PROPHYLACTIC FREE EXERCISE: THE FIRST AMENDMENT AND RELIGION IN A POST-KENNEDY WORLD

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INTRODUCTION

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission,*[1] the Supreme Court had the chance to resolve the building tension between the equality principle embodied in anti-discrimination laws and the First Amendment's guarantee of free exercise.[2] In that case, a cake maker refused to make a cake for a same-sex couple's wedding, defying a Colorado civil-rights law that required him to do so while invoking his freedom of conscience as a religious believer.[3] Do one's deeply believed biblical convictions excuse one from compliance with neutral and generally applicable laws?

The Court, per Justice Kennedy, avoided the question.[4] Instead, it wagged its finger at the Colorado Civil Rights Commission and gave it a stern talking-to about impartiality and respect, holding merely that *in this case*, the state had been partial in its dealings with the cake maker.[5]

Justice Kennedy was able to get some of the Court's more liberal justices to sign on to his opinion (albeit with some reservations).[6] It seems safe to say, when one considers the concurring *Masterpiece*

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1 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

2 *See id.* at 1723, 1726.

3 *See id.* at 1723, 1725–26.

4 *See id.* at 1723–24. ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here.").

5 *See id.* at 1729–31.

6 *See id.* at 1732–34 (Kagan, J., concurring, joined by Breyer, J.).

Cakeshop opinions of Justices Gorsuch[7] and Thomas,[8] together with the writings of the Chief Justice[9] and Justice Alito[10] in other cases, that Justice Kennedy *caused* the result (or the non-result, as it were) in the case. For reasons that will be fleshed out more thoroughly below, had Justice Kennedy not been on the Court (and had a more socially conservative jurist like Justice Brett Kavanaugh been in his place), the Court would likely have decided more broadly that free exercise trumps any generally applicable obligation under a mere state statute.[11]

Part I of this article examines the drift, in free exercise jurisprudence, from the protection of affirmative, active, kinetic religiosity (things like expressing belief, praying, gathering for worship services, participating in rituals and sacraments and rites, and so forth) to the protection of beliefs that conflict with the strictures of generally applicable and seemingly even-handed laws—even laws that simply require state neutrality as to religion.[12] I call this the drift from *dynamic* free exercise to *prophylactic* free exercise; under this emerging view (in a historical sense, reemerging), if I am a believer, then I am not just *free to* do what I please in my religious life, but also *free from* the application of any law that might cause me angst because of my religious beliefs.

Part II explores Justice Gorsuch's concurring opinion in *Masterpiece Cakeshop*, which seems to have been laid as a foundation for the Court's post-Kennedy doctrine as to this tension between secular laws and free exercise rights. Part III suggests that, in the new paradigm Justice Gorsuch presages, where belief will be of a higher constitutional rank than non-belief, those who now characterize themselves as non-believers might wish to cast themselves as believers instead—not "believers" in the sense of adhering to sectarian dogmas, but in the sense of *having opinions*

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[7] *See id*. at 1734–40 (Gorsuch, J., concurring, joined by Alito, J.).

[8] *See id*. at 1740–48 (Thomas, J., concurring, joined by Gorsuch, J.).

[9] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (showing that the Court was more likely to deem a legislative provision unconstitutional due to its targeting of a group based on their status as a religious organization than to find that the same generally applicable law applies to that organization).

[10] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762, 2785 (2014) (finding that the Religious Freedom and Restoration Act precludes legislation that limits business' right not to fund certain forms of contraception based on religious beliefs regardless).

[11] *See infra* notes 48–54 and accompanying text.

[12] *See infra* notes 21–25 and accompanying text; *see also Trinity Lutheran*, 137 S. Ct. at 2024 (finding a state policy denying a qualified religious organization a public benefit solely because of its religious character to be a violation of the Free Exercise Clause despite such a policy being generally applicable and religiously neutral).

and ideas about religion, spiritual matters, and how the world works.[13] The new Supreme Court majority will likely hold that because the First Amendment protects beliefs and the expression of beliefs, it therefore has no application to the absence of beliefs or their expression—to mere attitudes or disbelief systems. It would be harder, on the other hand, for the Court to ignore arguments that are framed to set up a contest between or among competing *beliefs about religion*, all of which implicate the First Amendment. Part III therefore proposes a new vocabulary for non-adherents in the free-exercise cases to come: a vocabulary that does not passively deny the truth of perceived falsehoods, but rather assertively expresses those beliefs about religion that may be held even by a secularist.

I. FROM DYNAMIC TO PROPHYLACTIC FREE EXERCISE

There are two religion clauses in the Constitution.[14] The first is the Establishment Clause, which is widely understood as enjoining governmental entanglement with religion,[15] endorsement of religion,[16] or coercion.[17] According to the Supreme Court, the principle undergirding the Establishment Clause is neutrality: the government may not favor religion over non-religion, non-religion over religion, or one religion over another.[18]

The second is the Free Exercise Clause, which is also understood,

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[13] *See infra* notes 145–49 and accompanying text. I am fully aware of how distasteful this may be to some. *See, e.g.*, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 10–11 (2007) ("And yet—the believers still claim to know! Not just to know, but to know *everything*. Not just to know that god exists, and that he created and supervised the whole enterprise, but also to know what 'he' demands of us—from our diet to our observance to our sexual morality. In other words, in a vast and complicated discussion where we know more and more about less and less, yet can still hope for some enlightenment as we proceed, one faction—itself composed of mutually warring factions—has the sheer arrogance to tell us that we already have all the essential information we need. Such stupidity, combined with such pride, should be enough on its own to exclude 'belief' from the debate"). I do not propose this tack as a prescription for the debate about religion in philosophy or politics, and certainly not for all time, even in the law. I simply propose it as a new vocabulary for *litigating free-exercise cases* before *the present iteration of the Supreme Court*.

[14] U.S. CONST. amend. I.

[15] *See* Mitchell v. Helms, 530 U.S. 793, 807 (2000) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

[16] *See* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citing Engel v. Vitale, 370 U.S. 421, 436 (1962)).

[17] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[18] See Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S 440, 445–51 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107–08, 114 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–11 (1976)).

as a matter of the political philosophy prevailing at the time the Constitution's drafting, as requiring the government to be neutral as to religion—as to its *existence* and its *exercise* in the lives of citizens: "[The] history [of the union of church and state] prompted John Locke to urge toleration and stress the necessity of distinguishing 'the business of civil government from that of religion' and establishing clear boundaries between them."[19]

The two clauses, quite famously, tend to come into conflict, as when a public school tries to maintain government neutrality by stopping a student from intoning a sectarian prayer during a commencement speech.[20] When maintaining governmental neutrality is at odds with abiding religious practices, the Court has naturally sought to discover which takes precedence.[21] There was a time when the Supreme Court seemed to suggest a broad exemption for believers offended by the strictures of secular laws: courts were to exempt religious adherents from those strictures when a belief and a stricture were in alleged conflict unless the government had some interest "of the highest order" in play.[22] The Court then lurched in the other direction, holding that one's religious beliefs do not exempt one from complying with a generally applicable and even-handed law.[23] Now, however, the Court is moving back toward the "highest order" standard: a neutral law cannot be enforced against a religious objector unless the government has some compelling interest in enforcing compliance.[24]

Under this view, not only is the government prohibited from *interfering* in what a religious adherent *does*; it is required to *respect and abide* what the adherent *believes*, even when the adherent's belief runs afoul of a seemingly neutral law.[25]

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[19] Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 4 (D.C. Cir. 2015) (Brown, J., dissenting) (quoting John Locke, *A Letter Concerning Toleration*, *reprinted in* 5 THE WORKS OF JOHN LOCKE 5, 9 (12th ed. 1824)).

