A NON-CATEGORICAL APPROACH TO FREE EXERCISE RIGHTS

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INTRODUCTION: UNCONSTITUTIONAL CONDITIONS AND FREE EXERCISE JURISPRUDENCE

The unconstitutional conditions doctrine, which holds that "the government may not deny a benefit to a person because [that person] exercises a constitutional right,"[1] has been applied inconsistently to matters within the Free Exercise Clause and without, including entitlements to unemployment benefits,[2] licenses to proselyte,[3] educational benefits,[4] and the right to run for public office.[5] Sometimes the underlying right that the benefits are conditioned on appears to be a Free Exercise one, while at other times it is Free Speech, or an Equal Protection right. Philip Hamburger has noted that "[t]he cases on

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1 Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 545 (1983).

2 *See* Sherbert v. Verner, 374 U.S. 398 (1963).

3 *See* Jones v. Opelika, 316 U.S. 584, 598–600 (1942) (upholding a license tax charged for the right to proselytize by selling religious texts), *vacated*, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (invalidating a license tax on proselytizing activity similar to the tax upheld in *Jones v. Opelika*).

4 *See* Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 264–65 (1989) (footnote omitted). McConnell points out how, under *Lemon v. Kurtzman*, 403 U.S. 602 (1971),

> [i]f a state chooses to provide money or other fungible forms of assistance to all elementary and secondary education, public as well as private, secular as well as religious, the [Supreme] Court deems the portion of the aid that goes to religious schools as "aid" to religion. The Court thus gets caught in a mass of inconsistencies and contradictions. "Penalizing" the exercise of first amendment rights is impermissible, the Court says, but withholding generally available subsidies from people who exercise those rights is not only permissible but required.

5 *See* Nicole. A. Gordon, *The Constitutional Right to Candidacy*, 91 POL. SCI. Q. 471, 471, 479–80 (1976).

unconstitutional conditions are so poorly conceptualized that they cannot provide more than rough support for any theory of such conditions."[6]

Similarly, compared to other U.S. constitutional rights and international and comparative religious freedom provisions, the Free Exercise Clause is also poorly conceptualized. International human rights norms, for example, have an explicit balancing test and specific topics (education, proselyting, producing religious literature, religious autonomy) where the balance of interests clearly favors the religious individual or group. In contrast, Alan Brownstein argues that in the American system

> nothing is settled. The entire meaning of the clause is an open question as to which there is little consensus on anything. History provides few definitive answers. The very idea that there may be a theory on which to base the protection of religious liberty is seriously challenged. The current Supreme Court's interpretation of free exercise rights is under continuous challenge.[7]

Unlike the law on religious freedom in other jurisdictions, U.S. Free Exercise jurisprudence has not explicitly developed law with a core of highly protected aspects of Free Exercise or one that permits differentiation of Free Exercise claims by importance. I have long shared Brownstein's confusion as to why U.S. constitutional doctrine on this subject is so anemic and poorly developed. As Brownstein explains,

> Free exercise doctrine is generally expressed as a simple formula, or more accurately, as a debate between two simple formulas [strict scrutiny and generally applicable laws] . . . . For the most part, that is all there is . . . . I am continually astonished by this reality. I believe it is wrong headed and needs to be corrected. I have no easy explanation for the lack of doctrinal development in this area . . . .[8]

The need for doctrinal development in the Free Exercise realm has been further noted by Justice Barrett. In her concurrence in *Fulton v. City of Philadelphia* in 2021, joined by Justices Kavanaugh and Breyer, she raises the question of what standard should replace *Employment Division Smith*,[9] which held that religious conduct cannot be exempted

6 Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 487 (2012).

7 Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 505 (2003) (footnotes omitted).

8 *Id.* at 506.

9 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

from neutral, generally applicable laws.[10] She expressed skepticism "about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[11]

In this Essay, I use the way the Supreme Court has applied the unconstitutional conditions doctrine and other anomalous cases, history, and comparative law to reconstruct a more nuanced Free Exercise regime, one that in many ways more closely parallels U.S. protections for speech and assembly. I propose adopting an approach with an inner core of rights like proselytism and institutions' right to religious autonomy that would garner more protection than rights less closely tied to the history and purpose of the Free Exercise Clause, such as religious rights in mass commercial settings. Moreover, these non-core rights, I argue, have in fact been less protected by the Supreme Court over time.

To take an initial stab at what rights should be in an inner core, I look at history and theory of the Free Exercise Clause and religious freedom rights as well as comparative experience, which is used as a reference or a form of a check on the results rather than as dispositive evidence of how the Free Exercise Clause should be interpreted. I also use the odd duck of unconstitutional conditions and other anomalous cases. Recognizing the limitations and erratic decisions of both the unconstitutional conditions doctrine and Free Exercise interpretation, it may seem counterintuitive to use the one to help bolster the other. But I suggest that it is precisely because the unconstitutional conditions doctrine has had limited and patchwork application that it can be helpful in indicating which areas of the Free Exercise Clause could be considered core. While this is not all the work that the unconstitutional conditions has been made to do—some cases clearly focus on more equal protection/nondiscrimination issues[12]—I think it can be helpful as an initial matter in narrowing down a normative core of the Free Exercise Clause.

Logically, this makes sense. If a right is a core aspect of a constitutional protection, then the government should have less room to

10 Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

11 *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

12 Comparative law also addresses nondiscrimination issues but does so separately from the core right to religious freedom. *Compare, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, *with id.* at art. 14.

condition receipt of government benefits on exercise/nonexercise of this right. A core right is important enough that the government should not be permitted to abridge that right by threats or rewards. For example, if a core aspect of the Free Exercise right is that an individual can freely choose membership (or nonmembership) in a religious group, then it stands to reason that the government similarly cannot condition my receiving government benefits on my becoming or not becoming an Episcopalian or Hare Krishna follower. Similarly, the existence of a core right to proselyting would mean that the government cannot withhold government benefits to someone because of their public professions of faith.[13] In this sense, the very inconsistency of the unconstitutional conditions doctrine can be helpful—seeing when the unconstitutional conditions doctrine has been applied can be understood as revealing (at least in part) the outlines of a minimum normative core of Free Exercise rights.[14]

I also argue that the Supreme Court has already *sub rosa* interpreted the Free Exercise Clause to have a normative core aside and apart from the ruling exemption doctrine of the day. The excessive focus on exemptions to burdensome laws in Free Exercise jurisprudence has obscured this, but we see this in some of the post-*Smith* cases that do not fit squarely under the *Smith* rule. Religious autonomy, for example, would clearly be part of the normative core. Even despite the precedent of *Smith*, the Court in *Hosanna-Tabor v. Evangelical Lutheran Church and School* rejected enforcement of a neutral, generally applicable law when the law effectively dictated religious teachers or ministers to a religious school.[15] The Court rightly understood that preserving religious autonomy is a core element of religious freedom.[16]

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13 Proselyting in a coercive fashion, however, such as to a military subordinate or to someone seeking welfare relief from a religious social service provider, should not fall within the core, and could be reason to withhold military rank or contracting benefits to the agency. Indeed, coercive proselytism is not protected at all in the European Court of Human Rights. *See* Manoussakis & Others v. Greece, App. No. 18748/91, ¶¶ 48–53 (Sept. 26, 1996), https://hudoc.echr.coe.int/eng?i=001-58071 [https://perma.cc/P763-HUJR].

14 Alan Brownstein argues that identifying this core is particularly needed:

> Thus, in my view, if we are serious about protecting religious liberty, we have to start thinking about the development of new and more elaborate free exercise doctrine. This is going to be a difficult undertaking. To some extent, it will have to start from scratch. But the real issue here may not be the difficulty of the task as much as it is convincing the political and legal community that the job is worth pursuing.

Brownstein, *supra* note 7, at 507.

15 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189–90, 194 (2012).

16 The Court noted that it drew from a separate line of authority going back to *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See Hosanna-Tabor*, 565 U.S. at 185–86.

Regardless of what one makes of *Smith*, *Hosanna-Tabor* holds that the government simply lacks the power to force change in the teachers or ministers of a religious organization.[17] I would argue that this suggests that internal autonomy is a core Free Exercise right.[18]

The layers of historical, comparative, and finding extra-favored protections or unconstitutional conditions in existing court cases build up a case for specific aspects of religious freedom that should be understood as forming a normative core of Free Exercise rights. This paper is only an initial attempt, and leaves more unanswered questions than it solves—Is there a middle tier or tiers of rights? How do other aspects of religious freedom fit within the spectrum of core versus fringe rights? What standards should be used for assessing various tiers of rights? What rights are least protected? This Essay is designed to start the conversation and focus attention on a new conceptual Free Exercise framework, not to fully work it out. But what the Essay does do is suggest a radically different approach to Free Exercise analysis, one that lines up with history, comparative experience, and important Supreme Court jurisprudence. I also offer a few suggestions of rights that would likely be considered worthy of core Free Exercise protections.

