

# Religion as a Legal Proxy

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## I. INTRODUCTION

Should the law provide special protection for religion? Writing in the late 1960s, Milton Konvitz offered one answer to this question. He suggested that the framers of the First Amendment could have saved us all some trouble if only they had included the word “conscience” alongside the free exercise of religion.<sup>1</sup> Had they done so, the Supreme Court would not have needed to distort out of recognition a federal

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1. MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 98–99 (1968).

statute to protect secular conscientious objectors in the Vietnam draft protest cases.<sup>2</sup> More fundamentally, the First Amendment would not be read to privilege religious claims of conscience, implying that those with nonreligious ethical and moral convictions are not worthy of the same constitutional protections.<sup>3</sup>

Given the diversity of religious and philosophical perspectives that have developed within our society, the inequality between religious and nonreligious views implied by the constitutional text is morally indefensible.<sup>4</sup> Perhaps it made sense during the drafting of the Constitution and the Bill of Rights, at a time when claims of conscience were understood mainly in religious terms, but it now seems regrettable that the framers singled out religion in the way that they did.<sup>5</sup> In selecting the phrase “free exercise of religion” and by not also including “rights of conscience” or “equal rights of conscience”—two options we know they considered<sup>6</sup>—the framers gave us a text that has limited the power and perhaps the willingness of courts to protect claims of conscience not grounded in what are considered traditional religious sources.

This view of the First Amendment, that it is unfortunately limited by the religious assumptions of an age since past, might now seem like conventional wisdom within the legal academy.<sup>7</sup> Steven Smith says it is “more accurately . . . characterized as ho-hum.”<sup>8</sup> Of course, not everyone is persuaded that the framers were mistaken and that the First Amendment

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

3. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 216, 234–36 (1972) (suggesting, in dicta, that beliefs that are “philosophical and personal rather than religious . . . [do] not rise to the demands of the Religion Clauses”).

4. For various arguments to this effect, see, for example, RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* (2011); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

5. I do not think this point is anachronistic. We can regret the limitations of the framers’ decision while nevertheless understanding it to have been a remarkable and historically significant advance in protecting individual liberties. See Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1403 n.181 (2012).

6. See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 78–89 (3d ed. 2011) (discussing drafting history of the First Amendment).

7. Though clearly not among the justices of the Supreme Court. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (“[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”).

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

leaves something to be desired. Among those defying the “ho-hum” view, some persist in defending the distinctiveness of religion on theological grounds.<sup>9</sup> Others advance secular arguments based on epistemic, psychological, or metaphysical distinctions between religious and nonreligious convictions.<sup>10</sup> But these, too, are “shopworn” arguments.<sup>11</sup> Indeed, at this point in the debate, it seems unnecessary to rehearse the familiar responses to these justifications for singling out religion.<sup>12</sup>

All of this raises the question: Is it possible to argue on nontheological grounds for providing religion with special treatment while simultaneously conceding that religious views are not epistemically, psychologically, or metaphysically distinct from secular ethical and moral convictions?

Andrew Koppelman thinks that it is not only possible but also that the resulting view is more attractive than the leading alternatives. In his recent and important book, *Defending American Religious Neutrality*, Koppelman argues that the American legal tradition of treating religion as a “good thing” is justified on the grounds that, when interpreted at a sufficiently high level of abstraction, religion serves as an indispensable legal proxy for a plurality of important goods.<sup>13</sup> His claim is not that religion is epistemically or ontologically special, but rather that no other legal category can serve as an adequate doctrinal substitute for it, at least

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9. See, e.g., Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013); Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165 (2013); see also Stanley Fish, *Where’s the Beef?*, 51 SAN DIEGO L. REV. 1037 (2014).

10. See, e.g., Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 792 (2013) (suggesting that the demands of religious conscience might be “ontologically superior” to “personal conclusions about right and wrong”).

11. Cf. Richard W. Garnett, “*The Freedom of the Church*”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 48 (2013) (“On the other side, however, there is more than a little influence of a shopworn Rawlsian liberalism, the attractiveness and authority of which is more often assumed or asserted than established.”).

12. But just in case, see Schwartzman, *supra* note 5, at 1377–1403; see also Anthony Ellis, *What Is Special About Religion?*, 25 LAW & PHIL. 219 (2006); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); and the sources cited in *supra* note 4.

13. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 2–7 (2013).

not without sacrificing some of the goods that would otherwise be protected.<sup>14</sup>

In what follows, after briefly summarizing Koppelman's position, I argue that his view is vulnerable to the charge that using religion as a legal proxy is unfair to those with comparable, but otherwise secular, ethical and moral convictions. Koppelman has, of course, anticipated this objection, but his responses are either ambivalent or insufficient to overcome it. The case for adopting religion as a proxy turns partly on arguments against other potential candidates. In particular, Koppelman rejects the freedom of conscience as a possible substitute. But even if he is right that its coverage is not fully extensive with the category of religion,<sup>15</sup> the law does not have to choose between them. It can and should provide significant protections for both.

