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Speech and Exercise by Private Individuals and Organizations

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I. INTRODUCTION

A central issue about redundancy concerns how far the exercise of religion is simply a form of speech that is, and should be, constitutionally protected only to the extent that reaches speech generally. Insofar as a constitutional analysis leaves flexibility, we have questions about wise legislative choices. To consider these issues carefully, we need to have a sense of what counts as relevant speech and the exercise of religion. That is the focus of this article.

It addresses the basic categorization of what counts as "speech" for freedom of speech and what counts as religious exercise when each is engaged in by ordinary individuals and private organizations. There is an obvious overlap, but does the category or combination matter for how state and federal governments may treat practices? Does speech just swallow religious exercise? The most obvious form of government involvement is prohibition, but favorable treatment, including financial aid, can also matter. Of concern here are constitutional limits, acceptable and wise legislative and administrative choices, and what the common law provides, including what counts as a tort.

My basic claim is that, despite the large number of actual overlaps and similar considerations, the Free Exercise Clause is not, and should not be, seen as simply redundant under the Free Speech Clause. I provide both a summary account of existing law, in part according to leading Supreme Court decisions, and an analysis of what makes good sense under our basic constitutional values. Given my view that constitutional understand-

ing does properly evolve over time with a shift in cultural values,[1] such as the equality of women and appropriateness of same-sex marriage, I do not see present understanding and proper understanding as completely unrelated, but one does not simply fold into the other. My basic claims are that, when one engages in a fairly careful analysis, the Free Speech and Free Exercise Clause have independent significance both in respect to existing law and what is actually sensible.

I want to note here a consideration that may affect some people's views, even if they are hesitant to rely on it explicitly. The perceived importance of religious beliefs and practices has declined somewhat in recent decades for part of the population in our country, especially some who are highly educated. If virtually everyone thought that belief in God was silly and that religious practices were misguided, it could make sense for the law to evolve, so that religious exercise received no particular protection. Then the basic concept becoming heavily redundant would be appropriate.

For two basic reasons, I think any present view of this sort is badly misguided. The most important of these is that the majority of people in our country do maintain religious beliefs.[2] Among these is a large diversity, but a high percentage are Christians of one kind or another who believe in a loving God.[3] If one thought such views were decidedly irrational, one might wish to give them less significance. However, the truth is that although scientific evolution can provide many rational answers to the development of animals, including human beings, it cannot tell us why anything at all exists and whether God or gods have played a key role in that. Ordinary reason also cannot settle whether spiritual forces have anything to do with personal and group development.

Given the absence of a clear, rationally dictated answer to these questions, we cannot classify basic Christian and other religious beliefs as irrational. Once this is acknowledged, along with the understanding that when both the Bill of Rights and Fourteenth Amendment were adopted, religious beliefs and practices were considered highly important, we have strong reasons not to simply dismiss any protection of free exercise as fundamentally misguided. And, of course, protecting free exercise ties to the Establishment Clause's premise that the government should not favor one particular religion over others; the strength of that premise has not diminished.

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1. *See* KENT GREENAWALT, REALMS OF LEGAL INTERPRETATION: CORE ELEMENTS AND CRITICAL VARIATIONS 65–68 (2018); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 374 (2015).

2. *See* Frank Newport, *2017 Update on Americans and Religion*, GALLUP (Dec. 22, 2017), https://news.gallup.com/poll/224642/2017-update-americans-religion.aspx [https://perma.cc/83Q2-ELQP].

3. Without a sense of certainty about what is actually true, I see myself as falling into this category. In recent years I have been attending Riverside Church with some regularity, and I became a member in the fall of 2018.

These conclusions do not themselves answer the question whether the warranted protections of free speech and free exercise are essentially the same. There is definitely a substantial overlap in content and in the reasons for protection, but that does not tell us whether we also have some differences in basic coverage or whether, even in some overlap circumstances, the same or different degrees of constitutional, statutory, and common law protections are what now exist or are the wisest approaches. I shall start with a basic coverage of free speech, noting many of the matters about which overlap exists. This is important because a good deal depends on how free speech is viewed and what the ranges of its protections are. This analysis will lead to a summary both of how far all religious exercise amounts to speech, and whether it warrants treatment different from other speech.

