
THE CASE FOR RELIGIOUS EXEMPTIONS —
WHETHER RELIGION IS SPECIAL OR NOT

WHY TOLERATE RELIGION? By Brian Leiter. Princeton, N.J.: Princeton University Press. 2013. Pp. xv, 187. \$24.95.

DEFENDING AMERICAN RELIGIOUS NEUTRALITY. By Andrew Koppelman. Cambridge, Mass.: Harvard University Press. 2013. Pp. 243. \$55.00.

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The United States is a place of enormous religious diversity.¹ How should a liberal and tolerant society respond to such religious diversity, particularly when this diversity means that society will include some people who are unable to comply with certain laws for religious reasons? That question is at the heart of two new books on religious liberty.

For centuries — indeed, even a full century *before* the adoption of the First Amendment — part of the American response to the nation's religious diversity has been to grant exemptions from some laws that would force a religious believer to violate her faith.² The exemptions approach takes religious diversity seriously by recognizing that people of different faiths have different rules for what they can and cannot do — for example, religious Quakers cannot fight in the military and

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¹ *E.g.*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 10 (2008), *archived at* <http://perma.cc/L58D-977M> (“The Landscape Survey details the great diversity of religious affiliation in the U.S. at the beginning of the 21st century. The adult population can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups.”). *See generally* DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION (2001) (detailing America’s transformation into a religiously diverse nation).

² For example, the General Assembly of Rhode Island provided exemptions from military service for Quakers in 1673. ² RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 488, 497–99 (John Russell Bartlett ed., 1857), *reprinted in* LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF THE EXPERIENCES OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR 9–11 (Peter Brock ed., 2002).

religious Muslims cannot transport alcohol.³ Exemptions reflect the notion that our society is better and richer for this diversity, and that the law should not force people to violate their deeply held beliefs without a very good reason.⁴ The opposite path — allowing a variety of religious *beliefs*, but denying believers the room to act as if those beliefs are actually *true* — would be a hollow type of religious toleration, and it is a path that American law has largely rejected.⁵

Yet for as long as the Supreme Court has been deciding religious liberty cases, Justices and commentators have been suggesting that religious exemptions also create something of an anomaly: a religious individual's right to violate a law that others must obey.⁶ If this centuries-old practice is an anomaly — and there are good reasons to say it is not⁷ — it is a very persistent one, and one of increasing importance as the growth of the modern regulatory state creates ever more opportu-

³ See, e.g., KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG* 45–56 (2005) (describing Quaker objections to military service and oath-taking); Press Release, U.S. Equal Emp't Opportunity Comm'n, *EEOC Sues Star Transport, Inc. for Religious Discrimination* (May 29, 2013), archived at <http://perma.cc/UX4Y-7TV8> (describing the Equal Employment Opportunity Commission's lawsuit against a trucking company for not accommodating Muslim truck drivers who were prohibited by their faith from carrying alcohol).

⁴ See, e.g., Presidential Debate in San Diego, 2 *PUB. PAPERS* 1837, 1855 (Oct. 16, 1996) (Pres. Clinton) (“One of my proudest moments was signing the Religious Freedom Restoration Act, which says the Government’s got to bend over backwards before we interfere with religious practice.”).

⁵ See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also Eugene Volokh, *Religious Exemption Law Map of the United States*, *VOLOKH CONSPIRACY* (July 9, 2010, 5:36 PM), <http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states>, archived at <http://perma.cc/P7TV-ZVU5> (showing state-by-state exemption rules).

⁶ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (“[T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law.”); *Emp’t Div. v. Smith*, 494 U.S. 872, 885–86 (1990) (rejecting the “compelling government interest,” *id.* at 885 (internal quotation marks omitted), as a constitutional requirement in most free exercise cases because “what it would produce here — a private right to ignore generally applicable laws — is a constitutional anomaly,” *id.* at 886).

⁷ Exemptions actually appear throughout our laws, whenever lawmakers believe competing values should be balanced in a particular way. Justification defenses in criminal law function as exemptions allowing persons who would otherwise be guilty of crimes to avoid conviction if acting, for example, in self-defense. All evidentiary privileges (attorney-client, doctor-patient, husband-wife) are exemptions to the otherwise liberal rules of evidence favoring admissibility. Our tax code is full of exemptions. The Patient Protection and Affordable Care Act exempts many different people from its requirement that each individual purchase insurance. See, e.g., 26 U.S.C. § 5000A(d)–(e) (2012) (exempting various groups including “[i]ndividuals not lawfully present,” “[i]ncarcerated individuals,” “[m]embers of Indian tribes,” and “[t]axpayers with income below [the] filing threshold” from the minimum essential coverage requirement). Given the prevalence of exemptions, variances, and waivers of enforcement in our modern state, it would actually be far more anomalous to eliminate religious exemptions than to allow them.

nities for friction between legal and religious obligations. In the ongoing controversy over the federal requirement that all new health insurance plans include coverage for contraception, for example, the Obama Administration has granted religious exemptions to protect some religious objectors from having to violate their religion by being forced to “contract, arrange, pay, or refer for” contraceptives, sterilizations, and drugs and devices that can destroy a newly formed embryo.⁸ This exemption allows some religious objectors to engage in a behavior — failure to provide insurance coverage for the relevant services — for which other employers will face enormous fines.⁹ And where that exemption has been challenged as too narrow — chiefly by religious business owners who claim that their religions forbid them from directing their companies to purchase such products — most courts have sided with the religious business owners.¹⁰

Two recent books address the practice of granting religious exemptions in very different ways. Professor Brian Leiter’s *Why Tolerate Religion?* asks whether there is any “moral reason to single out matters of religious conscience for special legal consideration and solicitude” (p. ix). Leiter argues that while there are compelling reasons to protect liberty of conscience generally (pp. 15–17), he sees no valid reason to give claims of *religious* conscience any greater protection than exemption claims based on deeply held secular belief (pp. 63–64). And because Leiter views the allowance of secular conscience exemptions as unworkable and a threat to the general welfare (pp. 97–100), he favors eliminating all religious exemptions except those that impose no burdens at all on society or on other individuals (pp. 100–01).

Professor Andrew Koppelman’s *Defending American Religious Neutrality* considers religious exemptions as part of a broader analysis

⁸ 45 C.F.R. § 147.131 (2013). The government claimed that the exemption of religious employers from the final text of the rule concerning the contraceptive mandate “respect[s] the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement.” Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

⁹ Employers who refuse to follow the mandate must pay a fine of \$100 per day for each affected employee. 26 U.S.C. § 4980D(b)(1) (2012).