[20] *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 676–77 (1979).

[21] *See id.* at 673–74.

[22] *See id.* at 674.

[23] *See Emp't Div.*, 494 U.S. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[24] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Thomas, J., concurring, joined by Gorsuch, J.).

[25] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1735–36 (2018) (Gorsuch., J., concurring).

A. Dynamic Free Exercise

There seems some confusion about the word *exercise*. Exercise means "the act of bringing into play or realizing in action."[26] It is "[a]n activity carried out for a specific purpose."[27] To exercise something is to engage in "the use of something."[28] "If you exercise something such as your authority, your rights, or a good quality, you use it or put it into effect."[29] The exercise of something cannot, by definition (it would seem), be passive or inert. The exercise of something is, rather, active and kinetic—it is dynamic. The same is true of a number of the freedoms, even outside the First Amendment, guaranteed by the Bill of Rights[30]: in the constitutional sense, we are free *to*, not free *from*, except in the sense that we're free *from* the government's interference when we choose *to do* something that we have a right *to do*.[31] The free *exercise* of religion, then, seems to involve a right to practice one's religion and to express it: to pray, to celebrate, to worship, and to indulge whatever ceremonies and rites one sees fit to indulge.[32]

The Court seemed to take this view, for example, in *Church of Lukumi Babalu Aye v. City of Hialeah*.[33] There, the issue was whether a city could constitutionally target animal sacrifices that were undertaken as part of religious rituals associated with Santeria.[34] The city's ordinance did not apply across the board; although adherents to Santeria were not allowed to kill chickens as part of any animal sacrifice, others in the city were allowed to kill chickens for other reasons[35] (when I teach this to law students, I call it "the KFC exception"; one wonders whether a chicken with its head

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[26] *Exercise*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/exercise (last visited Sept. 30, 2018).

[27] *Exercise*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/exercise (last visited Sept. 30, 2018).

[28] *Exercise*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/exercise (last visited Sept. 30, 2018).

[29] *Exercise*, COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/exercise (last visited Sept. 30, 2018).

[30] U.S. Const. amends. I–X.

[31] *See* Brendan T. Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It's Not About Individual Rights, But State Power and the Social Compact,* 75 NAT'L LAW. GUILD REV. 1, 4 (2018) ("Constitutional rights. . . are there to restrain governmental intrusions into their exercise . . .").

[32] *Free Exercise Clause*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/free_exerciseclause (last visited October 1, 2018).

[33] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[34] *See id.* at 527.

[35] *Id.* at 544.

on the chopping block really cares one way or the other). This being so, the Court, per Justice Kennedy, applied strict judicial scrutiny[36] and struck down the ordinance as applied against Santeria.[37]

The Court noted, "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[38] As Justice Kennedy emphasized, animal sacrifice, unlike merely inert religious belief, is a ritual—an overt and active expression of religious belief undertaken in the context of worship and prayer.[39] This is consistent with the notion that the First Amendment protects dynamic free exercise; there is nothing passive or dormant about it.

In *Lukumi*, the Court, helpfully, surveyed other cases involving the application of the *Free Exercise Clause* under then-prevailing norms:

> At a minimum, the protections of the *Free Exercise Clause* pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the *Free Exercise Clause*." . . . In *McDaniel v. Paty*,[40] for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of . . . religious status." On the same principle, in *Fowler v. Rhode Island*,[41] we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.[42]

Under this view, mere religious belief is only protected under the *Free Exercise Clause* to the extent that it is purposefully targeted by

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[36] *Id.* at 531–32 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)).

[37] *Lukumi*, 508 U.S. at 547.

[38] *Id.* at 531 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)).

[39] *Lukumi*, 508 U.S. at 531 (quoting Frazee v. Ill. Dept. of Emp't Sec., 489 U.S. 829, 834 n.2 (1989)) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981)).

[40] McDaniel v. Paty, 435 U.S. 618 (1978).

[41] Fowler v. Rhode Island, 345 U.S. 67 (1953).

[42] *Lukumi*, 508 U.S. at 532–33 (first quoting Bowen v. Roy, 476 U.S. 693, 703 (1986); then quoting *Emp't Div.*, 494 U.S. at 877)).

the government. Absent that kind of discrimination, the clause only applies to "conduct . . . undertaken for religious reasons."[43] The factual examples, too, are instructive. They involve the overt targeting of religious beliefs and religious practices: the act of being a clergy member or the act of preaching one's tenets.[44] Again, the First Amendment was understood as protecting *dynamic* free exercise.

The Free Exercise Clause, when construed this way, does not excuse one's participation in the social compact, or civic life, in conformity with neutral and even-handed laws. So the Court (per Justice Scalia, which might surprise some) had this to say in *Employment Division v. Smith*, a case dealing with whether a state could prohibit the use of peyote:

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.
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> [The religious objectors] in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or

[43] *Lukumi*, 508 U.S. at 532.

[44] *See McDaniel*, 435 U.S. at 621; *Fowler*, 345 U.S. at 67.

> requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.[45]

Or, as Justice Frankfurter once put it:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[46]

B. The Trend Toward Prophylactic Free Exercise

But alas, Justice Scalia, the author of *Employment Division v. Smith*, is no longer on the Supreme Court; he was replaced by Justice Gorsuch,[47] who has a different view of things.[48] And now Justice Kennedy, the author of *Lukumi*, has left the Court as well, bequeathing his seat to President Trump, who picked Justice Brett Kavanaugh, a jurist firmly of a mind with Chief Justice Roberts[49] and

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[45] *Emp't Div.*, 494 U.S. at 877–78.

[46] *Id.* at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

[47] Mark Grabowski, *Give Gorsuch a 21st Century Litmus Test*, 35 YALE J. ON REG. ONLINE 1 (2017).

[48] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

[49] *See generally* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (holding that the Missouri Department of Natural Resources excluding the Trinity Lutheran church from public benefit solely because it is a church is a violation of the First Amendment).

Justices Alito,[50] Gorsuch, and Thomas[51]—the four more socially conservative justices already on the Court.[52] That makes five[53]: a new majority for the proposition that free exercise can be inert and passive, and that the First Amendment's promise of religious freedom is prophylactic.

Although this trend is now likely to accelerate, it has been developing for several years, sometimes with Justice Kennedy's grudging acquiescence.[54] In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court considered the constitutionality of a Missouri state constitutional provision that forbade the state from providing public benefits to religiously affiliated organizations.[55] Trinity Lutheran Church applied to participate in a state-run scrap-tire program that offered state grants to non-profit organizations that repaved surfaces with surfacing made from recycled tires.[56] The state's argument seemed compelling, but only if one sees free exercise as dynamic rather than prophylactic:

> [Missouri] contends that merely declining to extend funds to Trinity Lutheran does not prohibit the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says [Missouri], its policy is unlike the ordinances struck down in Lukumi, which outlawed rituals central to Santeria. Here the [state] has simply declined to allocate to Trinity Lutheran a subsidy the State had no

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[50] *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) ("The contraceptive mandate [requiring employers with 50 or more employees to offer FDA approved contraceptives among other procedures as part of the Affordable Care Act of 2010], as applied to closely held corporations, violates [Religious Freedom Restoration Act of 1993]. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised.").

[51] *See Trinity Lutheran Church*, 137 S. Ct. at 2025 (Thomas, J., concurring, joined by Gorsuch, J.).

[52] *See* Jasmine C. Lee et al., *Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/interactive/2018/07/09/us/politics/supreme-court-kavanaugh-justice-conservative.html.

