

Religious Liberty or Religious License? Legal Schizophrenia and the Case Against Exemptions

Tara Smith*

I. INTRODUCTION

While religious freedom is firmly planted in our First Amendment, we have long debated its exact parameters—concerning prayers in public schools, for instance, sectarian displays on public grounds, and membership policies of religious organizations that receive government financing. Recent years, however, have brought a dramatic uptick in both the number and scope of demands for religious exemptions—permission to violate generally applicable laws on the basis of one’s religious beliefs.¹ Although the exemptions debate has grabbed headlines triggered by same-sex marriage and the Affordable Care Act’s insurance mandates for employers, the exemptions campaign dates back decades and extends far more widely. *Roe v. Wade* precipitated measures permitting health care providers to opt out of facilitating procedures that offended their religious beliefs.² Some of these laws encompass pharmacists, ambulance drivers, and supermarket cashiers.³ Adoption agencies in some states are allowed

*Tara Smith is Professor of Philosophy at the University of Texas at Austin and the BB&T Chair for the Study of Objectivism.

¹ In *Sherbert v. Verner*, the Court set a major precedent in awarding religious exemptions by protecting a Seventh Day Adventist who had been fired for refusing to work on Saturday. 374 U.S. 398, 401–02 (1963). Even exemption advocates, however, typically view exemptions as *prima facie* claims that are subject to override by a “compelling state interest.” *Id.* at 403.

² 410 U.S. 113 (1973). In 1973, Congress enacted the Church Amendment, which provided that receipt of federal funds under that Amendment did not require an individual or institution to perform sterilizations or abortions if it “would be contrary to . . . religious beliefs or moral convictions.” See Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91 (codified as amended at 42 U.S.C. § 300a-7 (2012)). Since then, the federal government and most states have passed laws allowing health care providers to opt out of procedures that offend their religious convictions. The U.S. Conference of Catholic Bishops has also issued Ethical and Religious Directives for Catholic Health Care Services (ERDs), a set of guidelines for religious hospitals and HMO’s, and has revoked the religious status of institutions that failed to comply. U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (5th ed. 2009); see also Memorandum on the Ethical and Religious Directives for Catholic Health Care Services, Catholics for Choice, CATHOLICS FOR CHOICE (Apr. 2011), http://www.catholicsforchoice.org/issues_publications/catholics-for-choice-memorandum-on-the-ethical-and-religious-directives-for-catholic-health-care-services/.

³ Dahlia Lithwick, *Conscience Creep – What’s So Wrong with Conscience Clauses?*, SLATE (Oct. 3, 2013, 10:35 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/is_there_a_principled_way_to_respond_to_the_proliferation_of_conscience.html.

by law to refuse to place children with certain families on religious grounds.⁴ A Catholic university has sought to defy union laws for religious reasons.⁵

In 2012, the Supreme Court ruled in *Hosanna-Tabor* that a religious school was not answerable to the usual anti-discrimination requirements in the treatment of its teachers.⁶ Indeed, Title VII of the 1964 Civil Rights Act includes a ministerial exception from the strictures of employment law, leaving religious bodies largely free to set their own rules regarding wages, overtime, and collective bargaining.⁷ Still further afield, naturalized citizens need not recite the full oath of citizenship if passages clash with their religious beliefs.⁸ In several states, “conscience clauses” allow parents to exclude their children from mandatory vaccines, while an “opt out” movement to exclude children from standardized testing in public schools is gaining force.⁹ Even child abuse laws are relaxed in deference to religion.¹⁰

⁴ *Id.*

⁵ Duquesne University has maintained that the unionization of adjunct professors would interfere with its religious mission. *Id.*

⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

⁷ 42 U.S.C. § 2000e-1(a); see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 224–225, 250 (2007). Courts have ruled that the exemption encompasses a church’s treatment of all its employees, regardless of whether their work affects the religious functions of the institution. This includes building engineers, for instance. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987). Additionally, over 200 colleges have received religious exemptions from Title IX requirements. Lawrence Biemiller, *This Week*, CHRON. HIGHER EDUC. (May 13, 2016), <http://www.chronicle.com/article/The-Week-What-You-Need-to/236390>.

⁸ See Christopher C. Hull, Opinion, *A Beautiful Oath, Sullied by Politics*, WALL ST. J. (Aug. 4, 2015, 7:28 PM), <http://www.wsj.com/articles/a-beautiful-oath-sullied-by-politics-1438730914>.

⁹ See PAUL OFFIT, BAD FAITH 109–11 (2015) (discussing a Pennsylvania statute, later overturned in court); *id.* at 191–92 (discussing a more recent Pennsylvania exemption); *id.* at 168–76 (discussing Christian Scientists’ pressure for a religion accommodation in the Child Abuse Protection and Treatment Act of 1974 (CAPTA)); *id.* at 185–87 (discussing Oregon’s religious exemptions), *id.* at 192–93 (discussing Christian Scientists’ lobbying for an exemption to the Affordable Care Act); Denise Grady, *Vaccinations Are States’ Call*, N.Y. TIMES (Feb. 16, 2015), <http://www.nytimes.com/2015/02/17/health/vaccinations-are-states-call.html> (reporting that “48 states allow parents to opt out of [mandatory vaccines] for religious reasons”); Elizabeth A. Harris, *As Common Core Testing is Ushered In, Parents and Students Opt Out*, N.Y. TIMES (Mar. 1, 2015), <http://www.nytimes.com/2015/03/02/nyregion/as-common-core-testing-is-ushered-in-parents-and-students-opt-out.html> (reporting that the opt-out movement faces “generally few repercussions for students who do not take the tests”); David Oshinsky, *Return of the Vaccine Wars*, WALL ST. J. (Feb. 20, 2015), <http://www.wsj.com/articles/the-return-of-the-vaccine-wars-1424463778>; *Thundering Herd*, ECONOMIST (Sept. 26, 2015), <http://www.economist.com/news/united-states/21666217-californias-anti-vaccine-brigade-and-dark-side-individualism-thundering-herd; and on schools’ standardized testing>.

¹⁰ A clause in the Child Abuse Protection and Treatment Act of 1974 (CAPTA) stipulates that the act shall not be construed “as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian;” or

Religious accommodations are immensely popular¹¹—and deeply misguided. My thesis is that religious exemptions are unjustified in theory and destructive in practice. The problem rests not simply in the discrete injustices that any isolated exemption represents (serious though these are). More deeply, the practice of bestowing such unwarranted exceptions in the application of law corrodes the objectivity of the legal system and cripples its ability to fulfill its function.

Ultimately, we cannot understand the proper status of religious exemptions without understanding the basic purpose and authority of a legal system, overall. For these furnish the foundation for resolving narrower questions about the propriety of particular enforcement policies. That foundation is a far larger subject than I can engage here, and I have written elsewhere about the cornerstones of objective law.¹² Yet this is part of why the issue is important: misconceptions concerning the legitimacy of exemptions reflect and reinforce erroneous views of the basic role of the legal system itself and, correspondingly, of the proper use of legal power in all spheres, including those having nothing to do with religion. These deeper issues also inform my disagreement with those critics of religious exemptions who contend that the problem arises only when exemptions are reserved for the religious. As long as exemptions are extended to all sincere claims of conscience, secular as well as religiously inspired, many contend, the difficulty disappears. As I will explain, this misses the root problem and endorses an extension of exception-making that would only exacerbate the damage.

“to require that a State find, or to prohibit a State from finding, child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.” 42 U.S.C. § 5106i(a)(1)–(2); see also OFFIT, *supra* note 9 at 170–71. Lithwick depicts the “slow but systematic effort to use religious conscience claims to sidestep laws that should apply to everyone” as “conscience creep.” Lithwick, *supra* note 3. Back in 2006, the *New York Times* reported on the number of the law’s “special arrangements” for religions as “multiplying rapidly,” citing over 200 adopted since 1989, encompassing looser licensing regulations for religious child care centers and greater protection from IRS audits. Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), <http://www.nytimes.com/2006/10/08/business/08religious.html>. We will see additional areas where questions of exemptions arise a little later.

¹¹ See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 5–6 (2013) (citing the overwhelming Congressional support for the Religious Freedom Restoration Act (RFRA) enacted in 1993).

¹² See TARA SMITH, *JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM* 45–66 (2015) [hereinafter SMITH, *JUDICIAL REVIEW*]; Tara Smith, *Objective Law*, in *A COMPANION TO AYN RAND* 209 (Allan Gotthelf & Gregory Salmieri eds., 2016) [hereinafter Smith, *Objective Law*].

My aim here, again, is to demonstrate how thoroughly misguided the notion of religious exemptions is. The practice of granting select groups of people wholesale permission to violate perfectly good law directly collides with the mission of a proper legal system and thus undermines its efficacy.

To be clear: religious *freedom* is important.¹³ Yet if we misconstrue it as sanctioning favoritism, it will lose its ability to protect those activities that it should. The ceaseless proliferation of demands for exemptions—from military service, measles vaccines, helmet laws, etc.—will instigate hostility to religious freedom as such and foster the assumption that any demand for religious freedom is merely another negotiable desire, rather than a *bona fide* right.

My discussion will proceed in four stages. I will begin, in Part II, by laying out the fundamental case against exemptions, showing how they fracture the backbone of a proper, integrated legal system and sanction illegitimate uses of its power. Next, I will present the four strongest arguments made on behalf of religious exemptions: appeals to the First Amendment, to equality, to liberty, and to the significant role of religious identity in many people's lives. In Part IV, I will respond to these arguments, exposing the logical infirmities that undermine each. Finally, I will consider whether differential legal treatment of individuals might *ever* be justified. How categorical is my opposition to exemptions? And if differential law enforcement might sometimes be justified by special circumstances, should we also allow at least some religious exemptions?

Before beginning, a caution concerning the vocabulary of this debate. Pivotal terms are used, at times, in ways that presuppose arguable conclusions and thus skew subsequent thinking along inappropriate tracks. (Consider the connotations of “privilege,” “burden,” “neutral,” “accommodate,” or “compelling state interest,” among others.) It is easy, in the course of attending to the most disputed features of a specific exemption's legitimacy, to miss the fact that we have accepted invalid premises in the very terms by which we describe the alternatives. (Who could oppose something as congenial as an “accommodation?” The term conjures a gracious host.) My point is not to condemn every use of these terms, but simply that we must be alert to implicit assumptions that might themselves beg salient questions and impede sober analysis.

¹³ For an analysis of the roots of religious freedom, see Tara Smith, *What Good is Religious Freedom? Locke, Rand, and the Non-Religious Case for Respecting It*, 69 *ARK. L. REV.* (forthcoming 2017).

II. THE CASE AGAINST RELIGIOUS EXEMPTIONS – LEGAL SCHIZOPHRENIA

Before we can assess the merits of religious exemptions, I must make plain the framework of government that I am relying on. A government enjoys a unique kind of authority, namely, to make people do as it says regardless of whether or not they would like to.¹⁴ This authority to coerce people's compliance with its rules is justified only to achieve a specific mission: the protection of individual rights. While one can argue about whether that *is* the mission of government, any coherent approach to the question of exemptions must presuppose more basic beliefs about the role of government as such, so I am simply laying bare my premises.¹⁵

This overarching purpose of safeguarding individual rights—the reason for which a legal system holds its power—in turn, constrains its legitimate work. A proper, objectively valid legal system will do all that is necessary to accomplish that end and only what is necessary to accomplish that end. Because that is its distinct, authority-conferring responsibility, the question that it must repeatedly consider is: would this law (or this application of law, or policy, etc.) advance the purpose for which we have the power that we do and do so in a way that does not simultaneously work against that purpose? Only when the answer is *yes* does the legal system exercise its power legitimately, within the bounds of its authority.¹⁶

Once we focus on the purpose of government, the problem with exemptions should not be difficult to appreciate. Permission for religious people to disobey valid laws undermines a legal system's ability to fulfill

¹⁴ This has become the widely accepted notion of a government, often attributed to Max Weber, who characterized a state as “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.” Max Weber, *Politics as a Vocation*, reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). See THE FEDERALIST NO. 15 (Alexander Hamilton), for evidence of the Founding Fathers employing the same basic idea. While “government” is a wider concept than a “legal system,” I will sometimes use the two interchangeably merely for convenience; it will not affect clarity or argument.

¹⁵ Note that this is essentially the framework of the Founders, expressed in the Declaration of Independence, the Constitution, and much of the reasoning of the Federalist Papers. For a much fuller explanation and defense of the basic nature of a proper legal system, see SMITH, JUDICIAL REVIEW, *supra* note 12, at 45–66, 88–111; Smith, *Objective Law*, *supra* note 12, at 209–21.

¹⁶ A government could do more only at the expense of individual rights. That is, it would need to violate the rights of some in order to supply further goods to others – for instance, by limiting one person's property rights to ensure another a certain wage. For specific arguments against such rights and against the idea of inevitable conflicts between rights, see TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM (1995) [hereinafter SMITH, MORAL RIGHTS]; Tara Smith, *On Deriving Rights to Goods from Rights to Freedom*, 11 LAW & PHIL. 217 (1992); Tara Smith, *Rights Conflicts: The Undoing of Rights*, 26 J. SOC. PHIL. 139 (1995) [hereinafter Smith, *Rights Conflicts*]; Tara Smith, *Why a Teleological Defense of Rights Needn't Yield Welfare Rights*, 23 J. SOC. PHIL. 35 (1992).

its function.¹⁷ As “chits to cheat,” religious exemptions reflect a rival sovereign determining the use of legal power. By injecting conflicting directives into a legal system, exemptions erect double standards that dilute the authority and correspondingly hamstring the efficacy of the legal system. Let me elaborate.

