli-

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MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 3 (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973). If "conscience" is defined as a part of "religion," it might have the effect of limiting "religion" to religiously compelled acts. *See infra* notes 56, 124 and accompanying text. For a further discussion of the difficulties that attend the definitional process, see *infra* text accompanying notes 128-129.

51. *See infra* part V.

52. See *infra* part V for a discussion of the development of an "eclectic" definition.

53. See the discussion *infra* notes 123, 130-133 and accompanying text regarding definitional problems related to sincerity and matters of ultimate concern. See also JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 67-85 (1995) for a critique of the Tillichian and other views of conscience.

gious expression" can be classified as "conscience."[54] Although "conscience" is certainly an aspect of religion, the terms are not interchangeable. Religion is both more restrictive and more expansive than the term "conscience"—not all conscience is religiously based, and not all religion is based on conscience. By leaving the term "religious" in the statute, it would not be necessary to analyze whether a given act or expression was both religious and a matter of conscience; it would suffice if it could be demonstrated that the act was either religious or based on a matter of conscience. As suggested later in this Article,[55] "conscience" should be restrictively defined to include only compelled behavior—behavior that is a matter of duty.[56]

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54. Professor Michael McConnell makes this point effectively when he notes, "'conscience' emphasizes individual judgment, while 'religion' also encompasses the corporate or institutional aspects of religious belief." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1490 (1990) (citations omitted). See also *infra* text accompanying notes 107-126 for a discussion of the distinctions that might be drawn between "conscience" and "religion" and the possible political and legal implications of those distinctions.

55. *See infra* text accompanying notes 113-124.

56. Admittedly, the distinction between behavior that is motivated and behavior that is compelled as a matter of conscience is not easy to draw. Indeed, if an action is motivated by conscience, that behavior is in some sense, by its very nature, compelled. Thus, to fail to act in accord with one's conscience must, in some measure, constitute a breach of a covenant or duty, although the sense of duty may in some respects be less compelled in one instance than in another. In following the call of my religion or conscience, for example, I may believe that I should visit the sick and the needy on a regular basis. To fail to make such visits would be to act counter to my understanding of my religion or conscience. Is such a visit motivated or compelled? The answer is not clear, because the terms "motivated" and "compelled" might best be understood as contiguous points on a continuum.

What is more clear, as demonstrated by placing motivation next to compulsion on a continuum, however, is that some matters are more a matter of compulsion or duty, while others are more a matter of motivation, fancy, or choice. Thus, I may prefer (be motivated) to use actual candles, as opposed to ones that are battery operated, as a part of a given religious service. The use of candles may be compelled (mandated), but the form of candle used may be merely a matter of preference. As to matters of conscience, especially where such conscience does not draw on a tradition that helps to define what is mandated, as is the case with many religiously compelled acts, I am recommending that some caution be employed in determining whether a matter is compelled as opposed to being preferred. For example, as a matter of conscience, I may believe that it is wrong to eat meat, but my choice of alternative foodstuffs may be one of preference. Under my suggestion that the protection of matters of conscience only include compelled behavior, I am suggesting that some distinction between compelled and motivated (preferred) behavior might be drawn. Thus, in my vegetarian example, if an individual supported a claim that she refused to eat meat as a matter of conscience, she should not be forced to do so; however, she should not be able to invoke her right of conscience to otherwise design her menu, unless she can also prove

IV. POLITICAL AND LEGAL REASONS FOR ADDING "CONSCIENCE"

There are a number of political and legal justifications that support adding "conscience" to a religious equality act and warrant confronting the definitional difficulties that necessarily attend the inclusion of "conscience." Politically, adding the term "conscience" recognizes the pluralism that characterizes America today. Despite persistent equilibrium arguments calling for limiting the definitional class protected on the ground that expanding the class protected would necessarily lead to a diminution in the right being protected,[57] adding "conscience" would likely increase support for (or at least weaken political opposition to) the statute.[58]

Legally, adding "conscience" also virtually eliminates establishment concerns, because, as a doctrinal matter, the statute would be consistent with and could ultimately clarify much of the Court's establishment jurisprudence. As demonstrated below, a statute providing for nondiscrimination (or nonpreference) on the basis of religion and conscience is consistent with contemporary establishment jurisprudence.

Recent cases clearly suggest that governmental accommodations or aid programs that do not discriminate on the basis of conscience are permissible, as opposed to those given only to religions. For example, in 1989, in *Texas Monthly, Inc. v. Bullock*,[59] the Supreme Court held that an exemption of religious books and periodicals from a sales tax violated the establishment provision of the First Amendment because the exemption was not broad enough, even though three Justices argued that the exemption should be upheld. In the decisive concurrence, Justice Blackmun, joined by Justice O'Connor, emphasized:

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that the desired choices were in fact compelled as a matter of choice.

57. *See, e.g.*, Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1, 21-22 (1985).

58. President Clinton may be more inclined to sign a somewhat more expansive act—one that includes religion and matters of conscience. Furthermore, the Executive Branch, including the Office of the Solicitor General, may be more aggressive in enforcing such legislation. Weakened political opposition may also result in fewer challenges to the act, either politically or within the court system.

59. 489 U.S. 1 (1989). For an in-depth analysis of the opinions in the *Texas Monthly* case, see Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 263-69 (1991).

> It is possible for a State to write a tax-exemption statute consistent with [the free exercise and establishment values]: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such *matters of conscience* as life and death, good and evil, being and nonbeing, right and wrong.[60]

To pass constitutional muster, under both the Free Exercise and Establishment provisions, therefore, it is enough that the statute is written to include "matters of conscience."[61]

Even *Lee v. Weisman*,[62] a five-to-four decision in which the Court held that a public school that allowed a cleric to offer prayers at an official graduation violated the First Amendment, supports the proposition that a statute or procedure that does not discriminate on the basis of conscience would be upheld. In Justice Kennedy's decisive opinion, he stressed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[63] He added that "[o]ne timeless lesson [of First Amendment jurisprudence] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that *sphere of inviolable conscience* and belief which is the mark of a free people."[64] Thus, a careful reading of the *Weisman* decision, a case that may well have been the stimulus behind current efforts to amend the Constitution, reveals

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60. *Texas Monthly*, 489 U.S. at 27-28 (emphasis added).

61. Later in his opinion, Justice Blackmun interestingly noted that:

> At oral argument, appellees suggested that the statute at issue here exempted from taxation the sale of atheistic literature distributed by an atheistic organization. If true, this statute might survive Establishment Clause scrutiny . . . . But, as appellees were quick to concede at argument, the record contains nothing to support this facially implausible interpretation of the statute.

Id. at 29 (citations omitted). This comment indicates that a statute might not even have to be drafted to include all conceivable matters of conscience to pass constitutional muster under the establishment provision. It may be enough that it include matters like atheism that are very closely aligned with the religious sphere (i.e., the definition of conscience can be tied to matters of conscience akin to religion as in the *Welsh* draft exemption case, *infra* text accompanying notes 65-73).

62. 505 U.S. 577 (1992).

63. *Id.* at 592; *see also* Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of the End to a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917, 930-35 (1993).

64. *Weisman*, 505 U.S. at 592 (emphasis added).

that adding "conscience" to a statute protecting religion and thereby respecting the "sphere of inviolable conscience" should suffice for constitutional purposes.

