Third, one important argument for the special protection for religious freedom missing from Brady's analysis is that protection of religion and religious freedom has proved critical to the protection of many other human rights.[38] Even in postmodern liberal societies, religions help to define the meanings and measures of shame and regret, restraint and respect, responsibility and restitution that a human rights regime presupposes. They help to lay out the fundamentals of human dignity and human community, and the essentials of human nature and human needs upon which human rights are built. Moreover, religions stand alongside the state and other institutions in helping to implement and protect the rights of a person and community—especially at times when the state becomes weak, distracted, divided, or cash-strapped. Religious communities can create the conditions and sometimes prototypes for the realization of civil and political rights of speech, press, assembly, and more. They can provide a critical, sometimes the principal, means of education, health care, child care, labor organization, employment, and artistic opportunities, among other things. And they can offer some of the deepest insights into duties of stewardship and service that lie at the heart of environmental care.

Because of the vital role of religion in the cultivation and implementation of human rights, many social scientists and human rights scholars have come to see that providing strong protections for religious beliefs, practices, and institutions enhances, rather than diminishes, human rights for all. Many scholars now repeat the American founders' insight that religious freedom is "the first freedom" from which other rights and freedoms evolve. For the religious individual, the right to believe often correlates with freedoms to assemble, speak, worship, evangelize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to practice religion collectively implicates rights to corporate property, collective worship, organized charity, religious education, freedom of press, and autonomy of governance. Those who argue that American religious freedom is a dispensable and dangerous cultural luxury might well be playing right into the hands of those who would wish to subvert human rights and freedoms altogether.

THE DISTINCTIVENESS OF RELIGION: RESPONSE TO READERS

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I am very grateful to the participants of this roundtable, and I have learned much from their comments and, indeed, agree with a lot of what they say. My brief reply will touch on a few areas of agreement and also respond to some of the queries and criticisms raised.

In my book I argue that when religion is understood in the way I describe, a number of the arguments that have been offered to justify special treatment become more convincing. For example, religious convictions are not just deeply important to adherents in the way that secular convictions may be. They are uniquely important because they have a unique object and promise. Religion's unique object also means that forcing believers to disobey religious conscience violates human dignity in a special way; what is at stake is not just convictions about right and wrong, but the ability

38 Brian J. Grim and Roger Finke, *The Price of Religious Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011); John Witte, Jr., and M. Christian Green, *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012).

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to engage freely with the ground of goodness and truth. Thomas Berg suggests that my understanding of religion's distinctiveness can support other arguments for special treatment in ways that I have not considered. For example, religious social-service organizations can make unique contributions to public purposes because the openness to ultimate reality that undergirds their work can give them a "distinctive capacity to transform lives." I do not disagree and welcome further insights like this.

Marc DeGirolami is concerned with the capaciousness of the book's understanding of religion, and he wonders if I am committed to the additional refinements that I propose for defining religion in the context of free exercise exemptions. I am. We should not expect a single legal definition of religion. The particular context in which the definitional question arises will shape the relevant considerations, and while we should begin with the understanding of religion that underlies our commitment to religious freedom, we cannot necessarily end there. In the exemptions context, an approach that is administrable, feasible, and fair will mean criteria that are both broader and narrower than the description of religion I begin with.

I also agree with Vincent Phillip Muñoz that a balancing approach to free exercise limits is ahistorical and with Michael Moreland that the Court's compelling state interest test, in particular, is under-theorized and susceptible to judicial manipulation. When developing a right of exemption under the Free Exercise Clause, I propose instead specific limits that are conceptualized as preconditions of religious liberty rather than as concessions to countervailing state interests. Specific limits also help to cabin judicial discretion and, thus, reduce the risk that free exercise protections will be undermined by judicial bias or other forms of distorted decision making. Those in the founding era envisioned limits on free exercise, but they viewed these limits as themselves essential to the protection of religious liberty rather than as something that comes at the expense of it.

Frederick Gedicks questions the fairness of my critique of the limits he proposes when legislative and administrative accommodations burden third parties. I argue that limits whenever these accommodations place material burdens on third parties, even a discrete group that does not share the religious beliefs involved, are too broad and that respect for conscience in conflicts with the state requires a more nuanced inquiry involving a range of considerations such as the foreseeability and avoidability of the harm, the expectations of the parties, the nature and substantiality of the burden, and whether it is shouldered by an individual or corporate entity. When I write that Gedicks's proposal does not respect conscience, I do not mean to accuse him of "hostility to religious belief" or to question his commitment to religious freedom, which is unimpeachable. Rather, I mean to say something objective about the proposal and the balance it embodies. I worry that it does not sufficiently value the importance of accommodating conscience in conflicts with the state and that its proponents too easily equate burdens on third parties with religious liberty violations.

