

WHO NEEDS FREEDOM OF RELIGION?

JAMES W. NICKEL*

This article proposes that we view freedom of religion as a specific application area of more general basic liberties such as freedoms of thought, expression, association, assembly, movement, privacy, political participation, and economic activity. Separate enumeration of freedom of religion in national and international bills of rights may be useful, but it is not indispensable. In this respect freedom of religion is more like scientific freedom or artistic freedom than like freedom of expression. Recognizing that separate enumeration of freedom of religion is dispensable has salutary consequences for how we conceive and justify freedom as it applies to religion. First, we see that the general grounds of the basic liberties will also be the grounds of religious freedom. Second, we gain a broad and ecumenical scope for freedom of religion that extends into areas such as association, movement, politics, and business. Third, this perspective helps us avoid a narrow clause-bound focus in interpreting freedom of religion. Finally, this approach helps us resist exaggerating the priority of freedom of religion.

INTRODUCTION

When we try to describe the meaning of freedom as a political norm, we usually identify important *areas* of liberty in which governments should enter only with good reasons and tread lightly when they do. We speak of freedom of expression, religion, association, assembly, and movement. This is the “basic liberties” approach to understanding liberty. One of its early uses was the enumeration of liberties in the First Amendment to the U.S. Constitution—which protected the free exercise of religion, freedom of speech and press, the right of peaceable assembly, and the right to petition the government.¹ Contemporary human rights

* James Nickel is a professor at Arizona State University College of Law. I wish to thank Gail Merten for research assistance with this essay.

1. U.S. CONST. amend. I.

declarations and treaties use the basic liberties approach in a more extensive way. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) enumerates the following basic liberties: freedom from slavery, servitude, and compulsory labor (art. 4); respect for one's private and family life, home, and correspondence (art. 8); freedom of thought, conscience, and religion (art. 9); freedom of communication and expression (art. 10); freedoms of association and peaceful assembly (art. 11); and freedom to marry and found a family (art. 12).² Subsequently added amendments include a right to property (Protocol 1, art. 1); a right of parents to control their children's education so that it conforms to their religious and philosophical convictions (Protocol 1, art. 2); and a right to freedom of movement and residence (Protocol 4, art. 2).³

This article considers whether separate reference to freedom of religion is really necessary.⁴ The issue is not whether freedom of religion is important—it obviously is—but whether it requires separate mention once the full set of basic liberties is in place. Once we have all of the basic liberties, religious belief and activity are an application area whose content is adequately covered by more general rights and liberties. Suppose that all references to religion in the European Convention were removed, except for the prohibition of discrimination on grounds of religion in Article 14. In a country where this revised version of the Convention was fully respected and protected, people would be protected against all of the familiar forms of religious persecution. Security rights would protect them against murder, massacre, and torture. Due process rights would protect them against forms of religious persecution that imprison people without fair trials. Equality rights would protect them against forms of persecution that would deny them equal citizenship or subject them to discrimination. Political liberties would ensure that they

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *Eur. Conv. On H.R.*].

3. *Id.*

4. This article is about freedom in the area of religious belief and practice. It concerns "free exercise" rather than "establishment clause" issues. These two areas cannot be entirely separated, however, since strong forms of state sponsored and enforced religion violate people's free exercise of religion by requiring them to belong to and participate in a religious organization that they reject. If a state religion requires people to conform their beliefs to, participate in, or support a particular religion, freedom of religion is violated. Mild forms of establishment of an official religion, however, do not impose requirements of religious membership and participation. I doubt that a country's having an official church alone is an inherent violation of freedom of religion. Great Britain and Brazil are religiously free countries even though they have official churches. They do not require adherence to the beliefs or practices of their official religions.

could publicize their grievances, petition the government, take legal action, form political organizations, and engage in electoral politics. And the enumerated individual liberties would ensure freedoms such as thought, conscience, expression, movement, association, assembly, and property. Even if freedom of religion is not mentioned, people who fully enjoy all of the listed human rights thereby enjoy freedom of religion.

This article explores and defends the idea that we do not need freedom of religion as a separate enumerated liberty. It does not propose that freedom of religion should disappear as a distinctive category; but argues that it could do so without much loss. Further, recognizing that explicit enumeration of freedom of religion is dispensable has salutary consequences for how we conceive and justify freedom as it applies to religion.

The claim that all categories of human rights help protect freedom of religion is not particularly controversial. The controversial issue, I believe, is whether we can adequately enumerate the basic liberties without referring to religion. I think that we can. I believe that nine general liberties, working together, provide full protection for freedom in the area of religion. Those nine liberties are:

1. Freedom of belief, thought, and inquiry
2. Freedom of communication and expression
3. Freedom of association
4. Freedom of peaceful assembly
5. Freedom of political participation
6. Freedom of movement
7. Economic liberties
8. Privacy and autonomy in the areas of home, family, sexuality, and reproduction
9. Freedom to follow an ethic, plan of life, lifestyle, or traditional way of living

When we recognize that religious freedom is constituted by broader basic liberties, a number of consequences follow. First, we see that the general grounds of the basic liberties will also be the grounds of religious freedom. No special grounds relating to God's commands, the nature of salvation, or the value of religion are required.⁵ Second, we obtain a

5. Many theorists of freedom of religion hold that it has unique grounds. John Witte, Jr., gives a representative formulation:

[R]eligion is special and is accorded special protection in the Constitution. . . . The founders' vision was that religion is more than simply a peculiar form of speech and

broad and ecumenical scope for freedom of religion that extends into areas such as association, movement, politics, and business. Religious liberty, like political liberty, is seen to have many dimensions. Third, this approach helps us avoid a narrow clause-bound focus in interpreting freedom of religion. Freedom of religion is not just rooted in the First Amendment or clauses pertaining to belief and conscience. Finally, this approach helps us resist exaggerating the priority of freedom of religion.

