

DISENTANGLING CONSCIENCE AND RELIGION

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What does “liberty of conscience” mean? Religious liberty? Freedom of strong conviction? Freedom of thought? Since the Founding Era, Americans have used liberty of conscience to paper over disputes about the proper scope of religious, moral, and philosophical liberty. This Article explores the relationship between conscience and religion in history, political theory, and theology, and proposes a conception of conscience that supports a liberty of conscience distinct from religious liberty. In doing so, it offers a theoretical basis for distinguishing between conscience and religion in First Amendment scholarship and related fields. Conscience is best understood, for purposes of legal theory, as a universal faculty that issues moral commands and judgments. This conception overlaps with religion but is not concentric with it. On one hand, conscience may be informed by religious beliefs (or by nonreligious beliefs). On the other, religious beliefs and practices may be entirely independent of conscience. Protecting fidelity to conscience, whether religious or nonreligious, promotes integrity and undermines the government’s pretensions to moral totalitarianism. This conception of conscience is coherent enough to support a legal right and valuable enough to deserve one.

* Assistant Professor, University of Georgia School of Law. This article is better for the generous engagement of Amy Coney Barrett, Will Baude, Ash Bhagwat, Sam Bray, Jud Campbell, Kenny Ching, Marc DeGirolami, Chad Flanders, Rick Garnett, Kent Greenawalt, Michael McConnell, Andy Koppelman, Michael Perry, Steve Smith, and Derek Webb. Special thanks to Betty Chapman, who taught Huckleberry Finn to thousands of Missouri high school students in spite of the cost.

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I. INTRODUCTION

Huckleberry Finn had a moral dilemma. Should he tell Miss Watson the whereabouts of Jim, her runaway slave? That is what Huck's conscience, molded in Sunday school, told him to do. But Huck got to thinking." He remembered the good times he had shared with Jim on the Mississippi River, and he recalled that Jim was more than Miss Watson's property; he was a friend. He tore up the letter, deciding to protect Jim even if that meant he would "go to hell."¹ Huck thought he was disobeying his conscience because he assumed the voice of conscience spoke in religious commands.² Many readers, though, would conclude that Huck was obeying his conscience; it is just that his conscience urged him to act in spite of his religious beliefs.³

1. MARK TWAIN, THE ANNOTATED HUCKLEBERRY FINN 344 (Michael Patrick Hearn, ed., 2001).

2. Mark Twain maintained that Huck was not acting on conscience, and disclaimed the concept of conscience. *See id.* at 162 (detailing Twain's revisions to the small pox story and its inclusion as part of his "Morals Lecture"); MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 767 (Victor Fischer, et al. eds., 2003) (introducing the small pox story in his *Morals Lecture* with the proposition that "in a crucial moral emergency a sound heart is a safer guide than an ill-trained conscience"); Fred W. Lorch, *Mark Twain's "Morals" Lecture During the American Phase of His World Tour in 1895-1896*, 26 AM. LIT. 52, 59 (1954) (discussing Twain's use of Huck to show "the power of early training to mould the human conscience").

3. The distance between Huck, Twain, and Samuel Clemens' respective reflections on morality and conscience calls to mind Wendell Berry's observation that "[Huck's voice] is not Mark Twain's voice. It is the voice, we can only say, of a great genius named Huckleberry Finn, who inhabited a somewhat lesser genius named Mark Twain, who inhabited a frustrated businessman named Samuel Clemens." Wendell Berry, *Writer and Region*, in *WHAT ARE PEOPLE FOR?* 73 (1990).

Outside the domain of law, whether Huck's decision was based on religious belief, conscience, or both, may make little difference. What is crucial is that he felt obligated to help Jim. Law, however, may relax its strictures depending on whether one's action is based on religion, conscience, or both. Suppose Huck's efforts to help Jim ran afoul of a statute against aiding a runaway slave and Huck wanted to raise conscience as a defense. Would his claim sound in *religious* liberty?⁴ Perhaps not—after all, Huck turned his back on the Sunday School norms of his religious community, and he thought his actions might even punch his ticket to hell.⁵ If not religious liberty, what about freedom of conscience? Some legal provisions, like the First Amendment's Free Exercise Clause,⁶ speak in terms of religious liberty, and whether they cover non-religious conscience claims is unclear.⁷ Others, like the Model Rules of Professional Conduct, provide legal exceptions for what seems like conscience but not necessarily religion.⁸ Still others, like statutory exemptions from requirements to participate in abortion,⁹ physician-assisted suicide,¹⁰ and capital punishment,¹¹ seem to protect both religious and nonreligious moral convictions.

4. See *United States v. Rycraft*, 27 F. Cas. 918, 921 (D. Wis. 1852) (rejecting conscientious objection as a defense to a conviction under the Fugitive Slave Act for aiding a runaway slave).

5. TWAIN, *supra* note 1, at 344.

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

7. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (suggesting that Henry David Thoreau's conscientious objections were insufficiently religious to be protected by the religion clauses). This position was unanimously reaffirmed in *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 833–34 (1989); see also *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (“[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly-held beliefs do not.”); *Welsh v. United States*, 398 U.S. 333 (1970) (holding the same for a draftee who admitted to being an atheist). *But see* *United States v. Seeger*, 380 U.S. 163 (1965) (interpreting the Selective Services conscientious objector exemption generously to exempt a draftee whose objection was based on nonreligious moral considerations).

8. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002) (permitting an attorney to terminate representation of a client who “insists upon taking action the lawyer considers repugnant”); see also *id.*, Preamble, ¶ 7 (noting that in addition to the rules of professional conduct and substantive law, “a lawyer is also guided by personal conscience”).

9. Church Amendment, 42 U.S.C. § 300a-7(b) (2006) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45) (mandating that public officials may not require individuals or entities receiving certain public funds to perform abortion or sterilization procedures if it “would be contrary to [the individual or entity's] religious beliefs or moral convictions”); Danforth Amendment of 1988, 20 U.S.C. § 1688 (part of the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259) (clarifying that Title IX of the Education Amendments of 1972 may not be construed to prohibit or require any individual or entity to provide or pay for abortion-related services); Coats/Snowe Amendment of 1996, 42 U.S.C. § 238n(a)(1) (part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134) (specifying that federal, state, and local governments may not discriminate against health care entities that decline to participate in abortion training or abortions); Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (part of the Balanced Budget Act of 1997, Pub. L. No. 105-33) (exempting managed care providers from requirement to cover counseling or referral for procedures that violate their moral or religious views, the first to exempt for counseling or referrals); Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034.

10. Oregon Death with Dignity Act § 4.01, OR. REV. STAT § 127.885 (2012); Washington Death with Dignity Act § 19, WASH. REV. CODE § 70.245.190 (2008).

Legal theorists have been unclear about the relationship between religion and conscience and whether one or both should be eligible for legal exemptions. Many who argue for a robust religious freedom simultaneously endorse liberty of conscience without clearly distinguishing between the two. Indeed, sometimes they appear to deliberately conflate them.¹² Some theorists contend that there are good reasons for protecting a broad notion of religion but weaker reasons to protect conscience generally.¹³ Others suggest that the most convincing rationales for sometimes exempting religious conscientious objectors from generally applicable laws do not extend to exempting those whose conscientious objections are not based on religion.¹⁴ Still others argue that it is *conscience*—religious, nonreligious, or both—that is worth protecting.¹⁵ And some conclude that it is unfair to provide exemptions for *religious* conscience without likewise extending exemptions for *nonreligious* conscience.¹⁶

These disagreements have several sources. First, the Constitution's religion clauses expressly protect "religion."¹⁷ The drafters and ratifiers of the First Amendment, however, used religious freedom and liberty of conscience interchangeably.¹⁸ Many U.S. political theorists have continued this rhetorical tradition without accounting for the evolution of those terms through time. The result is that many theorists speak the same language as the Founders but mean something different.¹⁹ Second, the

11. 18 U.S.C. § 3597(b) (prohibiting state governments and federal agencies from requiring an employee "to be in attendance at or participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee" including "personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities").

12. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 208–09 (2000).

13. See generally Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *LEGAL THEORY* 215 (2009); see also Steven D. Smith, *The Tenuous Case for Conscience*, 10 *ROGER WILLIAMS U. L. REV.* 325, 357 (2005) (concluding that "freedom of conscience can thrive only in rarified environments," and that "the case for conscience seems to depend on metaethical objectivism").

14. See JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* 54–55 (1996); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1409 (1990) [hereinafter McConnell, *Origins*].

15. See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65–71 (1996); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience"*, 1996 *BYU L. REV.* 645 (1996).

16. See, e.g., NUSSBAUM, *supra* note 12 (arguing that religion should be "broadly defined" to include all "comprehensive conceptions" that are sufficiently "religion-like"); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 *U. ARK. LITTLE ROCK L. REV.* 555 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. CHI. L. REV.* 308, 319–21 (1991); Micah Schwartzman, *What if Religion Isn't Special?*, 79 *U. CHI. L. REV.* 1351 (2012).

17. U.S. CONST. amend I; see Douglas Laycock, *Religious Liberty as Liberty*, 7 *J. CONTEMP. LEGAL ISSUES* 313, 314 (1996) ("For whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism . . .").

18. See *infra* Part II.A.

19. See WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 122 (1986) ("*Conscience* is one of the many . . . words . . . that have undergone a considerable change

conceptual distinction between religion and conscience has remained undeveloped in legal theory. This becomes especially apparent in arguments both for and against protection of *nonreligious* conscience. As Andrew Koppelman has noted, “there has been remarkably little explanation of why conscience is a legitimate basis for objecting to the application of a law. . . . [A]ssumptions about political theory, about morality, and perhaps even about theology . . . are rarely stated. ‘Conscience’ has been something of a black box.”²⁰ Finally, in the western moral tradition, “‘conscience’ has been a protean notion with different meanings for different people.”²¹ The result is a conceptual muddle. Are religion and conscience the same thing? Are they the same thing for purposes of liberty? If not, how do they relate to one another, and what makes them worth protecting?

This Article distinguishes between two different human experiences protected by what is usually labeled liberty of conscience in U.S. legal theory: religious liberty and liberty of conscience. The two overlap, but they are not the same. One’s conscience may be informed by religious beliefs or not. And one may engage in religious activities for reasons besides conscience.²²

For purposes of distinguishing religion and conscience, this Article assumes a broad notion of religion. Theorists put it variously, but many suggest that religion for purposes of religious liberty is a cluster of ideas meant to encompass the variety of beliefs and actions, personal and social, that respond to the experiences of birth, learning, failure, love, death, and the awe of being small in a grand universe.²³ This is capa-

in meaning across the centuries, and that had at the very least a different nuance in the ideological frame of eighteenth-century Americans from what they mean today.”).

20. Koppelman, *supra* note 13, at 216.

21. *Id.* at 225; see, e.g., Thomas E. Hill, Jr., *Four Conceptions of Conscience*, in NOMOS XL: INTEGRITY AND CONSCIENCE 13–52 (Ian Shapiro & Robert Adams eds., 1998) (distinguishing between the following conceptions: popular religiously intuitive; culturally conditioned; Joseph Butler’s “reason”; and Immanuel Kant’s inner judge); Nomi Maya Stolzenberg, *Jiminy Cricket: A Commentary on Professor Hill’s Four Conceptions of Conscience*, in NOMOS XL, *supra*, at 53 (arguing that Hill’s conceptions are really just different perspectives on the same conception of conscience as the faculty of subjective moral judgment).

22. One interesting question this Article does not explore is whether those, or at least some of those, who engage in orthopraxy, but not orthodoxy, engage in the “exercise of religion” but not the exercise of conscience because they do not feel obligated to do so. See, e.g., Lisa Miller, *Kosher Atheists? Obama Advisor Breaks with His Faith but Still Abides by Its Rules*, WASH. POST (Aug. 9, 2012), http://www.washingtonpost.com/national/on-faith/kosher-atheists-obama-advisor-emanuel-breaks-with-his-faith-but-still-abides-by-its-rules/2012/08/09/618b49b2-e23d-11e1-a25e-15067bb31849_story.html.

23. See Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 981–82 (2010); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000); see also 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 139–42 (2006) (proposing an approach that analogizes “the practice in question” to “undoubted religious practices, without prejudging whether some conditions are absolutely necessary or usually crucial”). For reflections on the limits of language to express the depths of religious experience, see WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 3 (2005) (“Courts need some way of deciding what counts as religion if they are to enforce [laws that guarantee freedom of religion]. Is it possible to do this without setting up a legal hierarchy of religious orthodoxy? And who is legally and constitutionally qualified to make such

scious. What is *not* religion, as I use the term, are those beliefs and actions that those who hold and practice them consider *nonreligious* when it costs them nothing to do so. That is, beliefs and practices they acknowledge to be nonreligious when no legal right turns on them being religious. This Article likewise assumes this notion of religion is worth protecting for a variety of mutually reinforcing reasons—some of them religious, some not.²⁴

Because so much work has been done to explore the proper object of religious liberty, this Article focuses on disentangling conscience *from* religion and developing a discrete notion of conscience that is coherent and worthy of protection in its own right. The Article proceeds as follows. Part II analyzes two influential American accounts of liberty of conscience to explore how and why they have failed to distinguish between religion and conscience. The Founders collapsed conscience into a narrow view of religion. They used liberty of conscience to refer to the liberty to abide by one's religious beliefs. This rhetorical tradition was so powerful that even religiously unorthodox political radicals, like Thomas Paine, complied with it. John Rawls, on the other hand, in whose shadow much contemporary theorizing about liberty of conscience occurs, collapsed religion into conscience. He argued for an infeasible liberty of conscience that included "religion, morality, and philosophy." He neither defined the proper level of abstraction of conscience nor justified protecting religious beliefs and practices that are not driven by conscience. Neither the Founders nor Rawls justified protecting religious liberty *and* liberty of conscience (religious and nonreligious).

Liberty of conscience and religious liberty emerged from the Christian intellectual tradition. Part III shows that the tradition does not necessarily merge conscience and religious obligations. Many thinkers in the Christian intellectual tradition have distinguished between conscience and God's commands—or what might be thought of by outsiders as religious duty. They have, therefore, encouraged adherence to conscience on matters indifferent to one's religious duties, as worthy of respect in its own right. Accepting such a conception of conscience clears the way for Christian thinkers to endorse freedom of nonreligious as well as religious conscience. This, in turn, promotes the possibility of an overlapping consensus among Christian and secular thinkers on liberty of nonreligious conscience.

judgments?"). See generally James Boyd White, *How Should We Talk About Religion?: Inwardness, Particularity, and Translation*, 7 *ETHICAL PERSPECTIVES* 316 (2000). For an argument that courts should be wary of establishing a religion by adopting a more or less "official" description of a religious belief or practice, see generally Winifred Fallers Sullivan, *Judging Religion*, 81 *MARQ. L. REV.* 441 (1998).

24. See Laycock, *supra* note 17. This Article makes no attempt to defend the notion that religion deserves "toleration" or "respect." See, e.g., Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 *SAN DIEGO L. REV.* 935 (2010); Brian Leiter, *Why Tolerate Religion?*, 25 *CONST. COMMENT.* 1 (2008).

Part IV draws on John Locke's epistemology to propose a conception of conscience that is distinct from religion and coherent enough to support a legal right.²⁵ Conscience is a universal faculty that applies moral knowledge to one's past and future acts, a moral judge. This Article relies on a conventional, nontechnical conception of "moral"—what one *ought* to do. This notion of "conscience" is consistent with, but not reliant upon, the notion developed in the Christian tradition. While the notion is not novel, it is narrower than the conception of conscience usually incorporated into arguments for liberty of conscience. With religion and conscience disentangled, conscience is free to become more precise because it is no longer doing the work of two. This notion of conscience is still admittedly vague. As a conception that may be useful for law, however, it has several attractive features: it is less vague than the conceptions of conscience in most rhetoric about liberty of conscience, it comports with common usages of the term, and it is as precise as many concepts the law already uses to refer to internal states of mind.