¹⁰ Of the thirty-nine cases of for-profit organizations seeking preliminary injunctions against the mandate, courts have ruled in favor of the for-profit organization thirty-three times. See *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Feb. 2, 2014). For an example of a case of this nature, see *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–38 (10th Cir.) (“No one disputes in this case the sincerity of Hobby Lobby and Mardel’s religious beliefs. And because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA.”), cert. granted, 134 S. Ct. 678 (2013). Disclosure: I represent Hobby Lobby in this matter.

of American religious liberty law. Koppelman aims to defend the First Amendment's balancing of free exercise and establishment concerns against criticisms from two sides: "radical secularists," who think the law is too generous to religion, and "religious traditionalists," who think the law is too hostile to religion (p. 1). Koppelman argues that the religious neutrality each side criticizes is actually both "coherent and attractive" and has made the nation "unusually successful in dealing with religious diversity," even as compared with other liberal democracies (p. 1). The key, according to Koppelman, is understanding the ideal of religious neutrality at the proper level of generality — which has shifted as the nation has grown more religiously diverse, and as the common ground between different religions has narrowed (p. 2).

Within this larger discussion of American religious liberty law, Koppelman argues that the practice of granting religious exemptions is part of the First Amendment's approach to religion as a "distinctive human good" (p. 11). Unlike Leiter, Koppelman finds valid reasons for the government to single out religion for special treatment (p. 11). In fact, Koppelman argues that the only real controversy over religious exemptions concerns *who* should grant them (legislatures or judges) rather than whether they should exist (p. 11).¹¹

Both *Why Tolerate Religion?* and *Defending American Religious Neutrality* offer valuable insights for scholars seeking to understand, challenge, or defend the American system of religious exemptions. At one level, the two books demonstrate the unsurprising fact that one's appraisal of the value of religion — Leiter's is fairly negative, Koppelman's is more positive — will influence one's opinion of religious exemptions. But the broader lesson of the two books is this: *regardless* of the value one places on religion itself, there are strong reasons for a liberal and tolerant society to provide religious exemptions to many laws, at least as part of a broader system that generally protects citizens from being forced by the government to violate their most deeply held beliefs. This is because the moral arguments laid out by both authors for generally protecting conscience are far stronger than the mostly practical arguments Leiter offers for eliminating all exemptions.

This Review proceeds in three parts. Part I examines Leiter's arguments for protecting conscience broadly, for denying special treatment for religion, and ultimately for doing away with religious exemptions entirely. Part II explores Koppelman's analysis of the American

¹¹ Koppelman argues that "hardly anyone doubts" that "it is appropriate for *someone* to enact exemptions" (p. 11). He also notes: "The sentiment in favor of accommodations is nearly unanimous in the United States" (p. 5).

doctrine of religious neutrality, and in particular his view that government can give special treatment to religion as a public good. Part III explains how both approaches — one premised on the claim that religion is unworthy of special treatment and one premised on the opposite view — ultimately should end up embracing religious exemptions as the appropriate response of a liberal and tolerant society to religious diversity. If religion is deemed specially valuable, then religious conscience claims may merit some kind of special protection over and above what exists for secular conscience claims. And if both religious and secular conscience claims deserve equal treatment, then the best response for a liberal and tolerant society is to protect both rather than to protect neither.

I. LEITER'S CASE AGAINST RELIGIOUS EXEMPTIONS

A. *Compelling Reasons for Protecting Conscience Broadly*

Leiter begins by analyzing whether there are principled reasons for protecting liberty of conscience generally, including both religious conscience and secular conscience. By “conscience” Leiter means something quite specific: “A claim of conscience is . . . a claim about what one *must* do, no matter what — not as a matter of crass self-interest but because it is a kind of moral imperative central to one’s integrity as a person, to the meaning of one’s life” (p. 95). Leiter finds at least three compelling reasons for broadly protecting the right to act on the moral imperatives generated by such deeply held beliefs.

First, Leiter notes John Rawls’s view that rational persons in the so-called “original position”¹² would “choose principles that secure the integrity of their religious and moral freedom” (p. 16).¹³ Knowing that they “will have certain convictions about how they *must* act in certain circumstances — convictions rooted in reasons central to the integrity of their lives” (p. 17) — Rawls concludes that “equal liberty of conscience is the only principle that the persons in the original position can acknowledge.”¹⁴ This is because, from the original position, people “cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes.”¹⁵

¹² JOHN RAWLS, A THEORY OF JUSTICE 136 (1971). Rawls’s *A Theory of Justice* considers which principles of justice a rational person would choose to govern society if the choice were made behind a “veil of ignorance” in what Rawls calls the “original position” — a position in which the chooser is deprived of information about his or her place in society that might render the choices self-serving or partial. *See id.* at 136–37.

¹³ The author quotes RAWLS, *supra* note 12, at 206.

¹⁴ RAWLS, *supra* note 12, at 207.

¹⁵ *Id.*

Next, Leiter recognizes a utilitarian argument for liberty of conscience: the idea that “human well-being” is maximized by protecting liberty of conscience from state infringement (p. 17). The argument here is that being allowed the private space to choose what to believe and how to live makes for a better life, and that being forcibly coerced by government in these matters makes for a worse life (p. 18). Although Leiter does not clearly embrace this argument — he appears open to the idea that such freedom to choose how to live may actually make lives worse — Leiter accepts this “private space” argument as a plausible ground for toleration (p. 18).¹⁶

Finally, Leiter considers an epistemic argument for tolerating liberty of conscience: the idea that tolerating diversity makes a contribution to knowledge (p. 19). Referencing arguments from John Stuart Mill, Leiter explains that diversity of conscience may be tolerated because the majority is not infallible, and therefore should choose to tolerate “dissident opinions, which may well be true” (p. 20). Even if dissident ideas turn out to be false, considering and responding to such false opinions helps expand knowledge of the truth (p. 20).

Ultimately, Leiter concludes that these Rawlsian, utilitarian, and epistemic arguments “generate compelling support for the conclusion that the state should protect liberty of conscience under the rubric of principled toleration” (p. 92). Leiter emphasizes, however, that even these compelling arguments do not mean that all acts of conscience must be privileged — rather, toleration is subject to “side-constraints,” such as limits related to harm to others or to public order (p. 21).¹⁷

B. *No Special Treatment for Religion*

Although *Why Tolerate Religion?* finds compelling reasons to support broad protection for liberty of conscience, much of the book is devoted to an argument about why, within the set of conscience claims,

¹⁶ Notably, this “private space” argument is quite similar to the argument used by the Supreme Court in numerous substantive due process cases to justify restrictions on government interference with certain decisions that the Court deems deeply personal and important. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (internal quotation mark omitted)). Leiter’s invocation of the private space argument in the area of conscience rights raises the interesting question whether the *Casey/Lawrence* “mystery of the universe” view of the law should also apply, either through the First Amendment or the Fourteenth, to requests for conscience-based exemptions from laws. For further exploration of this question for both religious and secular objectors, see Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121 (2012); Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1 (2011).

¹⁷ Original emphasis has been omitted.

religious claims of conscience merit no better protection than secular claims of conscience.

