

Damned If You Do, Damned If You Don't:  
Navigating Exemptions in Civil Society

by

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# INTRODUCTION

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On December 18, 2015, a man named Christopher Avino received a letter from the Georgia Department of Driver Services informing him that he would need to retake his driver’s license photograph. In his prior picture, he had, as prescribed by his religion, been wearing a metal colander on his head.

Avino, who has since moved to Nevada and received a driver’s license in which he is wearing a colander, is a Pastafarian—someone who belongs to the Church of the Flying Spaghetti Monster. After having “existed in secrecy for hundreds of years,” this religion “came into the mainstream” in 2005 when Bobby Henderson wrote an open letter to the Kansas State Board of Education in response to reports that the Board was considering having its schools teach both evolution and Creationism (Henderson 2005). Henderson, in his letter, insisted that if Intelligent Design were to be taught in schools, then students should hear a variety of explanations for life and the universe. He told the Kansas Board that the “alternative approach” presented by Pastafarianism, under which the universe was created by the Flying Spaghetti Monster, ought to be taught in schools as well. He concludes his letter by saying:

I think we can all look forward to the time when these three theories are given equal time in our science classrooms across the country, and eventually the world; One third time for Intelligent Design, one third time for Flying Spaghetti Monsterism (Pastafarianism), and one third time for logical conjecture based on overwhelming observable evidence. (Henderson 2005)

Since then, Pastafarianism has gained tens of thousands of followers, as evidenced by the membership of their several Facebook groups. The number of requests for license photos with colanders as religious headgear has risen in tandem.

For people accustomed to Western religious tradition, this situation sounds absurd—like an anomaly or a joke. However, the issue of whether Pastafarians should be exempt from bans on headwear in driver’s license photos exemplifies the key issues at stake when society determines under what circumstances to grant exemptions.

First, it raises the question of whether there should be exemptions from laws at all, especially from laws that apply to everyone and serve a clear purpose. Second, if the legislature has determined that there can be exemptions for wearers of religious headgear, on what grounds does it limit that privilege to people with religious motives? A court or legislature analyzing this Pastafarian exemption scenario also must consider a number of other specific factors. How much of a burden is it on Pastafarians for them to not wear their colanders? How central is the practice of wearing of colanders to Pastafarian beliefs? How much harm does it cause to the state or to others if Pastafarians are permitted to wear colanders in their license photos? And does it matter whether Pastafarianism is actually a “real” religion?

In some ways, this last question is the stickiest, but the thought behind it also underlies many of the debates surrounding exemptions.<sup>1</sup> First, addressing this question throws into relief the fact that laws are generally constructed with deference

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<sup>1</sup> The terms “exemption” and “accommodation” mean slightly different things. Exemptions are freedom from laws that generally apply to everyone, and are a subset of accommodations. While all religious exemptions represent an accommodation of religious beliefs, not all religious accommodations are exemptions from pre-existing laws. An example of an accommodation that is not an exemption is the provision of flexible dietary options in prison—there is no law requiring prisoners to eat non-kosher food, and so providing a kosher diet to those who request it is an accommodation, not an exemption. This paper primarily focuses on exemptions from laws, so it will usually use the term “exemption.” However, there are several places where the two terms are used interchangeably.

to dominant religions, and that as a result conflict usually arises only at the margins. For example, if Mormonism were the dominant religion in the United States, polygamy would probably be legal and there would have been no need to litigate *Reynolds v. United States*, in which the Court ultimately denied members of the Church of Jesus Christ of the Latter-day Saints exemptions from marriage laws banning polygamy (98 U.S. 145 (1878)). Second, asking whether Pastafarianism qualifies as a “real religion” raises the thorny issue of how we should define “religion” for legal purposes in the first place.

For the most part, courts and legislatures have avoided providing an explicit definition of “religion.” However, every time the government considers an exemption claim, it incorporates into its decision perceptions of what qualifies as legitimate religious practice, even if it doesn’t explicitly state any definitions. To adequately address issue of religious exemptions there must be a workable and standard understanding of religion, but the idea of governing bodies providing this definition is fundamentally problematic. The need to define what constitutes religion heightens the tension between the two religion clauses of the First Amendment: the Establishment Clause, which prohibits the government from passing any law “respecting an establishment of religion,” and the Free Exercise Clause, which bars the government from prohibiting the free exercise of religion. The government must define religion in order to protect it, but in the process it can become unconstitutionally entangled in religious systems.

This tension can also manifest itself as one between the idea that certain laws unconstitutionally burden religion and the idea that granting exemptions from these laws (especially in light of inherent prejudices among courts and legislatures) may

unconstitutionally privilege certain religious claims over others, or religion as a whole over other civil interests. The underlying question here is whether the provision exemptions represents the state pursuing equality of interests, or whether it is a means of advancing religion.

The current legal approach to religious exemptions is outdated. When the Free Exercise Clause was drafted, the scope of the legal system was far more limited, meaning there were fewer situations in which laws would conflict with the free exercise of religion. Moreover, there was significantly less diversity in terms of the number of religions and types of religious practice; the rise in this diversity, in tandem with the expanded scope of government, has contributed to the number of religious/legal conflicts we see in the United States today. The expanding scope of both the legal and religious spheres has not only contributed to increased conflicts, but also changed the understanding of the Free Exercise Clause; instead of primarily safeguarding against active encroachments on religious practice by the government, the Free Exercise Clause has come to be used as protection for a wealth of religious-based actions that are inconsistent with generally applicable laws. The dynamic between religion and the law has changed even further with the evolution of the nature of American religiosity. While the number of religions has grown, the number of people who describe themselves as religious or strongly religious is in decline. As this transition progresses, the privileging effect of the Free Exercise Clause becomes increasingly dramatic, because the comparative advantage for those with religious claims grows.

Accordingly, it has become important to re-evaluate our understanding of what practices, if any, merit accommodation. While this paper concludes with

reservations that exemptions are sometimes necessary, it reframes the types of claims that are eligible for such heightened protection in a way that covers all deeply held “claims of conscience.” This formulation expands the scope of belief-based actions that can qualify for exemptions to include those founded in morality and ethics. At the same time, the formulation also includes new limitations, eliminating religious exemptions for actions that, while falling under the arbitrarily-defined umbrella of “religion,” are not directly related to a deeply held belief. Further, the model presented in this paper emphatically limits the scope of exemptions to those that would not cause direct harm to others in the society, and creates a higher threshold for the level of burden on “claims of conscience” that is deemed unacceptable.

To be clear, this paper primarily addresses issues of exemptions for individuals and also, to an extent, exemptions for individuals in business such as landlords or wedding cake bakers. There are separate but equally compelling questions to be asked about exemptions for churches that affect them in the context of broader society—such as having tax-exempt status—and ones that affect their internal actions—such as allowing them to implement discriminatory hiring practices—but these issues are generally beyond the scope of this paper.