II. SPEECH AND ITS PROTECTIONS

What counts as "speech," and why does it warrant protection against government interference? In fact, we have had fairly significant development over time in our legal system, but I shall concentrate on present perceptions and what makes sense. Considering what can properly be made criminal, I often refer to the Model Penal Code, drafted by Herbert Wechsler and approved by the American Law Institute some decades ago.[4] That obviously now has somewhat reduced practical significance, but it was a serious effort to work things out in a clear and warranted way. For this reason, it is helpful to look at some of its foundations regarding communications.[5]

What are the reasons to protect freedom of speech, particularly those that reach beyond a general favoring of safeguarding individual liberty? In reality, multiple justifications are present. Communications are a crucial way in which individuals relate to each other. They are central to how people discover the truth and develop their own autonomy. They also have a close relation to a political order of liberal democracy. Free communication allows all sorts of political views to be expressed and protects the exposure of abuses of authority. If this subject were left completely to government control, we could expect views favorable to the dominant party and its outlooks to be strongly favored over those in opposition. When we reflect on personal interactions and human autonomy, those reasons also strongly support freedom of religious exercise, so we have a substantial overlap in bases for protection here.

These conclusions do not tell us whether it makes a difference what kind of speech is involved, how far that should matter for protection, and whether religious exercise is special in some way. One obvious point here is that, for many matters, most of us are unable to discern what assertions

4. *See generally* MODEL PENAL CODE (AM. LAW INST. 1985).

5. I actually had very tangential involvement in the commentary at stages after the Model Penal Code was approved. For a brief summary, see KENT GREENAWALT, FROM THE BOTTOM UP 491 (2016).

are true and which are false, at least if we put aside what most experts in a field are asserting. This is true about many scientific claims. Although some such claims may be obviously false, for the most part, we non-scientists must rely on what experts say about matters like evolution and climate change. This does not eliminate all free speech reasons. It is still preferable to have open discourse on such matters rather than forms of government control.

Another current matter is communications that are designed to promote the speaker's interests rather than reveal the truth or enhance personal interactions. An obvious example is advertising. One may conclude that the government should have a bit more control if some advertising is seen to promote actions that are really undesirable. We have had, for some time in the United States, restrictions on advertising that promotes purchases of items needed for smoking.[6]

I shall note here a distinction that will not be emphasized in what follows. The First Amendment protects freedom of speech and the press. Both in terms of historical understanding and what makes good sense, these are not completely identical, although most coverage is essentially the same.[7] One may perceive a restriction on advertising as appropriate for the press but not for individuals, although, with modern electronic communication, even individuals and small businesses can reach a very wide audience.

What kinds of communications are arguably not covered by freedom of speech, and what may be covered that varies from any ordinary communication? In the former category, a notable example is situation-altering utterances. If a couple says "I will" in a marriage ceremony, that is not primarily or only a communication; it is a way to alter one's status. If the government wants to preclude a couple from getting married, say because one person is already married to someone else, it may effectively bar them from saying "I will" in a marriage ceremony. Another kind of situation-altering utterance is when a boss gives a direct order of behavior to a subordinate. That is effectively a way for the boss to get done what he has ordered. We can easily understand why the government can forbid such orders to commit criminal acts.

How to see agreements and promises more generally is a bit more complicated. Suppose one person says to another, "I want you to promise to steal the wallet of the man walking toward us," and the recipient responds, "I promise to do so." That is effectively an agreement to commit an illegal act. It is not protected by freedom of speech. But suppose a committed pacifist says to a fifteen-year-old nephew, "Please promise me that you will never submit to a military draft if one exists and covers you," and the nephew responds, "Yes, I promise." The nephew's response here realistically amounts to a present expression of opinion rather than

6. *See* 15 U.S.C. § 1335 (2012).

7. *See* GREENWALT, INTERPRETING THE CONSTITUTION, *supra* note 1, at 206.

what either person would take as a binding promise, regardless of what the nephew's views become if and when he is actually subject to a draft.

Two points are notable about these examples. The first is that weak imperatives such as requests and encouragements to engage in certain behavior are a kind of intermediate category. These may be little more than an expression of one's hopes and outlooks, which would be protected by freedom of speech, or they may come close to polite orders. As I explore later in respect to criminal solicitation, we have difficult questions about just how the law should treat situations in which it is hard to draw any clear line between what rightly amounts to a properly protected category and what does not. One cannot rely simply on the best application of categories by those with perfect information and ideal judgment. One needs standards that human beings, whether judges or juries, are capable of applying appropriately.

The second point worth noting here, but explained later, is that various situation-altering utterances can be significant in religious practice. These may or may not warrant more protection than such utterances in ordinary life. If they do warrant more protection, a significant question is whether similar protection should extend to nonreligious ideological groups.

When we turn to threats, some variations are important and how the law should handle certain threats is complicated. Freedom of speech seems clearly related to a pure, unconditional threat. By such a threat, I mean that given what has already happened, a person speaks that he will, in the future, act in a certain way. For example, one man says to another who has broken up with his sister, "One of these days when I see you, I'm going to beat the hell out of you." This is a statement of likely future action and it represents one's feelings and appraisals. It does not follow that all such threats should be protected, but free speech definitely comes into play.