Leiter begins this analysis by trying his hand at a famously intractable task: defining religion.¹⁸ Drawing together threads from various authors who have approached the issue, Leiter identifies three defining characteristics of religion. First, religions “issue . . . categorical demands on action — that is, demands that must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up” (p. 34).¹⁹ Second, religions involve beliefs that are “insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science” (p. 34). Third, religions provide what Leiter calls “existential consolation” in that they “render intelligible and tolerable the basic existential facts about human life, such as suffering and death” (p. 52).²⁰

Armed with this definition of religion, Leiter proceeds to explore “whether there is any *special* reason to tolerate beliefs whose distinctive character is defined by the categoricity of its demands conjoined with its insulation from evidence” (pp. 60–61). Leiter sees none. To the contrary, he finds reason to fear that this combination of “categorical demands” and “insulation from evidence” might be particularly likely to cause harm and infringe upon liberty (p. 59). Nor does Leiter believe that these dangers can be outweighed by the “existential consolation” offered by religion, because people can and often do achieve

¹⁸ Leiter considers, and ultimately rejects as either under- or overinclusive, definitions of religion in the following works: EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., Free Press 1995) (1912) (pp. 27–30); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (p. 145); TIMOTHY MACKLEM, *INDEPENDENCE OF MIND* (2006) (pp. 31–32); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (2d ed. 2005) (pp. 32–33); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984) (pp. 145–46); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) (p. 144); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002) (p. 144); and Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L.J. 1 (2000) (pp. 31–32).

¹⁹ Original emphasis has been omitted.

²⁰ Original emphasis has been omitted. Leiter considers but rejects a fourth possible aspect to this definition, the notion that religious beliefs involve “a metaphysics of ultimate reality” (p. 47) (emphasis omitted). This characteristic would describe the fact that religious beliefs often concern what “is most important for valuable/worthwhile/desirable human lives, whether that concerns the transcendent well-being of the ‘soul,’ or the moral value of life in this, the material world” (p. 48). Leiter ultimately discards this aspect of his definition because he believes it to be subsumed within his broader claim that religious beliefs are “insulated from evidence” (p. 47) (emphasis omitted). Leiter offers no explanation for preferring his broader “insulated from evidence” factor over the much narrower “metaphysics of ultimate reality” descriptor. It seems likely that many or most of the religious beliefs that meet Leiter’s “insulated from evidence” description are, in fact, beliefs about transcendent or ultimate realities that the religious believer accepts as factually true, but beyond our ability to prove to others. Thus it is not clear why “insulated from evidence” represents a better definitional characteristic than a focus on a transcendent or “ultimate reality.”

such consolation without what Leiter views as the dangerous combination of categorical beliefs insulated from evidence (p. 62). Thus, while Leiter acknowledges some beneficial results of some people living by religious principles,²¹ he ultimately finds that there is no principled reason to single out religious claims of conscience for special protection (pp. 66–67).²²

C. The “No Exemptions” Approach

Having rejected the notion of special protection for *religious* claims of conscience, Leiter presents two possible paths for the law of religious liberty in a tolerant society. First, based on his earlier finding of compelling reasons to protect liberty of conscience generally, Leiter posits that society might allow for conscience-based exemptions for religious and secular conscience claims alike (p. 93). Alternatively, society might reject the notion of exemptions entirely, except for situations in which an exemption imposes no burdens on others (pp. 100–01).²³ In short, Leiter’s view that religion should not get special treatment gives him two possible paths to equality: either both religious and secular objectors get conscience exemptions or no one does.

Faced with this all-or-nothing choice, Leiter chooses “nothing,” rejecting the notion of a broad exemption scheme that would include secular conscience as both impractical and immoral. First, he argues that protecting secular conscience “would be tantamount to constitutionalizing a right to civil disobedience” and “would appear to amount to a legalization of anarchy!” (p. 94). Second, he explains that claims of secular conscience would raise difficult evidentiary issues: unlike religious claims (which can typically point to “texts, doctrines, and commands, either written or passed down orally among many adherents” (p. 95)), a secular claim of conscience would require “trying to peer into the depths of a man’s soul” (p. 95).

²¹ For example, Leiter notes that adherence to categorical demands insulated from evidence has at times produced “laudatory and courageous behavior, such as resistance to Nazism and to apartheid” and remains “one of the few sturdy bulwarks” against pure profit-driven market norms in capitalist societies (p. 60).

²² For similar reasons, Leiter also rejects the notion that religious beliefs are worthy of positive “appraisal respect” (p. 70) (internal quotation marks omitted) meriting special treatment (pp. 73–91).

²³ Interestingly, the two examples Leiter cites as imposing no burden on others — “the right to wear certain religious garb” and the right to “use certain otherwise illegal narcotics in religious rituals” (p. 100) — have both generated government claims that allowing these practices is, in certain circumstances, harmful to the public. For example, in *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006), the federal government argued that a religious group’s consumption of a hallucinogenic tea brewed from otherwise illegal narcotics threatened compelling interests in protecting the public from diversion of the drugs to nonreligious uses. *Id.* at 426; see also *United States v. Bd. of Educ.*, 911 F.2d 882, 901 (3d Cir. 1990) (Ackerman, J., concurring) (finding that allowing teachers to wear religious garb in public school would “harm the interests of the children”).

To these practical objections, Leiter adds a moral objection: that exemptions from generally applicable laws will often impose burdens on others. Every society pursues some “Vision of the Good” — essentially the state’s view as to what is “worthwhile or important” (p. 118) — and this vision is pursued through law. Leiter argues that if general compliance with such laws is necessary to promote the general welfare or common good, “then selective exemptions from those laws is a morally objectionable injury to the general welfare” (p. 99).

These practical and moral concerns about a broadened exemption regime prompt Leiter to embrace what he calls the “no exemptions” approach (p. 100). Under this approach, so long as the state is not deliberately targeting disfavored claims of conscience, there should be no conscience-based exemptions to generally applicable laws, unless it can be shown that the exemption imposes no burdens of any kind (p. 101).

II. KOPPELMAN’S ARGUMENT FOR RELIGIOUS EXEMPTIONS

Unlike *Why Tolerate Religion?*, Koppelman’s *Defending American Religious Neutrality* is not focused primarily on the question of religious exemptions. Instead, Koppelman’s book makes a much broader argument about American religious liberty law. Koppelman aims to defend American religious liberty doctrine against criticisms both by those who “regard[] religion as toxic and valueless” — and therefore reject the current system as too friendly to religion — and those who view the system as too hostile to religion (p. 1). According to Koppelman, the First Amendment reasonably “treats religion as a distinctive human good,” and it is therefore “not unfair” to give religion special treatment (p. 11).