The first chapter presents and analyzes the legal and judicial history of exemptions from laws, highlighting through several case studies the way that religion has been consistently given more protection than other types of beliefs and civil interests, in a manner that goes beyond just protecting religion to privileging it as a category of belief. This chapter also outlines the tensions inherent within the system of exemptions in the United States, demonstrating that there have always been battles playing out in courts and legislatures over the types of interests that should be

protected, how strongly they should be protected, and who should get to make those decisions.

The second chapter delves more deeply into the present constitutional understanding of exemptions. It explains how the Free Exercise Clause, while seemingly simple, raises challenging questions about the types of claims that must be approved: can a law “prohibit free exercise” if it doesn’t mention religion? How much of a burden on a religion makes its exercise no longer “free”? Are there limits to free exercise? What qualifies as religion in the first place? In tandem with addressing these questions, the chapter looks at the two different judicial approaches that are used to evaluate free exercise exemption claims: the “strict scrutiny” standard, under which any law that places substantial burden on religion must serve and be narrowly tailored to a compelling state interest, and the “rational basis” standard, under which no exemptions are required as long as the law has a rational purpose. This chapter essentially concludes that there are no definitive legal answers: the Supreme Court and Congress implement different standards of review, and the American legal system has not yet come up with coherent answers that might illuminate what substantial burden, compelling state interests, or religion should be understood to be.

Chapter 3 steps back from this discussion to address the questions surrounding our understanding of religion. After discussing several factors used in religious philosophy to identify religion, the chapter argues that these factors are not enough to meaningfully distinguish religion in a way that would give it heightened protection, at least compared to other types of deeply held beliefs. This is in part because, while religion is unique in the way it combines certain elements, these elements are generally not unique to religion. The primary distinguishing feature of religion is

faith, or insulation from reason, and this factor is not an adequate reason to privilege religious beliefs. Further, in a society that has evolved to a point where religion is less threatened and where certain secular ideas are readily understood to hold the same level of significance to a person as religion might, it makes little sense to continue singling out religion for special protection. Thus, this chapter recommends transitioning from a system that applies heightened protection only to religious claims, to one that applies the same protection, whatever that may be, to all deeply held moral, ethical, and religious beliefs—three categories I will include under the term “claims of conscience.”

Chapter 4 presents the culmination of the previous three chapters—an outline of a system for granting exemptions that might begin to address some of the issues that have been raised. It begins by explaining how, although inherently and ideologically problematic, a practical and utilitarian legal system must allow for exemptions in limited circumstances. This system must take into account an understanding of the claims of conscience that are worthy of protection, as outlined in Chapter 3. This final chapter then presents a system for evaluating and weighing two broad variables to determine whether an exemption should be granted. The first is the extent to which there is a violation of deeply held claims of conscience. For an unlawful action to be potentially worthy of accommodation, it must be based on a belief that deals with deep issues—moral, ethical, or religious ones, generally. The law in question must be burdensome to the point that it directly forces someone to do something in violation of their conscience, or directly prohibits something that their deeply held beliefs require them to do. If it can be determined that the law would cause a violation of a deeply held belief that qualifies as a claim of conscience, the

next consideration is how an exemption would affect others and society as a whole; this is the second variable—the level of social harm. The chapter concludes that the harm allowed under the current system of exemptions is too great; there should be no exemptions for practices that cause direct harm to other individuals or to society, but exemptions may be permissible if they would only impose a limited, diffused cost.

Overall, this paper begins by locating the origins and manifestations of, and then analyzing and highlighting, the inconsistencies and ambiguities within the current system for providing individual exemptions from neutral laws. There will always be issues that arise in a system that involves subjective evaluation of what constitutes “harm,” or “burden,” or “compelling state interest.” However the proposed model treats all claims of conscience equally, prioritizes only the deepest beliefs over civil law, and firmly blocks any harm to others that actions based on these beliefs could cause. An approach such as this will ultimately achieve the best possible results when dealing with impossibly challenging questions.

# CHAPTER 1

## THE HISTORY OF EXEMPTIONS IN THE UNITED STATES

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Incorporated into our legal system is a system of exemptions from various statutory obligations, provided for reasons ranging from medical, to religious, to moral. Medical claims are given great deference, to the point of being rarely controversial. Moral, philosophical, and “personal” claims, on the other hand, are given very little deference. Religious exemptions, in contrast to both, have caused a significant amount of controversy, and the presence of religious exemptions has served to highlight the difference in treatment between religious and secular claims in the United States.

Religion is by far the most salient impetus for requests for (and grants of) exemptions from civil law. A possible reason for this is that religious beliefs are often seen as more authoritative than civil law, and significantly more authoritative than beliefs with “merely” moral bases. Philosopher Brian Barry remarked, citing Peter Jones, “If we leave aside the ‘religious components of culture,’ there should be ‘few, if any, problems of mutual accommodation’ arising from cultural diversity” (Barry 2001, 33). The treatment of exemptions has evolved over time—perhaps because during an era when the government was smaller there were simply fewer clashes between laws and religious practice.

The present system is, to say the least, a system of tensions and inconsistency—where policies about exemptions vary based on the law in question, the motivation for the exemption request, and the jurisdiction involved. The power

over exemptions is currently split between the judiciary and the legislature, with the courts acting as a check on, but generally deferential to, the legislature; today, most exemption-based ‘religious liberty’ protection is statutorily defined. Nevertheless, the common thread between both branches is that religion frequently receives priority over civil law itself, and certainly over other types of exemption claims, other than, perhaps, medical ones. This chapter will first address the judicial and legislative history of exemptions from generally applicable laws, and will then look specifically at realms where claims to exemptions have been most prevalent.

## **STATUTORY AND CONSTITUTIONAL HISTORY**

The following overview of the history of exemptions addresses those cases and laws that have served to significantly alter the understanding of exemptions in the United States. Not addressed in this section is, of course, a wealth of other cases involving exemptions that have enhanced our understanding of this phenomenon; many there cases will be dealt with later, in the Case Studies section of this chapter. This section’s overview also primarily deals with religious exemptions, for it is in this realm that the treatment of exemptions has changed over time.