Notice, for starters, that far from impartially treating like cases alike, a regime that grants exemptions anoints the legal equivalent of teachers’ pets and treats the non-religious as second class citizens: while they are compelled to obey the law, the religious are permitted to break laws otherwise thought to be perfectly appropriate, by the lights of the legal system. Religion tickets a person to a free-ride—permission to defy the safety regulations, ignore the zoning restrictions, discriminate against women, etc., without liability to the legal restrictions that everyone else is accountable to.¹⁸

To crystallize the friction that exemptions engender, consider the conflict that an exemptions reading of religious freedom has created between the First and Fourteenth Amendments. In the recent disputes about religious businesses serving at same-sex weddings or satisfying the medical insurance mandates of the Affordable Care Act, the proposed exemptions raise a dilemma. Which should the legal system value more greatly: equal protection of laws, as the Fourteenth Amendment guarantees,¹⁹ or religious liberty, as the First Amendment demands?²⁰ We cannot respect both. For the government to enforce the Fourteenth Amendment anti-discrimination requirement (at least, according to current doctrine on Equal Protection), it must violate the wishes of those who, for religious reasons, prefer not to facilitate activities they disapprove of. Yet

¹⁷ Throughout, my critique proceeds from the perspective of a proper legal system. Obviously, the logic of granting exemptions would be altered by having something other than that, such as unjust laws or corrupt rulers.

¹⁸ See, e.g., Religious Land Use and Institutionalized Persons Act, 42 U.S.C §§ 2000cc to -5 (2012); EISGRUBER & SAGER, *supra* note 7 at 79–81; Jess Bravin, *Church Turns to Higher Authority in Zoning Battle*, WALL ST. J. (Nov. 16, 2011), <http://www.wsj.com/articles/SB10001424052970204450804576623053812974230>; Henriques, *supra* note 10; Lithwick, *supra* note 3; see generally MARCI A. HAMILTON, *GOD VS. THE GAVEL* (2d ed. 2014); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015). Note that the free ride objection has sometimes been leveled against religious tax exemptions on the grounds that the relevant institutions continue to enjoy the services of police or fire protection, for example, that are funded by such taxes. I will discuss problems with the common tactic of attaching costs to the “rides” by imposing compensating burdens in Part IV.D.

¹⁹ See U.S. CONST. amend XIV.

²⁰ See *id.* amend. I.

to respect the First Amendment (at least, under the religious exemptions conception of it), the government must violate the Fourteenth Amendment right to not be discriminated against.²¹

Leaving aside questions about the propriety of the dominant doctrinal reading of the Fourteenth Amendment,²² let's assume that the Fourteenth Amendment's doctrine represents the government's conscientious best judgment as to what is required to fulfill its responsibility of safeguarding individual rights. If that is so, however, then the government must enforce that judgment as rigorously as it is able, in order to accomplish its work. For it to do anything less would hamper its ability to fulfill its role and betray its responsibility. Religious exemptions could only be had, in other words, by leaving the Fourteenth Amendment toothless. One man's right against discrimination would be trumped by another man's right to a religious indulgence.²³

Bear in mind that in a proper legal system, all government actions—all laws, policies, decisions, etc. —are ultimately justified by the sole purpose of protecting individual rights. The government's use of its coercive power has *no other* valid foundation. Correspondingly, the First Amendment does not bestow on religious people the freedom to obstruct the legal system's efficient execution of its mission. That would jeopardize others' rights.

Again, this example merely illustrates the larger point that religious exemptions create conflicts that can only be resolved by non-objective means. When a government grants wholesale permissions to defy some of its laws for reasons that do not stem from its core function (that is, that in no way enhance its fulfillment of that function), it erects a second sovereign, splinters its standards, and injects arbitrariness into its bloodstream, necessitating legal officials' use of extraneous considerations for their decisions. For when a legal official confronts competing injunctions from a rights-guided standard pointing to one action and a religion-guided standard pointing to another, he is left to choose between them on the basis of . . . whatever he likes. The law can no longer serve as his guide.

²¹ I stress that the tension depends on particular readings of the First and Fourteenth Amendments.

²² According to this Amendment, individuals are legally entitled to not have private parties discriminate against them on particular grounds spelled out in Title VII of the Civil Rights Act, such as race, gender, disability, or sexual orientation. 42 U.S.C. §§ 2000e–2000e17 (2012).

²³ In SMITH, JUDICIAL REVIEW, *supra* note 12, at 255–58, I discuss this tension more fully and explain that, on a rational reading of each Amendment, the apparent conflict dissolves.

To put the point in more colloquial terms, the practice of exemptions effectively says: “The particular law from which the religious are excused *is* valid, but, for this set of people, never mind. Something else is more important.” (More important than adherence to the rules that we deem most conducive to the safeguarding of rights.) Since the only standard by which a just government should adopt its laws and policies for enforcing them is service to its authorizing mission, however, by straying from that standard, such a regime is abusing its authority and failing to do its job.²⁴

A. Pushback on Source of the Tension

Some might resist my argument by claiming that any tension surrounding religious freedom is endemic to the First Amendment itself. Conflicts result not from a mistake by those who champion exemptions, but from the fact that the First Amendment includes clauses that pull in opposite directions. Burt Neuborne, for instance, depicts the Establishment Clause as “suspicious” of religion, while the Free Exercise Clause is “supportive” of it.²⁵ So, some might contend, even if religious freedom does stand in tension with other elements of our Constitution, the culprit is the First Amendment, not an erroneous understanding of it. It is the challenge of balancing the discordant religious clauses that ripples out to cause further friction.

This line of defense does not withstand scrutiny, however. For the Amendment’s religion clauses are not at odds. They read: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²⁶

Imagine an alternative First Amendment that included only one of these statements, without the other. Had it guaranteed free exercise without placing a bar on state establishment, that might have suggested that the government is to encourage religion, to positively smooth its path by especially favoring religious activities. If, instead, the Amendment had

²⁴ It is fine for a private individual to believe that some things are more important than compliance with law and to take his chances with the repercussions of engaging in conscientious disobedience. He might even be correct about what is most important in life. It is not for a legal system to make such judgments or to adjust its policies on such a basis, however. Its authority, again, is founded in a narrower purpose and its power may thus be exercised only to achieve that purpose. Its job is not the protection of rights *and a few other things that some people find especially compelling* (such as soothing certain kinds of consciences).

²⁵ BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* 141 (2015); see also KOPPELMAN, *supra* note 11, at 6–7, 39–41, and 88.

²⁶ U.S. CONST. amend. I.

assured non-establishment without mentioning any commitment to protect free exercise, that might have suggested government's active hostility to religion, the belief that religion poses a threat to be subdued. The combination of the two clauses, in short, wards off natural misinterpretations that either one of them, by itself, might have nourished.

Note that under an overly robust interpretation of "free exercise," the two clauses *would* work at cross-purposes. If one believes that "free exercise" entails favored legal treatment (including privileges that the non-religious do not enjoy), then it would seem that by respecting individuals' free exercise of religion, the government *is* "establishing" a religion, insofar as it is extending additional forms of support to the religious. And by that measure of what respect for "free exercise" demands, to the extent that the government refrains from "establishing" religion, it would be failing to respect free exercise. So in this way, the two clauses would work against one another.

The problem, however, is that advocates of exemptions cannot *assume* the legitimacy of exemptions by bundling them into a thick notion of "free exercise," which they then invoke to deflect problems with the exemptions reading (the problem of its generating conflicting legal directives). For that would beg the question, which is: Are religious exemptions a valid legal category?

In short, on a logical reading, the First Amendment's religious clauses rest in perfect harmony. Thus, defenders of religious exemptions cannot dismiss the inconsistent directives created by exemptions as a problem bequeathed by that Amendment itself.²⁷

B. Proliferation Testifies to Absence of an Objective Standard

To appreciate the gravity of the problem posed by religious exemptions, consider the range of exemptions claimed—and, in many cases, granted. These include, but are by no means limited to, exemptions:

- From military service²⁸
- From mandatory measles vaccinations²⁹

²⁷ For a good statement of what the bar on establishment forbids, see Justice Black's majority opinion in *Everson v. Bd. of Educ.*, 330 U.S. 1, 3–18 (1947).

²⁸ The Selective Service Act of 1948 exempted anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Pub. L. No. 80-759, 62 Stat. 604, 612 (1948) (codified as amended at 50 U.S.C. § 3806(j)), *quoted in* KOPPELMAN, *supra* note 11, at 132.

²⁹ See Grady, *supra* note 9.

- From standardized testing in public schools³⁰
- From motorcycle helmet requirements (e.g., to accommodate Sikh turbans)³¹
 - From dress codes and grooming codes (e.g., beards worn by police officers or prison inmates)³²
 - For pharmacists, from filling certain prescriptions³³
 - For medical professionals, from performing certain procedures³⁴
 - For parents, in refusing medical treatment for children or subjecting them to harsh forms of discipline or other physical harm (e.g., genital mutilation)³⁵
 - From restrictions on drugs and alcohol (peyote or wine used in religious rituals)³⁶
 - From zoning restrictions on property use³⁷
 - From anti-discrimination employment laws, encompassing work schedules, hiring, firing, promotion (a male-only Catholic priesthood), and mandates to provide employee benefits (medical insurance coverage of abortion and contraception)³⁸
 - From anti-discrimination mandates to provide goods or services to paying customers (e.g., catering at gay weddings)³⁹

³⁰ See Harris, *supra* note 9.

³¹ Veit Bader, SECULARISM OR DEMOCRACY? 165 (2007). This is a subject of much discussion in Canada. See *Should Turban-Wearing Sikhs Be Exempt from Motorcycle Helmet Laws?*, CITY NEWS (June 14, 2016, 11:45 PM), <http://www.citynews.ca/2016/06/14/should-turban-wearing-sikhs-be-exempt-from-motorcycle-helmet-laws/>.

³² See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015); Holt v. Hobbs, 135 S. Ct. 853 (2015).

³³ See Lithwick, *supra* note 3.

³⁴ See *id.*

³⁵ See 42 U.S.C. § 5106i.

³⁶ See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990); Monica Davey, *A Church of Cannabis Tests Limits of Religious Law in Indiana*, N.Y. TIMES (July 2, 2015), <http://www.nytimes.com/2015/07/02/us/a-church-of-cannabis-tests-limits-of-religious-law-in-indiana.html>.

³⁷ 42 U.S.C §§ 2000cc to -5 (2012); see also Bravin, *supra* note 18.

³⁸ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); EISGRUBER & SAGER, *supra* note 7.

³⁹ See, e.g., Tamara Audi and Jacob Gershman, *Arizona Religious Freedom Bill Becomes Test Case*, WALL ST. J. (Feb. 26, 2014), <http://www.wsj.com/articles/SB10001424052702304834704579405511403370366>; Eric Eckholm, *Colorado Court Rules Against Baker Who Refused to Serve Same-Sex Couples*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/14/us/colorado-court-rules-against-baker-who-refused-to-serve-same-sex-couples.html>; Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 2, 2016), <http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html>; Scott Neuman, *Indiana Governor Signs 'Religious Freedom' Bill*, NPR (Mar. 26, 2015, 2:28 PM), <http://www.npr.org/sections/thetwo-way/2015/03/26/395583706/indianas-governor-signs-religious-freedom-bill>.

- From labor laws governing unions⁴⁰
- From fulfilling job responsibilities of government officials (issuing marriage licenses to same-sex couples or approving gay parents' adoptions)⁴¹

When do the exemptions swallow the rule?⁴²

Douglas NeJaime and Reva Siegel have documented the recent rise in claims seeking exemptions from laws requiring a person's complicity in sin, as distinguished from direct commission of sin – which only further extends the loopholes gutting the legal system.⁴³

The proliferation of such demands to indulge an ever-wider array of personal preferences as to which laws a person should be made to respect—and the government's willingness to indulge them—testifies to the absence of any principled basis for the legal system's use of its power. Further, it illustrates the corrupting effects of allowing any alien standards to gain influence over the exercise of legal power. Once a legal system permits any non-objective criteria to determine its enforcement policies, on what basis can it reasonably deny others? What if my religion tells me that women are inferior to men in respects that instruct me to treat women in ways that violate equal protection law? The same could easily be imagined for my treatment of blacks, or religious infidels, or countless other members of legally protected classes. If we excuse religious people from legal prohibitions on such discrimination despite the legal system's belief in a citizen's right against such discrimination,⁴⁴ why not similarly excuse those who, on account of religious belief, would rather not obey prohibitions on property violation? Or prohibitions on assorted other rights violations, for that matter? If, alternatively, we do not excuse religious people from these prohibitions while we do excuse them from others, what

⁴⁰ See EISGRUBER & SAGER, *supra* note 7; Lithwick, *supra* note 3.

⁴¹ See Alan Blinder & Richard Perez-Pena, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html>; Jonathan M. Katz, *North Carolina Allows Officials to Refuse to Perform Gay Marriages*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html>. Note that many of the claimed exemptions in this list are also discussed in Henriques, *supra* note 10 and in Hamilton, *supra* note 18. For further discussion, see also *supra* notes 2–3, 9–10 and accompanying text.

⁴² In 2015, 87 religious-refusal related bills were introduced in 28 state legislatures (as of mid-November). Katherine Stewart, *Ted Cruz and the Anti-Gay Pastor*, N.Y. TIMES (Nov. 16, 2015), http://www.nytimes.com/2015/11/16/opinion/campaign-stops/ted-cruz-and-the-anti-gay-pastor.html?_r=0.

⁴³ NeJaime & Siegel, *supra* note 18.

⁴⁴ Again, leaving aside here the propriety of that assumption about rights.

is the basis for the government discriminating in *that* way—between some laws that are to be strictly enforced and other laws that are not?

The usual response is that certain laws advance a compelling state interest and these should not be compromised.⁴⁵ Yet this hardly suffices. Indeed, it merely raises the question: on what basis would a proper government ever enact laws that do anything other than that? What “state interests” that are *not* compelling could justify government coercion?

