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Few among us concerned for the defense of religious freedom can doubt that these have become dark times indeed. Most recently, arguments have been brought before the Supreme Court—there has been a veritable cascade of briefs—against the government on Obamacare. Many of these have one way and another concentrated on the argument that even a business organized as a corporation, in reflecting the character of its founders, may still be touched with a religious character.

A corporation is an association of free persons, and no one is contesting any longer that a corporation, for many legal purposes, has the standing of a person. Every association, as Aristotle taught us, is aimed at some

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notion of a good, whether that good be the making of shoes for profit or the relieving of famine. Based both on legal precedents and the logic of the thing, it should be clear that there is no plausible way to argue that, among all the things that may shape the notion of the “good” sought by a corporation, a religious understanding is the only one that must be ruled out as illegitimate. Thus one has reason to fairly confident that such an understanding will prevail in these cases. But it could prevail and yet the case still be lost. In the end, the heart of the matter will come down to something else.

Even people experienced in politics were jolted to discover that the Obama administration had deliberately chosen, as a political stroke, to pick a fight with the Catholic Church by compelling both Catholic institutions and Catholic business men to cover abortifacients and contraceptives in the medical insurance they offer to their employees. (And what can be said in regard to Catholics can be said just as well for Mormons and Evangelicals.) The religious, now embattled in the courts, have been persistent in invoking part of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Yet it appears to be coming as a surprise to religious Americans and their lawyers—even so late in the seasons of our experience—just how thin and equivocal the First Amendment might prove to be as a support for their religious freedom.

It is a telling, and troubling, sign that people on the side of religious freedom now find themselves appealing for a release from the obligations of Obamacare on the strength of what they claim “sincerely to believe.” For in this way they have backed into the liberal of religion that John Courtney Murray warned about many years ago: identifying religion merely with “beliefs,” or opinions, rather than with truths. As the religious in our time invoke their “beliefs,” they deflect themselves from the deep truths that underlie their positions on matters of public policy. Thus it has come about that on the basis merely of “beliefs,” they can claim at most an exemption from the laws imposed on others. That position is quite at odds with the moral dimension of the argument: They should, that is, make a claim to far more than “tolerance”—in other words, to the exercise of a right.

In his notable letter—so characteristically terse, and yet withal magnificent—George Washington remarked to the Hebrew Congregation in Newport that “it is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights.” Several years earlier James Madison had invoked a comparable idea of the freedom of religion as nothing less than a natural right. In his 1785 “Memorial and Remonstrance Against Religious Assessments,” Madison insisted that “this right [of religious freedom] is in its nature an unalienable right.”

I t was not until 1925 that the provisions on free speech in the First Amendment would be applied by the Supreme Court to the states. As the argument then ran, certain parts of the Bill of Rights were thought to be “incorporated” and applied to the states through the due process clause of the Fourteenth Amendment. And it wasn’t until 1940, in Cantwell v. Connecticut, that the court would apply to the states the provision on the “free exercise” of religion. Only seven years later, in the Everson case, Justice Hugo Black took the First Amendment as his lever for inverting the establishment clause. Instead of barring the federal government from interfering with religion in the states, Black and his colleagues would convert the establishment clause into one that would work toward driving religion—and the religious—out of what we have come to know as the public square altogether.

And since the court lifted the provisions on religion to the level of clauses enforced against the states, the trend produced by the liberal mind has been one of reducing “religion” to a body of “beliefs” with no claim to truth, and no claim to be taken seriously by anyone who does not share those beliefs.

And yet, if we take seriously the claims to freedom of religion as a natural right, we discover that in the courts the conventional and familiar arguments for religious freedom suffer a critical embarrassment. For those arguments are not offered in the currency of “natural rights,” with reasons that are accessible even to people who do not share the convictions of the religious. There the defenders of religious freedom offer foremost an avowal of their earnest beliefs, sincerely held, whereas understanding religious freedom as a natural right leads us to a recognition that today’s defenders of religious freedom might find jolting, or at least uncongenial or impolitic: namely, the recognition that not everything that calls itself “religion” has a claim to be viewed with the same respect.