### The Beginning: Exemptions through 1963

The notion of exemptions has existed since the early formative days of the United States, most notably with religious exemptions granted from participation in the Revolutionary War to citizens in certain states (West 1993, 274). A century prior, the early state charters and constitutions incorporated the idea of religious liberty, and took varied approaches to granting exemptions based on this principle. For example,

the understanding of exemptions evolved in Rhode Island over several decades. In 1641, the state legislature allowed for religious liberty only when the action in question was not “repugnant” to any preexisting law, but the Charter of 1663 said that people may have full liberty of religion as long as it does not disrupt the “civill peace,” which is a less strict standard of review (McConnell 1990, 1426). Even more explicitly addressing exemptions, the 1665 Charter of Carolina granted “indulgences and dispensations” to those whose beliefs did not conform to the established Church of England (McConnell 1990, 1428). On the federal level, arguably, exemptions were built into the Free Exercise Clause, with “free exercise of religion” implying a constitutional requirement for accommodation of religious practice, and state constitutions generally conformed to match the two religious liberty clauses in the federal constitution. By 1789, nearly every state had adopted a constitution that had a free exercise clause with an indication of the provision of religious exemptions.<sup>2</sup>

In spite of this pervasiveness, early exemption cases did not indicate an overwhelming consensus that the right to religious free exercise necessitated exemptions. The earliest reported free exercise case, *Stansbury v. Marks* (2 Dall. 213 (Pa. 1793)), involved Jonas Phillips, a Jewish citizen, who was supposed to testify in court on a Saturday in violation of the Sabbath. After refusing, he received a fine, and contested the penalty on the grounds of Pennsylvania’s religious liberty clauses. He said that the requirement to testify on this day violated his religious worship and demonstrated preference for religions that worship on Sundays. Phillips lost the case, with the court arguing that such exemptions could lead to anarchy if generally

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<sup>2</sup> For a more extensive analysis of religious liberty clauses in early state constitutions, see the section of Chapter 2 titled “The Many Facets of Religious Exemptions,” with the subheading, “The Free Exercise Clause.”

applied, and that for pragmatic purposes a majoritarian system was necessary. Almost 100 years later, the first case to reach the Supreme Court to address the limits of the Free Exercise Clause was *Reynolds v. United States* (98 U.S. 145 (1878)), which addressed the issue of polygamy as an element of Mormon religious practice. The Court concluded that the ban on polygamy did not represent a violation of the Free Exercise Clause. Chief Justice Waite's analysis involved several steps; he said both that an exemption from the law would be unacceptable, and that the law itself did not pose any constitutional problem. To the former point, he said, "To permit this would 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" (98 U.S. 145, 167), foreshadowing a theme that still runs deep in free exercise jurisprudence. To the latter point, Waite drew a distinction between the congressional regulation of beliefs and that of actions, saying that legislation concerning beliefs was unconstitutional under the Free Exercise Clause, but that Congress retained the power to "reach actions which were in violation of social duties or subversive of good order" (164). Was polygamy, in fact, "subversive of good order"? Waite concluded the answer to be yes, based on longstanding legal tradition and the importance of American social values that he claimed would be subverted by polygamy (165). For the next half-century, this decision put the free exercise issue mostly to rest, leaving the nation with the distinction drawn between the unconstitutional practice of regulating beliefs and the constitutional practice of regulating behavior (Waltman 2011, 25). *Jacobson v. Massachusetts*, a vaccination case decided in 1905, expanded the state power, holding that under the state's police power and interest in the "common good" Massachusetts could enforce vaccination

laws in spite of Jacobson's request for exemption based on the "great and extreme suffering" vaccines caused him (197 U.S. 11).

After the freedom of speech and freedom of religion protections of the First Amendment were found by the Court to be incorporated by the Fourteenth Amendment to the states in *Cantwell v. Connecticut* (310 U.S. 296 (1940)), free exercise cases from the states started to be heard more regularly in the Supreme Court, and in most cases the Supreme Court ruled in favor of the state (Waltman 2011, 26-27). However, the tide began to turn in *Braunfeld v. Brown* (366 U.S. 599 (1961)), in which Chief Justice Warren, while ruling in favor of the Pennsylvania mandate that retail stores close on Sundays, conceded that statutes would be unconstitutional if they could otherwise achieve their goals without imposing burdens on religious groups (in this case, an enhanced economic burden on Jewish merchants, who would have to lose business on both Saturday and Sunday). Justice Brennan's dissent took this point further, arguing that the state must have a compelling interest if it is to burden religion, and this logic was applied two years later, in *Sherbert v. Verner*.

#### The "Strict Scrutiny" Era: 1963 through 1990

*Sherbert v. Verner* (374 U.S. 398 (1963)) established the "compelling state interest" test as the test for laws that burdened religious practice without allowing for exemptions.<sup>3</sup> This case dealt with a woman, Seventh-Day Adventist Adell Sherbert, who was denied unemployment benefits. Sherbert's religion prohibited work on

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<sup>3</sup> The "compelling state interest" test is one part of the "strict scrutiny" level of review employed by the courts. While *Sherbert* does explicitly mention the term strict scrutiny, the idea of employing strict scrutiny when reviewing laws burdening religion became more common in later decades. Rather than altering the idea of *Sherbert* this phenomenon seems to be just an expansion of the understanding of the case, and it is still accurate to say that *Sherbert* moved the nation toward a model of strict scrutiny for laws that implicate religious liberty.

Saturdays, so Sherbert had left a job that required her to work on Saturdays and turned down offers for jobs that had a similar requirement. In *Sherbert*, the Supreme Court held that the denial of unemployment benefits constituted an infringement of Sherbert's free exercise rights. Justice Brennan, in his decision, did not give extensive guidance about how free exercise claims should be evaluated. However, he established the compelling state interest test as the appropriate test for evaluating exemption claims, saying, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'" (374 U.S. 398, 406). Further, he subtly equated "substantial burden" with "any burden" on free exercise, beginning by showing that the laws imposed "any" burden on the appellant and then asking whether there was justification for this "substantial" burden (374 U.S. 398 at 403, 406). This advanced the general practice of religious exemption quite a bit, with the burden of justification falling heavily on the government and lightly on the exemption requestor.

After *Sherbert*, the next major case to advance free exercise jurisprudence was *Wisconsin v. Yoder* (406 U.S. 205 (1972)), which allowed Amish children to be exempt from Wisconsin's school attendance laws. This case added to free exercise jurisprudence by amending the basic logic of *Reynolds*: while religious behavior could often be regulated by the state, there are constitutional limits, and the line between belief and action can at times be blurred. Chief Justice Burger said, "This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context, belief and action cannot be neatly confined in logic-tight compartments" (406 U.S.

205, 220). While *Yoder* expanded the scope of situations to which the *Sherbert* test could be applied, it also narrowed the range of unconstitutional burden subject to the compelling state interest test; rather than “any” burden, only an “undue” burden on religion would be tested for a compelling state interest (Waltman 2011, 29).

Notions of religious exemptions were simultaneously evolving in Congress. Shortly after the *Sherbert* decision the Civil Rights Act of 1964 was passed, Title VII of which created the Equal Employment Opportunity Commission (EEOC) and outlawed discriminatory practices in hiring, saying it was unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. (Civil Rights Act of 1964)

This opened the door to required religious accommodation in the workplace, though the understanding of the scope of this requirement remained unclear; more clarity on this issue was provided the following decade.