As a matter of law, *Welsh v. United States*[65] is the most supportive case for the proposition that a statute designed to promote conscience in a nondiscriminatory way is constitutionally permissible. In *Welsh*, the Supreme Court upheld a congressional draft exemption statute by interpreting it broadly to "exempt[] from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[66] The statute itself provided for a draft exemption for those who "'by reason of [their] religious training and belief [are] conscientiously opposed to participation in war in any form.'"[67] In his thoughtful concurrence, Justice Harlan framed the issue as, "whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress."[68] After noting that such a provision "would not offend the Free Exercise Clause,"[69] Harlan concluded that "having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."[70] He added, "[i]f the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held."[71] Justice Harlan candidly conceded that he believed that "there is a compelling reason for a court to hazard the necessary statutory repairs [to save the statute from constitutional attack]."[72] He con-

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65. 398 U.S. 333 (1970).

66. *Id.* at 344.

67. *Id.* at 336 (quoting Universal Military Training and Services Act of 1948, § 6(j), 62 Stat. 612 (codified as amended at 50 U.S.C. app. § 456(j) (1994))). Under the Act, "religious training and belief," in turn, are defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.*

68. *Id.* at 356 (Harlan, J., concurring).

69. *Id.*

70. *Id.*

71. *Id.* at 358 (Harlan, J., concurring).

72. *Id.* at 366 (Harlan, J., concurring).

cluded that he was "prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as a patchwork of judicial making that cures the defect of underinclusion in [the draft exemption statute] and can be administered by local boards in the usual course of business."[73]

In addition to the *Welsh* decision, recent cases indicate that by adding "conscience" to the Hyde-Hatch amendment and converting that amendment to a statute, the resulting statute would pass constitutional muster. The statute, as revised, would have the added benefit of clarifying and unifying free exercise and establishment doctrine. It could create this benefit by placing emphasis on nondiscrimination or nonpreference based on conscience, not on the more unwieldy (and unfathomable)[74] endorsement and coercion tests that are occasionally used by various members of the Court.

The endorsement test, which was initially proposed by Justice O'Connor,[75] essentially examines "'whether [based on the perception of a reasonable, informed observer, a] challenged governmental practice either has the purpose or effect of "endorsing" religion.'"[76] The noncoercion test, which was originally employed by Justice Stewart,[77] has been given new life by Justice Kennedy,[78] who has expressed "concerns with protecting freedom of conscience from subtle coercive pressure."[79] The noncoercion test, which seems to raise free exercise and not establishment concerns, is in its infancy and has not been widely supported on the Court. It is significant, in a doctrinal sense, that Justice Kennedy often provides the "swing" vote on the Court. Under his noncoercion test, Justice Kennedy takes psychological evidence

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73. *Id.* at 366-67 (Harlan, J., concurring).

74. The "endorsement" and "noncoercion" tests, as applied in the establishment context, have been criticized. *See, e.g.*, Smith, *supra* note 63, at 957-61 (criticizing the "noncoercion" test); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the "endorsement" test).

75. *See* Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

76. Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2452 (1995) (O'Connor, J., concurring) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989)).

77. *See* Rodney K. Smith, *Justice Potter Stewart: A Contemporary Jurist's View of Religious Liberty*, 59 N.D. L. REV. 183 (1983).

78. *See* Lee v. Weisman, 505 U.S. 577 (1992).

79. *Id.* at 592.

of coercion seriously, but it is not clear how strong that evidence must be or when it can be overridden in instances of individual oversensitivity. Additionally, Justice Kennedy has not distinguished between culturally based coercion and political or governmental coercion.[80]

The proposed statute would clarify matters both as to endorsement and noncoercion in the establishment context because those doctrines would essentially become superfluous. If government nonpreferentially accommodated conscience, including religion, in a nondiscriminatory way, it would be difficult to assert that religion was being endorsed, although occasional troublesome cases might arise.[81] By the same token, if matters of conscience were treated in a nondiscriminatory fashion, it would be difficult to assert that one was being coerced inappropriately, because an individual acting on conscience would have an opportunity to respond or participate on an equal basis. The only "coercion" that would typically occur would be essentially persuasive in nature, in that exposure to a variety of matters of conscience might influence individuals who had not previously been exposed to such matters. Increased exposure, in this "persuasive" sense, however, would not, in and of itself, be coercive. It must be conceded, however, that coercion might arguably arise if some religions or matters of conscience are given greater access by virtue of their numbers than smaller or minority religions. If this were the case, exemptions from such exposure might be

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80. *See* Smith, *supra* note 63, at 957-61.

81. Nonpreference typically implies nonendorsement. To endorse religion, the government normally would have to prefer it. Nevertheless, in application, some problems of possible endorsement could arise because a statute might be adopted that would, by its terms, apply to conscience as well as religion, but would, as a practical matter, afford little opportunity for the exercise of conscience. For example, the government might provide financial aid for the purchase of candles used in exercising one's conscience or religion. Candles might be used in exercising one's conscience (e.g., a candlelight vigil), but are far more likely, as a practical matter, to be used in religious services. Thus, even though conscience would be afforded equal or nonpreferential access to candles, it is less likely that candles would be used in accommodating one's conscience, and it might be more difficult to prove that the use of candles is compelled as a matter of conscience. See *supra* note 56 for a discussion of the distinction between compulsion/duty and motivated/preferred action. As a practical matter, therefore, a reasonable observer might believe that religion was being endorsed when the candles were purchased and distributed, and it might be more difficult for the person of conscience to prove that her use of the candles was compelled.

warranted on free exercise grounds.[82] Noncoercion and endorsement would, therefore, largely be absorbed by the broader nondiscrimination test in the statute, which would include conscience as well as religion. To the limited extent that this might not be the case, exemptions could be granted under free exercise.

The proposed statute would also perform a unifying function by minimizing the much maligned conflict between establishment and free exercise values.[83] The establishment value conflicts with free exercise in at least two significant ways: (1) granting a free exercise exemption to a law of general application appears to confer a particular benefit on an individual for religious reasons, thus raising establishment objections;[84] and (2) prohibiting an exercise of religion under the Establishment Clause, in an effort to separate religion from the public sector or to refuse public support for religious activities when other nonreligious activities receive such support, has the effect of limiting free exercise.[85] Each of these conflicts would be minimized under

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82. Justice Potter Stewart routinely made an argument for excusal or exemption on free exercise grounds from certain religious activities in the public sector. *See* Smith, *supra* note 77.

83. In criticizing the Supreme Court's Establishment Clause decisions, Justice Stewart stated that "there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause." Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring) (citations omitted). Professors Shiffrin and Choper state that the potential for conflict remains:

> It is difficult to explore either [the Free Exercise or the Establishment C]lause in isolation from the other. The extent to which the clauses interact may be illustrated by the matter of public financial aid to parochial schools . . . : On the one hand, does such aid violate the establishment clause? On the other hand, does a state's failure to provide such aid violate the free exercise clause? Another example of the potential conflict between the clauses . . . is whether, on the one hand, a state's exemption of church buildings from property taxes contravenes the establishment clause or whether, on the other hand, a state's taxing these buildings contravenes the free exercise clause.

STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 623 (1991).

84. For example, granting a free exercise exemption from a general law (e.g., a worker's compensation law that requires a willingness to work on Saturday) may benefit a sabbatarian at the "expense" of a nonsabbatarian who would like to refrain from working on Saturday for personal reasons, but who is not exempted.