Part V argues that fidelity to conscience is worthy of respect because it promotes integrity and undermines the government's tendency towards moral totalitarianism. Both of these are good enough reasons to protect fidelity to conscience, religious or not, in at least some circumstances. Having developed a framework for discussing and valuing conscience as a general matter, the Article leaves to another time the difficult tasks of determining when the claims of conscience should override government interests, and whether the Constitution should be understood to protect nonreligious conscience.

II. TWO WAYS TO CONFUSE LIBERTY OF CONSCIENCE AND RELIGIOUS LIBERTY

Two conceptions of liberty of conscience that conflate religion and conscience hamper legal theorists. The Founding Generation used liberty of conscience to refer to the freedom to abide by one's religious beliefs. Even political and religious radicals like Thomas Paine used liberty of conscience this way. By contrast, the foremost twentieth century U.S. political theorist John Rawls dissolved religion, philosophy, and morality into the conscience that was the subject of liberty of conscience. Thus, the intellectual traditions normally relied upon to frame contemporary discussions of liberty of conscience collapse religion and conscience and fail to provide independent rationales for protecting both of them; they either favor religion or conscience by subsuming one into the other. If we are to give religion and conscience independent meaning and value, we must look beyond the conceptions offered by the Framers and Rawls.

25. This Article uses "conception" and "notion" interchangeably to mean a version of a "concept." See JOHN RAWLS, A THEORY OF JUSTICE 6 (1971) [hereinafter THEORY OF JUSTICE].

A. *The Founders' Liberty of Conscience*

Scholars agree that in “our founding era . . . ‘freedom of conscience’ dominantly referred to individual *religious* liberty.”²⁶ Why would most Americans in the founding era have used liberty of conscience to refer to religious liberty? After all, many Americans influenced by the Scottish Common Sense movement understood that *conscience*, standing alone, referred to an internal moral judge and not necessarily a religious one.²⁷ And Americans occasionally—but rarely—argued that liberty of conscience should extend beyond religious concerns to nonreligious matters. The preacher Simeon Howard, for instance, distinguished between “private judgment in matters of religion” and “the power to order and govern all [of one’s] actions that were not of a religious nature.”²⁸ The latter he assigned to the “liberty to act according to [one’s] own conscience.”²⁹ Howard’s *use* of conscience was conventional, but his argument for liberty of moral judgments, distinguished from liberty for judgments of a religious nature, was far from it. This Section explains why Howard’s understanding was so unusual for Founding-Era rhetoric about liberty of conscience and puts a fine point on just how unusual it was.

Most members of the Founding Generation embraced John Locke’s theory of religious toleration.³⁰ Locke’s theory was based on theological

26. Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 901 (2010) (emphasis added); see McConnell, *Origins*, *supra* note 14, at 1493 (“[T]he vast preponderance of references to ‘liberty of conscience’ in America were either expressly or impliedly limited to religious conscience.”); Steven D. Smith, *What Does Religion Have to Do With Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 912 (2005); see also MILLER, *supra* note 19; JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 39 (2000) (“[F]or most founders, liberty of conscience protected *voluntarism* . . . the unencumbered ability to choose and to change one’s religious beliefs and adherences.”).

27. John Witherspoon’s *Lectures on Moral Philosophy*, which “espoused the Scottish Common Sense movement as the best solution” to “the troubled relationship of faith and reason arising from the study of Locke, Berkeley, deism, and Hume’s atheistic scepticism” and “the danger of ‘infidelity’ and atheism,” was “the first widely known work of American philosophy,” circulating from the 1760s onward. JONATHAN ISRAEL, DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS 1750–1790, at 451–52 (2011); see, e.g., JOSEPH BUTLER, SERMON I: UPON HUMAN NATURE, *reprinted in* FIVE SERMONS PREACHED AT THE ROLLS CHAPEL AND A DISSERTATION UPON THE NATURE OF VIRTUE 25, 29–30 (Stephen L Darwall ed., 1983) (“[Conscience] is a principle of *reflection* . . . by which [people] distinguish between, approve and disapprove, their own actions.” (emphasis added)); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, Part III, Chap. III (1759) (referring to conscience as a “judge within,” an “impartial spectator” who reminds us that “we are but one of the multitude, in no respect better than any other in it; and that when we prefer ourselves so shamefully and so blindly to others, we become the proper objects of resentment, abhorrence, and execration”); John Perkins, *Theory of Agency: Or, an Essay on the Nature, Source, and Extent of Moral Freedom*, *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, at 137, 149 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (“Every human creature has a sense of right and wrong, ought and ought not, which are evidently intended to remind him of duty and obligation.”).

28. Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston*, *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, *supra* note 27 at 185, 188–89.

29. *Id.* at 189.

30. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 373 (2002) (describing the “broad agreement in postrevolutionary America on a Lockean concept

principles, namely the protestant belief that individuals have the authority and duty to determine what is necessary for eternal salvation.³¹ Locke thought that coercing people into religious beliefs was contrary to Christianity³² and ultimately ineffective because only freely held beliefs led to salvation.³³ This liberty of conscience favored members of protestant groups that stressed individual responsibility and authority on spiritual matters.³⁴ Indeed, Locke excluded some Catholics and Muslims from religious tolerance on the grounds that some Catholics believed they were not required to keep their promises to non-Catholics or to recognize the sovereignty of an excommunicated prince,³⁵ and some Muslims were politically beholden to the mufti of Constantinople, and therefore the Turkish Caliphate.³⁶ Likewise atheists were deemed to be untrustworthy because they had no fear of eternal judgment.³⁷ In a nutshell, freedom to abide by one's conscience on religious matters promoted peace among competing protestant sects; they agreed that fighting about the means of salvation did nothing to promote salvation itself.

Many of the colonial charters expressed this conception of liberty of conscience. The charter of the Massachusetts Bay (1691), for example, provided that "there shall be a liberty of Conscience allowed in the Worship of God to all Christians (Except Papists)."³⁸ Five other colonial con-

of liberty of conscience"); see also JOHN LOCKE, LETTER CONCERNING TOLERATION (James H. Tully ed., William Popple, trans., Hackett Publ'g 1983) (1689) [hereinafter LOCKE, LETTER].

31. LOCKE, LETTER, *supra* note 30, at 26–27, 35, 47, 48; see Micah Schwartzman, *The Relevance of Locke's Religious Arguments for Toleration*, 33 POL. THEORY 678, 685–86 (2005); cf. JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 81–82 (2002) (arguing that much of Locke's theory of equality is inexplicable without its theological assumptions).

32. LOCKE, LETTER, *supra* note 30, at 25, 30.

33. *Id.* at 27, 28; see Alex Tuckness, *Locke's Main Argument for Toleration*, in NOMOS XLVIII: TOLERATION AND ITS LIMITS 114, 114 (Melissa S. Williams & Jeremy Waldron eds., 2008).

34. The generic use of conscience to refer to the specific demands of the Protestant religion correlates to the tendency of the age to conflate religion generally with "true religion," captured brilliantly in the satirical statement of Parson Thwackum in Henry Fielding's 1749 novel *The History of Tom Jones: A Foundling*: "When I mention religion, I mean the Christian religion, and not only the Christian religion but the Protestant religion; and not only the Protestant religion, but the Church of England." MICHAEL I. MEYERSON, ENDOWED BY OUR CREATOR: THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 14–16 (2012) (quoting Fielding).

35. LOCKE, LETTER, *supra* note 30, at 49–50.

36. *Id.*

37. *Id.* at 51 ("Promises, covenants, and oaths, which are the bonds of humane society, can have no hold upon an atheist."); John Locke, *A Third Letter Concerning Toleration*, reprinted in 5 THE WORKS OF JOHN LOCKE, IN NINE VOLUMES 414 (London, C. Baldwin 1824) (denying that "atheism, which takes away all religion, [has] any right to toleration at all"); see, e.g., COTTON MATHER, OPTANDA: GOOD MEN DESCRIBED AND GOOD THINGS PROPOUNDED 46 (Boston, 1692) ("[L]iberty of Conscience is not to be permitted as a cloak for *Liberty of Profaneness*. To live without any Worship of God, or to Blaspheme and Reville his Blessed Name, is to be chastised, as abominably Criminal, for there can be no pretense of *Conscience* thereunto"). Atheism did not gain much traction even in continental philosophical circles until the 1770 publication of *Systeme de Nature*. See ISRAEL, *supra* note 27, at 648–54.

38. CHARTER OF MASS. BAY (1691), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1870, 1881 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS AND CHARTERS].

stitutions followed suit,³⁹ as did a handful of colonial statutes.⁴⁰ By the mid- to late-eighteenth century, almost all Americans conceived of liberty of conscience as the right to act according to one's religious beliefs.⁴¹ Although Americans gave numerous reasons for religious tolerance, ranging from religion's corruption of politics (and vice versa) to religious liberty's economic benefits,⁴² "by far the most common argument, especially in America, and the argument most pointedly establishing religious freedom as a special case, was based on the inviolability of conscience."⁴³ The evidence is extensive, including state constitutional provisions,⁴⁴

39. CHARTER OF DEL. (1701), *reprinted in* 1 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 557, 558 ("Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I hereby grant and declare, That no Person or Persons . . . shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice . . ."); CHARTER OF GA. (1732), *reprinted in* 2 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 765, 773 ("[T]here shall be a liberty of conscience allowed in the worship of God . . . and . . . all such persons, except Papists, shall have a free exercise of their religion . . ."); THE FUNDAMENTAL CONST. FOR THE PROVINCE OF EAST N.J. IN AMERICA (1683), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 2574, 2579–80 ("All persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and holds themselves obliged in conscience to live peaceably and quietly in a civil society, shall in no way be molested or prejudged for their religious persuasions and exercise in matters of faith or worship . . ."); THE CONCESSION AND AGREEMENT OF THE LORDS PROPRIETORS OF THE PROVINCE OF NEW CAESAREA, OR N. J., TO AND WITH ALL AND EVERY THE ADVENTURERS AND ALL SUCH AS SHALL SETTLE OR PLANT THERE (1664), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 2535, 2537; PA. CHARTER OF PRIVILEGES (1701), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 3076, 3077 (same as quoted Delaware text).

40. One Connecticut statute was titled "An Act for securing the Rights of Conscience in Matters of Religion, to Christians of every Denomination." McConnell, *Origins*, *supra* note 14, at 1494. Another statute, "The Carolina proprietor's Agreement with proposed settlers," provided for "liberty of conscience in all religious and spiritual things." *Id.*

41. *See id.* at 1493. *See generally* Philip Hamburger, *The Constitutional Right of Religious Exemption*, 60 GEO. WASH. L. REV. 915 (1992).

42. *See* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Beome v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1998).

43. *Id.*

44. N.C. CONST. art. XIX (Dec 18, 1776), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 2787, 2788 ("[A]ll men have a natural and inalienable right to worship Almighty God according to dictates of their own consciences."); N.J. CONST. art. XVIII (July 2, 1776), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 2594, 2597 ("[N]o person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment . . ."); N.Y. CONST. art. XXXVIII (Apr 20, 1777), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 2623, 2637 ("[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."); PA. CONST. art. II (Sep 28, 1776), *reprinted in* 5 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 3081, 3082 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: . . . And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship."); VT. CONST. ch. I, § III (July 8, 1777), *reprinted in* 6 CONSTITUTIONS AND

state bills of rights,⁴⁵ debates over state disestablishment,⁴⁶ federal legislative acts,⁴⁷ sermons,⁴⁸ and private papers.⁴⁹

CHARTERS, *supra* note 38, at 3737, 3740 (“[A]ll men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD; and that no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiment, or peculiar mode of religious worship, and that no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case, interfere with, or in any manner controul, the rights of conscience, in the free exercise of religious worship: nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord’s day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of GOD.”); VT. CONST. ch. I, § III (July 4, 1786), *reprinted in* 6 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 3749, 3752 (same wording as earlier Vt. Const.).

45. VA. CONST. § 16 (1776), *reprinted in* 7 CONSTITUTIONS AND CHARTERS, *supra* note 38, at 3812, 3814 (“That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore, all men are equally entitled to the exercise of religion, according to the dictates of conscience . . .”).

46. James Madison, *A Memorial and Remonstrance Against Religious Assessments*, *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 22 (Ralph Ketcham ed., 2006) (“The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”).

47. Resolution of July 18, 1775, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 187, 189 (Worthington Chauncey Ford ed., 1905) (asserting that it would be a “violence to their consciences” to impose military conscription on “people, who, from religious principles, cannot bear arms in any case”).

48. See, e.g., James Dickinson, *Letters from a Farmer in Pennsylvania: Letter VI*, *reprinted in* EMPIRE AND NATION: LETTERS FROM A FARMER IN PENNSYLVANIA (JOHN DICKINSON); LETTERS FROM THE FEDERAL FARMER (RICHARD HENRY LEE), at 33, 35 (Forrest McDonald ed., 1999) (“James II when he *meant* to establish popery, *talked* of liberty of conscience, the most sacred of all liberties; and had thereby almost deceived the Dissenters into destruction.”); Levi Hart, *Liberty Described and Recommended: In a Sermon Preached to the Corporation of Freemen in Farmington (1775)*, *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, *supra* note 27, at 305, 311 (“Religious liberty is the opportunity of professing and practising *that religion* which is agreeable to our judgment and consciences, without interruption or punishment from the civil magistrate.”); John Leland, *The Rights of Conscience Inalienable* (1791), *reprinted in* 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 1079 (Ellis Sandoz ed., 1998); Samuel Sherwood, *Scriptural Instructions to Civil Rulers* (1774), *reprinted in* 1 POLITICAL SERMONS OF THE FOUNDING ERA, *supra*, at 373, 380 (“I desire that every man may think and judge for himself in religion, and enjoy all the sacred rights and liberties of conscience in full.”); Daniel Shute, *An Election Sermon* (1768), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, *supra* note 27, at 109, 121 (“Civil laws, of right, can relate only to those actions which have influence on the welfare of the state; and to all *such* the subject may be urged by the civil authority consistently with that freedom of mind, in judging of points of speculation, and that liberty of conscience relative to modes of worship, which he has a natural right unmolested to enjoy.”); Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), *reprinted in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, *supra*, at 51.

49. Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *reprinted in* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11, 11 (Edward Frank Humphrey ed., 1932) (“The liberty enjoyed by the people of these States, of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their *blessings*, but also of their *rights*. While men perform their social duties faithfully, they do all that society or the state can with propriety demand or expect; and remain responsible only to their Maker for the religion, or modes of faith, which they may prefer or profess.”); Letter from George Washington to Benedict Arnold, Sep. 14, 1775, *reprinted in* 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 455 (Philander D. Chase ed., 1985) (“While we are contending for our own liberty, we should be very cautious not to violate the Rights of Conscience in others, ever considering that God alone is the Judge of the Hearts of Men, and to him only in this Case they are answerable.”).

Arguments about liberty of conscience figured prominently in the framing and ratification debates over the First and Second Amendments.⁵⁰ Madison proposed several amendments touching on religious liberty. Two were aimed at protecting the “equal rights of conscience,” one against the federal government and another against the states.⁵¹ Scholars have suggested that Madison’s goal with the “equal rights” provisions was to provide “the same safeguard of conscience to the non-Christian and nonreligious” as to Christians.⁵² Another provision would have appeared in the Second Amendment, exempting from “military service” any “person religiously scrupulous of bearing arms.”⁵³ The “equal rights” and “military service” proposals failed. Madison’s other proposals became the First Amendment Establishment and Free Exercise Clauses.⁵⁴

The drafting history of the Free Exercise Clause may be the clearest evidence that some members of the Founding Generation thought there was a distinction between the free exercise of religion and the rights of conscience, but the history provides few details as to what that distinction—if any—might have been. Several versions of the Free Exercise Clause that ultimately failed would have protected both free exercise of religion and the rights of conscience.⁵⁵ The House and Senate records shed little light on why that version failed.⁵⁶ The “free exercise language connotes protecting action, where the rights of conscience is more vague on that score.”⁵⁷ But, it is unclear why Congress declined to include *both* provisions. Some may have thought rights of conscience may have been understood to cover nonreligious beliefs, something Congress did not mean to support.⁵⁸ The most likely reason is that many believed rights of

50. For a discussion of the debates at the Philadelphia Convention and ratification over the provisions that touch on religion in the 1787 Constitution, see generally Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 496–524 (2011); McConnell, *Origins*, *supra* note 14, at 1480–85.