A government’s authority stems entirely from its charge to serve one “compelling” interest, namely, the security of individual rights. That is its reason for being. Correspondingly, it is the sole source of its authority to exercise its coercive power. If we release the legal system from the discipline of that unifying principle, inconsistent legal directives will be impossible to contain and their “solutions” utterly arbitrary.⁴⁶

C. Exemptions Subjectivize the Legal System

The overall effect of religious exemptions is to subjectivize the legal system. To see this, consider the implications for those charged to carry out the law, be it a police officer, state prosecutor, county clerk, or bureaucrat applying the regulations of the Food and Drug Administration or any other government agency. A policy of religious exemptions renders it impossible for legal officials to apply the law objectively—in a consistent, function-fulfilling, rights-respecting manner. The conflicting directives issued by a law that dictates one course of action and an exemption that dictates the contrary leave him rudderless. In the *Hobby Lobby* dispute, for instance, should the relevant officials grant an exemption and thus allow one party to abide by its conscience despite this resulting in breach of the health law? Or should they uphold another party’s freedom to not be discriminated against?⁴⁷

⁴⁵ The Religious Freedom Restoration Act affirms that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests,” 42 U.S.C. § 2000bb(a)(5) (2012), and stipulates that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).” *Id.* § 2000bb-1(a). Subsection (b) decrees that “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(b). See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (detailing the history and basic meaning of “compelling state interest.”). I criticize the rational basis test in SMITH, JUDICIAL REVIEW, *supra* note 12, at 228–31.

⁴⁶ Arbitrary, that is, by standards that are grounded in the legal system’s mission.

⁴⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

When it comes to actually answering such questions, the embrace of exemptions effectively subordinates the Rule of Law to the Rule of Men, as objective uniformities yield to the subjective beliefs of those particular individuals who happen to hold the relevant positions of government power. The problem is not presumed bad faith on their part. Their efforts to be faithful to the law may be thoroughly conscientious. The problem is that, once contradictory directives are introduced, we are inescapably ruled by *those men's beliefs* rather than by the enacted, articulated law. Exemptions elevate personal conscience over law – the consciences both of those permitted to defy the law and of those who decide which requests for legal reprieve will be granted.

It should be obvious that a person's conscience might be sincere, though depraved. Religion can inspire terrorists as well as pacifists, justice or injustice, harsh repression, heedless toleration, and everything in between.⁴⁸ What is salient to the propriety of exemptions is simply this: sincerity is no guarantee that a person's conscience does not counsel action that would violate the rights of others—which is the only aspect of anyone's conscience that a government should be concerned with.

Legal accommodation of conscience-based requests to be excused from legal obligations would essentially deliver us to Do-It-Yourself government, making law enforcement a game of “Mother, May I?” For on this view, the government should enact laws on the basis of its judgment of which rules are most conducive to its effectively fulfilling its mission but, before actually applying those laws in any particular case, obtain permission by asking the relevant person, “May I? Do you have a philosophical objection to that?”⁴⁹

Note that our courts have sometimes recognized this problem. In a 19th century case concerning Mormon marriage, Justice Waite wrote that to permit laws' violation because of religious belief “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”⁵⁰ In *Chandler v.*

⁴⁸ Koppelman recognizes this when arguing against the idea that conscience should warrant exemptions regardless of its religious character, yet he fails to observe that it is equally true of religious conscience. KOPPELMAN, *supra* note 11, at 134. For a related discussion of the differences between individual conscience and institutional conscience, see Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012).

⁴⁹ Bear in mind throughout that my concern is with government enforcement of its laws, not with the question of whether a citizen's disobedience might ever be justified.

⁵⁰ *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

James, the United States District Court for the Middle District of Alabama reasoned that “if the Free Exercise Clause protected *all* religious activity, it would not be possible to maintain a civil, pluralistic society.”⁵¹ And in *Employment Division v. Smith*, the peyote case that propelled Congress’s adoption of the Religious Freedom Restoration Act,⁵² Justice Scalia’s majority opinion observed that “[to] make an individual’s obligation to obey . . . a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’ . . . contradicts both constitutional tradition and common sense.”⁵³

D. Exemptions Sabotage the Government’s Function

The fundamental problem, again, is that the indulgence of people’s personal beliefs at the expense of the law is inimical to the government’s fulfilling its function. For such indulgence subordinates the proper end of government to extraneous ends. If, in a proper legal system, the premise beneath all government action is its necessity as a means of the government’s effectively serving its charge of protecting individual rights, then to allow violations of its rules is essentially to permit some people to violate (or, at best, to jeopardize) others’ rights. In this way, permissions to break the law compromise the government’s commitment to its mission and undercut its ability to serve that mission most effectively.

On the surface, the grant of religious exemptions can seem benevolent, even generous; the language of “accommodation” is warm and welcoming. And claims of exemptions are sometimes motivated by the desire to escape laws that are unjustifiably restrictive. Many non-religious people who recognize the injustice may sympathize with the desire for relief, even if they do not themselves stand to benefit from the sought exemption. Further, exemptions’ appeal rests heavily on apparently benign cases where it seems harmless to grant them—surely, people suppose, another clerk can issue the marriage license or another party can pay for the medical insurance.

Beneath the surface, however, the damage from a regime of exemptions is grave. *Hobby Lobby*⁵⁴ is a tragic illustration. At one level, the court’s

⁵¹ 958 F. Supp. 1550, 1555 (M.D. Ala. 1997) (emphasis added).

⁵² See 42 U.S.C. §2000bb.

⁵³ 494 U.S. 872, 890 (1990). Scalia’s opinion also quotes Justice Waite, in *Reynolds. Id.* at 886, 890. For a related discussion, see BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 133, 171, 236, 258 (2001).

⁵⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

ruling to protect the company owners' "religious freedom" seems a victory for individual rights. Yet the ruling did not liberate *all* business owners to operate on the conditions that they, with willing partners, choose.⁵⁵ *Hobby Lobby* was actually a setback for individual liberty insofar as it entrenches the insidious belief that rights are a privilege, to be enjoyed by the select, rather than the entitlement of all. Under *Hobby Lobby's* premises, a person is free to run his business as he likes only if he qualifies as religious (according to the criteria that happen to be adopted by incumbents of the relevant government offices).⁵⁶ Individual rights are reduced to "freedom favors"—gifts granted by our governors, contingent on a person's standing in their good graces.

In truth, if certain laws are deemed necessary for the government to fulfill its function, those should apply equally to everyone.⁵⁷ Once a legal system adopts policies that treat some citizens as more entitled than others, however, it invites further deviations from objective standards and proper law. In the immediate case, it treats people in ways that it should not, holding only some accountable to the rules designed to safeguard rights while allowing others to defy those rules and thereby endanger rights. And in the longer term, it fosters the notion that the legal system is inherently arbitrary, that governing *consists of* subjectivist decisions, and that its coercive power may be used to serve purposes other than its authorized mission. The gradual but inevitable effect of crediting extraneous agendas is to drift further from the correct criteria for legal action. The more our legal system diverges from its proper standard of governance, the more

⁵⁵ See *id.* at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA."). In his majority opinion, Justice Alito writes that "we must address . . . whether this provision applies to regulations that govern the activities of for-profit corporations," *id.* at 2767, and he directly rejects HHS' arguments concerning whether exemptions might extend to all for-profit corporations (since non-profit corporate entities had already been granted certain exemptions), *id.* at 2769–75. Alito also explains that the cases in question "do not involve publicly traded corporations." *Id.* at 2774. The opinion includes other references to its limited nature, and concludes that "the contraceptive mandate, as applied to closely held corporations, violates RFRA." *Id.* at 2785, emphasis added; see also John Inazu, *Contesting Religious Liberty*, HEDGEHOG REV., Fall 2016, at 121 (commenting on the now widespread understanding of *Hobby Lobby* as "relatively narrow").

⁵⁶ I am leaving aside the vexed questions of what constitutes a religion. For discussion, see ROBERT AUDI, *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE* 72 (2011); KOPPELMAN, *supra* note 11, at 6–8, 124; LEITER, *supra* note 18, at 31–35. For some of the specific legal implications posed by differing definitions, see Davey, *supra* note 36; *How Europe Defines Religious Freedom*, *ECONOMIST* (Mar. 31, 2014), <http://www.economist.com/blogs/erasmus/2014/03/europe-faith-and-liberty>.

⁵⁷ I will discuss the possibility of conditions under which differential treatment might be justified in Part V.

readily claims to exemptions of all sorts find a foothold, and we find ourselves with a legal system shot through with loopholes, tailored to the particular profiles of innumerable constituencies. This is less a regime of laws and more of personal circumstance, with the use of legal power *ad hoc*.⁵⁸

In the end, we must assess the legitimacy of religious exemptions by the same standard that governs all proper legal action. The reason for which a government holds power is the protection of individual rights. A legal system's proper concern, correspondingly, is those laws and policies that it deems the best means of safeguarding those rights and people's obedience of those laws. The fact that a person might be acting as he does for religious reasons in itself makes no difference to how the legal system should treat him. While a given lawbreaker's motivations may legitimately come into play to determine his culpability and punishment, the fact that a person acts as he does for religious reasons is immaterial to the scope of a legal system's concern. For that matters not to whether his action complies with its laws.

To put the point slightly differently: my rights are unaffected by my neighbor's religiosity. Valid laws that are designed to enforce a person's rights—his property rights, privacy rights, speech rights, or any others, including his religious rights—are respected neither more nor less, depending on the religious inspiration of the would-be violator. My neighbor's legal responsibilities, correspondingly, should be unaffected by such inspiration.

III. ARGUMENTS ON BEHALF OF RELIGIOUS EXEMPTIONS

The insidious character of religious exemptions has not, alas, been widely appreciated. Exemptions advocates offer a handful of arguments on their behalf. I will consider four. While these do not exhaust the lines of support, they represent the most compelling rationales for the view that religion should receive special legal deference.

⁵⁸ Consider the assortment of subsidies, deductions, and the like that riddle the tax code as well as countless statutes and regulations. Carve-outs to protect particular constituencies from farm law, eminent domain policies, environmental regulations, etc., have become the norm, rather than the exception. Eisgruber and Sager observe that in our legal system today, exceptions are pretty much the rule. EISGRUBER & SAGER, *supra* note 7, at 97.

A. Constitutional Text

The first defense of exemptions is the most straightforward. Religion should receive special deference because the Constitution's First Amendment says that it should. What part of "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" do you not understand?⁵⁹ The text of the First Amendment expressly prescribes special treatment for religion.

Moreover, this argument proceeds, the historical context explains why the Constitution does this. Many of the colonists and their forebears had suffered religious persecution elsewhere. European countries of the day typically had established state churches and imposed corresponding restrictions on people's religious practices. It was to break from such practices that the Founders deliberately asserted religious freedom.⁶⁰

There is no need, on this defense of exemptions, to resort to any more roundabout considerations to appreciate their justification. The Constitution's text, along with its surrounding context, make their underpinnings plain.⁶¹ And contrary to those who would extend exemptions to conscience more broadly, secular as well as religious,⁶² some of the text-based advocates of exemptions stress that the Amendment speaks exclusively of religion, which is a unique kind of belief system that accepts an "extra-human source of normative authority."⁶³ Accordingly, they contend, religion is not simply a placeholder for other values that should also be legally privileged.⁶⁴

⁵⁹ U.S. CONST. amend. I.

⁶⁰ NEUBORNE, *supra* note 25, at 138. (portraying the First Amendment as a truce among different sects).

⁶¹ See MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 102 (2008); Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL'Y 225 (2006) [hereinafter Greene, *Apparent Consistency*]; Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 TEX. L. REV. 963, 967–70, 986–87 (2009) [hereinafter Greene, *Three Theories*].

⁶² See, e.g., RONALD DWORKIN, RELIGION WITHOUT GOD (2013) 110–116; EISGRUBER & SAGER, *supra* note 7, at 52–53, 100–04, 113–15; WILLIAM GALSTON, THE PRACTICE OF LIBERAL PLURALISM 45–71 (2005); NEUBORNE, *supra* note 25, at 134; NUSSBAUM, *supra* note 609, at 19–20, 164–74, 226; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Micah Schwartzman, *What if Religion Isn't Special?*, 79 U. CHI. L. REV. 135 (2013); see also Koppelman, *supra* note 11, at 217 n.46; LEITER, *supra* note 18 at 15–25, 92–108; Christopher Shea, *Beyond Belief*, CHRON. HIGHER EDUC. (June 9, 2014), http://www.chronicle.com/article/The-Limits-of-Religious/146971/?cid=cr&utm_source=cr&utm_medium=en.

⁶³ Greene, *Three Theories*, *supra* note 61, at 986.

⁶⁴ Several scholars have maintained that while the Founders considered making explicit reference to conscience in their debates and in some earlier drafts of the First Amendment, the language they

While scholars debate exactly what can be inferred from the Amendment's language, the main point is clear: according to the Textualist Argument for exemptions, religion is special. And the First Amendment declares that our legal system should treat it as special.

B. Equality

A different type of argument reaches beyond the text to defend religious exemptions. On this view, exemptions are necessary as a means of upholding the political ideal of equality.