In Part I, I flesh out the idea of a normative core. I suggest the power of identifying a normative core, such as has been done in the Free Speech Clause, as a way of providing gradated levels of scrutiny and a more nuanced Free Exercise jurisprudence. I propose that a normative core can be identified in multiple ways: historically, conceptually, and by examining anomalous cases within existing U.S. precedents. I detail how international law distinguishes between *forum internum* and *forum externum* and discuss the centrality of the right to have or adopt a religion or belief in international law. I suggest that logically, a normative core can be found with expressions of rights close to this central right to have or adopt a religion or belief, such as the right to adopt or leave a religious community, the right to establish a religious organization, the right to express one's religious belief, and the right for the religious organization to select its own leaders, teachers, and doctrine.

17 Some may understand this and other core rights as structural rights, but comparative perspectives suggest that these are not necessarily tied to separation of church and state. Virtually all states that lack a formal separation between church and state still protect religious autonomy.

18 As I detail later, the right to select (and be) a minister (part of autonomy protections) is also at the heart of the *McDaniel* unconstitutional conditions case, which is consistent with my argument that unconstitutional conditions tend to be applied to core Free Exercise rights. *See* McDaniel v. Paty, 435 U.S. 618 (1978).

Part II explains the connections between anomalous existing U.S. cases and a normative core in more depth. I suggest that U.S. courts have been *sub rosa* treating certain parts of Free Exercise as a protected normative core. This privileging of certain types of religious freedom rights can be seen in rights that have had the unconstitutional conditions doctrine applied to them and rights protected despite the *Smith* regime.

I specifically examine how some possible candidates for elements of a normative core of Free Exercise rights, such as religious autonomy and proselyting, have fared under the unconstitutional conditions doctrine cases and Free Exercise cases and how they are treated in comparative and international law. Again, I invoke comparative and international law not to argue that international and foreign religious freedom rights are necessarily coterminous with those in U.S. law, but to suggest that referencing core rights internationally can be an additional important reference point for what likely belongs to a normative core in the United States because of their common intellectual and historical sources.

In Part III I take on the slightly more problematic right, that of legal entity and 501(c)(3) "church" status. While well-established as a core religious freedom right internationally, U.S. caselaw has unresolved tensions on this topic with *Bob Jones University v. United States* and its implicit rejection of the unconstitutional conditions argument. There is also some ambivalence in U.S. law with how tax exemption has been dealt with more generally, i.e., as both a right in *Walz v. Tax Commission of the City of New York* and a subsidy in *Regan v. Taxation with Representation of Washington.*[19] I suggest that a right to legal entity status should be understood as part of the normative core of religious freedom, particularly as legal entity status and 501(c)(3) "church" status are tied to other standard benefits and freedoms for religious organizations (tax exemption, chaplaincy, ability to receive funds for social services).

I. IDENTIFYING A NORMATIVE CORE

As mentioned previously, Justice Barrett has recently raised the question as to whether it might make sense to have various degrees of protection for Free Exercise claims.[20] Should there be some form of

19 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1982); Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970); Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 545 (1983).

20 *See supra* note 11.

intermediate scrutiny between *Smith*'s general rule of no protection and the *Sherbert v. Verner* and Religious Freedom Restoration Act (RFRA) standards of strict scrutiny?[21] One way to go about this is to vary protections based on the nature of the claim. This is done in other areas of constitutional law, such as the distinction between core political speech and commercial speech in Free Speech doctrine[22] or the distinctions between race and gender claims under the Equal Protection Clause.[23]

But how does one go about demarcating differences in types of claims in the Free Exercise context? One approach would be to look at what the Free Exercise Clause historically was designed to protect. While this could be a fruitful and interesting approach,[24] it is also a highly contested one,[25] and one that has primarily focused in the Free Exercise context on whether the Free Exercise Clause is designed to permit exemptions for religiously motivated behavior from general laws.[26]

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21 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J. concurring).

22 *Compare* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1416 (2016), *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York., 447 U.S. 557, 561–63 (1980).

23 *Compare* United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (quoting Craig v. Boren, 429 U.S. 190, 197 (1976))), *with* Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954) (applying strict scrutiny to racial classifications).

24 *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

25 *See, e.g.*, Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 301 (those who framed and adopted the Free Exercise Clause had differing opinions); John A. Murley, *The First Amendment and Religion*, 16 POL'Y STUD. J. 628 (1988) (reviewing THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION (1987)) (noting discrepancies between Curry's *The First Freedoms* (1986), Levy's *The Establishment Clause* (1986), and Smith's *Public Prayer and Constitution* (1987)).

26 *See, e.g.*, Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 374 (2016) ("I am aware of no place where the founders defined with precision the exact contours of the right [to free exercise]."); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) (arguing that the First Amendment was just designed to delegate religion policy to the states and does not contain a theory of religious freedom); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 225–28 (2003) (suggesting that the First Amendment embodies Christian power); McConnell, *supra* note 24, at 1410 (concluding that the Free Exercise Clause history supports exemptions); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991) (arguing that the Free Exercise Clause history does not support exemptions).

In light of Mary Ann Glendon's arguments about the structural unity of the Free Exercise and Establishment Clauses,[27] perhaps it is most helpful to turn to the history of the Establishment Clause. Michael McConnell has identified hallmarks of the English established church, which most agree that the First Amendment was designed to avoid.[28] Such hallmarks include: governmental control over doctrine, structure, and personnel of the state church; mandatory attendance at religious worship services in the state church; public financial support; prohibition of religious worship in other denominations; use of the state church for civil functions; and limitation of political participation to members of the church.[29] Core Free Exercise rights presumably also address these concerns and protect rights to independence of doctrine, structure, and personnel, freedom to attend or not attend worship, freedom to organize or belong to a religious organization of one's choice or not to belong without injuring one's right to participate in public life.

In addition to history, a conceptual approach suggests itself from comparative and international law and theory. Theorists of religious freedom and international law distinguish between what is called the *forum internum* and the *forum externum.*[30] *Forum externum,* or manifestations of religion, may be regulated under certain circumstances by governments, but the *forum internum* may not.[31] Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which has served as the model for regional human rights treaties and many national constitutions, clearly distinguishes these.[32] *Forum internum* has not been precisely defined but is generally understood to include the ICCPR unlimited "freedom to have or to adopt a religion or belief of his choice."[33] The ICCPR further explains, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a

27 *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise,* 90 MICH. L. REV. 477, (1991); *see also* CURRY, *supra* note 25, at 216 ("The two clauses represented a double declaration of what Americans wanted to assert about Church and State.").

28 *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105, 2131 (2003).

29 *Id.*

30 *See, e.g.*, PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 19 (2005).

31 *Id.*

32 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 178. *See also, e.g.*, HEINER BIELEFELDT, NAZILA GHANEA & MICHAEL WEINER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 64 (2016).

33 International Covenant on Civil and Political Rights, *supra* note 32, at 178.

religion or belief of his choice."[34] These rights are stated as absolute, not subject to limitation by governments.

Freedom to manifest one's religion or belief, however, or the *forum externum*, may be limited. These rights are "subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,"[35] but are subject to regulation by the state under certain circumstances.

In an official interpretative comment, the Human Rights Committee has explained,

> Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. *It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally*, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.[36]

The *forum internum* rights can be seen as creating an inner normative core of religious freedom protection. The Human Rights Committee explains that:

> the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.[37]

In broad terms, then, a normative core based on the principles of *forum internum* would include the right to belong or not belong to a religion or belief community, including the right to acknowledge publicly one's beliefs and presumably the associated right to be able to

34 *Id.*

35 *Id.*

36 U.N. Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 22 (48) (art. 18), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993), *reprinted in Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 36 (July, 29, 1994) [hereinafter U.N. Human Rights Committee General Comments] (emphasis added).

37 *See id.*

found a religious community.[38] In the context of a community, this would presumably be the right to choose and maintain one's own community doctrines, leaders, and teachers. Without being able to form a community or have the community select its own doctrines, teachers, and leaders, *forum internum* and the right to have or adopt a religion is essentially meaningless. Public sharing of one's beliefs and the right to religiously self-identify similarly are the logical extensions of the right to have a belief.[39] If one is only permitted to have a belief without public acknowledgement of it, then the freedom is meaningless.

Interestingly, these rights related to the *forum internum*—right to have or adopt a belief, the right to publicly share one's beliefs, the right to organize a religious community and have it select its own doctrines, leaders, and teachers—line up remarkably well with the historical core reasons for First Amendment protections (addressed in more depth in Section II.C. below)—protecting rights to independence of doctrine, structure, and personnel; the freedom to attend or not attend worship; the freedom to organize or belong to a religious organization of one's choice or not to belong without injuring one's right to participate in public life.