A. *The American Doctrine of Religious Neutrality*

Koppelman argues that the key to the success of American religious liberty law is a particular notion of religious neutrality (p. 1). In the American system of neutrality, the government is permitted to “treat[] religion as something special in a broad range of legislative and judicial actions” so long as the state does not “declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth” (p. 3). This approach to the law has allowed the nation to be “unusually successful in dealing with religious diversity” in ways “beyond the capacities of many other generally well-functioning democracies” (p. 1).²⁴

²⁴ Although Koppelman finds coherence in religious liberty law, he also notes that the demonstrated success of the American system in dealing with diversity might make the system “an attractive approach” even if the system were “entirely incoherent” (p. 1).

Koppelman offers a host of possible justifications for this conception of neutrality. Moral pluralism posits that there are many different ways to live well and that the state ought to be neutral among competing conceptions of the good (pp. 19–20). The argument from futility says that states cannot compel religious faith and therefore that attempting to do so is harmful rather than helpful to religion (pp. 20–21). Another argument is epistemic incapacity: even if there is an objectively best way to live, the state is incompetent to determine what it is (p. 21). The classic argument for religious neutrality is that it ensures civil peace (pp. 21–22).²⁵ On this score, Koppelman observes that “[t]he virtue of neutrality . . . is that it removes potentially destructive issues from politics” (p. 22). He also cites John Milton’s and John Stuart Mill’s argument that true character can only develop in an atmosphere of freedom where one is faced with different ideas (pp. 22–23). Finally, “neutrality is required by respect for human autonomy and dignity” (p. 24).

Koppelman argues that the concept of neutrality is fluid, and has changed over time as the nation has become more religiously diverse and the common ground between different faiths has diminished. While “American law has always treated religion as a distinctive human good,” “[i]ts neutrality toward different religious forms . . . has shifted over time, becoming vaguer and more inclusive” (p. 26). In the colonial era “nearly everyone [in America] was Protestant” and the laws likewise privileged Protestant religious exercise, but “[t]his was not understood to amount to establishment” (p. 28), chiefly because a kind of generic ecumenical Protestantism was widely shared and did not raise any disputed theological questions.

As religious diversity increased, the notion of neutrality expanded. Around the turn of the twentieth century, growing numbers of Catholics and Jews pushed the prevailing neutrality from generic Protestantism to a Judeo-Christian “[n]onsectarian [m]onothelism” (p. 36). This notion became dominant during the mid-century, a time when virtually all Americans — nearly ninety-seven percent — identified as either Protestant, Catholic, or Jewish (pp. 36–37). The idea of neutrality based on broad agreement on nonsectarian monotheism reached its height in the 1950s, when Congress established the National Day of Prayer, added “under God” to the Pledge of Allegiance, and required

²⁵ Here Koppelman quotes Locke: “It is not the diversity of Opinions, (which cannot be avoided) . . . but the refusal of Toleration to those that are of different Opinions, (which might have been granted) that has produced all the Bustles and Wars, that have been in the Christian World, upon account of Religion” (p. 21) (quoting JOHN LOCKE, A LETTER CONCERNING TOLERATION 55 (James H. Tully ed., Hackett 1983) (William Popple trans., 1689)) (internal quotation marks omitted).

“In God We Trust” to appear on all currency, rather than just selected coins (p. 37).²⁶

Koppelman argues that changing demographics and belief systems from the 1960s to the present have now eroded any broad agreement on “nonsectarian monotheism” as a neutral core of religion. In particular, Koppelman points to the Supreme Court’s recognition of the concept of nontheistic religions, as well as the mass immigration of Muslims, Hindus, and Buddhists, and the rising popularity of “New Age” spirituality as prompting yet another adjustment to the meaning of neutrality (p. 38).

These changes mean that there is no longer any “set of propositions that all religions converge[] upon. Religion [will] henceforth have to be understood in a different way” (p. 37). Koppelman argues that this void can be filled by finding common ground on a “more abstract and vague” premise — the notion that “religion is something of value, and that that value is jeopardized when religious questions are adjudicated by the state” (p. 42).

B. Koppelman’s “Family Resemblance” View of Religion

Despite relying on claims about the value of religion, Koppelman does not define the term. He sees a concrete definition of religion as virtually impossible to craft and, as a practical matter, largely irrelevant. Those who have tried to define religion by distilling such disparate worldviews as Christianity, Buddhism, and Hinduism into their common denominators have found their efforts “unavailing” (p. 7). The Supreme Court’s early attempts to define religion “take for granted that religion is theistic” (p. 43), but it has since abandoned this definition as too narrow because it excludes nontheistic religions such as certain types of Buddhism (p. 44).

Koppelman’s solution is to rely on the common understanding of the word religion. He notes that “[c]ourts almost never have any difficulty in determining whether something is a religion or not” (p. 7) because religions have a “family resemblance” to one another (p. 128); they do not need a “set of necessary or sufficient conditions demarcating the boundaries of the set” (p. 128). Accordingly, “[t]he question of

²⁶ Notably, when federal courts have considered whether “under God” in the pledge of allegiance is a religious statement, they have disagreed with Koppelman on this point, finding the phrase better explained as an affirmation of the political philosophy of the Founders. *See, e.g.,* *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010) (“Taken in the context of the words of the whole Pledge, the phrase ‘under God’ does not convey a message of endorsement [of religion.]”); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1032 (9th Cir. 2010) (“The words ‘under God’ were added as a description of ‘one Nation’ primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government.”).

what ‘religion’ means is theoretically intractable but, as a practical matter, barely relevant. We know it when we see it. And when we see it, we treat it as something good” (p. 7).

C. Religion as a Public Good

Koppelman favors religious exemptions to generally applicable laws in order to keep the government from legislating or regulating religious practice and the good it produces. He draws a distinction between whether religion in general is good — a question he calls “profoundly unanswerable” — and whether it is appropriate for the United States to treat religion as good (p. 120). Koppelman believes such treatment for religion is appropriate, based “in part [on] the peculiar nature of the religion-based claims that find their way” into U.S. courts (p. 120). Koppelman observes that the vast majority of religious practices “generate no legal or political claims,” while the “most toxic” kinds of religion do not survive because they cannot obey criminal law (p. 120). Within the narrowed class of possible religious claims, Koppelman focuses on the question “whether the practice of accommodating religious claims is likely to make people’s lives better” (p. 121).

Koppelman finds that it is, because of the benefits of religion both to society and to the particular religious believers themselves. Koppelman offers examples of the good religion has done in American society. He notes that laudable progressive movements such as abolitionism and the civil rights movement were “grounded in religious considerations” (p. 123). Religion remains “a powerful constraint on the tendencies toward economic and political inequality in contemporary America,” and it “foster[s] civic and political participation and skills” among the disadvantaged (p. 123).

Beyond political considerations, religion also encourages humanitarian efforts and results in happier living. Koppelman emphasizes:

American churches also provide social services that mitigate material inequalities, such as soup kitchens, homeless shelters, shelters for victims of domestic violence, and medical and dental clinics and hospitals. . . .