The thinking here is that our legal system exerts a subtle secular bias. Although it may not be by design, the First Amendment's ban on establishment tilts the legal system to favor secular views and disadvantage religious views. In its effort not to establish religion, the government is acutely wary of giving aid to religious activities. Yet in practice, the contention is, this handicaps religious citizens. Spokesmen for non-religious belief systems such as utilitarianism or environmentalism, for instance, are free to advocate their philosophies in public schools or government office buildings without triggering fears of unconstitutional establishment and attendant restrictions. Yet those espousing religious philosophies are not.⁶⁵

Moreover, as Abner Greene observes, because the Establishment Clause has been taken to demand secular reasons for government policy, religious believers cannot make direct appeals to the purported truth of their beliefs in the course of arguing over public policy on abortion, or criminal punishment, or war, etc., while non-religious citizens labor under no such constraints.⁶⁶ To compensate, therefore, the religious should be provided with extra protections. Without them, they would be disproportionately burdened. Rather than enjoying free exercise, the religious would have only hampered exercise. Thus to avoid the bar on establishment coming at

finally adopted spoke only of religion. *See* Shea, *supra* note 62; *see also* NUSSBAUM, *supra* note 61. Others have challenged the conclusion that the final language reflects a deliberate rejection of conscience as warranting the same legal status, since the authors might have assumed that a reference to conscience would be redundant. *See* NEUBORNE, *supra* note 25, at 132–42, 209–10.

⁶⁵ Shea, *supra* note 62 (citing Stanford Professor Michael W. McConnell). *See* NUSSBAUM, *supra* note 61, at 116 (“Majority thinking is usually not malevolent, but it is often obtuse, oblivious to the burden such rules impose on religious minorities.”); Greene, *Three Theories*, *supra* note 61 (providing a good roundup of different forms of this line of argument).

⁶⁶ Abner S. Greene, *The Incommensurability of Religion*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 226, 236 (Stephen M. Feldman ed., 2000).

the expense of some individuals' free exercise, the legal system must grant exemptions. The nub of this argument is an appeal to equal treatment.

As Martha Nussbaum sees it, "equality is the glue that holds the [religion] clauses together" and exemptions are needed in order to ensure that equality.⁶⁷ It is not enough merely to "tolerate" religion by passively refraining from interfering with it. To avoid the asymmetry of unequal treatment, she contends, religion must receive more active shielding.⁶⁸

Greene agrees that religious exemptions do not give the religious a special favor, but simply offset what would otherwise be a disadvantage. Because the establishment ban hampers religious believers, the Free Exercise Clause should be understood to authorize exemptions from otherwise generally applicable laws as a means of leveling the playing field.⁶⁹ Even Christopher Eisgruber and Larry Sager, who oppose most religious exemptions, do accept some precisely when they would protect a special vulnerability, avoid an inferior status, counter some form of disfavor, or bring about parity.⁷⁰ In such cases, religious activity warrants special legal treatment not *qua* religious, but *qua* vulnerable. "The right of religious freedom is the right to participate in the constitutional project on fair terms," Eisgruber and Sager write, "so that one is neither privileged nor disfavored on the basis of the religious (or nonreligious) character of one's commitments."⁷¹ If religious exemptions are sometimes needed to achieve those terms, so be it. "The right principle for analyzing exemptions claims is . . . a kind of equality principle," and the principle they defend for navigating claims to exemptions is dubbed "Equal Liberty."⁷²

The central idea, again, is plain: equality demands religious exemptions. Without them, our legal system would suffer from an unjust asymmetry in its treatment of religious and non-religious citizens. The religious would be at a disadvantage because of the Constitution's bar on establishment; exemptions provide the necessary corrective.

⁶⁷ NUSSBAUM, *supra* note 61, at 104.

⁶⁸ Nussbaum examines the issue at length. *Id.* at 224–72.

⁶⁹ See Greene, *supra* note 66, at 235.

⁷⁰ EISGRUBER & SAGER, *supra* note 7, at 59, 107.

⁷¹ *Id.* at 108.

⁷² *Id.* at 107; see also Jeremy Waldron, *One Law for All: The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3 (2002).

C. Personal Liberty

From a very different quarter, some endorse religious exemptions as part of a larger suspiciousness toward all government restrictions. This is a Liberty-Based Argument. Greene, who has supported both Text- and Equality-rooted reasoning on behalf of exemptions, offers a particularly crisp statement of this argument, so I shall simply relay his reasoning.⁷³

Greene denies that people have a *prima facie* duty to obey the law and endorses the presumption of individual liberty.⁷⁴ Indeed, he observes, our constitutional system is deliberately structured to be “deeply wary of concentrated power.”⁷⁵ He writes, “even as we regulate based on best evidence and arguments, we still should be open to our being wrong . . . and should exempt or accommodate minority practices to the extent possible consistent with protecting the liberty of others.”⁷⁶ This is not skepticism, Greene assures us, but simple humility about the possibility of adopting mistaken government policies.⁷⁷

“The presumption of liberty is a strong one,” he explains, “and government may overcome it, but only with a substantial case about the harm that would likely ensue were an exception provided.”⁷⁸ The government, in other words, must justify its *refusal* to grant religious exemptions. Even if we assume that a given government is, in principle, legitimate, if some individuals, for fiercely held religious reasons, object that they should not be obligated to obey a particular law, they should enjoy the benefit of the doubt. “Government has to earn its stripes, law by law or case by case; the justificatory burden is always on the coercive governmental entity. This is not an anarchistic position—the state can often prevail—but it is an effort at shifting the burden”⁷⁹

The upshot is that religious exemptions are fully justified as a means of securing individuals’ liberty.

⁷³ Greene seems to hold that while the text of the First Amendment shows why religion warrants special legal status, the Equality and Liberty Arguments furnish more specific grounds for exemptions, in particular. Greene, *Three Theories*, *supra* note 61. I will use “liberty” and “freedom” interchangeably.

⁷⁴ *Id.* at 991–92.

⁷⁵ *Id.* at 974.

⁷⁶ *Id.*

⁷⁷ *Id.* at 996–97; *see also id.* at 974.

⁷⁸ *Id.* at 992.

⁷⁹ *Id.* at 991–92.

D. Transcendent Value and Personal Identity

The final argument for exemptions appeals not to specifically political ideals, but to the value of human life itself. Religion can be integral to personal identity and serve as a value that transcends all others. It is on these grounds, some maintain, that it warrants special accommodation.

For many people, religion is foundational to their entire worldview. It provides the bedrock frame of reference that shapes their beliefs about life and death, salvation, meaning, ethics, and value, encompassing what it takes to lead a good life and the importance of one's doing so.⁸⁰ Religion provides legitimization for many people, conferring a sacred status on their activities and a sense of "harmony with the "transcendent origin of universal order."⁸¹ It motivates some to die for their beliefs; others, to kill for them. Indeed, it can furnish a person's very sense of himself, of who he is. As Michael Sandel has observed, for some, "the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity."⁸²

Correspondingly, this argument proceeds, religion's authority must be supreme. When eternal damnation or the very point of life looms in the balance, the stakes of compliance with one's religious convictions are paramount. Divine commands dwarf all others. The legal system should recognize this by accommodating religion, accordingly.⁸³

Nussbaum embraces a form of this Transcendent Value argument when she explains why (in her view) exemptions for the religious should be extended to conscience, more broadly: so that people can pursue their search for meaning.⁸⁴ It is not religious belief as such that warrants legal deference, she contends, but *thinking* about such issues—because "[t]o be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly

⁸⁰ See KOPPELMAN, *supra* note 11, at 121.

⁸¹ *Id.* at 124.

⁸² MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 67–68 (1996); *see also* Waldron, *supra* note 72.

⁸³ See AUDI, *supra* note 56, at 71. For related discussion of the alleged uniqueness of religious conviction, see EISGRUBER & SAGER, *supra* note 77, at 100–04; KOPPELMAN, *supra* note 11, at 121–24; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1. This line of thinking also sometimes emerges in popular debate. See Charlotte Allen, lamenting the "persecution of Christians" in states that penalize private business people who refuse to serve at gay weddings, implies that these people are being mistreated by law for *who they are*. See Charlotte Allen, *Modern Sin: Holding on to Your Belief*, WALL ST. J., May 1, 2015, at A11.

⁸⁴ NUSSBAUM, *supra* note 61, at 19, 168–69.

human.”⁸⁵ Courts have also sometimes invoked such considerations. In *Texas Monthly, Inc. v. Bullock*, Justice Brennan’s majority opinion argued that a tax exemption for religious publications would be appropriate if it were aimed, more expansively, “to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life.”⁸⁶

Others emphasize the value of identity that can be enfolded in a person’s religious conviction. Robert Audi discusses the “protection of identity principle,” the idea that “[t]he deeper a set of commitments is in a person, and the closer it comes to determining that person’s sense of identity, the stronger the case for protecting the expression of those commitments tends to be.”⁸⁷ Some have pointed out that despite the conventional framing of certain exemptions disputes as pitting “gay rights versus religious rights,” the interests of religious minorities and sexual minorities are surprisingly alike in one significant respect: both assert the irreplaceable value of a person’s sense of identity.⁸⁸ A person’s religion and a person’s sexual orientation are both frequently asserted as being intensely precious and self-defining and, on that basis, properly free of government restrictions.⁸⁹ Douglas Laycock observes that “in resisting legal and social pressures to conform to majoritarian norms,” both groups sometimes claim

that some aspects of human identity are so fundamental
that they should be left to each individual, free of all
nonessential regulation, even when manifested in conduct.
No human being should be penalized because of his beliefs

⁸⁵ MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 179 (2000). This reflects Nussbaum’s “capabilities” conception of justice. As she writes, it is “the faculty with which each person searches for the ultimate meaning of life” that justifies religious and conscience exemptions. NUSSBAUM, *supra* note 61, at 168–69.

⁸⁶ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). Justice Blackmun’s concurring opinion similarly argued that the state may favor activities concerned with “such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.” *Id.* at 27–28 (Blackmun, J., concurring).

⁸⁷ AUDI, *supra* note 56, at 42, 71.

⁸⁸ Douglas Laycock, *Afterword to SAME SEX MARRIAGE AND RELIGIOUS LIBERTY – EMERGING CONFLICTS* (Douglas Laycock et al. eds., 2008); Michael Kent Curtis, *A Unique Religious Exemption from Anti-Discrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 196 (2012); Steven J. Heyman, *A Struggle for Recognition: The Controversy Over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1 (2015).

⁸⁹ Laycock, *supra* note 88, at 189.

about religion, or because of his sexual orientation. And no human being should be penalized because of her religious practice, or because of her choice of sexual partners, unless her conduct is actually inflicting significant and cognizable harm on some other person.⁹⁰

In the end, whatever the particular emphasis of a specific advocate of the Transcendent Value Argument, the animating idea is that certain commitments are in a class by themselves; their value is incomparable, and those commitments should be subordinated to no others. Religious conviction can be so precious that the denial of one's ability to live according to its dictates would defeat the value of all the other benefits made possible by a government. Thus a person should not be made to choose between God and Caesar. Indeed, a religious person may feel that he *has no other option* but to do what his religious conviction demands.⁹¹ For a government to demand that he do otherwise would demand his self-betrayal. Exemptions are therefore warranted as a means of avoiding the imposition of such an unconscionable choice.

⁹⁰ *Id.* Because he believes that the asserted rights do sometimes clash, Laycock proposes a resolution:

The scope of any right to refuse service to same-sex couples must depend on comparing the harm to the couple of being refused service and the harm to the merchant or service provider of being coerced to provide service. What is most importantly at stake for each side is the right to live out core attributes of personal identity. In my view, the right to one's own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.

Id. at 198.

⁹¹ SANDEL, *supra* note 82, at 67–68. On this view, a devout person cannot readily divide his thinking into religious reasons and secular reasons and exclusively consult the latter, in his role as citizen. Rather, as Audi notes, a devout person routinely *draws on* his religious beliefs in the everyday conduct of his life. AUDI, *supra* note 56, at 86 (citing Jürgen Habermas, *Religion in the Public Square*, 14 EUR. J. PHIL. 1, 1–25 (2006)). The conflict seems particularly acute for those who claim that without the shield of exemptions, they would be forced to facilitate activities to which they object and thereby be complicit in sin.

* * * * *

These, then, are the strongest lines of defense of religious exemptions: appeals to our Constitutional Text, to Equality, to Liberty, and to religion's unique and Transcendent Value.⁹²

IV. FAILINGS OF THE EXEMPTIONS ARGUMENTS

None of these arguments vindicates exemptions. Let us consider each of them in turn, beginning with the appeal to the First Amendment's text.

A. Critique of the Text Argument

The Constitution is certainly a reasonable place to turn in an examination of religious exemptions. This defense of exemptions, however, misunderstands its meaning. While the historical background of religious persecution does help us appreciate the motivation for specifying religion as among the objects protected by the Constitution, it does not justify religion's enjoyment of an *exalted* legal station. It offers no reason for permitting religious believers to disobey laws that the government deems necessary to protect individual rights.

Proponents of the Text Argument effectively treat the First Amendment as a stand-alone edict and neglect the philosophical context of the Constitution as a whole, the meaning of which is informed by deeper, abiding principles. Note that the First Amendment is not *peculiarly* religious; its subject matter is intellectual freedom. For that is what unifies its specific references to religion, speech, assembly, petition, and press. All of these are forms of exercising freedom of thought—itsself a form of freedom of action, which is what the Constitution as a whole is designed to protect.⁹³ Indeed, long before debate over a bill listing specific rights, James Madison had urged that a clause asserting the right to freedom of conscience be added to Article I, a clear indication of his understanding that the relevant freedom later articulated in the First Amendment was not religion-centric.⁹⁴ According to many, that proposal was not adopted only because it was considered a needless redundancy.⁹⁵ In the same spirit, our

⁹² Allowing, again, that some authors defend exemptions on the broader ground of religion's philosophical, meaning-providing character.

⁹³ See U.S. Const. amend. I.

⁹⁴ NEUBORNE, *supra* note 25, at 209.

