**A Bang or a Wimper? Assessing Some Recent Challenges to Special Protection for Religion in the United States**
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**Introduction**

In addressing our subject, I shall focus specifically on three American authors who have, in recent years, expressed strong reservations about what they regard as standard American legal attitudes and practice toward protecting religious freedom. They are Winifred Sullivan, *The Impossibility of Religious Freedom* (2005); Marci Hamilton, *God vs. The Gavel: Religion and the Rule of Law* (2005); and Brian Leiter, *Why Tolerate Religion?* (2013).

Sullivan is a legally trained religious studies professor at Indiana University; Hamilton is a chaired professor at the Yeshiva University Law School in New York City; and Leiter is Director of the Center for Law, Philosophy, and Human Values and a chaired professor at the University of Chicago Law School.

All three authors begin by announcing either that they see no reason to single out religion for special treatment or that granting exemptions to religious believers does enormous harm to society. At first blush, it does look as though their challenges pose an ominous threat to the protection of religious freedom, at least as we ordinarily understand the idea in this country.

If religious freedom is, in fact, “impossible,” as advertised by Sullivan’s title, then our accepted ways of thinking would seem to be in deep

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trouble. The same appears to be true if Hamilton’s opening claim is correct that there should be no exemptions for religious people from general and neutral laws unless they can prove that “exempting them will cause no harm to others.” And again, the conclusion would seem to hold if there is, as Leiter argues, nothing whatsoever about religion itself that warrants special exemption. The three have different axes to grind, but they are one in representing what looks like growing suspicion in American society about bestowing special privileges on religion.

However, there is a problem. On inspection, the arguments of each book are not, in their various ways, altogether consistent. The authors all shout loud, threatening utterances out the front door, while whispering more agreeable, less startling words out the back. Taken together, the shouts and whispers of all three do prompt us to reconsider our tradition concerning religious freedom, but in a way that is not, after all, quite as threatening as it first appeared.

**Sullivan, Hamilton, and Leiter**

*Sullivan.* Sullivan has two principal objections to providing special legal protection for religion. One is that it results in discrimination against “those who do not self-identify as religious.” The last sentence of her book asserts that whatever it is legal protection of religion is intended to do is “not best realized through laws guaranteeing religious freedom but through laws guaranteeing equality,” such as, one supposes, freedom of speech or assembly. The second objection is that the category “religion” “can no longer be coherently defined for purposes of American law.”

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6 Ibid., 159.
7 Ibid., 150.
Much of her book attempts to demonstrate the saliency of these two objections by discussing a case involving complaints against an ordinance imposed by the city of Boca Raton, Florida prohibiting the erection of any but flat gravestones in a public cemetery.\(^8\) The plaintiffs appealed for an exemption on grounds of religious freedom, but were denied it on the basis of a very narrow definition of religion. Sullivan, a witness for the plaintiffs, strongly criticizes the narrowness of the ruling, but then goes on to draw a puzzling inference. She concludes that the real problem was not with the judge’s narrow understanding, but with the vagueness of the category of religion itself, and with the discriminatory effect such vagueness inevitably has on religiously unconventional individuals like the plaintiffs.

Her inference is all the more puzzling because she then proceeds at end of her book to make statements that wind up undercutting her original objections. She affirms in ringing words “the right of the individual, every individual, to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made,”\(^9\) and a few pages earlier declares that “religion is…arguably different from speech, movement, association and the like”—the legal protection of which presumably guarantees equality. “To be religious is, in some sense,” she says, “to be obedient to a rule outside of oneself and one’s government, whether that rule is established by God, or otherwise. It is to do what must be done…and doing so at some personal cost.”\(^10\)

Sullivan here is suspiciously close to defending the familiar idea of sovereignty of conscience, closely related to religious belief, and to implying that the right to it is not, after all, “best realized by laws guaranteeing

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\(^10\) Ibid., 156
equality.” In addition, being obedient to a higher rule, “whether established by God, or otherwise,” recalls a broad, inclusive view of conscience—applicable to religious and nonreligious people alike—that is readily found in traditional American defenders of religious freedom like Roger Williams, James Madison, and Thomas Jefferson. In fact, it is curious Sullivan did not herself see fit to oppose a more inclusive understanding of conscience to the judge’s crabbed interpretation in the Boca Raton case.

