condition—from which it follows that social hierarchies are inconsistent with the equal standing of all citizens. The larger disagreement between the kind of liberalism Laborde defends and my interpretation of political liberalism concerns the scope of reasonable conceptions of justice. This raises the question of how to define reasonable pluralism about justice itself. In tackling this question, *Liberalism's Religion* is at the forefront of the most difficult issue liberals must address, and no doubt will be a central resource and voice in those debates for years to come.

On Religion's Specialness

Mark Storslee

Penn State Law

At least since John Locke, the category of religion has played a unique role in liberal politics. Most obviously, it is a master concept that animates the project of church-state separation—the task of "distinguish[ing] … the Business of Civil Government from that of Religion."[1] And American law is an inheritor of that tradition. The First Amendment says that Congress shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In so doing, it singles out religion for both special protection and special disability. Thousands of other laws do the same.[2] In our political culture and our law, the concept of religion is inescapable.

In recent years, however, many scholars have begun to question religion's distinctive role in our legal vocabulary. Liberal egalitarians such as John Rawls have argued that religion is just one "conception of the good" among many, and ought to be treated as such.[3] Others complain that the

[1]John Locke, *A Letter concerning Toleration*, in *A Letter Concerning Toleration and Other Writings*, ed. Mark Goldie (Indianapolis, IN: Liberty Fund, 2010), 12. For an especially interesting and historically informed discussion of this project, see Richard W. Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?," *St. John's Journal of Legal Commentary* 22, no. 2 (2007): 515–33.

[2]See, e.g., James E. Ryan, "*Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review* 78, no. 6 (1992): 1445 (estimating that as many as two thousand statutes involve special rules for religion).

[3]See generally John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

concept of religion is simply a tool to legitimate the secular nation-state.[4] And perhaps most notably, many scholars now contend that the law's special treatment of religion is unfair because the obvious justifications for it seem both over- and underinclusive.[5] To use just one example, the argument that religion is special because it involves weighty matters of conscience seems too broad and too narrow: it includes practices like wearing a yarmulke or growing a beard that are often matters of communal identity more than individual conscience, and it fails to protect weighty secular convictions like nonreligious pacifism.[6] These challenges have generated an urgent question: Is religion's unique status—in the Constitution and in the rest of our law—either regrettable or downright wrong?

Laborde addresses this challenge in an innovative way. She agrees with Rawlsian arguments that we ought to stop talking about "religion" and instead focus on "the good." But Laborde argues that this approach has also fallen short, above all because it lacks a theory of the *specific* goods that merit unique legal treatment. Developing such a theory is the book's core aim. Laborde first insists that we ought to "eschew[] the term 'religion'" in political theory and law, and instead focus on "broader categor[ies] of respect-worthy beliefs and activities"—things like identity formation, voluntary association, conscience, and so on (2, 28). At the same time, we ought to "disaggregate" those goods—to identify which of them is implicated by things like requests for exemptions, limits on government speech, and claims of associational freedom in order to correctly calibrate legal rights (3–9, 239–42). In a nutshell, this is liberalism's religion: an insistence that we jettison the category of religion coupled with an attempt to identify more general values and the specific insistences in which they merit protection.

Laborde's argument is provocative because it both validates the usual complaints about religion's specialness while also moving beyond them. Laborde unquestionably agrees with the critics that religion is not special. But she also insists that religion *nonetheless* frequently involves important goods that are worthy of protection. Like secular claims of conscience or important cultural practices, for instance, religion sometimes involves deep commitments that merit legal exemptions (197–42). Similarly, religious communities like other minorities ought to be protected from discrimination or disparagement,

[4]See, e.g., William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009), 16 (arguing that the category of religion was designed to "delegitimate[] certain kinds of violence" while "legitimating … violence done in the name of secular, Western ideals").

[5]See Christopher C. Lund, "Religion Is Special Enough," *Virginia Law Review* 103 (2017): 496–97 (surveying these arguments).

[6]To be sure, one might also ask what makes "conscience" special. For an interesting discussion of this question, see Steven D. Smith, "The Tenuous Case for Conscience," *Roger Williams University Law Review* 10, no. 2 (2005).

even the kind that may be the result of mere government indifference (113–59). In short, there are many things about religion worth protecting—and they are worth protecting whether religion is special or not. That insight and the care with which Laborde explores it is a valuable contribution.