. . . Religious people are more likely to do volunteer work; more likely to contribute their money to charity; more likely to be involved in their communities. They are also happier. (p. 123)

Religion thus supplies multiple goods to society. It also provides adherents with “maps of the world” that “help to cope with life’s mysteries,” along with a host of other beliefs and practices “worthy of positive appraisal” (p. 130). To Koppelman, these factors “can justify the special treatment of religion by the law” (p. 130).

To be clear, Koppelman’s view is not that religious believers always do or always should win exemption cases. Rather, he views the accommodation right as “a right to a certain kind of weighing, in which religion is treated as a good that should be allowed to be pursued in

specific cases unless the marginal cost is too high” (p. 108). Whether that balancing ends up too favorable to religious belief “all depends on how the balance is struck in individual cases” (p. 165).

III. THE CASE FOR EXEMPTIONS DOES NOT REQUIRE APPRAISING RELIGION AS VALUABLE

One obvious lesson from these two books is that the contested question of whether religion is valuable (or should be treated as valuable by government) will figure prominently in arguments about whether religious exemptions should be granted. Although Leiter describes his own view as “friendlier to religious belief than [he] would have imagined before undertaking systematic work on the topic” (p. ix), his book presents a mostly negative view of religion, at times rather strongly so.²⁷ Once he determines that the defining characteristic of religion is a negative — namely, the holding of beliefs that are “culpabl[y] false” (p. 77)²⁸ — the rest of his conclusions quickly fall into place: religious belief is not worthy of “appraisal respect” that would warrant special treatment (pp. 84, 90–91),²⁹ should not be privileged (p. 92), and should not receive exemption from most generally applicable laws (p. 4). Koppelman starts with a more favorable view of religion (p. 11) and concludes that religious exemptions are permissible (pp. 5–6). In light of their divergent starting points, neither conclusion is terribly surprising.

Whether religion (however defined) is valuable is of course a perfectly valid issue for debate in a free society. The historical premise of American religious liberty law, though, has always been Koppelman’s: that religion is special and valuable. This was the Founders’ view, which explains the singling out of religion in the Free Exercise and Establishment Clauses.³⁰ Indeed, if religion is *not* special, it is difficult to

²⁷ For example, Leiter explains that his interest in religious liberty was prompted by his experience with the “pernicious influence of reactionary Christians” on politics and education during his time in Texas (p. ix). Leiter regards “religious belief [to be] a *culpable* form of unwarranted belief” (p. 81) and laments what he calls the “hyperreligiosity of the United States” as harmful (p. 113). Leiter notes that such beliefs have only “not yet” resulted “in the burnings of heretics or the legal persecution of nonbelievers” (p. 113).

²⁸ Original emphasis has been omitted.

²⁹ Leiter explains that he believes religion is worthy of something he calls “recognition respect” (p. 69) (quoting Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36, 38 (1977)) (internal quotation marks omitted) — essentially toleration of people who hold religious beliefs — but is not worthy of any positive assessment or “appraisal respect” (p. 70) (quoting Darwall, *supra*, at 39) (internal quotation marks omitted).

³⁰ See, e.g., JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 8 *THE PAPERS OF JAMES MADISON* 295, 299 (Robert A. Rutland et al. eds., Chicago Univ. Press 1973) (1785) (“[W]e hold it for a fundamental and undeniable truth, 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 or violence.’ The Religion then of every man must be left to

fathom why governments should be forbidden from establishing religion but nothing else.³¹ The view that religion is a societal good also explains more recent statutory exemption regimes such as the Religious Freedom Restoration Act of 1993,³² which was signed by President Clinton after a unanimous bipartisan vote in the House of Representatives and a 97–3 vote in the Senate.³³

Yet as that baseline comes under increasing attack,³⁴ perhaps the most surprising and important lesson of these books is that the case for religious exemptions does not actually depend on treating religion as specially valuable at all. Rather, as both books demonstrate, there are strong reasons to protect acts of conscience — that is, acts based on a person’s deeply held beliefs about his or her moral obligations — regardless of whether those beliefs are religious or secular, and regardless of whether religion is accorded special treatment. The books therefore support a strong argument that if any change is necessary to the current regime of religious exemptions, it should be to expand rather than eliminate their availability.

*A. Koppelman’s Broad Understanding of Religion
As Including Secular Conscience*

For Koppelman, broad protection of both religious and secular conscience seems unproblematic. Part of Koppelman’s comfort with this expansive approach to exemptions comes from his observation that atheist claims of conscience are relatively rare (pp. 161, 174).³⁵ While

the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” (footnote omitted) (quoting Va. Declaration of Rights art. XVI (1776)); *see also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (noting that the First Amendment “gives special solicitude” to religious organizations).

³¹ We of course allow governments to espouse and advance viewpoints on contested issues about science, art, ethics, the environment, and history in ways that we would never allow them to espouse and advance religious viewpoints. *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9–10 (2000).

³² 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³³ As Professor Michael Stokes Paulsen has recently argued, this view of the special nature of religion both explains the First Amendment’s treatment of religion and provides one reason to treat religious conscience claims differently from secular conscience claims: “The nature of religious obligation is intrinsically different from [atheistic] philosophical or moral belief systems The believer understands himself to be under the superior authority of God. The ethical humanist, secularist, or atheist does not; he does not believe in God. Rather, he is subject to the moral commands he discerns for himself.” Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1203 (2013).

³⁴ Both Leiter (pp. 26–91) and Koppelman (p. 1) discuss this trend.

³⁵ *See also* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10–11 (“[U]nbelief entails no obligations and no observances. Unbelief may be coupled with various sorts of moral conviction But these convictions must necessarily be derived from some source other than unbelief itself”).

this answer may be right as a historical matter, it is not hard to imagine at least some increase in claims of secular conscience in the future, particularly as traditional religious affiliations wane.³⁶

Yet Koppelman provides a deeper answer as well: that the expanding definition of religion can likely be used to protect secular conscience that is similar to religious conscience. For this point he relies on the Supreme Court's decisions in *United States v. Seeger*³⁷ and *Welsh v. United States*,³⁸ cases in which the Court stretched statutory language protecting religious conscientious objectors to cover essentially secular claims based on reference to the law governing religious conscience claims (pp. 132–33).³⁹

Like Leiter, Koppelman recognizes that there could be an equality problem in privileging religious conscience over secular conscience (p. 161). But because of his expansive view of religion and his perception that comparable secular conscience claims are rare, Koppelman appears to find the protection of both types of conscience acceptable.⁴⁰

³⁶ This possibility seems particularly likely given recent increases in the number of Americans reporting no religious affiliation at all. See “Nones” on the Rise, PEW RES. RELIGION & PUB. LIFE PROJECT (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise>, archived at <http://perma.cc/X2H8-MWJD> (“The number of Americans who do not identify with any religion continues to grow at a rapid pace.”). As Koppelman notes, “[m]odern humanism is itself shot through with quasi-religious longings and even rituals” (p. 122). Of course, even with this increase in the percentage of the population with no religious affiliation, a significant increase in conscience claims is far from certain. As discussed *infra*, p. 1412, a conscience claim still requires asserting — in court, under oath, and under penalty of perjury — a sincere belief in the existence of a moral imperative one is obligated to obey.