85. For example, prohibiting a parent with a child in a sectarian private school from receiving government funds, on establishment grounds, while permitting a parent whose child attends a nonsectarian private school to receive funds adversely affects the rights of parents with children in sectarian schools. It also has the effect of coercing, by making the choice of a parent with a child in a sectarian school considerably more

the proposed equality statute. As to exemptions, broadening the statute to include "conscience" would require expanding exemptions to include nonreligious matters of conscience, as well as religious matters. Such an expansion would negate arguments that religion alone was being preferred. By including conscience, and not just religion, in the statute, public expressions as to matters of conscience as well as public support for conscience would also be protected, and would include, but not single out, religion.

The free exercise and establishment provisions might be made to work in concert with one another and produce the greatest overall benefits under the proposed statute. Under the establishment and free exercise provisions, the following general permutations are plausible: (1) strict separation of religion from the public sector, permitting no governmental accommodation of or financial support for religion in the public sector nor any exemption from laws of general application on free exercise grounds; (2) nondiscrimination between religion and nonreligion, permitting governmental accommodation or exemption on religious grounds only when nonreligious activities are similarly exempted or accommodated; (3) nondiscrimination among religions, permitting governmental accommodation or exemption when other religions are similarly exempted or accommodated; or (4) nondiscrimination on the basis of religion and conscience, permitting governmental accommodation or exemption for religion only when other matters of conscience are also exempted or accommodated.[86]

The first and second possibilities—strict separation and nondiscrimination between religion and nonreligion—are unappealing for two reasons. First, they limit religious activity in the public sector at a time when that sector is growing at a pace that causes it to be increasingly intrusive in the lives of individuals and the activities of churches. If strict separation were adopted, the pervasive and intrusive nature of the public sector would severely limit religious exercise. Similarly, if exemptions from public regulations had to include nonreligious reasons as well as reasons based on religion or conscience, the category of exemp-

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difficult, or by preventing a parent from sending a child to a sectarian school for lack of funds.

86. *See* Smith, *supra* note 63, at 919-26.

tions would be so broad as to render governmental action ineffectual.[87] Second, neither view has ever commanded a majority of the Court. The effectuation of either view would, therefore, require a massive overruling of past precedent. Such an overruling of precedent could, in turn, cause a significant loss of legitimacy for the Court.[88]

The third possibility—nondiscrimination among religions—is appealing because it would increase religious activity or freedom, but it is unappealing because it has never received more than three votes on the Court.[89] It is also unappealing because it prefers religion and religious matters of conscience over other deeply held views or forms of conscience. Not all individuals are religious, in a conventional sense, but arguably all are or should be committed to some matters of conscience as a part of their personal identity.

The fourth possibility—nondiscrimination on the basis of conscience—is appealing because it would increase religious activity and activity as to matters of conscience, and because it continues to receive majority support, for establishment purposes, on the Court. Since the right being protected under the fourth model would be expanded from religion to religion *and* conscience, the benefit would not be conferred for solely religious purposes. Conscience, including religion, would be benefitted; such a benefit is warranted for at least four other major reasons.[90]

First, pursuing and acting upon one's conscience provides deeper meaning to one's life. The pursuit of conscience—seeking to find that which one considers to be most significant in life or that which one feels bound to uphold[91]—provides one with a sense of purpose. Second, the process of seeking after matters of

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87. For example, if exemptions from combat service in the military were expanded to cover nonreligious as well as religious or conscientious objections to such service, the capacity of the government to raise an army would be rendered ineffectual.

88. As both the role of government in the lives of individuals and the operations of churches increase, and as both public support for religion and fears that religion is being disfavored intensify, the likelihood of such a loss of legitimacy increases.

89. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

90. A full delineation of these reasons is beyond the scope of this Article. Nevertheless, they need to be introduced to give the reader a sense of the benefits that are attributable to the pursuit of conscience.

91. See *infra* text accompanying notes 95-98, 115-124 for a discussion of the binding/covenanting nature of conscience.

conscience often has a peculiar capacity to exhort and edify the individual.[92] In this sense, it is arguable that personal, and perhaps even external, peace comes through the pursuit of the higher truths—truths worthy and capable of engendering full commitment.[93] One might have momentary happiness in other pursuits, but personal peace only seems to come through devoting one's self to that which is of a higher order or provides a form of transcendent meaning in our lives. This pursuit of conscience, in turn, may not always be reducible to reason alone, although it may often ultimately be comfortably confirmed by the language of reason.[94]

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92. See Smith, *supra* note 63, at 952-57 for a discussion of ways in which the pursuit of conscience edifies. That material refers to the night when Martin Luther King became committed, as a matter of conscience, to the righteousness, truth, and justice of the civil rights movement, as he reflected on the needs of his daughter and family. *Id.* at 954-55. That, for Dr. King, was a moment of exhortation and edification—a moment when reason and inspiration combined in a way that caused him to see things more clearly and confirmed his willingness to commit himself to a higher cause. In that moment, as he discerned and determined to act in accordance with his conscience, Martin Luther King found peace, the first lasting peace that he had experienced since commencing his leadership role in the Montgomery bus boycott.

93. Professor William Marshall has strongly defended the search for truth as a First Amendment justification, although he might not agree with the conclusion that peace can only come through the pursuit of those truths that one can become fully committed to, as a defining part of one's identity. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 19-34 (1995) [hereinafter Marshall, *Defense of the Search for Truth*]. Unfortunately, and rather paradoxically, Professor Marshall concludes that "[t]he value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself." *Id.* at 4. There certainly is something existential, in the darkest existential sense, about Professor Marshall's conclusion—one is protected in the pursuit of truth, but acting upon one's findings is not protected. Thus, for example, under Professor Marshall's view, an individual may search for truth, but if she finds it in the Native American religion that uses peyote as a sacrament, she will not be protected in exercising her conscience. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991). Professor Marshall reaches this conclusion, in part, because he concedes and evidently accepts the conclusion that "[c]ontemporary philosophical thought . . . does not believe in truth, at least in the 'objective' or 'transcendent' sense of the word." Marshall, *Defense of the Search for Truth*, *supra*, at 2. To protect the pursuit of truth, while refusing to afford some protection for one's exercise of truths found, however, is a bitter irony, an irony that strains reason itself.

94. Professor Michael Perry recognizes that reason and religion are not incompatible, noting:

> [F]or most religious believers [in religiously pluralistic democracies], . . . the persuasiveness or soundness of any religious argument about the requirements of human well-being depends, or should depend, partly on there being at least one persuasive secular agument . . . that reaches the same

Third, acting to accommodate conscience, which is often drawn from that which is unique in each of us, demonstrates respect for individuals and groups in an increasingly pluralistic world. Respecting each individual's conscience—viewing it as a duty that transcends the rightful power of government, except when the equal rights of another are implicated or when the interests of the state are "manifestly endangered"[95]—provides each

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conclusion about the requirements of human well-being as the religious argument.

PERRY, *supra* note 42, at 72-73. Professor Perry would permit strictly religious arguments in the public sector, but he would only permit them to be relied upon for final policy-making purposes when they can be stated in plausible secular terms.

In the religious context, Professor Obert C. Tanner explains, however: "Here is a fact, yet one which defies intellectual analysis. It is a strange thing that an experience so decisive as to influence a person's total life and commitment should yet be described as ineffable, unutterable, indescribable, and unexpressible." OBERT C. TANNER, ONE MAN'S SEARCH 151 (1989).

Again in the religious context, Elder Dallin Oaks articulates that in the interplay between reason and revelation or personal inspiration (inspiration that causes one to be devoted to a particular "truth," as a matter of conscience):

> [R]eason screens revelation and revelation confirms or overrules reason. As concerns sacred knowledge, it is just as important for reason to have the first word as it is for revelation to have the last word. I believe this is one meaning of the Lord's command for his people to "seek learning, by study and also by faith."