As soon as we remind ourselves of the logic that attaches to natural law and natural rights, the pieces begin to sort themselves out. Washington’s letter cannot be misunderstood on this cardinal point: To say that Jews had a natural right to be left undisturbed in the practice of their religion was to say that Jews possessed a right that had a claim to be respected.
as a right even by people who did not take seriously for a moment the revelation recorded in the Hebrew Bible. Somehow, those who were not Jewish had to be able to grasp through reason alone why they were obliged to respect the freedom of Jews to practice their religion, even if those Gentiles understood and respected nothing in the religion that they were enjoined now to respect.

It is similarly critical to remind ourselves that the Catholic position on abortion has not been based on faith or revelation; it has, rather, been an argument drawing upon the facts of embryology woven with principled reasoning. In other words, it moves through the moral reasoning that marks the natural law. And so it runs in this way: We ask, why is that offspring of *homo sapiens* in the womb anything less than a human being? It doesn’t speak? Neither do deaf mutes. It has yet no arms or legs? Well, other people lose arms or legs in the course of their lives without losing their standing as human beings in receiving the protections of the law. The upshot here is that there is nothing one could cite to disqualify the child in the womb as a human being that would not apply to many people walking about well outside the womb. Once again, there is no appeal to faith or beliefs. One doesn’t have to be Catholic or religious in order to understand this argument—and that has been precisely the argument of the Church, that this is a matter that turns on the moral reasoning of the natural law.

And so it was telling in this respect when Archbishop William Lori spoke for the Conference of Catholic Bishops in resisting those controversial mandates on contraception and abortion under Obamacare. Archbishop Lori made it clear that Catholics were not seeking an exemption from the mandate on contraception and abortion based on beliefs of their own that may not be shared by others. They were pronouncing the mandates to constitute an “unjust law, no law at all,” and therefore *rightly binding on no one*. This was not, he said, a Catholic or Protestant position, but an American position.

Archbishop Lori cast the argument for religious freedom around the claims of conscience, but he made it clear that he was not using “conscience” as it has been used—and virtually unraveled over the years—in the claims of “conscientious objection,” where it has been taken to mean any conviction that a person holds with earnest passion. The archbishop was appealing, rather, to conscience in the sense once explained with exquisite care by John Paul II in *Veritatis Splendor*: conscience as an understanding ordered to a body of objective moral truths.

Conscience is not directed inward to oneself and one’s feelings, but outward to the natural law and moral truths. But with the corrupted or “relativized” version of conscience and religion, religious moral teaching can be reduced simply to “beliefs,” in the modern, vulgar sense, and hence the line grown familiar among Catholic political figures from Edward Kennedy and Mario Cuomo to John Kerry and Joseph Biden: that they have an aversion to abortion but they would not impose their Catholic “beliefs” through the law. (In fact, of course, as the joke ran, they would not even impose these beliefs on themselves.)

But when we recognize that the argument for religious freedom is now cast as an argument in natural law, moving beyond “beliefs” and appealing to objective moral norms, accessible to our reason, the problem of Obamacare and the mandates becomes transformed. The landscape for lawyers and judges is suddenly altered, leaving them less certain about the terms that would guide them. For consider this problem of two owners of businesses. Both of them object on moral grounds to the mandates of Obamacare on abortion and contraception. One is a Catholic, whose understanding has been informed by the Catholic reasoning on these matters. The other claims no religious attachment; he has formed a moral objection to abortion, say, solely on the grounds of that principled reasoning that the Church itself proposes as a teaching in natural law. Would we actually say that the Catholic businessman had a stronger claim to challenge the law on grounds of religious freedom, when his reasoning was in no way different from that of the businessman, who reached his moral conclusion with the same weave of the empirical evidence from embryology, amplified by moral reasoning—the same weave of reasoning that forms the teaching of the Church? Are the claims distinguishable on any grounds that matter? And does one position claim a certain dignity, on the basis of religious conviction or religious freedom, that is not available to the man who opposes the law with the same moral reasoning as the Church?

We might ask, then, with the labels stripped away, is one man being deprived of his religious freedom, and the other deprived of nothing of comparable moral or constitutional standing?