## II. THE PROXY ARGUMENT

The proxy argument for singling out religion holds that no other legal concept can be used to protect the same range of goods and values that support protecting religion. This argument begins with an objection to standard justifications for giving religion special treatment. Such justifications are said to rest on two related mistakes. First, they claim that some quality is fundamental to religious belief, and second, they give a reason specific to that quality for why the state should protect religion. For example, a common justification for accommodating religion is that believers owe a duty to a transcendent moral authority (God, or

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14. See *id.* at 44–45; Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 74 (2013) [hereinafter Koppelman, *Religion's Specialized Specialness*].

15. I do not mean to concede this claim. According to Koppelman, as a substitute for the concept of religion, freedom of conscience would be underinclusive because it emphasizes duty-based claims and thus fails to explain some paradigm cases of religious accommodation, including *Employment Division v. Smith*, 494 U.S. 827 (1990) (rejecting exemption for sacramental use of peyote) and *Lyng v. Northwest Indian Cemetary Protective Ass'n*, 485 U.S. 439 (1988) (rejecting religious accommodation to protect sacred lands). See Koppelman, *Religion's Specialized Specialness*, *supra* note 14, at 75–77. But I am not persuaded by Koppelman's discussion of these examples. Moreover, a social or relational theory of conscience might be able to explain them. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 856, 868–69 (2005); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1576, 1578–79. For now, however, I bracket this line of argument. Even if the freedom of conscience is not an adequate substitute for religion, it may and indeed ought to serve as a supplemental legal proxy. My aim here is only to defend that more limited claim.

some other deity or deities).<sup>16</sup> Compliance with that authority's demands takes priority over any duties created by positive law. Therefore, when religious obligations conflict with positive duties, the state should so far as possible accommodate those who believe they are compelled to follow them. On this view, what is essential about religious belief is that it relates to divine authority, and the state should value that quality about religion either because of its intrinsic theological significance or perhaps because of the psychological force it has for believers.<sup>17</sup>

Although the divine command theory is only one example, the problems with it are indicative of the general difficulties faced by any theory that attempts to define religion according to some quality (or set of qualities). For all such theories, there are always counterexamples to defeat them. To continue with divine command theory, it is significantly underinclusive. It cannot account for nontheistic religions (for example, some forms of Buddhism), nor can it explain why the state ought to, and indeed often does, accommodate religious beliefs and practices that implicate significant aspects of believers' personal identities but which are not, strictly speaking, matters of duty or obligation.<sup>18</sup>

This objection can be generalized.<sup>19</sup> Every attempt to define religion according to some fundamental quality (or set of qualities) will face the same type of criticism. The lesson to draw from this, according to the proxy argument, is that we should abandon such strategies in favor of a fuzzier, messier, and ultimately more pluralistic approach to defining religion and to explaining why the state should provide it with special treatment.

The upshot is that, at least for legal purposes, the concept of religion should be interpreted with deliberate vagueness and at a fairly high level of abstraction.<sup>20</sup> There are no necessary and sufficient conditions that distinguish between religious and nonreligious beliefs. Instead of searching

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16. See, e.g., Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 28–30 (2000); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1611 (1997) (book review).

17. See, e.g., Thomas C. Berg, "Secular Purpose," *Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24, 36–37 (2013); see also Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319–20 (1996) (giving the psychological version of the argument).

18. See KOPPELMAN, *supra* note 13, at 43–45, 139.

19. See *id.* at 43–45.

20. See *id.*

for criteria to determine what counts as religious, the law should (and arguably does) adopt an analogical approach.<sup>21</sup> There are paradigms of religion—easy cases, so to speak—and it is possible to make comparisons and to extrapolate from those examples to others about which there is less certainty. Approaching the concept of religion in this way avoids as much as possible the problem of discriminating among religions. The law does not rely on criteria drawn from one religion or another, but rather allows for the concept to develop and expand as necessary to address new claimants as they arise. On this view, as Koppelman has argued in a related context, the vagueness of the concept of religion “is a feature, not a bug.”<sup>22</sup>

The same basic point applies with respect to the justification for accommodating religion. If there is no quality or set of qualities that determines what counts as religious, then there can be no particular value or set of values specific to those qualities that will explain why protecting religion is important. Instead, any given claim for protecting religion will appeal to different aspects of religion, which, in turn, will make relevant different values.<sup>23</sup> Sometimes, the state ought to accommodate religion because of its psychological urgency for believers; in other cases, the reason will have more to do with enabling people to explore their conceptions of the good, or perhaps avoid conflicts of conscience, or find spiritual guidance, or cope with their mortality, and so on.<sup>24</sup>

According to this pluralistic approach, religion is conceptually irreducible. No other legal category covers the same set of beliefs and practices. And for that reason, no other category is connected to the range of goods and values associated with religion. Thus, to the extent that the state aims to promote those goods and values, religion is an indispensable legal proxy.<sup>25</sup>

As with all proxies, religion is both overinclusive and underinclusive. In some cases, religious believers may benefit from special protections even when no good or value is served by those protections. And in other cases, the state may fail to protect some nonreligious beliefs and practices that instantiate one or more of the goods or values that justify protecting

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21. For analogical approaches to the definition of religion, see George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1529–30 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 762–66 (1984); Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 794, 814–16 (1997).