[53] This is why the optimism of some commentators that Justice Kennedy would stand in the way of an ideological lurch in the Court's interpretation of the religion clauses, while that optimism was somewhat well-grounded as long as Justice Kennedy remained on the Court, is no longer operative. *See, e.g.*, Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 17–18 (2016) ("Justice Kennedy's thoughts on the issue of the interplay of religious liberty—as reflected in [federal statutes] and the First Amendment—and antidiscrimination laws are important given his central role in the Court's pro-LGBT rights jurisprudence. Thus, if and when a case presenting the Antidiscrimination Question reaches the Court, all eyes will be on Justice Kennedy.").

[54] *See, e.g.*, *Burwell*, 134 S. Ct. at 2785 (Kennedy J., concurring).

[55] *See Trinity Lutheran Church*, 137 S. Ct. at 2017.

[56] *See id.*

> obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the [state] is free to heed the State's antiestablishment objection to providing funds directly to a church.[57]

But Chief Justice Roberts disagreed:

> [T]he . . . policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church . . . . But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way . . . the State has punished the free exercise of religion: "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."[58]

Chief Justice Roberts went so far as to suggest that the Missouri law, which required only that the state not aid religion, had the effect of requiring a church "to renounce its religious character"[59]—because the state would not provide a grant to a church that wished to repave its playground with tar derived from used tires.[60] This is obviously a nod to the prophylactic view of free exercise: even when a government simply refrains from providing otherwise-available aid to a sectarian church, it will be deemed to have interfered with the free exercise of religion, regardless of a state's interest in avoiding establishment.[61]

The Court, having found that Missouri's abstention from aiding religious organizations amounted to discrimination against religious belief, resurrected the old "highest order" standard: "only a state interest 'of the highest order' can justify the [state's] discriminatory policy."[62] Justices Thomas and Gorsuch endorsed the reemergence of

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[57] *Id.* at 2022.
[58] *Id.* at 2021–22 (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978)).
[59] *Trinity Lutheran Church*, 137 S. Ct. at 2024.
[60] *See id.* at 2017.
[61] *See id.* at 2024.
[62] *Id.* (quoting *McDaniel*, 435 U.S. at 628).

this standard,[63] but fretted that a footnote in the Court's opinion could be construed as limiting the reach of the new standard only to "playground resurfacing" cases.[64]

As Justice Sotomayor put it in her dissent:

> This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.[65]

In Justice Sotomayor's view, as the new majority applies prophylactic free exercise, religious adherents will be shielded even from the insult of state neutrality.[66]

The Court has indulged the same reasoning in applying a federal statute that purports to vindicate the free exercise of religion.[67] In *Burwell v. Hobby Lobby*, the Court considered the Religious Freedom Restoration Act (RFRA) of 1993[68], which, like the First Amendment itself, requires judicial intervention when a government "substantially burdens the exercise of religion."[69] Substantively, RFRA differs from the First Amendment in that it requires the application of strict judicial scrutiny even when a generally applicable and even-handed law interferes with the free exercise of religion,[70] whereas the Court has interpreted the First Amendment as requiring deference to a neutral and generally applicable law that incidentally touches on religious sensibilities.[71] (It is interesting that the Court tolerated a congressional act that purported to change a judicial, constitutional rule by legislative fiat—a practice that is

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[63] *See Trinity Lutheran Church*, 137 S. Ct. at 2025 (Thomas, J., concurring in part, joined by Gorsuch, J.).

[64] *Id.* at 2026 (Gorsuch, J., concurring in part).

[65] *Id.* at 2027 (Sotomayor, J., dissenting).

[66] *See id.* at 2028–41 (Sotomayor, J., dissenting).

[67] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

[68] 42 U.S.C. § 20000bb (2012).

[69] *Burwell,* 134 S. Ct. at 2759.

[70] *See id.*

[71] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)).

generally eschewed).[72] Be that as it may, the threshold question is the same under either RFRA or the First Amendment: neither triggers judicial intervention absent a burden *on free exercise*.[73]

Addressing whether the Affordable Care Act (ACA)[74] could, without running afoul of RFRA, require employers to provide health-insurance policies for employees that, in turn, had to cover contraception, the Court first held that a closely held corporation is a "person" entitled to the free exercise of religion.[75] The Court further held that the ACA's mandatory-contraceptive-coverage requirement did burden free exercise—for two reasons.[76] First, the Court stated that the plaintiffs "ha[d] religious reasons for providing health-insurance coverage for their employees."[77] Second,

> The [challengers] believe that providing the coverage demanded by the . . . regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[78]

According to the Court, then, the provision of employment benefits is a religious exercise (this seems somewhat at odds with "originalism").[79] And clearly, free exercise does not just involve one's

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[72] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) (noting that deciding cases and controversies is an activity reserved for the judiciary branch) (citing THE FEDERALIST NO. 48 (James Madison)); United States v. Klein, 80 U.S. 128, 147–48 (1872) (holding that Congress does not have authority to change the executive power of pardon or direct the Court on how decide a case); Marbury v. Madison, 5 U.S. 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to the particular cases, must be of necessity expound and interpret that rule.").

[73] *See Burwell,* 134 S. Ct. at 2792 (Ginsburg, J., dissenting) (citing Rasul v. Myers, 563 F.3d 527, 535 (D.C. Cir. 2009)).

[74] Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as 42 U.S.C. § 18001 (2012)).

[75] *See Burwell*, 134 S. Ct. at 2769.

[76] *See id.* at 2775–78.

[77] *Id.* at 2776.

[78] *Id.* at 2778.

[79] *See generally*, Brendan Beery, *When Originalism Attacks: How Justice Scalia's Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant*, 59 DRAKE L. REV. 1047 (2011) (explaining originalism's application to constitutional interpretation).

own dynamic participation in religious traditions and rituals or the active expression of one's religious tenets, but also judicial protection against psychic harm suffered by adherents because of the unreligious choices of third parties.[80] "In a decision of startling breadth, the Court [held] that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[81]

Justice Kennedy, although he concurred, was discernably disquieted over the potential reach of the decision, claiming (hoping?) that the opinion "does not have the breadth and sweep ascribed to it by the respectful and powerful dissent,"[82] and stating, as an aside, that free exercise means "the right to express . . .beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult."[83]

But again, Justice Kennedy is no longer on the Court, and his replacement, Justice Brett Kavanaugh, seems not to share Justice Kennedy's reservations about the drift toward prophylactic free exercise.[84] In *Priests for Life v. United States Department of Health and Human Services*, (a case much like *Hobby Lobby*), the U.S. Court of Appeals for the District of Columbia Circuit again took up the question whether the ACA abridged the free-exercise rights of believers—but this time, not by requiring employers to provide health-insurance coverage that would provide access to contraceptives, "including certain methods of birth control that, some believe, operate as abortifacients and result in the destruction of embryos,"[85] but even by requiring that an employer wishing to opt out of the mandatory-contraceptive-care provision of the law do so by filing a form.[86] Like the Supreme Court in *Hobby Lobby*, the circuit court was applying RFRA,[87] not the Free Exercise Clause of the First Amendment, but again, both RFRA protections and First-Amendment protections are triggered only by governmental

[80] *See Burwell*, 134 S. Ct. at 2764–65.
[81] *Id.* at 2787 (Ginsburg, J., dissenting).
[82] *Id.* at 2785 (Kennedy, J., concurring).
[83] *Id.*
[84] *See* Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 2 (D.C. Cir. 2015).
[85] *Id.* at 14 (Kavanaugh, J., dissenting).
[86] *See id.* at 15.
[87] *See id.* at 5 (Brown, J., dissenting).

meddling in "free exercise."[88]