The article proceeds as follows. The first two sections develop the view that religious liberty can be derived from broader liberties and outline the advantages of taking such a view. The third section addresses the weight of the basic liberties and explains why religion is generally a high priority area within the basic liberties. The fourth section describes the broad scope that this view gives to religious freedom and addresses the issue of exemptions to general legal duties given on religious grounds. The final section offers three broad justifications for the basic liberties approach, challenging the view that the grounds of freedom of religion must somehow be "special."

I. HOW THE BASIC LIBERTIES CONSTITUTE FREEDOM OF RELIGION

People who fully enjoy the nine basic liberties listed above thereby fully enjoy freedom of religion. They are free to study, adopt, and revise theological, metaphysical, and ethical beliefs, to express and advertise their views on these matters, to put their views into practice, to associate and assemble with people holding similar views and engaging in the same practices, to engage in political action to protect their religious views, to move about in pursuit of their religious, ethical, and other goals, and to engage in economic activity with their co-religionists to facilitate their collective life, promote their religious beliefs, and establish systems of mutual aid among their members.

Religious freedom is not the only species of liberty created by the nine basic liberties. People who fully enjoy those liberties also thereby enjoy, for example, scientific freedom, artistic freedom, culinary freedom, medical freedom, and recreational freedom. Like religious free-

assembly, privacy and autonomy. Religion is a unique source of individual and personal identity, involving "duties that we owe to our Creator, and the manner of discharging them," as Madison put it. Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith.

JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 250 (2d ed. 2005) (citation omitted).

dom, scientific freedom has a distinctive history that can be written separately from the general history of freedom of inquiry and belief. It faces threats different from those to artistic freedom. Its importance must be explained in ways that differ somewhat from those used to explain the importance of other freedoms, and it may be useful to speak specifically of scientific freedom in legislative and other contexts. Still, scientific freedom is constituted by the basic liberties. When you enjoy those liberties you thereby enjoy scientific freedom.

Fundamental freedoms are not unqualified. Limits are often warranted. The European Convention on Human Rights and Fundamental Freedoms qualifies the basic liberties by suggesting that they are subject to such limitations as are necessary to facilitate "public safety," "the protection of public order, health or morals," or "the protection of the rights and freedoms of others."⁶ Beyond this, when the exercise of a basic liberty requires the participation of others, that participation typically requires consent. If Kim wants Lee as a partner for prayer, protest, or scientific research, Lee's willingness or consent is required.

The remainder of this section briefly explains the nine basic liberties and suggests how each one contributes to religious liberty.

Freedom of belief, thought, and inquiry

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief.⁷

Every person has the right to study, reflect upon, evaluate, adopt, and revise all types of beliefs. Freedom from coercion in the area of belief is central to religious liberty. Theistic, metaphysical, ethical, social, and political beliefs are open to consideration, choice, and revision without coercive interference from government. "Freedom of conscience" protects free choice and commitment within the area of people's deepest and most intensely felt moral, social, religious, and cosmological convictions.

6. Eur. Conv. on H.R., *supra* note 2, at art. 9.

7. *Id.*

Freedom of communication and expression

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers.*⁸

Freedom to communicate is essential to religious life. When this liberty is respected, religious people are free to talk, argue, criticize, preach, publish, and use broadcast and other electronic media. This liberty permits publication of religious books and materials. It also allows for religious outreach and evangelism.⁹ This fundamental freedom also protects communications that criticize religious doctrines and activities.

Freedom of association

*Every person has the right to associate with others to promote, exercise, and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.*¹⁰

People should be free to meet, combine for various purposes, and reside with others on a consensual basis. Religious activities are often group activities—ones in which the adherents of a religion gather together for fellowship, study, discussion, and worship. Freedom of association protects these activities. It also protects the liberty to meet with others to form a new congregation, denomination, or religion. The freedom to associate is also freedom to dissociate. This means that individuals are free to quit religious organizations. It also means that religious groups can exclude people from membership and leadership positions on grounds of belief and behavior.

8. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19, cl. 2, 999 U.N.T.S. 171 [hereinafter Int'l Covenant].

9. The European Court of Human Rights upheld the right to proselytize in *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411–14 (1993).

10. American Declaration of the Rights and Duties of Man (1948), art. 22, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

Freedom of peaceful assembly

*The right of peaceful assembly shall be recognized.*¹¹

People should be free to assemble peacefully in large groups; governments may not prohibit meetings or restrict them to a few people. This gives religious groups the liberty to assemble for worship, study, pilgrimages, and protests.