This confusion over beliefs and reasoning was on display in a notable case this past summer. A federal appellate court in Colorado went to the aid, for a moment at least, of the Green family, the owners of the Hobby Lobby craft stores and Mardel, a chain
of Christian bookstores. The Greens offer a health insurance plan to their employees, and under Obamacare they would have been obliged to cover, in their plans, contraceptives and abortifacients. The Greens asserted that they could not do that without violating their religious convictions. The appellate court preserved for them the possibility of sustaining their suit and holding at bay the barrage of fines that the government was prepared to unload on them. But if this was a victory, it was a melancholy one. According to Judge Timothy Tymkovich, who wrote for the majority, the Greens asserted, among their “sincere beliefs,” a “belief that human life begins when sperm fertilizes an egg.” A “belief”? That would surely come as news to the authors of all of the texts in embryology, who report that point as one of their anchoring truths. The Greens also “believe” that they would be “facilitating harms against human beings” if they helped to provide drugs that prevent implantation on the uterine wall. Since the blocking of implantation does kill the nascent life, we may ask, what is the part that belongs here to “belief” rather than truth?

Some who are litigating religious freedom feel pressured to argue within the grooves of “sincere beliefs,” because they are the terms that the courts have confirmed and the judges recognize. But in this way the litigators plug into a trend of cases that has seen “conscience” reduced, or relativized, to virtually anything that a person sincerely believes, and religion itself relativized until it is detached from any notion of God and the laws springing from that God. Well into the nineteenth century, judges could invoke Madison’s understanding of religion as “the duty which we owe to our Creator and the manner of discharging it.” But as the judges dealt with claims of conscientious objection, the “conscience” they were protecting did not require the commands of a Lawgiver, nor did it require an elaborate body of theology—for late revelations may be as valid as early revelations. “Religion” did not require a body of moral teachings with a claim to truth, and in fact a religious sense could be supplied simply by passions that were thought to offer the functional equivalent of religious convictions.

The truth that dare not speak its name is that even many friends of religious freedom have been content to argue for that freedom on terms that accept this reduction of religion to “beliefs” untested by reason. They do so because they don’t wish to put themselves in the position of speaking the uncomfortable truth: that not everything that calls itself religion in this country may be regarded as a legitimate religion. And so we try to vindicate a “ministerial exception” to the laws on employment. We insist that churches must be free to determine who counts as a minister according to their own criteria and teaching. But does that freedom from the intrusion of the government apply as well to the ministers appointed under the Church of the Flying Spaghetti Monster, or even worse, does it apply to Satanists claiming the standing of a religion?

We cannot detach ourselves from judging Satanism, or radical evil, and in the same measure we cannot detach ourselves from the task of discriminating between religions that are more or less plausible, more or less legitimate, based on the substance of what they teach. No argument that seeks to explain a just regime of religious freedom—and a sweeping protection for anything that calls itself religion—could possibly offer a coherent moral account when it seeks to incorporate in its understanding a posture of indifference to radical evil. The canons of reason will ever be woven into the laws on religion—even in judging what is plausible or implausible in what is reported to us about the word of God.

Aristotle taught us that the mark of the polis, the political order, was the presence of law, and laws springs distinctly from the nature of that creature who can give and understand reasons concerning matters of right and wrong. Aristotle expressed the classic understanding of the moral ground of the law in that way, and I would suggest that the freedom of religion will find firmer ground by insisting again on that connection between moral reasoning and the law—between the reasons that support our religious convictions and the religious freedom we would protect through the law. The beginning of the argument would be to remind people of that connection between the very logic of a moral judgment and the logic of law. In the strictest sense, a “moral” judgment moves beyond statements of merely personal taste or private belief; it speaks to the things that are right or wrong, just or unjust, generally or universally—for others as well as ourselves.

In a corresponding way, the law moves by overriding claims of mere private choice, personal freedom, subjective belief. It imposes a rule of justice that claims to hold for everyone who comes within its reach. In the classic understanding, we do a portentous thing when we impose laws on other people, and that move will always call for a justification, an explanation of what makes it just or rightful for others as well as ourselves. It used to be understood that those creatures we call “moral agents” have the capacity to reason about the grounds of their well-being: They
have a presumptive claim to all dimensions of their freedom, and the burden lies with the law to supply a moral justification for overriding that freedom.