The plaintiffs in *Priests for Life* argued that having to return the form to opt out of the ACA, because it required the employer to take affirmative steps on the basis of the employer's religious convictions, was sufficiently burdensome to give rise to a free-exercise claim:

> Many prominent religious organizations around the country—including the plaintiffs in this case—have bitterly objected to this scheme. They complain that submitting the required form contravenes their religious beliefs because doing so, in their view, makes them complicit in providing coverage for contraceptives, including some that they believe operate as abortifacients. They say that the significant monetary penalty for failure to submit the form constitutes a substantial burden on their exercise of religion. They contend, moreover, that the Government has less restrictive ways of ensuring that the employees of the religious organizations have access to contraception without making the organizations complicit in the scheme in this way.[89]

Justice Kavanaugh agreed: "[U]nder *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties."[90] Under this reasoning, free exercise is decidedly prophylactic: it is a substantial burden on the exercise of religion to cause a religious believer the pique of having to submit to a bureaucratic certification that would allow the believer to opt out of having to comply with a neutral and even-handed law that would, allegedly, entangle the believer in the areligious private choice of an employee to access contraceptives under an insurance policy written and administered by a third-party insurance carrier.[91]

If the Court adopts this view, then free exercise will not be about *practicing* one's religion anymore. We will likely soon reach the end

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[88] *See Burwell*, 134 S. Ct. at 2759, 2760.

[89] *Id.* at 15 (Kavanaugh, J., dissenting).

[90] *Id.*

[91] *See id.* at 19–21 (Kavanaugh, J., dissenting) (quoting Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs., 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., dissenting) (citing Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting); *Hobby Lobby*, 134 S. Ct. at 2759; Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting); *Hobby Lobby*, 134 S. Ct. at 2778; Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714–16 (1981)).

of the line for dynamic free exercise and move squarely into an age of prophylactic free-exercise.

II. UNDER PROPHYLACTIC FREE EXERCISE, WHO IS PROTECTED FROM WHOM?

When it comes to the relative constitutional ranks of belief versus nonbelief, the Court is trending toward a clear choice.[92] There is perhaps no better illustration of this than Justice Gorsuch's concurring opinion in *Masterpiece Cakeshop*; Justice Gorsuch began the substantive point of his concurrence by opining that the case of Jack Phillips, the cake maker who refused to make a cake for a same-sex couple, was on all fours with another case:

> Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief.[93]

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[92] *See* Tara Isabella Burton, *What Brett Kavanaugh's Past Decisions on Religious Liberty Mean for the Future of SCOTUS*, VOX (July 10, 2018), https://www.vox.com/2018/7/10/17553548/brett-kavanaugh-religious-liberty-scotus-supreme-court.

[93] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734–35 (2018)

Justice Gorsuch complained that the commission allowed for cake makers to have secular objections to religion-based anti-LGBT animus, but not for a religious cake maker to have an objection to a secular edict requiring equal treatment for LGBT Coloradans.[94]

In Justice Gorsuch's view, then, a baker who would not put a discriminatory message on a cake is, conceptually (and for constitutional purposes), the same as a baker who would not make a cake at all because he wished to discriminate.[95] Discrimination is not really discrimination if it is religion-based discrimination (then it is a constitutionally protected belief), but the secular insistence on non-discrimination *is* discrimination, because it is an areligious attitude that, when applied against a religious person, becomes an anti-religious preference.[96]

Suppose Mr. Jack had been a secular racist rather than a religious objector to same-sex marriage, and that he had asked bakers to write a racist epithet on a cake rather than an anti-same-sex-marriage message. In Justice Gorsuch's view, would the commission's acquiescence to the bakers' refusal to do so constitute *discrimination* for First-Amendment purposes? Would Justice Gorsuch say that a baker's refusal to write a racist epithet on a cake was *just like* Phillips's refusal to make a cake for a same-sex couple? It seems doubtful, because in this hypothetical, the customer's animus would not be grounded in religion, and presumably would not, in Justice Gorsuch's view, implicate constitutional protection.

To reframe this a bit, here was Justice Gorsuch's query: Why did the commission allow for a secular belief in non-discrimination but not a religious belief that requires discrimination?[97] According to Justice Gorsuch, the commission, a state actor, would have to be neutral as between the two.[98] (We might say that the problem was disallowing Mr. Jack's claim while vindicating the same-sex couple's claim against Phillips;[99] maybe if the commission had denied both

(Gorsuch, J., concurring).

[94] *See id.* at 1734.

[95] *See id.* at 1734 ("Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. . . . That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the *First Amendment* and cannot begin to satisfy strict scrutiny.").

[96] *See id.* at 1736.

[97] *See id.* at 1734 (Gorsuch, J., concurring). I note here than any reader who would say that I misuse the word discrimination because no belief can embody discriminatory animus when it is a religious belief would rather be making my point.

[98] *See id.* at 1736.

[99] *See id.* at 1734–35.

claims, it could have restored itself to what Justice Gorsuch would have considered a neutral posture).[100] If both claims were equal in constitutional weight, then so must have been the beliefs underlying each: in one case, a secular belief in non-discrimination, and in the other, a religious belief requiring discrimination. Justice Gorsuch wrote,

> Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class [under Colorado law—sexual orientation], then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it presumed that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable.[101]

So, according to Justice Gorsuch, disallowing one claim and allowing the other was itself discrimination, because both claims were conceptually, and, again, for all legal purposes, the same.[102] But this would not be so if the belief in the necessity of discriminating was not religious.

After all, a merely secular disposition toward discrimination would be inferior to a secular belief in equality (that must be so if Justice Gorsuch would agree that the former must yield to the latter in my secular-racist-customer hypothetical).[103] Certainly the Supreme

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[100] *See id.* at 1740 (Gorsuch, J., concurring); *see also* Julianne Belaga, Comment, *Now You See It, Now You Don't: The Impact of RFRA's Invalidation on Religious Tithes in Bankruptcy*, 14 BANK. DEV. J. 343, 369 (1998) (discussing how a bestowal of benefits on a religious individual may be allowed so long as the benefits provided to that person are the same as those afforded to all citizens, and those benefits are so removed from religious function that the state action can be defined as a neutral posture towards religion).

[101] *Masterpiece Cakeshop*, 138 S. Ct. at 1736.

[102] *See id.* at 1736.

[103] *See supra* Part II.

Court gave no weight to secular beliefs requiring discrimination in *Loving v. Virginia*[104] when that belief was weighed against the equality principle in the Fourteenth Amendment.[105] In *Loving*, to justify Virginia's anti-miscegenation law barring "interracial marriage," Virginia courts had cited the "legitimate purposes . . . 'to preserve the racial integrity of [the state's] citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' . . . ."[106] With those stated purposes in mind, the Court held, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[107] Overriding what? Overriding the equality principle, of course. So again, when a *secular* discriminatory belief is ranked against the equality principle (for constitutional purposes), the equality principle prevails. The two are not on the same plane.

But when religion is joined with the belief that discrimination is sanctioned or required—when it is not just a *secular attitude*—then we have a different matter. We have tethered a hot-air-balloon to an anvil, and now the discriminatory belief is lifted to the same plane as the equality principle, because that secular principle, embodied as it is in one constitutional amendment,[108] cannot outrank the free-exercise principle embodied in another.[109] The two (religion-based discrimination and the secular notion of equal treatment) only become equivalent when discriminatory animus is directed against a group that is biblically condemned[110]—based on the religiousness of the belief.[111] Since the discriminatory belief was inferior to the idea of equality until religion hoisted the two into equilibrium,[112] we see that religious belief is inherently of more value than secular attitudes—or what we might call religious non-belief.