That same year that *Yoder* was decided, Congress passed the Equal Employment Opportunity Act (EEOA) of 1972. This amended Title VII to make it apply to state and local governments. The EEOA also clarified (and added an interesting spin to) the analysis of what constitutes religious practice that cannot be infringed upon. It included a definition of “religion,” saying,

The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s

religious observance or practice without undue hardship on the conduct of the employer's business. (EEOA 1972)

This definition did several things. For one, it made the understanding of religion extensive, essentially saying that employers must accommodate nearly any religious claim unless it causes "undue hardship." The Equal Employment Opportunity Commission (EEOC) website says that the types of accommodation that are necessary include flexible scheduling and modification of workplace policies, including those regarding "dress and grooming" accommodations. The 1972 Act also put the burden of proof on the employer to demonstrate hardship caused by accommodation, rather than placing the burden on the individual to show that it is a legitimate religious practice that is burdened to the point of requiring accommodation. The EEOC website clarifies understanding of employers' "undue hardship" to an extent, saying,

An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work. (EEOC, "Religious Discrimination")

However, this definition can truly be read narrowly or broadly, depending, for example, on the classification of "burdensome."

Section 12 of the July 2008 EEOC "Directives Transmittal" attempted to provide, in its word, "guidance" for analyzing charges of religious discrimination in the workplace. It gestured at a definition of religion, saying that religion need only be religion in the person's "own scheme of things." It references the tension that may be caused when the same practice can be inspired by religious and secular motives (specifically referencing vegetarianism), and says whether or not the

practice is religious must be determined by “situational factors.” The document provides a number of examples that employers may encounter, explaining that a consideration of religious beliefs as “illogical” is not relevant to their legal legitimacy, and saying that a belief being unique to an individual does not make it nonreligious. The document does, however, pose a distinction between unique or uncommon religious beliefs and personal preferences that “do not relate to any ‘ultimate concerns’ ” (Earp 2008).

The EEOC also decreed that to be worthy of protection under the Title XII, the religious beliefs must be “sincerely held,” deriving the language from *United States v. Seeger* (380 U.S. 163, 185 (1965)); both the EEOC and *Seeger* suggested that while it is not legitimate to question beliefs themselves, it is legitimate to question whether the claimant actually holds the beliefs, an issue that might arise if there is something preferable to be gained from accommodation. The document again says that investigators must take a case-by-case approach, potentially relying on statements by the individual or by affiliated others (Earp 2008).

Additionally, Title XII provided an exemption for religious organizations from certain requirements of nondiscrimination in employment, as will be discussed later in this chapter.

#### The “Rational Basis” Shift, and Its Backlash: 1990 through 1993

After *Yoder*, *Employment Division v. Smith* (1990) was the next major case to change the understanding of religious liberty, and it set the stage for rapid structural developments regarding exemptions over the next decade. Known as the “Peyote Case” to many, *Smith* overturned the strict scrutiny model provided in *Sherbert*, ruling

that Oregon was not required to grant a religious exemption to the Native American Church to accommodate their ritualistic use of peyote, a drug classified by the state as an illegal substance. The Court noted that the law was one of general applicability, not one targeting religious practice, and said that the only times the Court had granted religious exemptions from neutral, generally applicable laws were when the cases invoked other constitutional principles in tandem, such as freedom of speech; in other situations the provision of exemptions remained under the jurisdiction of the legislature (494 U.S. 872 (1990)). The Court held that the application of strict scrutiny (namely the use of the compelling state interest test) in *Sherbert* applied only to the context of that case: “unemployment compensation eligibility rules” (873). Justice Scalia further declared, “We cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order” (888), emphasizing the impracticality of governing under such a high standard of review. *Smith* declared that exemptions were not required by the Free Exercise Clause, but rather objectors should seek redress from their elected representatives (890), thus instituting the rational basis standard—the lowest level of scrutiny—as the only constitutional requirement for considering laws that burden religion. In the wake of *Smith*, both the Oregon legislature and Congress passed laws protecting the use of peyote for religious purposes (Eisgruber and Sager 2007, 78-79).

The Coalition for the Free Exercise of Religion was formed in the wake of *Smith*, comprised of groups that saw the decision as indicative of widespread government hostility toward religion, particularly at the federal level; this group, in turn, pushed Congress to pass the Religious Freedom Restoration Act (RFRA) in

1993 (Sullivan 2005, 25-29). The Act drew the Fourteenth Amendment, invoking the Equal Protection and Due Process Clauses enumerated in Section 1 and the congressional enforcement powers enumerated in Section 5, and it operated on the assumption that Congress could legislate on First Amendment issues within the states (Waltman 2011, 36). The Act's first stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*...and *Wisconsin v. Yoder*... and to guarantee its application in all cases where free exercise of religion is substantially burdened" (RFRA 1993). Section 3 of the Act, entitled "Free Exercise of Religion Protected," declared that no federal or state government could "substantially burden a person's free exercise of religion" even if the law is neutral and generally applicable, except where application of the burden is necessary to protect a compelling government interest and the law reflects the least restrictive means of achieving its goal (RFRA 1993). This two-pronged structure of review mirrors the strict scrutiny test used in equal protection cases (Waltman 2011, 37-38).

*City of Boerne v. Flores* (1997)

*City of Boerne v. Flores* invalidated the state and local applications of the RFRA. The issue at hand was, anticlimactically, building permits in Texas—local zoning authorities had denied an application for enlarging a church, and the church brought suit under the RFRA (521 U.S. 507 (1997)). Justice Kennedy's majority opinion argued that while Congress has authority under Section 5 of the Fourteenth Amendment to enforce the provisions of the amendment (here, the Due Process Clause primarily), this authority was intended to be remedial and preventive, not substantive (521 U.S. 507, 519). He continued by saying that the RFRA was

substantive in that it altered and expanded the understanding of the Free Exercise Clause; in its “sweeping” nature, it lacked “proportionality or congruence” (521 U.S. 507, 532-533). He said: “RFRA is so out of proportion to a supposed remedial or preventive objective that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior” (521 U.S. 507, 532).

Justice Stevens’ concurrence in *Flores* approached the issue from a different perspective, declaring the RFRA a violation of the Establishment Clause, not simply an overreach of Congress’s enforcement powers. He noted that if the plaintiff had represented a nonreligious organization, it would not have been eligible for exemption, and that on a broader scale, the RFRA gives religious organizations a power that no nonreligious group could hope to obtain, thus showing an unconstitutional governmental preference for religion (521 U.S. 507, 537).

While the RFRA’s applicability to state and local governments was struck down, it remains in effect on the federal level (and was the foundation of the decision in *Hobby Lobby v. Burwell*, in 2014). The principles of the RFRA also still remain in effect on the state and local levels, through the many state-level RFRA and through the Religious Land Use and Institutionalized Persons Acts of 2000, discussed in the next several sections.

#### In the Wake of *Flores*: RLUIPA of 2000

In the wake of *Flores*, members of Congress tried to find a way to make a new religious liberty law that could apply to the states. The Religious Liberty Protection Act (RLPA), proposed in 1998 and in 1999, did not pass Congress, but it was the precursor to the narrower Religious Land Use and Institutionalized Persons Act (RLUIPA), which became law in 2000. The RLPA based its claim of legitimacy on

the Commerce Clause, the Spending Clause, and, again, Section 5 of the Fourteenth Amendment, saying that at least with regard to land use claims, Congress had found enough evidence that there was a problem that needed remedying (Waltman 2011, 52-58). The RLPA stated that regardless of the general applicability of a law or practice, the government could not burden religious practice in any “programs or activities” operated by the government or receiving federal funding, or in commercial practices, and it would have reinstated strict scrutiny as the level of review for laws burdening religious practice, by saying that the government would have to prove compelling state interest and least restrictive means (RLPA 1999).