³⁷ 380 U.S. 163 (1965).

³⁸ 398 U.S. 333 (1970).

³⁹ The federal government has since expressly changed its conscientious objector provisions to embrace both secular and religious conscience objections. See DEP’T OF DEF., INSTRUCTION NO. 1300.06, CONSCIENTIOUS OBJECTORS (2007), archived at <http://perma.cc/Z8HR-WYHA>. The government now exempts objectors based on “Religious Training and/or belief” but defines that phrase broadly as:

Belief in an external power or “being” or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or “being” need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term “religious training and/or belief” may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as “[r]eligious” in the traditional sense, or may expressly characterize them as not religious. The term “religious training and/or belief” does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.

Id. at 2.

⁴⁰ To be clear, Koppelman does not believe that the category of “conscience” adequately describes the entire field of religious liberty claims. To the contrary, he argues “that conscience *excludes* some claims that are widely recognized as valid. Many religious claims that are uncontroversially weighty, and which nearly everyone would want to accommodate, are not conscientious” (p. 134).

*B. Leiter's Moral Arguments Ultimately Support Broad
Protections for Religious and Secular Conscience Together*

Despite the negative assessment of religion driving Leiter's arguments in chapters 2–5, the moral arguments he sets forth in chapter 1 provide strong support for broadly protecting both religious and secular conscience. Forced to choose between protecting both types of conscience or protecting neither, Leiter argues in chapter 5 that practical and moral considerations require protecting neither. Yet on close inspection, this argument is not strong enough to trump Leiter's sound moral arguments from chapter 1. The result is that Leiter's book offers strong reasons why even those with a negative view of religion should embrace a broad system of conscience-based exemptions that would protect religious as well as secular conscientious objectors.

Recall that Leiter's recognition of a moral case for liberty of conscience turned on the argument that there are "compelling" reasons for a liberal society generally to protect the right of individual citizens to arrive at and live by their own deeply held sense of moral obligations (p. 63). Most people have some kind of deep conviction about how they must live their lives, and so, from the Rawlsian original position, they should choose a society that would give them freedom to live by those convictions (pp. 15–16). Human beings, Leiter notes, should perhaps be left free to form their own views about religion and morality, without government interference (p. 18). Also, from a utilitarian perspective, many competing points of view on important matters will help society find truth (p. 19).

Leiter's philosophical arguments here mesh well with old but sound advice to "live and let live." Life in a diverse society requires understanding that our neighbors will often not be like us: They might differ by race and religion and sexual orientation. Our neighbors will also hold different beliefs about any number of deeply important issues.⁴¹ As a general rule, in a free and pluralistic society, the government should not force people and institutions to violate their deeply held beliefs unless it has a particularly strong reason to do so. The opposite approach — a system in which the coercive power of government can be employed by the majority to stifle differences and force conformity even without a particularly strong reason — is incompatible with the nation's aspiration to be welcoming, inclusive, and pluralistic.

Ultimately, Leiter does not let chapter 1's arguments for a live-and-let-live approach to differences of conscience carry the day. Instead, in chapter 5, he offers three reasons — two practical and one moral —

⁴¹ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

that society should nevertheless refuse to provide conscience exemptions (pp. 94–100). On close inspection, however, these arguments cannot overcome the arguments for broadly protecting conscience that Leiter identifies in chapter 1.

1. *Leiter's Pragmatic Argument that Exemptions Are Akin to Anarchy Contradicts Our Experience with Religious and Secular Exemptions.* — Leiter begins his argument by claiming that a system that protects both secular and religious conscience would essentially create anarchy: “What legal system will say ‘this is the law, but, of course, you have the right to disregard it on grounds of conscience’? This would appear to amount to a legalization of anarchy!” (p. 94).

The anarchy claim is a time-honored argument by opponents of exemptions. The argument was used by the Court to enforce a two-person definition of marriage in the nineteenth century,⁴² and by Justice Scalia in *Employment Division v. Smith*⁴³ to deny a constitutional exemption for Native American religious practices in the twentieth century.⁴⁴

The problem with this argument is that we have now had enough experience under religious exemption regimes to know that they do not create anarchy. For example, we have lived under a religious exemption regime at the federal level for more than twenty years.⁴⁵ And roughly half of all states apply similar regimes based on either state court decisions or state statutes resembling the federal regime.⁴⁶ No serious claim can be made that these systems have produced anarchy, or anything close to it. Indeed, it is far more likely that none of us even notices when we travel from an exemption state to a nonexemption state and back.

Is it possible that only *secular* conscience protection will create this anarchy where we know that religious conscience protection has not? This too is doubtful in light of observable facts. As a society, we *already* protect secular conscience broadly in the circumstances in which serious secular conscience objections are most likely to arise. For example, our laws frequently protect secular conscience in the context of military service,⁴⁷

⁴² See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879) (“Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”).

⁴³ 494 U.S. 872 (1990).

⁴⁴ *Id.* at 888 (“Any society adopting such a system [of exemptions from criminal laws] would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”).

⁴⁵ See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

⁴⁶ See Volokh, *supra* note 5.

⁴⁷ Rienzi, *supra* note 16, at 134–35; see also *supra* note 39.

capital punishment,⁴⁸ assisted suicide,⁴⁹ and abortion.⁵⁰ There is no indication these conscience rights have bred anarchy. Moreover, both Leiter and Koppelman acknowledge that most conscience-based objections are religious rather than secular, so it seems unlikely that the addition of the set of secular conscience claims would have a dramatic impact. Even if secular conscience claims were to increase in the future, there is no indication that the prevalence of exemptions for other interests in our criminal, evidence, tax, or healthcare systems⁵¹ has produced anarchy, and therefore no reason to believe anarchy would result.

A final check on the anarchy concern is Leiter's own definition of what a conscience claim really is: "[A] claim about what one *must* do, no matter what — not as a matter of crass self-interest but because it is a kind of moral imperative central to one's integrity as a person, to the meaning of one's life" (p. 95). Situations where one's desires or self-interests conflict with the law may arise with some frequency, and exempting a person from following the law in these cases really might look like anarchy. But cases where someone can assert the particular type of conscience claim at issue here — and is willing to assert it in court, under oath, and on pain of perjury — will probably be quite rare.⁵²

⁴⁸ Rienzi, *supra* note 16, at 139–41; *see also* 18 U.S.C. § 3597(b) (2012) ("No employee . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee. In this subsection, 'participation in executions' includes 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.").

⁴⁹ Rienzi, *supra* note 16, at 145; *see also* WASH. REV. CODE ANN. § 70.245.190(1)(d) (West 2011) ("Only willing health care providers shall participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner.").