II. AN EXISTING NORMATIVE CORE: AUTONOMY AND PROSELYTING

My suggestion in this Part is that a picture of what belongs in a normative core starts to emerge under U.S. law and history, as well as by comparison with normative cores of the international right to freedom of religion or belief and that autonomy and proselyting fall clearly within this normative core. Caselaw in the U.S. reveals that courts have already been distinguishing *sub rosa* between various levels of Free Exercise claims two ways—unconstitutional conditions and cases under the *Smith* regime that are not resolved on the basis of generally

38 The exact contours of *forum internum* are debated. Paul Taylor argues that they include "freedom of each individual to choose a particular religion, to maintain adherence to a religion or to change religion altogether at any time, and the right to be free from restrictions or coercive forces that impair that choice," TAYLOR, *supra* note 30, at 24, as well as "coercion to act contrary to one's beliefs, compulsion to reveal one's beliefs and punishment for holding particular beliefs." *Id.* at 120.

39 Bielefeldt et al. argue that while the right to adopt a religion falls within *forum internum*, noncoercive proselyting is part of the *forum externum*. BIELEFELDT ET AL., *supra* note 32, at 66. They do recognize that anti-proselytism restrictions also have and are often meant to have "negative repercussions on the reputation and status of converts themselves." *Id.* I would argue that the right to adopt a religion is meaningless if individuals cannot freely acknowledge their religion and discuss it with others in a noncoercive way. Coercing individuals to not share their beliefs is effectively "the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations." *See* U.N. Human Rights Committee General Comments, *supra* note 36.

applicable laws. I examine these cases, and note that they suggest that doctrines of autonomy and proselyting are part of a normative core.

I also bring in some historical evidence as another layer of understanding why certain norms would be closer to the core. While Free Exercise Clause history is unclear and highly debated, I look at the history of the religion clauses together to get a picture of what kinds of rights and protections the Founders were particularly concerned about. These include, among others, internal autonomy of religious organizations and proselyting.

Finally, I look to comparative experience, not to define the scope of protections under the First Amendment, but as a form of confirmation and a source of theory, since the protection of freedom of religion or belief in international law and in Europe draw on similar historical trends to that of religious freedom law in the U.S. Comparative law gives a framework for conceptualizing core versus fringe protections with its division between *forum internum* and *forum externum.* Core rights are those that government may not restrict, such as the right to have and adopt a religion or belief. I suggest that autonomy and proselyting fall in or near that core.

In Part III, I conclude by addressing a more problematic right to categorize—the right to access of a nonprofit legal entity status. While this right is not problematic in the least internationally, the *Bob Jones* decision casts some doubt on whether it belongs in a normative core in the United States.

A. *Unconstitutional Conditions*

Existing evidence for a normative core can be found in U.S. caselaw in the application of unconstitutional conditions and in anomalous cases under *Smith.* To understand how unconstitutional conditions support a normative core, a brief explanation of unconstitutional conditions is necessary. In Free Exercise unconstitutional conditions cases, there appear to be at least two different types of unconstitutional conditions: (1) "benefits" that are part of core rights to free exercise even if styled as "benefits" and (2) actual benefits the State is not required to provide, but if provided by the State, come with an associated nondiscrimination requirement imposed by the Free Exercise

Clause.[40] My argument about a normative core involves the first type of unconstitutional conditions.[41]

If the government is not permitted to withhold "benefits" based on a right, then one could equally say that those "benefits" are part of the underlying right to religious freedom. To use the example identified earlier, the benefit of running for political office as a religious leader is part of the underlying religious freedom right to be a religious leader. Withholding the "benefit" of running for office would be the same as withholding part of the underlying right to be a religious leader, for a religious leader in a free society enjoys the same rights and privileges (including running for office) that nonreligious leaders enjoy.

In contrast, the right to operate parochial schools does not come with mandatory "benefits." Courts have held that the government may (and indeed sometimes must) withhold state financial benefits from parochial schools depending on conditions such as whether the funds are exclusively for religious use or whether the schools meet standard licensing requirements.[42] The unconstitutional conditions doctrine in this context thus falls within what I refer to as the second type, which ensures nondiscrimination in the distribution of funds.[43]

Distinguishing rights that come with erstwhile "benefits" from those that do not is in essence the creation of a hierarchy of rights. In distinguishing these stronger rights from weaker ones that the government may impose conditions on, courts have effectively delineated the basis of a normative core of Free Exercise rights. Being a religious leader is a strong right that comes with a full set of automatic benefits such as running for office, while running a parochial school does not automatically come with access to government benefits, but only with a nondiscrimination provision if the benefits are given.

In sketching out a normative core based on these examples, the right to be (or select) a religious leader (who can also run for public

40 Non-Free Exercise unconstitutional conditions cases are beyond the scope of this Essay.

41 It is an interesting question whether unconstitutional conditions of the second sort or an underlying nondiscrimination norm is part of the constitutional core of Free Exercise rights. For clarity, I follow the international law approach and designate nondiscrimination on the basis of religion as a separate set of rights from core religious freedom rights. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 12, at 230, 232; BIELEFELDT ET AL., *supra* note 32 (compare part I and part II). Those do not fall within the scope of this Essay, although it is possible to see nondiscrimination as an enforcement of the core right to have or adopt a religion.

42 *See, e.g.*, Locke v. Davey, 540 U.S. 712, 715 (2004).

43 *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).

office) would be in the core, while rights to establish parochial schools with state funding would not. Being a religious leader comes with all the rights to be fully engaged in public and government life in a way that being a parochial school does not. The government has few, if any, legitimate reasons for regulating religious leaders, while it has a much larger scope for appropriately regulating religious schools. *Trinity Lutheran*, for example, ensures that the second form of unconstitutional conditions, or nondiscrimination, is still robustly protected, but the rights these are applied to are simply lower in the hierarchy of rights.[44]

The noncoercion aspect of these rights protected under the unconstitutional conditions doctrine also strongly echoes the international law provisions dealing with *forum internum*. Article 18.2 of the International Covenant on Civil and Political Rights, one of the key international treaty documents protecting religious freedom, states that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[45] Just as the *forum internum* protects core rights against government bribery or coercion, so too do limits on unconstitutional conditions.

So which rights fall within the normative core suggested by the first type of unconstitutional conditions? There are two obvious candidates: religious autonomy and the right to proselyte.[46] Autonomy, or

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44 *Trinity Lutheran* and nondiscrimination do indirectly protect what could be seen as a core right to have or adopt one's religion. Ensuring that the state does not discriminate ensures protection of a free choice among religious alternatives. *Sherbert* also specifically seems to suggest that state discrimination should not be based on the doctrines of one's faith. *See* Sherbert v. Verner, 374 U.S. 398, 403–04 (1963). While the line between status and action in both *Trinity Lutheran* and *Sherbert* can be difficult to ascertain, the precedent that the government should not be attempting to sway one's beliefs directly or indirectly is significant. *Bowen v. Roy*, 476 U.S. 693 (1986), suggests a brightline rule: "[G]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. But this is not consistent with *Sherbert*, where the government did not criminalize or compel working on Sunday. 374 U.S. at 399–401. A full discussion of the meaning of nondiscrimination and whether it belongs as part of a normative core is beyond the scope of this Essay. See discussion *supra* notes 40 and 41.

45 International Covenant on Civil and Political Rights, *supra* note 32, at 178.

46 Mark Chopko suggests these and the rights to worship form the core of religious issues that the government has no place in. *See* Mark Chopko, *Constitutional Protection for Church Autonomy: A Practitioner's View*, *in* CHURCH AUTONOMY: A COMPARATIVE PERSPECTIVE (Gerhard Robbers, ed.) (2001).

> Certain matters in human life belong only to Religion, and are none of the business of government. These matters would include the freedom to preach, practice, and proselytize. They would include the freedom to organize and operate a

the right for a religious organization to select its own leadership, members, teachers, and doctrine, is a statement of the broader principle of the unconstitutional conditions religious leader case referenced above, *McDaniel v. Paty*.[47] In *McDaniel*, the Court struck down Tennessee's ban on religious leaders serving in public office, holding that it "imposed an unconstitutional penalty upon [McDaniel's] exercise of his religious faith."[48] The Court held "that because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion."[49]

Another key unconstitutional conditions case involving more than just nondiscrimination is *Cantwell v. Connecticut*,[50] which involved proselyting. Cantwell was denied a permit under a statute that barred individuals from soliciting

> money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.[51]

The statute required an official to "determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."[52] The Court held that conditioning solicitation for aid on the determination by a state authority "as to what is a religious cause" serves as "censorship of religion as the means of determining its right to survive" and "a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[53]

> [C]ondition[ing] the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a

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> religious community institutionally separate from other secular or religious organizations in that society. Likewise, they would include the freedom for the liturgical, worship, and ritual life of that faith community.

Id. at 5.

47 435 U.S. at 618.

48 *Id.* at 633 (Brennan, J., concurring).

49 *Id.* at 634.

50 310 U.S. 296 (1940).

51 *Id.* at 301–02.

52 *Id.* at 302.

53 *See id.* at 305, 307.

> religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[54]

The holding that the license was an unconstitutional condition rested on the importance of the right to believe and persuade others of one's belief.[55] The Court explained:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[56]

Like religious autonomy in *McDaniel*, the unconstitutional condition here is tied to the underlying right and its importance. The government may not condition proselytism on a license because the underlying right itself encompasses the right to speak freely. Broad protection of this right under the unconstitutional conditions doctrine is significant evidence that U.S. courts regard this right, along with the right to organizational autonomy, as part of a normative core of religious freedom.