The civil rights implications of the RLPA (particularly the possibility of discrimination based on sexual orientation) contributed to the collapse of the bill in 1999, even though supporters insisted that the Act would not encroach on civil rights since those were a compelling interest of the government (Waltman 2011, 104). The RLUIPA, introduced as a replacement, dealt with the more limited scope of land use and prison cases, which Representative Canady called “two areas where the right to religious exercise is frequently infringed” (Waltman 2011, 112); its supporters sought to not implicate civil rights the way a broader bill might. Drawing from the rationales for the legitimacy of the RLPA, the RLUIPA was signed into law in 2000 (Waltman 2011, 99).

One important element of the RLUIPA is that its definition of religion does not require that the religious practice in question be central to the religion as a whole. It declared, “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief” (RLUIPA 2000). This definition necessarily expanded the scope of protected religious practice. Derek

Gaubatz, lawyer for The Becket Fund, published a study in 2005 finding that only seven of 46 prisoner claims under the RLUIPA were dismissed for not demonstrating “substantial burden,” compared with over 75 percent of RFRA claims made prior to the *Flores* ruling. Substantial burden was found in nearly all cases that dealt with religiously prescribed diet and garment requirements, and in many, though not all, of the cases that dealt with restrictions on worship practices or possession of religious items (Waltman 2011, 125).

The RLUIPA was upheld in *Cutter v. Wilkinson*, a case that dealt with the Ohio prison system (544 U.S. 709 (2005)). Although the decision in that case upheld the constitutionality of the RLUIPA with regard to prisoners, Justice Ginsburg, in her majority opinion, qualified, “Should inmate requests become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the functioning of an institution, the facility would be free to resist the imposition” (544 U.S. 709, 726).

Waltman highlights the difficulty of evaluating the “success” of the RLUIPA, saying:

If religious institutions were indeed suffering widespread discrimination before RLUIPA, as the evidence presented at the hearings we covered seemed to say, then the law is merely setting a wrong right. If, on the other hand, the contention is that the pre-RLUIPA regime was working satisfactorily, then the scales have been tipped unfairly. (Waltman 2011, 135)

Like with all religious liberty laws, this harkens to the tension between relieving religious practice of unfair burden, while simultaneously not removing burden that is an acceptable part of existing in civil society, and that is felt by those with other kinds of beliefs.

### In the Wake of *Flores*: The State of State RFRA's

In addition to the federal legislative response, one result of *Flores* was the proliferation of RFRA's by the individual states. Both Rhode Island and Connecticut, in fact, had their own versions of the RFRA already on the books, having passed them in 1993, at the same time as the federal legislation was being passed. From 1998 through 2016, an additional 20 states passed such religious liberty laws, bringing the total to 22 states that currently have RFRA's or RFRA-inspired legislation (NCSL 2015, Domonoske 2016). As of 2014, an additional 13 states implemented RFRA-like provisions as a product of judicial decisions (Eilperin 2014). Utah, not one of these 35 states, has a similar religious liberty law, which applies only to land-use issues. My survey of these acts shows that one primary purpose is to enact strict scrutiny as the standard of review for laws burdening the free exercise of religion generally. These laws additionally establish that generally applicable laws can be found to burden religious practice in an unconstitutional way.

Despite their similarities, these laws vary in a number of important ways. One area of difference is the level of burden that is deemed unacceptable. While most states adopt the substantial burden test found in the national legislation, several states have lowered the standard for what is unacceptable burden. Connecticut, for example, says only that a state "shall not burden" religious exercise, without even reference to substantiality (Connecticut RFRA). Missouri adopted the substantial burden test only for institutions of higher education—for everything else, it merely said that except for cases of compelling state interest, "A governmental authority may not restrict a person's free exercise of religion," without referencing a substantial burden as a threshold at all (Missouri RFRA). Arizona's religious liberty law, enacted

in 1999, adopts the “unreasonable” burden test with regard to land use, defining “unreasonable” as when “a person is prevented from using the person’s property in a manner that the person finds satisfactory to fulfill the person’s religious mission” (Arizona RFRA). For other scenarios, Arizona implements the substantial burden test but clarifies, “In this section, the term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions” (Arizona RFRA). The Virginia, Oklahoma, and Idaho laws maintain the substantial burden test but define substantial burden with the identical broad stroke: “‘Substantially burden’ means to inhibit or curtail religiously motivated practice[s]” (Virginia RFRA, Oklahoma RFRA, Idaho RFRA). Kansas’s definition of substantial burden is more elaborate, but serves to affirmatively broaden the definition of unacceptable burden, saying it is:

[A]ny government action that directly or indirectly constrains, inhibits, curtails or denies the exercise of religion by any person or compels any action contrary to a person’s exercise of religion, and includes, but is not limited to, withholding benefits, assessing criminal, civil or administrative penalties, or exclusion from government programs or access to government facilities. (Kansas RFRA)

While most of these state laws provide definitions of “exercise of religion,” only a minority of the states adopted the language from the federal legislation that protected “religious practice” includes practices that are not compulsory or central to the belief system (RFRA 1993). These states include Florida, Illinois, Utah, Missouri, Idaho, Texas, Arizona, Kansas, and Indiana. Further, there was some variation as to the definition of “person,” regarding which persons or entities could not have their religious practice burdened. Most states do not provide a specific definition of “person.” Pennsylvania and Arizona indicate that “person” refers to an individual or

a religious organization like a church (Arizona RFRA, Pennsylvania RFRA). Other states, namely Idaho, South Carolina, Utah, and Indiana all say in their laws that “person” refers not just to individuals and religious bodies, but also to a much broader array of business organizations. South Carolina’s law reads: “‘Person’ includes, but is not limited to, an individual, corporation, firm, partnership, association, or organization” (South Carolina RFRA). In addition to individuals and religious organizations, Indiana’s law states it applies to,

A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that: (A) may sue and be sued; and (B) exercises practices that are compelled or limited by a system of religious belief held by: (i) an individual; or (ii) the individuals; who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes. (Indiana RFRA)

Indiana’s law, passed in Spring 2015, received national attention as people protested the legislation over its implications for discrimination by businesses against homosexual couples. In response, the legislature quickly introduced a non-discrimination amendment, stating:

[This law does not] authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service.

While it indicated that this amendment applied to most bodies included under the definition of “persons” in the law, including individuals and corporations, it added that this nondiscrimination policy does not apply to religious figures or organizations (State of Indiana Conference Committee).