When we view the law through that lens, the burdens of justification for the law would be altered—and deepened. For we are no longer asking merely whether people are “sincere” in holding to “beliefs,” quite beyond any test of their plausibility or truth. The law would now be tested, rather, with the more demanding tests that we would bring into play when the law restricts freedom in any instance. And so, before the law would impose the mandates of Obamacare on the owners of the Hobby Lobby stores, it should bear the burden of showing that there is something deeply unreasonable about the understanding maintained by the Greens: that lives destroyed in abortions cannot be anything other than human lives; that those lives are inescapably innocent in the sense that they cannot be the source of any intentional wrongdoing; that the standing of these offspring as human beings cannot be in any way contingent on their height or weight, or whether they are speaking yet in sentences. Unless the government can have something plausible to say on these points, it should back away from any presumptuous willingness to displace the moral code of a family.

Of course, for a court to entertain this argument seriously, it would have to be willing to look into the very ground of the judgment in Roe v. Wade, and so we can hardly expect this particular argument to be a winner for the time being. If the Supreme Court considered this argument, it would have to address for the first time the point it so strikingly—and unaccountably—evaded in Roe v. Wade: the point marked in all the books on embryology and obstetric gynecology as to when human life begins.

The moral argument here may actually be deepened by pointing out the claims that the Greens have forgone. They do not make the kinds of arguments we have seen in the past on the part of people who object “conscientiously” to the fact that the money they are compelled to pay in taxes is being used for policies they find deeply repugnant: the support of the United Nations, for instance, or the provision of welfare to unmarried mothers or—even more keenly—the support for abortion. The Greens understand that they are already committed, through the nexus of the tax system, to the support of abortions funded and promoted by the government. But the question now is just why the Greens should be compelled to support abortion more directly and personally through the medical services they fund for their employees. In another day, the very notion of the public authority compelling a private person A to make payments, or transfer his property, to private person B, would have been marked as the plainest example of “class legislation” and a form of legalized theft. If done by the federal government, it would have come clearly under the Fifth Amendment as a “taking of property” without due process of law. Chief Justice Salmon Chase caught the sense of this matter many years earlier in the famous Legal Tender cases (1870) when he remarked that

[the provision on the taking of property] does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

To put it another way, if a service is mandated by the federal government, the federal government should be required to fund that service, not transfer a public service to private persons to bear at private expense. That convenient device manages to avoid the discipline of constitutionalism, for it frees the government from the need to raise the money to cover its own commitments, and justify to voters the added taxes that it is laying upon the public. In the case of abortion, the surgery is readily affordable by most people who desire to have it, and if an additional child is really seen as an economic burden, then it would make as much sense to borrow money for the abortion as to borrow money to pay for a car or for the monthly bills on a smart phone.

I began making arguments in this vein more than a year ago, but just this past November there were two decisions in federal courts of appeal, supporting the religious plaintiffs, and moving precisely within the lines sketched out here. In early November, Judge Janice Rogers Brown wrote for a panel in the DC Circuit in the case of Gilardi v. U.S. Department of Health and Human Services (HHS), and about two weeks later Judge Diane Sykes, in the Seventh Circuit, did so in the companion cases of Korte v. HHS and Grote v. Sebelius. As Judge Brown wrote, the case was not about “the sincerity of the Gilardis’ religious beliefs, nor does it concern the theology behind Catholic precepts on contraception.” Judge Sykes was willing to leave uncontested the sincerity of the plaintiffs, for the argument had
to move to another level. A “right to contraception” was not engaged here because neither the laws nor the owners of these businesses barred the access of anyone to contraceptives. Judge Brown, testing the matter severely, noted that “the government has failed to demonstrate how such a right—whether described as noninterference, privacy, or autonomy—can extend to the compelled subsidization of a woman’s procreative practices.”

As Judge Sykes observed, the government cited two “public interests” here: first, that the “public health” would be enhanced by the wider availability of contraceptives; and second, that “gender equality” would be advanced if women could be as liberated from the prospects of pregnancy as men are. But even if it were the case that these interests would be served by distributing contraceptives more widely in the land, why would any of this justify a policy of forcing an unwilling person to bear a direct responsibility to fund these services for any other particular person? As Judge Sykes pointed out, contraceptives could be distributed to the population at large in many other ways: The government could provide “contraception insurance”; it could “give tax incentives to both the suppliers and consumers of contraception to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services.”

The government could also just buy the contraceptives and give them away, but with funds it has to raise from the public by justifying taxes. That is, these ends of public policy can be accomplished quite readily without compelling any particular person to buy contraceptives for anyone else—and compelling him at the same time to violate the moral principles taught in his church.