Yet Laborde's proposal also offers an even more tantalizing possibility, but one she does not seem to consider in any detail. Unlike commentators with a more reductive approach,[7] Laborde quite rightly sees religion as involving a wide variety of concerns. She argues, however, that once those concerns have been identified we can safely "dispense[] with" the category of religion for legal purposes and focus only on the piecemeal goods it implicates (2). But why not draw a different conclusion? Why not conclude instead that what makes the category of religion justifiable is *precisely* the fact that it implicates many values at once, and in ways that one-to-one analogues do not? In other words, perhaps religion is "special" (or more accurately, defensible as a legal category) not because it possesses some singular quality that makes it superior to other things, but because it identifies instances in which multiple values—the kinds of things Locke thought were particularly important to "Peace, Equity and Friendship" in society—combine in a unique way.[8]

To see what I mean, consider just a few examples. In *Wisconsin v. Yoder*, the Supreme Court famously held that Amish parents were entitled to a religious exemption from a law requiring their children to attend school until the age of sixteen.[9] Writing for the majority, Chief Justice Burger stressed that the Free Exercise Clause only concerns religion, and thus would not apply to Henry David Thoreau and his "philosophical and personal" choice to reside at Walden Pond.[10] Critics have long disparaged that assertion as unfairly

[7]See, e.g., Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), 34–53 (arguing that religion is marked by "categoricity of commands" and "insulation from reasons and evidence").

[8]Locke, *Letter concerning Toleration*, 21. Andrew Koppelman has made a similar argument, insofar as he has suggested that the category of religion is a "proxy" for goods that cannot be "targeted directly." See Andrew Koppelman, "Religion's Specialized Specialness," *University of Chicago Law Review Online* 79, no. 1 (2013): 78. Unlike Koppelman, however, my argument is that the category of religion identifies a phenomenon that is *more than* and *distinct from* any of its constituent parts, not just a convenient substitute for them. On this score, my argument has more in common with Founding-era arguments—which almost always invoked religion's multifaceted character—than it does with Koppelman's theory. See, e.g., Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7 (1996): 316–19 (discussing pluralist arguments about religion made by the founding generation); Michael W. McConnell, "The Problem of Singling Out Religion," *DePaul Law Review* 50 (2000): 16–31 (same).

[9]406 U.S. 205 (1972).

[10]Ibid., 216.

privileging religious conscience.[11] But Laborde's argument offers a persuasive way of seeing how the two claims might be distinct. Like the Amish, Thoreau's desire to live at Walden arises out of a deep moral conviction, and is valuable for that reason. But the claim from the Amish possesses other characteristics as well. The exemption did more than allow religious parents to live according to their consciences; it also shielded a whole community in preserving its values. It dealt with ethical conviction, but also with the Amish belief that their way of life was a matter of cosmic significance that ought not be dictated by government. And one need only think of the unique dress and mannerisms of the Amish to understand the ways that the exemption shielded their children from the persecution they would have encountered in public high school. It is difficult to imagine a secular claim that would exhibit all of those features. And if one did, it is very likely we would call it religion.

Or take another example from the facts of *Employment Division v. Smith*, the case in which the Court radically narrowed its view of the Free Exercise Clause and upheld a penalty for using peyote in a Native American worship service.[12] In Laborde's parlance, *Smith* involved an "integrity-protecting commitment"—Al Smith did not feel bound to use peyote as a matter of moral duty, but he did see it as part of his Native American heritage (216).[13] But peel back the layers and see that the case was about so much more. For one thing, it concerned the core sacrament of a whole community.[14] For another, it arose in the context of social exclusion and indifference toward Native American spirituality.[15] It could even be said to have involved the government in divisive theological judgments, since the state had exempted communion wine from regulation but chose to treat peyote differently.[16] We could try to imagine an analogous secular claim touching on all those themes—cultural identity, associational freedom, historical animus, government judgments about cosmic claims, and so forth. But when we do so, the exercise almost always ends up feeling stilted and fanciful. Yes, things like veganism or utilitarianism sometimes involve comprehensive convictions or even collec-

[11]See, e.g., William P. Marshall, "In Defense of *Smith* and Free Exercise Revisionism," *University of Chicago Law Review* 58 (1991): 319–20.

[12]494 U.S. 872 (1990).

[13]See also Garrett Epps, "Elegy for a Hero of Religious Freedom," *The Atlantic*, Dec. 9, 2014, https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/ (recounting the story behind Al Smith's decision to attend the peyote ceremony at issue in *Smith*).

[14]See *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in the judgment).

[15]See Epps, "Elegy" (noting that "To the white people who ran the agency" where Smith worked, "peyote was not a religious exercise—it was an 'illegal drug'").