51. 1 ANNALS OF CONG. 450–51 (1789) (Joseph Gales ed., 1834); see Esbeck, *supra* note 50, at 531–35.

52. Esbeck, *supra* note 50, at 535; PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 444 (2010). See generally DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 45–50 (2011).

53. 1 ANNALS OF CONG. 450–51 (year) (ed. Info); see Esbeck, *supra* note 50, at 531–35.

54. U.S. CONST. amend I.

55. New Hampshire’s proposal would have prohibited laws “touching religion, or to infringe the rights of conscience.” THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 326 (Jonathan Elliot ed., 1941). James Madison’s initial draft was: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed.” 1 ANNALS OF CONG. 451 (proposal of James Madison, June 8, 1789). After debate, the House approved Fisher Ames’s formulation, which protected both the free exercise of religion and the rights of conscience. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (Linda Grant De Pauw ed., 1972) (Senate Journal); *id.* at 159 (House Journal).

56. For a detailed analysis of the decision to drop “rights of conscience” from the Free Exercise Clause, see McConnell, *Origins*, *supra* note 14, at 1481–1500.

57. *Id.* at 1488–89.

58. *Id.* at 1488–91.

conscience to be redundant with free exercise of religion. After all, “the vast preponderance of references to ‘liberty of conscience’ in America were either expressly or impliedly to religious conscience.”⁵⁹

Even Americans prone to religious radicalism used liberty of conscience to refer to religious liberty. By the Revolution, some Americans had come to believe that “the natural light of conscience” was a surer guide to religion and morality than conventional religious norms such as those derived from the Bible. Thomas Paine, pilloried by evangelicals in the early nineteenth century as an “infidel,”⁶⁰ argued that the “dictates of natural light” which are available to all through “reasoning, or the dictates of their own hearts” demanded an end to the “wicked practice” of slavery.⁶¹ Most shocking of all to Paine was that some Americans appealed to Scripture to justify the slave trade and the institution of slavery.⁶² Rather than arguing that slavery advocates had misread the plain meaning of Scripture (as many U.S. abolitionists argued in the antebellum era),⁶³ Paine asserted that slavery advocates should interpret Scripture according to the dictates of conscience.⁶⁴ The “natural light” of conscience, in other words, should govern one’s interpretation of sacred text. This may not seem radical now, but to argue that “natural” conscience should influence one’s reading of Scripture, rather than vice versa, extended conscience’s jurisdiction under prevailing religious views and underscored its independence from revealed religion.⁶⁵ Paine’s role for conscience was robust.

In his later work, Paine argues, however, that following conscience is ultimately a *religious* matter; indeed, he relies on an entirely conventional notion of liberty of conscience to justify his unorthodox religious views. In *The Rights of Man*, he argued that liberty of conscience is not a matter of a state’s “toleration” of religious diversity, which makes religious freedom subject to the sovereign’s discretion.⁶⁶ Rather, it is an innate freedom possessed by each person to determine what acts of worship God requires: “Man worships not himself, but his Maker; and the liberty of conscience which he claims, is not for the service of *himself*, but

59. *Id.* at 1493, 1493–94 (giving examples).

60. Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. QUART. 682, 690 (2000).

61. Thomas Paine, *African Slavery in America* (March 8, 1775), reprinted in 1 THE WRITINGS OF THOMAS PAINE 4, 4–6 (Moncure Daniel Conway ed., 1894). Paine may have drawn the metaphor of the “natural light” of conscience from the work of Jean-Jacques Rousseau, whose exposition of the role of natural conscience in *Emile* heavily influenced continental thought, and ultimately American thought, on the nature of conscience.

62. *Id.* at 4–9.

63. See MARK NOLL, THE CIVIL WAR AS A THEOLOGICAL CRISIS 31–50 (2006); Mark Noll, *The Bible and Slavery*, in RELIGION AND THE AMERICAN CIVIL WAR 43 (Randall M Miller, et al., eds., 1998).

64. Paine, *supra* note 61, at 6.

65. Here Paine was in debt to radical enlightenment thinkers such as Spinoza and Bayle who had been far more influential in Europe than in America. See ISRAEL, *supra* note 27, at 451–52. See generally JONATHAN ISRAEL, RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY 1650–1750 (2001).

66. THOMAS PAINE, THE RIGHTS OF MAN ch. 1, 22 (London, 1795).

of his God.”⁶⁷ Paine thought that guaranteeing liberty of conscience would lead many to reject the tenets of traditional Christianity and embrace deism, agnosticism, or atheism.⁶⁸ Liberty of conscience for Paine was therefore liberty to choose one’s answers to questions about God’s existence and demands—questions about religion.⁶⁹

The reason few Americans imagined a place for nonreligious conscience was surely that most of them maintained Locke’s Protestant assumptions about the centrality of the individual’s pursuit of eternal salvation, together with his suspicion of the untrustworthiness of atheists.⁷⁰ As the intellectual historian John Marshall puts it, most mainstream enlightenment thinkers—to say nothing of those who maintained religious orthodoxy—thought an atheist had no “‘conscience’ to claim ‘liberty of conscience.’”⁷¹ For example, one of the Federalists’ chief arguments for the Constitution’s No Religious Test Clause was that a religious test would be pointless.⁷² An “Oath or Affirmation” requirement on its own, they argued, would be sufficient to pique the consciences of truly religious persons;⁷³ a separate religious test would simply induce dishonest heterodox believers and atheists to perjure themselves by taking the oath because they lacked any fear of God’s judgment.⁷⁴ No one thought religion was irrelevant. To the contrary, they thought a Religious Test

67. *Id.*

68. Paine’s hypothesis was proved by subsequent events: within the first three generations after the War of Independence, America had spawned an untold number of new sects and denominations, some believed to be consistent with traditional Christianity, others based on a deliberate departure from that tradition. *See generally* NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* 57 (1989).

69. Douglas Laycock has suggested this formulation of religious liberty. *See* Laycock, *supra* note 17.

70. *See, e.g.*, MOSES DICKINSON, *A SERMON PREACHED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT, AT HARTFORD ON THE DAY OF THE ANNIVERSARY ELECTION, MAY 8TH, 1775*, at 35 (Conn. 1755) (“It is absurd, to speak of allowing Atheists Liberty of Conscience. Because he who professeth himself to be an Atheist, at the same time professes that he has no Conscience. For what Conscience can a Man have; who believes that there is no God, no moral Obligations, no future Rewards, and Punishments?”); MATHER, *supra* note 37, at 46 (“[L]iberty of Conscience is not to be permitted as a cloak for *Liberty of Profaneness*. To live without any Worship of God, or to Blaspheme and Revile his Blessed Name, is to be chastised, as abominably Criminal, for there can be no pretense of *Conscience* thereunto.”).

71. JOHN MARSHALL, *JOHN LOCKE, TOLERATION, AND EARLY ENLIGHTENMENT CULTURE* 694 (2006); *see, e.g.*, Debate in the North Carolina Ratifying Convention (statement of James Iredell, Jul. 30, 1788), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION* 91 (Philip B. Kurland & Ralph Lerner eds., 1987).

72. *See, e.g.*, Note, *An Originalist Analysis of the No Religious Test Clause*, 120 *HARV. L. REV.* 1649, 1652–55 (2007).

73. *See id.*, at 1655–57; Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), *reprinted in* 4 *FOUNDERS’ CONSTITUTION*, *supra* note 71, at 639; Debate in the North Carolina Ratifying Convention (statement of James Iredell), *supra* note 71.

74. *See* Debate in the North Carolina Ratifying Convention (statement of James Iredell), *FOUNDERS’ CONSTITUTION*, *supra* note 71, at 55–62; Tench Coxe, *An Examination of the Constitution* (Fall 1787), *reprinted in* 4 *FOUNDERS’ CONSTITUTION*, *supra* note 71, at 639; Oliver Ellsworth, *Landholder*, No. 7 (Dec. 17, 1787), *reprinted in* 4 *FOUNDERS’ CONSTITUTION*, *supra* note 71, at 639, 640. Jews experienced a mixed bag: some appreciation from elites, mixed with anti-Semitism from non-elites. *See generally* William Pencak, *Anti-Semitism, Toleration, and Appreciation: The Changing Relations of Jews and Gentiles in Early America*, in *THE FIRST PREJUDICE: RELIGIOUS TOLERANCE AND INTOLERANCE IN EARLY AMERICA* 241 (Chris Beneke & Christopher S. Grenda eds., 2011).

Clause was irrelevant, and true religion was all that mattered. Some who could have articulated a basis for protecting nonreligious conscientious scruples, such as Paine, focused on what may have seemed to be the more pressing need of religious liberty. Paine's liberty of conscience is inextricably tied to beliefs about religion, not actions inspired by nonreligious beliefs about philosophy or morality. Others, like Thomas Jefferson, simply defined the rights of conscience to refer narrowly to freedom of religious belief and not action.⁷⁵

The conventional use of liberty of conscience by radical thinkers, such as Paine, suggests a reason for its restricted meaning besides protestant theology and force of habit. As a matter of political rhetoric, freedom of *conscience*, abstractly conceived, may have enabled those who held disparate religious opinions—including disparate Protestant theological doctrines—to agree upon freedom of religion generally without emphasizing their doctrinal differences. Promoting freedom of conscience was therefore a gesture of good will, or perhaps a “guise of universalism,”⁷⁶ towards those with religious disagreements. Conscience's ambiguity continues to make liberty of conscience a rhetorically attractive vehicle for recruiting support for a relatively narrowly defined version of religious liberty.⁷⁷ As the next Section suggests, the ambiguity of liberty of conscience has the same promise—and perils—for political theory.

B. John Rawls's Liberty of Conscience

John Rawls has been the most influential U.S. political theorist of the last fifty years.⁷⁸ His work aimed to justify a political enterprise between those with irreconcilable moral and religious commitments.⁷⁹ To secure their cooperation, his theory of justice guaranteed their equal rights of conscience.⁸⁰ Unfortunately, Rawls gave relatively little attention to the contours of conscience and its distinction from religion, morality, and philosophy. His work blurs the line between the three concepts, rendering conscience so vague that it could encompass virtually

75. McConnell, *Origins*, *supra* note 14, at 1451–52.

76. See MEYERSON, *supra* note 34, at 14.

77. See, e.g., Evangelicals and Catholics Together, *In Defense of Religious Freedom*, FIRST THINGS, March 2012, at 32–33 (generally reducing calls for liberty of conscience to liberty of religious conscience); Robert George, *Manhattan Declaration: A Call of Christian Conscience*, FIRST THINGS (Nov. 20, 2009), <http://www.firstthings.com/onthesquare/2009/11/manhattan-declaration58-a-call-of-christian-conscience>.

78. See, e.g., SHELDON S. WOLIN, *POLITICS AND VISION* 529 (2004).

79. See *id.*

80. There are important differences between *A Theory of Justice* (1971) and *Political Liberalism* (1993), but for the purposes of this Article, the differences are more of a degree than of a kind. THEORY OF JUSTICE, *supra* note 25; JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter *POLITICAL LIBERALISM*]. On the “discontinuities” between *Theory of Justice* and *Political Liberalism* for purposes of understanding the relationship between Rawls's theory and religion, see *introduction* to DANIEL A. DOMBROWSKI, *RAWLS AND RELIGION: THE CASE FOR POLITICAL LIBERALISM* at viii (2001).

any strongly held belief about anything, leaving religion with little independent meaning.

Rawls's theory of justice is built on two principles: (1) "each person has an equal claim to a fully adequate scheme of equal basic rights and liberties," and (2) "social and economic inequalities" should be equally available to all people and "are to be to the greatest benefit of the least advantaged members of society."⁸¹ The point is to articulate the basis of agreement for people who hold "reasonable" "opposing and irreconcilable religious, philosophical, and moral doctrines."⁸² Such "irreconcilable" doctrines may be "comprehensive" in that they "include[] conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct."⁸³ As Rawls sees it, the liberal tradition of political theory, which includes thinkers such as John Locke, John Stuart Mill, and himself, provides a set of political values that those with competing reasonable comprehensive doctrines may share. The goal is a peacefully enduring pluralistic democracy.⁸⁴

In large part because reasonable pluralism is an empirical fact, "equal liberty of conscience and freedom of thought" are essential aspects of a liberal society. Liberty of conscience means the freedom to "honor" "fundamental religious, moral, and philosophical interests."⁸⁵ Rawls usually uses examples drawn from the history of religious tolerance to elaborate the meaning of liberty of conscience, but he consistently maintains that liberty of conscience likewise extends to freedom of morality, philosophy, and thought more generally.⁸⁶

The central reason a liberal constitutional regime should protect liberty of conscience is to gain the assent of those who hold irreconcilable, yet reasonable, religious, moral, and philosophical commitments.⁸⁷ "[R]eligious and moral obligations" are perceived to be "binding absolutely in the sense that one cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests."⁸⁸ Elsewhere he links the intractability of conscientious commitments, religious or nonreligious, with the challenge of articulating a set of political principles that might be agreeable to those who hold irreconcilable reasonable compre-

81. POLITICAL LIBERALISM, *supra* note 80, at 5–6; *see also* THEORY OF JUSTICE, *supra* note 25, at 14–15, 150–61.

82. POLITICAL LIBERALISM, *supra* note 80, at 3–4.

83. *Id.* at 13.

84. *Id.* at 3–4.

85. THEORY OF JUSTICE, *supra* note 25, at 206.

86. Rawls does say that Hume and Kant's moral theories are reasonable comprehensive doctrines, and Hume's, at least, was not religious in any ordinary sense. *See introduction* to POLITICAL LIBERALISM, *supra* note 80, at xxvii.

87. *See* Joshua Cohen & Thomas Nagel, *Introduction* to JOHN RAWLS, A BRIEF INQUIRY INTO THE MEANING OF SIN AND FAITH 5–6 (Thomas Nagel ed., 2009) [hereinafter RAWLS, A BRIEF INQUIRY].

88. THEORY OF JUSTICE, *supra* note 25, at 207; *see also id.* at 214 ("Moral and religious freedom follows from the principle of equal liberty; and assuming the priority of this principle, the only ground for denying the equal liberties is to avoid an even greater injustice, an even greater loss of liberty.")

hensive doctrines. At least some of those doctrines “introduce[] into people’s conceptions of their good a transcendent element not admitting of compromise.”⁸⁹ This “irreconcilable latent conflict” gives rise to two alternatives: “mortal conflict moderated only by circumstance and exhaustion, or equal liberty of conscience and freedom of thought.”⁹⁰ To secure political society that mediates between competing comprehensive doctrines, “the principles of toleration and liberty of conscience must have an essential place in any constitutional democratic conception. They lay down the fundamental basis to be accepted by all citizens as fair and regulative of the rivalry between doctrines.”⁹¹ Those who hold “nonnegotiable” “religious, moral, and philosophical” commitments therefore commit themselves to liberty of conscience because no one who takes “religious, philosophical, or moral convictions of persons seriously” “would gamble” on being a member of the majority, instead of the minority religion.⁹²

Perhaps because Rawls’s overarching concern is to explore how conflicting doctrines can coexist in a political society, he pays little attention to the differences between religion, morality, and philosophy. They are all species of “conscience,” which he treats as the proper object of a right. According to Rawls, all three species of conscience may affect one’s conception of the good. Protecting conscience therefore promotes one’s “capacity for a conception of the good,” or ability to determine and change one’s mind about the good,⁹³ and promotes one’s ability to determine that the “relation between our deliberative reason and our way of life itself” is part of our “determinate conception of the good.”⁹⁴ That is to say, liberty of conscience “is among the social conditions necessary for the development and exercise” of “the capacity for a conception of the good”⁹⁵—the means of determining the good—and among the conditions necessary for realizing that aligning one’s rational deliberation with one’s actions is a good in itself. This elaboration focuses conscience on morality generally—the impulse to determine the good—and the ability to reflect upon one’s morality more specifically. Rawls nowhere, howev-

89. *Introduction to POLITICAL LIBERALISM*, *supra* note 80, at xxvi.