DALLIN H. OAKS, THE LORD'S WAY 66-67 (1991) (quoting THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 88:118).

Even matters of conscience that are secular in nature often seem to be the combined product of a dynamic between religious faith or personal inspiration and reason. Reason and personal inspiration are tools that assist in the pursuit of truth and the peace and purposefulness that attend conscience. Postmodernists, with their emphasis on context and their distrust of reason standing alone, provide a helpful insight—conscience and the pursuit of meaning might not solely be the product of reason. The person of conscience might ultimately have to act on faith and reason, although faith, as such, may not be religiously based. Such a view should not be particularly troublesome to the postmodernists, who otherwise launch a "powerful . . . attack on normative truths." Marshall, *Defense of the Search for Truth*, *supra* note 93, at 2 n.5. Transcendent or ultimate truths (truths central to one's self definition) are discovered through a dynamic that includes an interplay among reason, faith, and context. The pursuit and living of such truths could be protected legally, out of a respect for individual choices, without offending the postmodernist or others who argue that transcendent or objective truth—truth confirmed by reason alone and applicable to all—is unobtainable.

95. This is the test Madison espoused in the draft of his version of the religious liberty provision of the Virginia Declaration of Rights:

> That religion, or the duty we owe our creator, and the manner of discharging it, being under the direction of reason and conviction only, not of *violence*, or *compulsion*, all men are entitled to the full and *free exercise* of it according to the *dictates of conscience; and therefore no man or class of men ought on*

of us with the latitude we need to pursue and live personal and essential truths which bind us to higher purposes,[96] merging our right of conscience with a sense of personal responsibility.[97] The result of this pursuit of conscience may be personal peace. For the government to constrain that right, therefore, would be to deprive its holder of the personal peace that can be had only through allegiance to the dictates of one's conscience. We ought to respect one another enough to be exceedingly hesitant to deprive others of a right that can lead to such personal peace.[98]

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account of religion be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.

MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21 (1978) (emphasis added). For purposes of this Article, as well, Madison's reference to "duty" and to "conscience" are interesting.

96. All may not find the same "essential truths" to be evident in their lives, but all should be protected in both the search for those truths and in their respective, yet often differing, conclusions as to what those truths or purposes are.

97. See *infra* notes 98-101 and accompanying text for a discussion of the interplay between the right of conscience and notions of personal responsibility.

98. To refuse such respect is to invite alienation—alienation of the individual from her definition of self, alienation of the individual from the community her conscience would lead her to, and ultimately from her government. All should desire to refrain from taking that which is essential to others in order to protect that which is of similar magnitude in their own lives and to further a sense of community based on mutual respect in a pluralistic world. Parents often experience this latter sense of the need for respect as they witness the growth of their children, when children are nourished in their differences without depreciating family unity.

Interestingly, and perhaps paradoxically, promoting conscience can be a powerful means of strengthening one's sense of belonging, and of association with others. See BRUCE C. HAFEN & MARIE K. HAFEN, THE BELONGING HEART 21-73 (1994) for a thoughtful discussion of the need of individuals to experience this sense of belonging, which the Japanese refer to as *amae*. The Hafens state that:

> The word *amae*, for which no English equivalent exists, describes the innate need and desire within each person to depend on and feel connected to other people, especially in relationships of love and intimacy. In a sense, *amae* is the desire to *receive* love. Through fulfillment of our *amae* we find not only security but also freedom and meaning.

Id. at 21. In seeking to further define *amae*, the Hafens note that:

> Dr. Doi's translator chooses "dependence" as the closest one-word English equivalent for *amae*. Professor Morita tells me he finds my use of the term *belonging* to be somewhat closer. But, he says, better than either of these is the German translation of *amae*, which is *Freiheit in Geborgenheit*, literally "freedom through emotional security."

Id. at 23-24. The Hafens also discuss "the liberty/duty paradox," pointing out that "[f]reedom of expression has two meanings: freedom *from* restraints on expression, and freedom *for* expression." *Id.* at 65. They add:

Fourth, and finally, in a world where rights often unfortunately depreciate responsibility, religion and conscience deserve particular solicitude because conscience is a right that includes by its very nature a strong sense of responsibility. In this sense, acts based on conscience are a matter of duty and are not simply chosen as a matter of mere preference. In short, it is a unique responsibility-based right.[99] When Martin Luther King decided, as a matter of conscience,[100] to risk his life in the interests of the civil rights movement, he did so out of a sense of responsibility. In a world where personal responsibility seems to be on the decline, this concept of duty or responsibility, which is essential to

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> The waning of belonging . . . has the long-range effect of reducing meaningful individuality and actual personal autonomy. When the search for personal liberty is divorced from commitments to discipline and duty, that separation only increases the likelihood that our lives will lack meaning. In their best sense, liberty and duty exist in a rich paradox as two poles at opposite ends of a single construct. Neither is meaningful without the other. When we sever the link between them, we face two unhappy options: being dominated by others, or being abandoned by others.

Id. This paradox or seeming gulf between individual liberty and duty may be bridged by the one right that is responsibility-based—the right of conscience. As one's commitment to matters of conscience grows, one often finds that seeking to exercise her sense of duty leads her to associate with others who share her faith or are similarly compelled as a matter of conscience. That association can result in deep bonds that provide one with the peace that comes from associating with others who share one's deeply held faith or beliefs. In short, commitment to conscience meaningfully contributes to the individual's need for belonging by helping to create communities of conscience.

99. President Václav Havel of the Czech Republic put it well in an address to a joint session of the United States Congress on February 21, 1990, when he emphasized:

> We still don't know how to put morality ahead of politics, science and economics. We are still incapable of understanding *that the only genuine background of all actions—if they are to be moral—is responsibility.* Responsibility to something higher than my family, my country, my firm, my success. Responsibility to the order of Being, where all our actions are indelibly recorded and where, and only where, they will be properly judged.

OAKS, *supra* note 94, at 186 (quoting President Václav Havel, Address Before a Joint Session of the United States Congress (February 21, 1990)). Elder Oaks adds that "[r]esponsibilities are closer to heaven than rights because responsibilities represent what we give, whereas rights represent what we seek to receive." *Id.*; *see also* Dallin H. Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427 (1985).

100. See *supra* note 92 for a discussion of Martin Luther King's decision to remain involved in the civil rights movement, despite threats to his own life. As a mere preference, Reverend King might have desired to stay home and raise his family, rather than placing his life on the line on virtually a daily basis. He could not do so, however, and remain true to the sense of duty he felt compelled to fulfill as a matter of conscience.

the right of conscience, is the kind of right that ought to be given special prominence. If we afford protection to conscience, we encourage people to take personal responsibility.[101]

As an analytical matter, each of the four justifications offered for a right of conscience is incompletely developed, but even as articulated, the justifications should suffice to give the reader a flavor of what is at stake. In the concluding section of this Article, I describe two personal experiences involving matters of conscience, one which is largely secular and the other religiously based. These experiences should help further clarify, at least at an anecdotal level, the costs that are associated with constraining the right of conscience as well as the benefits that flow from recognizing such a right.