22. Andrew Koppelman, “*Freedom of the Church*” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 148 (2013).

23. See Koppelman, *Religion’s Specialized Specialness*, *supra* note 14, at 77.

24. See KOPPELMAN, *supra* note 13, at 124 (describing numerous goods associated with religion).

25. See Koppelman, *Religion’s Specialized Specialness*, *supra* note 14, at 77.

religion (for example, exercising autonomy, promoting moral integrity, or avoiding psychological pain). But according to the proxy argument, since there is no category that is less overinclusive and underinclusive than religion, the state has sufficient reason to single it out for special treatment.<sup>26</sup>

### III. THE PROXY'S UNFAIRNESS

The main concern with the proxy argument is that singling out religion will lead to significant and unjustifiable inequalities. Consider an example from the health care context recently highlighted by Elizabeth Sepper.<sup>27</sup> A doctor working at a Catholic hospital is confronted with a patient who is miscarrying about half way through her pregnancy. Following medical protocols and with the patient's consent, the doctor recommends ending the pregnancy. Although it is clear that the fetus cannot survive, the hospital relies on religious grounds to reject the doctor's request to perform an abortion.<sup>28</sup> To save the patient's life, the doctor performs the abortion anyway, but the hospital's delay causes the patient permanent injuries. Following the incident, the doctor resigns.<sup>29</sup>

Suppose that instead of resigning, the doctor in this example sues the hospital to enjoin it from taking any adverse employment action against her. When asked why she violated the hospital's policy, the doctor says, "[The patient] was so sick she was in the intensive care unit for about 10 days and very nearly died. . . . Her bleeding was so bad that the sclera, the white of her eyes, were red, filled with blood. And I said, 'I just can't do this. I can't put myself behind this.'"<sup>30</sup> Suppose further that when asked whether her decision to perform the abortion was religiously motivated,

26. *See id.* at 78.

27. My description of this example follows Sepper's. *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1502–03 (2012). For the underlying facts, see Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774, 1777 (2008).

28. Such conflicts between doctors and religiously affiliated hospitals are apparently quite widespread. *See* Sepper, *supra* note 27, at 1502 (reporting that "[f]orty-three percent of doctors have worked in a religiously affiliated institution" and that "[o]ne in five . . . reports experiencing conflicts between religious restrictions and what they perceive to be their duties to their patients"); *see also* Debra B. Stulberg et al., *Obstetrician-Gynecologists, Religious Institutions, and Conflicts Regarding Patient-Care Policies*, 207 AM. J. OBSTETRICS & GYNECOLOGY 73 (2012).

29. Sepper, *supra* note 27, at 1502.

30. Freedman et al., *supra* note 27, at 1777.

the doctor says something to the effect of: “I am not religious. I don’t believe in God. What I believe is that a doctor’s most basic ethical obligation is to provide necessary, life-saving care. That is my duty, and I was absolutely required to perform it here.”

Assuming that a doctor who refused to perform abortions on religious grounds could seek a religious accommodation under Title VII, or perhaps under a state or federal Religious Freedom Restoration Act (RFRA) (or under a pre-*Smith* interpretation of the First Amendment), should the doctor in the example above be able to assert a legal right to freedom of conscience under such laws?<sup>31</sup>

A proponent of the proxy argument might concede that there is no first-order justification for distinguishing between the nonreligious doctor who believes, as a matter of conscience, that she has a moral duty to perform a life-saving abortion under certain circumstances and a religious doctor who refuses to participate in such treatment.<sup>32</sup> Unless there is some ontological, epistemic, or psychological difference between the secular and religious claims here—some quality or set of qualities—that provides a reason to favor one over the other, a law that relies on

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31. This example might lack state action for purposes of raising a claim under RFRA or the First Amendment. *See Sepper, supra* note 27, at 1515 n.51. But a doctor fired for performing an abortion that she felt was morally compelled might claim religious discrimination under Title VII of the Civil Rights Act of 1964, which requires that employers “reasonably accommodate to an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e (2012). A religiously affiliated hospital might argue that allowing a doctor to violate its restrictions on performing abortions is an undue hardship, or it might claim an exemption for religious organizations under Section 702 of Title VII. *See* 42 U.S.C. § 2000e-1 (2012); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (upholding Section 702 against an Establishment Clause challenge involving a religious nonprofit). But of course the issue of hardship, or the need to claim an exemption, only arises if the doctor can state a claim under the statute, which requires determining whether her beliefs and practices count as “religious” in the first place. *See Amos*, 483 U.S. at 331–32.

32. Of course, there may be first-order moral reasons to distinguish between performing abortions—even when the fetus is not viable and when the life of the mother is seriously at risk—and refusing to perform them. But those reasons are not at issue here. The only question is the threshold matter of whether a doctor’s claim of conscience receives greater protection because it is grounded in religious beliefs. We could formulate a different example in which one doctor refuses to perform abortions for traditional religious reasons and another refuses to perform them on the basis of a moral or philosophical objection. As it happens, such examples may not arise, not because the proxy of religion is applied expansively but rather because the law in many jurisdictions protects those who oppose performing abortions on the basis of either “religious beliefs or moral convictions.” *See Schwartzman, supra* note 5, at 1408 (citation omitted); *see also Sepper, supra* note 27, at 1509–14 (discussing individual and institutional “conscience clauses” and collecting examples).



religion as a proxy for special protection is underinclusive and, to that extent, unfair to those excluded.