90. *Id.* Rawls’s experience in World War II likely contributed to his conviction that any successful political theory must offer a means of ideological convergence. On the one hand, “the need for a theory of justice to take [religious convictions] seriously drew on his own personal experiences of religious faith” before the War. See Cohen & Nagel, *supra* note 87, at 7; Eric Gregory, *Before the Original Position: The Neo-Orthodox Theology of the Young John Rawls*, 35 J. REL. ETHICS 179 (2007). On the other hand, the horrors of the war and the Holocaust made theodicy impossible for him; his religious faith shaken, he sought a nontheological solution for the political problem of irreconcilable religious and ideological beliefs. See John Rawls, *On My Religion*, in RAWLS, A BRIEF INQUIRY, *supra* note 87, at 262–63.

91. JOHN RAWLS, *POLITICAL LIBERALISM, EXPANDED EDITION* 461 (2011) [hereinafter *POLITICAL LIBERALISM, EXPANDED EDITION*].

92. *Id.* at 311.

93. *Id.* at 312.

94. *Id.* at 313.

95. *Id.*

er, gets into the weeds on where religion ends and morality begins.⁹⁶ Neither does he discuss whether his conception of liberty of conscience protects “religious practice”⁹⁷ but not “moral” or “philosophical” “practice.” At one point, he states that “the strength of religious and moral obligations as men interpret them seems to require that the two principles be put in serial order.”⁹⁸ It is unclear what he means by “as men interpret them” or what it means as a practical matter to put “religious and moral obligations” “in serial order.”⁹⁹ Although “the principle of equal liberty . . . arose historically with religious toleration,”¹⁰⁰ “the intuitive idea [of political liberalism] is to generalize the principle of religious toleration to a social form,”¹⁰¹ and, consequently, religious toleration “can be extended to other instances.”¹⁰² Rawls’s aim to promote “equal liberty of conscience” surely counseled against focusing on differences of religion, morality, and philosophy; drawing too fine a distinction between them might undermine an argument that they deserve equal respect.

Rawls’s purpose for enveloping “religion, morality, and philosophy” in the broader category of “conscience” appears to be to emphasize that comprehensive doctrines based on these concepts present equally nonnegotiable commitments to some notion of the good.¹⁰³ The principal reason to protect them is instrumental: it is a prerequisite to convincing those who hold a plurality of comprehensive doctrines to enter into the social contract. Additionally, Rawls suggests that conscience should be protected in its own right because the exercise of conscience—in the exercise of deliberative reason to form and revise one’s conception of the good—is constitutive of personhood.¹⁰⁴ It is unclear, however, whether assigning a moral value to conscience creates a tension with Rawls’s commitment against privileging any specific moral theory (or theory of the good) in order to gain consensus among those of competing theories.¹⁰⁵ Indeed, some comprehensive philosophies would hold that all

96. Daniel Dombrowski, writing on religion in Rawls’s work, must routinely refer to “comprehensive religious (or philosophical) doctrines” to capture the ambiguity in Rawls’s conceptions of comprehensive doctrines and their relationship to conscience. See, e.g., DOMBROWSKI, *supra* note 80, at 3, 79, 95.

97. See also THEORY OF JUSTICE, *supra* note 25, at 207 (discussing “the liberty to examine one’s beliefs”).

98. *Id.* at 208.

99. *Id.*

100. *Id.* at 220.

101. *Id.* at 205–06 n.6.

102. *Id.* at 220.

103. POLITICAL LIBERALISM, *supra* note 80, at 314–15 (“In the first [ground for liberty of conscience], conceptions of the good are regarded as given and firmly rooted; and since there is a plurality of such conceptions, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt. In the next two grounds, conceptions of the good are seen as subject to revision in accordance with deliberative reason, which is part of the capacity for a conception of the good. But since the full and informed exercise of this capacity requires the social conditions secured by liberty of conscience, these grounds support the same conclusion as the first.”).

104. *Id.* at 313–14.

105. *Id.* at 9–10.

forms of morality are harmful, and presumably, under those philosophies, the exercise of conscience would not be instrumentally or inherently useful. To be sure, some religions or other comprehensive doctrines may have reasons internal to them for protecting religion or nonreligious conscience.¹⁰⁶ These reasons may be helpful for the purpose of establishing an overlapping consensus to protect liberty of conscience,¹⁰⁷ but for Rawls, the commitments of comprehensive doctrines are irrelevant to establishing equal liberty of conscience behind the veil of ignorance because they are not equally accessible to all people. They are not “public reasons.”¹⁰⁸

Liberty of conscience and its constituent species, “religion, morality, and philosophy,” as Rawls conceives them, are too abstract to form the basis for a right of conscience. Rawls treats “religion, morality, and philosophy” as synonyms; they add nothing to the meaning of conscience, so the scope of *liberty* of conscience depends on the scope of conscience. There are (at least) four candidates for what Rawls may mean by conscience. Each of these conceptions of conscience finds adherents among courts and scholars (usually independently of Rawls’s theory).

First, and most narrowly, conscience might mean a faculty that issues “religious, philosophical, or moral” commands. Rawls urges that liberty of conscience is a prerequisite of liberal society because conscience is “binding absolutely”¹⁰⁹ and therefore nonnegotiable. Rawls’s meaning is not entirely clear. One possibility is that conscience issues commands that the individual may choose to obey or not to obey, but the individual has no say over the content of those commands. Conscience is a blind dictator. This would be in contrast to a voluntarist view of conscience where conscience is governed by free will.¹¹⁰ A voluntarist conception sees conscience as worthy of respect *because* it is an expression of an “unencumbered self” rather than because it is evidence of an obligation beyond oneself.¹¹¹ By incorporating religion, philosophy, or moral beliefs into conscience, Rawls suggests that the blind dictator may be equally influenced by any of these sources. They provide input for conscience’s commands. The point of conjoining them is that people should be free to follow the commands of conscience whether those commands issue from religious or nonreligious beliefs.

This is similar to the conception of conscience this paper later elaborates and defends as a basis for liberty of conscience. The key differ-

106. See, e.g., John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEG. ISSUES 275 (1996); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013).

107. See, e.g., Schwartzman, *supra* note 31.

108. See generally John Rawls, *The Idea of Public Reason Revisited*, in POLITICAL LIBERALISM, EXPANDED EDITION, *supra* note 91, at 440. For a succinct critique of the requirement that publicly presented reasons be equally accessible to all members of society, see Gregory, *supra* note 90, at 198–200.

109. See THEORY OF JUSTICE, *supra* note 25, at 207.

110. See, e.g., SANDEL, *supra* note 15, at 65–71.

111. *Id.* at 66.

ence is that this paper conceives of conscience as issuing commands on the basis of deliberative reasoning. Rather than dictating blindly or being the epitome of an exercise of will, conscience gives a moral nudge in the direction that deliberative reason suggests. This conception fails, however, to encompass the full range of liberty of conscience *and* religious liberty. Because Rawls makes religion a subset of conscience, he implies that there is no religious belief or action that is not commanded by conscience that is also worthy of respect. This would exclude religious beliefs and practices based on culture, custom, ritual, or love rather than a sense of internal obligation. As Andrew Koppelman has noted, such a conception “*excludes* some claims that are widely recognized as valid.”¹¹² Would a Buddhist’s meditation qualify? What about an Orthodox Jew’s yarmulke?¹¹³ What about exploring a religion without committing to it?¹¹⁴ Making conscience-as-internal-moral-judge the touchstone for religious liberty could leave many religious beliefs and practices without legal protection.¹¹⁵

Second, perhaps Rawls’s notion of “conscience” should be construed more broadly to refer to what Martha Nussbaum calls the “faculty in human beings with which they search for life’s ultimate meaning.”¹¹⁶ On this reading, Rawls’s point is that those for whom “life’s ultimate meaning” is religious and those for whom it is based on nonreligious philosophy or morality ought to enjoy equal liberty to search for that meaning. The problem with this definition of conscience is that it is indistinguishable from definitions of religion. It is difficult to imagine a notion of conscience that deals with life’s ultimate concern that does not amount to a common understanding of religion.¹¹⁷ Indeed, this is precisely how many theorists would have the Supreme Court interpret free exercise of religion in the First Amendment and how a number of Supreme Court justices have interpreted statutes that refer more narrowly to one’s belief in a “Supreme Being.”¹¹⁸ To be sure, this interpretation of conscience is broader than a definition of religion that favors one religious sect or one aspect of religion, such as theism, eternal judgment, prayer, or communal

112. Koppelman, *supra* note 13, at 222.

113. See, e.g., Greenawalt, *supra* note 26, at 902 (“Some perceived religious obligations, such as daily prayer or wearing a yarmulke, are nonmoral, unless ‘moral’ is understood *very* broadly.”).

114. *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990); see Garrett Epps, *To An Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998).

115. See Koppelman, *supra* note 13, at 221–24; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 25–26; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 27; David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 796, 826–34 (1991).

116. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 19 (2008).

117. Koppelman, *supra* note 23, at 981–82 (“Religion denotes a cluster of goods. . . . No *general* description of the good that religion seeks to promote can be satisfactory, politically or intellectually.” (emphasis added)); McConnell, *supra* note 23, at 42 (“[T]here is no other human phenomenon that combines all of [the aspects of religion]; if there were such a concept, it would probably be viewed as a religion.”).

118. *United States v. Seeger*, 380 U.S. 163, 179–80 (1965); see also John Sexton, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066–67, 1075–83 (1978).

rituals. But few theorists or courts argue that the Free Exercise Clause protects only the exercise of religions that can check a certain number of items off of a list of religious attributes. Even those, for instance, who argue that religious liberty presumes the existence of God, rarely go a step further and suggest that religious liberty should only extend to theistic religions.¹¹⁹ The most widely agreed upon definitions of religion for purposes of religious liberty are somewhat fluid, accounting for the diversity of human experience with what people take to be the divine, transcendence, or mystery. This is the meaning of religion that this Article has presumed for purposes of distinguishing between religious liberty and liberty of conscience.

Precisely because this understanding of conscience overlaps the generally accepted notion of religion in religious liberty, it merely duplicates, rather than solves, the difficulty of defining religion. Andrew Koppelman has suggested that this difficulty may be more hypothetical than real; in practice very few cases turn on whether the claimant's beliefs and actions were "religious."¹²⁰ And to the extent those claims do arise, the difficulty of defining a religion may be a feature, not a bug. A vague notion allows an ongoing conversation about its meaning¹²¹ and suggests the inclusion of unusual or minority religious beliefs and practices by analogical reasoning.¹²² This conception of liberty of conscience does little, however, to determine what limiting principle, if any, courts ought to apply to give *some* definition to religion or conscience where it appears in the law. It has the additional problem of failing to give liberty of conscience any independent role to play in our scheme of ordered liberties. That is to say, it fails to give any reason that nonreligious moral or philosophical beliefs or actions ought to be protected besides that they are similar, in some unarticulated way, to religious beliefs and actions, and it would be unfair to protect religious but not nonreligious ones.¹²³ It gives no independent justification for respecting fidelity to one's thoughtful moral judgment *per se*.

Third, Rawls's conscience may refer more broadly to a comprehensive philosophy. How "comprehensive" does the system of thought have to be? Perhaps this is like the position advanced by David A.J. Richards, that "the motivation for universal toleration must encompass all belief systems, religious and nonreligious, expressive of our moral powers of rationality and reasonableness."¹²⁴ Does this favor people who happen to be smart or predisposed to think about abstract notions such as reli-

119. Paulsen, *supra* note 106, at 1160.

120. See Koppelman, *supra* note 23.

121. See generally Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

122. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 139–142 (2006).

123. See Schwartzman, *supra* note 16.

124. DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 138 (1986).

gion?¹²⁵ Some people are remarkably “inarticulate” about their motivation for acts of moral courage.¹²⁶ Just like the “ultimate meaning” interpretation of conscience, the “comprehensive philosophy” interpretation solves none of the problems inherent in defining religion for purposes of law—it increases the concept’s circumference without defining its boundary. It may even make the boundary more ephemeral by eliminating the limiting principle that the protected commitments must be about “ultimate” things. Would environmentalism count?¹²⁷ What about Secular Humanism?¹²⁸ The intuitive answer to each of these questions may (or may not) be easy, but stating a principled distinction is hard.

Fourth, and most abstractly, “conscience” could refer to freedom of thought generally.¹²⁹ Rawls describes conscience as something that “bind[s] absolutely,”¹³⁰ but perhaps it “binds absolutely” in the sense that it is constitutive of one’s mental life: *cogito ergo sum*. Various members of the Supreme Court have written in soaring prose about the First Amendment’s protection of freedom of thought, mind, and spirit.¹³¹ The first such articulation may have been Justice Holmes’s famous dissent in *United States v. Schwimmer*,¹³² declaring that “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”¹³³ This seed blossomed into the Court’s holdings that the First Amendment prohibits coerced speech, at least on matters of politics and religion.¹³⁴ The assumption underlying these decisions is that coerced speech, contrary to the views of some early modern philosophers, such as Hobbes, Spinoza, and Locke,¹³⁵ does, in fact, shape our minds.¹³⁶

125. NUSSBAUM, *supra* note 116, at 172 (“A different sort of unfairness no doubt remains: such formulations reward articulate people and penalize those, equally sincere, who cannot give a good account of themselves.”).

126. *See, e.g.*, Koppelman, *supra* note 23, at 978 n.79.

127. *See* Grainger PLC v. Nicholson, [2009] ICR 360, EAT [361–64].

128. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (“Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.”).

129. *See, e.g.*, TIMOTHY MACKLEM, INDEPENDENCE OF MIND (2006).

130. THEORY OF JUSTICE, *supra* note 25, at 207.

131. *Wallace v. Jaffre*, 472 U.S. 38, 52 (1985); *Woolley v. Maynard*, 430 U.S. 710, 706 (1977) (referring to the First Amendment’s protection of the “sphere of intellect and spirit”); *Jones v. Opelika*, 316 U.S. 584, 594 (1942) (“[T]he mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.”); *Minersville v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) (“The guaranties of civil liberty are but guaranties of the human mind and spirit and of reasonable freedom to express them.”).

132. 279 U.S. 644, 653–55 (1929) (Holmes, J., dissenting).

133. *Id.* at 654–55.

134. *Woolley*, 430 U.S. at 705; *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

135. Ronald Beiner, *Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke*, 47 SAN DIEGO L. REV. 1107, 1109 (2010) (explaining that Hobbes, Spinoza, and Locke held that “conscience pertains to what cannot be touched by coercion because the conviction of what is believed is inherently unshakable”); *see also Opelika*, 316 U.S. at 594 (“[T]he mind and spirit of man remain forever free,

Freedom of mind and thought, however rhetorically attractive, begs theoretical and practical questions. What counts as mind? Is the liberty of mind negative, as in the compelled speech cases? How far does the liberty extend? To matters of religion, ethics, and politics—or beyond? If this liberty is positive, as some theorists have argued, how does the government choose between different ways of developing its citizens' freedom of mind?¹³⁷ Given Rawls's point—to protect those beliefs or thoughts that “bind[] absolutely”¹³⁸—it seems unlikely he would have endorsed a freedom of conscience that swept in all manner of thought. This would expand conscience to include everything, and therefore nothing.