B. Anomalies under Smith

Another way to see a *sub rosa* hierarchy of rights in existing court cases is to see what cases have upheld religious freedom rights even under the no-exemption *Smith* regime. Autonomy and proselyting (to a lesser extent) have not only been protected under unconstitutional conditions, but also survived the *Smith* ban on exemptions, as this Section discusses.

The right to religious autonomy in a religious organization's internal affairs was upheld by the Supreme Court in *Hosanna-Tabor* in 2012.[57] The Court refused to apply a general law on employment discrimination because it would permit the state to override a religious

54 *Id.* at 307.

55 Further evidence that the Court relied on Free Exercise rather than Free Speech comes from the fact that the Court used the compelling state interest standards (versus the reasonableness standard for speech regulations in nonpublic forums). *See* Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830 (1992); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992)). *See Cantwell*, 310 U.S. at 307.

56 *See Cantwell*, 310 U.S. at 310.

57 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

organization's selection of its own minister/teacher. The Court acknowledged *Smith,* but distinguished it:

> But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*], at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma").[58]

What the Court is doing here is privileging religious freedom claims involving "internal church decision[s] that affect[] the faith and mission of the church itself" or "controversies involving religious authority or dogma" over other types of religious freedom claims foreclosed by *Smith.* Implicitly, the Court here places religious autonomy within the normative core.

Proselytism is also a potential anomaly under *Smith.* In *Watchtower Bible and Tract Society v. Village of Stratton,* the Supreme Court upheld the right of Jehovah's Witnesses to canvass during reasonable hours without a license.[59] The Jehovah's Witnesses asserted constitutional religion and speech rights. The decision alludes to "constitutional rights" at one point but appears to decide the case under Freedom of Speech.[60] This is not as significant evidence for proselyting being in the Free Exercise normative core as *Hosanna-Tabor* is for autonomy but is still worth consideration—in contrast to the large number of religion-related rights left unprotected under *Smith,* this one has been protected.

C. *First Amendment History*

Although a thorough examination of First Amendment history is beyond the scope of this Essay, both autonomy and proselytism also appear to be core because of their historical significance and conceptual centrality to religious freedom rights.

Proselytism reflects the freedom to organize or belong to a religious organization of one's choice or not to belong without injuring one's right to participate in public life, including the right to speak freely about the religion of one's choice. In the wake of the Revolutionary War, McConnell notes, there was a wave of disestablishment

58 *Id.* at 188, 190 (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)).

59 536 U.S. 150 (2002).

60 *Id.* at 154.

and evangelization.[61] Baptists and Presbyterians, who pushed for freedom of religion in the 1780s, were known respectively for their preaching to slaves and "dangerously 'enthusiastic'" preaching.[62] Hamburger notes that "Evangelical dissenters dominated the antiestablishment struggle that shaped the First Amendment," explaining that the non-evangelical denominations largely either lived in states with no established church (such as Pennsylvania or Rhode Island) or obtained statutory exemptions.[63] McConnell explains that "[t]he drive for religious freedom was part of this evangelistic movement. . . . The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities. Guaranteed state support was thought to stifle religious enthusiasm and initiative."[64] In Virginia, the Baptists spoke out against a proposal to fund churches for this very reason:

> If, therefore, the State provide a Support for Preachers of the Gospel, and they receive it in Consideration of their Services, they must certainly when they Preach act as Officers of the State, and ought to be Accountable thereto for their Conduct, not only as Members of civil Society, but also *as Preachers*. The Consequence of this is, that those whom the State employs in its Service, it has a Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach.[65]

By banning Congress's establishment of a religion, the Founders sought to protect the rights for free proselyting and preaching. Later in his life, Madison also mentioned proselyting as one form of the successful aspects of religious freedom in Virginia:

> Religious instruction is now diffused throughout the Community by preachers of every sect with almost equal zeal, tho' with very unequal acquirements; and at privatehouses & open stations and occasionally in such as are appropriated to Civil use, as well as buildings appropriated to that use.[66]

Rights for religious persuasion have also been seen as at the core of Free Speech concerns, which further suggests that proselytism, with

61 McConnell, *supra* note 24, at 1421–38.

62 *Id.* at 1438 (quoting RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790, at 149 (1982)).

63 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 92 (2002).

64 McConnell, *supra* note 24, at 1438.

65 Thomas Jefferson, Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 660, 661 (Julian P. Boyd, Lyman H. Butterfield & Mina R. Bryan eds., 1950) (quoted in McConnell, *supra* note 24, at 1439).

66 T. JEREMY GUNN AND JOHN WITTE JR., NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 176 (2012).

its truth-seeking concerns and need for tolerance, was at the protected nexus of multiple constitutional rights.[67]

The above quote about the Baptists also addresses the question of internal autonomy—the idea that the selection of preachers and what they preach should not be regulated by the state. A Baptist petition of 1768 similarly noted, "if we may not settle and support a minister agreeable to our own consciences, where is liberty of conscience?"[68] There was significant history in the English Civil War of control of religious doctrines and leadership by the State, a reaction to which formed part of the background to the adoption of the First Amendment. "Parliament took it upon itself to rewrite the prayer book and confession of faith, dissolve the episcopal structure of the Church, and confiscate the property of the bishoprics;" rejected "the advocates of 'blasphemous, licentious, or profane' doctrines;"[69] and ejected from clerical office ministers who continued to frequently use the unapproved prayer book.[70]

In the Continental Congress, James Madison argued that the First Amendment meant "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[71] Historian Curry explains that the debates surrounding the First Amendment were a "discussion about how to state the common agreement that the new government had no authority whatsoever in religious matters."[72] The essence of the protection of internal autonomy of religious organizations is that the core of a religion can be found in its doctrine, teachings, membership criteria, and leaders.[73]

Keeping the government out of religion means first and foremost protecting the internal autonomy of religious organizations. This was understood as early as the Magna Carta, which proclaimed "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired" and specifically noted the freedom of elections,

67 *See* Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L.J. 453, 457 (2004); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 65(1996).

68 STANLEY GRENZ, ISAAC BACKUS—PURITAN AND BAPTIS 172 (1983).

69 McConnell, *supra* note 24, at 1421 (quoting FELIX MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND 85 (1895)).

70 *Id.*

71 1 ANNALS OF CONG. 730 (1789) (Joseph Gales ed., 1834).

72 CURRY, *supra* note 25, at 215.

73 *See, e.g.*, Timothy Samuel Shah, *Institutional Religious Freedom in Full: What the Liberty of Religious Organizations Really Is and Why It Is an "Essential Service" to the Common Good*, 12 RELIGIONS 6 (2021).

"thought to be of the greatest necessity and importance to the English church."[74] U.S. Supreme Court cases deferring to internal religious structuring go back to *Watson v. Jones* in 1897.[75] This, the Supreme Court said, was "founded in a broad and sound view of the relations of church and state under our system of laws."[76] The Supreme Court's cases on religious autonomy, it has been noted, "grew almost seamlessly out of a rich . . . sub-constitutional common law tradition."[77] Respect for religious autonomy has been dated back to nineteenth century Holland[78] or the eleventh-century Investiture Crisis.[79] The Supreme Court in *Hosanna-Tabor* detailed the history of this right in the development of the First Amendment.[80] Most tellingly, it describes an occasion in 1806 when the first Catholic bishop asked the U.S. president who should be appointed to head the church in the Louisiana Purchase territories. Madison consulted with President Jefferson and then replied that "the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment."[81] The "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" prevented the Government from rendering an opinion on the "selection of ecclesiastical individuals."[82]

Historical experience buttresses the U.S. caselaw suggesting that autonomy and proselyting should fall within a normative Free Exercise core.

D. Comparative Experience

Reinforcement for the idea that religious autonomy and proselyting are likely part of a normative core can also come from seeing their core role elsewhere in international and comparative law. Autonomy,

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74 Magna Carta, cl. 1 (1215), *reprinted in* J.C. Holt, Magna Carta app. IV, at 317 (1965).

75 80 U.S. 679 (1872).

76 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 RECS AM. CATH. HIST. SOC'Y 63–64 (1909)).

77 Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 82 (2016).

78 Paul Horowitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 83 (2009).

79 *See, e.g.*, Richard W. Garnett, *The Worms and the Octopus: Religious Freedom, Pluralism, and Conservatism*, 56 NOMOS: AM. SOC'Y POL. & LEGAL PHI. 160, 174 (2016).

80 *Hosanna-Tabor*, 565 U.S. at 181–87 (2012). See also the detailed historical notes in Michael McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 829–832 (2012).

81 *Hossana-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 RECS AM. CATH. HIST. SOC'Y 63 (1909)).