As has been shown, accommodating both conscience and religion would avoid creating a preference for religion. The nonreligionist would not be excluded from receiving special benefits related to her conscience, although receipt of the benefit would be conditioned on a demonstration that conscience was in fact implicated.[102] Adding "conscience" to a religious equality statute and broadening its legal impact could, therefore, unify free exercise and establishment in a beneficial manner, both as a matter of legal doctrine and public policy. If an individual is exempted from an otherwise general law on free exercise grounds, the statute would require that individuals seeking a similar exemption on grounds of conscience be required to receive it. Neither religion nor conscience could be discriminated against on establishment grounds. "Conscience," as envisioned in the statute, would provide a bridge between the free exercise and establishment provisions.[103] Defining "conscience," as it would be used

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101. There are those, of course, who would assert that we can best encourage this sense of responsibility by requiring that those acting as a matter of conscience bear the weight of acting contrary to existing laws. To be a true conscientious objector, under this view, a person must take responsibility by going to prison or otherwise suffering the consequences of one's beliefs. When one acts as a matter of conscience, however, one often acts contrary to existing social mores and culturally acceptable behavior. Acting contrary to social mores or cultural norms itself carries with it a heavy price—often social ostracism or being labeled odd or unacceptable. *See infra* note 131 and accompanying text. It is not necessary, therefore, to require that legal penalties be added to this weighty price in order to enhance the responsibility that attends acts of conscience.

102. See *infra* part V for a discussion of the definition of "conscience."

103. As noted, *supra* text accompanying notes 83-86, tension has developed between the First Amendment's establishment provision, which has been interpreted

in the act, or establishing a viable means of attaining such a definition, is therefore crucial.

V. DEFINING "CONSCIENCE"

The *Oxford English Dictionary* offers a number of definitions for the term "conscience."[104] The first two are illustrative: (1) "inward knowledge or consciousness; internal conviction" and (2) "[t]he internal acknowledgment or recognition of the moral quality of one's motives and actions; the sense of right and wrong as regards things for which one is responsible."[105] The *Oxford English Dictionary* adds: "Opinions as to the nature, function, and authority of conscience are widely divergent, varying from the conception of the mere exercise of the ordinary judgment on moral questions, to that of an infallible guide of conduct, a sort of deity within us."[106]

The indeterminate nature of the terms "conscience" and "religion" has been recognized in legal scholarship.[107] For example,

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to forbid preference for religion free exercise provision, and the free exercise provision, which, together with the Religious Freedom Restoration Act, exempts religious exercise, under some circumstances, from laws of general application. The tension is obvious. If religion is given preference under the free exercise provision and the Religious Freedom Restoration Act, religion is being preferred and the establishment provision is being violated. On the other hand, if the establishment provision is interpreted to forbid such exemptions, free exercise is being violated. However, conscience provides a bridge and could resolve this tension. If exemptions from laws of general application were extended to matters of conscience, as well as religion, the establishment provision, as currently interpreted, would not be violated. "Adding a little 'conscience,'" therefore, does much to unify the free exercise and establishment provisions.

104. OXFORD ENGLISH DICTIONARY 754 (2d ed. 1989).

105. *Id.*

106. *Id.*

107. In a recent article regarding the definition of "religion" for First Amendment purposes, Andrew Austin noted that "[t]he courts have avoided the quagmire of defining religion." Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 2 (1991-92). The indeterminancy of the term "religion" is the source of this quagmire. Professors Eisgruber and Sager react similarly regarding the difficulty of defining conscience:

> The [added] difficulty [of using "conscience" in place of "religion" for First Amendment purposes] becomes clear when we try to give content to the idea of conscientious commitment. Need a conscientious commitment be framed in recognizably *moral* terms? Does it require a system of belief, or can it be simply a sharp impulse? Need it involve an element of sacrifice? On the one hand, if we try to contain the idea of conscience within relatively narrow bounds, we will encounter our old difficulties of explaining why a particular form of commitment should be treated differently from comparably gripping life projects. On the other hand, if we broaden conscience to include a great

Professor Richards offers a definition of religion based on a "respect for the person as an independent source of value."[108] This broad definition "includes everything and anything, including purely scientific beliefs about the causal structure of the world integrated into some larger rational and reasonable conception of one's ends."[109] Professor Richards adds that his envisioned "universal toleration" under the First Amendment would "encompass all belief systems, religious and nonreligious, expressive of our moral powers of rationality and reasonableness."[110]

Not surprisingly, Professor McConnell responds that "if the exercise of religion [or conscience] 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."[111] Professor Durham makes a related point:

> One of the major hazards in our century is that the notion of conscience is gradually becoming so broad and vague that it is being emptied of any meaningful content. This process began innocently enough in the conscientious objector cases. There, the notion of conscience was defined as "[a] sincere and meaningful [belief which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who

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> swath of the deep commitments people hold, we face the fantastic idea that it is a matter of constitutional regret whenever an otherwise valid law collides with the commitments of an individual or group.

Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1268 (1994).

108. DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 142 (1986).

109. Professor Richards argues that:

> Any attempt to limit the scope of constitutionally protectable religion to certain contents or institutions of belief would betray the underlying values of respect for the rational and reasonable conscience that both the history and practice of religion clause jurisprudence reflect. Respect for conscience cannot be limited, for example, to belief in a personal deity, for a religion such as Buddhism lacks such a belief. Any vaguer characterization of the religious, which is what neutrality requires, includes everything and anything, including purely scientific beliefs about the causal structure of the world integrated into some larger rational and reasonable conception of one's ends. Certainly, all of the classic exclusions from universal toleration are today unacceptable.

Id. at 141-42.

110. *Id.* at 138.

111. McConnell, *supra* note 54, at 1493; *see also* Rodney K. Smith, *Establishment Clause Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463 (1990).

> clearly qualifies for the exemption." Extending the notion of conscience in this direction is obviously reasonable, because conscience does not always wear religious garb. The difficulty comes when conscience is extended to cover any deeply felt psychological state experienced at moments of decision.[112]

Professors Durham and McConnell are no doubt correct when they assert that the definition of "conscience" can become attenuated to the point that it is unhelpful, at least in terms of its likely legal force.[113]

The project of defining "conscience" in a sufficiently constraining way, like the troublesome effort to define "religion," is daunting. This difficulty, however, does not warrant refusing to try to place sufficient definitional limits on "conscience" so as to make it a viable concept for the purpose of the proposed statute.[114] Professor McConnell states that "[t]he most widely ac-

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112. W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71, 85 (1993) (quoting United States v. Seeger, 380 U.S. 163, 166 (1965)) (alterations in original) (footnotes omitted).

113. A very broad definition faces at least two major challenges at the judicial level: (1) rather than relying on a very expansive definition that would lead to numerous exemptions from general laws, courts would likely restrict the core provision itself (i.e., a broad definition of "conscience" would be accepted, but courts would simply close the door to the party asserting a right of conscience by determining that the right of "conscience" could be easily outweighed by a governmental interest); and (2) if a broad definition is utilized, requiring that the judiciary evaluate "sincerity," "centrality of concern," or similar notions, the courts may simply assert a lack of competence and defer to the legislature or other organs of government, thereby permitting "conscience" to be restricted or expanded as a matter of legislative fiat. However, for a discussion of why issues such as "sincerity," "centrality," "rectitude," and "duty" might need to be considered as a part of recognizing a right of conscience, see *infra* notes 123, 130-133 and accompanying text.