Conditioned threats are more complicated. Such a threat may simply indicate what I will be likely to do if you act in a certain way. For example, "If you commit adultery in violation of your marriage to my sister, I will never want to see you again." As this illustration shows, some conditioned threats are natural responses. But sometimes a threat may be mainly designed to get a person to act in a certain way. We may call these manipulative threats as compared with warning threats. If the manipulative threat is to cause a harm to someone unless she commits a criminal act, the way in which the person is induced to commit a crime can be, and is, made criminal. It does not really fall within the realm of free speech, although the speaker's evaluations of the circumstances may be implicitly expressed. Suppose the manipulative threat is to do something one has a right to do unless the listener does something he is allowed to do. For example, "I will disclose to your wife the affair you are having unless you give me $5,000." Virtually everyone agrees this form of blackmail should be criminal, and the effort to induce behavior favorable to oneself strongly reduces any free speech values.

With at least nearly all of these complicated matters, we can imagine examples of religious practices. Whether those deserve any protection beyond that given generally by freedom of speech is a subject we will explore.

On the question of threats, the formulation of the Model Penal Code is worth noting. It limits itself to threats that are generally regarded as illegitimate. It also includes a broad affirmative defense that covers actors who believe that accusations of criminal behavior they have threatened to make, or secrets they have threatened to reveal, are true, and who have the purpose of getting those threatened "to behave in a way reasonably related to the circumstances."[8]

Do encouragements of criminal acts raise free speech concerns? This depends heavily on the kind of encouragement. Under the Model Penal Code, a person is guilty of criminal solicitation if "he commands, encourages or requests another person to engage in specific conduct that would constitute such crime."[9] One possible view is that if a person encourages the commission of a crime, that practical objective is just not reached by freedom of speech. But this view is oversimplified in various respects. What is involved may constitute only a minor crime. The encouragement may not concern immediate behavior but that which the listener may possibly do in the future. The words themselves, or what they genuinely convey, may be ambiguous. The expression may reflect strong feelings and beliefs to which freedom of speech is definitely related.

In respect to minor crimes such as speeding and trespassing on government property, suppose someone says, "That would be a good idea." Should he be guilty of a crime? At least with speeding, which most drivers do in the United States, I believe only drivers themselves and those with authority who directly order that would be held liable, not any passenger who recommends it.

When it comes to a listener's future behavior, suppose a man opposed to war engagement says in a talk to a high school audience, "You young people should not submit to a draft." This is more an expression of a view about appropriate disobedience than a direct encouragement of someone to violate the law, for it concerns mainly future behavior and it does reflect strong feelings and beliefs.

In respect to ambiguity, suppose a speaker says, "If our president sends soldiers abroad and some will be killed, it would be good for one of us to respond and kill our president." Whether the speaker really means to encourage that assassination or has just chosen strong rhetoric would be very hard to conclude. Another factor that is relevant for all this is that only a small percentage of simple encouragements lead to the actual commission of crimes.

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8. MODEL PENAL CODE § 212.5(1) (1962).
9. *Id.* § 5.02(1).

All the factors we have looked at briefly generate three related kinds of difficult questions. The first is when considerations of free speech are important for encouragements of criminal acts. The second is when it makes sense to have those encouragements punished. The answer here relates both to the force of free speech values and broader concerns about the breadth of criminal liability. The third question ties to the second. One might think that ideally punishment should take place only when certain criteria are met, such as a speaker's sense of the danger and harm in the criminal activity he suggests, but we may doubt whether anything like that standard is really one juries and judges would be able to apply, given doubts about actual facts and what exactly motivates a speaker. These are far from simple problems. Related to all this, we have the question of whether anything in the category of religious exercise deserves protection beyond what should be extended to speech more generally.

When advice is based on disinterested evaluation, free speech concerns clearly come into play, but some circumstances may still be dangerous enough to warrant criminal punishment. What if all that is involved in a person's communication is the likelihood that it will be a reckless or negligent cause of genuine serious harm? For example, a woman addressing a group about a police shooting of a teenager may say, "These police don't deserve to live. Whoever wipes them out is doing our people a favor." She may hope only to encourage reform of police practice, but her words create some risk that listeners may choose to attack the police. Under the Model Penal Code, she could be criminally liable as a "proximate cause" if a criminal harm occurs of which she should have been aware.[10] Depending on her awareness of the risk, she could be liable under a standard of recklessness or negligence.[11] The Model Penal Code also labels a misdemeanor of "reckless endangerment," in which it is enough that one recklessly places "another person in danger of death or serious bodily injury."[12] This reaches beyond what many jurisdictions cover.

These problems all suggest that even when free speech considerations apply to a degree, certain forms of communication may still be criminal. Just what lines to draw in basic theory and in practical legal rules are difficult questions. And we also have the related question of whether religious exercise should be treated as anything special here.