Freedom of political participation

*Every citizen shall have the right and the opportunity (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in his country.*¹²

All adults should be free to participate in politics, to make their views known on moral, social, economic, and political issues, to vote, and to compete for positions of political leadership and administration. Religious (and non-religious) groups and leaders are free to play a political role.

Freedom of movement

*Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.*¹³

People should be free to move, migrate, and flee. When respected, this liberty gives religious individuals and groups the liberty to engage in the movements requisite to association and assembly. It also allows them to flee persecution. The *Canadian Charter of Rights and Freedoms*

11. Int'l Covenant, *supra* note 8, at art. 21.

12. *Id.* at art. 25.

13. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 13, U.N. Doc. A/810 (1948).

gives citizens the right to "enter, remain in, and leave Canada" as well as a qualified right to move to, reside, and work in any province.¹⁴

Economic liberties

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*¹⁵

People should be free to choose their occupation, hold property, engage in economic activity, and use and consume goods. These freedoms apply to both personal and productive property. Many activities protected by freedom of religion have significant economic dimensions. Restricting economic activities in a wholesale way will accordingly restrict freedom of religion. Religious people frequently engage in activities such as (1) buying, renting, or constructing buildings for religious activities; (2) starting and running religious enterprises such as churches, schools, and publishing houses; (3) hiring employees to serve as religious leaders, editors, teachers, office workers, cooks, and janitors; (4) soliciting donations for religious causes; (5) saving, managing, and spending the funds coming from donations and the proceeds of religious enterprises; and (6) abandoning work or career to pursue religious study and callings.¹⁶ The economic activities of religious organizations are not

14. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 6. The words "travel" and "movement" are not found in the original Constitution and Bill of Rights of the United States. Interstate movement was envisioned and protected nonetheless. Article IV, Section 2, Clause 1 of the U.S. Constitution provides, "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." The right of interstate travel was affirmed in *Edwards v. California*, 314 U.S. 160, 177 (1941) (finding a California law that forbade the immigration of indigents to violate the Commerce Clause).

15. Eur. Conv. on H.R., *supra* note 2, at Protocol 1, art. 1.

16. The U.N. *Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief* explicitly identifies liberties in the economic area including: establishing and maintaining places for worship and assembly; making, acquiring, and using religious artifacts; writing, publishing, and disseminating religious works; receiving donations; and having charitable organizations. G.A. Res. 36/55, U.N. GAOR, 36th Sess., art. 6, § a-f, U.N. Doc A/36/51 (1981).

immune to government regulation. But if these economic activities are entirely or largely blocked then important religious activities will be severely limited.¹⁷

Privacy and autonomy covering home, family, and sexuality

*Everyone has the right to respect for his private and family life, his home and correspondence.*¹⁸

*The States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions.*¹⁹

Governments should not interfere with people's private lives without strong justification. People's rights—and particularly their rights against violence—need to be protected in the private realm, so the claim to privacy and autonomy in one's home cannot be absolute.²⁰ Still, autonomy and privacy within the realm of private and family life is essential to an adequate system of liberty. Parents have qualified rights to govern the upbringing and education of their children so as to transmit their beliefs and culture.²¹

Freedom to practice an ethic, lifestyle, or traditional way of living

Eight of the nine basic liberties are fully recognized in international human rights documents. A general right to act in ways that do not violate the rights of others or disturb public order, however, is not. This is the freedom that J. S. Mill called "liberty of tastes and pursuits."²² It gives people liberty to live and act in both traditional and unorthodox ways, to continue traditional ways of living, to follow ethical and political outlooks, and to pursue private dreams and visions. Religions should attach great importance to this liberty. Without it, freedom of religious

17. See James W. Nickel, *Economic Liberties*, in *THE IDEA OF A POLITICAL LIBERALISM* 155, 155–75 (Victoria Davion & Clark Wolf eds., 2000).

18. Eur. Conv. on H.R., *supra* note 2, at art. 8. In *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 40 (1981) (Commission report), the right to autonomy within home and family was found to extend to homosexual relationships.

19. Int'l Covenant, *supra* note 8, at art. 18, cl. 4.

20. See Christopher Nowlin, *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 HUM. RTS. Q. 264 (2002).

21. See United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44.

22. JOHN STUART MILL, *ON LIBERTY* 12 (Elizabeth Rapaport ed., Hackett Publishing Co. 1982) (1859).

practice is insufficiently provided for by the basic liberties. Liberty of tastes and pursuits is important as a dimension of religious liberty since religious people often engage in unusual activities such as prostrations and baptism by immersion, wear unusual clothes and hats, adhere to non-standard diets, and live communally.²³

II. ADVANTAGES OF SEEING FREEDOM OF RELIGION AS DERIVATIVE

The biggest advantage in understanding freedom of religion as deriving from the nine basic liberties is that it simplifies and integrates our view of fundamental freedoms. Religious liberty is treated in the same way as artistic and scientific freedom, areas in which basic liberties have important applications because substantial liberty interests are present along with recurring threats to those interests. In this approach, the importance of freedom of religion comes from the fact that the sorts of activities it involves are covered by the most important general liberties.