## **EXEMPTION CASE ANALYSIS: RELIGIOUS OVER SECULAR**

### Case Study: Conscription

When people discuss exemptions from laws, one of the most salient examples is that of statutory exemptions from conscription to combat roles in the military. Part of the reason for this salience is that the idea of exemptions for “reasons of conscience” (particularly religious reasons) has come to be written into the laws themselves and has played out prominently on the national stage. As early as the American Revolution, exemptions were granted from military service to those with religious objections to war, which indicates the way religion has frequently been prioritized over generally applicable laws since the nation’s inception (West 1993, 274). This alone does not indicate that there is a constitutional right to such exemptions, and, indeed, later cases such as *United States v. Macintosh* (1931) suggest that there is not. In this particular case the Court held that “The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress” (283 U.S. 605, 624). *Macintosh* also cited *Jacobson* for the proposition that in spite of the individual liberties guaranteed by the Fourteenth Amendment, such liberties can be suspended in the interest of the state, including the state’s interest in compelling its citizens to take up arms.

Over the centuries, religious exemptions from conscription became increasingly grounded in statutory law. During the Civil War, there were few exemptions specifically for religious reasons. Exemptions from the Enrollment Act were provided to those who were physically incapable of performing service and to those who had dependent family members (The Enrollment Act, §2). People who had

been drafted were also allowed to find someone to take their place, or to pay \$300, thus exempting themselves from the draft as well (The Enrollment Act, §13).

The Selective Service Act of 1917 was the first major instance of Congress specifically granting exemptions from the draft to religious objectors. In drafting men for service in World War I, the Act read,

[N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations. (Selective Service Act of 1917, §2)

Two decades later, the Selective Service and Training Act of 1940 required men between the ages of 21 and 36 to register with their local draft boards. With regard to religious exemption, the language was slightly broader than that of the Act passed in 1917, and contained much of the same language that is applicable today. It read, “Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form” (The Selective Service and Training Act of 1940, §5(g)). This language broadened the scope of potential religious exemptions. Whereas the 1917 Act required objections to be grounded in the explicit tenets of a “well-recognized” religious organization, the 1940 law did not qualify that the religion must be well-established, nor did it say that participation in war must be expressly forbidden by the religion in question. This language does seem to have led to some ambiguities, for the Selective Service Act of 1948 clarified the nature of this exemption. While it retained most of the language of the 1940 Act, it added:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. (The Selective Service Act of 1948, §6(j))

After 1948, this language for exemptions was upheld through Congressional updates to the Act, with minimal changes. However, two decades later, two Supreme Court cases, *United States v. Seeger* (1965) and *Welsh v. United States* (1970) altered and expanded the justification for conscientious objection. As will be discussed further in the next chapter, *Seeger* struck down the requirement for the religion to include a "Supreme Being" (380 U.S. 163, 176) on the grounds that the Senate Report about the 1948 Act said that it intended to reenact the 1940 Act, which in turn referred broadly to "religious training and belief." *Seeger* proposed to replace the idea of a Supreme Being with "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God," (380 U.S. 163, 176). *Welsh*, in turn, reinterpreted the scope of conscientious objection to include objections "spurred by deeply held moral, ethical, or religious beliefs" (398 U.S. 333, 344). The Selective Service System website alludes to this shift, saying, "Conscientious objectors perform service to the nation in a manner consistent with their moral, ethical or religious opposition to participation in war in any form" (Selective Service System 2016). Other exemptions currently provided include those for ministers and for people whose service would cause hardship for those they support.

#### Case Study: Prison Diet

Another interesting case study regarding preferential legal treatment for certain types of beliefs and practices is the question of dietary accommodation in

prisons. While, officially, this is a question of accommodation rather than one of exemptions, the two are very similar for these purposes. Both exemptions and accommodations involve recourse from government laws or practices that are deemed overly burdensome under religious liberty laws.

In general, especially in the wake of the RLUIPA, special religious diets receive accommodation in prisons. For example, the recent 11<sup>th</sup> Circuit case *United States v. Florida Department of Corrections* (2015) held that Florida's failure to provide Kosher meals to its Jewish inmates was unconstitutional and a violation of the RLUIPA (\_\_\_ F.3d \_\_\_ (11th Cir. 2015)). This holding has been consistent with others in recent decades; A 2003 Second Circuit case, with the majority opinion written by then-Circuit Judge Sotomayor, said, "We, however, have clearly established that a prisoner has a right to a diet consistent with his or her religious scruples" (*Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003)).

That said, the standard for accommodation is fairly high in these circumstances. *Turner v. Safley* (1987), though decided long before the passage of the RLUIPA, is still referenced as the standard for weighing prisons' interests against prisoners' interests. *Turner* lays out four considerations: 1) whether there is a connection between the regulation and a governmental interest that justifies it; 2) whether the inmate has an alternate means of exercising the religious right; 3) the impact of the inmate exercising the right on the rights of others at the prison; and 4) whether the prison had easy alternatives to the regulation that could accomplish the same objective (482 U.S. 78, 89-91).

Prisoners' requests for accommodation must be specifically tailored to the religious requirement, and prisoners must show that the religious belief is sincere.

*Wall v. Wade*, a case involving a prisoner who was denied accommodation for Ramadan, quoted *Cutter v. Wilkinson* (the case that upheld the RLUIPA), saying, “As a preliminary matter, ‘prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic’” (\_\_\_ F.3d \_\_\_ (11th Cir. 2014)). To demonstrate this authenticity, prisoners frequently need to submit applications for the dietary accommodation to the prison chaplain (Federal Bureau of Prisons 2004, 18).

Moral claims to dietary restrictions receive much less favorable treatment. Imprisoned secular vegetarians are frequently denied vegetarian meals, even when such meals are provided to those with religious claims. While certain districts are willing to provide vegetarian and vegan meals, many are not (James 2011). Later in this paper, this example will be the subject of consideration about the weight of moral claims compared with religious ones; legally, however, it is clear that there is frequently religious recourse but very little other.

#### Case Study: Vaccination

One of the most prominent examples of tension over exemptions in today's society is that of laws regarding vaccinations. All states have requirements for children to receive vaccines before entering the school system. At the end of 2015, 46 states had exemptions written into their vaccination laws specifically for religious objectors, 17 states had exemptions for religious or personal reasons, and the laws of one state, Minnesota, mentioned only personal reasons, which presumably covers religious claims. Mississippi and West Virginia do not allow religious or moral exemptions, and

California repealed its allowance for exemptions in 2015. All 50 states provide exemptions for medical reasons (Sandstrom 2015).