82 *Id.*

for example, is privileged in over thirty nations that protect collective religious autonomy rights.[83] Freedom to serve as a religious leader and

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83 *See Hosanna-Tabor,* 565 U.S. 171; Gerhard Robbers, Document submitted by the Government of the Federal Republic of Germany to the European Court of Human Rights in the Case of Obst v. Germany (English translation, document available upon request) (discussing multiple jurisdictions); CHURCH AUTONOMY: A COMPARATIVE SURVEY (Gerhard Robbers ed., 2001) (discussing Austria, the Czech Republic, Ireland, Italy, Hungary, Norway, and Russia); Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 119; see also Supreme Holy Council of the Muslim Community v. Bulgaria, App. No. 39023/97, (Dec. 16, 2004), https://hudoc.echr.coe.int/eng?i=001-67795 [https://perma.cc/AM24-XZNM]; Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria, App. Nos. 412/03 and 35677/04 (May 6, 2009), https://hudoc.echr.coe.int/eng?i=001-100433 [https://perma.cc/PRD2-8KZS]; Gay & Lesbian Clergy Anti-Discrimination Soc'y v. Bishop of Auckland [2013] NZHRRT 36 (N.Z.); Supreme Court, Oct. 13, 1989, KKO: 1989: 122, No. 2792 (Fin.); Judgment of the Constitutional Review Chamber of the Supreme Court, May 10, 1996, No. 3-4-1-1-96 (Est.); Ecclesia De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Ir 2015 (2) SA 1 (CC) (S. Afr.); Matti Kotiranta, communication with ICLRS (June 2011, document available upon request) ("[T]he Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State."); Schüth v. Germany, 2010-V Eur. Ct. H.R. 399; Obst v. Germany, App. No. 425/03, (Sept. 23, 2010), https://hudoc.echr.coe.int/eng?i=001-100464 [https://perma.cc/GL99-MLQA]; Siebenhaar v. Germany, App. No. 18136/02, (Feb. 3, 2011), https://hudoc.echr.coe.int/eng?i=001-103249 [https://perma.cc/P5AP-SU8N]; Serif v. Greece, 1999-IX Eur. Ct. H.R. 75; STATE AND CHURCH IN THE EUROPEAN UNION 323, 336–37 (Gerhard Robbers ed., 2d ed. 2005) (discussing Hungary, Lithuania, Luxembourg, Slovakia, France, the United Kingdom, Latvia, and Sweden); Lev Simkin, Church and State in Russia, *in* LAW AND RELIGION IN POST-COMMUNIST EUROPE 261, 275 (Silvio Ferrari & W. Cole Durham, Jr. eds., 2003) ("Religious organizations are entitled, in accordance with their charters, to draft labor contracts with employees. The terms of the contract are established between the religious organization and the employee in accordance with general norms of Russian legislation."); Dusan Rakitic, communication with ICLRS (June 2011, document available upon request) ("[Serbia Const., art. 8, para. 1] expressly provides that ministers and religious officials are elected and appointed by churches and religious communities in accordance with their own autonomous regulations."); ALBANIAN CONSTITUTION Oct. 21, 1998, art. 10(4)–(5) ("The state and the religious communities mutually respect the independence of one another and work together for the good of each of them and for all. Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers."); 2008 CONST. (Belg.) art. 21 ("The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever . . . ."); Listiny Základních Práv a Svobod [Charter of Fundamental Rights and Freedoms], Ústnaví zákon 162/1998 Coll., art. 16(2) (Czech) ("Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independently of state authorities."); Germany Basic Law, art. 140, incorporating art. 137 of the Weimar Const. GRUNDGESETZ [GG] [Basic Law], Art. 140 ("(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community."), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg .html [https://perma.cc/JXH6-L8EH]; XIANGGANG JIBEN FA art. 141, § 1 (H.K.) ("The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict

for religious organizations to select leaders, members, and teachers are similarly strongly protected in international law. The Organization for Security and Cooperation in Europe's Vienna Concluding Document, a key statement of human rights from the détente process, for example, includes the commitment of member states to "respect the right of . . . religious communities to . . . organize themselves according to their own hierarchical and institutional structure, . . . select, appoint and replace their personnel in accordance with their respective

religious activities which do not contravene the laws of the Region."); CONSTITUTION OF THE REPUBLIC OF POLAND, Apr. 2, 1997 art. 25(2)–(5) ("The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good."); CONSTITUTION OF ROMANIA, art. 29(5) ("The religious denominations are autonomous in relation to the state and enjoy its support.). *See, e.g.*, William Eduardo Delgado Páez v. Colombia, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/ 195/1985 (1990); Serif v. Greece, App. No. 38178/97 (ECtHR, Dec. 14, 1999); Hasan and Chaush v. Bulgaria, App. No. 30985 /96 (ECtHR, Oct. 26, 2000); Obst v. Germany, App. No. 425/03 (ECtHR, Dec. 23, 2010); Siebenhaar v. Germany, App. No. 18136/02 (ECtHR, Feb. 3, 2011) (European Court of Human Rights cases are available on the Court's website at http://www.echr.coe.int/echr /, as well as at http://www.strasbourgconsortium.org/); Basic Law of the Federal Republic of Germany, art. 140, incorporating art. 137 of the Weimar Constitution (affirming self-determination rights of religious bodies); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 28, 2003, V ZR 261/02, juris (Ger.) ("The question of whether a minister has been lawfully dismissed from his service is an absolute autonomous decision of the church or religious denomination."); OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., ORG. FOR SEC. & COOP. IN EUR., Concluding Document of the Vienna Meeting, in 2 OSCE HUMAN DIMENSION COMMITMENTS 39, 42–43 (3d ed. 2011) [hereinafter Vienna Concluding Document], available at http://www.osce.org/files/documents /b/0/76895.pdf; *see also* Richard Puza, Report of Austria, *in* LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY 57 (Hildegard Warnink ed., 2001) [hereinafter LEGAL POSITION OF CHURCHES]; RELIGION AND THE SECULAR STATE: INTERIM NATIONAL REPORTS (Javier Martinez-Torrón & W. Cole Durham, Jr. eds., 2010) [hereinafter INTERIM REPORTS], http://www.iclrs.org/index.php?blurb_id=975 [https://perma.cc/5E3W-YVDW] (discussing Belgium, the Czech Republic, Estonia, Ireland, the Netherlands, Finland, Scotland, and the United Kingdom); THE CONSTITUTIONAL ACT OF DENMARK OF JUNE 5TH 1953, art. 67; Lisbet Christoffersen, correspondence with International Center for Law and Religion Studies (hereinafter "ICLRS") (June 2011, document available upon request) ("According to both theory and practice this free right to worship [in Denmark] includes a right to self-determination and autonomy in matters of doctrine and ecclesiastical structures."); Gerhard Robbers, Church Autonomy in Germany, *in* LEGAL POSITION OF CHURCHES, *supra* note 83, at 121, 122 (German constitution "guarantees autonomy of all religious and ideological communities regardless of their religious creed.); Poland Const. (1997), art. 25.3; Lei n.°16/2001 de 22 junho [Act no. 16/2001 of 22 June] arts. 1, 3, & 15, https://dre.pt/dre/detalhe/lei/16-2001-362699 (Port.); CONSTITUTCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 16 (Spain); Organic Act 7/1980, of 5 July, on Freedom of Religion art. 6.1 (B.O.E. 1980, 15955) (Spain).

requirements and standards as well as with any freely accepted arrangement between them and their State."[84]

The European Court has held similarly that the state may not interfere with purely religious questions such as leadership[85] and doctrine[86] and has held that the state may not withhold legal recognition because of the beliefs of the religious organization in question. In *Metropolitan Orthodox Church of Bessarabia*, the European Court held that the state could not condition registration on the beliefs of the organization: "the State's duty of neutrality and impartiality, as defined in [the Court's] case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs."[87]

The European Commission of Human Rights (ECmHR, a precursor to the ECtHR) has upheld organizational rights even beyond those of religious communities *per se*. In *Rommelfanger v. Germany*, the Commission upheld a German decision permitting a Catholic hospital to fire an employee who spoke out against Catholic teachings.[88] The Commission has also characterized Article 9 religious freedom rights as having a more collective nature than other rights under the European Convention on Human Rights (ECHR).[89]

In addition, the Grand Chamber of the European Court has held that religious communities' activities must be free from state interference, even if such interference takes place in normal legal channels and is conducted through ordinary secular means that would be uncontroversial with non-religious organizations. In *Sindicatul "Păstorul cel Bun" v. Romania*, the court held that the autonomy of religious organizations would be impaired if Romania were required to register a trade union of priests and lay employees of the Romanian Orthodox Church.[90] Even though the Church's relationship with its religious employees had many characteristic features of traditional employment

84 Vienna Concluding Document, *supra* note 83, art. 16.

85 Serif v. Greece, 1999-IX Eur. Ct. H.R.75; Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 119; Agga v. Greece (No. 3), App. Nos. 50776/99 & 52912/99 (Oct. 17, 2002), https://hudoc.echr.coe.int/eng?i=001-60690. [https://perma.cc/X55R-ENW8].