#### A. *Expanding the Proxy*

One way to avoid this conclusion would be to argue that the nonreligious doctor is more “religious” than she thinks. If a doctor with traditional religious views has a claim under the First Amendment, or, what is more likely, under RFRA (or a similar state law) to avoid participating in providing abortions, then courts might extend the same protection to doctors who describe themselves as nonreligious but who nonetheless claim that they are compelled by conscience to perform abortions in some cases. After all, the lesson of the Vietnam draft protest cases is that the legal definition of religion is sufficiently vague and capacious to include secular claims of conscience, at least when they are functionally equivalent to their religious counterparts.<sup>33</sup>

More specifically, if the proxy argument incorporates the approach adopted by a plurality of the Supreme Court in *Welsh*, then a claim is “religious” for legal purposes if (1) it is based on “moral, ethical, or religious beliefs about what is right and wrong,”<sup>34</sup> and (2) those beliefs are “held with the strength of traditional religious convictions.”<sup>35</sup> In explicating the latter condition, involving the level of intensity with which a belief must be held, the plurality explained that sincere beliefs that are “purely ethical or moral in source and content but that nevertheless impose . . . a duty of conscience”<sup>36</sup> have the same practical force as religious beliefs. As the plurality put it, such beliefs “certainly occupy in the life of that individual ‘a place parallel to that filled by God’ in traditionally religious persons.”<sup>37</sup>

The *Welsh* plurality’s definition of religion effectively subsumes secular, moral and ethical claims of conscience. And to the extent the proxy argument adopts this approach, it might significantly diminish the problem of unfairness with respect to singling out religion for special

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33. See *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

34. *Welsh*, 398 U.S. at 340.

35. *Id.*

36. *Id.*

37. *Id.*

accommodations.<sup>38</sup> As I have argued elsewhere, expanding the definition of religion to include otherwise secular, but nevertheless deeply held, ethical and moral beliefs is one strategy for reconciling laws that privilege religion with the demands of political morality, which require giving equal treatment to those with comparable claims of conscience.<sup>39</sup>

### B. Limiting the Proxy

Not all proponents of the proxy argument, however, are willing to expand the definition of religion to the full extent suggested by the plurality in *Welsh*.<sup>40</sup> In particular, Koppelman seems to have some ambivalence on this point. On the one hand, he approves of the outcomes in *Seeger* and *Welsh* and of the plurality's reasoning for them.<sup>41</sup> By expanding the definition of religion to include claims that are "purely ethical or moral,"<sup>42</sup> provided they are held in the right sort of way, the plurality showed the benefit of incorporating a fluid and amorphous legal proxy. But on the other hand, Koppelman attempts to contain the potentially radical implications of the holding in *Welsh*, which would apply the logic of religious accommodations to a wide range of ethical and moral beliefs that would not ordinarily be considered religious.

Koppelman suggests that *Welsh* is limited in two ways. First, he argues that the plurality emphasized the presence of a source of value that extends beyond an objector's personal or policy preferences. A request for accommodation must be grounded in an ethical or moral principle.<sup>43</sup> Second, Koppelman claims that "the inherent attractiveness of pacifism" played a role in the Court's considerations.<sup>44</sup> Not just any ethical or moral claim would do. Pacifism has a long and recognizable history in the United States, and the Justices could understand the moral force

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38. But for some reservations about this claim, see Part IV.B, *infra*.

39. Schwartzman, *supra* note 5, at 1414–21; *see also* Laycock, *supra* note 17, at 336.

40. *Cf.* Berg, *supra* note 17, at 25 ("We can extend such [distinctive] treatment to systems that share the same features [as religion] but have not traditionally been called religious, but the extension should be limited . . .").

41. *See* KOPPELMAN, *supra* note 13, at 142–43; Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *LEGAL THEORY* 215, 242–43 (2009) [hereinafter Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*]; Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh's Two Religious Tests*, in *FIRST AMENDMENT STORIES* 293, 313 (Richard W. Garnett & Andrew Koppelman eds., 2012) [hereinafter Koppelman, *Story of Welsh*] (arguing that an analogical approach to the definition of religion can make sense of the "puzzling results in *Seeger* and *Welsh*").

42. *See Welsh*, 398 U.S. at 340.

43. *See* KOPPELMAN, *supra* note 13, at 143.