114. See *supra* text accompanying notes 90-101 for a discussion of four benefits that would attend an expansion from "religion" to "conscience." In supporting a right of conscience, Professor Laura Underkuffler-Freund adds:

> Ideas of conscience, public virtue, and value choice—so important during the Founding Era—may seem quaint to us in this age of preference maximizing and other wizardries. However, underneath all of our professed sophistication, we remain human. The failure of the "science" of secularized, liberal theory to account for "nonrational" or religious yearnings has been cited as a primary reason for the popular decline in the appeal of liberal political ideology and the rise of the politics of right-wing evangelism in its stead. This failure also has resulted in the tacit denial of the importance of the mystical, the emotional, and the symbolic in our lives. The spiritual impulse persists, in part, because of the certitude of illness, loss, suffering, and death. The denial of the "religious" in public life has mirrored a denial of the human yearning for meaning beyond ourselves, for ways of knowing that transcend those of ordinary experience. As the result of this denial, we suffer a cost not only to

cepted derivation of the word 'religion' is from the Latin 'religare'—to bind."[115] The definition of "religion" can be limited by understanding it in the sense of being bound. By its nature, the term "conscience" can be limited in a similar fashion.[116] The term "conscience" was not used in the Old Testament because the "divine covenant [was] the all-controlling sphere for the people" and conscience in that context was simply a matter of "harmony of the I with God's will."[117] In time, however, with the Hellenistic influence, Philo was the "first to think through theologically a doctrine of conscience."[118] He concluded that "[c]onscience is the only impartial accuser and infallible judge."[119] This notion of binding or covenanting in conjunction with the development of the concept of "conscience" as an "impartial accuser" or as a "pull toward rectitude"[120] is helpful because it connotes a sense of duty or obligation, as opposed to merely preference or choice.[121] One

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> legal coherence, but to the human spirit as well. With the denial of this part of life, each is, in the end, "shut up in the solitude of his own heart."

Underkuffler-Freund, *supra* note 36, at 987-88 (citations omitted).

115. McConnell, *supra* note 54, at 1490 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1628 (2d ed. 1987)).

116. See *supra* notes 97-98 and accompanying text for a discussion of "duty" as a component of "conscience."

117. 7 THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 908 (Gerhard Friedrich ed. & Geoffrey W. Bromley ed. and trans., 1971).

118. *Id.* at 911.

119. *Id.*

120. Professors Eisgruber and Sager use this "pull to rectitude" terminology:

> Our best account of a general privileging of conscience would understand the key term, *conscience*, as follows: An important mark of a well-formed person is an internal gyroscope that pulls her toward doing the right thing and away from doing the wrong thing. As right and wrong are understood here, self-interest—in an immediate, material, short-term sense—is only coincidentally congruent with rectitude. The tug of this gyroscope toward the right thing is consciously experienced, but in many forms: as raw impulse, as deep but unlocated conviction, or as fully articulate and located within a scheme of belief. The provenance or bona fides of this tug is similarly and associatedly diverse: if it is consciously acknowledged at all, it may range from the command of a deity, to the interpreted understanding of a covenant, to a mystic and intuitively driven sense, to a constructed and coherent, but free-standing system of moral judgment. Under some circumstances—chronic and life shaping, or acute and focused—this pull toward rectitude becomes a central, dominating feature of a person's motivation and self-identity. When these circumstances obtain, and a person acts on them, she is performing an act of conscience.

Eisgruber & Sager, *supra* note 107, at 1268-69.

121. *See, e.g.*, Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE

worthwhile way to restrict the definition of conscience, therefore, would be to analogize it to religious duty or covenant, as suggested in the military draft cases.[122] Thus, matters of choice or preference could only claim the status of a right of conscience when accompanied by a strong sense of duty or obligation, a sense that operates like a religious covenant, binding the party exercising her "conscience" in much the same way that religion does. Admittedly, in cases of individual conscience, where the source of such duty is not evident—as is often the case in the context of religious traditions—it might be necessary for the party asserting her conscience to prove that her commitment is sincere and in the nature of a covenant, as was the case in the draft cases. When one's act of conscience is derived from a religious covenant that is evident and shared with others, it may be easier for a party to prove facts necessary to warrant an exemption, while it may be more difficult to prove similar facts in a case of individualized conscience. This possible disparity in terms of the difficulty of proof should not, however, deter courts from engaging in such analysis.[123] Additionally, it should be acknowledged that "religion" may receive more protection than "conscience" because there may be conceptual and practical dif-

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AMERICAN PUBLIC PHILOSOPHY 74 (James D. Hunter & Os Guinness eds., 1990) (discussing the conceptual distinctions between the obligatory nature of conscience and choice as manifested in other contexts).

122. See *supra* text accompanying notes 65-73 for a discussion of the draft cases.

123. Courts may believe that they should be deterred from evaluating "sincerity," "centrality," or "rectitude" for two reasons: (1) courts lack the competence necessary to evaluate individual assertions of sincerity or belief and (2) if of necessity courts must require more proof regarding sincerity of commitment in cases of individualized conscience, as opposed to adherence to a tenet of an organized religion, they may decline to engage in such analysis on the ground that they would be implicitly preferring organized religion over conscience. The competence issue should not deter the courts, however, because courts regularly are involved in making similar findings in a multitude of contexts (e.g., proof of criminal intent). The concern about a preference for religion over conscience also should not deter them because parties asserting an individualized religious concern would be put to the same proof as those asserting a duty based on individualized conscience. It is clear, as well, that a party asserting her claim to an exemption based on individualized conscience would prefer the opportunity to make her case rather than be denied the opportunity on the ground that there is a possible preference for organized religion. The party asserting her individualized right of conscience might prefer to be put to less proof, but she clearly would not prefer to be precluded from having an opportunity to marshal proof altogether.

ferences between the terms—differences that possibly should carry legal weight.[124]

As noted previously, conscience may be further defined by its capacity to provide purpose, to edify, and to combine the forces of reason and faith or inspiration.[125] Mere preferences do not typically produce such fruits. Therefore, there may be merit in using such characteristics of conscience as aids in the definitional enterprise.

Judicial examination of this edification process and the dynamic between reason and inspiration may, again, necessarily result in some evaluation of sincerity and centrality. Such an examination for definitional purposes might legitimately raise fears that courts will become subjective, in a substantive sense, by refusing to accept the interplay of reason and inspiration leading to certain conclusions they disagree with or find difficult to comprehend.[126] Finally, it is conceded that not all acts of conscience or religion arise as a result of this process. Indeed, some are more a result of tradition—a tradition that may have been based at some early juncture in its development on such an edification process but that is now accepted as a part of one's identi-

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124. "Religion" may include a set of practices that might not rise to the level of being compelled, as a matter of duty. For example, one's religion may require attendance at services on certain dates, but it might not require that the services be held at a particular time. There may be some reason to afford greater protection to religiously compelled activities, but some level of protection may be afforded to religiously motivated ones as well. It may make sense, for practical and political reasons, to limit the protection afforded conscience to compelled actions. See the discussion of attenuation and related political problems, *supra* notes 111-113 and accompanying text, that may suggest that conscience be interpreted more restrictively. It may also be the case that there are conceptual distinctions between "conscience" and "religion" that would be disclosed in further discussions and adjudications. Even if it turns out that there are political and conceptual differences that warrant distinguishing between "religion" and "conscience," the development of the "conscience" principle should proceed in an incremental fashion to avoid unanticipated conceptual pitfalls and to ensure that the fears of Professor Choper and others who oppose a broader definition, discussed *infra* notes 133-135 and accompanying text, do not materialize.

125. See *supra* notes 91-97 and accompanying text for a discussion of the benefits, including edification, associated with religion and conscience.