Hamilton. In a devastating review of Hamilton’s book entitled, “A Syllabus of Errors,”11 Douglas Laycock reveals, among other shortcomings, similar kinds of inconsistency in Hamilton’s argument. Up until the last chapter, her opposition to all religious exemptions that cause any harm presupposes a highly expansive notion of “harm.” Without a careful definition of the term, religious people, seeking to build a house of worship or to institute a feeding program, could be denied exemptions depending on what any neighbor, zoning board or taxing authority happened to consider harmful, thereby extensively inhibiting religious free exercise.

However, when she comes to the final chapter, “The Path to the Public Good,” she abruptly adopts a more nuanced understanding, one that is a good deal closer to conventional approaches to religious exemptions. She now speaks of the task “of balancing the value of religious liberty over and against the harm to others if a religious individual or institution is permitted to act contrary to the law,” and of “weighing” “the importance of respect and tolerance for a wide panoply of religious faiths” with “whether the harm that the law was intended to prevent can be tolerated in a just society.”12

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12 Hamilton, God vs. The Gavel, 297.
Suddenly, protecting religious liberty has important value, and to restrict it is itself a harm that must be *balanced* and *weighed* against the harm to “the public good” of granting exemptions to existing laws. It is now a question of competing harms, and Hamilton does favor some exemptions, as in the case of military service or the religious use of peyote, where, one assumes, the threat to the public good is not too great. In the final chapter, she clearly adopts a much less radical position, and comes close to, though never quite embraces, RFRA standards, according to which the government may “substantially burden” the exercise of religion only if the burden imposed is “(1) in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that…interest.”

Laycock also identifies a second inconsistency, though one Hamilton does not seem aware of. In the concluding chapter, she argues for the exclusive competence of legislatures to perform the necessary balancing acts. Contrary to the state and federal RFRAs and RLUIPA, she contends that courts have absolutely no place. Only legislatures are capable of adequately “assessing the public good in the light of all circumstances and facts, and weighing social goods and harms.”13 What she forgets is that much of her discussion leading up to these claims consists of an extended and detailed catalogue of repeated and egregious failures by legislatures to get the balance right. As Laycock concludes, “her faith in legislatures is incomprehensible, because she has little good to say about them.”14

*Leiter.* Leiter introduces his subject by pointing out that while special protection for religion is widely accepted in America, no one has ever

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13 Ibid., 297.
14 Laycock, “Syllabus of Errors,” 1173
provided a “credible principled argument” exactly why “we ought,” as he says, “to accord special legal and moral treatment to religious practices.”¹⁵ He does not believe any such argument can be made, and spends much of the book telling us why. To be sure, he is willing to tolerate religion, but that has nothing to do with religion as such, nor does it mean that religious practices should enjoy any special exemptions.

Religion should be tolerated because, like all beliefs about what people take to be good and how they should live—whether the beliefs are religious or not, individuals are best left free to decide, and, within limits, to act on their decisions. State interference in such matters, except where compelling public interests are at stake, is bad for individuals and for society. Thus, good laws ought to protect equally as much “private space” as possible consistent with public order, and that includes making room for religion. That is true, says Leiter, whether one follows Rawls or Mill, apparently assuming that that combination ought to be good enough for anyone.

But however favorable Leiter is toward equally tolerating religion as one set of beliefs among many in a pluralistic society, there is cause, on an initial reading, for concern. First, for him the key defining characteristic of religious belief is “insulation from evidence and reasons” as understood by common sense and science,¹⁶ something that is not, in his view, especially laudable. Consequently, while religion is due minimal respect, as are all beliefs about what is good and how life should be lived, it has no right to be considered intrinsically valuable. Some believers are virtuous, others vicious, but the ratio of virtue to vice in any given situation is variable and

¹⁵ Leiter, Why Tolerate Religion?, 7
¹⁶ Ibid., 34.
unpredictable. Leiter does worry that his disparaging view of religion might lead a society, like France, to demean or disadvantage religious groups, but thinks that can be prevented by doing something France ought to do, adopt religiously neutral laws consistent with a commitment to “principled toleration.” I must say, in passing, that despite Leiter’s reassurances, I continue to worry that the inability to find anything of general value in religion might, in fact, lead to demeaning and disadvantaging religion.