What is an appropriate government response when speakers are guilty of fraud and falsehood? Generally, some of these communications may be subject to punishment or civil liability for defamation. Nearly everyone lies at some point in their life, so we can see that some broad protection appropriately covers at least some lies. We also have the practical questions of whether it matters if what a person communicates is inaccurate and if the person is aware of that and its significance. This has be-

10. *See id.* § 2.03(2)–(3).
11. *Id.* § 2.03(3).
12. *Id.* § 211.2.

come an increasingly intense concern during the presidency of Donald Trump. Inaccurate statements can convey negative impressions about another person that cause that person harm based on the actual reactions of listeners or on the deep emotional upset she may experience about what has been said about her, or both. Although the Supreme Court has for some time said that defamation lies outside the First Amendment,[13] free speech obviously has some relevance to certain situations in which people say things that are defamatory.

Just what should be done about these communications is obviously debatable. I strongly believe that the extremes of absolute protection and no protection are both badly misguided. The foreseeable harm and speech value should matter, and the latter should include whether the statements are made about public officials and leading figures and thus have some relevance to how our country operates.

In respect to the relevance of what may be religious misstatements of actual facts, the Supreme Court in the 1944 case of *United States v. Ballard* made clear that judges and juries cannot reach the truth of religious claims.[14] In that case, the Ballards had collected millions of dollars through representation of various powers, including the curing of diseases. The Supreme Court ruled that juries should not determine the truth or falsity of such assertions, although they can make judgments about sincerity.[15]

Some forms of communication, such as insults and epithets, are designed to put down individuals or groups. These can be subject to tort liability for the "intentional infliction of mental or emotional distress,"[16] and in some instances even criminal punishment. Under the Model Penal Code, a person may be guilty of "disorderly conduct" if he purposely or recklessly creates a risk of "public inconvenience, annoyance or alarm" by making an "offensively coarse utterance, gesture or display" or by addressing "abusive language to any person present."[17] A person has committed "harassment" if, "with [the] purpose to harass another, he . . . insults, taunts or challenges another in a manner likely to provoke [a] violent or disorderly response."[18] Some kinds of insults may be particularly threatening for the long term. Racial and ethnic insults are a notable example that may justify punitive prohibitions. Whether that should be possible for similar insults that occur within religious exercise is a significant question.

Yet another kind of communication that raises difficult questions is physical acts that are not speaking or writing but are undertaken to convey a point of view. Parades are often an example of this, although those

13. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301–02 (1964).
14. United States v. Ballard, 322 U.S. 78, 87–88 (1944).
15. *Id*.
16. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 57–66 (5th ed. 1984).
17. MODEL PENAL CODE § 250.2(1)(b) (1962).
18. *Id.* § 250.4(2).

within a parade often display explicit messages. Picketing is also often done to convey a message. Other examples are desecrating a flag or burning a draft card. It is a puzzling question how far physical acts that do not involve ordinary means of communication should enjoy speech protection if their evident aim is conveying a message. Another example is public nudity when that is engaged in to express some sort of idea. Obviously, if behavior is seriously offensive to others, it will not be protected even if the motivation is to communicate. Generally, the relevance of free speech protection here is debated. For religious exercise, one assumes that such behavior would at least enjoy potential protection.

We have covered a wide range of circumstances for which a serious question is whether free speech notions apply at all and, if so, how far they may warrant protective actions. For many of these, we can see similar practices as within religious exercise. What that alone does not tell us is whether for such matters the degree of protection for religious exercise should be the same or different. It also does not tell us whether when some religious practices get protection, somewhat similar nonreligious analogues should or should not get the same. On this latter subject, if religious groups and their exercises receive protections that do not apply to people generally, should these also cover groups that are created to reflect and promote basic nonreligious ideas and purposes, such as gender equality?

Those are all matters that are genuinely difficult to resolve. We will explore them both in the remainder of this article.

III. DOES RELIGION WARRANT SPECIAL TREATMENT?

I shall briefly note here some possible circumstances in which religious ideas and groups warrant treatment that need not extend to nonreligious analogues. One of these has to do with what we might call internal discrimination. In one case, the Supreme Court made clear that churches could choose ministers according to criteria, such as excluding women and gay people, that would otherwise constitute impermissible discrimination in most contexts.[19] As is often noted, there is a nonreligious analogue in which the Court allowed the Boy Scouts to preclude leaders who were openly gay, since parts of its message to young men was that they should not be homosexual.[20] The Boy Scouts case does indicate that not every privilege to discriminate in this way is limited to religious groups, but it does not really resolve whether the degree of privilege and the amount of review are, and should be, exactly the same for religious and nonreligious organizations.

A second kind of issue involves the government favoring some groups or ideas over others. Here, the Establishment Clause, which accompanies the Free Exercise Clause, is key. The government is barred from favoring

19. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012).

20. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

some religious ideas and organizations over others. That strict rule, which safeguards free exercise, does not apply to nonreligious groups, although some forms of categorizing nonreligious organizations could offend freedom of speech or other principles of liberal democracy.

A third possible difference involving religious practices concerns those that might be in serious tension with tort law principles or criminal standards. To take a tort law illustration, a person may be liable for "unreasonably" intruding on the privacy of another or engaging in "outrageous" conduct that inflicts emotional distress. Various churches engage in shunning of members or former members who in some way have departed from what the principles of the churches require. In many of these situations, the churches are calling for an outright rejection by its members that would be tortious in typical nonreligious situations. Courts have been divided on how far these religious practices shall be seen as protected,[21] but clearly the fact that religious practices are involved has mattered for evaluation.

Before turning to the relevance of the Free Exercise Clause, I shall summarize a range of questions that arise in terms of freedom of speech, ones that earlier paragraphs address. Those help to reveal just how complex any proper analysis is in determining what all any particular constitutional provision entails. Relevant speech deserves more protection than individual liberty in general. We have multiple justifications for that protection. Typical speech is communication of perceived facts and values. Protecting it can be good generally for truth discovery, human autonomy, and individual dignity. In our liberal democracy, it can also be good for the political order.

In respect to the coverage of free speech, whether directly by the Constitution or legislative implementation, the two fundamental questions are what counts as relevant communication and whether the bases for protection can be outweighed by other reasons. Exactly where a particular issue fits here is not always clear, and some matters have shifted with changing Supreme Court doctrine. For example, if someone suggests that an audience should engage in certain criminal behavior, such as violating a draft law, is that simply outside the range of relevant speech or, though it falls within that range, do the reasons for punishment outweigh the bases for protection? The categorizations and appropriate degree of protection arise in a number of contexts.

What is the status of behavior that differs from ordinary communication? Here, we have not only matters like musical performance, but more ordinary physical acts that are designed to convey messages, such as burning draft cards and picketing. More typical behavior whose status is dubious involves situation-altering utterances, such as agreements, or-

21. *Compare* Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 883 (9th Cir. 1987) (permitting the practice of shunning by Jehovah's Witnesses), *with* Bear v. Reformed Mennonite Church, 341 A.2d 105, 107–08 (Pa. 1979) (demonstrating a position favorable to a shunned former member).

ders, promises, and offers. One can see an agreement to carry out immediate criminal behavior as not relevant speech, but a promise to violate some law in the distant future is more complicated. Serious manipulative threats should not be protected, but if one is deeply disturbed by another's behavior, a threat to engage in a normal response can be seen as a natural warning that expresses one's sense of what is appropriate. When it comes to inaccurate statements, should protection not be granted if a person understands he is not telling the truth or is either reckless or negligent in that respect? Given that all of us at times get things wrong and the vast majority of people occasionally say things they know are not accurate, any general principle that free speech covers only accurate statements of fact would be much too narrow. Intentional insults to individuals and group epithets might be viewed as outside the range of free speech, or more realistically as having a speech value that can be outweighed by competing considerations.

This summary and the preceding coverage of this article indicate just how complicated it can be to decide what the edges are of what counts as speech for freedom of speech and when, within those boundaries, the law may nonetheless make something criminal or tortious. The complexity of all this bears on how far the Free Exercise Clause is redundant. As explained earlier, it is definitely not redundant if it justifies legislation that favors religion in some way. A thoughtful approach to free exercise leads to the conclusion that it includes some aspects of behaviors that do not really count as "speech" and, more subtly, that the balance of considerations may protect behavior that would not be protected in nonreligious settings. One such example is when a denomination's practices include harsh words and penalties for members who depart from required behavior; those practices may be seen as properly protected, even though they would not be in other contexts.

A subtle question I have briefly mentioned is: how should we take the claim that if a privilege extends to religious groups it should also be granted to nonreligious ideological organizations? If one concludes it is, or should be, so granted, would that make free exercise redundant? I shall not here tackle how far this practical claim should be accepted; still, we need to see that its doing so does not by itself render free exercise redundant. The reason is this: if we think about the right of religious groups to shun noncomplying members, that may lead to the conclusion that similar treatment is warranted for nonreligious groups. Here, the sense of what free exercise calls for could be the basis for according similar treatment to nonreligious groups. Under that analysis, free exercise would be a basic cause for the broader treatment, not somehow "redundant" and unimportant.