44. *Id.*

behind the objectors' claims, even if they did not share their views about the ethics of military service. Had the objectors come forward with different claims, they might have met stronger resistance. Koppelman suggests that an objection to racial integration in public accommodations based on sincerely held racist views would not have received the same treatment.<sup>45</sup>

The problem for Koppelman is that neither of these limits works to contain the scope of the definition expressly articulated in *Welsh*. Many nonreligious objectors might be motivated by ethical and moral principles that are not obviously reducible to their personal preferences. The most well known examples involve military conscription, but as noted above, there are increasingly common conflicts among medical providers and their religious employers. Moreover, if courts were seriously committed to protecting ethical and moral claims of conscience,<sup>46</sup> we might also expect to see claims for "religious" exemptions brought by women who oppose abortion regulations, or gays and lesbians who object to employment discrimination, or animal rights activists who refuse to use animals in education or testing, and so on.<sup>47</sup> Of course, if for-profit corporations are permitted to assert religious liberty claims, then secular "socially conscious" firms might challenge burdensome regulations, just as religiously affiliated companies have in recent years.<sup>48</sup>

There is also no reason why those with otherwise nonreligious claims of conscience should only be able to assert them in the context of military conscription. The *Welsh* plurality stated no such limit on its inclusion of strongly held ethical and moral beliefs within the definition of religion. And any such limit would be arbitrary. To Koppelman's example, even the racist who asserts a sincere ethical basis for discrimination—as

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45. *Id.*

46. For more on this point, see Part IV.B *infra*.

47. *Cf. Grainger plc v. Nicholson*, [2010] ICR 360, [26]–[27] (EAT) (holding that moral claims stemming from belief in climate change were protected as a "philosophical belief" under British law prohibiting employment discrimination on the basis of "religion or belief"); *R. v. Secretary of State for Education and Employment*, [2005] UKHL 15, [2005] 2 A.C. 246 (H.L.) [55] (appeal taken from Eng.) ("[P]acifism, vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which would fall within Article 9 [of the European Convention on Human Rights] (of course pacifism or any comparable belief may be based on religious convictions, but equally it may be based on ethical convictions which are not religious . . .)").

48. For examples of conscience-based claims in the corporate context, see Nelson, *supra* note 15, at 1567; ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 179–205 (2010).

oxymoronic as that might seem today—could qualify in principle. Of course, that does not mean the government must allow exemptions from prohibitions on racial discrimination. It clearly has a compelling interest in rejecting them, at least with respect to public accommodations. But that is true even when such claims are grounded in beliefs that are paradigmatically religious.<sup>49</sup> There might be sincere religious racists,<sup>50</sup> and they could assert claims for exemptions on the basis of their beliefs, even if the government has compelling reasons to override them. If there are sincere racists whose beliefs are grounded in ethical, moral, or philosophical doctrines, their claims would not be any more successful in court. But they might nevertheless satisfy the definition of religion in *Welsh*. Nothing in the plurality's approach precludes that result.

Perhaps Koppelman's attempts to hedge the outcomes in the draft protest cases are driven by a deeper skepticism about protecting ethical or moral claims of conscience. At times, Koppelman has argued that using conscience as a legal proxy instead of religion would be overinclusive because it would protect the equivalent of "welfare monsters."<sup>51</sup> In debates about consequentialism, a welfare or "utility monster" is someone who gains great utility from the marginal consumption of resources, thereby imposing sacrifices on others who lose less utility than the monster gains. The possibility of such monsters is said to embarrass utilitarian theories by illustrating the unfairness of distributing welfare on the basis of subjective preferences.<sup>52</sup> Similarly, in the name of conscience, people may claim that they are morally obligated to engage in actions that impose unreasonable burdens on others. In extreme cases, those following their consciences may feel compelled to do terrible or atrocious things—commit "honor killings,"<sup>53</sup> withhold necessary medical treatment from minors,<sup>54</sup>

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49. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 579–80, 604 (1983) (affirming denial of tax exempt status to a religious school with racist admissions policies).

50. See William Saletan, *From Bob Jones to Bobby Jindal*, SLATE (Feb 14, 2014, 12:10 PM), [http://www.slate.com/articles/news\\_and\\_politics/frame\\_game/2014/homosexuality\\_religious\\_freedom\\_and\\_interracial\\_sex\\_is\\_bobby\\_jindal\\_the.html](http://www.slate.com/articles/news_and_politics/frame_game/2014/homosexuality_religious_freedom_and_interracial_sex_is_bobby_jindal_the.html) (noting that prior to dropping its policy against interracial dating in March 2000, Bob Jones University had defended its position by claiming, among other things, that "[e]very effort man has made, or will make, to bring the world together in unity plays into the hand of Antichrist. . . . Bob Jones University opposes one world, one church, one economy, one military, one race, and unisex. God made racial differences as He made sexual differences").

51. See KOPPELMAN, *supra* note 13, at 135; Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, *supra* note 41, at 224, 237; Koppelman, *Story of Welsh*, *supra* note 41, at 309.

52. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 41 (1974).

53. See Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, *supra* note 41, at 222 n.27.

54. See Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 806.

engage in various forms of racial and gender discrimination, and so on.<sup>55</sup> As a result, any account of legal exemptions based on respect for conscience will be vulnerable to embarrassment by such claims.