86 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others*, para. 137; Karlsson v. Sweden, App. No. 12356/86, 57 Eur. Comm'n H.R. Dec. & Rep. 172 (1988); *Spetz and Others v. Sweden,* Karlsson v. Sweden, App. No. 12356/86, 57 Eur. Comm'n H.R. Dec. & Rep. 172 (1988); *Williamson v. United Kingdom,* no. 27008/95, ECmHR (May 17, 1995).

87 Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 83, 116.

88 Rommelfanger v. Germany, App. No. 12242/86 (Sept. 6, 1989), https://hudoc.echr.coe.int/eng?i=001-1010 [https://perma.cc/97AH-SF39].

89 *See* Church of Scientology of Paris v. France, App. No. 19509/92 (Jan. 9, 1995), https://hudoc.echr.coe.int/eng?i=001-4576 [https://perma.cc/46AX-PT3S].

90 Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 43.

relationships, the Court held that "religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities."[91]

Proselyting is also considered a core aspect of religious freedom elsewhere in the liberal democratic world. The European Court of Human Rights has recognized that religious freedom under Article 9 of the European Convention includes "freedom to 'manifest [one's] religion,' including the right to try to convince one's neighbour, for example through 'teaching,'" but that religious freedom "does not, however, protect every act motivated or inspired by a religion or belief."[92]

The European Court has found that penalizing of religious advocacy violates religious freedom rights even when an individual was supposed to have entered a home on false pretexts, used "skillful" analysis of scriptures to "delude" a woman and took advantage of her inadequate "grounding in doctrine,"[93] or when individuals contacted a woman "in a state of distress brought on by the breakdown of her marriage."[94]

As the Special Rapporteur for Freedom of Religion or Belief has indicated, proselytization involves four subcategories of rights: "(a) the right to conversion (in the sense of changing one's own religion or belief); (b) the right not to be forced to convert; (c) the right to try to convert others by means of non-coercive persuasion; and (d) the rights of the child and of his or her parents in this regard."[95]

"Similar to freedom of expression," explained the U.N. Special Rapporteur for Freedom of Religion or Belief,

> freedom of religion or belief has a strong communicative dimension which includes, inter alia, the freedom to communicate within one's own religious or belief group, share one's conviction with others, broaden one's horizons by communicating with people of different convictions, cherish and develop contacts across State

91 *Id.* at 68.

92 Larissis v. Greece, App. Nos. 23372/94, 26377/94, & 26378/94, ¶ 45 (Feb. 24, 1998), https://hudoc.echr.coe.int/eng?i=001-58139 [https://perma.cc/GT7C-SUBB] (quoting Kokkinakis v. Greece, App. No. 14307/88, ¶ 31 (May 25, 1993), https://hudoc.echr.coe.int/eng?i=001-57827 [https://perma.cc/6RVX-266X]).

93 Kokkinakis v. Greece, supra note 92, at ¶ 46.

94 Larissis v. Greece, App. Nos. 23372/94, 26377/94, & 26378/94, ¶ 59 (Feb. 24, 1998), https://hudoc.echr.coe.int/eng?i=001-58139 [https://perma.cc/GT7C-SUBB].

95 Heiner Bielefeldt (Special Rapporteur on Religious Freedom or Belief), *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, 16, U.N. Doc. A/67/303 (Aug. 13, 2012).

> boundaries, receive and disseminate information about religious or belief issues and try to persuade others in a non-coercive manner.[96]

Religious persuasion is also protected as an important part of general speech rights. The U.N. Human Rights Committee, which is authorized to interpret the International Covenant on Civil and Political Rights, has stated in an interpretive General Comment to Article 19, which protects the rights to freedom of opinion and expression, that the right to expression includes religious discourse and freedom of opinion includes religious opinions.[97]

While comparative experience itself is of course not dispositive of the Free Exercise Clause's meaning, it is significant that religious autonomy and proselyting also are central aspects of religious freedom elsewhere in the world. This adds to the weight of evidence from conceptional and historical bases and from U.S. caselaw, which all suggests that autonomy and proselyting are core Free Exercise rights.

III. LEGAL ENTITY STATUS/501(C)(3) "CHURCH" STATUS

A. *Comparative, Conceptual, and Historical Basis*

The most interesting and potentially problematic potential core First Amendment right is that of a legal entity status, or its typically used parallel, 501(c)(3) "church" status. Access to a legal entity is a core religious freedom right elsewhere in the world, but U.S. caselaw is inconsistent on this point.

Internationally, however, the right is well established in the normative core of freedom of religion. In most countries, this issue is usually raised in the registration context, where some countries place onerous restrictions on which groups may attain legal entity status. But, as the U.N. Special Rapporteur on Freedom of Religion or Belief makes clear, reasonable access to legal entity status (or having the choice not to seek legal entity status) is a core part of being able to engage in forms of community life:

> Freedom of religion or belief is a right held by all human beings because of their inherent dignity. According to article 18, paragraph 1 of the International Covenant on Civil and Political Rights this includes the freedom, "either individually or in community with others and in public or private, to manifest [their] religion or belief in worship, observance, practice and teaching." The possibility of engaging in various forms of community activities thus

96 *Id.* ¶ 27.

97 Human Rights Committee, General Comment. No. 34, ¶¶ 9, 11, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

> clearly falls within the scope of freedom of religion or belief. Thus registration should not be compulsory, i.e. it should not be a pre-condition for practising one's religion, but only for the acquisition of a legal personality status.[98]

The Organization for Security and Co-operation in Europe's Vienna Concluding Document specifically refers to the importance of access to legal entity status: states must "grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their States, recognition of the status provided for them in their respective countries."[99] The European Court of Human Rights has also repeatedly upheld the right to reasonable access to a legal entity status,[100] describing "the autonomous existence of religious communities" as "*indispensable for pluralism in a democratic society* and is thus an issue *at the very heart* of the protection which Article 9 affords."[101]

This core right can only be limited in rare cases. The European Court of Human Rights has explained that, short of evidence "that the applicants had intended or carried on or sought to carry on activities capable of undermining . . . territorial integrity, national security or public order," a state limitation on registration is not "necessary in a democratic society" because there is no "pressing social need" that would justify restricting benefits.[102]

Access to legal entity status is particularly crucial because the State cannot be a filter on the religious beliefs of communities. The European Court of Human Rights, in interpreting Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"),[103] which parallels Article 18 of the ICCPR, held that a state mandate to register all religious activity

> would amount to the exclusion of minority religious beliefs which are not formally registered with the State and, consequently, would amount to admitting that a State can dictate what a person must believe. The Court cannot agree with such an approach and

98 Heiner Bielefeldt (Special Rapporteur on Religious Freedom or Belief), *Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 41, U.N. Doc. A/HRC/19/60 (Dec. 22, 2011).

99 Vienna Concluding Document, *supra* note 83, art. 16.3.

100 *See, e.g.*, Moscow Branch of the Salvation Army v. Russia, 2006-XI Eur. Ct. H.R. 1; Jehovah's Witnesses of Moscow v. Russia, App. No. 302/02 (June 10, 2010), https://hudoc.echr.coe.int/eng?i=001-99221 [https://perma.cc/FTJ4-ZUZZ].

101 Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 83, 114 (emphasis added).

102 *Id.* at 115.

103 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

> considers that the limitation on the right to freedom of religion [at issue in the case] constituted an interference which did not correspond to a pressing social need and was therefore not necessary in a democratic society.[104]

The European Court further held that States have a duty of neutrality and impartiality with respect to this right that "excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed."[105] Even when a limited category with additional benefits separate from a basic legal entity is created by the State, the country must "remain neutral."[106] "[I]f a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a nondiscriminatory manner."[107]

Beyond comparative law, access to legal entity status lines up with historical purposes of the First Amendment. One of the hallmarks of the established church in England at the time of the Founding was prohibition of religious worship in other denominations.[108] Obtaining a legal entity is a key part of creating additional denominations, enabling the entity to sign contracts, rent property, defend itself in court, protect the founders from personal liability, etc. This close tie to the essence of founding and maintaining a belief community also suggests that is should be part of a conceptual core. While it is possible to have or adopt a belief without a legal entity, it is difficult to maintain a community of believers without reasonable access to legal entity status. This centrality to the ability to freely choose among independently maintained beliefs is part of the reason that the European Court of Human Rights described it as "an issue at the very heart of the protection" afforded by religious freedom norms.

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104 Masaev v. Moldova, App. No. 6303/05, ¶ 26 (May 12, 2009), https://hudoc.echr.coe.int/eng?i=001-92584 [https://perma.cc/Y397-EQNE].

105 Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 83, 113.

106 Religionsgemeinschaft der Zeugen Jehovahs v. Austria, App. No. 40825/98, ¶ 92 (July 31, 2008), https://hudoc.echr.coe.int/eng?i=001-88022 [https://perma.cc/KED2-W54P].