Another advantage to this approach is that it yields a broad and ecumenical conception of religious freedom. It does not require that we precisely define the boundaries of religion because it equally protects near-relatives of religion such as philosophical and ethical outlooks.²⁴ It recognizes that different religions have different emphases. Doctrinally oriented religions can emphasize freedom of belief and the intellectual liberties; proselytizing religions can emphasize freedoms of expression and assembly; socially and ethnically oriented religions can emphasize freedom of association; religious groups that focus on mutual aid or promoting the economic success of members can emphasize economic

23. Cases addressing these matters include *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (denying right to wear yarmulke in military); *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (denying right to practice polygamy); and *Africa v. Pennsylvania*, 662 F.2d 1025, 1036 (3d Cir. 1981) (denying right to diet of raw foods in prison).

24. Douglas Laycock argues that the meaning of “religion” in the First Amendment must be understood to include “any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.” Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326 (1996). This is a good start, but Laycock misses its potential by giving a narrowly theistic account of what “religious questions” are, namely, “What is the nature of God and what does He/She want for us?” *Id.* Laycock later attempts to avoid the limitations that this narrow answer imposes when he says,

The nontheist’s belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.

Id. at 336. See also Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

liberties; and ethically oriented religions can emphasize freedom to live in accordance with one's conscience or traditions as long as that does not harm others or violate their rights.²⁵

Third, seeing religious liberty as deriving from many basic liberties helps us avoid an approach that focuses narrowly on just one article or clause within bills of rights. It avoids the misconception that we have to find all protections for religious activity within a phrase like "the free exercise of religion" or "freedom of thought, conscience, and religion." Instead it suggests that freedom of religion is protected through the contributions of many basic liberties, and that interpreting freedom of religion will often require us to understand the meaning and roles of several basic liberties.

Fourth, this approach bases freedom of religion on general grounds that can gain widespread acceptance in a religiously and ethnically diverse society that includes many nonreligious individuals. People do not need to attach special value to religion, or to a particular religion, in order to accept the implications of the basic liberties for religious freedom. Religious liberty is more secure when nonreligious people see it, not as a special concession to the orthodox, but rather as simply an application of liberties and rights that all enjoy. If nonbelievers dislike religion and have no desire to protect it as such, reflection will nevertheless reveal to them that undermining religious liberties would come at the cost of undermining their own liberties of thought, expression, association, assembly, and so on. Thus, religious freedom does not depend on positive attitudes towards religion or some religions.

Finally, this approach ensures that religious freedoms are bilateral, that they are both freedoms to accept and to reject particular religious propositions. Just as the value of association is often most significant in contexts where one has a choice about whether to join with other people, the value of religion is often most significant in contexts where one has a choice about what to believe and practice. The believer, the religion shopper, the founder of a new religion, the syncretistic new age seeker, the theologian, the doubter, and the atheist all find shelter in the broad basic liberties.

25. Confucianism provides a good example of a religion that is largely ethical in its concerns. An American example is the Ethical Culture Society, founded in 1877, http://www.nysec.org/ab_history.htm.

III. THE WEIGHT OF RIGHTS TO BASIC LIBERTIES

The *weight* of a liberty or right is its strength or power to prevail when it conflicts with other considerations. The *scope* of a right is the benefit, freedom, power, or immunity that it confers upon its holders. For example, specifying the scope of the right to freedom of movement involves describing a set of freedoms in the area of movement and residency that the holders of the right enjoy. If a right lacks exceptions, that is a matter of scope. If it is absolute, that is a matter of weight or priority. We are often uncertain whether to attribute the failure of a right to dictate the result that should be followed in a particular case to an implicit qualification within the right (scope) or to subjection to other considerations (weight).

In this section I defend four propositions about the weight of the basic liberties. First, to be a basic liberty a generic freedom must be high-priority in many cases, but there are usually areas where its priority is much lower. Second, freedom of religion fits this pattern. Not all liberties connected in some way with religion are of high priority. Third, not all liberties connected in some way with religion require compelling justifications when they are regulated by the government. Finally, in those areas where freedom of religion has very high priority, its weightiness derives from traits that freedom of religion shares with other highly-protected liberties.

A. Variations in Weight within Basic Liberties

The areas of action covered by the basic liberties are vast; they cover enormous numbers of specific actions and contexts. It would be surprising if each action within those areas was of equal importance. Assembly, for example, can occur with many different people in all sorts of places for an immense number of different purposes. It is not plausible to suggest that every kind of peaceable assembly is of equal importance to human liberty or that legal limits on assembly must always be justifiable by a compelling state interest. The problem is not just that some kinds of assembly are drunken, riotous, or criminal; those types of assembly can be carved out of the scope of the right to freedom of assembly, just as we carve human sacrifices out of the scope of freedom of religion. The problem, rather, is that some of the protected parts of the right to peaceful assembly are of less importance than others. Assemblies vary in how important they are to society, how important they are to the people involved, in their costs and dangers to participants and by-

standers, and in the degree to which alternative ways of meeting or communicating are nearly as good. It is often helpful to try to distinguish the core of a liberty from its margins or less-central areas. The non-core areas of a basic liberty are still protected but may have lower priority.