The obvious problem with the “welfare monster” objection is that it applies with equal force to claims for religious accommodations.<sup>56</sup> If using conscience as a legal proxy is overinclusive, the same will be true for religion, especially if we adopt an analogical approach to defining it. Of course, Koppelman knows this, so it is somewhat puzzling why he raises the objection. Moreover, as Koppelman has previously acknowledged, any claims that impose unfair burdens on others can be limited, either by statute or by courts applying some form of balancing, including measuring against compelling state interests.<sup>57</sup> Of course, determining how that balancing should be conducted is a deep and difficult problem. Indeed, critics have argued that the impossibility of developing a principled approach to limiting religious exemptions is a reason to refuse them in the first place.<sup>58</sup> But if proponents of singling out religion are unmoved by that objection, either because they have a theory about how balancing should work or perhaps because they think it is sufficient for legislatures and courts to muddle through such problems,<sup>59</sup> then it is difficult to see why legal protections for the freedom of conscience cannot be defended in a similar fashion.

#### IV. THE PROXY ARGUMENT RECONSIDERED

Up to this point, we have been considering one way of avoiding the objection that the proxy argument is unfair to those with nonreligious ethical and moral views. Koppelman seems to accept the *Welsh* plurality’s

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55. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1256–57 (1994) (giving additional examples).

56. See *id.* at 1256 (arguing that “the demands that religions place on the faithful, and the demands that the faithful can in turn place on society . . . are potentially extravagant”).

57. See Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, *supra* note 41, at 222 (“This difficulty can be accommodated by noting that the claim for accommodation is only presumptive and can be defeated by a strong enough state interest.”); Koppelman, *Story of Welsh*, *supra* note 41, at 310 (“Perhaps this could be rebutted by the idea that a compelling interest can trump conscience.”).

58. See, e.g., Eisgruber & Sager, *supra* note 55, at 1258–60.

59. See KOPPELMAN, *supra* note 13, at 164 (“That balancing is a matter of context-specific judgment. It is not reducible to any legal formula.” (footnote omitted)).

strategy of expanding the definition of religion to include them. Yet he seems uncomfortable with its implications, even while realizing that there is no obvious way to contain them.

Suppose now that a proponent of the proxy argument rejects the strategy of expanding the definition of religion to include secular claims of conscience. Would it still be possible to defend the singling out of religion against the charge of unfairness? Here I want to consider more directly the argument that because no concept can serve as a global substitute for religion, the state is justified in using religion as a proxy to promote a diversity of goods and values.

To defend this proxy argument, Koppelman gives the example of licensing “safe drivers.”<sup>60</sup> Because we cannot tell who is a safe driver, we use a driving test to make some determinations. The test will be underinclusive, which means it will exclude some safe drivers. But that does not mean the test is unfair. If no other test would do a better job at sorting drivers, then we have a sufficient basis for relying on the test as a reasonably good proxy.

According to Koppelman, the same goes for using religion as a proxy. As with safe drivers, we cannot make direct determinations about which deeply held personal commitments warrant special protection. Religion serves as a good, if imperfect, proxy for that purpose. And if there is no better proxy—none that would be less overinclusive and underinclusive—then that is reason enough to adopt it, even if there is some residual unfairness.<sup>61</sup>

Although the point of Koppelman’s analogy is clear enough, it also suggests a number of problems with his argument. First, while driving involves important interests, we do not generally consider them to be matters of fundamental rights—except maybe in California. For that reason, we might tolerate a driving test that errs on the side of excluding unsafe drivers, even at the cost of failing to include a considerable number of safe drivers. But when proxies are used to determine the scope of basic rights and liberties, we are generally more suspicious of significant overinclusiveness and underinclusiveness. In various domains of constitutional law, this suspiciousness is marked by courts’ use of heightened review to determine whether there are, in fact, substantial or compelling reasons for adopting particular legal classifications. If it turns out that the fit between a proxy and the goals it serves is seriously underinclusive, that is a reason to question the proxy’s validity.

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60. Koppelman, *Religion’s Specialized Specialness*, *supra* note 14, at 74, 77.

61. *See id.* at 74.

A further difficulty with the driving test analogy is that it does not account for the possibility of using supplemental proxies.<sup>62</sup> Suppose a subset of safe drivers fails our standard driving test in a specific and predictable way. Knowing this, we might wonder whether a different test could be used to identify that subset with greater accuracy, even if a second round of testing would not substitute completely for the first. If this were possible, then drivers who failed the first test might reasonably demand that the state offer them another opportunity to obtain their licenses.

Similarly, even if religion is a reasonably good proxy for protecting a diversity of goods, it is not sufficient to establish that no other proxy can serve as a global substitute. To rebut the charge of unfairness, especially given that we are dealing with matters of basic rights, it is also necessary to show that there are no feasible supplemental proxies that could be used to diminish, or perhaps eliminate, instances of unequal treatment resulting from the underinclusiveness of singling out religion.