IV. HOW FAR MAY THE FREE EXERCISE CLAUSE BE REDUNDANT?

I turn now to the question whether, in terms of how the government treats private citizens and organizations, the Free Exercise Clause has essentially been swallowed up by free speech concerns. One generalization is clear: any idea that modern law has reached this conclusion is significantly misguided. It rests on a misunderstanding of the case of *Employment Division v. Smith*[22] and what has followed. The *Smith* Court ruled that if a law is cast generally and is not aimed at religious practice, no free exercise exemption is constitutionally required by judicial determination.[23] But two other elements of the opinion are potentially important. Before we explore those, it is worth mentioning that historically the use of free speech arguments by religious groups preceded that case. Jehovah's Witnesses notably advanced such arguments in cases a few decades earlier.[24]

With Justice Scalia writing the majority opinion, the Court in *Smith* decided that if the use of a substance like peyote was forbidden, then a religious group, the Native American Church, had no constitutional right to use peyote for sacramental purposes.[25] Part of the opinion's logic was that judges should no longer be making such a determination according to some flexible standard like the compelling interest test. This case effectively eliminated a free exercise claim, standing alone, to act not in accordance with a general law, or at least virtually all general laws. What is badly mistaken is to see this as effectively eliminating the Free Exercise Clause as having genuine significance. One definitely cannot reach this conclusion just because cases resting directly on such independent constitutional claims have largely disappeared.

Two aspects of the *Smith* decision and what has followed are significant. I shall begin with an aspect I believe is illogical in an important respect and which has had little practical influence; I then turn to what is of central importance. The opinion refers to earlier cases and implies that, when a free exercise argument is joined with a contention based on another constitutional provision, the hybrid bases for an exception may be successful.[26] At one level, such a possibility clearly makes sense. In some situations, the overall basis for a form of treatment can be increased if a claimant has two substantial reasons for it rather than only one.

What is illogical is this: if a kind of claim can with some frequency be strong enough to produce a constitutional right when it is combined with a different claim, how can it never be strong enough to create a right by itself? How can a free exercise claim really matter when in combination,

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22. 494 U.S. 872 (1990).
23. *Id.* at 888–90.
24. *See* Fowler v. Rhode Island, 345 U.S. 67, 68 (1953); Niemotko v. Maryland, 340 U.S. 268, 274 (1951).
25. *Smith*, 494 U.S. at 890.
26. *See id.* at 881–82.

but always be too weak standing alone? This is not a defensible position. This aspect of *Smith* has had little influence in the decades following.[27] If the previous paragraph seems harshly critical, I should mention an aspect of majority opinions. These often include Justices who actually have somewhat different perspectives but believe having an opinion to which a majority subscribes is desirable. The aim to get all to join can sometimes produce expressed views that are subject to logical critique.

I now turn to what is the important element of the case that has a good deal to do with free exercise still mattering in our law. Justice Scalia's majority opinion addresses the relevance of legislation that privileges religious practices. Among the relevant passages is the following:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.[28]

Although not put explicitly, the clear implication of this language is that the free exercise value reflected in the Constitution can sometimes, even often, justify legislative concessions to forms of religious practice. Congress was actually overwhelmingly unsatisfied with what the Supreme Court had decided in *Smith*. In 1993, it passed the Religious Freedom Restoration Act (RFRA) which effectively reenacted the standard of review that the Supreme Court had rejected as constitutionally required. Congress announced, among other things,

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification . . . .[29]

According to RFRA, the government may not substantially burden a person's exercise of religion even by a general law unless it can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30]

The Supreme Court decided that Congress did not have the authority

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27. *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon* Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 600, 602 (2003).

28. *Smith*, 494 U.S. at 890 (internal citations omitted).

29. 42 U.S.C. § 2000bb(a)(1)–(3) (2012).

30. *Id*. § 2000bb-1(b)(1)–(2).

to impose this standard on states,[31] but it assumed both that RFRA could apply to federal laws and that states were free to enact similar provisions. In 2000, Congress adopted a narrower Religious Land Use and Institutionalized Persons Act (RLUIPA) that reached aspects of state practices including prisons.[32] The prison provision was upheld in 2005 in *Cutter v. Wilkinson*.[33]

Although it is possible to see other constitutional bases for this legislation of Congress, the obvious authority is conferred by the Free Exercise Clause, and what Congress has done is to reintroduce the flexible standard of review that preceded *Smith*. Many states have enacted similar laws.[34] What the courts are now doing in many states is applying these statutes to a variety of situations. This is not a direct application of a constitutional requirement, *but* it is an application of laws whose authority in treating religion as special does rest significantly on the constitutional protection of free exercise. We have no general standard to determine which similar forms of nonreligious categorizations are acceptable and which are not, but we do have a central ingredient of why seeing the Free Exercise Clause as redundant is grossly misleading, especially since the federal laws themselves adopt what were the preceding set of standards used in free exercise cases. Plainly, free exercise claims can play a crucial role in what are legal rights even if courts do not need to refer directly to the constitutional clause. What I have said here is completely consistent with what the opinion in *Smith* contains. Taken as a whole, that case is far from making the Free Exercise Clause redundant.