⁹⁵ *Id.*

courts have often invoked secular conscience to explain their rulings in religion cases, thereby implying that a wider freedom is at issue.⁹⁶

In Madison's view, religious freedom is not distinctive—at least, not in any way that is relevant to the government performing its authorized work. Madison writes in the *Memorial and Remonstrance Against Religious Assessments* that “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience” is held by the same tenure with all our other rights.⁹⁷ Significantly, he holds, neither its origin nor its importance gives it any greater weight among legal considerations.⁹⁸

Thomas Jefferson likewise conceives of religion as enjoying no greater legal prerogatives than other exercises of freedom. In the *Virginia Statute for Religious Freedom*, Jefferson writes that no one should be forced either to support a particular religious belief nor to suffer on account of his own religious belief, “but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no way diminish, enlarge or affect their civil capacities.”⁹⁹ This is far short of endorsing any sort of special privileges for religion.

The point is, when properly understood, the First Amendment does not carve out a zone for “doing your own thing” regardless of the effects on others. Religious liberty must not be mistaken for religious license; it carries no immunity from the abiding obligation to respect others' rights. Correspondingly, it provides no permission to violate laws that the government deems necessary to protect those rights.

The Text Argument is correct, then, that the First Amendment explicitly affirms religious freedom. To read that as authorizing exemptions,

⁹⁶ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625–42 (1943); see also *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

⁹⁷ JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* para. 15 (1785) (citing *VA. DECLARATION OF RIGHTS* (1776)), <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

⁹⁸ *Id.*

⁹⁹ THOMAS JEFFERSON, *THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM* (1786), reprinted in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* xvii–xviii (Merrill D. Peterson & Robert C. Vaughan eds., 1988). Any thought that Jefferson harbored an especially favorable regard for religious freedom should be chastened by his observation about Christian religion: “Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined and imprisoned. What has been the effect of this coercion? To make one half the world fools and the other half hypocrites; to support roguery and error all over the earth.” THOMAS JEFFERSON, *NOTES ON VIRGINIA* (1784), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 276–77 (Adrienne Koch & William Peden eds., 1944). Nonetheless, on the grounds that a man's life is his own to pursue as he sees fit and that his intellectual freedom is a vital part of that, Jefferson's support of religious freedom was unflinching.

however, would read the words “free exercise” in a way that contradicts the underlying philosophy that the language expresses. If a person could hold a right to infringe on others’ rights, all rights would be moot and the very concept of rights fraudulent. If liberty were understood to mean license to do whatever a person wanted, we would have no basis for distinguishing one man’s “rights” from another man’s urges and protecting the former against encroachments of the latter. For the very notion of “encroachment” of a person’s liberty would be vaporized. On the subjectivist conception that what rights are *to* is the ability to do *whatever* one wants, no holds barred and no laws being obstacles, a person would have no ground for objecting to some people wanting to use their so-called liberty in ways that violate laws and violate others’ so-called rights. “Rights” would be rendered no different in kind from the panoply of random desires that a person might seek to gratify.

To solidify our grasp of this point, it may be helpful to approach the issue from a somewhat different angle. The fundamental reason that Americans are legally entitled to religious freedom is not because the First Amendment says so. If that textual statement were its fundamental platform, we would possess only those rights explicitly named in the Constitution. A right to travel? To marry? To raise children? To pursue the work that you choose? The Constitution does not say a word about those. Should we conclude that we do not possess those rights? Do we conclude that? Hardly. And the fact that we do not testifies to our recognition that it is not any list in the Constitution that is the *source* of our rights (it is not their moral source).¹⁰⁰ Rather, the conviction behind the Constitution is that human beings possess certain rights independently of the Constitution—with the logical implication that they possessed these rights before the Founders got around to adopting a Bill of Rights, some years after adopting the Constitution itself.¹⁰¹ Accordingly, before the First

¹⁰⁰ Indeed, the 9th Amendment testifies to this—but it only testifies to this, for the 9th is not the source of our rights, either. See U.S. CONST. amend. IX.

¹⁰¹ See RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION* 32–51 (2016); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 4–5, 32–38, 53–70 (2004); SCOTT GERBER, *TO SECURE THESE RIGHTS* (1995); TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 2–4, 6–8, 25–26, 41–43, 104 (2014). As Evan Bernick puts it, notwithstanding their other differences, the Framers “shared the same fundamental understanding of the proper function of government. For the Framers, as for Locke, government was a means of protecting the natural rights of the individual ‘to dispose, and order as he lists, his person, actions, possessions, and his whole property’” Evan Bernick, *Reason’s Republic*, 10 N.Y.U. J.L. & LIBERTY (forthcoming 2016) (quoting JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* § 123 (1689)).

Amendment's profession of free exercise, Article VI barred religious tests for public office in recognition of the same principle of religious freedom.¹⁰²

The Bill of Rights does not *add* new rights. Rather, it is an explicit statement of some of the implications of the Constitution and of the conception of individual rights on which it is built. It articulates a handful of the logical applications of those principles, indicating how they can be properly respected, in practice. But the Bill of Rights is not a charter of favoritism which creates special privileges for those engaged in select activities, there designated.

In the final analysis, the exemptions reading of the First Amendment completely misconstrues its relationship to the rest of the Constitution and to the conception of individual rights which animates it. Ultimately, the question of religious exemptions can be settled neither by a patch of language detached from its philosophical context, nor by historical facts about religion, but only by facts concerning a proper government and the freedom that it is to protect.¹⁰³ The proper standard for government action is service to government's function, which is the protection of individual rights.¹⁰⁴ Because religion is fundamentally irrelevant to this, however, there is no reason for a legal system to treat an individual's religious activities differently from any of his other activities—be they anti-religious, non-religious, trivial, momentous, etc.¹⁰⁵ Religion is simply not the lens through which a legal system is to determine its responsibilities and adopt its policies. Because religion *per se* is irrelevant to whether or not some activity is within a person's rights, it is irrelevant to the government's concern. The single thing, at bottom, that a proper legal system should be concerned with is this: does the activity in question

¹⁰² U.S. CONST. art. VI, cl. 3. Mark McGarvie argues that the Contract Clause of Article 1, Section 10 also reflects recognition of the sanctity of private, voluntary choice – which is re-asserted in the First Amendment's pledge of liberty of religion, speech, assembly, etc. Mark McGarvie, *McGarvie on Hamburger, 'Separation of Church and State'*, H-LAW (Mar. 2003) (reviewing PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002)), <https://networks.h-net.org/node/16794/reviews/17002/mcgarvie-hamburger-separation-church-and-state>.

¹⁰³ For a more general critique of Textualism as a methodology for judicial review, see SMITH, *JUDICIAL REVIEW*, *supra* note 12, at 148–62; Tara Smith, *Why Originalism Won't Die – Common Mistakes in Competing Theories of Judicial Interpretation*, 2 *DUKE J. CONST. L. & PUB. POL'Y* 159 (2007). For elaboration of my own view of proper judicial methodology when interpreting the law, see SMITH, *JUDICIAL REVIEW*, *supra* note 12.

¹⁰⁴ Again, a claim that I defend elsewhere. See *infra* note 12.

¹⁰⁵ I will say more on this in Part IV.D, when responding to the Transcendent Value/Personal Identity Argument.

exercise an individual's rightful freedom or does it infringe on any other persons' rightful freedom? Insofar as the government's purpose is secular, its operations should be secular. The state has no basis for scrutinizing individuals' religious beliefs and treating individuals either more favorably, or less, on that basis.

B. Critique of the Equality Argument

Next, recall the Equality Argument for exemptions.¹⁰⁶ Religion warrants special protections, allegedly, to offset disadvantages imposed by the First Amendment's bar on the establishment of religion. In the government's efforts to avoid favoring religion, the contention is, it inadvertently hinders religion. To compensate, therefore, it should provide special shelter to religious citizens through exemptions.

While this line of reasoning has come in for sharp attack, it is instructive to see that certain of these critiques fail to penetrate to the nerve of the issue. So let me begin by dispensing with these.

One line of criticism charges hypocrisy. Some of the groups that seek religious exemptions do not themselves honor equality of the sexes, or of race, or for heretics. They reserve positions of power in marriage, child rearing, or church leadership, for instance, to men. Consider Mormon polygamy, an exclusively male Catholic priesthood, or Islamic restrictions on the activities of women. Such policies of dedicated inequality, critics contend, should disqualify any claims to exemptions pressed by appeals to equality that exemptions advocates themselves do not honor.

One need not be an apologist for hypocrisy to see that this objection is misguided in at least two respects. First, rights protect individuals' freedom to engage in certain immoral actions. Although the shielding of immorality is not what rights are *for* and is not the fundamental justification of rights, it is a logical outgrowth of rights' protection of freedom of action. As long as a person's action does not infringe on the rightful freedom of others, it falls within his rightful freedom (regardless of its moral character by various other measures, such as its courage, kindness, reflection of personal integrity, and so on).¹⁰⁷ Even on the belief that the policies of unequal treatment espoused by certain religions are morally wrong, therefore, that fact alone is too coarse-grained to show that the advocates

¹⁰⁶ See *supra* Part III.B.

¹⁰⁷ I explain the difference between what is right and what one has a right to do in SMITH, MORAL RIGHTS, *supra* note 16, at 18–23; Smith, *Rights Conflicts*, *supra* note 16, at 141–58.

of these policies do not accord equal respect to the *rights* of others and, on that narrower and more legally salient basis, that they forfeit any demands for their own equal treatment. It is only further facts about the nature of their wrong (specifically, its bearing on others' rights) that would determine that. Thus the hypocrisy objection requires a more precise explanation of how the inequalities cited are salient to the rights-protecting function of a legal system. Without that, its criticism of the Equality Argument falls lame.

Moreover, suppose that some of the religious groups that seek religious exemptions do practice forms of unequal treatment that violate rights. That could be reason to deny religious exemptions to those groups.¹⁰⁸ Yet it would not justify the denial of all exemptions to any religions whatsoever. Such a conclusion would punish some for the sins of others.

In short, however much we might sympathize with those pointing out the equality-trampling practices of certain religions, their inconsistency on the principle of rights-equality is not a valid basis for rejecting the Equality Argument for exemptions *tout court*. It is reason, at most, to be careful in determining who should receive exemptions.

Another frequent critique of the Equality case for exemptions alleges that religious accommodation cannot be consistently applied because of difficulties with defining "religion."¹⁰⁹ New religions are minted every month. Or are they? What counts as a religion is a matter of dispute. And this, the critics charge, is the problem. Does Jedi-ism, whose acolytes believe they can manipulate "the Force" of *Star Wars* film mythology, qualify? Does the Church of All Worlds, a neo-pagan movement based on a Robert Heinlein novel? Or the Grey School of Wizardry, inspired by the Hogwarts in the Harry Potter novels? What about the belief system of the Yaohnanen tribe in the South Pacific who worship Britain's Prince Philip as a divine son of an ancient spirit?¹¹⁰ As you might expect, legal officials

¹⁰⁸ A few additional conditions would also be required, but those need not concern us here.

¹⁰⁹ While this objection also arises more frequently in popular and journalistic discussion of the issue, it figures into scholarly examination of the exact contours of religion. See AUDI, *supra* note 56, at 72–73; KOPPELMAN, *supra* note 11, at 42–45, 121–22, 128–30; LEITER, *supra* note 18, at 26–54; see also Davey, *supra* note 36; *How Europe Defines Religious Freedom*, *supra* note 56.

¹¹⁰ These examples are taken from *Top Five Eccentric Religions*, TELEGRAPH (May 12, 2011, 8:42 PM), <http://www.telegraph.co.uk/news/newstopics/howaboutthat/8510276/Top-5-eccentric-religions.html>. Christopher Gilbert reports that a school district excused a girl from an outdoor gym class because she was a practicing witch who believed herself obliged to avoid suntans. Christopher Gilbert, *Harry Potter and the Curse of the First Amendment: Esoteric Religion, the Public Schools and the Christian Backlash*, 198 EDUC. LAW REP. 399, 417–18 (2005). For discussion of both what qualifies as a religion and the implications for legal protection, which are naturally complicated when multi-

tend to interpret “religion” in ways that favor the more familiar, mainstream religions, but critics charge that these groups are the least in need of special protections.¹¹¹

More basically, even if our legal system does not systematically favor certain religions over others, some maintain that the concept of religion is simply too difficult to define for religious exemptions to be upheld in a consistent, even-handed manner. In practice, the legal system accommodates some religious demands, but far from all. And in that way, government is the hypocrite that treats some religions less well than others. Thus it cannot invoke equality to justify its granting of exemptions.

Here again, the argument is unconvincing. It is true that a legal system cannot treat religion justly if it lacks a firm grasp of what religion is. Is there good reason to believe that we cannot reach a sound understanding of religion, however? The sheer fact that people contest the concept does not show that a valid understanding is unattainable. Religion is a genuine phenomenon; the word refers to a certain kind of belief system (often with certain kinds of associated practices), and not others. Islam? Yes. Jogging? No. Mormonism? Yes. A gluten-free diet? No (notwithstanding the fervor of some). Other examples obviously pose harder questions: Scientology? Satanism? The Church of Cannabis?¹¹² Yet the exact contours of many concepts are contested—consider art, beauty, love, integrity, or the more legally potent ideals of liberty, rights, justice, or equality itself. This does not show that all reference to these phenomena is hopelessly subjectivist and thus legally inappropriate.¹¹³

In short, we have no good reason to conclude that “religion” defies objective understanding; thus, the contention that it must inescapably be employed in an inconsistent manner cannot underwrite the rejection of the Equality defense of exemptions. Indeed, that line of thinking would condemn far too much. In defiance of the First Amendment, it would dismiss all concern for the free exercise of religion and establishment of religion as incapable of objective interpretation and, correspondingly, of consistent application. For that matter, it would imply that the government

national companies seek to adhere to different nations’ differing criteria, see also *Faith in the Workplace*, *ECONOMIST* (April 12, 2014), <http://www.economist.com/news/business/21600694-managers-are-having-accommodate-workers-religious-beliefs-while-taking-care-expressing>; *How Europe Defines Religious Freedom*, *supra* note 56.