All four of these conceptions run into a separate problem when interpreting legal provisions like the First Amendment that expressly provide for the “free exercise” of “religion” but not freedom of conscience. Depending how one believes the Supreme Court ought to interpret the Constitution, this may pose no problem: one may simply choose to include nonreligious conscience rights within religious liberty because conscience is worth protecting or because it would be unfair to protect religious but not nonreligious conscience.¹³⁹ But this is not what the Amendment says. Some theorists have suggested that the Equal Protection Clause of the Fourteenth Amendment compels this result. This presumes, however, that religion, morality, and philosophy are in some meaningful sense equal, which theorists tend to assert rather than show. The Constitution's text is a hurdle for those who would advance Rawls's conception of liberty of conscience as constitutional law rather than imperative of political morality.¹⁴⁰

In sum, Rawls's own work provides no conceptual tools to disentangle religion and conscience for purposes of law. Religion collapses into conscience. The liberty of conscience that makes the most sense with Rawls's overall theory of justice is the narrowest: it guarantees protection of those comprehensive beliefs that no one would reasonably forgo to enter into the social contract. Perhaps ironically, Rawls's greatest success in the area of liberty of conscience may have been in persuading most theorists to embrace a generous understanding of religion and demand that all religions be treated equally. This may have had the collateral effect of widening the scope of religious liberty but by making it more difficult to conceptualize a conscience distinct from religion and therefore may have made it more difficult to justify nonreligious conscience rights. Disputes over nonreligious conscience claims became dis-

while his actions rest subject to necessary accommodation to the competing needs of his fellows.”); *id.* at 618 (Murphy, J., dissenting) (“Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.”).

136. See Michael W. McConnell, *Establishment and Toleration in Edmund Burke's “Constitution of Freedom,”* 1995 SUP. CT. REV. 393; see also Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 319 (2011).

137. See MACKLEM, *supra* note 129.

138. THEORY OF JUSTICE, *supra* note 25, at 207.

139. See, e.g., Schwartzman, *supra* note 16, at 1355.

140. See, e.g., *id.*

putes about whether the claim was religious rather than about whether the conscientious objection was worth protecting, religious or not. This was, of course, also driven to some extent by the limits of the constitutional text.

The forgoing analysis suggests two insights. First, assuming the first interpretation of liberty of conscience explored above is the best reading of Rawls, it is unclear whether there are *in fact* any nonreligious comprehensive doctrines that would serve as a veto gate for someone contemplating the social contract (or overlapping consensus). Rawls never elaborates on such an example. His mention of Kant and Hume may come the closest,¹⁴¹ but it is unclear which beliefs or practices of a thoroughgoing Kantian or Humean would require special protection in exchange for entering the social contract. Furthermore, as noted above, this definition of liberty of conscience would leave many aspects of religion and religious activity—those not based on conscience—totally unprotected. Second, none of the other possible definitions of conscience explored above give any *independent* reason to protect nonreligious conscience other than fairness to those who hold religious-like beliefs. But it is unclear from those definitions of conscience what makes religious and nonreligious conscientious beliefs so similar that fairness requires treating them the same. Furthermore, Rawls gives no reason to protect nonreligious conscience where a society prizes religious liberty and concludes that nonreligious belief is meaningfully different. Yoking nonreligious conscience to the value of religious conscience creates a burden to explain how nonreligious beliefs or practices are meaningfully similar to religious ones.

III. DISENTANGLING CONSCIENCE AND RELIGION IN CHRISTIAN THOUGHT

Religious tolerance and cries for liberty of conscience emerged from doctrinal differences within the Christian tradition. The Founders, entrenched in various permutations of Protestant thought and religious belief, collapsed conscience into religion. John Rawls, who rejected neo-orthodox theology and a career as an Episcopalian minister,¹⁴² collapsed religion into conscience. Does Christian thought (and its ghosts that haunt academic philosophy in the West) inevitably blur the line between the demands of conscience and the demands of God? This part argues that it does not. Beginning with the Apostle Paul, there are strands of Christian thought that promote fidelity to conscience even when it may be at odds with revealed truth. The tradition, therefore, supplies grounds for respecting conscience *per se*—whether religious or not. Theorists working within or committed to the norms of the Christian intellectual tradition need not reject the value of nonreligious conscience.

141. See introduction to POLITICAL LIBERALISM, *supra* note 80, at xxvii.

142. See, e.g., Gregory, *supra* note 90, at 195.

A. *The Apostle Paul's "Conscience"*

The Apostle Paul introduced the notion of conscience into Christian thought.¹⁴³ Paul “baptized” a quasi-stoic conception of conscience that was likely in common currency in the eastern part of the Roman Empire.¹⁴⁴ Generally Paul’s “conscience” was a universally experienced awareness that certain actions are wrong.¹⁴⁵ A conscience may confirm one’s sincerity of speech,¹⁴⁶ declare one’s moral guilt with regard to past acts,¹⁴⁷ or provide guidance about the blameworthiness of future conduct.¹⁴⁸ Paul also suggested that the universal experience of conscience is *evidence* that each person has a “law within.”¹⁴⁹ The Christian tradition has interpreted this function of conscience as a foreshadowing of God’s final judgment.¹⁵⁰

Paul also believed that a conscience could make imperfect judgments. In his view, there was no reason for Christians to categorically abstain from eating meat that had been sacrificed to pagan idols.¹⁵¹ Some Christians, though, believed that eating such meat would make them spiritually impure and their consciences forbade them from partaking.¹⁵² Paul therefore encouraged Christians whose consciences were “stronger” to abstain from eating such meat out of respect for “weaker” believers’ consciences.¹⁵³ This implies that conscience is not always a surefooted

143. The Hebrew Scriptures used “*leb*” (heart) in a way that was similar but not the same as the way Paul used the Greek “*syneidesis*” (conscience). See J.N. SEVENSTER, *PAUL AND SENECA* 93 (1961).

144. C. A. PIERCE, *CONSCIENCE IN THE NEW TESTAMENT: A STUDY OF SYNEIDESIS IN THE NEW TESTAMENT* 15–17 (1955). For a comparison of Seneca and Paul’s use of “conscience,” see SEVENSTER, *supra* note 143, at 84–102. Seneca and other stoics used conscience to refer to God’s voice inside, a voice that was a final judgment on one’s moral actions. It was a *source* of moral knowledge, not just a judge that applied moral knowledge gained elsewhere. See ANTHONY C. THISELTON, *THE FIRST EPISTLE TO THE CORINTHIANS: A COMMENTARY ON THE GREEK TEXT* 640–42 (2000).

145. THISELTON, *supra* note 144, at 640; see also ROBERT JEWETT, *ROMANS: A COMMENTARY* 558 (2007) (“Unlike most modern conceptions, conscience for Paul was neither the voice of God nor a guiding moral agency but rather the irrepressible knowledge one has ‘with oneself’ that an action is consistent or inconsistent with one’s ethical norm.”). For a brief overview of the modern interpretive history of *syneidesis* in Paul, see THISELTON, *supra* note 144, at 640–44. Some recent scholars prefer to translate *syneidesis* as “conscious” or “consciousness.” See, e.g., RICHARD A. HORSLEY, *ABINGDON NEW TESTAMENT COMMENTARY: 1 CORINTHIANS* 121 (1998).

146. *Romans* 9:1; see JEWETT, *supra* note 145, at 558 (commenting on *Romans* 9:2, noting that Paul is “conveying the idea that [conscience] functions as an autonomous witness to the consistency of behavior and internalized norm”); see also *2 Corinthians* 1:12, 4:2. In the Book of Acts, written by the author of the Gospel of Luke, Paul refers to his conscience as an internal faculty that verifies his claims. *Acts* 23:1, 24:16.

147. PIERCE, *supra* note 144, at 21–28.

148. *Romans* 2:9–16.

149. See *Romans* 2:15; JEWETT, *supra* note 145, at 215–17 (commenting on *Romans* 2:15). For the notion that God writes the law on consciences, or “hearts” (the term in the Hebrew Scriptures that most closely mirrors conscience on Paul’s writing), Paul may have been drawing on *Jeremiah* 31:33. See ARLAND J. HULTGREN, *PAUL’S LETTER TO THE ROMANS: A COMMENTARY* 118 (2011).

150. See *Romans* 14:10–12; OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* 294 (2005).

151. *1 Corinthians* 8:7–12, 10:25–29; see JOHN FOTOPOULOS, *FOOD OFFERED TO IDOLS IN ROMAN CORINTH* 249–50 (2003); see also *Romans* 14:1–4.

152. *1 Corinthians* 8:7.

153. See *1 Corinthians* 10:23–33.

guide to God's requirements.¹⁵⁴ At the same time, however, Christians should respect and encourage fellow believers to be faithful to conscience, even when its judgments are based on misinformation.¹⁵⁵

Paul never clearly states why fidelity to conscience, even erroneous conscience, is valuable. He may have thought fidelity to even an erroneous conscience was worthy of respect because in practice moral obligations are difficult to discern, and one's obligations may differ from another's. One may have overlapping moral obligations to God,¹⁵⁶ earthly authorities,¹⁵⁷ family members,¹⁵⁸ other believers,¹⁵⁹ humankind as a whole, and all creation. Each of these may bind conscience in different ways.¹⁶⁰ How is a believer to prioritize the claims of these authorities when they conflict? Who has the authority to determine whether there is such a conflict and how to resolve it? Paul may have counseled fidelity to conscience because, though fallible and internal, it may be the clearest guide to resolving such a conflict.¹⁶¹ At bottom, Paul advocates relationships built on faith in Christ and love for one another, not legalistic moral distinctions.¹⁶²

B. Addressing Conscience's Fallibility Three Ways

Christianity produced a plurality of intellectual traditions that each elaborate on Paul's concept of conscience. They all, however, maintain the tension latent in Paul's thought between conscience's fallibility and the importance of following conscience. Christian thinkers address this tension in different ways. To exaggerate the differences for clarity's sake, the Catholic Church emphasizes the church's role in moral formation, and various protestant thinkers often emphasize the individual's prophetic role against religious authorities or the importance of reform-

154. See THISELTON, *supra* note 144, at 640 (“[S]omeone’s self-awareness or conscience may be insufficiently sensitive to register negative judgment or appropriate *discomfort* in some contexts (10:6–22), and oversensitive to the point of causing *mistaken* judgment or *unnecessary* discomfort in others (10:23–27)”); SEVENSTER, *supra* note 143, at 101 (“The voice of conscience is not always the voice of God: the conscience of the ‘weak’ in Corinth was at fault. It is only when it bears witness in the Holy Spirit that it may be called upon as a witness for the truth.”).

155. See SEVENSTER, *supra* note 143, at 98–99.

156. See *James* 4:7.

157. See *Romans* 13:1–7; *Matthew* 22:21; SEVENSTER, *supra* note 143, at 94.

158. See *Ephesians* 5:21; *Colossians* 3:18–4:1; *Titus* 2:1–10; 1 *Peter* 2:18–3:7; see also ELISABETH SCHUSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS 218 (1983). See generally RICHARD HAYS, THE MORAL VISION OF THE NEW TESTAMENT: A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS 64–65 (1996).

159. See *Ephesians* 5:21 (“Be subject to one another out of reverence for Christ”).

160. *Romans* 13:5 (“Therefore one must be subject, not only because of wrath but also because of conscience.”).

161. Cf. *Romans* 14:1–12. See generally CATECHISM OF THE CATHOLIC CHURCH, ¶ 1789 (1994) [hereinafter CATECHISM].

162. See HULTGREN, *supra* note 149, at 511 (“The one who is ‘weak in faith’ from the standpoint of ‘the strong’ practices what he or she does ‘for the Lord’ (14:6) and as a matter of ‘faith’ (14:22–23).”); THISELTON, *supra* note 144, at 644 (“Freedom and ‘rights’ . . . must be restrained by self-discipline for the sake of love for the insecure or the vulnerable, for whom ‘my freedom’ might be ‘their ruin.’”).

ing natural conscience through faith.¹⁶³ As a general matter, both traditions operate with a notion of conscience that is separate, though interrelated with, religious obligations, and that is worthy of respect in its own right, whether religious or nonreligious. This anthropology is entirely compatible with a concept of conscience that is theologically agnostic but that acknowledges the operation of moral thought and judgment.

1. *Conscience Reformed by the Church*

Building on Thomas Aquinas,¹⁶⁴ the Roman Catholic Catechism emphasizes both the universality of conscience as the discerner of God's moral principles and the need for conscience to be rightly formed by the sacraments and catechesis.¹⁶⁵ The Catechism speaks of conscience and of the Church's role in articulating moral principles in multiple ways.¹⁶⁶ Conscience is a faculty that "includes the perception of the principles of morality (*synderesis*); their application in the given circumstances by practical discernment of reasons and goods; and finally judgment about concrete acts yet to be performed or already performed."¹⁶⁷ The Catechism combines with this definition more "intensely personal tones."¹⁶⁸ Conscience is "a law inscribed by God . . . man's most secret core and his sanctuary. There he is alone with God whose voice echoes in his depths."¹⁶⁹ "Hear[ing] and follow[ing] the voice" of conscience requires

163. In fact, of course both traditions include a diversity of voices within them, and both emphasize moral formation *and* fidelity to conscience.

164. THOMAS AQUINAS, 1 SUMMA THEOLOGICA Q. 79, arts. 12–13 (Fathers of the English Dominican Province, trans. 1981) [hereinafter SUMMA THEOLOGICA].

165. For a succinct overview of how the different moral traditions within Catholic thought have understood conscience, see Charles E. Curran, *Conscience in the Light of the Catholic Moral Tradition*, in CONSCIENCE 3 (Charles E. Curran ed., 2004). For a brief sketch of the means and goals of moral formation, see Germain Grisez & Russell Shaw, *Conscience: Knowledge of Moral Truth*, in CONSCIENCE, *supra*, at 39, 45–48; see also Richard M. Gula, *The Moral Conscience*, in CONSCIENCE, *supra*, at 51, 54 ("The obligation to follow one's conscience presupposes that we have properly formed our conscience.").

166. See generally Linda Hogan, *Conscience in the Documents of Vatican II*, in CONSCIENCE, *supra* note 165, at 82.

167. CATECHISM, *supra* note 161, at ¶ 1780; see also ¶ 1776 (quoting the Vatican Council II, Pastoral Constitution on the church in the Modern World, *Gaudium et Spes*). A scribal error introduced a second Greek word, *synderesis*, into an influential copy of a work by Jerome that resulted in a medieval dispute over whether conscience was a *source* of knowledge or an *act* of judgment. See ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 52 (2010). Aquinas concluded that it was an act for two reasons: (1) its use – a conscience is usually said to do something, and (2) its etymology—the latin "*conscientia*" can be broken down into "*cum alio scientia*," which means knowledge applied to a specific case. 1 SUMMA THEOLOGICA, *supra* note 164, at Q. 79, art. 13.

168. Jayne Hoose, *Conscience in Veritatis Splendor and the Catechism*, in CONSCIENCE, *supra* note 165, at 89, 91.

169. CATECHISM, *supra* note 161, at ¶ 1776 (quoting the Vatican Council II, Pastoral Constitution on the church in the Modern World, *Gaudium et Spes*); see also Gula, *supra* note 165, at 54 ("We give primacy to conscience and regard the moral claims of conscience as absolutely binding because in conscience is where we meet God's Spirit leading us."); ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS 125–26 (1966) (describing the distinctive aspect of Martin Luther's emphasis on conscience as focusing on "the experience of an individual who is alone before God").

“interiority,” or the practice of being “present” to oneself.¹⁷⁰ In the Catholic conception, conscience is not God’s voice, as it was for stoics like Seneca and Cicero;¹⁷¹ it is more like God’s microphone.