⁵⁰ Rienzi, *supra* note 16, at 148–49; *see also* N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 2009) ("When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital, person, firm, corporation or association, and no such hospital, person, firm, corporation or association shall discriminate against the person so refusing to act.").

⁵¹ *See supra* note 8.

⁵² The fact that a person or organization making a conscience claim must be willing to assert the deeply held belief and resulting moral imperative in court, under oath, and on pain of perjury likely also explains the rarity of *religious* conscience claims. For example, the Supreme Court recognized that business owners could assert valid religious freedom claims concerning requirements imposed on their businesses more than three decades ago in *United States v. Lee*, 455 U.S. 252, 257 (1982). Yet there was no resulting rush of businesses seeking to take advantage of the rule to avoid government regulation over the next three decades. Even in the recent Health and Human Services mandate litigation, all of the business claims to date have been by closely held family businesses (that is, those that can sincerely swear in court to being operated according to religious principles), and none have been by publicly traded corporations (which would virtually never be able to so swear). *See HHS Mandate Information Central*, *supra* note 10.

For these reasons, it seems unlikely that expanding conscience protections to atheists acting on sincere claims of conscience will result in anarchy.

2. *Leiter's Pragmatic Argument that Exemptions Are Difficult to Administer Contradicts Our Experience with Exemptions and Many Other Inquiries into Mental States.* — Leiter next argues that it would be difficult to administer a system of exemptions that includes secular conscience (pp. 94–100). First, he argues that, unlike religious beliefs, which can often be traced to some authoritative text or tradition, secular conscience is more individualized. This distinction provides the “great practical advantage of a regime that privileges liberty of religious conscience” because religious claims “give[] courts a more robust evidential base for their determinations” (p. 95). This source material allows courts to focus on the religion and its doctrines “[r]ather than trying to peer into the depths of a man’s soul” (p. 95). Leiter suggests that these evidentiary difficulties will lead to an inequality problem because some secular objections will be difficult to prove (p. 97).

Leiter explains that this concern is not an absolute bar to broad conscience protections. He explains that it is “possible” to develop a system that treats religious and secular conscience equally, such that his concern “is not *necessarily* fatal” (p. 99). Whether any system functions well enough to survive this objection “will entail a judgment about matters of degree” (p. 99).

There are good reasons to believe that a system can be worked out to assuage Leiter’s concerns in this regard. First, even in expressly religious exemption cases, the court’s task is actually quite focused on the claimant’s individual beliefs. While texts and doctrines can be relevant, the ultimate question for the court is always whether the particular believer is engaged in a sincere exercise of religion.⁵³ Courts cannot decide whether religious and analogous secular claims are true, but they can decide whether the claimant truly holds the beliefs she says she does. Thus, even for religious objectors, the courts really must “peer into the depths of a man’s soul” (p. 95) at least far enough to determine whether he is acting on a sincere religious belief.

⁵³ The classic example of this principle is *Thomas v. Review Board*, 450 U.S. 707 (1981). When Thomas, a Jehovah’s Witness, sought unemployment benefits after refusing to work in a department that manufactured tank turrets, the state supreme court rejected his claim, in part because of testimony from other Jehovah’s Witnesses that contradicted Thomas’s stated beliefs. *Id.* at 715. The Supreme Court reversed, finding that “it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.” *Id.* at 716. Yet the Court emphasized the important part of the analysis for courts: to determine whether Thomas acted “because of an honest conviction that such work was forbidden by his religion.” *Id.* In other words, even in the religious liberty context, courts must “peer into the depths” (p. 95) in order to determine whether the claimant is acting on an honest and sincerely held belief.

In this regard, the secular conscientious objector would be quite similarly situated. In both religious and secular exemption cases, the question would be the same: is the person asserting a sincere claim of conscience? This inquiry is actually a familiar one for secular objectors in some contexts, including conscientious objection to military service.⁵⁴

More fundamentally, the concern about having to “peer into the depths of a man’s soul” diminishes when one considers that courts engage in that kind of analysis about sincerity and mental state quite regularly, even outside the realm of conscientious objections. It is not clear why determining whether someone has acted based on a sincere conscientious belief is any different from determining, for example, whether an employer fired an employee because of racist, or anti-Semitic, or homophobic beliefs rather than concerns about the employee’s competence. The same analysis applies to fraud prosecutions or the application of any law that has a subjective intent element. In each case, the finder of fact needs to “peer into the depths” of a person’s soul to determine why an action was taken and what beliefs prompted the action.

For these reasons, the proposed concerns about unadministrability do not seem sufficient to overcome Leiter’s strong arguments for protecting atheist conscientious objectors as part of a broad live-and-let-live approach to life in a pluralistic and tolerant society.

3. *Leiter’s Moral Argument that Exemptions Are Burdensome and Harmful Is Rarely True and Is Adequately Addressed in Exemption Regimes.* — To these two practical objections, Leiter adds a moral one: providing exemptions for either religious or secular conscientious objectors “is a morally objectionable injury to the general welfare” (p. 99). Furthermore, exemptions can “impose burdens on those who have no claim of exemption” (p. 99).

There is some truth to these claims. For example, in the military draft scenario, it is presumably true that one person’s refusal to fight will necessarily result in the government drafting the next person in line instead. And it is at least conceivable that there would be situa-

⁵⁴ See *supra* note 39 and accompanying text. Furthermore, as the military context demonstrates, it is often possible to check the sincerity of a claim of secular conscience. For example, the lower court opinion in *United States v. Seeger* suggests that the draft board could have found Seeger sincere based on a wide variety of evidence, including his multiple written submissions, citations to philosophers, personal interviews, and interviews with his friends, teachers, and employers. See *United States v. Seeger*, 326 F.2d 846, 848–49 (2d Cir. 1964). Although the Department of Justice ultimately advised against allowing Seeger an exemption, the DOJ hearing officer found that Seeger was, in fact, asserting a sincere conscientious objection “based upon his individual training and belief, both of which include[d] research in religious and cultural fields.” *Id.* at 849 (quoting Department of Justice report).

tions in which the nation needs every able-bodied person to fight, such that an exemption seriously endangers the common good.

Two responses to this problem, however, reveal that the truth of these claims is not nearly enough to justify doing away with exemptions. The first is to note that American society has long judged exemptions from military service to be in the common good. That is, the Constitution has not forced exemptions on Congress or the states; instead, the elected representatives of many different generations of Americans have willingly granted them. One very plausible explanation for this phenomenon is that the sovereign people simply believed the common good was *better* served by granting exemptions than by denying them. This explanation suggests that Leiter is simply wrong to assume that burden-shifting exemptions are necessarily injurious to the general welfare. If a time arrives when the exemptions do threaten the common good, presumably legislatures will no longer offer them.