One explanation of less important areas within the basic liberties is that the presence of many good options often lessens the importance of access to particular options within the same range. If there are many good public spaces for groups to stage protests or hold large revival meetings, access to a particular one that is under construction or that has large amounts of automobile traffic nearby is less important. If the next best option is nearly as good—as will often be the case when there are many good options—then the whole value of the liberty is not lost if one cannot access the best option.²⁶

As an example of this concept, during the 1980s the city of Boulder, Colorado had an annual Halloween party (the “Mall Crawl”) for tens of thousands of people in its downtown pedestrian mall. High levels of drunkenness and fighting, difficulties in crowd and traffic control, and high clean-up costs eventually led the city government to suspend the party and block access to its downtown mall on Halloween. The city believed, perhaps, that the Halloween street party had high costs and dangers with a limited economic payoff to local businesses, was not very important to society or the general welfare, and that its personal importance to some of the people involved was diminished by the fact that they were free to have smaller Halloween parties in other places, public and private.

Legislators and judges who are called upon to shape and apply the basic liberties cannot avoid making judgments about importance. A decision by lawmakers to close a wilderness area to most forms of public access will restrict freedom of movement, but not as significantly as a decision to close an equally large section of a city. If judges review bans on publishing certain sorts of scientific and technological information that are imposed on grounds of national security, they will have to weigh the seriousness of the likely impact of those bans on scientific and academic freedom.

26. This is consistent with the U.S. Supreme Court’s consideration of the availability of alternatives as one factor when analyzing time, place, and manner restrictions on speech. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that the restriction must, among other things, “leave open ample alternative channels for communication of the information”); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding the same); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981) (holding the same).

B. Compelling Justifications for Legislation

If an action is within the scope of a liberty right, this does not generally mean that it is immune to regulation. Perhaps freedom of thought, and some areas of freedom of expression, are immune to regulation in this way. Generally, however, to describe the freedom to do some kind of action as "basic" is only to say that proposals to regulate that kind of action bear a heavier than normal burden of justification.

If the importance of particular instances of freedom of assembly varies in the manner suggested above, then we would expect the size of the burden of justification to vary as well. A city may be justified in regulating Halloween street parties in ways that it would not be justified in regulating large political rallies. Here, the difference is probably that political rallies are of greater importance to society and the general welfare than Halloween street parties.

These considerations undermine the idea that regulating any type of assembly always requires a compelling justification. A sliding scale, not a two-tier scheme, is far more plausible. Designating broad areas of action as areas of fundamental freedoms does not commit us to always hold legislation regulating within those areas to the highest standard of justification.

C. Do All Liberties Connected with Religion Have High Priority and Require Compelling Justifications?

Religious activities occur in many different areas of life including the intellectual realm, the area of communications and media, and the physical sphere of movement and traffic. Religious activities also occur in the social realm including areas of private space such as the home and family, and the business areas of food service and real estate. The activities associated with religious pursuits are enormously varied, and it is implausible to suggest that they are all equally important as liberties. Worshipping and preaching are religious activities of the highest importance, while driving and plastering are religious activities of lesser importance, even when done within religious organizations or contexts. It would be a far greater infringement of religious liberty to limit the length of worship services than it would be to limit the duration of bus trips.

Since the importance of activities associated with religion varies, so should the burden of justification. It is not plausible to suggest that just because a religious organization or a religiously motivated individual is the actor, the highest standards of justification should be required of any

regulations affecting that actor.²⁷ The fact that an actor in an enterprise is religiously motivated, or is a religious organization, does not transform a bus driver into a priest or make every activity of the bus driver or cook into a religious act for purposes of regulation. If a city ordinance requires all parking areas with spaces for three or more vehicles to be hard-surfaced, the fact that this ordinance applies to church parking lots does not by itself mean that a higher standard of justification must apply.

D. What Makes Religiously Motivated Activities More or Less Important?

The considerations that make religious activities more or less important as areas of liberty are the same ones that make other common activities more or less important as areas of liberty. The presence of a religious actor, organization, or motivation only ensures importance when that presence connects with the broader considerations that make some liberties very important or valuable. The criteria used above in discussing freedom of assembly can be used to illustrate this point. Religious (and anti-religious) activities, like assemblies, vary in how important they are to society, how important they are to the people involved, in their costs and dangers to participants and bystanders, and in the degree to which alternative forms of action are nearly as good. The importance of a religious activity will be heightened in the following ways. First, an activity's importance is heightened when the activity is very valuable to society, such as religious educational and medical institutions, or religious discourse and learning. Second, the importance of religious activity is heightened when it is very important personally to its participants in the way that communion is to many Christians or that meditative sitting is to many Buddhists. Third, an activity's importance is heightened when it does not have substantial costs and dangers to participants and bystanders in the way that prayer and religious discussion generally do not. Finally, a religious activity is especially important when alternatives to the activity are not nearly as good. For example, holding religious services in homes rather than in dedicated religious buildings is not nearly as good from the perspective of many religious groups.

This account of what makes religious activities important as areas of liberty also suggests that religious activities will not uniformly be more important than other kinds of activities. The liberty to engage in a cer-

27. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting Congress' attempt to statutorily overrule *Smith*).

tain sort of political assembly may end up having higher priority than the liberty to engage in a particular kind of religious assembly because the political assembly is more valuable to society, is equally or more valuable to its participants, has lower costs and dangers than the religious assembly, and is not as easily replaced by nearly as good alternatives as the religious assembly.