126. Recognition of the concern that a judge can easily become unfairly subjective in evaluating matters of conscience should serve as a powerful reminder to judges and others that they must be sensitive to such a proclivity in evaluating a particular claim. Based on my experience, I am inclined to believe that judges who take their responsibilities seriously, as most do, will be more likely to find a claim of conscience in close cases out of a fear that they may otherwise be acting in too subjective a manner.

fying, by birth or otherwise, with that tradition. Despite these problems, this dynamic between reason and inspiration leading to edification and commitment may be helpful in identifying conscientious or religious commitment, especially in instances where there is no strong tradition that can be relied upon for evidentiary purposes.

Another characteristic of most forms of conscientious or religious commitment that may assist in determining whether it is present in a particular instance is that such commitment tends to be other-directed. Unlike many matters of mere preference, the pursuit of conscientious commitments is generally more concerned about others or matters external to one's self than it is about internal or egoistic concerns. This is not to say, of course, that matters of conscience do not bring individual joy.[127]

Efforts to create a definition of "conscience" that is sufficiently restrictive to be viable and, at the same time, capable of protecting actual matters of conscience are challenging. Challenges of this sort, however, are hardly new in the context of constitutional interpretation.

Words of constitutional magnitude are often necessarily broad and indeterminate in both an interpretive and a normative sense.[128] James Madison recognized this in his defense of the use of indeterminate constitutional language when he stated: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[129]

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127. When I was in college, my father asked me what I "wanted to do with my life." I responded that I wanted to be of service to others. He, in turn, responded that my aspiration was a selfish one. Noting my confusion, he added that, having observed many people seeking after happiness in this life, he had discovered that those who seemed to be happiest were those who had involved themselves in service to others. There is joy in service, just as there is peace in adherence to one's conscientious convictions.

128. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 70-82 (1994).

129. THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961), *cited and discussed in* PERRY, *supra* note 128, at 74, *and* Smith, *supra* note 111, at 464. Quoted more fully, Madison thoughtfully adds:

> Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only

Madison's call for a "series of particular discussions and adjudications" implies a role for all branches of the government. The legislative and executive branches should be involved in the discussion of what "conscience" means, drawing on the expertise of theologians, philosophers, psychologists, sociologists, and lawyers. Formulating a statute with a meaningful definition of "conscience" requires participation in an interbranch dialogue.

The judiciary should also be engaged in the definitional enterprise in an adjudicatory sense. Indeed, given the difficulty of formulating a definition of "conscience" apart from the context in which it arises,[130] such adjudicatory activity may be a welcome aid. The Court's decisions in *Seeger* and *Welsh* have established an adjudicatory base for definitional purposes. The Court's focus on "sincerity" and "meaningfulness" in those cases is helpful in terms of limiting "conscience" in order to make it politically and conceptually viable. Under the draft laws, it was more difficult for parties to assert an individualized claim on the grounds of conscience than for parties who could rely on an established tenet of a traditional religion. Nevertheless, parties succeeded on both grounds. Additionally, the fact that we were able to wage a less-than-popular war without being inundated with claims for exemption on the ground of conscience is also enlightening, indicating that there were and no doubt continue to be strong cul-

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> that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

THE FEDERALIST No. 37, *supra*, at 229-30. Madison's recognition of the difficulty of the definitional process in the writing of the Constitution is at once informative and heartening. It is informative in that it helps the reader understand the difficulties that attend the definitional process and the fact that those difficulties were recognized by the Framers. It is heartening in that it reminds us that we should follow the example of the Framers and not be incapacitated by the difficulty of the definitional project when the end is one worthy of our best efforts, however inadequate they may be.

130. See *supra* note 94 for a brief discussion of the postmodernist insight regarding the role of context in contemporary legal analysis.

tural currents that often cut against exercising one's conscience.[131] Further clarity can be "ascertained by a series of particular discussions and adjudications," and using the statutory form invites just such a dialogue or discussion among all branches of government.

There are some additional insights that may aid in the effort to formulate a limited, viable definition of conscience. In this regard, Professor Choper has noted that "two distinct [definitional] paths" are possible: "One is a functional approach that seeks similarity in the intensity of conviction with which beliefs are held. Another is a content-based approach that searches for analogues in subject matter that are both common and exclusive to concededly religious beliefs."[132] Choper delineates the strengths and weaknesses of each approach and examines "transcendent reality" as another possible approach, concluding:

> Any "single feature definition" appears beset with serious shortcomings . . . . "[U]ltimate concerns" and "transcendental reality" suffer from ambiguity and are also both underinclusive and overinclusive. The extratemporal consequences criterion, although it possesses the virtue of relative clarity, with the consequent restraint against parochial judicial application, is still surely not free of defects, as has been conceded at length. It may be that an "analogical approach" is preferable, one that first "identifies what is indubitably religious largely by reference to [its] beliefs, practices, and organizations (recognizing that "no single feature is indispensable") and then defines religion [or conscience, in our case] "by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion."[133]

Professor Choper is correct when he acknowledges that the definitional enterprise may have to be eclectic in nature, drawing on

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131. Given the force of culture, this is not surprising. Claiming an exemption is no easy task because it is often met with intense cultural pressure to conform. A nonlegal illustration may help. As a matter of religious conscience, my son does not engage in organized recreational activity on Sunday, believing that it is a day of rest, reflection, and worship. He recently had to ask his basketball coach to exempt him from playing or practicing on Sunday. Although the exemption was granted, the cultural pressure to conform was intense. In deciding to assert his claim of conscience, my son was forced to engage in a heart-wrenching balancing of his conscience against the social pressures he felt and the possible impact of his decision on his teammates.

132. CHOPER, *supra* note 53, at 69.

133. *Id.* at 85.

a variety of sources and analogies to find a viable definition that is broad enough to include legitimate matters of conscience—that "Deity in [one's] bosom"—without being so broad as to be meaningless, ineffective, or detrimental to the cause of the liberty of conscience.

Unfortunately, Professor Choper loses faith in efforts to render a viable definition and ultimately opts for a restrictive, context-based definition of religion (e.g., an exemption is treated differently than an accommodation),[134] fearing that any broader definition might weaken religious liberty.[135] Even after decidedly limiting the definition of religion in this manner, he remains apprehensive that he may have gone too far by ceding too much discretion to the Court.[136]

Professor Choper offers no empirical justification for his concerns that a more expansive definition of religion or conscience might somehow limit liberty by unduly expanding judicial discretion. His concerns may be even less warranted in the statutory, as opposed to amendment, context for three reasons. First, courts are increasingly deferential to democratically elected bodies and rarely engage in dynamic statutory interpretation.[137] The threat of abused discretion is more imagined than real in the statutory context, although a somewhat broader definition would also permit the courts to retain jurisdiction, to rectify legislative failures, and to recognize the right of conscience. Furthermore, on the whole, history does not seem to support Professor Choper's inference that the judiciary is somehow more likely, as an institutional matter, to vindicate the liberty of conscience than are the legislative and executive branches.[138] Second, inter-

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134. For a further critique of Professor Choper's book on the ground that his view unduly constrains the liberty of conscience, see Rodney K. Smith, Book Review, 6 L. & POL. BOOK REV. 206 (1995).

135. CHOPER, *supra* note 53, at 115-17.

136. *Id.* at 90.

137. *See supra* text accompanying note 46.