Of course, all this does not answer what should happen in the future. If we got to a point at which virtually everyone thought all religious ideas and practices were silly and misguided, then the notion of singling religions out for special favorable treatment could disappear. It would follow then that statutes like RFRA would be repealed or themselves declared unconstitutional.

Although statutes like RFRA make concessions to religious practices that do not extend more generally, one can imagine an argument that any such concession must constitutionally extend to any nonreligious reason to engage in the same behavior. We have no indication in Supreme Court decisions that this is generally true, and the language we have noted in *Smith* indicates otherwise. Just how forceful this kind of argument may be depends on what kind of concession to practice is involved. If one is considering use of a drug in a worship service or the practice of shunning, one may well conclude that a limit to religious practice is appropriate. When it comes to eligibility not to submit to military service, I believe the argument is powerful that nonreligious pacifists should be treated like religious pacifists. Given a statute whose plain language and objective

31. City of Boerne v. Flores, 521 U.S. 507, 533–35 (1997).
32. *See* 42 U.S.C. §§ 2000cc, 2000cc-1(a) (2012).
33. 544 U.S. 709, 725 (2005).
34. *See, e.g.*, 775 ILL. COMP. STAT. 35/15 (2015).

limited the right to religious pacifists, the Supreme Court interpreted it broadly enough to reach all sincere pacifists.[35]

When the issue concerns government treatment of individual believers, one religion cannot be favored or disfavored over others. This is largely a consequence of the bar on establishment of religions, but it relates to free exercise. Things can be a bit more complicated when we turn to government practices themselves, since it may seem appropriate to have modest religious practices at public ceremonies.

I do want to note one possible exception concerning the treatment of individuals, an issue actually raised by existing practical concerns about Muslim terrorists. If a high percentage of members of a religion are dedicated to committing violent acts against outsiders, can members of that religion be treated differently in some respect, such as entry into the country? Putting aside differences in age and gender of those who commit violence, if sixty percent of the members of a faith were terrorists and it was nearly impossible to tell whether an individual fell within that group, it could be reasonable to preclude members from coming to the United States. In present circumstances, the percentage of Muslim terrorists is much, much smaller and definitely should not bar Muslim immigration. What may be warranted, at least for men within a certain age range, may be a somewhat more extensive examination of background than is used for people generally. Taking a person's religion into account to this limited degree can be appropriate in order to promote safety in the country.

Is there a free speech analogue to the bar on favoring some religions over others in the treatment of private individuals? A categorization here could depend on the nature of the communication or the substance of what is conveyed, or both. Thus, we can have restrictions on advertising that do not apply to other communications; if a person directly encourages criminal actions, that may be punished. When it comes to direct restrictions on speech, there would be many conceivable differences among content that would not be all right for regulation. The law cannot directly favor support for Republicans over Democrats. Whether the range of permissible restrictions would be as limited as they are for religion is more doubtful. And when we turn from restraint to support, favoritism for particular views seems more acceptable. For example, I assume that the government could provide some financial aid for groups supporting racial equality and gay marriage, while denying similar help to those who oppose those aspects of equal treatment. If this analysis is correct, the restraints on favoritism are more absolute respecting religion than nonreligious advocacy that is protected by free speech.

This article has made a number of important points. There is a large overlap between religious exercise and communication protected by free-

35. For a more detailed analysis, see Kent Greenwalt, *Granting Exemptions from Legal Duties: When Are They Warranted and What Is the Place of Religion?*, 93 U. DET. MERCY L. REV. 89, 100–02 (2016).

dom of speech. Exactly which form of religious exercise counts as speech is a bit complicated and debatable, but many claims by religious speakers can be cast in terms of freedom of speech. Despite this substantial overlap, it is seriously misguided to perceive freedom of speech as actually swallowing up the Free Exercise Clause. The rules against favoring one communicative approach over another are stricter when religion is involved, and, as RFRA and RLUIPA illustrate, the government remains free to make some concessions to religious practice that do not extend to all those who would like to do something similar for nonreligious reasons. As the article explains, although *Smith* did eliminate some kinds of free exercise claims, it definitely did not suggest that the Free Exercise Clause was basically redundant when restrictions and benefits for private communications and activities were involved.

V. A NOTABLE RECENT CASE IN WHICH OPINIONS DEALT WITH MANY OF THESE ISSUES

In this final section, I will give a brief account of the opinions in the significant 2018 case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[36] My reason is this: although the majority decided the case on a fairly narrow basis, the majority opinion and the individual concurring opinions addressed many of the topics of this article and how they should be dealt with. When one reflects on what these opinions claim, one can perceive both how complicated some of these considerations are and how difficult it often is to determine the proper assessments. Although what follows could provide some insight into likely future decisions by the Supreme Court, that is not the objective. It is rather to help readers understand the issues and what considerations should matter.