What of the burden that the exemption imposes on the nonexempt person who is then forced to fight? Here, Leiter is assuredly right that there is a very heavy burden imposed on the nonexempt person. But Leiter's military service example stands in stark contrast to most exemptions cases, which impose relatively slight burdens on nonexempt parties. For example, Leiter raises the example of a vegan prisoner who has deeply held moral objections to eating animal products and seeks a dietary exemption (p. 97). Such a request may result in a slight increase in costs but seems unlikely to impose significant burdens on anyone.⁵⁵ Requests for the ability to observe a particular Sabbath or other holy day, to be excused from participation in abortions, or not to serve on a jury that might impose the death penalty likewise seem to impose fairly slight burdens on nonobjectors, given that the objector can work other days, participate in other procedures, and serve on other juries. Most exemption requests are of this nature and therefore impose little to no burden on others.

Consider an exemption request that, a decade ago, may have appeared to impose real burdens on third parties: a pharmacist's desire to be exempt from selling emergency contraception because doing so would violate his religion. The claim raised by opponents was that such exemptions interfered with women's right to access the drugs. This concern prompted two states (Washington and Illinois) to issue regulations purporting to force religious objectors to dispense the drugs. Yet when pharmacists and pharmacies seeking exemptions

⁵⁵ Certainly our prison systems have learned that they can provide kosher meals without significant burdens, and many have now voluntarily adopted that practice. *See, e.g.,* Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 794–95 (5th Cir. 2012) (noting that refusing to provide kosher meals would impose a substantial burden on an inmate's religion, but that the state "has been offering kosher meals to prisoners for more than two years," *id.* at 794).

challenged these regulations, it turned out that the claimed burden on third parties was essentially nonexistent. In each case, the state had to admit that it was not aware of a single situation in which a religious objection had stopped an actual patient from accessing emergency contraception.⁵⁶ Moreover, the states also acknowledged that they would allow pharmacies not to sell the drugs for any number of reasons *other than* religious objections.⁵⁷ When put to the test, neither state could prove that the claimed third-party harm had manifested in any significant way. This makes sense, given that the drugs are available in a market full of willing distributors, by phone and internet and through government programs designed to increase availability. The claimed need to force *every* pharmacist either to dispense the drugs or to lose his pharmacy license could not be supported.

These examples undermine the broad argument that exemptions harm the public welfare. The fact that exemptions generally do not harm the public welfare presumably explains why legislatures frequently grant them. And in the occasional case where a claimed exemption would actually impair some compelling public interest, virtu-

⁵⁶ See, e.g., *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, 2011 WL 1338081, at *3-4 (Ill. Cir. Ct. Apr. 5, 2011) (“Even as to emergency contraception, the Court heard no evidence of a single person who ever was unable to obtain emergency contraception because of a religious objection. . . . Nor did the government provide any evidence that anyone was having difficulties finding willing sellers of over-the-counter Plan B, either at pharmacies or over the internet.”), *aff’d in part as modified, rev’d in part sub nom.* *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

The trial court order in *Morr-Fitz* was affirmed in part and reversed in part by the state’s intermediate appellate court, in an opinion finding that plaintiff pharmacists and pharmacies could receive complete protection under the state’s Conscience Act, obviating any need to address state Religious Freedom Restoration Act or federal First Amendment arguments. *Morr-Fitz*, 976 N.E.2d at 1171-72, 1176. The appellate court did not call into question the trial court’s factual findings, *see id.* at 1170, and the state ultimately chose not to appeal to the state supreme court, ending the case and leaving a permanent injunction in place allowing the pharmacists to continue practicing without selling the drugs in question, *see id.* at 1176. A federal court in Washington made similar factual findings. *See Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 946-47 (W.D. Wash. 2012) (“[T]here is no evidence that any of Plaintiffs’ customers have ever been unable to obtain timely access to emergency contraceptives or any other drug.” *Id.* at 946. “Board witnesses confirmed that there was no problem of access to Plan B or any other drug, either before or after the rulemaking process.” *Id.* at 947.). Disclosure: I helped represent the pharmacies and pharmacists in both cases.

⁵⁷ See, e.g., *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1199 (W.D. Wash. 2012) (“The rules are not at all narrowly tailored; they are instead riddled with secular exemptions that undermine their stated goal of increasing patient access to all medications. The rules operate primarily to force (some) religious objectors to dispense plan B, while permitting other pharmacies to refrain from dispensing other medications for virtually any reason.”); *Morr-Fitz*, 2011 WL 1338081, at *6-7 (“The Rule excuses compliance for a host of ‘common sense business’ reasons, but not for religious reasons. And the variance process is, by the government’s admission, a system of individualized governmental assessments that is available for non-religious reasons, but not for religious ones, even though the government acknowledged that the proximity of willing competitors nearby Plaintiffs’ pharmacies made any health-related impact of their religious constraints unlikely.”).

ally all exemption regimes would allow the government to argue that the public interest requires denying the exemption. Such a nuanced approach allows society to *generally* exempt conscientious objectors from many laws while still reserving the power to refuse an exemption in the rare case where there is a compelling reason to do so.

* * *

For these reasons, Leiter's arguments against including protections for secular conscience cannot overcome the strong moral case he makes early in the book for protecting conscience broadly. Conscience-based exemptions demonstrably do not create anarchy, are administrable, and generally do not injure the general welfare or impose significant burdens that society cannot work around.

IV. CONCLUSION: THE DURABILITY OF RELIGIOUS EXEMPTIONS

The American practice of granting religious exemptions has proven remarkably durable. That durability in part reflects the premise underlying both the First Amendment and our religious freedom statutes: religion is special, and it is particularly important for the government to avoid interfering with it. But religious exemptions also fare quite well when considered alongside purely secular claims of conscience, even if one assumes that religion is *not* special at all but is merely one of many possible sources free people might consult in forming their deeply held beliefs about the moral limits on their own conduct.

None of this should be surprising. There will be times when even a tolerant and pluralistic society will need to force religious people to violate their beliefs to pursue some particularly important goal. Those situations tend to be few and far between, and when they occur, an exemption regime is capable of addressing them.⁵⁸ In the main, however, liberal governments usually can and should avoid forcing people to violate their deeply held moral beliefs about their own actions.

If a claimed equivalence between secular and religious beliefs cannot threaten the practice of granting exemptions, what might? Leiter suggests the answer: an argument that religious conscience is not merely equivalent to secular conscience, but rather that all "religious belief per se deserves disrespect (e.g., intolerance)" (p. 91). As discussed above in section II.C, Koppelman supplies strong reasons to reject such an argument (pp. 120–24). And even Leiter agrees that this logic would lead to a "pernicious conclusion" that forms "no part of the ar-

⁵⁸ See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2006) (noting that government need not provide exemptions when it can show that denial of an exemption is the least restrictive means of pursuing a compelling interest).

gument of the book” (p. 91). Unless and until the American system adopts such an aggressively negative approach to religious diversity — which is squarely foreclosed by current doctrine⁵⁹ — the nation’s long embrace of religious exemptions is likely to persist and thrive.

⁵⁹ See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (noting that governments may not regulate “acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display”).