IV. THE SCOPE OF RELIGIOUS FREEDOM

A right's *scope* is the area of action to which the right applies. "Freedom of assembly" is an abstract description of the scope of the right to freedom of assembly. When conceived less abstractly, the scopes of rights generally contain exceptions. If, for example, the constitutional right to freedom of speech does not include protection for speeches made from the visitors' gallery during legislative sessions, this exception could be specified in a full statement of the scope of the right to free speech. The scopes of fundamental rights are typically given broad statements in bills of rights but then defined in greater detail through adjudication and legislation.

The scopes of fundamental rights must be adjusted to accommodate each other. For example, rights to freedom of speech, religious practice, assembly, movement, and political participation require substantial qualification and regulation so that they harmonize with each other and with other important considerations. A *system* of rights must adjust the scopes and weights of its rights so that they can coexist with each other and form a coherent system. The right to privacy, for example, must be adjusted to coexist as best as it can with the right to a fair trial.

This section begins with an account of why minimal religious freedom is inadequate. It then turns to an account of why religious liberties are bilateral, why they should be understood to include liberties to disbelieve and dissociate as well as liberties to believe and associate. Finally, it addresses the question of whether the need for exemptions to general legal duties is a unique feature of religious liberty and suggests that it is not.

A. Minimal Religious Freedom

Consider a minimal right to religious liberty that only covers freedom of belief and private religious observance. This minimal right would require that people's personal religious beliefs and private forms of meeting, prayer, and worship not be subjected to coercive interven-

tion. It would protect praying at home or meeting quietly in a nonpublic location for religious discussions or worship. Such a minimal right to religious liberty does not include public expression and proselytizing, public association and assembly, public political action to defend the religion, movement except of a small-scale and quiet sort, economic activities such as building churches or publishing religious books, and public displays of distinctive clothing, practices, or social patterns.

This minimal right to religious liberty is certainly better than none because it excludes some of the worst forms of religious persecution. John Rawls proposes that liberal democracies refrain from imposing diplomatic and military sanctions on countries—ones he calls “decent nonliberal peoples”—whose accommodation of religious diversity goes no farther than this.²⁸ Minimal religious freedom will be more acceptable to doctrinally oriented religions and those whose religious observances can be done in private than it will to religions emphasizing distinctive lifestyles and cultures, public worship and expression of one’s convictions, evangelism, good works done for religious reasons, and mutual aid to members in the economic arena.

We should reject minimal religious freedom, not just as a view of religious freedom, but because of its overly narrow view of human freedom generally. People have general liberties that are violated when they cannot publicly say what they believe, when they cannot move, associate, and assemble as they please within the bounds of respecting the rights of others, when they cannot use their economic assets to promote common goals, and when they cannot practice nonstandard or unpopular forms of living.

B. Religious Freedom is Bilateral

Seeing religious freedom as derivative leads us to see religious liberties as bilateral, as allowing belief or disbelief and worship or refusal to worship. It ensures that religious liberties are bilateral because it bases those liberties not on the value of some or all religions,³⁰ or even on the distinctive value of religious freedom, but rather on the value of the fundamental freedoms. Liberties to inquire, believe, and doubt cover all propositions, not just some favored set.

28. JOHN RAWLS, *THE LAW OF PEOPLES* 76 (1999).

30. John Garvey holds that the basis for freedom of religion is that “religion is a good thing.” JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 49 (1996).

Even a narrow view of the grounds of freedom of religion would support the conclusion that freedom of religious belief is bilateral in the sense that it permits people to believe, be uncertain about, or disbelieve any religious proposition. Religious beliefs that are part of one religious perspective are often anti-religious in the sense that they contradict other religions or versions of the same religion. Different branches of Christianity, for example, disagree about which scriptures are authoritative, the requirements of salvation, the structure of religious authority, and resurrection. To be a Lutheran, say, is to reject some of the religious beliefs of Catholics, Mormons, and Unitarians. Accepting one religious belief typically involves rejecting others. If one does not have the freedom to disbelieve, this will make many acts of belief pointless or impossible. This is not to deny that religions vary in how strongly they reject or disapprove of other religions, nor to deny the possibility of syncretism. But fully endorsing one religion almost always involves excluding some others. A person who endorses an ethically oriented religion may reject all forms of theism. To understand free religious belief, we have to think of it as an area in which both belief and disbelief are simultaneously occurring.³¹

C. Religious Freedom and Exemptions from General Duties

Some advocates of religious liberty will worry that this approach to religious liberty cannot support the exemptions to general regulations and civic duties that religious groups have sometimes been granted.³²

The justifiability in some cases of exemptions to general legal requirements for religious persons and groups does not show that religious freedom is special or unique. Such exemptions are sometimes justifiable as ways of accommodating other freedoms as well. For example, it is sometimes appropriate to give scientific researchers exemptions from drug laws in order to allow them to study controlled substances. And it is sometimes justifiable to grant indigenous peoples exemptions to fish-

31. See James W. Nickel, *Why Basic Liberties Are Bilateral*, 17 LAW & PHIL. 627, 627-34 (1998).

32. See generally *Bd. of Educ. v. Barrette*, 319 U.S. 624, 642 (1943) (holding public school students may not be compelled to salute the flag); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (allowing the Amish to keep their children out of school after the eighth grade). In the 1963 case, *Sherbert v. Verner*, 374 U.S. 398, the Court held that a state could not withhold unemployment benefits from a Seventh Day Adventist who was out of work because she refused to work on Saturdays. In the 1990 case, *Smith*, 494 U.S. 872, the Court refused to go further in the direction of granting religious exemptions for conduct solely on the basis of the free exercise clause.

ing and hunting regulations and to allow them to control their own schools. We cannot conclude from the justifiability of these exemptions that scientific freedom or the liberties of ethnic and indigenous groups do not fit within a general conception of the basic liberties.