So who is protected from whom? The religious believer is protected from the secular non-believer. That is the First-Amendment world we now occupy, and non-believers had best be ready to litigate within this framework—by making of themselves believers (in

[104] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944); McLaughlin v. Florida, 379 U.S. 184, 198 (1964)).
[105] *Loving*, 388 U.S. at 11.
[106] *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
[107] *Loving*, 388 U.S. at 11.
[108] *See* U.S. CONST. amend. XIV.
[109] *See* U.S. CONST. amend. I.
[110] *See Leviticus* 18:22.
[111] *See id.*
[112] *See* Velte, *supra* note 53, at 11–12.

something).[113]

The Court's elevation of belief over non-belief, and its drift from dynamic to prophylactic free exercise, seems synchronized with the shifting political tactics of what one scholar calls the Religious Right as to LGBT-rights issues:

> From the 1950s through the 1980s, the Religious Right regularly relied on a narrative that vilified "homosexuals" as pedophiles and child molesters and that pathologized homosexuality as a mental illness. Thus, the argument against LGBT civil rights was outwardly attacking: it was based on lashing out against LGBT people with blatant homophobic and antigay rhetoric based on personal qualities, characteristics, and conduct, rather than based on any qualities, characteristics, or conduct of those opposed to LGBT civil rights. This narrative was employed to create affirmatively anti-LGBT laws, such as bans on LGBT teachers in public schools, or to roll back civil rights protections for LGBT people. That narrative was supported by the force of constitutional law.[114]

And from a socio-political perspective, this anti-LGBT posture made sense:

> Like any cultural tradition[,] a dominant . . . culture must constantly be reproduced and sustained. For that reason, subcultural discourses or interpretations of reality represent "oppositional readings," deviant threats to the complex web of meanings enforced by the dominant culture. For the dominant culture to maintain its position, it must neutralize or subdue any such threats. . . . [T]he dominant culture can actively exclude and objectify the members of the subcultural group. With this . . . form of redefinition, the dominant group may acknowledge the differences of the subculture, but those differences now establish the inferiority of the subcultural group. In short, the dominant culture defines difference from itself as *inferiority*.[115]

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[113] *See infra* notes 117–20 and accompanying text.

[114] Velte, *supra* note 53, at 8–9.

[115] Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 854–55 (1996).

But there may have been a shift in rhetorical emphasis in the anti-LGBT movement:

> The Religious Right's outward-attacking narrative changed dramatically in the late 1990s and into the 2000s as more people came out as gay, lesbian, bisexual, or transgender and as the LGBT community experienced victories—legislatively, through judicial decree, and in the court of public opinion. Today, the tables have largely turned. Gone (mostly) are the days attacking the "other"—of denigrating and maligning gay, lesbian, bisexual, and transgender people based simply on their sexual orientation or gender identity. Overtly anti-LGBT rhetoric has become socially unacceptable and thus no longer "utterable." What was once an outwardly attacking anti-LGBT narrative has become an inwardly protective one that is couched in the narrative of "religious liberty." In short, the Religious Right has gone from attacker to victim in the national dialogue about LGBT equality.[116]

This is an interesting observation, and it may provide one explanation for the shift discussed in this article: if the Religious Right has gone from attacker to victim in its rhetoric and its political messaging, then so too must a sympathetic Court move from dynamic to prophylactic free exercise.

III. PROPOSING A NEW VOCABULARY IN THE AGE OF PROPHYLACTIC FREE EXERCISE

We are headed inexorably into an age of prophylactic free exercise: a paradigm under which belief, and especially the religious beliefs of the dominant religious tradition in the United States,[117] is of a manifestly higher constitutional rank than non-belief, or what we often call agnosticism.[118] The Court is likely to regard the First Amendment as protecting beliefs and the expression of beliefs; ideas and the expression of ideas—and to regard non-belief or agnosticism as the absence of ideas and the absence of expression, rendering the First Amendment entirely inapposite as to conscientious

[116] Velte, *supra* note 53, at 9.

[117] *See* Feldman, *supra* note 115, at 855 ("For most of the last two millennia, Christians have maintained a position of hegemonic domination in Western society . . .").

[118] *See id.* at 860–61.

predispositions or choices or activities that are framed as contrary to belief rather than *as belief*.

To cope with the shifting ideology on the Court, advocates for non-adherents to any religion should take care to develop a new vocabulary:

> [L]anguage looms as [a] . . . direct means of implementing power. As Michel Foucault says: "Discourse transmits and produces power." Our "distinct ways of talking about and interpreting events" constitute the shape of our very being-in-the-world. The conceptual distinctions and criteria of legitimation embedded in our discursive practices shape our understandings and perceptions of social events and reality. Hence, in this . . . way, language appears as a technique of power because it helps to produce and reproduce meaning and, thus, social reality.[119]

Language is power, and when it comes to litigating constitutional cases, nowhere is that power more crucially exercised than it is in framing the issue.[120] In conceding the discursive advantage to "believers" in the contest between belief and non-belief, non-believers will largely have lost the rhetorical battle before it has even begun.[121]

A. Beliefs, Attitudes, and Disbelief

Citing the work of a scholar named Milton Rokeach, Professor Linz Audain explains the importance of distinguishing between belief, attitude, and disbelief:

> Since Rokeach's model of dogmatism is premised on a model of the nature of beliefs, it is useful to focus on the distinction between attitudes and beliefs. That distinction is: while a belief is what "links an object to so some attribute," an "attitude refers to a person's favorable or unfavorable evaluation of [that] object . . . ." An attitude then, is either positive or negative, or exists along a "bipolar affective dimension," reflecting the net effect of several beliefs about a given object. Note then, that an attitude focuses on an object,

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[119] *Id.* at 850–51.

[120] *See* Beery, *supra* note 31, at 2–3.

[121] *See* Feldman, *supra* note 115, at 850–54; Velte, *supra* note 53, at 11–12.

> while a belief mediates between an object and an attribute. "Objects" and "attributes" refer to "any discriminable aspect of an individual's world." . . .
>
> . . . .
>
> With the preceding in mind, it is now possible to turn to a consideration of the relevant theoretical framework. That framework is, in essence, the psychological analysis of beliefs since, under Rokeach's analysis, intolerance or dogmatism is equivalent to a "closed system of beliefs". . . .
>
> Rokeach, in his original work, defined a "belief system" as consisting of "all the beliefs, sets, expectancies, or hypotheses, conscious and unconscious, that a person at a given time accepts as true of the world he lives in." A "disbelief system" was defined as consisting of a "series of subsystems . . . [of] the disbeliefs, sets, expectancies, conscious and unconscious, that . . . a person at a given time rejects as false."[122]

To illustrate, I will use my own experience as a fan of Bradley University's (my undergraduate alma mater's) basketball team. That experience has been, as sports-fan experiences go, disappointing if not tragic. I have grown accustomed to expecting that Bradley, no matter what team it is up against, will lose.[123] That is an attitude: as to the object *Bradley basketball team*, my attitude is pessimism, and this pessimism exists along a "bipolar affective dimension"[124]: in this relationship, there are only two aspects of my life at play—Bradley basketball and my own disposition toward it.

But then suppose I discover that Bradley is to play the Ramblers of Loyola University of Chicago (of recent Final-Four vintage[125]). Now there are more objects and attributes in play. Because my attitude about Bradley is pessimistic, and because my attitude about Loyola is that its basketball team is usually likely to win,[126] I

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[122] Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1082–1083 (1992).

[123] *See, e.g.*, *Bradley University 2015-2016 Men's Basketball Schedule*, BRADLEY BRAVES, https://bradleybraves.com/schedule.aspx?schedule=471 (last visited Sept. 30, 2018*); Bradley University 2016-2017 Men's Basketball Schedule*, BRADLEY BRAVES, https://bradleybraves.com/schedule.aspx?schedule=485 (last visited Sept. 30, 2018).