In the case, Jack Phillips, the owner of a cake shop, refused to sell a wedding cake to a same-sex couple. At a simple level, the question was whether that violated the Colorado anti-discrimination law's coverage of sexual orientation. Colorado at the time did not yet recognize same-sex marriage, and the cake was to celebrate a marriage that occurred in another state. The crucial question was whether, given Phillips's strong religious convictions that such marriage was unwarranted, he could refuse to provide the cake. When his refusal was challenged and reviewed by Colorado administrative agencies and courts, he claimed a free speech right not to exercise his artistic talents against his convictions and a free exercise right not to act contrary to his religious beliefs. These arguments did not succeed in Colorado, but the Supreme Court, with seven votes, held that negative comments by commissioners showed that the Commission had not been neutral about religious beliefs, and this failure undercut its ruling that Phillips had to provide the cake.[37] Given this basis for

36. 138 S. Ct. 1719 (2018).
37. *Id.* at 1729–31.

its ruling, the Court did not need to decide whether the state had legitimate reasons to require providing cakes in similar settings.

Perhaps the key question for cases like this is whether someone with religious or other objections can refuse services. In previous writing, I have suggested that much depends on whether what is called for is direct participation or peripheral services.[38] Although the Justices have different views about how particular circumstances should be treated, in a broad sense, they accept this position. All of them subscribe to the view that for ordinary goods and services after the event, it is fine if vendors are not able to refuse on the basis that they object to a couple's sexual orientation or marital status.[39] All of them also agree that clerics may not be required to perform marital services to which they have religious objections.[40] I have taken the position that someone asked to be the main photographer at a wedding should be able to refuse based on religious convictions, but those whose duties are peripheral, such as cleaning a facility, should have no such privilege.

How to classify the provision of a wedding cake is debatable and it divides the Justices. In most of the opinions, we have no clear distinctions concerning proper treatment between what Phillips was asked to do and the provision of the same ordinary cake supplied for other weddings. How should supplying an ordinary wedding cake be viewed? One might say a cake is so central for a wedding celebration that providing it is a kind of participation that should not be required. This indeed is a position underlying a concurrence by Justice Gorsuch.[41] But, suppose the cake itself has no message on it? The fact that it is critical to the celebration should not itself be enough to warrant refusal to provide. A helpful comparison here is with wedding rings. They are a crucial symbol for the marriage itself. But we would not expect a seller of rings to deny a purchase for someone about to enter a same-sex marriage. If a cake has no special message on it, should it be different? My inclination is "no," although Justice Gorsuch suggests otherwise.

For this particular situation, two considerations are relevant. The opinions refer to a set of three cases in which the sellers of cakes refused to provide ones with explicit antigay messages. All the Justices accepted the determination that bakers should not have to print on their cakes explicit messages to which they have strong objections.[42] Although at least one opinion in *Masterpiece Cakeshop* sees it as no different from the cases with the explicit messages that were actually at odds with anti-discrimination principles,[43] being required to convey a definite message one finds directly offensive is quite different from simply selling an ordinary cake.

38. *See* Greenawalt, *supra* note 35, at 107–10.
39. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728–29; *id.* at 1739 (Gorsuch, J., concurring).
40. *See id.* at 1727 (majority opinion).
41. *Id.* at 1738 (Gorsuch, J., concurring).
42. *See, e.g.*, *id.* at 1733 (Kagan, J., concurring).
43. *Id.* at 1735–36 (Gorsuch, J., concurring).

Most of the opinions in the case do not seem to treat what Phillips does as different from providing an ordinary cake for a same-sex couple. Justice Thomas provides a more complex perspective.[44] He notes that Phillips prescribes himself as an artist. "Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."[45] Phillips discusses these matters with a couple before their wedding and, with some frequency, he stays and interacts with guests of the weddings. All this amounts to more direct involvement in the wedding than simply providing a standard cake. If one accepts a basic distinction between direct involvement and peripheral contact and believes a privilege to refuse should depend on direct participation, this fuller account of how Phillips operates really places him on the edge, hard to classify.

Another subject the opinions in the case touch on is how free speech plays in all this. The opinion of Justice Thomas, joined by Justice Gorsuch, explores this in some depth.[46] He explains that behavior meant to be communicative, such as parades, can qualify as protected speech and that refusing to provide this cake fell into that category.[47] Thus, what was involved for Phillips was an overlap of free exercise and freedom of speech. Justice Thomas does not delve into whether the degree of protection is precisely the same in all circumstances, but he seems to assume that, in settings like this one, the free speech concerns carry the same kind of power as those based on free exercise.

When one reads the opinions in this case, one sees the complexities of many of the subjects covered in this article, and that leads to uncertainty about how some specific instances will be treated in the future and how they should be resolved.

44. *Id.* at 1740 (Thomas, J., concurring).
45. *Id.* at 1742.
46. *See id.* at 1740–48.
47. *Id.* at 1741–43.