A commitment to the basic liberties does not dictate any particular policy on the appropriate role of the courts in granting such exemptions. It may sometimes be justifiable for judges to invalidate legislation that fails to exempt groups having particularly strong liberty interests in the area of action covered by the legislation. But there are issues of fairness and nondiscrimination on the other side. The willingness of the United States Supreme Court to invalidate general legislation that fails to grant exemptions to religious groups seems to have declined in recent years.

It is not the case that religious grounds for special exemptions are always more powerful than nonreligious ones. Scientists may have stronger grounds for experimenting with controlled substances than religious believers do. Indigenous peoples seeking access to historically important sites may have stronger grounds for exemptions to wilderness regulations than Christians seeking a place for a sunrise service. People who have survived severe burns to the head and face may have stronger grounds for exemptions to bans on headgear than do Jews or Sikhs.

V. GROUNDS OF RELIGIOUS LIBERTY

This section pursues the philosophical task of explaining the general grounds for the basic liberties. The goal is to show that adequate general grounds for the basic liberties, and thus for religious freedom, are available. Proving this point undermines the argument for unique or special grounds of religious liberty.

Before attempting to sketch some general grounds for the basic liberties, however, it is important to recognize that religious people often believe that they have special religious grounds for their rights and liberties. Religious people *can* adequately defend their religious and other liberties without invoking such special grounds, but I do not claim that they *must*. Here it is helpful to follow Rawls in acknowledging that people come to beliefs about justice and rights from different religious and philosophical perspectives but sometimes succeed nonetheless in forming an “overlapping consensus” on a political conception of justice.³³

Still, a problem with special religious rationales for freedom of religion is that they usually have difficulty in extending that freedom to all

33. JOHN RAWLS, *POLITICAL LIBERALISM* 150–54 (Expanded ed., 2005).

religions. Indeed, religious liberty conceived in this way may be restricted to the liberties of the church and of believers—as historically it often was. It is not hard to understand why people demand freedom to practice their own religion. After all, being blocked from practicing one's religion is frustrating and infuriating. Harder to understand is how people move from demanding tolerance for their own religion to advocating tolerance of all religions and beliefs. When one strongly disapproves of other religions and beliefs, it is hard to forswear the use of violence and legal coercion. The basic liberties require us to take the difficult step of extending freedoms to people we disagree with and disapprove of—including people who are culturally and religiously distant from ourselves.

To understand how a popular justification for freedom of religion can fail to apply to some types of religions, consider John Locke's defense of religious toleration. Locke defended tolerance on the grounds that its alternative, coercion of religious belief, was pointless since it could not achieve its desired result:

[T]rue and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.³⁴

This argument will not find a foothold with all religious believers. It seems to be targeted at Christians who believe in personal salvation through faith. It has little leverage with those who see religion as having a purpose different from personal salvation. If religious success is defined in terms of outward conformity to the right pattern of life, for example, such conformity can be achieved through coercion. Further, this argument does not even succeed in showing that religious coercion is pointless in promoting Christian salvation. Although it is usually impossible to produce a particular person's salvation by coercing that person to go through the motions of religious belief and practice, one may be able to maximize the overall number of people who are sincere believers by coercing dissidents to conform outwardly to orthodox belief and practice.

34. JOHN LOCKE, *A Letter Concerning Toleration*, in *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 167, (Charles L. Sherman ed., Irvington Publishers 1979) (1689).

The resulting invisibility of dissidents may be conducive to other people thinking that every rational person accepts the local religious orthodoxy and thus to their acceptance of that orthodoxy. People typically evaluate their beliefs only when they find them problematic, and the appearance of universal acceptance produced by coercion can make it less likely that people will find their society's religious orthodoxy problematic.

To defend the proposition that special religious grounds are not needed for the defense of religious freedom, adequate secular grounds for the basic liberties must exist. Three justifications are sketched. They are intended to be accessible to people of all faiths and religious outlooks. To that end these justifications rely heavily on common sense and try to avoid highly speculative premises. All of these justifications assume that the basic liberties are at least partially justified by the great goods they protect. These goods are not defined narrowly, however, and it is recognized that both individual choice and social traditions are often required to make those goods determinate.