The treatment of religious exemptions among the different states is mixed. Some say individual religious beliefs qualify, while others require people to be part of a church that actively bans vaccines; states also have varying degrees to which they require proof of these beliefs. A requirement that the person claiming an exemption must be part of a government-recognized religion has been found unconstitutional, partially on the grounds that requiring government recognition violates the “entanglement” prong of the “Lemon test” set forth in *Lemon v. Kurtzman* (which provides requirements for religion-related legislation) by overly involving the government in religious practice, thus creating a violation of the Establishment Clause (NVIC 2014; *Sherr v. Northport-East Northport U. Free Sch. d.*, 672 F.Supp. 81 (1987)). Colorado’s vaccination exemption requirements are among the stricter ones, require an annual signature by the parent, guardian, or legal student that they or the student is an “adherent to a religious belief whose teachings are opposed to immunizations” (Colorado Rev. Stat., §25-4-903). Delaware, in turn, requires parents or guardians of the children to sign an affidavit stating:

2. (I) (We) hereby (swear) (affirm) that (I) (we) subscribe to a belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.;
3. (I) (We) further (swear) (affirm) that our belief is sincere and meaningful and occupies a place in (my) (our) life parallel to that filled by the orthodox belief in God.;
4. This belief is not a political, sociological or philosophical view of a merely personal moral code. (14 Del. Code Ann. §131)

This language seems heavily lifted from the Selective Service Act of 1948 and, even though it retains the necessity for a Supreme Being, seems to partially reflect the judgment in *Seeger* (which struck down the need for a Supreme Being) that it was important that the spirituality occupy a place parallel to belief in a Christian god (380 U.S. 163 (1965)). Connecticut, on the other hand, is much more relaxed, saying simply, “Any individual whose parents or guardian presents a statement that such immunization is contrary to the religious beliefs of such child is exempted from immunization requirements” (Conn. Gen. Stat. §10-204a-2a). Connecticut is not unusual in exemption administration; many states, even ones that technically do not allow philosophical exemptions, do not attempt to confirm the bases of requests for exemption.

Notably, there are very few religious sects that explicitly oppose vaccination, meaning that most of the claims stem from “individual religious beliefs,” or personal concerns. The primary group that is known to advocate against vaccination is the Christian Science Church, though, according to doctor and bioethicist Douglas Diekema, the religion does not explicitly advocate against vaccinating children, per se (Sandstrom 2015). The strongest demand for exemptions comes from those who believe vaccines are dangerous or ineffectual, a belief that, though widespread despite scientific evidence to the contrary, is not a religious or even a philosophical concern.

When California repealed religious and philosophical exemptions from vaccination laws in 2015 in the wake of a measles outbreak, a major group that formed in opposition was Californians for Vaccine Choice (Pamer 2015). This group bases its objections partially on the “Lemon test” of *Lemon v. Kurtzman*, (presumably arguing the law overly “inhibit[s] religious practice”) and the Free Exercise Clause,

but the group is primarily focused on the secular arguments. The group argued, first, that there was no health crisis from the measles outbreak, and elsewhere on its website declares, “The passage of any bill to repeal the personal belief exemption will create an even more hostile environment for California families who don’t agree with safety, efficacy, or necessity of every single dose of every single government mandated vaccine” (Californians for Vaccine Choice).

There have been few major cases dealing with vaccine law, with the exception of the 1905 case, *Jacobson v. Massachusetts*, which upheld mandatory vaccination, declaring,

The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State. (197 U.S. 11 (1905))

A recent decision by a New York State district court, *Phillips v. City of New York*, invoked *Jacobson* in its determination that schools could ban unvaccinated children from attending class when other students had vaccine-preventable diseases, saying, “The Supreme Court has strongly suggested that religious objectors are not constitutionally exempt from vaccinations” (27 F. Supp. 3d 310, 312 (E.D.N.Y. 2014)). The *Phillips* decision was upheld by the Second Circuit on appeal. In general, this seems to be the trend in constitutional analysis. As *New Republic* declared in February 2015: “Yes, the Government Can Make You Vaccinate Your Child” (Farias, 2015).

### Case Study: Religious Drug Use

While *Smith* perhaps represented a constitutional nadir of religious exemptions from drug laws, the use of drugs for religious purposes has, since the passage of the RFRA, received favorable treatment, at least on the national level. In 1994, perhaps in response to the *Smith* decision of 1990, the exemption from the ban on peyote was extended to all recognized Native American tribes as an amendment to the American Indian Religious Freedom Act (AIRFA 1978). Further, in the 2006 case *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court held that the sacramental use of hoasca, a hallucinogenic drug used by certain sects for religious purposes but banned under the Federal Controlled Substances Act, should be permissible for those religious sects under the RFRA. The Court held that while there was a compelling state interest in banning the drug, there was no compelling reason why granting the exemption would be problematic. The decision was based in part on the notion of the drug as essential to a “sincere exercise of religion” (546 U.S. 418 (2006)). Religious exemptions from drug laws are relatively common, to the extent that they arise. For example, 26 states have exemptions from underage drinking laws when the alcohol is consumed for religious purposes (ProCon 2014).

To the extent that legal decisions about religious exemptions from drug laws have been mixed it is generally because of a question about the legitimacy of the religious beliefs rather than a legal or philosophical objection to granting exemptions for the religious use of drugs. For example, a 1996 10<sup>th</sup> Circuit Court case, *United States v. Meyers*, upheld the district court decision that Meyers, the Reverend of the Church of Marijuana who claimed that his religion required him to use and distribute marijuana, did not require an exemption from marijuana laws because his claim did

not reflect religious beliefs.<sup>4</sup> While the court ruled that the beliefs were sincerely held, it found that they derived from secular, rather than religious origins (95 F.3d 1482 (10<sup>th</sup> Cir. 1996)). This again shows the way religious beliefs are privileged over equivalent beliefs of secular origin. However, the extent to which states will make allowances for religious (or “religious”) drug use is being put to the test, as groups such as the Church of Cannabis of Indiana bring suit against their states, citing their states’ RFRAAs (Ferner 2015).

### Case Study: Civil Rights Laws

The analysis of exemptions from civil rights laws takes a slightly different form than the analysis about exemptions from other types of laws. The above cases present a straightforward analysis: do the religious interests prevail over the government interest in the law in each specific circumstance? In many cases, the answer has been yes. However, as has been highlighted by recent events, exemptions from civil rights laws are a more complicated issue, because the exemptions come more directly at the expense of another party and conflict more directly with other constitutional interests. This conflict is heightened because exemptions from civil rights laws are generally not claimed by individuals acting as individuals, as they were in the previously discussed cases. When the claimant is not simply an individual, the potential impact of granting the exemption, and thus the state interest in denying it, grows. This section of this chapter deals with groups that are generally beyond the scope of this paper, including

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<sup>4</sup> This does raise the question of whether Meyers was operating as an individual, or as an organization in the public sphere. The legitimacy of his claim perhaps depends on this—Rastafarians, in contrast, generally receive exemptions for marijuana usage, so the distinguishing factor may be that the religion demanded the distribution.

religious organizations themselves and corporations with religious interests. The case of individuals acting in business represents a tricky middle ground that will receive some treatment, particularly in Chapter 4's discussion of the extent to which harm caused by exemptions is permissible.