[124] Audain, *supra* note 122, at 1082.

[125] *See* Gene Wang & Jacob Bogage, *Ramble On: Loyala Chicago Beats Kansas State to Reach Final Four*, WASH. POST (Mar. 24, 2018), https://www.washingtonpost.com/news/sports/wp/2018/03/24/loyola-chicago-vs-kansas-state-ramblers-go-from-grass-roots-rebuild-to-elite-eight/?utm_term=.611f45c4d90d.

[126] *Id.*

disbelieve that Bradley will win the game; that is an idea that, at any given time, I am likely to regard as false.

As to what I believe—I *believe* that Loyola will win the game (or, one might say, that Bradley will lose). In this, I am applying an attribute (likely to win) to an object (Loyola) as it relates to another object (Bradley) and its own attribute (likely to lose).

This may be a mundane illustration, but it makes the point. And as applied to free-exercise claims before the emerging ideological majority on the Supreme Court, litigants had best avoid attitudes (mere dispositions in a bipolar construct involving only the individual and either her positive or negative appraisals of an object[127]) or disbelief systems, which reflect only those "expectancies" that an individual, at a given time, rejects as likely to be false.[128]

These variations on one's conception of human thought generally seem well-suited to explaining, at least to some extent, the emerging Supreme Court majority's view of when the First Amendment applies, who may invoke it, and who it protects from whom.[129] One might say that the Court sees the more dogmatic tenets of religious adherents as a belief system, whereas it sees skepticism, agnosticism, or even atheism as merely attitudes (a general disposition toward an object—religion—without any reference to an attribute against which it might be juxtaposed) or disbelief systems (relating only to the rejection of perceived falsehoods rather than any exposition as to what is accepted as true).[130]

The Court, under the emerging application of prophylactic free exercise, sees only an affirmative belief system as the proper beneficiary of First Amendment protections, and not mere attitudes or disbelief systems—and the Court therefore seeks to protect believers against non-believers. It goes almost without saying, then, that free-exercise protections may be invoked only in defense of some belief system by a believer, and not in defense of some disbelief system in favor of a non-believer.

As hopeless as this may seem for non-adherents, the framing of much agnostic thought as non-belief is conceptually unnecessary. There is a way to reframe the debate. A scholar named Iain T.

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[127] *See* Audain, *supra* note 122, at 1082.

[128] *Id.* at 1083.

[129] *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 571–72 (1995) (holding that the state court's order that an LGBT Irish-American group must be allowed to march in a parade infringed upon the parade sponsor's right to freedom of expression as the order requireed the sponsors to transform the meaning of their gathering).

[130] *See* Audain, *supra* note 122, at 1085–86.

Benson, in a context different than the one explored here, recently lamented:

> [P]eople discuss 'belief' as if it is limited to 'religion' and analyze the difficulty of defining 'religion' as if it somehow gives a free pass to atheist and agnostic believers and the often unnoticed or uncommented upon dominance of these positions in law and public policy. It is a quirk of our post Enlightenment age that the category of 'believer' is more or less reserved for religious believers *and likely to be unevaluated as akin to religion*, for all others. Since everyone is a believer in something, the tendency to analyze only religion and religious belief as if problems of definition do not apply to atheist and agnostic believers causes a series of significant problems.[131]

Indeed this is so. What has gotten lost in much of the Court's focus on belief, and its implicit insistence that only dogmatic belief is protected under the First Amendment,[132] is that secular notions about social issues can themselves be a certain kind of dogmatic belief, and that secularism is itself, when properly framed, a *belief about religion*.[133] Although people who describe themselves as atheistic or agnostic may be uncomfortable reframing their beliefs in this way, they may have no choice if they wish to appeal to a Court that will otherwise dismiss their concerns as outside the bounds of First-Amendment free exercise or even free expression.

So secularists should start to frame their beliefs as affirmative and assertive, not merely passive and agnostic. Because the Court has never conceptualized non-belief as belief, it so far has seen the believer-as-victim paradigm in religion cases as a one-way proposition; it casts religious dogmatists as the victims of secular overreach.[134] That is because the Court has never been forced to tangle with non-adherents as being believers themselves.[135] But non-

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[131] Iain T. Benson, Getting Religion and Belief Wrong by Definition: Why Atheism and Agnosticism Need to Be Understood as Beliefs and Why Religious Freedom Is Not 'Impossible': A Response to Sullivan and Hurd 11 (Apr. 22, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955558.

[132] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1747–48 (2018) (Thomas, J., concurring) (arguing that freedom of expression must prevent *Obergefell* from being used to quell dissent).

[133] *See* Benson, *supra* note 131, at 14.

[134] *See Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

[135] *Cf.* Priests for Life v. U.S. Dep't. of Health & Human Servs., 808 F.3d 1, 1–2 (D.C. Cir.

adherents *are* believers, and they must therefore present themselves as believers, and they must thereby point out that they also may be victims in cases centered around governmental hostility toward believers and beliefs.

When non-adherents to the dominant religion are passive rather than aggressive in asserting their own beliefs, the Court tends to read their silence as acquiescence or even as endorsement of the dominant religion and its symbols and traditions:

> Members of the subcultural group go unheard (and sometimes unseen) by members of the dominant cultural and other subcultural groups. Indeed, in the face of cultural imperialism, outgroup members sometimes figuratively and sometimes literally stop speaking, so that there is nothing to be heard. In *Lynch*, for example, the Court supported its conclusion by noting that, prior to that lawsuit, nobody had complained about the crèche even though it had been publicly displayed for forty years. To the Court, this silence meant that the crèche had not generated dissension—apparently, everybody happily supported the Christmas display. The Court overlooked the possibility, however, that Christian cultural imperialism had produced the silence of religious outgroup members. Silence often demonstrates domination, not consensus.[136]

B. Non-Belief as Belief

So it is time for what Professor Feldman calls religious or cultural "outgroup members" to frame their arguments in terms that are affirmative, vociferous, and bold.[137] Helpfully, there is ample support for the framing of what many now see as non-belief (or idiosyncratic belief) as belief–both in history and in judicial precedents.

1. Historical Support for the View that Non-Belief Is Belief

Historically, one need not look further than Thomas Paine and Thomas Jefferson. In *The Age of Reason*, Thomas Paine wrote,

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2015) (Pillard, J., concurring) (acknowledging that RFRA and the Court's holding in *Hobby Lobby* provides protections for religious adherents).

[136] Feldman, *supra* note 115, at 863.

[137] *Id.*

> I believe in one God, and no more; and I hope for happiness beyond this life.
>
> I believe in the equality of man; and I believe that religious duties consist in doing justice, loving mercy, and endeavoring to make our fellow creatures happy.
>
> But, lest it should be supposed that I believe in many other things in addition to these, I shall . . . declare the things I do not believe, and my reasons for not believing them.
>
> I do not believe in the creed professed by the Jewish church, by the Roman church, by the Greek church, by the Turkish church, by the Protestant church, nor by any church that I know of. *My own mind is my own church.*
>
> All national institutions of churches, whether Jewish, Christian or Turkish, appear to me no other than human inventions, set up to terrify and enslave mankind, and monopolize power and profit.
>
> I do not mean by this declaration to condemn those who believe otherwise; they have the same right to their belief as I have to mine. But it is necessary to the happiness of man, that he be mentally faithful to himself. Infidelity does not consist in believing or in disbelieving; it consists in professing to believe what he does not believe.[138]

In this passage, Paine clearly expresses his understanding of the difference between disbelief and belief, and he obviously sees them as two sides of the same coin. But his emphasis, as it should be, is on his affirmative beliefs, and after a cursory nod to deism, he casts what might seem to some a number of secular beliefs as being, in truth, religious beliefs: his beliefs in equality, justice, mercy, happiness, and, critically, his statement, "My own mind is my own church."[139]

Why would Paine's claim that his own mind was his own church not be a *religious belief*, then–meaning a *belief about religion*–that should acquire as much buoyancy as a constitutional matter as the belief of a religious cake maker that homosexuality is an abomination?