Fair Terms of Living Together Peacefully in a Diverse Society

The basic liberties provide a basis for fair, stable, and peaceful co-existence between people and groups with very different views of the world and of the human good, thereby reducing the likelihood of civil strife and war.³⁵ This is one way in which the basic liberties are valuable to society. Some people may prefer to see their own convictions and practices imposed coercively so as to create uniformity of belief and practice. But in the contemporary world this attitude is a challenge to war, not a basis for fair and peaceful cooperation between people of different outlooks who find themselves mixed together.³⁶

The basic liberties help ensure that people who comply with the law and pay their taxes will enjoy substantial freedom to live in accordance with their own beliefs, traditions, visions, and conceptions of the good. Living peaceably in accordance with views that the government or a ma-

35. This rationale for the basic liberties is broadly Rawlsian. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971) and *POLITICAL LIBERALISM* (Expanded ed., 2005).

36. Douglas Laycock offers a similar justification: "[I]n history that was recent to the American Founders, governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States." Laycock, *supra* note 24, at 317. The preamble to the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief* says that infringements of freedom of religion "have brought, directly or indirectly, wars and great suffering to mankind." U.N. Doc A/36/684 (Nov. 25, 1981).

jority of people hold to be deeply erroneous will not by itself result in coercion and loss of liberty. This makes these liberties very important to individuals and to religious and ethnic groups.

The rationale relating to peaceful coexistence applies most directly to matters that people feel so strongly about that they are potentially willing to resort to violence to promote them. Perhaps not all matters of basic liberty are things that people will fight over, but clearly some of them are. These include ideologies and religions, ethnic traditions, and political and economic arrangements.

Fecundity

The basic liberties facilitate the pursuit of happiness—and of many other goals as well. They are useful to everyone because they identify liberties that are all-purpose, that keep open the main roads to goals of the sorts that people are likely to find valuable. Joel Feinberg called this the “fecundity” of some liberties.³⁷ “Options that lead to many further options can be called ‘fecund’; those that are relatively unfecund can be called ‘limited.’”³⁸ Our conception of fecundity can be enriched by enumerating the roles that contemporary social, economic, and political institutions expect people to fulfill. These roles include learner and inquirer, moral and legal agent, social being, citizen, economic agent, worker, householder, and consumer.

To fulfill these roles people need adequate options, ways of developing and using their powers of cognition, choice, and responsibility. Great fecundity is found in the main options available to persons performing these roles. For example, adequate options for the role of citizen include reading, discussing, and voting. Adequate options for the economic agent include a range of careers and ways of managing one’s assets. Adequate options for the consumer include places to buy goods such as food and clothing and ways of getting information to evaluate those goods. Keeping these options open is important both to individuals and to society.

Feinberg’s rationale for the basic liberties holds that these liberties are often justified by the great goods they protect and promote. Freedom of movement, for example, is instrumental in pursuing one’s social and economic life, and in escaping oppression. Free movement has great fecundity. Sometimes, though, we move about simply for the joy of it.

37. JOEL FEINBERG, HARM TO OTHERS 208 (1984).

38. *Id.*

Similarly, a ground for freedom of association, for example, is the great value that humans typically find in relationships with others.

Contemporary Forms of Life Require Individual Choice and Consent

Most of the options available nowadays for meeting one's needs and living one's life require individual preferences and decisions. In earlier times far more was prescribed by government, society, and one's family, but in today's world, particularly in the West, people are expected to plan and choose their own lives. Today's patterns of living and career possibilities presuppose and frequently require the use of a capacity for choice. In almost all areas, they require people to identify what they want and to give their consent to joint endeavors. These social arrangements both reinforce and reflect people's conceptions of themselves as independent agents and choosers. People who have little capacity for individual choice have to fake it by tossing a coin or imitating others. As Joseph Raz puts it, "For those who live in an autonomy-supporting environment there is no choice but to be autonomous: there is no other way to prosper in such a society."³⁹ If social and economic arrangements require us to be agents and choosers, they demand the basic liberties. If individuals have to choose and find their jobs, then they need the liberties requisite to choosing and pursuing a career. If individuals have to find their own marriage partners and friends, then they need the liberties requisite to building family and social life. If individuals are expected to be reflective about their ethical, political, and religious views, then they need the liberties requisite to studying, discussing, and evaluating these matters.

One cannot provide arguments like these for religious liberty without equally providing grounds for other basic liberties. If one emphasizes the importance of religious beliefs to the individual, this rationale applies equally to philosophical and ethical commitments. John Witte, Jr. claims that "religion is a unique form of individual and personal identity."⁴⁰ This, however, overlooks the way in which philosophical and ethical beliefs play a role similar to religious beliefs in constituting a person's identity. Witte also claims that "[r]eligion is . . . a unique form of public and social identity, involving a vast plurality of sanctuaries,

39. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 391 (1986). Another version of this rationale is found in CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 29–32 (2001).

40. WITTE, *supra* note 5, at 250.

schools, charities, missions, and other forms and forums of faith.”⁴¹ But many areas of life (including games and sports, education, work, and politics) have elaborate institutional structures associated with them, and these structures are enormously important to people.

CONCLUSION

Seeing religious liberty as derivative of broader human rights and fundamental freedoms has many benefits. It explains how religious liberty fits into, and is a product of, a larger system of basic liberties. It explains the importance of religious liberty without exaggerating its weight and it generates a broad scope for religious liberty that protects all kinds of religious beliefs and activities. It also offers plausible rationales for the basic liberties (and thereby for religious liberty) that people of all religious and philosophical persuasions can accept.

41. *Id.*