107 *Id.*

108 See *supra* note 24 and accompanying text.

B. U.S. Law

1. What comprises "legal entity status" for religious organizations?

To what extent does access to legal entity status, particularly access to 501(c)(3) "church" status rise to the level of a core religious freedom right in the U.S.? As a preliminary matter, it is helpful to look at what legal entities are used for religious organizations and which benefits flow from them. In most states, religious organizations have the opportunity to function under various registration systems, although eighty-seven percent nationally choose a nonprofit form.[109] A charitable/public benefit nonprofit form comes with tax benefits, although it also faces stricter regulation[110] and additional rules on the distribution of assets in the case of dissolution than does a nonprofit mutual benefit association.[111] The advantages of registering as a not-for-profit corporation include the ability to own and transfer title to property, being able to accept contributions of property in the organization's own name, protection of members from liability, legal continuity of organization, the right to sue and be sued, the ability to borrow money, invest, and reinvest its funds.[112]

Fourteen of the fifty U.S. states have statutes providing exclusively for incorporation of religious organizations[113] and eight additional states provide for another type of charitable association which includes religious ones (e.g., categories such as "Charitable, Educational, and

109 Rhys H. Williams & John P.N. Massad, *Religious Diversity, Civil Law, and Institutional Isomorphism*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 111, 121 tbl.3 (James A. Serritella et al eds., 2006).

110 These types of regulation include, e.g., bans on the sale of memberships, limitations on mergers, notice to the attorney general for the sale of assets other than in the course of regular activities, and restrictions on voluntary dissolution. Patty Gerstenblith, *Associational Structures of Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, *supra* note 109, at 223, 230 n.31.

111 See discussion of various state options in *id.* at 226–30.

112 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 3:62 (William W. Bassett, W. Cole Durham, Jr. & Robert T. Smith eds., 2012).

113 These states are Alaska, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Wisconsin, and Wyoming. ALASKA STAT. § 10.40.020 (2023); CAL. CORP. CODE § 9120 (West 2023); CONN. GEN. STAT. § 33-264a (2023); DEL. CODE ANN. tit. 27, § 101 (2023); 805 ILL. COMP. STAT. 110/35 (2023); ME. STAT. tit.13, § 2861 (2023); MD. CODE ANN., CORPS. & ASS'NS § 5-302 (West 2023); MASS. GEN. LAWS. ch. 67, § 22 (2023); MICH. COMP. LAWS § 450.159 (2023); MINN. STAT. § 315.01 (2023); N.J. STAT. ANN. § 16:1-2 (West 2023); N.Y. RELIG. CORP. LAW § 3 (Consol. 2023); WIS. STAT. § 187.01 (2023); WYO. STAT. ANN. § 17-8-103 (2023).

Religious Associations" or "Religious and Benevolent Organizations.").[114]

To be a federally tax-exempt or "501(c)(3)" organization an organization must be "organized and operated exclusively for" exempt purposes, which includes religious purposes, and none of the earnings may inure to the benefit of a private shareholder or individual.[115] The organization must also not be an "action organization," i.e., where attempts to influence legislation are a substantial part of its activities or if it participates in any campaign activity for or against political candidates.[116]

Nearly 5,000 religious organizations have been recognized as tax-exempt by the Internal Revenue Service (IRS).[117] In practice, this

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114 These states are Alabama, Colorado, Kansas, Missouri, Mississippi, Ohio, Oklahoma, and Virginia. ALA. CODE § 10A-20-2.01 (2023) ("Churches, Public Societies, and Graveyard Owners"); COLO. REV. STAT. § 7-50-101 (2023) ("Religious, Educational, and Benevolent Societies"); KAN. STAT. ANN. § 17-1701 (2023); MO. REV. STAT. § 352.010 (2023) ("Religious and Charitable Associations"); MISS. CODE ANN. § 79-11-135 (2023) ("Nonprofit, Nonshare Corporations and Religious Societies"); OHIO REV. CODE ANN. § 1715.01 (2023) ("Religious and Benevolent Organizations"); OKLA. STAT. tit. 18, § 543 (2023) ("Religious, Charitable and Educational Corporations"); VA. CODE. ANN. § 57-49 (2023) ("Registration of Charitable Organizations; Prohibition Against Support of Terrorists"). Generally, religious corporation statutes or religious and benevolent organization statutes function similarly for not-for-profit organizations or are a subset of them, but they require less regulation and often also omit the ability to merge and provisions for dissolution and distribution of assets. 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 3:62 (William W. Bassett, W. Cole Durham, Jr. & Robert T. Smith eds., 2012). These statutes also often give more flexibility to match the internal structure of religious organizations, defer to religious doctrine in the event of a conflict with corporation law, and permit the organization to state its purposes broadly enough to ensure flexibility over time, although some activities may not meet the religious purpose requirement and thus need separate incorporation as regular not-for-profit entities. *Id.* Fifteen states have specific provisions for individual religious denominations, which helps to align state requirements with their demands of various religious beliefs and structures. The state statutes each accommodate from one to thirty-five denominations. CONN. GEN. STAT. §§ 33-277 to -278b (2023) (two denominations); DEL. CODE ANN. tit. 27, §§114–118 (2023) (two denominations); KAN. STAT. ANN. §§ 17-1711-13c, 17-1716a-16c, 17-1732-33, 17-1753-55 (2023); 805 ILL. COMP. STAT. 110/50 (1997) (Eastern Orthodox Church); LA. STAT. ANN. §§ 12:481–483 (2023) (Orthodox Church); ME. REV. STAT. ANN. tit. 13, § 2982 (2023); MD. CODE ANN., CORPS. & ASS'NS §§ 5-314 to -336 (West 2023) (three denominations); MASS. GEN. LAWS ANN. ch. 67, §§ 39–55 (2023) (four denominations); MICH. COMP. LAWS ANN. §§ 458.1–536 (2023) (15 denominations); MINN. STAT. ANN. §§315.17–.19 (2023) (one denomination); N.H. REV. STAT. ANN. §292:15–17 (2023) (one denomination); N.J. STAT. ANN. §§ 16:5-1 to 16:5-27 (West 2023) (one denomination); N.Y. RELIG. CORP. LAW §§ 1–68 (Consol. 2023) (over 35 denominations); VT. STAT. ANN. tit. 27, §§ 781–944 (2023) (five denominations); WIS. STAT. §§ 187.01–.24 (2023) (six denominations).

115 I.R.C., 26 U.S.C. § 501(c)(3) (2018).

116 *See id.*

117 INTERNAL REVENUE SERVICE, CUMULATIVE LIST OF ORGANIZATIONS DESCRIBED IN SECTION 170(C) OF THE INTERNAL REVENUE CODE OF 1986 (counting organizations coded

means that many more have tax-exempt status, as only a parent organization is listed when religious organizations apply as a group. Eighty-seven percent of all religious organizations stated that they meet the requirements of the Internal Revenue Code section 501(c)(3) according to the IRS and an additional eleven percent were uncertain.[118]

Religious organizations which are "churches" under a broad definition in the Internal Revenue Code[119] are given additional benefits. They are considered automatically exempt and need not apply for and obtain recognition of tax-exempt status by the IRS, although most individual churches do choose to apply for this recognition.[120] The IRS, of course, retains the right to investigate potentially fraudulent claims. "Churches" under the Internal Revenue Code also benefit from special rules limiting IRS audit authority.[121]

501(c)(3) "church" status not only comes with tax and audit-related benefits designed to meet the needs of religious organizations, but also effectively functions as a required status for any form of cooperation with the federal government or receipt of federal benefits. To apply for military or VA hospital chaplaincy with the federal government, for example, religious organizations must be federally tax-exempt "churches."[122]

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number 3, "A church, synagogue or other religious organization"), available in a searchable online database at https://babel.hathitrust.org/cgi/pt?id=nyp.33433016643763&view=1up&seq=7.

118 Rhys H. Williams & John P.N. Massad, *Religious Diversity, Civil Law, and Institutional Isomorphism*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 111, 121 (James A. Serritella et al eds., 2006).

119 I.R.C., 26 U.S.C. § 501(c)(3) (2018). The IRS examines whether the church has: (1) A distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular worship services; (13) Sunday schools for religious instruction of the young; (14) schools for the preparation of ministers. INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 33 (2015). "The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes." *Id.* *See also* Edward McGlynn Gaffney, Jr., *Exemption of Religious Organizations from Federal Taxation*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 446 (James A. Serritella et al eds., 2006).

120 INTERNAL REVENUE SERVICE, *supra* note 117, at 2.

121 *See id.* at 31–32.

122 DEPARTMENT OF DEFENSE, INSTRUCTION NUMBER 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS § E3.1.3.1 (2004); *See* U.S. Dept. of Veterans Affairs, *How to Become a VA Chaplain* (2022), http://www.va.gov/CHAPLAIN/components/Employment_Information.asp [https://perma.cc/WMD4-8TMT].

Much like in European and international law, being able to create religious nonprofit entities is core aspect of religious organizations, allowing them to operate freely and autonomously. One could argue that the importance of a right to legal entity status (paralleling that in international law) should only apply to legal registration, not IRS tax-exempt or "church" status. But the argument can also be made that designation as a "church" or use of religion-specific nonprofit registration forms help facilitate a religious organization's ability to freely function in ways that match internal structuring and religious purposes, have equivalent tax statuses to non-religious nonprofits, and minimize entanglement between religious organizations and the State. These points suggest that even a 501(c)(3) "church' status should be worthy of core protections.