138. One need look no further than the role of the legislative and executive branches of government in the civil rights movement—from the era of passage of the Civil War Amendments to the present era in which these branches of government have penned expansive civil rights legislation—to cast doubts on the assertion that the judiciary is more apt to promote liberty than the other branches. Indeed, perhaps the only time when the Court has arguably been more conscious of expanding liberty than other branches was during the Warren Court era, a brief time period in our nation's history. Based on this reading of history, encouraging the majoritarian branches of the government to engage in the definitional dialogue might, therefore, actually increase

preting a statute differs, in a practical and theoretical sense, from interpreting a constitutional provision. If a court errs in interpreting a statute, the harm is far more negligible than an error in constitutional interpretation because it can easily be corrected through conventional legal processes without having to resort to onerous amendment procedures. Third, by initiating a statute of this sort, Congress could have the first "bite at the [definitional] apple." Congress could conduct hearings to aid in formulating a viable definition. In conducting those hearings, Congress can draw on a wealth of expertise—psychological, theological, legal, and philosophical—in seeking to arrive at an eclectic and viable definition of "conscience." The courts can thereafter "liquidate . . . through adjudication" the definition supplied by Congress. In response to this "liquidation through adjudication," Congress may, in turn, engage in further definitional dialogue with the courts if necessary. The executive branch can be involved as well, by giving advice at the legislative stage, by ultimately selecting cases for the purposes of clarifying the definition, and perhaps by eventually setting up an administrative process for processing claims, if necessary.

The use of eclectic and more comprehensive statutory definitions of "conscience" and "religion" than those espoused by Professor Choper would ultimately provide us with the empirical basis with which to evaluate Professor Choper's assertion that an expansive definition of "religion" or "conscience" would somehow result in a reduction in the liberty of conscience. It is con-

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liberty. Certainly, if this is not the case, the judiciary may invoke the Constitution to limit or, if necessary, trump the statutory language.

Professors Eisgruber and Sager make a related argument in favor of legislative activity in this area:

> There are several reasons why legislatures may be better at both the general task of accommodating religious interests and the more specific task of vindicating the constitutional principle of equal regard [for conscience]. With regard to accommodation in general, the explanation for legislative primacy immediately emerges from our analysis. Even if the demands of equal regard have been fully satisfied, legislatures have discretion to enhance the value they place upon accommodating fundamental personal commitments, including religious commitments. The legislature's decision favoring increased accommodation would not be a matter of constitutional duty, although the principle of equal regard would then require the legislature (and authorize the courts) to ensure that the new premium upon accommodation is shared equally.

Eisgruber & Sager, *supra* note 107, at 1304-05.

ceivable, and I believe likely, that Professor Choper's fears that religious liberty would diminish under a broad definition, derived from a dialogue among the branches, would not materialize. It is certainly as likely that liberty would be increased by providing a comprehensive definition. Indeed, in time, a dialogical statutory process that calls on all branches of government to be involved in refining the definition of "conscience" should yield a viable definition because it draws on the institutional strengths of each branch of government. The risks to religious liberty that attend adoption of a broader definition of conscience through such an interbranch dialogue are limited, especially after the Court's decision in *Employment Division v. Smith*,[139] which has already substantially reduced religious liberty. The possible benefits that would attend a statute protecting equality based on religion and conscience are significant, however, as further demonstrated by the following personal examples.

VI. SOME PERSONAL OBSERVATIONS ABOUT THE IMPORTANCE OF THE PROJECT

In the preceding parts of this paper I have sought to establish that putting a little "conscience" into the Hyde-Hatch amendment and converting the amendment to a statute is a course that can and should be followed as a means of increasing religious liberty and the liberty of conscience. In the interests of disclosure and in an effort to humanize the discussion, I will close with two personal examples that illustrate why I believe such a project is worthwhile. These examples are also intended to shed light on the definitional enterprise. I regret using personal examples, especially ones that are difficult for me to raise in this public and scholarly context. Indeed, I have been encouraged not to do so by those who fear that I may harm my reputation as a scholar, but I remain convinced that they may be helpful in an illustrative sense. In raising these examples, I certainly am not desirous of drawing attention to myself. As a friend once noted, we should be concerned with blessing and not impressing. In that spirit I offer these examples and appreciate your indulgence if you are of the opinion that they are inappropriate.

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139. 494 U.S. 872 (1990) (refusing to allow religious exceptions to laws of general applicability).

After graduating from a high school in a small town, where I had received the American Legion's patriotism award, I left to attend college at the University of California in 1969. Even though I was blessed with goodly parents—parents of deep conviction and conscience, who loved me dearly—I was hardly prepared for the tumult that I found. As a nation, we were involved in a "war" that was being seriously questioned. One friend had already died in Vietnam, and a student on campus was seriously burned when he ignited his body, which had been covered with gasoline. It was a time when I had to ask serious questions about the meaning of life. It was a time of serious reflection as to matters of conscience, and I desperately sought personal peace in the midst of great turmoil.

After much reflection and a great deal of heartache, I determined that, as a matter of conscience, I could not kill another. It was necessary for me, therefore, to seek exemption from draft laws on the ground of conscientious objection, even though I continued to hold a student deferment. I carefully prepared my application, which was not based on any particular religious creed or belief. At that time, although I fancied myself to he Christian, I was not a member of any religious faith, and my faith was, at best, ill-defined. I prepared my application, drawing on what I felt I had learned from Christ, Gandhi, other philosophical sources, and from searching deep within my heart. Reason was an aid in the enterprise, but reason alone did not bring me the peace that I ultimately found. When I finally found that peace, I felt bound to follow the dictates of my conscience.

After submitting my application, I appeared before the draft board to explain why, as a matter of conscience, I could not kill another. This was a difficult time for me. One of the members of the draft board was the mother of my friend who had given his life in Vietnam. It was hard for me to face her and the other members of the board, each of whom was a prominent member of my hometown. I shared what was in my heart; and, after a few questions, I was dismissed and left to wait for a letter that would determine my future.

The letter arrived. As I held it in my hands, I trembled, fearing its contents. If my application was not granted, I was prepared to go to prison for my beliefs, which would have entailed giving up much of what I had come to treasure. As I read the letter, I wept. The country that I had been taught to love had

confirmed that my conscience mattered. I cannot put into words the feelings that filled my soul or the depth of gratitude and respect that overwhelmed me at that moment.

I had learned, as a nineteen-year-old, that following one's conscience was difficult but worthwhile. When my country confirmed that my conscience was worthy of respect, I was also strengthened in my resolve to follow my conscience wherever it might lead.

Just over three years later, I had my second great call of conscience. As I was working in Washington, D.C., in a congressional office, I met a young man who was a member of The Church of Jesus Christ of Latter-day Saints. As we worked together, we became friends. I was impressed with him, although I found his lifestyle to be odd in a pleasant sort of way. With time, we talked about religion. The more he talked, the more interested I became.

Eventually, I went to church with my friend. I was interested in his religion, at least at first in primarily a sociological sort of way. However, he encouraged me to meet with the missionaries from his church and to read the *Book of Mormon*. I was told that if I read the *Book of Mormon* prayerfully, I would receive a witness that it came from God. I read it, critically at first, and then prayerfully. One day, as I read from its pages, my soul was filled, and I knew that it was from God. I vividly recall my first thought at that moment: "Oh, no, bring on the sackcloth and ashes, now I am a Mormon." My conscience had called, however, and I knew that I must heed the call, whatever the cost.

Despite my initial concerns, the heeding of that call of conscience continues to be the source of the greatest joy I have known in my life. Much that I hold most dear is directly attributable to that decision made as a matter of conscience.

I want my children to be free to heed the call of their respective consciences and find meaning in their lives. Adding a little "conscience" to the religious equality amendment, therefore, seems like a very good idea to me. At a minimum, it is an experiment that should be undertaken in the interests of liberty. If such a statute providing for equality of religion and conscience fails to increase liberty, as an empirical matter, it can be dismantled much more easily than if it were undertaken in amendment form.