Angela Carmella agrees with my goal of encouraging religious believers and government officials to reach mutually acceptable solutions to conflicts, but she is less sanguine about the room for compromise and is skeptical that it will result from the strong right of exemption I propose. We are beset by claims of conscience that leave no space for compromise, including complicity claims that have grown in number with the cultural disestablishment of Christianity. While such claims may, indeed, be increasing, I have sought to design my proposal to provide strong incentives for both believers and government officials to move from polarized positions to find new room for compromise. For example, the right of exemption I propose includes clear and narrow limits that resist judicial manipulation, burdens of proof and evidentiary standards that encourage good faith engagement and exploration of possible compromises, and a role for the residual judicial anxieties that will almost certainly continue to affect judicial decision making in ways that weaken

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free exercise protections. I am more optimistic about the effectiveness of this design than Carmella, but even more important is our agreement on the goal.

Several roundtable participants, including Vincent Phillip Muñoz, Gerard Bradley, Marc DeGirolami, and John Witte, question the role that history plays in my analysis. I state in my book that I do not offer my conclusions on originalist grounds. However, I draw upon founding-era thought for my account of religion's distinctiveness as well as for principles to guide religion clause jurisprudence. Why do I turn to history? And when I do, is it problematic to choose shared principles as my starting point rather than more specific directives?

My engagement with history is multifaceted. At the book's outset, I argue that the unique history of the religion clauses makes conventional forms of originalist interpretation impossible. The religion clauses were drafted to apply only to the federal government, and their purpose was limited. Founding-era Americans agreed that the Constitution gives the federal government no power in religious matters, and the religion clauses were added to assuage the concerns of those who feared the federal government would overstep its boundaries. Those who drafted and ratified the First Amendment shared a commitment to free exercise and disestablishment, but they disagreed about what their commitments entailed and their views were evolving. Because the religion clauses had a limited purpose, the adoption of the First Amendment did not become an occasion for debating and resolving these differences. Starting with shared principles is faithful to the historical record in a way that does not seek historical answers that do not exist or insist on historically accurate positions that the Court is unlikely to ever embrace.

However, my engagement with founding-era thought is not just a historical exercise. Part of the purpose of the book is to demonstrate the continuing power of founding-era principles. As I explain in the book, text and history are foundational sources of constitutional meaning, and we can usually begin and end with them. However, where there is deep normative disagreement, we need to show why founding-era history contains insights for the present. If we do not, history will be resisted, and it can easily be subverted, sometimes openly or other times by sleight of hand. When that happens, we risk losing a sense of the Constitution's historical understanding without even recognizing that we are doing so, and if this were to occur with respect to the religion clauses, we would be losing a lot.

John Witte closes the comments with an important observation. The protection of religious freedom in political communities is associated with enhanced protection for other human rights as well. Witte gives a number of reasons for why this is so, and the analysis in my book offers another. When a community values religious freedom, it values an essential aspect of human freedom and, thus, opens itself to expanding that freedom. For those in the founding era, religious freedom was "the first freedom" in part because it protects the ability of persons to engage with the source of human freedom. "God hath created the mind free,"[39] Thomas Jefferson wrote, and religious freedom and other human freedoms are linked. I argue in my conclusion that appreciating the distinctiveness of religion allows us to see the sacredness of both religious and secular conscience and, indeed, the sacredness of human beings.

Will my arguments convince secular skeptics? I have sought an account of religion's distinctiveness and related arguments for religious liberty that will be persuasive to believers and nonbelievers alike, but both Witte and Anna Bonta Moreland worry that I am too optimistic. Witte worries "about having to defend religious freedom in a way that the bitterest skeptic and most cynical

39 Thomas Jefferson, "A Bill for Establishing Religious Freedom," in *The Papers of Thomas Jefferson*, vol. 2, *1777 to 18 June 1779 including the Revisal of the laws, 1776–1786*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 545.

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nonreligionist will be convinced—knowing that they have already made a faith-like leap against religion that no rational argument can rebut." Moreland describes a prevailing scholarly narrative that views religion as something irrational and dangerous that must be kept out of politics and the public square. She doubts that those who adhere to this narrative will be persuaded that religious commitments are something that should matter to them.

Certainly, I will not convince every skeptic, but I remain hopeful that my arguments will be persuasive to some, even many. My purpose is not to move the secular reader to faith but to promote deeper understanding and appreciation in part by drawing connections between religious conviction and experiences that we all share. I have included examples from a variety of religious traditions with the hope that unfamiliar examples can help dislodge preconceptions that impede understanding. I agree with Anna Moreland that we cannot subsume secular claims of conscience into religious ones; secularists do not implicitly believe the same thing that believers profess explicitly. However, religious and secular conscience are related, and when we see religion for what it is, we can also better appreciate the worth of secular conscience. Understanding what is at stake for religious believers is fruitful for protecting religious liberty and also human freedom more broadly.

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