However, since 501(c)(3) status is necessary for religious organizations to be able to support members in the military and VA hospitals as chaplains, it also could be seen to parallel higher tiers of cooperation with the State in international systems. In that case, at the very least, the State should still have a responsibility when considering 501(c)(3) "church" status to act neutrally and impartially with respect to the organizations' doctrines and beliefs.[123] Either way, freedom to form a legal entity and cooperate with the State to ensure that individuals have the ability to freely worship and manifest their beliefs communally without interference by the State should be part of core First Amendment protections.

2. Case law

While it would seem that right to a nonprofit religious entity status should easily be part of a normative core of Free Exercise protection because of its function, U.S. case law presents a problem. In the key case in this area, *Bob Jones,* the Supreme Court upheld the IRS's actions stripping the religiously affiliated university of its tax-exempt status because of its application of Biblical principles it claimed opposed interracial dating.[124] The IRS applied the common-law charity concept in the requirement that nonprofit organizations' activities not be "contrary to settled public policy."[125] The Court explained that:

123 *See, e.g.*, Masaev v. Moldova, App. No. 6303/05, ¶ 26 (May 12, 2009), https://hudoc.echr.coe.int/eng?i=001-92584 (States have a duty of neutrality and impartiality with respect to this right that excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.).

124 *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

125 *Id.* at 585.

> Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.[126]

The invocation of public policy and "community conscience" over the doctrines of a religious organization and failure to apply the unconstitutional conditions doctrine seems to suggest that religious entity status, or at least 501(c)(3) status, does not fall within a normative core. It is possible however that *Bob Jones* can be distinguished on the basis of its facts—racial discrimination, given American history and experience, is particularly odious and contravenes public policy to a degree that should override even core religious freedom rights.

The tensions within *Bob Jones* can also be seen in unconstitutional conditions tax exemption cases. In *Walz*, tax exemptions for religious organizations are seen as a protection for religious freedom:

> Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.[127]

In *Regan v. Taxation with Representation* [hereinafter TWR], however, tax-exempt status (for nonprofits generally) is seen as a benefit, something that the government can take away:

> TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right.[128] But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as

126 *Id.* at 591–92 (footnotes omitted).

127 Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 673 (1970).

128 *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

TWR claims here to a person who wishes to exercise a constitutional right.[129]

The Court reiterated that: "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"[130] This result can be distinguished from *Walz* and from international practice in two ways: (1) the fact that *Regan* involved lobbying and political activity removes it from the core rights of nonprofits or religious nonprofits (2) Since *Regan* does not address religious communities and *Walz* does, *Walz*'s non-entanglement logic and the fact that it invokes unconstitutional conditions suggests that religious entity status (of the 501(c)(3) "church" variety) is indeed part of the normative core of First Amendment protections for religious organizations.

I would suggest that for religious organizations at least, the logic of *Walz* should apply. Like other legal systems internationally, the U.S. should understand access to religious nonprofit status as part of core First Amendment rights. Conceptually, the First Amendment was designed to permit non-established churches to flourish and to keep the government out of the business of selecting doctrine for churches, either by fiat or by subsidy. If the power to tax is the power to control and avoiding government control of doctrine and existence of religious groups is core to the First Amendment, then reasonable, nondiscriminatory access to religious nonprofit status should fall within a normative core.

Even if 501(c)(3) status is seen as a "higher" tier of cooperation with the State and access to state benefits rather than a basic legal entity status, the nondiscrimination aspects of the unconstitutional conditions should apply. Multiple-tier legal entity systems are quite common elsewhere in the world, but the core norm is still to ensure nondiscrimination based on theological differences in evaluation of organizations for higher tiers. The European Court of Human Rights has explained that "if a state sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a nondiscriminatory manner."[131] In a case involving discrimination by Turkey among different branches of Islam—some favored, some unfavored—the European

129 Regan v. Tax'n with Representation of Washington, 461 U.S. 540, 545 (1983).

130 *Id.* at 546.

131 Jehovahs Zeugen in Österreich v. Austria, App. No. 27540/05, ¶ 35 (Sept. 25, 2012), https://hudoc.echr.coe.int/eng?i=001-113411 (citation omitted).

Court held that in refusing a higher-tier status to the unfavored Alevi community:

> [T]he respondent State has considerably restricted the reach of pluralism, in so far as its attitude is irreconcilable with its duty to maintain the true religious pluralism that characterises a democratic society, while remaining neutral and impartial on the basis of objective criteria. In that connection the Court observes that pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions and identities and religious convictions. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[132]

The court held that a government violates its duty of "neutrality and impartiality towards religions" when it takes sides in a theological debate.[133]

In U.S. circles, it is common to focus on the fact that the State's proffered reason is neutral or secular or even if it is compelling. In contrast, the European Court looked at how the law affects the religious freedom rights of the relevant community and both *de jure* and *de facto* discrimination. In the Turkey case:

> [T]he Alevi community is deprived of the legal protection that would allow it to effectively enjoy its right to freedom of religion. Moreover, the legal regime governing religious denominations in Turkey appears to lack neutral criteria and to be virtually inaccessible to the Alevi faith, as it offers no safeguards apt to ensure that it does not become a source of *de jure* and *de facto* discrimination towards the adherents of other religions or beliefs. In a democratic society based on the principles of pluralism and respect for cultural diversity, any difference on grounds of religion or beliefs requires compelling reasons by way of justification. In that regard it must be borne in mind that an unfavourable attitude and an unjustified difference in treatment with regard to a particular faith may have significant repercussions on the exercise of the religious freedom of its followers.[134]

The European Court approach is a helpful reminder that the focus on the religious freedom of the affected group should not be lost. The European Court in the Alevi case held that "[t]he needs of its followers as regards recognition and the provision of a religious public

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132 İzzettin Doğan v. Turkey, App. No. 62649/10, ¶ 178 (Apr. 26, 2016), https://hudoc.echr.coe.int/eng?i=001-162697.

133 *Id.* ¶ 179.

134 *Id.* ¶ 182 (citations omitted).

service in respect of their community appear comparable to the needs of those [who receive the public benefits]."[135]

Adopting a Free Exercise approach with a normative core of religious freedom rights helps ensure that the most crucial freedoms are most protected. With regards to *Bob Jones*, recognizing that access to nonprofit religious entity status is a core right (or in the case of 501(c)(3) "church" status, at the very least a near-core right) brings the discussion back to the central purposes of the First Amendment and the most important religious freedom needs to preserve Free Exercise and non-establishment: keeping the government from establishing a set of a religious beliefs or barring unfavored groups from operating and ensuring the freedom of individuals and groups to form religious groups without discrimination.[136] Thus in a future *Bob Jones*-like case dealing with non-racial discrimination and the right to 501(c)(3) "church" status, the emphasis should be on the freedom of group involved, their right to form and operate a religious entity, and on the government's neutrality with respect to the group's doctrines, even if those doctrines lead to discrimination.

This illustrates well the point of a normative, non-categorical core: that a single right can have more nuanced application. For example, the question of religious freedom in tension with nondiscrimination claims may have completely different resolutions depending on the aspect of religious freedom that it touches on. A nondiscrimination case with a nonprofit entity status claim might well turn out differently than a case where the government conditions benefits to contractors on nondiscrimination, since government contracting is likely less of a core right than right to religious entity status is. A case involving religious discrimination by for-profit non-closely held entity would be even further from the core with the religious corporation much less likely to prevail.

A normative core doesn't provide an automatic win for the religious claimant. But it is not clear that the *Sherbe*rt/*Yoder* test, which theoretically significantly favored religious claimants, always served them well. Even those who support broad protection for religious freedom recognize that the most robust protections in theory often get watered down in practice,[137] particularly when they have to be applied across the board. In contrast, a theory focused on core religious

135 *Id.* ¶ 169.

136 See *supra* note 126 and accompanying text.

137 *See, e.g.*, Jesse Choper, *In Favor of Restoring the Sherbert Rule—With Qualifications*, 44 TEX. TECH L. REV. 221 (2011); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

freedom rights retains robust protections for the most important aspects of religious freedom while also recognizing that having the highest degree of protection for all religious freedom cases equally may not be appropriate. This additionally brings the benefit of keeping religious freedom from becoming so broad and resented that the pendulum swings again to little or no protection of religious freedom in any context.

While it initially would require some sorting of past cases and reordering of priorities, a key advantage of a non-categorical approach to religious freedom claims would be the elimination of the perceived deadlock between religious freedom and nondiscrimination norms. Existential fears in both communities can be honored, as religious freedom claims prevail in the contexts most crucial for religious believers without justifying across-the-board discrimination. Within a non-categorical approach, freedom of religion can take its place among other rights in a measured and balanced way in a comparable fashion to free speech. This may not achieve everything religious claimants may want in the short term but has the advantage of longer-term stability in protecting the most important issues and avoiding backlash or watering down of protections.