In response to conscience’s fallibility, Catholic thinkers have tended to emphasize the importance of moral formation.¹⁷² “[A] well-formed conscience is upright and truthful[,] [and] formulates its judgments according to reason, in conformity with the true good willed by the wisdom of the Creator.”¹⁷³ The means of formation are “the Word of God,” “the Lord’s Cross,” “the gifts of the Holy Spirit,” “the witness or advice of others,” and “the authoritative teaching of the Church.”¹⁷⁴ Rather than a faculty that operates by blind intuition, a well-formed conscience is informed by the Church’s moral teachings and directed by reason, shaped by a lifetime of learning and practice.¹⁷⁵ Of course, even Catholics devoted to the Church’s authority as a moral teacher, however, may encounter moral dilemmas that pit their consciences against Church teaching.¹⁷⁶ The faithful Catholic is obligated to work through the quandary with “serious thought, prayer, and all available means of arriving at a right judgment on the matter in question.”¹⁷⁷

The Catholic emphasis on conscience’s universality contributed greatly to medieval and early modern natural law as understood by Catholics and Protestants alike. If all people have reason and a conscience and reason and conscience, together, issue moral commands, then the irreducible elements of those moral commands amounts to a kind of universal law. As James Wilson put it, “[l]aws may be promulgated by reason and conscience, the divine monitors within us . . . they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.”¹⁷⁸ The ques-

170. CATECHISM, *supra* note 161, at ¶ 1779.

171. THISELTON, *supra* note 144, at 641.

172. CATECHISM, *supra* note 161, at ¶ 1783 (“The education of conscience is indispensable,” particularly in light of the manifold temptations for people to “prefer their own judgment and to reject authoritative teachings.”).

173. *Id.* at ¶ 1798.

174. *Id.* at ¶ 1785.

175. *Id.* at ¶ 1784. On the reasons to defer to the Church’s moral teaching, see generally Timothy E. O’Connell, *An Understanding of Conscience*, in CONSCIENCE, *supra* note 165, at 25, 32–35; see also Hoose, *supra* note 168, at 91 (arguing that the Catechism represents a more authoritarian approach to the magisterium’s moral teaching office); William E. May, *Vatican II, Church Teaching, and Conscience*, in CONSCIENCE, *supra*, at 95 (defending the magisterium’s moral teaching authority as consistent with Vatican II).

176. See O’Connell, *supra* note 175, at 29 (“But note that [conscience] is not directly accountable to the Church. No, it is accountable to the truth and nothing else.”).

177. NAT’L CONFERENCE OF CATHOLIC BISHOPS, U.S. BISHOPS’ PASTORAL LETTER ON HUMAN LIFE IN OUR DAY 30 (1968).

178. See, e.g., James Wilson, *Lectures on Law*, ch. 2 (1790), *reprinted in* 1 THE COLLECTED WORKS OF JAMES WILSON 470 (Kermit L. Hall & Mark David Hall, eds., 2007) (“Laws may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner, they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.”); *id.* at 498 (“IV. That law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine

tion for natural law has always been how specific its commands are. What precisely does reason and conscience demand of everyone? Is this an empirical or theoretical question—or both? In any case, the Catholic commitment to natural law, perceived universally by conscience, provides further support for respecting conscience quite apart from religion.

2. *The Prophetic Conscience*

The unifying theme of the Protestant Reformers' theology was that salvation was by faith in Christ, not by works or "the law." They emphasized Christ's teaching in the sacraments and Scripture as the highest authority for Christian doctrine and conduct, and they equated the medieval church's ecclesiastical demands with the law that Christ had overcome; furthermore, they urged parishioners to follow their consciences in light of scripture not as a means of salvation but as a means of faithful obedience to God.¹⁷⁹

As a theological matter, the doctrine of justification by faith had legs; the Roman Catholic Church has since endorsed it.¹⁸⁰ As an ethical matter, liberating conscience from Church teaching (though maintaining that it was still subject to Scripture) put a great deal of pressure on the individual.¹⁸¹ For some the responsibility was too heavy;¹⁸² rather than liberate the believer from fear of failure, it multiplied the ways to go wrong.¹⁸³ For the western church it was the germ of constant schism. It meant no ecclesiastical hierarchy or system of doctrine was beyond suspicion; each individual must judge all moral and spiritual matters for himself. Anyone may be a prophet worth heeding. The emphasis on individual responsibility to follow Christ's teaching as presented in the Christian Scriptures indelibly shaped western political and moral thought

monitors within us, and by the sacred oracles, the divine monitors without us. This law has undergone several subdivisions, and has been known by distinct appellations, according to the different ways in which it has been promulgated, and the different objects which it respects. As promulgated by reason and the moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law. As addressed to men, it has been denominated the law of nature; as addressed to political societies, it has been denominated the law of nations. But it should always be remembered, that this law, natural or revealed, made for men or for nations, flows from the same divine source: it is the law of God.")

179. J.M. Porter, *Introduction*, in LUTHER: SELECTED POLITICAL WRITINGS 4 (J. M. Porter ed., 2003) ("In *The Freedom of A Christian* and *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate* Luther develops the three major Reformation doctrines which serve as the foundation for his political thought: the primacy of Scripture as the word of God, justification by faith, and the priesthood of all believers. Simultaneously, he contrasts these Reformation beliefs with those of the scholastic world and the papacy.")

180. See, e.g., THE LUTHERAN WORLD FOUND. & THE CATHOLIC CHURCH, JOINT DECLARATION ON THE DOCTRINE OF JUSTIFICATION 9, 11 (2000), available at http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/documents/rc_pc_chrstuni_doc_31101999_cath-luth-joint-declaration_en.html.

181. See, e.g., CHARLES TAYLOR, SOURCE OF THE SELF: THE MAKING OF THE MODERN IDENTITY 358–59 (1989).

182. MARK LILLA, THE STILLBORN GOD 148–49 (2007) (discussing Kant).

183. See O'DONOVAN, *supra* note 150, at 308.

and practice,¹⁸⁴ resulting in two related yet distinguishable conceptions of conscience within the protestant tradition, which I label the *prophetic* conscience and the *Christological* conscience. The former emphasizes fidelity to conscience as fidelity to God against the claims of religious conventions. The latter emphasizes the reformation of conscience by faith in Christ. There are, of course, members of the Catholic tradition who are exemplars of these types. Both the prophetic and Christological consciences emphasize the tension between the claims of conscience and some other religious norms—the norms of coreligionists or the demands of Christ.

Martin Luther King, Jr., embodied the prophetic conscience that has shaped British and U.S. political discourse.¹⁸⁵ His *Letter from a Birmingham Jail* rejected the calls of white moderates to forgo civil disobedience and patiently wait for the regular political process to bring an end to segregation.¹⁸⁶ Instead, King exhorted Christian and Jewish leaders to join the civil rights movement, drawing on the examples of other religious communities throughout history, the commands of scripture, and the concepts of just and unjust laws articulated by theologians from Augustine and Aquinas to Paul Tillich and Martin Buber.¹⁸⁷ The letter was a forceful denunciation of “lukewarm acceptance” of the movement and “shallow understanding from people of good will.”¹⁸⁸ It called moderates to “creative” “extremism . . . for the extension of justice”¹⁸⁹ in the tradition of other “extremist[s] for justice,” such as the Hebrew prophet Amos, the Apostle Paul, the Reformer Martin Luther, John Bunyan, Abraham Lincoln, Thomas Jefferson, and even Jesus himself.¹⁹⁰ He could have also listed Catholics, such as Thomas More and Dorothy Day.¹⁹¹ In keeping with this long line of prophets, King’s conscience urged him to chide the religious establishment for failing to resist injustice according to the demands of their shared religious tradition.¹⁹² Biblically, the prophet’s role was to call the people of God to renewed faithfulness. The prophetic conscience calls one to faithfulness to God when

184. See generally TAYLOR, *supra* note 181.

185. See MICHAEL WALZER, *EXODUS AND REVOLUTION* (1985) (linking the Exodus story to the political history of the West).

186. Martin Luther King, Jr., *Letter From Birmingham Jail*, *THE CHRISTIAN CENTURY*, June 12, 1963, at 767, 769.

187. *Id.* at 769–72.

188. *Id.* at 770; see also TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65*, at 47–49 (1998).

189. King, *supra* note 186, at 771.

190. *Id.*

191. Thomas More’s letters from prison are hallmarks of sensitivity to the competing demands of conscience and secular rulers. See Thomas More, *Letters from Prison, reprinted in CONSCIENCE DECIDES: LETTERS AND PRAYERS FROM PRISON WRITTEN BY SIR THOMAS MOORE BETWEEN APRIL 1534 AND JULY 1535* (Dame Beded Foord ed., 1971). For a well-known dramatic account, see ROBERT BOLT, *A MAN FOR ALL SEASONS* (1968). For an account of Dorothy Day’s role as a prophet, see STANLEY HAUERWAS, *WITH THE GRAIN OF THE UNIVERSE* 230–31 (2002).

192. For a lawyer’s reflections on Christian conscience in aid of the civil rights movement and against the United States’s engagement in Vietnam, see generally the work of William Stringfellow.

it runs counter to the demands of one's religious leaders.¹⁹³ The prophetic conscience decentralizes human authority, urging coreligionists to change course.

3. *The Christological Conscience*

The prophetic conscience stands at the nexus of religion and conscience, where one's perception of God's commands, quite apart from the moral norms of one's local community, become the commands of conscience. By contrast, another Protestant theological tradition emphasizes the radical distance between natural conscience and the commands of Christ. Bridging the gap—aligning one's conscience with Christ's commands so that one may obey both—requires faith.

Dietrich Bonhoeffer, a Lutheran pastor imprisoned and killed by the Nazis for plotting to kill Adolf Hitler,¹⁹⁴ exemplified and articulated the Christological conscience.¹⁹⁵ While in prison, he drafted several essays that have been published as an *Ethics*.¹⁹⁶

Bonhoeffer argues that a properly formed Christian conscience may condone violating God's moral law out of love for one's neighbor.¹⁹⁷ Bonhoeffer nowhere expressly condones violating conscience, but he strongly suggests that there may be a tension between Christ's commands and God's universal moral law.¹⁹⁸ Bonhoeffer's thought proceeds from the conviction that God has redeemed humankind in Christ, making it possible for humans to be fully human.¹⁹⁹ Christ's incarnation, cross, and resurrection enable humans to take "free, responsible action."²⁰⁰ Free, responsible action is a "concept of vicarious representative action"²⁰¹ whereby one may commit, as Christ did, to the "voluntary assumption of

193. As usual, Protestants were the not the first in the Christian tradition to articulate this position. See, e.g., Peter Abelard, *Ethics*, reprinted in ETHICAL WRITINGS 1, 24, 29 (Paul Vincent Spade trans., 1995); Brian Tierney, *Religious Rights: An Historical Perspective*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 17, 25 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (quoting Pope Innocent III).

194. See Reinhold Niebuhr, *The Death of a Martyr*, 5 CHRISTIANITY AND CRISIS, no. 11 at 6–7 (1945) (discussing why Bonhoeffer returned to Germany from his studies in the United States in 1939). The standard biography of Dietrich Bonhoeffer was written by his friend, editor, and brother-in-law. EBERHARD BETHGE, DIETRICH BONHOEFFER: A BIOGRAPHY (1970); see also ERIC METAXAS, BONHOEFFER: PASTOR, MARTYR, PROPHET, SPY (2010).

195. Martin Luther King, Jr., and Dietrich Bonhoeffer are two of ten twentieth-century Christian martyrs who appear on the façade of Westminster Abbey. Jenny E. Heller, *Westminster Abbey Elevates 10 Foreigners*, N.Y. TIMES (Sep. 22, 1998), <http://query.nytimes.com/gst/fullpage.html?res=9407E6DF1030F931A1575AC0A96E958260>.

196. 6 DIETRICH BONHOEFFER WORKS: ETHICS (Clifford J. Green ed., Reinhard Krauss et al. trans., 2005) [hereinafter BONHOEFFER: ETHICS].

197. See BONHOEFFER: ETHICS, *supra* note 196, at 221.

198. See *id.* at 281.

199. Green, *Introduction* to BONHOEFFER: ETHICS, *supra* note 196, at 6–9. See generally 3 DIETRICH BONHOEFFER WORKS: CREATION AND FALL (John W. de Gruchy ed., Douglas Stephen Bax trans., 2007).

200. Green, *Introduction* to BONHOEFFER: ETHICS, *supra* note 196, at 12.

201. 1 DIETRICH BONHOEFFER WORKS: SANCTORUM COMMUNIO 156 n.17 (Clifford J. Green ed., Reinhard Krauss & Nancy Lukens trans., 1998) [hereinafter BONHOEFFER: SANCTORUM COMMUNIO].

evil in another person's stead."²⁰² This entails taking "responsibility not bound by any law" to act to protect another's "life necessities."²⁰³ This responsibility demands a "willingness to take on guilt"²⁰⁴ in "an act of human heroic love (for one's country, friend, etc.)."²⁰⁵ One is willing to take on the objective guilt of violating God's moral law—for instance, by killing another—out of love for one's neighbor, relying on God's complete forgiveness of sin in Christ.

Bonhoeffer develops a nuanced distinction between "natural conscience and conscience liberated by Christ"²⁰⁶ to explain how one may at once run afoul of God's moral law and still be "acquitted by his conscience."²⁰⁷ "Where Christ . . . has become the unifying center of my existence, . . . [t]he natural conscience . . . is overcome by the conscience that has been set free in Jesus Christ, calling me to unity with myself in Jesus Christ. Jesus Christ has become my conscience."²⁰⁸ "The freed conscience aligns itself with the responsibility, which has been established in Christ, to bear guilt for the sake of the neighbor. . . . Responsible action . . . is demonstrated precisely by the responsible taking on of another's guilt."²⁰⁹ No longer "bound by [natural moral] principles," such as Kant's absolute demand for truthfulness in the face of a threat of violence to a neighbor,²¹⁰ the responsible persons takes on objective guilt "for [another's] sake," "wide open to the neighbor and the neighbor's concrete distress."²¹¹ Thus, Bonhoeffer can say that "[t]hose who act out of free responsibility are justified before others by dire necessity; before themselves they are acquitted by their conscience, but before God they hope only for grace."²¹²

Like the Roman Catholic tradition, Bonhoeffer emphasizes that conscience, fallible, must be reformed to operate properly. For Bonhoeffer the means of reformation begin and end with Christ. Christian conscience will lead one to take on objective guilt to allay a neighbor's "concrete distress."²¹³ Christian conscience may acquit an act that demands God's forgiveness. This is not "Christianity without conscience," but it is a Christian ethic that endorses violating God's universal law for the sake of another without offering a legalistic justification for that violation. Rather, one relies on forgiveness in Christ. How does one determine

202. *Id.*

203. BONHOEFFER: ETHICS, *supra* note 196, at 272–73.

204. Green, *Introduction* to BONHOEFFER: ETHICS, *supra* note 196, at 13.

205. BONHOEFFER: SANCTORUM COMMUNIO, *supra* note 201, at 156 n.17.

206. Green, *Introduction* to BONHOEFFER: ETHICS, *supra* note 196, at 13.

207. BONHOEFFER: ETHICS, *supra* note 196, at 283 & n.138.

208. *Id.* at 278.

209. *Id.* at 279.

210. *Id.* at 279–80.

211. *Id.* at 279.

212. *Id.* at 282–83.

213. *Id.* at 279. Bonhoeffer notes that Goethe articulated a fairly similar notion of counter-intuitive conscience in *Iphigenia*, though without adverting to Christian theology. BONHOEFFER: ETHICS, *supra* note 196, at 280–81. See JOHANN WOLFGANG GOETHE, *IPHIGENIA* 58–59 (Meredith Oakes trans., 2011).

whether an act that violates the moral law is nonetheless consistent with free responsibility? Perhaps killing Hitler is an easy case.²¹⁴ What about killing a heretic out of love for the church?²¹⁵ Bonhoeffer's subtle, provocative, and sometimes bewildering account encourages Christians to form and follow a Christocentric conscience at odds with natural conscience. By endorsing fidelity to this conscience he at once reiterates the distinctive Christian conception of conscience as being fallible and therefore distant from true religious obligation but nevertheless worth respecting in its own right.