#### A. Religion and Conscience

As I have previously argued<sup>63</sup> and as others have observed,<sup>64</sup> however, a wide range of international, federal, and state laws provide ample precedent for the existence of supplemental classifications to protect nonreligious ethical and moral views. For example, at the international level, the Universal Declaration of Human Rights explicitly distinguishes between conscience and religion, protecting both in Article 18, which

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62. In conversation, Koppelman has emphasized that “the point of the driver test analogy is not that only one proxy will work but rather that the use of proxies is unavoidable.” Although the analogy might be used to advance a stronger claim in favor of singling out only religion, Koppelman rejects that claim. See Andrew Koppelman, “*Religion*” as a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 SAN DIEGO L. REV. 1079.(2014). As a result, his theory is compatible with the argument for supplemental proxies developed in the text above. As between our views, then, remaining disagreements about singling out religion are likely to turn on the relative significance attributed to the proxy’s underinclusiveness and on whether there is an important class of religious exemptions that do not sound in conscience—and, if so, whether there are secular analogues. On the latter point, see *supra* note 15.

63. See Schwartzman, *supra* note 5, at 1408–09.

64. See, e.g., Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 994–95, 998–1002 (2010); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little “Conscience,”* 1996 BYU L. REV. 645, 663–64.

states that “[e]veryone has the right to freedom of thought, *conscience and religion*.”<sup>65</sup> If this language does not seem sufficient to mark a distinction between conscience and religion, the same article further provides that “this right includes freedom to change [one’s] religion *or* belief, and freedom . . . to manifest [one’s] religion *or* belief in teaching, practice, worship and observance.”<sup>66</sup> The use of the disjunctive in this provision was not accidental.<sup>67</sup> The Universal Declaration clearly contemplates protecting beliefs that are not religious.<sup>68</sup> Furthermore, nearly identical language is used in Article 9 of the European Convention on Human Rights<sup>69</sup> and in Article 18 of the International Covenant on Civil and Political Rights, a multilateral treaty that the United States signed and ratified in 1992.<sup>70</sup>

In terms of domestic law, federal and state legislation often goes beyond the category of religion to protect nonreligious ethical and moral beliefs. For a recent example, the Affordable Care Act (ACA) includes an exemption from its minimum coverage provision—the “individual mandate”—for members of a recognized “health care sharing ministry,” which the statute defines as a nonprofit organization whose members “share a common set of *ethical or religious beliefs* and share medical expenses among members in accordance with those beliefs.”<sup>71</sup> Similar language is used in federal legislation prohibiting public officials from requiring health care providers to perform or assist with abortions or sterilizations when doing so would violate their “religious beliefs or moral convictions.”<sup>72</sup> The federal government is also barred from requiring employees to participate in the administration of the death penalty “if such participation is contrary to the *moral or religious convictions* of the

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65. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/217(III), at art. 18 (Dec. 10, 1948) (emphasis added).

66. *Id.* (emphasis added).

67. See Malcolm D. Evans, *Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 11 (Tore Lindholm et al. eds., 2004) (discussing the drafting the Universal Declaration and noting that “[b]y including ‘thought and conscience’ alongside religion, nontheistic patterns of thought and belief are included”).

68. See NATAN LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS 178 (2d rev. ed. 2012) (“The term *belief* connotes the expression of spiritual or philosophical convictions that, while not necessarily organized as a religion, have an identifiable formal content.”).

69. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 222.

70. See International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171.

71. 26 U.S.C. § 5000A(d)(2)(B) (2012) (emphasis added).

72. Health Programs Extension Act of 1973 § 401(b), Pub L No. 93-45, 87 Stat 95 (codified as amended at 42 U.S.C. § 300a-7(b)) (The Church Amendment).



employee.”<sup>73</sup> Numerous other federal and state statutes and regulations involving foreign aid, counseling services, vaccinations, pharmacies, organ donation, assisted suicide, and, of course, military service follow the same pattern of expressly protecting not only religious convictions but also ethical and moral beliefs, conscience, or some combination thereof.<sup>74</sup>

Against the backdrop of all this international, federal, and state law, there is a sense in which the First Amendment feels somewhat antiquated. The problem is not that the constitutional text protects religious free exercise, but rather that it singles out religion while not explicitly providing protection for nonreligious ethical and moral beliefs, especially those that sound in conscience. When so much modern legislation extends protections in this way, it becomes increasingly difficult to justify the limitations of our constitutional text, except perhaps as a reflection of the historical period out of which it emerged. It is telling, I think, that in addition to the international human rights documents mentioned above, many of the constitutions adopted by other nations over the last half century are not restricted in this way.<sup>75</sup> In protecting the freedom of conscience and belief, as well as the freedom of religion, they recognize that democratic societies are now marked by a wider diversity of religious, ethical, and philosophical views than in generations past.

### *B. Addition, not Expansion*

In addressing concerns about fairness to nonreligious ethical and moral views, there are reasons to favor the modern trend of explicit legal recognition for such views over incorporating them within religion as a single legal proxy. The strategy of expanding the definition of religion is appealing, in part because of the Court’s precedents in *Seeger* and *Welsh*

73. 18 U.S.C. § 3597(b) (2012) (emphasis added).

74. See, e.g., 32 C.F.R. § 1630.16(a) (2013) (“Any registrant whose acceptability for military service has been satisfactorily determined and who . . . has been found, by reason of religious, ethical, or moral belief, to be conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces shall be classified in Class 1–O.”).

75. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (protecting “freedom of conscience and religion”); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 4 (Ger.) (“Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.”); INDIA CONST. art. 25, § 1 (“[A]ll persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”).

and because the text of the First Amendment is fixed. But although, like Koppelman and others, I have argued previously that a definitional approach might be one way to reconcile the First Amendment with the demands of fairness and equality,<sup>76</sup> increasingly I think the stickiness of conventional meanings and the reluctance of courts to go beyond them in understanding the concept of religion raise significant practical difficulties for this approach.

First, the fact that so many laws refer to conscience and to phrases like “religious beliefs or moral convictions” suggests that the distinction retains significance in ordinary language.<sup>77</sup> Justice Harlan made a similar point in his concurring opinion in *Welsh*. In construing the statutory requirement, under section 6(j) of the Universal Military Training and Service Act, that conscientious objection must be based on “religious training and belief,” the plurality defined “religious” to include secular ethical and moral beliefs.<sup>78</sup> Justice Harlan thought the word “religious” could not be read so expansively. As he put it, “[t]hat it is difficult to plot the semantic penumbra of the word ‘religion’ does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements.”<sup>79</sup>

Justice Harlan’s semantic objection to using religion as a proxy to cover purely ethical and moral beliefs leads to a second concern, namely, that courts will share his intuition and resist conflating the concept of religion with secular claims of conscience. Recall Sepper’s example of the doctor who violates hospital policy and performs an abortion to save a mother’s life.<sup>80</sup> Would courts today recognize the doctor as having a religious claim on the basis of her strongly held ethical and moral beliefs? Despite the holdings in *Seeger* and *Welsh*, the answer is far from clear. Relying on the Supreme Court’s dictum in *Yoder*, which distinguished between the religious convictions of the Amish and the “philosophical and personal” beliefs of Henry David Thoreau,<sup>81</sup> a number of federal

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76. See Schwartzman, *supra* note 5, at 1414–21.

77. See, e.g., KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION 146–47 (2006) (arguing that the ordinary meaning of the concept of religion does not include atheism and agnosticism).

78. See *Welsh v. United States*, 398 U.S. 333, 343–44 (1970).

79. *Id.* at 352 (Harlan, J., concurring).

80. See Sepper, *supra* note 27, at 1502–03.

81. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (“Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”). Dissenting in *Yoder*,

courts have interpreted the concept of religion more narrowly than the Supreme Court did in the draft cases and, on that basis, rejected claims for accommodation under the First Amendment.<sup>82</sup>

The draft cases may well have been the high-water mark for expanding the definition of religion to protect secular ethical and moral beliefs. If there has been some retrenchment in the definition of religion, and if courts are unwilling to apply the concept as broadly as the *Welsh* plurality, then singling out religion is a defective strategy. Under those circumstances, additional or supplemental proxies are necessary to prevent unequal treatment for those with comparable nonreligious claims.

## V. CONCLUSION

My objections to the proxy argument, at least as Koppelman has developed it, have focused on singling out religion for special protection and, more specifically, on legal accommodations and exemptions. I have not said anything here about the implications of my argument for the disestablishment of religion. My general view is that the state should extend the principle of disestablishment to cover comparable nonreligious ethical and moral doctrines. That view is less familiar and more controversial than expanding legal protections to include secular claims of conscience, but although it deserves more attention, I shall not attempt to address objections to it here.<sup>83</sup>

Milton Konvitz was on to something when he argued that the framers of the First Amendment should have included a provision protecting the freedom of conscience. If anything, the argument for that conclusion has

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Justice Douglas argued that the Court's dismissiveness with respect to Thoreau's beliefs was inconsistent with its holdings in *Seeger* and *Welsh*. *See id.* at 247–49 (Douglas, J., dissenting). But as Koppelman has noted, the majority said nothing in response. *See* Koppelman, *Story of Welsh*, *supra* note 41, at 314 n.100.

82. *See, e.g.,* *Moore-King v. County of Chesterfield*, 708 F.3d 560, 571–72 (4th Cir. 2013) (relying on dicta in *Yoder* to reject First Amendment and statutory free exercise claims of fortune teller); *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 51–52 (2d Cir. 1988) (rejecting exemption from immunization for beliefs based on “secular chiropractic ethics”); *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (rejecting special diet for member of MOVE organization); *Sapp v. Renfroe*, 511 F.2d 172, 177 (5th Cir. 1975) (distinguishing *Seeger* and *Welsh* as statutory cases and relying on *Yoder* to express doubt about whether plaintiff's objection to military instruction was “religious” under the First Amendment).

83. For a start at this, see Schwartzman, *supra* note 5, at 1421–26. *See also* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

only strengthened in recent years, not only because of changes in religious (or secular, as it were) demography or the intensification of culture war politics (if that indeed is happening), but rather because it has become increasingly clear over time that the arguments for singling out religion have failed to withstand criticism. The weakness of those arguments, along with sustained moral and philosophical challenges, is driving the sense among many that important aspects of our law with respect to religion have become outmoded.