¹¹¹ EISGRUBER & SAGER, *supra* note 7, at 85.

¹¹² Davey, *supra* note 36.

¹¹³ For discussion of the distinctive character of religion, see AUDI, *supra* note 56, at 72–73; KOPPELMAN, *supra* note 11, at 42–45, 121–22, 128–30; LEITER, *supra* note 18, at 26–53.

should avoid taking stands on the numerous contested concepts that give the Constitution its character—rights, equality, property, tax, taking, and so on.

Since neither of these critiques of the Equality Argument for exemptions succeeds, let us probe to more foundational matters. While the need for consistent criteria is serious, the fundamental problem with religious exemptions lies not with their consistency in application, but with the relevance of religion.

To understand the demands of equality with regard to religious activity, we must remind ourselves of what the legal ideal of equal treatment properly demands. And in its essence, the answer is simple: equal application of the laws. What is required for a legal system to treat people equally in the ways that it should is its diligently applying the laws objectively, treating like cases in like ways, and employing the same governing standards for all. The Fourteenth Amendment's pledge of equal protection does not promise equal treatment in any more capacious sense. In fact, in order to equally *protect* individuals' rights, a legal system must *treat* different individuals differently, depending on how those individuals act in relation to the laws and to others' rights. The person who recklessly endangers his neighbor, for instance, should be treated differently by the legal system than the responsible, rights-respecting, law-abiding person who does not. Yet the murkier our grasp of what proper legal equality is, the more confused our understanding of the conditions under which it is violated—a confusion exploited by the Equality Argument for exemptions.

In actual practice, advocates of religious exemptions do not seek equal application or equal protection of the laws, but selective application and uneven enforcement, depending not on how a person stands in relation to the laws, but on the perceived sincerity of some of his beliefs. Which beliefs? Those that he regards as really important—and that legal officials approve of his attaching importance to. As Madison argued, however, the equality of citizens entails one man's having no more rights and no fewer rights than the next.¹¹⁴ Speaking of a Virginia bill that would have awarded state funds to “teachers of the Christian religion,” he observed that “[a]s the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists . . . to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all

¹¹⁴ MADISON, *supra* note 97, at para. 4.

others?”¹¹⁵ A little later, Madison continued, “[a] just Government . . . will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”¹¹⁶ The simple idea is that a legal system must treat adherents of different religions (and adherents of no religion) equally.

Some might object that this ignores the asymmetry imposed by the Establishment ban and the resulting disadvantage that exemptions are intended to remedy. As Sager and Eisgruber emphasize, it is the fact that religions are especially vulnerable that justifies their special accommodation, in order to ensure equality.¹¹⁷ Thus the question becomes: *are* religious believers vulnerable in ways that the government is responsible for preventing? Is religion unjustly burdened due to the bar on Establishment?

I think not. A few observations demonstrate why.

On a proper interpretation of the First Amendment’s Establishment Clause, what is disallowed is government favoring religiously motivated activities, its bestowing special assistance on the people engaged in them. For a government to refrain from doing that, however—from aiding religious activity on the grounds that it *is* religious—is not for it to set religion back; it does not assign it a worse position relative to non-religious activities. Just as I do not deprive a person of anything that is his when I fail to give him a gift, so a government does not impose a burden on religious citizens by refusing to positively further their enterprises.

Appeals on behalf of the vulnerable elicit natural sympathy. Yet when they are invoked to determine how the government’s coercive power may be used, it behooves us to be specific: religions are especially “vulnerable” in what ways? Vulnerable *to* what? And precisely what is the value that is allegedly imperiled? Is it something to which a person holds a right, such that it is the responsibility of the government to protect it? If not, then it warrants no special legal status.

Charges that laws impose unfair “burdens” on the religious tend to skew the debate in misleading directions, for “burdens” are not the proper

¹¹⁵ *Id.*

¹¹⁶ *Id.* at para. 8.

¹¹⁷ EISGRUBER & SAGER, *supra* note 7, at 59, 107.

yardstick of government action.¹¹⁸ Many laws pinch, in the sense that people chafe at their restrictions. When is a pinch an unjustified burden? The proper standard for assessing all legal restrictions is service to the government's mission—that is, whether the restrictions in question are necessary for the legal system to do its job.

The contention of unfair asymmetry depends on an inflated conception of the “free exercise” of religious belief. For the feeling of oppression does not constitute the violation of one's rightful free exercise. Correspondingly, it is not license to infringe on others' rights or to defy laws that legal officials have adopted on the grounds that those laws are its most effective means of protecting individual rights. Unfairness—in the relevant sense of inappropriately unequal legal treatment—is not created whenever a group of people feels oppressed by the obligation to obey certain laws. Nor is it created when people are obligated by law to act in ways that they otherwise, for religious reasons, would not. This is what it means to have a legal system.

Finally, to dismantle this contention of the government's unfair asymmetry in its treatment of the religious, it is important to recognize that a proper government does not treat non-religious activities in the way that it does *on the grounds* that they are non-religious. The question, “Is your activity religious or non-religious?” is simply not its filter for determining what actions to permit or to punish. What *is* the filter for a proper legal system is that system's authorizing function, namely, the protection of individual rights. And to this, religiosity as such is completely irrelevant.

What is true in the Equality Argument is that religious views will sometimes be excluded from government support. Creationism will not be taught in public school biology classes, for instance, while certain non-religious views will be. The decisive criterion is not these views' religious character, however. It is their status as knowledge. Properly, we select the curriculum in all subjects according to the most advanced knowledge in the field. If, by that test, particular religious theories fail and thus are excluded, so be it. If they pass that test and thus are included, so be it. The objective application of that test neither establishes religion nor hinders religion, either by design or by effect.¹¹⁹

¹¹⁸ Recall that the Religious Freedom Restoration Act invokes the notion of a “substantial burden” to help determine the propriety of exemptions and courts have frequently done the same, to explain their reasoning. 42 U.S.C. § 2000bb-1(a) (2012).

¹¹⁹ This is not to say that the application of the First Amendment's Establishment Clause has always been correct.

In the end, when you step back to think it through, the contention that religion is at a disadvantage because the legal system does not favor it is bizarre. It suggests that the speaker does not understand what it is to *favor*. Alternatively, it simply presupposes that religion should be favored, such that the absence of such privilege is deemed an unjust affront. But of course, that would beg the question by assuming the very thing that the First Amendment denies, namely, that the government should lavish legal advantages on religious citizens by virtue of their religion.

In short, the purported unfairness of the refusal to grant exemptions gains credence only if one misunderstands what proper legal equality is.

C. Critique of the Liberty Argument

Next, recall the Liberty Argument for religious exemptions.¹²⁰ Here, the contention is that a robust presumption of individual liberty works in favor of a person who seeks relief from a law based on his religious beliefs. If a government is truly committed to the presumption of liberty, then it always bears the burden of justifying its laws and justifying the refusal to grant exemptions to its laws.

The fatal defect with this reasoning is that it conflates two different kinds of presumptions—or more precisely, it puts the concept of a presumption into service to do two different things, not both of which are legitimate: to work as a check when enacting a law and to work as a check when applying a law. The Liberty Argument is correct that government should make no laws other than those that are necessary to protect individual rights. On that question, the presumption of liberty rests properly on the side of the individual. If government also granted exemptions from the laws that it has enacted out of deference to the presumption of individual liberty, however, it would defeat the point of making laws.

To see this, bear in mind that a presumption is simply that—a presumption. It is not a definitive, irrefutable conclusion about the proper relationship between government power and individual freedom. If the government concludes, after careful, logical reflection and having duly respected the presumption in favor of individual liberty, that a particular law is necessary and proper for it to fulfill its function yet nonetheless presumes that no one is obligated to obey that law and that anyone who requests permission to disobey should be presumed to have that right, what

¹²⁰ See *supra* Part III.C.

would be the point of having laws? Such a stance—which is the essence of what the Liberty Argument endorses—would drain the law of its power. It would deprive laws of their *lawful* character and allow laws to be treated as if they had not been made.

Lest one object that I have overstated the libertarian position, let me clarify. Defenders of religious exemptions do not typically endorse the actual granting of exemptions simply to *anyone* who requests permission to disobey. Exemptions advocates usually admit that requested exemptions should be denied in some cases.¹²¹ Insofar as the Liberty Argument turns on the placement of presumptions, however, it does tilt in favor of those who seek release from a law, essentially, simply because they do. For on its view, the presumption of liberty must always rest in favor of those who want “out” from a law, regardless of a government having already responsibly accounted for that presumption when enacting the relevant law. Further, the conditions that the Liberty Argument imposes concerning when an exemption should and should not be granted—namely, the religious character of the petitioner’s motivation—do not alter the core of its reasoning, which holds that the sheer assertion of such a demand is ground for a presumption of the legitimacy of that demand and of the person’s disobeying the law.

What is ultimately most important is this: if a government needs to make a particular law, it needs to enforce it. Government should adopt all of its laws scrupulously, constructing laws with full respect for the presumption of individual liberty. Once it has done that, however, its laws must be respected *as laws*—as rules that the government is not only justified in enforcing, but that it is obligated to enforce, in order to fulfill its mission. For it to do less would betray its responsibilities.¹²²

The Liberty Argument’s mistake, basically, is to maintain that the presumption of liberty should guide us both before *and after* a law is made. But one cannot insist on the presumption of liberty for the construction of a nation’s laws and then, after the laws are adopted, insist that the individual retains that presumption as a personal “out” that justifies his breach of those laws. A government’s adoption of a law that defies an individual’s preference is evidence that the government has concluded that the

¹²¹ See, e.g., EISGRUBER & SAGER, *supra* note 7, at 87; LEITER, *supra* note 18, at 4; Greene, *Three Theories*, *supra* note 61, at 991–92. This idea is also reflected in RFRA. See *supra* note 118.

¹²² Proper enforcement of law must satisfy certain conditions, of course. What is important is that these conditions be grounded in the government’s ability to effectively fulfill its function, rather than in any extraneous considerations.

presumption has been respected in this particular case and its burdens have been logically satisfied—in other words, that it has sufficiently strong reasons that justify this law, despite its initial presumption of liberty and its logical investigation of what, all things considered, is the proper course for the legal system to take. The presumption of individual liberty cannot be a permanent veto power in the pocket of individual citizens. Nor can it be a presumption of license, entitling a person to pick and choose which laws he will be answerable to.

The appeal of the Liberty Argument for exemptions, I think, stems in part from its aura of humility. If a legal system is truly committed to individuals' liberty, it seems to ask, then given that the government might be mistaken in its adoption of a particular restriction, shouldn't it grant a person release from that restriction?

While the premise of our fallibility is certainly sound, the conclusion does not follow. *Of course* we should attend arguments contending that errors were made in the government's rationale for a particular law. Nothing that I have argued denies that. Nor would I minimize the imperative to remain open to reason and, thus, to correction of government policies. The belief that the law should not be enforced against certain individuals on the premise that "those people want out and they feel very strongly about it; they *really* want out" is not the triumph of reason, however. It holds the legal system hostage to passion. And it represents the illogical demand that the legal system prove a negative: prove that it is not mistaken. It thus misapplies the burden of proof.

In the adoption of laws, a government dedicated to the protection of individual rights should proceed on the presumption of liberty, as Greene emphasizes.¹²³ Before, during, and after that adoption, the government should be open to the possibility of its having erred and the corresponding need to correct its course. The rational response to this recognition of fallibility, however, is not to treat all laws as advisory rather than obligatory. To think that it would keep the burden on the government even after that burden has been met. It would assume that the government could never meet the burden of justifying a law. Rather, for as long as any skeptic denies a law's legitimacy (at least in relation to *his* being made to comply), the legal system must yield. Even after the government has satisfied the logical burden of showing that the laws it enacts are objectively valid, in other words, this position demands: "Okay, *now* show

¹²³ Greene, *Three Theories*, *supra* note 61, at 992.

us that we should *enforce* the law. And if you don't have a separate proof of that, then you shouldn't enforce it against those who wish to violate it."

In fact, a nation's laws, once they have been responsibly adopted in accord with objective standards and all the appropriate presumptions, create a new presumption, namely, that they are binding. Laws are to be strictly enforced unless, in extraordinary cases, the government has compelling reason to permit a particular person's non-compliance. (A "compelling" reason would have to be grounded in the government's ability to function as it should. I will elaborate in Part V.) The basic idea is that, once enacted, laws enjoy the benefit of the doubt and the presumption of legitimacy. Anything less would undermine the legal system's ability to perform its work.

A legal regime pocked with exemptions bespeaks a fundamental misconception of the proper relationship between government and the governed. Having a legal system means that *it* sets the rules, rather than individual citizens on an *ad hoc* basis, however sincere their disagreements with government policy might be. Correspondingly, an objective legal system does not require permission from an individual's conscience before it may rightfully apply the law to that individual. To think otherwise is effectively to affirm a Do-It-Yourself government, which is to affirm no genuine government, and no rule of law, at all.¹²⁴

D. Critique of the Transcendent Value / Personal Identity Argument

Finally, let us consider the Personal Identity Argument for exemptions.¹²⁵ Here, the appeal is to the unique, life-framing role that religion plays in the lives of many. Religious conviction can be integral to a person's sense of identity and of his place in the world, the most profound organizing principle of his life. As such, this argument holds, the obligation to act in accordance with one's religious convictions should supersede all others, liberating a person, at least at times, from the customary obligation to obey the law.

While the most familiar objections to this argument raise some valid points, they are comparatively superficial. Some critics are wary of insincere attempts to skirt the law's strictures.¹²⁶ Religious belief is

¹²⁴ I suspect that some advocates of the Liberty Argument are propelled by a deeper skepticism about the legitimacy of government itself.