IV. DEFINING CONSCIENCE

This Part argues that John Locke's notion of conscience—an internal moral judge that may be influenced by one's moral communities and beliefs, whether religious or not—is sufficient to support a legal right. The following Part argues that this notion is worth protecting.

Although Locke's theory of toleration extended only to religious beliefs and action, his *Essay on Human Understanding* gives a nuanced conception of conscience and its relationship to religion, education, and culture.²¹⁶ Locke argues that “moral Principles” are not innate; they “require Reasoning and Discourse, and some Exercise of the Mind, to discover the certainty of their Truth.”²¹⁷ Conscience makes moral judgments, but it is not an innate *source* of uniform moral rules. He alludes to Scripture's testimony that God has “written” “Moral rules” “on [the] Hearts” of only a few.²¹⁸ “[M]any men,” therefore—those who remain in the dark about God's revealed moral law—“come to assent to several Moral Rules, and be convinced of their Obligation” “by the same way that they come to the knowledge of other things”: “*Perswasion*.”²¹⁹ They may share “moral rules” with others because of the common “Education, Company, and Customs of their Country.”²²⁰ “[H]owever” people are persuaded, these “Moral Rules” “*will serve to set Conscience on work*, which is nothing else, but our own Opinion or Judgment of the Moral

214. Part of the purpose of Bonhoeffer's Ethics was to justify his participation in a plot to kill Hitler, notwithstanding his general commitment to pacifism. See Clifford J. Green, *Introduction* to BONHOEFFER: ETHICS, *supra*, at 1, 14. For a theological engagement with Bonhoeffer's pacifism and attempted assassination, see generally STANLEY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE (2004).

215. For a humorous fictional account of a young man who justified murdering heretics, among others, on the grounds of an extreme Calvinist belief in predestination, justification by faith, and the eternal security of the believer, see JAMES HOGGS, THE PRIVATE MEMOIRS AND CONFESSIONS OF A JUSTIFIED SINNER (1824).

216. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., 1975) (1690) [hereinafter ESSAY CONCERNING HUMAN UNDERSTANDING].

217. *Id.* bk. I, ch. iii, § 8, at 66. For an account of Locke's moral theory and its relationship to his epistemology, see NICHOLAS WOLTERSTORFF, JOHN LOCKE AND THE ETHICS OF BELIEF 134–48 (1996).

218. ESSAY ON HUMAN UNDERSTANDING, *supra* note 216, bk I, ch. iii, § 8, at 70; see *Jeremiah* 31:33 (referring to Israel); *Hebrews* 8:10, 10:16 (referring to the Church).

219. *Id.*

220. *Id.*

Rectitude or Pravity of our own Actions.”²²¹ He rejects the view of conscience as a source of universal moral law, or even a “Proof of innate Principles” because experience teaches that people hold contrary moral views: “some Men, with the same bent of Conscience, prosecute what others avoid.”²²²

For Locke, then, conscience judges based on the knowledge one already has, whether that knowledge is based on revelation or not. Jews and Christians have special moral knowledge through revelation and their consciences apply that knowledge, but everyone has a conscience that applies whatever moral knowledge they possess (people may discover their moral obligations by reason alone, although the conscience is a not a source of that knowledge).²²³ He thinks this conclusion is consistent with Scripture *and* empirical evidence. For Christians who know God’s will, conscience speaks with God’s authority (though it is not the voice of God). For non-Christians, conscience nonetheless acts as a moral judge and thereby as a witness to the fact of moral duty.²²⁴

This conception of conscience—as a universal faculty that applies moral knowledge to concrete situations—is obviously discrete from religion.²²⁵ Conscience issues *judgments* on past actions and issues *commands* with respect to contemplated future actions. Thomas Hill calls this the “core idea” that various conceptions of conscience “have in common”: “a capacity, commonly attributed to most human beings, to sense or immediately discern that what he or she has done, is doing, or is about to do (or not do) is wrong, bad, and worthy of disapproval.”²²⁶ Conscience is not a *source* of moral law, but it applies moral knowledge—whether that knowledge is shaped by religious beliefs or not. It is not *God’s voice*, as Cicero assumed²²⁷ and Jean Jacques Rousseau proposed.²²⁸ The moral knowledge conscience applies when making judgments includes whatever universal rules one may be able to discern plus the sum of one’s moral education. This may or may not include beliefs about what God demands. Christians believe it is a witness to the existence of God’s law and a foreshadowing of God’s judgment,²²⁹ but

221. *Id.*

222. *Id.*

223. See, e.g., JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY 11 (George W. Ewing ed., 1997) (1695) (arguing, in a commentary on Romans 1, that the conscience is a *witness* to a universal “moral law” or “rule of right” but not the specific “civil and ritual part of the law, delivered by Moses”). See WOLTERSTORFF, *supra* note 217, at 140.

224. Subsequent British empiricists elaborated on this conception of conscience as a universally experienced moral judge. See, e.g., LORD SHAFTESBURY, AN INQUIRY CONCERNING VIRTUE, OR MERIT, bk. I, part II, § I, at 7 (David Walford ed., 1977) (1699); see sources cited *supra* note 27.

225. For the notion of religion this paper presumes, see *supra* notes 23–24 and accompanying text.

226. Hill, *supra* note 21, at 14; see also Curran, *supra* note 165, at 3 (“Conscience is generally understood as the judgment about the morality of an act to be done or omitted or already done or omitted by the person.”).

227. THISELTON, *supra* note 144, at 641.

228. See JEAN JACQUES ROUSSEAU, EMILE 274–32 (Barbara Foxley trans., 1993) (1762) (detailing the creed of the Savoyard priest). See generally LILLA, *supra* note 182, at 115–31.

229. O’DONOVAN, *supra* note 150, at 294.

everyone may experience it as an internal sense of right and wrong. These descriptions are different perspectives on the same faculty.

On a Venn diagram, conscience and religion would overlap, not overlay. Religion may include beliefs that require no action, actions that require no moral judgment, and, as Bonhoeffer suggests, actions that cut against conscience's "natural" or ordinary judgment.²³⁰ Conscience requires no religious beliefs. It is an exercise of moral judgment—whether informed by religious beliefs or not. Someone with religious beliefs may come to a conscientious judgment about a particular course of conduct without consciously basing that judgment on religious beliefs, and a coreligionist may come to the same judgment by consciously drawing on religious beliefs. And as the testimonies of King and so many others suggest,²³¹ coreligionists may come to strikingly different moral judgments.²³²

This conception of conscience is coherent, unlike the notion of volitional necessity developed by Harry Frankfurt and criticized by Andrew Koppelman. Volitional necessity describes the predicament of someone who is wholeheartedly committed to a course of action and cannot do otherwise.²³³ Volitional necessity, just as it sounds, merges freedom and necessity; someone wants *to want* to do something and therefore is no longer free to abstain.²³⁴ The objects of this desire may, according to Koppelman, be "idiosyncratic" and "deeply unworthy."²³⁵ What about the murderer whose conduct was compelled by conscience?²³⁶ For this reason, Koppelman concludes that this notion of conscience is "a poor basis for legal exemptions."²³⁷

Unlike someone in the grip of volitional necessity, one has genuine freedom to disobey his or her conscience. Conscience does not *compel*; it *judges* and *commands*.²³⁸ Someone may want to violate conscience (although that desire would not be morally justifiable). Or, someone may want to change a conscientious judgment through education and practice. For Bonhoeffer this entailed conforming his natural conscience to

230. See *supra* notes 206–08 and accompanying text.

231. See *supra* notes 185–93 and accompanying text.

232. See, e.g., *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 711 (1981) (explaining that Jehovah's Witness who enjoyed constitutional protection against discrimination in unemployment benefits had disagreed with another Witness about whether working directly on the manufacture of weapons violated "Witnesses' principles").

233. Koppelman, *supra* note 13, at 215–16.

234. See HARRY G. FRANKFURT, *The Importance of What We Care About*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 80, 87 (1988) ("[A] person who is constrained by volitional necessity" "accedes to it because he is *unwilling* to oppose it and because, furthermore, his unwillingness is *itself* something which he is unwilling to alter."); Koppelman, *supra* note 13, at 234 ("This double unwillingness is what defines volitional necessity.")

235. Koppelman, *supra* note 13, at 236–37.

236. *Id.* at 225, 237.

237. *Id.* at 236. Koppelman admits that some notion of conscience may be worth protecting, but he does not develop it. See *id.* at 240–41. He is clear, however, that there is no conception of conscience that is a good substitute for religion as an explanation for Religion Clause jurisprudence. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 131–44 (2013).

238. See Hill, *supra* note 21, at 14.

Christ's conscience.²³⁹ And even where one accepts conscience's judgment, he may nevertheless choose to disobey and suffer its judgment of moral guilt. Moreover, even accepting, for the sake of argument, that "volitional necessity" is a persuasive account of the human experience of conscience, Koppelman's objection to it as a basis for a legal exemption is insufficient. The conscientious murderer, or "welfare monster,"²⁴⁰ is a stock character from seventeenth- and eighteenth-century pamphlets endorsing religious intolerance. As John Locke and Thomas Jefferson explained, liberty of conscience is not a license to harm others.²⁴¹ The conscientious murderer was a straw man then, and it is a straw man now.

This Article's account of conscience also differs slightly, perhaps in emphasis, from Michael Sandel's. Drawing on Locke, Madison, and Jefferson, Sandel notes that one does not choose the content of conscience's commands.²⁴² The content of those commands may be shaped by one's experiences, but the commands themselves arise unbidden, without will, and perhaps without any obvious reason. This view of the relationship between intellect, will, and conscience is unconvincingly static. Locke knew that one's moral judgments were the product of one's education, culture, and religious beliefs.²⁴³ Aquinas considered conscience to be a habitual act that could be improved by gaining knowledge.²⁴⁴ A full-blown epistemological account of conscience is well beyond the scope of this Article; it is sufficient to note that conscience, though it has a unique function, depends upon and interacts in complicated ways with every other mental faculty. Faced with a moral question, one may choose to gain more knowledge or remain ignorant; one may habitually obey or habitually disobey conscience, quieting it. Additionally, Sandel's (admittedly brief) account is insensitive to the ways that various moral obligations may result in divergent claims upon one's conscience. Law, social norms, religious beliefs, intuition, culture, the expectations of others, and love all contribute to one's sense of moral obligation.²⁴⁵ In any concrete case, conscience may resolve competing moral norms in unique and un-

239. See *supra* notes 206–08 and accompanying text.

240. Koppelman, *supra* note 13, at 225, 237.

241. JOHN LOCKE, LOCKE ON TOLERATION 26 (Richard Vernon ed., 2010) ("Things that in themselves are harmful to the community in everyday life and are prohibited by legislation in the common interest cannot become legitimate when employed in a church for a sacred purpose or expect to go unpunished."); see also *id.* at 43 ("As fathers of their country, may [civil rulers] direct all their efforts and intelligence to increasing the civil happiness of all their children who are not violent, unjust to others, and disloyal."); Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1786), reprinted in RELIGION AND THE CONSTITUTION 56–57 (Michael W. McConnell, et al. eds., 3d ed., 2011) ("[T]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ."); Thomas Jefferson, *Notes on the State of Virginia, Query 17, 157–61* (1784), reprinted in RELIGION AND THE CONSTITUTION, *supra*, at 44–45 ("The legitimate powers of government extend only to such acts as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.")

242. See SANDEL, *supra* note 15, at 66–67.

243. See *supra* notes 216–22 and accompanying text.

244. SUMMA THEOLOGICA, *supra* note 164, at Q. 19, arts. 5–6.

245. See generally Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

predictable ways. But, just because they are unpredictable does not mean they are not subject to reason, further thought, and revision.²⁴⁶

Most importantly, the conception of conscience advanced above is a useful tool for conceiving of liberty of conscience as a category separate from religious liberty. First, it is coherent enough to support a legal right. The perception of moral obligations may not be a crystal-clear notion, but it is no vaguer than conceptions of mental processes that are incorporated in legal questions of scienter and purpose. Second, this notion of conscience is more precise than religion or conscience as they appear in many arguments for religious liberty or liberty of conscience. This Article uses a broad notion of religion for purposes of religious liberty and courts have adopted a variety of tests and methods for determining whether a claimant's beliefs and conduct are religious.²⁴⁷ As this Article argues in Part II, many theorists merge religion and conscience in their notions of liberty of conscience, which does nothing to advance a clearer conception of either one. Third, this conception of conscience is administrable. Under this conception, courts would not need to engage in armchair social theory to determine whether a claim for conscientious exemption was based on religion.²⁴⁸ That would be vital for establishing a claim for religious liberty but not a claim for liberty of conscience. It might be relevant to showing that the claimant has reasons for the conscientious judgment—reasons based on religious faith—and that the claim is therefore credible. But the same credibility could be supported by evidence that the claimant's beliefs had been shaped by reading Thoreau without requiring the claim to fit into the conceptual box of religion.²⁴⁹ Finally, this notion of conscience maximizes human freedom by allowing for overlapping, but not concentric, areas of religious and conscientious liberty. Instead of pushing the concept of religious liberty past the point of plausibility and running the risk that religious liberty will be watered down as a result,²⁵⁰ it introduces a second, overlapping conception that may be the basis of a legal right. Starting with a generous notion of liberty, as this Article does, means that adding conscience rights to religious liberty merely extends liberty. Doing so may add liberty to

246. The next Part develops this aspect of conscience more fully.

247. See *supra* notes 118–19 and accompanying text; see, e.g., *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (“First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion can often be recognized by the presence of certain formal and external signs.”); *Grainger PLC v. Nicholson*, [2009] ICR 360, EAT [para. 24] (defining a religious belief to include a “genuinely held” “belief as to a weighty and substantial aspect of human life and behaviour” that “attain[s] a certain level of cogency, seriousness, cohesion and importance,” and is “worthy of respect in a democratic society”).

248. See, e.g., SULLIVAN, *supra* note 23.

249. See, e.g., *Seeger v. United States*, 380 U.S. 246 (1965).

250. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 452–59 (1985); Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 838 (2004) (arguing that “an enlarged definition of any right may invite limitations on the circumstances in which it is available”).

those whose conscientious judgments are based on religion, but it certainly extends the domain of liberty to nonreligious conscience.

Religious liberty and liberty of conscience, disentangled, are different concepts. The reasons for protecting them may be different, and, just like the concepts of religion and conscience, may overlap. The practical approach to securing liberty for one may not make sense for the other. Alternative mandatory service may be appropriate for accommodations for conscience (religious and nonreligious), for instance, although mandatory alternative service would not be appropriate for laws that discriminate against religion on their face. The state interests that may justify an intrusion on one may not apply to the other. Both rights, religious liberty and liberty of conscience, should extend as far as the reasons religion and conscience respectively are valuable to society when balanced against society's other needs.

V. CONSCIENCE'S VALUE

Theorists have debated for centuries whether conscientious objectors ought to be exempted from generally applicable laws and, if so, under what conditions. This Article suggests that these discussions have been plagued by insufficient precision about the scope of conscience. Having proposed a discrete conception of conscience as a moral judge, this Part explores justifications for protecting conscience. It does not explore which interests of the government might override those justifications in a given case nor whether and when the Religion Clauses of the First Amendment ought to be understood to protect conscience. First, as many theorists have noted, protecting conscience promotes obedience to conscience, which in turn promotes personal integrity. Second, protecting conscience undermines the totalization of morality by the government and promotes lawful avenues for ongoing moral debate and pluralism. Undermining the government's monopoly on morality may be especially important where the community agrees a matter raises morally grave questions but where members of the community give a wide diversity of answers. When one should participate in the taking of human life is the most obvious example.