As for the matter of the public health, Judge Brown noticed that the government had nothing to say on that point so conveniently left unnoticed these days: that certain oral contraceptives have been classified as carcinogens, marked by an increased risk for cervical, liver, and breast cancer.

Both Judges Brown and Sykes insisted that religious beliefs had nothing to do with this case—that the matter was treated most aptly by bringing to the case the discipline of testing in a demanding way the justifications that should be required in imposing laws, restricting personal freedom, and commandeering personal property. It was the style of judging that was more familiar before the New Deal and the advent of the administrative state. But that mode of judging was still available to Judges Brown and Sykes because, while the judgment did not hinge on religion, the cases were being argued under the Religious Freedom Restoration Act (or RFRA). That law put upon the government the test of whether its ends could be attained with measures that did not restrict the freedom of people as they were governed by their religious convictions. In other words, under the banner of religious freedom, Congress had simply authorized judges to do what judges had done in the past, and would be enjoined to do under the premises of a constitutional order: to test in a demanding way the laws that would restrict personal freedom in any domain, including the freedom to run a business. Congress had carved out a domain in which judges were required to do what they should be doing across the board, in all other cases.

What I’m arguing here is that the strongest argument on the side of the Green family and other religious people would be found in appeals not to belief and sincerity, but to the principles that are bound up with a constitutional order. And the deeper point is that there is nothing in this approach that diminishes the dignity or standing of the religious life. This is not, in the moral scale of things, a lesser argument. The truth of the matter is that the religious tradition does not come into our law and our lives as a set of eccentric “beliefs,” merely begging for indulgence and exemptions to the laws laid down for others. Rather, our religious teaching has formed the deep moral reservoir on which the law has drawn.

Our language of law speaks of persons, of their rights and wrongs and their “injuries,” the unjustified harms they absorb. But these terms are given a deeper resonance by our religious tradition. For something else comes into play to tell us what is so deeply portentous about the taking of a human life, or why it is hardly trivial to restrict the freedom, or take the property, of those beings we call “moral agents,” those beings who alone can impart a moral purpose to property and to inanimate matter. People will tell us of their concern for the unemployed and for people without medical insurance. And we ask, are you concerned about all of these people, including those you don’t know? Why do you assume that they are all worthy of your concern? Are you backing into the truth of “all men are created equal”? At the center of everything is that remarkable creature, the human person. And nothing has enlarged our sense of the moral meaning of the human person more than the teaching, long preserved, that that “person” was made in the image of something higher. What other teaching could have
shaped Lincoln’s understanding when he remarked that “nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows”? The law has lived, and continues to live, on the moral capital of our religious teaching, even while the awareness of that connection has fled the memory of most lawyers.

We have let that forgetfulness dictate our legal strategies and have backed ourselves into an impoverished and self-defeating mode of argument—and understanding. We have been content to settle for appeals for religious freedom based upon “sincere beliefs”—as though all beliefs sincerely held had a claim to our respect. As anyone will tell you, the zealots who flew those planes into the World Trade Center on September 11 no doubt earnestly believed the doctrines that had taken hold of their lives; and yet our respect is not summoned or commanded by the report that they held to their beliefs with a tenacious sincerity. As the Obama administration put the matter in its brief, the beliefs imputed to a corporation (Conestoga Wood Specialties) stand against “statutorily-guaranteed access to benefits of great importance to health and well-being.” When “beliefs” are set against deep budgetary commitments of the government, as in Social Security, the reliance on “beliefs” figures to be the loser.

To the extent that we cast our arguments along the lines of “belief” and “sincerity,” we can do no more than plead for an exemption from the laws imposed on others. But again, that kind of argument distorts the truer moral character of the argument we are making, for some of us truly see these mandates as wrongful laws, which should be enforced on no one. We must recast the arguments that the defenders of religious freedom have been making in the courts.

There is, then, no need to contrive anything new; it truly is a matter of teaching anew the things that judges used to know, and could easily know again, because these truths have always been there. But to give an account of the reasoning and the truths that form the ground of our religious conviction is to give a more faithful account of the life we are seeking to describe and a more coherent account of the jurisprudence we would seek to shape. And a jurisprudence that can explain its moral ground is a jurisprudence that does not back away from explaining the justice it seeks to do.