¹²⁵ See *supra* Part III.D.

¹²⁶ See LEITER, *supra* note 18, 94–100; NUSSBAUM, *supra* note 61, at 164–65.

unverifiable, and avowals of it are thus prone to abuse, they claim, too likely to be exploited for unjustified advantage. Others believe that while conscientious objection can be perfectly sincere, its boundaries are too fluid to determine the application of law. What counts as “conscience?” Still others note that the deliverances of conscience are not exclusively admirable.¹²⁷ A conscience can be sincere but vicious, prescribing racism, sexism, or violence. The appeal of the Personal Identity Argument depends heavily on the differences in individuals’ beliefs being relatively benign, but we should not overlook the wrongs that deference to religion would sometimes allow.¹²⁸

While all of these are fair criticisms, the more fundamental failing of the Personal Identity Argument is that its concerns are simply not germane to a legal system’s function and, consequently, to the standards that should guide its use of power. Exemptions premised on this reasoning would elevate conscience over law and thereby sabotage the legal system’s ability to do its job. Even if we supposed that assertions of conscience were uniformly sincere and that we could constrain the concept to firm, objective boundaries, what a citizen’s conscience decrees is simply irrelevant to the manner in which the government should treat him. Properly, a government is to work to identify those laws that are necessary to fill its function and, having done that, apply its laws in an evenhanded manner, heeding only those differences between people that are salient *from the point of view* of that function. However noble the exercise of conscience and however precious a person’s conclusions about life’s deepest meaning might be to him, that value does not alter the type of treatment that he should receive from the legal system. As we noted earlier, a government could hardly safeguard individual rights if it had to engage in rounds of *Mother, May I?*, obtaining each person’s permission before applying its laws.¹²⁹

Think again of the First Amendment. The First Amendment was not designed to exalt conscience. Rather, it announces that the government will not treat individuals differently on the basis of their beliefs.¹³⁰ Its point is that personal beliefs *don’t matter* to how a legal system should treat a person. A person may hold and may act on whatever beliefs he chooses,

¹²⁷ See LEITER, *supra* note 18, 94–100; NUSSBAUM, *supra* note 61, at 164–74.

¹²⁸ LEITER, *supra* note 18, at 36–37.

¹²⁹ See *supra* p. 55.

¹³⁰ U.S. CONST. amend. I.

provided that he respects others' rights. As long as a person does that, the legal system does not give a damn what he thinks.

On reflection, the contention that people should be exempted from laws "on the basis of the spiritual foundations of their deep commitments and important projects"¹³¹ is completely unfounded. The foundations of a person's beliefs are utterly beyond the scope of a government's legitimate concern. The sources and personal significance of a person's views, like those views themselves, are not salient to how a legal system should treat him. What *is* is his behavior insofar as it affects others' rights.

1. What about secular conscience?

From this, we should be able to appreciate the problem with another common line of reasoning concerning the Personal Identity defense of exemptions. Many critics have charged that exemptions unfairly favor religion without acknowledging that secular convictions can play just as vital a role in people's lives. Thus, this camp contends, exemptions should be extended to all claims of conscience, secular as well as religious.¹³²

Here once again, a true premise is taken to support an unwarranted conclusion. While it is true that a legal system has no logical grounds for treating those people guided by religious beliefs more favorably than those guided by non-religious beliefs, this misses the deeper truth that a proper legal system has no logical grounds for treating people guided by any type of beliefs more leniently than those who are not. The reasoning retains the erroneous notion that personal conviction should override the law.

Suppose that I have no conscience—no particular beliefs, no steady convictions, no world-view that matters to me. Should I have less legal freedom than the Muslim or Mormon next door? Or than the principled atheist who is fiercely committed to some life-framing credo, perhaps involving a commitment to pacifism or socialism or the environment? No. Even those devoid of conscience are entitled to intellectual freedom.¹³³ The root problem with religious exemptions is not the denial of exemptions to

¹³¹ EISGRUBER & SAGER, *supra* note 7, at 95.

¹³² See, e.g., DWORKIN, *supra* note 113, at 110–116; EISGRUBER & SAGER, *supra* note 7, at 52–53, 100–04, 113–15; NEUBORNE, *supra* note 25, at 134; NUSSBAUM, *supra* note 59, at 19–20, 164–74, 226; Schwartzman, *supra* note 62, at 1377–1403, 1427. *But see* KOPPELMAN, *supra* note 11, at 131–42.

¹³³ Reading Nussbaum, it sometimes sounds as if philosophy majors should enjoy more rights because they tend to be more thoughtful about deep, "meaning of life" questions. See NUSSBAUM, *supra* note 61, at 164–74 (describing conscience as "the faculty with which each person searches for the ultimate meaning of life" and of certain lesser affections as "just too silly to count").

some people; it is the granting of exemptions to *anyone*. Conscience, whether religious or secular, is not a “get-out-of-law-free” card. To treat it as if it were would subjectivize and thereby cripple a proper legal system.

Beneath its aura of judicious evenhandedness, then, the proposal to extend the conscience waiver would exacerbate the problem with exemptions, rather than eliminate it. To treat a greater number of people as special, by awarding them exemptions, is not the way to treat all people as equal.

So: *Should* a man be forced to choose between God and Caesar? Yes—if his god directs him to act in ways that contravene the laws that an objective legal system deems necessary to safeguard individual rights. A person may still choose to honor his god rather than Caesar, of course, but he must then accept the penalties, since a responsible legal system must enforce its laws. The fact that some people cling to certain beliefs and practices as all-important does not make them so. More precisely: those beliefs might be all-important *in the eyes of those people*; they are not all-important to a proper legal system. For it does not make those people’s ability to lead their lives according to those precepts more important *to the government* than the fulfillment of its singular mission.

2. *Shuffling the cost of exemptions*

Let me address a different line of defense of the Personal Identity Argument. Some advocates of religious exemptions resist charges of favoritism and damage to the legal system’s efficacy by arguing that when the provision of an exemption creates burdens on others in society (by requiring some employees to work inconvenient hours in order to accommodate religious employees’ Sabbath, for instance, or by making those who are not philosophically opposed to a war do its dirty work), inequity can be avoided by imposing compensating burdens on the exempted, to even things out.¹³⁴ Believers should be required to “contribute to the nation in other ways through alternative service,” Neuborne contends.¹³⁵ Eisgruber and Sager agree that the religious “must share fairly in the burdens and limitations that go along with membership in organized

¹³⁴ This defense of religious accommodations is not unique to defenders of the Personal Identity Argument.

¹³⁵ NEUBORNE, *supra* note 25, at 137; *see also id.* at 135–37.

society.”¹³⁶ We can still have everyone do their fair share, in other words, and no one will suffer disproportionately.

Here again, once we scratch the surface of fair-mindedness, we find a deeply confused conception of law. For this model implies that we may have laws with which compliance is not especially critical to the effective protection of individual rights. Only that premise would allow alternatives to compliance to be seen as equally satisfactory (such as a few hours’ service at a soup kitchen or mentoring inner-city children). It also suggests that laws come in differing strengths: *some laws really should be respected; others, not so much*. This completely distorts the role of government. That role is not: to protect individual rights and to do a handful of other nice things.

In the private sphere, buy-out schemes offering alternative sets of costs and benefits can be perfectly legitimate, such as when an employer wishes to promote early retirement by offering employees attractive terms. Exemptions from legal obligations allegedly justified by the imposition of compensating “burdens,” however, represent a buy-out *of law*. This is not legitimate. By the only appropriate standard for laws’ adoption and enforcement—namely, the mission for which the government holds its coercive power—all laws should be adopted and subsequently enforced on the single basis of their necessity in service to the protection of individual rights. Anything that makes it more difficult for the legal system to perform that function as well as it possibly can imposes a “burden” on everyone in that society—on all the intended beneficiaries of the government’s protection. To relax some citizens’ obligation to respect laws that are enacted as necessary for the legal system to fulfill its function is to enfeeble the protection of all citizens’ rights. That is a burden that no one should be made to suffer and that no objective legal system may countenance.¹³⁷

¹³⁶ EISGRUBER & SAGER, *supra* note 7, at 87. Leiter, who is generally hostile to exemptions, would allow exemptions that do not shift burdens or risks onto others. LEITER, *supra* note 18, at 4.

¹³⁷ More pointed questions arise for particular advocates of this burden-shifting fix. Neuborne, for instance, holds that draft resisters and religious institutions that oppose Affordable Care Act regulations should be offered means of performing “alternative service,” while people who refuse to serve gays or blacks should not be. NEUBORNE, *supra* note 25, at 137–38. On what basis should the government determine which requested exemptions should be granted on the condition of paying “alternative duties,” and which should not? He does not say. Yet the answer is important to ensuring the very equality of treatment he is invoking to stave off charges of unfair favoritism. Eisgruber and Sager observe that if religious people were liberated from those laws that did not advance a compelling state interest, they would be free to violate a host of laws, citing examples that range from environmental restrictions to anti-discrimination mandates. EISGRUBER & SAGER, *supra* note 7, at 83. The less

The upshot is, if it is true of a particular law that the substitution of activities other than compliance would be equally acceptable (by the standard of rights-protection), then that law has no business being a law. And if it is not true that alternative activities would be equally acceptable, then a government has no business granting exemptions from that law.

In the end, the Personal Identity Argument is no stronger a basis for religious exemptions than the others. At the heart of its reasoning is a red herring. The subjective value of a person's beliefs to him, however profound and however heartfelt, does not trump the objective value to all rights-holders of objective law, objectively enforced. My basic contention thus remains intact: while religious freedom is warranted for people of all creeds and consciences, exemptions are warranted for none.

V. IS DIFFERENTIAL APPLICATION OF LAWS *EVER* JUSTIFIED?

Before concluding that religious exemptions must be rejected, we should consider one final avenue of defense. Even if many of my points are sound, one might think, a total rejection of exemptions would be too sweeping. Surely it makes sense for the legal system to grant some exceptions, as it regularly does for non-religious reasons. Legal conventions routinely assign minors, felons, and the mentally impaired, for instance, different sets of rights and responsibilities, and no one bats an eyelash. (Children may not vote; the severely mentally impaired may not make binding contracts.) Would I dispute the legitimacy of these types of differential legal treatment? If not, then why refuse exemptions when religious people happen to be the beneficiaries? Why balk at accommodating the Sikh policeman who wants to wear a beard or the Jewish basketball player who wants to wear a yarmulke?¹³⁸ If differential treatment *is* sometimes justified, why deny it to the religious?¹³⁹

important a particular legal restriction itself is, of course, the more reasonable it will seem to allow a person to break the law. Yet far from strengthening the case for exemptions, this simply indicts those laws, inasmuch as they are not essential to the authorized function of government. It is reason to change those laws rather than to embrace a two-tiered legal system that holds: some laws, compliance mandatory; some laws, compliance suggested.

¹³⁸ EISGRUBER & SAGER, *supra* note 7, at 88; Tara Bahrapour, *DC Police to Allow Sikh Officers to Wear Beards, Religious Items on Job*, WASH. POST (May 16, 2012), https://www.washingtonpost.com/local/dc-police-to-allow-sikh-officers-to-wear-beards-religious-items-on-job/2012/05/16/gIQAInweUU_story.html.

¹³⁹ While this reasoning draws on similar elements to those used in the Equality Argument, it is distinct. The Equality Argument maintains that the government treats religion unequally if it fails to grant religious exemptions. This argument maintains that the government treats religion unfairly if,

I would agree that differential application of laws can sometimes be warranted, as in the cases noted. Along similar lines, the government can be justified in taking physical health into account in its treatment of prisoners or military conscripts (by excusing a person from mandated service if he suffers from a physical condition that would make such service particularly hazardous to his health, for instance). Moreover, it is legitimate for the government to extend deadlines or reduce penalties for a person whose ability to comply with a legal requirement was impeded by certain major life events (a death in the family, the impending birth of a child) or by consequential events beyond his control (such as a hurricane, flood, or public transportation strike). Exceptions can also be justified by the government's own errors. If the IRS issues incorrect instruction to taxpayers or the FDA provides erroneous explanations of its regulations to manufacturers, the affected parties' compliance requirements should be adjusted to compensate for their having been misled. The problem with granting similar exceptions on grounds of religion, however, is that a person's faith does not change the salient relationship in which he stands to rules that are designed to govern him *qua* rights-holder. Whatever the role that religion might play in a particular person's life, it fails to entail that the legal system should treat the person differently from all of the country's other rights-holders who lead their lives without such beliefs.

What is useful about this line of exemptions-defense is that it prompts us to consider the question of when the specialized application of law might ever be appropriate. To answer, a few closely connected questions are most salient: What would be the exact reasons for the government treating the selected cases differently? More specifically, what are the goods that such differential treatment would allegedly provide and the harms that it would avert? Further, what is it that creates the apparent need for exceptional treatment? Is it a defect in the law? Is it a defect resulting from peculiarities that would arise if the law were applied in the customary ways in a particular case (as when a government agency has provided erroneous information)? Is it some characteristic of the people who purportedly should be exempted? A characteristic that they choose or something out of their control? And, at the base of all of these: which of

more narrowly, it extends accommodations to others, for non-religious reasons, but denies them to the religious.

these should matter? Which are the types that would warrant special treatment?

The principled, objective way to answer these questions is by reference to the function of the legal system. As I have argued throughout, that mandate—to protect individual rights—is the sole source of the legal system’s authority and thus the standard for determining the propriety of all its actions, including its policies on exceptions. Thus the paramount question when assessing demands for exceptions is: to what is the person entitled by rights? And what is required for the government to do the best job possible to protect its citizens’ rights? Would the usual application of this law to this person, in these circumstances, interfere with his rights, rather than protect them? Would it impede the legal system’s broader efficacy in serving its mission?