[16]See Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 92 (explaining these exemptions for sacramental wine).

tive action.[17] But would anyone actually contend that they have been subject to long-standing and intense discrimination the way religion has? Or that the government is incompetent to choose among their competing forms the way it is incompetent to choose the one true religion? From Locke's time to ours, the cases involving these constellations of concerns and others like them almost invariably involve one thing. And we call that thing religion.

Religion is a semantic category that always involves multiple values important to liberal politics. Moreover, those values are always intersecting and woven together in a way that makes religion meaningfully distinct from other things. We will not know in advance precisely which combinations of values will be present, because different cases foreground different things. But that is the nature of concepts.[18] And that is precisely why the concept of religion is useful. Indeed, it is no exaggeration to say that it is a more reliable guide than Laborde's approach for identifying what is actually at stake in certain controversies, even if it does not ultimately resolve them.

For example, consider Laborde's treatment of *Burwell v. Hobby Lobby*, the case involving family business owners who sought a religious exemption from paying for drugs they believed caused abortions.[19] When discussing the case, Laborde is content to declare that because Hobby Lobby was not an "identificatory association" in which all participants shared a uniform sense of purpose, the exemption claim lacked any normative basis whatsoever and should have been rejected without further analysis (182–85, 301n65). But whatever one thinks of the outcome in *Hobby Lobby*, that kind of superficial evaluation is exactly what the category of religion pushes back against. Yes, the case had an associational aspect insofar as Hobby Lobby was a closely held business. But who could deny that it also involved weighty matters of conscience—specifically, questions about complicity in what some see as a grave moral wrong—that are worthy of at least some consideration? And more basically, is there any doubt that *Hobby Lobby* touched on questions about when life begins that the Court itself has famously declared are inseparable from one's views about "the mystery of human life?"[20] Indeed, one might even suggest that *Hobby Lobby* contained a hint of animus and discrimination insofar as the authors of the regulations chose to automatically exempt thousands of businesses from providing contraception but refused to extend

[17]See Leiter, *Why Tolerate Religion?*, 96 (pointing out similarities between religion and veganism); Micah Schwartzman, "What If Religion Is Not Special?," *University of Chicago Law Review* 79 (2013): 1422 (arguing that utilitarianism ought to be limited the same way as religion for purposes of governmental endorsement).

[18]For more on concepts and the ways that their application always involves "family resemblances" rather than uniform criteria, see Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1958), 31–35.

[19]134 S. Ct. 2751 (2014).

[20]See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

the same degree of consideration to many religious entities, even small religious colleges.[21] The majority in *Hobby Lobby* may well have been mistaken in concluding that the law required granting Hobby Lobby an exemption, either because the complicity claim was too attenuated or the harm to the public interest was too great. But they were not wrong to assume, just as statutes like the Religious Freedom Restoration Act and Title VII already do, that the category of religion is a reliable marker of instances where profound concerns weave together in genuinely unique ways. And indeed, that is exactly why the drafters of the First Amendment chose to single out religion from the very beginning.

Here, it is important to be clear. Seeing religion as a justifiable category implies that the law's decision to treat it specially is neither regrettable nor morally retrograde. But that does not mean religious concerns ought to prevail in every case. Nor does it mean the category of religion exhausts the universe of things we might want to protect. On the contrary, any one of the goods implicated by religion might offer a sufficient justification for special legal treatment. What is more, religion can also be a benchmark for identifying other kinds of concerns—things like sexual orientation, for instance—where a similar stacking of goods makes the case for special legal rules even stronger than it otherwise might be.[22] Explaining all of that is a much longer essay. For now, it is enough to begin where Laborde's valuable book leaves off. When it comes to religion, the whole is more than the sum of its parts. And indeed, that might just be what makes it special.

Group Rights in *Liberalism's Religion*

Avia Pasternak

University College London

Chapter 5 of Laborde's incredibly rich analysis engages with the question of religious group rights. Laborde argues that the politically liberal state should grant (some) religious associations legal exemptions and protections, on the basis of their freedom-of-association-related interests: first, their *coherence*

[21]See *Hobby Lobby*, 134 S. Ct. at 2763–64 (explaining the differing regulatory regimes).

[22]For a perceptive discussion of the affinities between religion and sexual orientation, see William N. Eskridge Jr., "A Jurisprudence of 'Coming Out': Religion, Homosexuality, and Collisions of Liberty and Equality in America," *Yale Law Journal* 106 (1997): 2416–30.