Second, he considers whether religion might gain some special protection by being tied to the idea of conscience, though he emphasizes, again and again, that it is conscience, inclusively understood, not religion as such, that would deserve protection. At one point, he celebrates the fact that nonreligious individuals across the world are now developing belief systems that “do not run any of the risks” associated with a “potentially harmful brew” of claims of conscience that are “insulated from evidence,” in a way characteristic, he thinks, of religious believers.17

But putting aside his invidious reflections on religion, the bigger problem is that he appears, on the surface, to favor a “no exemptions approach” from neutral, generally applicable laws, even for conscience inclusively understood.18 That is a startling proposal, indeed. Among other reasons, it rests for Leiter on the difficulty courts have in figuring out what a claim of conscience amounts to once it is disconnected from religious belief, since religious claims “provide evidential proxies for conscience that are much easier for courts to assess.”19 This consideration troubles him. If conscientious exemptions should be honored, and religious claims are more

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17 Ibid., 62
18 Ibid., 115, 132.
19 Ibid., 95
easily identified than nonreligious claims, then, despite all his efforts, religion would, ironically, wind up getting favored treatment, after all!

In fact, though, Leiter, like Sullivan and Hamilton before him, does not consistently follow through. Very much in passing, and in what I would call a distinct whisper, Leiter makes a huge concession: "it is possible," he says, “that a scheme of universal exemptions for [inclusive] claims of conscience, with suitable evidential standards, might do well enough to blunt the inequality objection. In that event, the inequality of treatment of claims of conscience is not necessarily fatal to a scheme of universal exemptions of conscience."20

Notice what is being said: A scheme of universal exemptions for conscience is acceptable so long as “suitable evidential standards” are applied without discrimination to both religious and nonreligious people alike, and, as Leiter has told us, we most readily find out what those standards are by considering religious expressions of conscience. Since, on his own account, religious expressions of conscience turn out to be a crucial source of “suitable evidential standards” for conscience, Leiter has given us, quite inadvertently, an additional reason to “tolerate religion,” and perhaps even to value it!

**Conclusion**

For those of us who believe in the validity and importance of granting exemptions from neutral, generally applicable laws for both religious and nonreligious conscience, consistent with protecting compelling public goods,

20 Ibid., 99 (original emphasis)
we may conclude from our review of Sullivan, Hamilton, and Leiter that the bark of these three putative opponents is worse than the bite.

The results of our examination certainly do not prove once and for all that conscience—profoundly connected, but not limited, to religious belief—has, after all, a right to legal deference, since we have hardly canvassed all possible objections. But it is interesting that in these three cases, at least, well-known experts in the field find it very difficult, no matter how hard they try, to escape the grip of these powerful ideas.

No doubt we should be troubled by the flashy, ominous-sounding objections with which the three authors open their books. They are the things that will grab the headlines, and likely reinforce growing, if unexamined, suspicion in America toward special protection for religion. But in the long-run the best antidote—employed here—is to follow scrupulously the arguments of all three books, always holding the authors to account. Far from strengthening the opposition, such a procedure will show, I believe, how resilient our tradition actually is.

Not that the proffered challenges fall completely flat. Working through the challenges forces us to face up to and rethink some remaining problems. One is identifying and developing “suitable evidential standards” for conscience, inclusively understood. It is clear that stretching the defining features of conscience to cover an expanding array of claims is likely to make it hard to be certain that standards are in every case being applied consistently and fairly.

For Leiter a claim of conscience means a moral imperative (above and beyond “crass self-interest”) “central to one’s integrity as a person, [and] to
the meaning of life,”21 an interesting proposal, but one that obviously calls for further consideration. We may also infer from Sullivan’s passing suggestions that conscience might mean being “obedient to a rule outside of oneself and one’s government, whether that rule is established by God, or otherwise.” However we work out the definition, it will remain highly abstract. All the same, this is hardly the first time the law has faced the difficulty of applying abstract principles to widely different circumstances.

A second problem is raised by Hamilton: Whether the courts or the legislatures should be entrusted with the responsibility of balancing harms related to the protection of conscience. I agree with Laycock that one thing Hamilton does achieve, however inadvertently, is to provide sufficient reason for doubting that legislatures are exclusively competent in these matters.

21 Ibid, 95.