About his Statute on Religious Freedom, "Jefferson rejoiced that there was finally 'freedom for the Jew and the Gentile, the Christian and the Mohammeden, the Hindu and infidel of every denomination'–

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[138] THOMAS PAIN, THE AGE OF REASON: PART I 3–4 (Albury Castell ed.1957) (emphasis added).

[139] *Id.* at 4.

note his respect, still unusual today, for the sensibilities of the 'infidel.'"[140] In classing "infidels" among "the Jew and the Gentile, the Christian and the Mohammeden [and] the Hindu," Jefferson implicitly recognized the infidel—the non-believer—not just as having a disbelief system, but also—like the others among whom the infidel was classed—as having a belief system.[141] There should be no difference as among the *beliefs* of Jews, Gentiles, Christians, Muslims, Hindus, *or infidels*.

Jefferson also wrote, "it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[142] Here too there is an implicit recognition that the statement there is no God is a belief, not just a disbelief. Had Jefferson constructed this sentence to say, "It does me no injury for my neighbour not to say (or not to believe that) there is a God," he would have framed this disposition as disbelief; but by writing, "it does me no injury for my neighbour to say that there are twenty gods, or no God," and by joining polytheism with atheism in this way, Jefferson framed this disposition as belief–not merely as an attitude or disbelief. Put another way, the phrase "to say that there are twenty gods, or no God" involves not just a bipolar expression of a negative or positive disposition toward an object, or the expression of an expectancy that one regards as false, but rather the application of an attribute (a studied opinion about the likelihood of there being any god) to an object (the proposition that there are 20 gods or that there is no god).

Put as simply as possible, it is one thing to say, "I am suspicious of all religious claims," or, "I do not believe there is a god," and quite another to say, "I believe that there is no god." The first is an attitude; the second is disbelief; the third—the way Jefferson put it—is belief.

In more modern times, thinkers like Sam Harris[143] and Richard

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[140] Brooke Allen, *Our Godless Constitution*, THE NATION (Feb. 3, 2005), https://www.thenation.com/article/our-godless-constitution/.

[141] *See id.*

[142] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed. 1982) (1785).

[143] *See generally* SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON 15 (2004) ("I hope to show [in this book] that the very ideal of religious tolerance—born of the notion that every human being should be free to believe whatever he wants about God—is one of the principal forces driving us toward the abyss.").

Dawkins[144] and Christopher Hitchens[145] have set a tone that points in this direction. In an essay that was meant to criticize these "new atheists," conservative religious scholar Reza Aslan wrote,

> New Atheism . . . isn't even mere atheism (and it certainly is not "new"). What Harris, Dawkins and their ilk are preaching is a polemic that has been around since the 18th century—one properly termed, anti-theism.
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> The earliest known English record of the term "anti-theist" dates back to 1788, but the first citation of the word can be found in the 1833 edition of the Oxford English Dictionary, where it is defined as "one opposed to belief in the existence of a god." . . . In other words, while an atheist believes there is no god and so follows no religion, an anti-theist opposes the very idea of religious belief, often viewing religion as an insidious force that must be rooted from society—forcibly if necessary.
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> The late Christopher Hitchens, one of the icons of the New Atheist movement, understood this difference well. "I'm not even an atheist so much as I am an antitheist," he wrote in his "Letters to a Young Contrarian." "I not only maintain that all religions are versions of the same untruth, but I hold that the influence of churches, and the effect of religious belief, is positively harmful."
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> . . . .
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> For a great many atheists, atheism does not merely signify "lack of belief" but is itself a kind of positive worldview, one that "includes numerous beliefs about the world and what is in it," to quote the atheist philosopher Julian Baggini. Baggini cautions against viewing atheism as a "parasitic rival to theism." Rather, he agrees with the historian of religions James Thrower, who considers modern atheism to be "a self-contained belief system"—one predicated on a series of propositions about the nature of reality, the source of human morality, the foundation of societal ethics, the question of free will, and so on.

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[144] *See generally* RICHARD DAWKINS, THE GOD DELUSION 31 (2006) ("Creative intelligences, being evolved, necessarily arrive late in the universe, and therefore cannot be responsible for designing it. God, in the sense defined, is a delusion . . . .").

[145] *See* HITCHENS, *supra* note 13, at 11, 13 ("[P]eople of faith are in their different ways planning your and my destruction, and the destruction of all the hard-won human attainments that I have touched upon. *Religion poisons everything*.").

> . . . .
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> [I]n the century that followed the Enlightenment, a stridently militant form of atheism arose . . . [b]y the middle of the 19th century, this movement was given its own name—*anti-theism*—specifically to differentiate it from atheism.
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> . . . .
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> The appeal of New Atheism is that it offered non-believers a muscular and dogmatic form of atheism specifically designed to push back against muscular and dogmatic religious belief. Yet that is also, in my opinion, the main problem with New Atheism. In seeking to replace religion with secularism and faith with science, the New Atheists have, perhaps inadvertently, launched a movement with far too many similarities to the ones they so radically oppose. Indeed, while we typically associate fundamentalism with religiously zealotry, in so far as the term connotes an attempt to "impose a single truth on the plural world" – to use the definition of noted philosopher Jonathan Sacks – then there is little doubt that a similar fundamentalist mind-set has overcome many adherents of this latest iteration of anti-theism.
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> Like religious fundamentalism, New Atheism is primarily a reactionary phenomenon, one that responds to religion with the same venomous ire with which religious fundamentalists respond to atheism. What one finds in the writings of anti-theist ideologues like Dawkins, Harris and Hitchens is the same sense of utter certainty, the same claim to a monopoly on truth, the same close-mindedness that views one's own position as unequivocally good and one's opponent's views as not just wrong but irrational and even stupid, the same intolerance for alternative explanations, the same rabid adherents (as anyone who has dared criticize Dawkins or Harris on social media can attest), and, most shockingly, the same proselytizing fervor that one sees in any fundamentalist community.
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> . . . .
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> [L]et's stop calling New Atheism, "atheism," and start calling it what it is: anti-theism.[146]

[146] Reza Aslan, *Why Richard Dawkins, Sam Harris and the 'New Atheists' Aren't Really Atheists*, ALTERNET (Nov. 21, 2014), https://www.alternet.org/belief/why-richard-dawkins-sam-harris-and-new-atheists-arent-really-atheists.

This broadside was obviously meant as a critique (and a scathing one) of the new language of public intellectuals who number among "outgroup members." And maybe, for purposes of the political or philosophical debates around religion, it is a point against which self-styled atheists or agnostics would wish to push back. But as a legal, constitutional matter—as a First-Amendment free-exercise matter—this is precisely the frame that advocates for secular causes should adopt.