Notice that these considerations explain the differential legal treatment that *is* sometimes justified. The legal system treats the mentally impaired differently from the mentally competent, for instance, because the mentally impaired are not able to exercise rights or assume responsibility in the usual ways.¹⁴⁰ While this obviously varies with different impairments, some people cannot be deterred by penalties that would deter others, and some people cannot be justly punished by penalties that would justly punish others who breached the same laws. Such individuals should therefore be treated differently.

Similarly, the legal system recognizes that minors lack the capacity to understand the ramifications of certain alternatives and thus to make responsible decisions; accordingly, they should be subject to different rules than adults. The rationale for denying certain rights to felons is that their criminal activity forfeits those rights.¹⁴¹ Regardless of one’s opinion of this rationale, the immediate point is simply that it is a belief concerning rights that explains the legal system’s treating felons differently. Beliefs about rights also explain why parental discretion in the upbringing of children is not unlimited. While the legal system permits some degree of discretion, a parent does not enjoy legal freedom to abuse a child or withhold critical medical care.¹⁴²

¹⁴⁰ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴¹ Christopher Uggen et al., *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCI. 307, 309–10 (2005)

¹⁴² The rationales for each of these policies could obviously be stated in finer detail, but these characterizations should suffice for our purposes.

What about exceptions granted to account for government mistakes, acts of nature, or physical illness? In these cases, to proceed with the usual application of the law would impose unreasonably high costs of compliance on the relevant individuals. “Unreasonable” by what standard? By the standard of the government’s mission, of what its rules are designed to do. It would not advance the effective provision of rights-protection for a government to insist that people abide by its rules when doing so would impose an extraordinary toll (or risk) on their safety or well-being—as it would if a person were required to comply with conflicting instructions about what the law commands (thanks to a government agency’s error) or if he were required to comply with a government’s requirement to appear in court despite the blizzard making travel hazardous on the appointed day. In more colloquial terms: it is one thing to grant an exception in response to an out-of-the-ordinary situation on a one-time-only basis—*for reasons rooted in the government’s authorizing mission*—and it is another to issue wholesale permissions for large swaths of the population to defy law on an ongoing basis when that basis does not stem from the government’s function.¹⁴³

How, then, would exemptions granted for religious belief fare, if held to this standard? Since the proper application of law should be context-sensitive, an unusual application of law must be based on an unusual situation—more specifically, one that is unusual in relevant respects, that is, in ways that matter to the proper and effective functioning of the legal system. What a particular person happens to believe or how much he cares about what he believes, however, do not. For these make no difference to the rights that he possesses or that others possess or to the efficacy of the legal rules designed to safeguard those rights. The purpose of government is not to ensure the comfort with which a given person is able to act on the things that he believes. If acting on his beliefs would violate laws that are necessary for the government to perform its job, he should not be free to act on them any more than the conscientious racist should be free to infringe on others’ rights. Lynching blacks or beating women should not be

¹⁴³ Here again, full identification of the appropriate conditions for exceptions depends on deeper premises concerning the mission and authority of government. While the legal system’s proximate purpose is to secure individuals’ rights to freedom, its reason for doing so – the indispensable value of freedom to a person’s well-being – provides the context for understanding proper uses of legal coercion. For an explanation of the rationale for rights, see SMITH, *JUDICIAL REVIEW*, *supra* note 12, at 88–111; SMITH, *MORAL RIGHTS*, *supra* note 16, at 31–59.

legally permissible for those who sincerely and deeply believe in these practices. Government *is* to work to prevent infringements of believers' rights, but it is not responsible to do any more than that, such as to clear away the myriad factors that might make it uncomfortable for a given person to conform to his beliefs.

Still, one might press, what if an otherwise innocuous government policy (concerning the dress code for government personnel, for instance, or the meals served to members of the armed forces, or the designation of a public election day) inadvertently imposes hardships on a segment of citizens who share a certain religious faith that it does not impose on others? Voting on a Saturday would require Orthodox Jews to violate strictures of their Sabbath; Muslim soldiers served pork would be compelled to violate the strictures of their faith (or go hungry). In these cases, basic fairness seems to call for accommodations so that the government avoids imposing hardships on select religious sub-groups.

Obviously, the government should not be indifferent to the impact of its policies on any of its citizens. What this reasoning actually highlights, however, is the need to *adopt* all policies carefully, so as to avoid imposing any unjust harms. We need to be equally careful in determining what would constitute such unjust harms, however. The pivotal question, as our earlier discussion made plain, is whether a government restriction would be unfair *from the proper perspective*—that is, relative to the appropriate concerns of the legal system. Would either the law in question or its enforcement in the usual ways violate some individuals' rights? Would it weaken the government's ability to provide protection of all citizens' rights as effectively as possible? If so, differential application would be called for. If not, it would not be.¹⁴⁴ Note that a military force from which otherwise amply qualified Muslims self-excluded due to the dietary conventions would be, for a government dedicated to the optimal performance of its work, a self-defeating proposition. Indifference to the effects of its policies on religious believers would be counter-productive. If and when a government can adopt alternative arrangements that would in no way compromise its fulfillment of its mission and would actually better advance them, it should do so.

Lest this seem a concession to exemptions, let me underscore that the relevant rationale remains the same, single, objective standard that I have

¹⁴⁴ If the law itself would violate rights or fail to responsibly protect them, it should be changed.

embraced throughout, namely, fulfillment of the legal system's rights-protecting function. Far from surrendering to alien goals and injecting rival standards, in other words, by recognizing that insistence on same treatment for sameness' sake serves no one, this policy maintains the integrity of a proper legal system. This should become clearer as I proceed.

To appreciate the stakes of granting purely religion-based exemptions, consider the question of weapons in public schools. If a jurisdiction has, responsibly, determined that the presence of weapons on school grounds poses a genuine danger of the type that it is charged to guard against and has thus adopted a ban on certain weapons (including knives of a particular size), then the fact that bearing a knife of the kind that is prohibited is a meaningful part of a particular student's religious identity (as carrying a *kirpan* is to male Sikhs of a certain age) is irrelevant. To allow the weapon in school on the grounds of the student's sincerity, as the Canadian Supreme Court did in a 2006 case, reasoning that it was permissible as long as the student's "personal and subjective belief in the religious significance of the kirpan is sincere," defies the government's rights-protecting responsibility.¹⁴⁵

Knives in schools either do or do not pose a threat of the kind and degree that warrants a government ban. A government must adopt its laws accordingly. If it concludes that they do pose such a threat (presumably, in part, because the good intentions of a weapon's owner do not preclude its being misplaced, left unlocked, and picked up by someone using it for sinister purposes), then everyone should be held to that ban, regardless of their beliefs. If the government concludes that they do not pose such a threat, then no one should be subjected, and religious beliefs are again immaterial. The fact that the reason for carrying a weapon is religious makes that weapon no less lethal.

What is crucial to recognize is that, to the extent that differential application of law is ever justified, it is not religiosity *per se* that warrants that differential application. Differential treatment could only be warranted by the anticipated effects of a policy on the government's overall ability to successfully carry out its mission. Inevitably, government policies impose disparate effects on different citizens. How much a particular traffic fine pinches or jury service inconveniences depends on a given individual's

¹⁴⁵ LEITER, *supra* note 18, at 65 (quoting *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256 (Can.)).

income, obligations, interests, and so on. As long as a law is objectively justified to begin with and is objectively applied, the endless variability in the degrees to which different individuals chafe at them is not the concern of the legal system. The legal system *should* tailor its policies to achieve their primary aim, alert to all factors that might affect their doing so (including the self-exclusion of capable would-be soldiers due to a meal policy). Yet the fact that a valid policy rubs against a person's love of god should register no more with the legal system than the fact that it rubs against his love of golf. This is not to trivialize the place of religion in some people's lives. It is simply to emphasize the irrelevance of that to the purview of a proper legal system.

While the impetus for the question of differential treatment is understandable, then, given that the legal system does not treat all persons in absolutely identical ways, it is crucial to recognize the significant difference between those classes of people that the legal system properly treats differently from others (minors, felons, et. al.) and people who seek special accommodation because of their religious beliefs. Members of the properly legally exceptional categories are distinguished not by their chosen beliefs, but by the relationship in which they stand to the legal system's ability to fulfill its function. For the legal system to punish those who are not fully responsible for their actions (such as minors or the mentally impaired) or to punish those who cannot comply for reasons beyond their control (such as a hurricane or severe illness) would not advance its fundamental mission. For the legal system to accord the same rights to those who have shown themselves to be actively contemptuous of others' rights (felons) would paralyze its capacity to protect individual rights. When it comes to demands for relaxed requirements on the basis of religion, however, no such impact on the legal system's ability to carry out its mission is at issue.

Contrary to the familiar framing, then, the propriety of exemptions is not a matter of "balancing" incommensurable goods. It is settled by reference to the purpose of government. What we need to know is: Would granting this accommodation in this particular way impair the legal system's ability to do its job? Would it put some people at heightened risk of the very rights-infringements that the government is to protect us from? By the same token, would failing to grant this accommodation hamper the government's fulfilling its charge? Essentially, a legal system should grant an exception if and only if failing to do so would work against its efficacy in fulfilling its mission. Remember: a legal system enjoys authority in order to achieve a specific goal, the security of individual rights. It would

be a misuse of that authority for the legal system to enforce its laws in deference to any considerations other than those that are essential to its fulfilling that role. Given its circumscribed mandate, the government has no reason to care about other aspects of individuals' lives. Accordingly, differential application of laws can be justified only for reasons that stem directly from the government's ability to do its job.

VI. CONCLUSION

The appeal of religious exemptions is not difficult to understand. In part, it reflects respect for the people involved. Despite its periodic inspiration of violence and repression, religion continues to enjoy an aura of wholesomeness. Thus, if some well-meaning people seek relief from legal strictures for religious reasons, many assume, we should be sympathetically disposed. The negligible consequences of certain exemptions also seem reason to grant them. What's the great harm of allowing peyote as part of a religious ritual or excusing a policeman from a grooming code?

Yet another basis of support lies in the belief that certain laws are overly intrusive. When the stakes are not negligible, in other words, and when a person regards the legal system as oppressive, it is natural to cheer on anyone who resists. Many non-religious people sympathized with the owners of *Hobby Lobby*, for example, on the grounds that *no* business should be compelled to provide employee benefits at the dictate of the federal government, regardless of whether it is owned by theists.

Their curb appeal notwithstanding, I hope to have shown that the notion of religious exemptions is profoundly misguided—confused in concept and destructive in practice to the objective Rule of Law. A legal system holds the authority to coerce compliance with its rules strictly as a means of accomplishing a specific mission: the protection of individual rights. That is its reason for being. Accordingly, this singular function is the ultimate standard by which to measure the propriety of all of a legal system's actions and policies. Because a person's religion does not alter his rights and does not alter his responsibilities to others' rights, however, it should have no bearing on how the legal system applies its rules. Belief in a god

gives a person no more rights than the atheist next door. Correspondingly, it warrants no “accommodation” from the legal system.¹⁴⁶

Religious exemptions issue conflicting instructions to the administrators of law—instructions which have *no good way of being settled* (that is, no principled way that is grounded in the function and authority of government). Rather, the premise behind such exemptions is that something other than that is more important—at least sometimes. Effectively, exemptions erect a competing sovereign. Yet when a legal official’s charge is so divided—when the protection of rights and rights-protecting rules points him to one course of action and allegiance to religious orthodoxy points to an opposing course of action—what is he to do? The legal system is now necessarily subjectivist, for he can only do as he, for whatever personal reasons might move him, thinks best. (“Personal” reasons rather than system-originated reasons.)

The resulting damage is severe. On one level, when people observe laws being applied selectively, their respect for the legal system suffers. *Whose claims count?* they will wonder, and *Which religions qualify?* The natural conclusion that *It’s all a game* diminishes their sense of obligation to abide by the law. Indeed, the reason why they should has itself been thrown into fog: is the legal system working to protect individual rights? Or is it serving some other agenda?

The corrosion penetrates beyond public perception, however. Such Janus-faced instruction—*Do not discriminate on the basis of sex, unless you are a Catholic organization; Do not carry weapons, unless you are a Sikh; Do not disobey the law, unless it happens to be a law that we do not actually care about very much*—fractures the legal system’s integrity and cripples its ability to fulfill its function. For when a legal system bends its rules to cater to consciences, it is not catering to rights. It is no longer serving its mandate. When the enforcement of law is customized to fit different citizens differently like carefully tailored suits, we no longer have the Rule of Law and we no longer gain the protection that it provides. A bespoke legal system, tailored to accommodate endless individuals’ diverging beliefs (his about weapons, hers about measles vaccinations, her sister’s about military campaigns, and so on) is not an effective legal system. When the law’s restrictions and permissions are so customized, a person’s rights are not knowable, and his rights are not secure.

¹⁴⁶ Pinning the word “religious” before the term “liberty” neither widens the scope of an individual’s rights nor shrinks the legal system’s sphere of responsibility to others’ rights.

In the end, we have seen, none of the major lines of defense of religious exemptions withstands scrutiny. The only way to determine whether special legal treatment is ever warranted is by reference to the function for which the legal system holds its coercive power. When special treatment *is* warranted, it is so only because it is instrumental to the system's fulfilling its function. For a government to relax restrictions for the sake of anything other than that is an abuse of its authority and a betrayal of its responsibility to individual rights.¹⁴⁷

¹⁴⁷ For helpful discussion of these issues, thanks to Tom Bowden, Dana Berliner, Evan Bernick, Onkar Ghate, Andrew Ingram, Elan Journo, Sam Krauss, Al Martinich, Matt Miller, Arif Panju, Greg Salmieri, Paul Sherman, and Steve Simpson. For excellent research assistance, I am indebted to Sam Krauss, Simone Gubler, Zach Blaesi, and Megan Hyska.