A. Integrity

Theorists have long noted that fidelity to conscience is a form of integrity.²⁵¹ Few have made the case for integrity more persuasively, nor

251. See generally George Kateb, *Socratic Integrity*, in NOMOS XL: INTEGRITY AND CONSCIENCE, *supra* note 21, at 77; Kenneth I. Winston, *Moral Opportunism: A Case Study*, in NOMOS XL: INTEGRITY AND CONSCIENCE, *supra* note 21, at 154; see also, POLITICAL LIBERALISM, *supra* note 80, at 312–13 (explaining that “liberty of conscience” “is among the social conditions necessary for the development and exercise of” “the capacity for a conception of the good,” which enables us to “strive to appreciate *why* our beliefs are true, our actions right, and our ends good and suitable for us”); Smith, *supra* note 26, at 936–37 (“The point, in sum, is to avoid undermining personhood by injuring

made its implications for political theory more clear, than Hannah Arendt. Arendt was struck by “the banality of evil” displayed by Adolph Eichmann through the course of his trial for participating in German war crimes during World War II.²⁵² Eichmann did not appear to be an inherently evil person who performed atrocious acts out of malice or ideology. These acts were due not to “radical evil”²⁵³ but to mere “thoughtlessness.”²⁵⁴ “The sad truth of the matter is that most evil is done by people who never made up their minds to be or do either evil or good.”²⁵⁵

In *The Life of the Mind*, Arendt explicated a concept of integrity as friendly inner dialogue, a picture of the dynamic relationship between thinking, willing, and making moral judgments, and the temporary internal peace derived from fidelity to conscience. Arendt explores two assertions attributed to Socrates that present moral paradoxes: (1) “It is better to be wronged than to do wrong,”²⁵⁶ and (2) “It would be better for me that my lyre or a chorus I directed should be out of tune and loud with discord, and that multitudes of men should disagree with me rather than that I, *being one*, should be out of harmony with myself and contradict me.”²⁵⁷ For Arendt, thinking is a sort of inner dialogue in which humans experience a kind of two selves.²⁵⁸ To the outward world or society, the world of appearances, each person appears as one. But in the absence of other people, each person is alone with his or her thought life, or consciousness. “[I]n this . . . case, I clearly am not just one. A difference is inserted into my Oneness.”²⁵⁹ Arendt refers to one’s self-awareness as “the two-in-one”: a person is “two” when alone with his thoughts if he is able to “keep [himself] company” but always appears as one to others.²⁶⁰ In fact, for Arendt, a person not only appears as unitary to others, but

the belief-action integration that helps to constitute the person. And that objective does not appear to depend on the nature of the beliefs that inform a particular person’s identity.”)

252. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

253. Hannah Arendt, “*Holes of Oblivion*”: *The Eichmann Trial and Totalitarianism. From a Letter to Mary McCarthy*, in *THE PORTABLE HANNAH ARENDT* 389 (Peter Baehr ed., 2000) (“[T]he very phrase: ‘Banality of Evil’ stands in contrast to the phrase [] used in the totalitarian book, ‘radical evil’”).

254. HANNAH ARENDT, *THE LIFE OF THE MIND: ONE/THINKING, TWO/WILLING* 4 (1978) [hereinafter *ARENDT, LIFE*].

255. *Id.* at 180.

256. *Id.* at 181. Arendt argues that this first assertion only makes sense following the presupposition that Socrates is “in love with wisdom and in need of thinking about everything and examining everything,” as opposed to a life of action, and he would therefore prefer to suffer wrong than to do wrong. *Id.* at 182.

257. *Id.* at 181 (quoting Plato’s *Gorgias*). Most translators omit “being one,” perhaps, Arendt suggests, because it implies a paradox: “Socrates talks of being one and *therefore* not being able to risk getting out of harmony with himself. But nothing that is identical with itself, truly and absolutely *One*, as A is A, can be either in or out of harmony with itself; you always need at least two tones to produce a harmonious sound.” Arendt believes, therefore, that the omission of “being one” rests on a misunderstanding of Socrates’ assertion. *Id.* at 183. For an account of conscience in the *Crito* and *Apology*, see generally Kateb, *supra* note 251.

258. *ARENDT, LIFE, supra* note 254, at 185.

259. *Id.* at 183.

260. *Id.* at 185.

their presence effectively brings an end to the thinker's internal duality: "when he is called by his name back into the world of appearances, where he is always One, it is as though the two into which the thinking process had split him clapped together again."²⁶¹ Arendt is unclear why a person loses the internal duality around others; perhaps because society draws one's focus outside oneself. This caveat seems unnecessary, and there is no reason why her explication of the inner dialogue could not extend to someone who may be in society, and yet may be thoughtful, as though alone.²⁶²

The notion of the inner dialogue supplies an answer to Socrates' moral paradoxes. To be in harmony with oneself is to "be consistent with oneself," as opposed to being one's constant adversary.²⁶³ Inner harmony is better than the inner discord of constant bickering. As a corollary, it is better to suffer wrong than to do wrong because, in the end, one must live with oneself, and "who would want to be the friend of and have to live together with a murderer? Not even another murderer."²⁶⁴ By contrast, integrity is a dialogue with oneself as a friend, not an opponent.

To deepen this account of integrity, Arendt next considers a Socratic story she believes to be about conscience.²⁶⁵

It is the end of the dialogue, the moment of going home. [Socrates] tells Hippias, who has shown himself to be an especially thickheaded partner, how "blissfully fortunate" he is in comparison with poor Socrates, who at home is awaited by a very obnoxious fellow who always cross-examines him. "He is a close relative and lives in the same house."²⁶⁶

On Arendt's reading, the "obnoxious fellow" who awaits Socrates is himself. Socrates cannot avoid this cross-examination, while Hippias when alone, though conscious, is relatively thoughtless. Socrates' insistence on not contradicting himself means that the person awaiting him, though pesky, "is a kind of friend."²⁶⁷ Arendt contrasts those who engage in friendly dialogue with themselves with "base people" who are "at variance with themselves" and "wicked men" who "avoid their own company," and whose "soul is in rebellion against itself."²⁶⁸ This kind of self-argument is a form of madness.²⁶⁹

According to Arendt, "[l]ater times have given the fellow who awaits Socrates in his home the name of 'conscience.' Before its tribu-

261. *Id.*

262. Thank you to Steve Smith for directing my attention to this point.

263. See ARENDT, *LIFE*, *supra* note 254, at 186.

264. *Id.* at 188.

265. *Id.* (citing PLATO, *HIPPIAS MAJOR* (Paul Woodruff trans., 1982)).

266. *Id.*

267. *Id.* at 189.

268. *Id.*

269. See *id.* (interpreting Richard III's various experiences alone and in company as a form of madness).

nal . . . we have to appear and give account of ourselves.”²⁷⁰ She acknowledges that the “accustomed” use of the term conscience implies a moral command within²⁷¹ and adopts a slightly different notion: the code of conduct that one must not violate if one is to “live at peace” with oneself. Conscience is not thinking per se but a “moral side effect”²⁷² of the inner dialogue between friends. It is the knowledge that the friend awaits. Conscience counsels one to “take care not to do anything that would make it impossible for the two-in-one to be friends and live in harmony.”²⁷³ Conscience is deeply personal. The thinker thus does not base his or her actions on “the usual rules, recognized by multitudes and agreed upon by society, but whether [she] shall be able to live with [her-self] in peace when the time has come to think about [her] deeds and words.”²⁷⁴

Arendt distinguishes between conscience and judgment. Conscience is the reminder that there is a nag waiting at home to engage in dialogue before and after the judge has done its work. In turn, whether that dialogue will be the warm conversation of friendship or the maddening contest of adversaries may very well depend on the quality and content of the thinker’s judgment. In the terms used by this Article, conscience judges on the basis of the conclusions one has reached, and expects to reach again, in the internal dialogue. Conscience turns reflection, the internal dialogue, into a directive that one may obey or disobey. This judgment feeds into the terms of the ongoing dialogue. Fidelity to this judgment is a form of integrity because it quiets the internal critic, at least for a time, allowing one’s thoughts in solitude to be the dialogue of friends.

This account of conscience as the faculty that leads to moral judgments on the basis of reflection nicely describes Huckleberry Finn’s decision-making process. Huck’s conscience initially instructed him to tell Miss Watson where Jim, her runaway slave, was being held.²⁷⁵ In fact he wrote a letter to that effect.²⁷⁶ Huck had been conditioned by social norms, some of them religious, that condoned slavery. After writing the letter, he felt he was able to pray again without having to conceal his desire to save Jim.²⁷⁷ Then memories of Jim washed over him. As Huck says,

somehow I couldn’t seem to strike no places to harden me against him, but only the other kind. I’d see him standing my watch on top of his’n, stead of calling me, so I could go on sleeping; and see him . . . always call me honey, and pet me, and do everything he

270. *Id.* at 190.

271. *Id.*

272. *Id.* at 192.

273. *Id.* at 191.

274. *Id.*

275. TWAIN, *supra* note 1, at 341–42.

276. *Id.* at 343.

277. *Id.*

could think of for me, and how good he always was; and at last I struck the time I saved him by telling the men we had small-pox aboard, and he was so grateful, and said I was the best friend old Jim ever had in the world, and the *only* one he's got now; and then I happened to look around, and see that paper. It was a close place. I took it up, and held it in my hand. I was a trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself: "All right, then, I'll go to hell" – and tore it up.²⁷⁸

It was only after this *reflection* and *judgment* that Huck was able to "shove[] the whole thing out of [his] head; and said [he] would take up wickedness again, which was in [his] line, being brung up to it, and the other warn't."²⁷⁹ The reader sees the irony in Huck's topsy-turvy moral notions, but the point is clear: Huck could not be at peace with himself, to live with integrity, without helping Jim escape. His conscience, as this Article uses the term, forbade him from returning Jim to slavery, and he chose to obey. To say that liberty of conscience promotes integrity means that, in the best instances, liberty of conscience promotes this sort of reflection and fidelity to this sort of selfless moral judgment.

Why would a government choose to protect this form of integrity? Does it require the government to hold that morality is objective rather than "conventional," subjective, or even a sham?²⁸⁰ Steven Smith has suggested that a "sovereign" would protect liberty of conscience only when the sovereign believed morality is objective—or at least conventional—and that personal integrity (Smith uses the term "authenticity") is inherently valuable.²⁸¹ In my judgment, Smith oversimplifies the position toward morality and the law that the sovereign in a pluralistic republic like the United States may take. Such a society need not depend upon or endorse any particular view of morality; each piece of legislation may be based on a different form of moral reasoning or none at all. And, most importantly, the government need not adopt a position on whether personal morality is objective; on this it may remain agnostic. I agree with Smith that in order to protect liberty of conscience for the purpose of promoting personal integrity, the government must value personal integrity, but it may do so for a wide range of reasons that have nothing to do with the objective value of personal integrity—reasons sounding perhaps in the value of political compromise, or, more weightily, in friendship among those who experience the commands of conscience generally, even if their consciences disagree about particulars.

278. *Id.* at 344.

279. *Id.*

280. *See generally* Smith, *supra* note 13.

281. *See id.* at 357–58.

B. Tyranny

Protecting personal integrity is a hedge against the government's moral tyranny. Although John Rawls's theory fails to protect religious beliefs and actions that are not based on conscience, it provides a strong political justification for protecting conscience. As discussed above, Rawls argues that conscientious judgments, whether religious or nonreligious, should be protected because otherwise citizens would be unwilling to engage in liberal society.²⁸² Put differently, citizens would be unwilling to sign the social contract without a guarantee of liberty of conscience because their conscientious judgments are nonnegotiable. With the importance of conscience for personal integrity as a background fact, liberty of conscience may be seen as the lynchpin of liberal society. At the individual level, it allows agreement with oneself, and at the social level, it enables agreement between people with different moral commitments. Government by consent assumes people who are able and willing to give consent. The ability and willingness of people to consent to external government are both enhanced by ensuring their personal sovereignty on matters of deep moral conviction.

As a practical matter, liberty of conscience may advance democratic deliberation. It eliminates some disputes over moral differences that might otherwise monopolize the public life of a pluralistic society. This leaves objectors and their opponents more resources—time, money, political capital—to debate (and to collaborate on) other important matters. It may also generate social trust between groups that may otherwise be suspicious of one another.

Protecting liberty of conscience also limits the government's pretensions to absolute moral authority. Liberty of conscience enables nonconformist moral thought that undermines moral tyranny. The government's moral monopoly may be good in many circumstances. The government regularly (and quite rightly) decides that certain moral positions are off the table. Virtually no one in the liberal tradition would tolerate physical abuse of another person under the banner of liberty of conscience. The government must set moral limits.

The government will almost invariably set limits that fly in the face of some peoples' consciences. This may give rise to civil disobedience on a small or large scale. Mass civil disobedience has an important place in political history and theory, and it can be particularly effective at jarring a morally apathetic society into taking notice and making important changes. It is quite likely that laws requiring one to violate conscience more frequently result in quiet acquiescence. The power of authoritative commands to shape an individual's thought and conscientious judgment is probably impossible to gauge. Small amounts of personal disintegration are easy to tolerate—or even ignore—when the costs of avoiding them are so great. In petty cases, society should probably accept such

282. See *supra* Part II.B.

personal disintegration and expect eventual reintegration along majority lines. The challenge is to not mistake the grand cases for the petty.²⁸³

Protecting conscience hedges against the chance that the majority has come to the wrong conclusion by promoting minority thought and practice that keeps alternatives alive. It allows majority decisions to be provisional and allows the persuasiveness of minority speech to be aided by the persuasiveness of minority action. Alternatively, by taking a minority moral position off the table, the government resists revising its position. Conscientious exemptions for those who disagree with prevailing norms prolong internal and national dialogues over contested moral issues. This may lead to better public understandings and decisions on morally novel issues such as the best use of new technology or morally profound issues such as those related to killing—abortion, euthanasia, capital punishment, war, and the like.²⁸⁴

Somewhat by contrast, Arendt argues that conscience matters most in “special emergencies” or “boundary situations.”²⁸⁵ Her reflections focus on when conscientious objectors may show society its flaws “when the stakes are on the table,” “when everybody is swept away unthinkingly by what everybody else does and believes in.”²⁸⁶ Then “those who think are drawn out of hiding because their refusal to join . . . is conspicuous and thereby becomes a kind of action.”²⁸⁷ She does not appear to consider the possibility of protecting conscience as a hedge against the development of “special emergencies.”

There is no reason to think that conscientious judgments about serious moral issues divide neatly along lines of religious belief. Liberty of conscience protects the integrity of those, religious and nonreligious, who take a minority position. More importantly from society’s standpoint, though, liberty of conscience undermines the government’s tendency toward a moral totalitarianism that society may eventually regret. When society promotes Eichmanns and kills Bonhoeffers, it is too late.

VI. CONCLUSION

This Article stops at the threshold of important questions. Some are theoretical, such as whether conscientious exemptions to generally applicable law challenge the rule of law. Other questions may be answered only in the context of a particular political community’s law, tradition, and ideals. What institutions should be responsible for creating exemptions? What should be their scope, structure, and the burdens of

283. For a compelling antityranny account of free exercise of religion that draws on George Orwell’s account of a government torturing someone until he is so broken that he embraces a lie (that two plus two equals five) and begs for the torture of his lover, see Alan Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L. J. 504, 517–23 (2003).

284. See *supra* notes 9–11 and accompanying text (collecting statutory exemptions for killing).

285. ARENDT, LIFE, *supra* note 254, at 192.

286. *Id.* at 192–93

287. *Id.* at 192.

proof and persuasion? What remedies? Should alternative service always or sometimes be mandatory? What government interests are sufficient to justify an imposition on conscience? Should the U.S. Constitution be interpreted to provide nonreligious conscience rights? Hopefully the exploration of these questions will be advanced by the conceptual clarifications this Article proposes. Conscience is a universally held moral judge. Its operation is influenced by the whole panoply of one's beliefs, knowledge, and experience, including those that have to do with God and God's will and those that are unrelated to religious beliefs or practices. Religious liberty and liberty of conscience should be used to describe two different (though often overlapping) rights. This notion of conscience is as coherent and "concrete" as many other mental states on which legal rights and obligations are based. Furthermore, fidelity to conscience, religious or nonreligious, is valuable in its own right; it promotes personal integrity and undermines government's tendency toward moral totalitarianism.