2. Judicial Precedent for Honoring Idiosyncratic (Non-Sectarian) Belief

The Supreme Court has said that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit *First Amendment* protection."[147] Furthermore, "[t]he Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[148]

In *Thomas v. Review Board of the Indiana Employment Security Division*, the Court considered a state court decision concluding that a Jehovah's Witness's conscientious objection to building armaments was not sufficiently religious because he struggled to articulate a religious belief:

> In reaching its conclusion, the [state] court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted . . . that he would not object to "working for [his employer] . . . [producing] the raw product necessary for the production of any kind of tank . . . [because he] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience . . . .
>
> The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in [a] roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that

[147] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

[148] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

> Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
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> The [state] court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, 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.[149]

This view was ratified and endorsed by the Court, per Justice Alito, in *Holt v. Hobbs*.[150]

As one can see, the Court, in interpreting this language, could use it to go either way as to whether to give the beliefs of outgroup members the same weight as the beliefs of sectarian traditionalists.

The better reading would be that, as to a contest between, for example, the competing beliefs that a) a holy book points one to a proper church, or b) one's own mind is one's own church, the Court is "singularly ill equipped to resolve such differences"[151] and should therefore treat the two as being of equal constitutional weight. On the other hand, the Court could interpret the beliefs of outgroup members as being "so bizarre, so clearly nonreligious in motivation,

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[149] *See Thomas*, 450 U.S. at 715–16 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1131 (Ind. 1979)).

[150] *See* Holt v. Hobbs, 135 S. Ct. 853, 862–63 (2015).

[151] *Thomas*, 450 U.S at 715.

as not to be entitled to protection under the *Free Exercise Clause*."[152] From the perspective of anyone trying to discern the real motivations of the Court, either outcome would be useful.

As to the first possibility, that would obviously entitle outgroup members to their own bases for objecting to otherwise generally applicable and even-handed laws. As to the second possibility, that would provide an illuminating entrée into the real purposes animating the Court. Religious adherents who insist that only their sectarian beliefs are to be credited under the First Amendment would ask the Court to craft a rule like this: a person's religious belief is not protected under the First Amendment unless she 1) partakes in some sectarian tradition that proposes the existence of a supernatural explanation for the existence of the universe; and 2) adheres to some affirmative interpretation (rather than denial or skepticism) of a scroll, holy book, or text that posits the existence of a supernatural authority.

This would be a useful exercise for the Court to undertake: either it will have to recognize that anti-theism, as Professor Aslan puts it, is a belief about religion that is protected under the First Amendment,[153] or it will have to transparently express its preference for sectarian religion over non-religion, even when non-religion, as properly framed, entails certain discrete and affirmative *beliefs about religion*. If the Court does that, then it will not only do violence to its own stated preference for neutrality, but also announce our descent into *de facto* religious establishment.[154]

C. Some Possible Applications for the New Vocabulary of Belief

If secularists do not merely disbelieve, but also believe, then their beliefs should require the application of prophylactic free exercise just as surely as any sectarian belief will require its application.

Certainly, it may even be that more progressive views or beliefs are grounded in doctrine that is overtly sectarian:

> [Even as to secularists, a] religious orientation persisted into

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[152] *Id.*

[153] *See* Aslan, *supra* note 146.

[154] *See, e.g.*, Lund v. Rowan Cty., N.C., 863 F.3d 268, 291 (4th Cir. 2017) ("Our Constitution seeks to preserve religious liberty without courting religious animosity. In this quest, our two religion clauses have been a great success, helping to spare Americans the depth of religious strife that so many societies have had to suffer and endure. And yet free religious exercise can only remain free if not influenced and directed by the hand of the state.").

> modernity. Indeed, . . . even a later theorist of the secular state such as Thomas Hobbes—recently lauded as the seminal rejecter of "political theology" and advocate of the "Great Separation"—devoted as many pages in his Leviathan to supporting his political views through painstaking scriptural exegesis and theological exposition as to the more secular social contract reasoning we focus on today. And . . . the most basic justifications for religious freedom given during the American founding remained at bottom religious in character.[155]

But what about the beliefs of outgroup members that are not grounded in such scriptures or holy books? It would seem that those beliefs, too, when properly framed, should result in the giving way of generally applicable and neutral laws that offend such beliefs, if those beliefs are sincerely held and are also, again, *beliefs about religion*.

Take, for example, a woman who believes that no supervising deity commands her to carry a pregnancy to term.

> When Hobby Lobby filed its 2012 lawsuit objecting to the mandate on religious grounds—with the Supreme Court ultimately ruling in its favor—it didn't do so because of a general objection to birth control. Rather, it did so because certain forms of birth control, including Plan B, also known as the "morning after pill," could be considered an abortifacient because it prevents implantation of an already fertilized egg. Hobby Lobby founder David Green wrote in a 2012 op-ed for *USA Today*: "Being Christians, we don't pay for drugs that might cause abortions. Which means that we don't cover emergency contraception, the morning-after pill or the week-after pill. We believe doing so might end a life after the moment of conception, something that is contrary to our most important beliefs."[156]

Since the Supreme Court accepted that frame, must it not also

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[155] Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1876 (2009) (reviewing KENT GREENAWALT, RELIGION AND THE CONSTITUTION — VOLUME 2: ESTABLISHMENT AND FAIRNESS (2008)).

[156] Tara Isabella Burton, *How Birth Control Became Part of the Evangelical Agenda*, VOX (Oct. 7, 2017), https://www.vox.com/identities/2017/10/7/16259952/birth-control-evangelical-agenda.

accept the claim of a woman that she has her own religion, or even that her own mind is her own church—and that, therefore, the application of majoritarian religious dogmas to her choices would be "contrary to [her] most important beliefs?"[157]

To be sure, we will still have debates about the government's interest in protecting fetal life and in regulating abortion procedures as it must regulate any medical procedure.[158] But as to the First Amendment, women seeking freedom from the application of laws restricting access to abortion services would be on solid ground to challenge such laws, under the prophylactic application of free exercise, if they frame their choices as matters of *belief about religion*, not merely s*ecular attitudes*.

And what about the LGBT-rights movement? As to any law that targets LGBT people, or that requires *their* participation in a society where *sectarian beliefs* offend their own religious sensibilities, they too would have standing to object to the application of any otherwise generally applicable and neutral law. And why not? When it comes to the Book of Leviticus and its preachments about men lying with other men,[159] it is not just that the LGBT individual might disbelieve it; it is more likely, rather, that he *believes against it*—that he *believes* that it is the product of frenetic fever dreams conjured during an ancient civilization—and, much more importantly, that as a religious matter, a gay person is not just entitled, but compelled, to seek a life of fulfillment, intimacy, and joy, free from the cruelties of wicked writs penned millennia ago.

CONCLUSION

If a citizen—let's say a cake maker—has a right to conduct his civic rather than personal life with fealty to his dogmatic insistence that a supervising God exists, does another citizen—say a gay person or a woman seeking an abortion—have a corresponding right to conduct his or her civic life with fealty to his or her dogmatic insistence that a supervising God does not exist, or that he or she is his or her own supervising god?

The Supreme Court, with Justice Kavanaugh replacing Justice Kennedy, is almost sure to move away from the notion of dynamic

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[157] *See id.*

[158] *See generally*, Planned Parenthood v. Casey, 505 U.S. 833, 877–78 (1992) (noting the disagreement among the justices in rendering this decision despite some agreement that the State has interest in fetal life and therefore may regulate abortion procedures).

[159] *See Leviticus* 20:13.

and toward the notion of prophylactic free exercise; it will protect religion from non-religion, and only belief rather than mere attitudes or disbelief will likely be eligible for First-Amendment protection. That being so, those who now cast themselves as non-believers should, for purposes of constitutional litigation, recast themselves as believers—in whatever ideas about religion they do sincerely, affirmatively hold to be true.

It will be time for atheists and agnostics to come out of the closet and agitate—and to aggressively assert their own beliefs about gods, spirituality, and the universe. The contest of ideas must be joined, for the First Amendment will, more than ever, be interpreted as protecting ideas, not the absence of ideas.