Within the realm of religious exemptions from civil rights laws, there is one area where the law is fairly straightforward: the hiring of spiritual leaders, such as ministers, within religious organizations is off limits to government control. This position has been upheld primarily on the grounds of the Establishment Clause, in that government involvement with the hiring practices of religious organizations would be illegitimate entanglement. *Rayburn v. General Conference of Seventh-Day Adventists* concluded, "Introduction of government standards as to the selection of spiritual leaders would significantly, and precariously, rearrange the relationship between church and state" (772 F. 2d 1164, 1167 (1985)). The broad application of this so-called "ministerial exemption" can cause issues, however. For example, the 1996 D.C. Circuit decision in *Equal Employment Opportunity Commission v. Catholic University of America* held that the court did not have the authority to apply Title XII to a gender discrimination case regarding the denial of tenure to Sister Elizabeth McDonough, on the grounds that her position as a teacher was equivalent to that of a minister (83 F.3d 455 (D.C. Cir 1996)). A loose interpretation of what qualifies as a minister means that discrimination, legally permissible in ministerial employment, may apply to more secular positions, such as teaching jobs.

The exemption from Title XII for religious organizations does not apply exclusively to ministerial hiring: it is settled that religious organizations can discriminate in hiring more broadly, though only on the basis of religion. Title XII,

Section 702 of the Civil Rights Act of 1964 provides that religious nondiscrimination policies in hiring are not required of employers within religious organizations (Civil Rights Act of 1964 § 7). This was upheld in *Corporation of the Presiding Bishop v. Amos*, which broadened the scope of exemptions to include religious discrimination by religious organizations in hiring for secular positions. (483 U.S. 327 (1987)) However, there is conflict about whether or not religious organizations can discriminate on the basis of other classifications. The EEOC website says no—that with regard to non-ministerial hiring: “the exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability” (Earp 2008). This has been supported by certain cases; for example *EEOC v. Fremont Christian School* held that it was a violation of Title XII for a religious school to provide health insurance only to employees they classified as a “head of household,” defined as single people and married men (781 F.2d 1362 (1998)). Similarly, racial discrimination outside of hiring practices by religious organizations has been found unconstitutional, as in *Bob Jones University v. United States*, where the private university lost its tax-exempt status for banning interracial dating (461 U.S. 574 (1982)), and in *Loving v. Virginia* where the Supreme Court rejected a law banning interracial dating, in spite of the religious claim for the “necessity” of such a law (388 U.S. 1 (1967)).

However, there is less clarity with regard to gender discrimination and discrimination based on sexual orientation by religious organizations, both of which have at least occasionally been deemed permissible even outside of hiring for ministerial roles. With regard to gender, lower courts have given conflicting decisions about employment decisions based on pregnancies that are in violation of the

religion's norms, and the Supreme Court has yet to address the issue (Minow 2007, 805).<sup>5</sup>

Further, discrimination by religious organizations on the basis of sexual orientation has frequently been deemed legitimate. For example, New York's Sexual Orientation Non-Discrimination Act (SONDA) of 2003 allows exemptions from its nondiscrimination policies for religious organizations so that they can "[t]ake 'such action as is calculated by such organization to promote the religious principles for which it is established or maintained' " (Office of the NYS Attorney General); this policy would be applicable, for example, to discrimination in the provision of housing. Another example is New York's Employment Non-Discrimination Act (ENDA) of 2009, which exempts religious organizations from compliance with its ban on discrimination in hiring practices based on sexual orientation (NYC Bar 2011, 3). Arguably, discrimination on the basis of sexual orientation has generally been less about the grant of exemptions to religious groups and more simply due to a lack of legal protection based on sexual orientation altogether. However, this trend may be shifting. The landmark 2015 case *Obergefell v. Hodges* protected the right of same-sex couples to marry, and shortly in its wake the EEOC held that discrimination in employment based on sexual orientation constitutes discrimination on the basis of sex and is thus unconstitutional (EEOC, "Facts About Discrimination"). Another recent example comes from the Colorado Court of Appeals, which denied the right of a baker to refuse to make a wedding cake for a same-sex couple (Gershman and Audi 2015). As gay rights come to be seen as more legitimate and critical, it seems likely

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<sup>5</sup> Hypothetically, however, such "illegitimate" pregnancy could be seen as making the person fall outside of the religion, making these cases examples of religious, not gender, discrimination.

that simultaneously, exemptions for religious organizations will be written into anti-discrimination laws, on the grounds that the discrimination would count as as (for religious organizations, legally permissible) discrimination on the basis of religion (rather than sex), but that other loopholes for sexual orientation discrimination will close.

## **CONCLUSION**

The variation in treatment of exemption claims based on the type of claim and the jurisdiction involved is apparent; however, the one consistency is the preferential treatment that religious individuals and organizations receive in nearly all policy realms as compared with people and organizations that have claims based on something other than faith. This can be seen in prisons' dietary accommodation of religion, and religious exemptions from vaccination, conscription, and drug laws. The RFRA and its state-level counterparts have cemented this disparity, elevating the weight of religious claims over civil law by implementing strict scrutiny as the standard of review for laws burdening religion; they also elevated the weight of religious claims relative to other types of claims, such as moral ones. Claims by religious organizations are also prioritized over civil rights laws in a way that no other type of organization could expect. However, as has been suggested, both the evaluation of claims to exemptions—especially religious claims—and the evaluation of the laws providing exemptions require additional analysis for full comprehension. Each and every religious claim, for example, requires a definition of religion. One must also understand the origins of claims to religious liberty and religious exemptions, and understand how these claims are evaluated constitutionally. The

further analysis in the next chapter, especially the analysis of the way courts have come to understand and evaluate free exercise claims, will help explain the mechanisms through which religion is prioritized over civil law and over other types of claims in the United States.

## CHAPTER 2

### THE LEGAL ANALYSIS OF EXEMPTIONS IN THE UNITED STATES

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The jurisprudence of exemptions has evolved over time but has always been rife with complications and necessarily subjective interpretations. In dealing with religious exemptions, for example, the courts have struggled to determine the extent to which exemptions may be required by the Free Exercise Clause of the First Amendment. In spite of its simplicity—Congress shall pass no law “prohibiting the free exercise” of religion (U.S. Const. am. 1.)—this brief clause is open to a broad range of interpretations. What is the appropriate definition of religious practice? What happens if the free exercise inflicts harm on others? What if the law affects religious practice only tangentially, without explicitly targeting or even mentioning religion at all?

Courts and legislatures have struggled with these problems increasingly over the past century, and as discussed, exemption law as a whole has both focused on and favored religious claims over non-religious claims. This is most likely a product of the Free Exercise Clause itself, which lends legitimacy to religious claims that other types of claims do not have. As a result, higher numbers of claims are brought on religious grounds than on others, and legislatures have encoded a preference into statutes for religious claims in a way they have not done for moral, philosophical, and personal

claims.<sup>6</sup> For this reason, this chapter focuses primarily on the nuances of religious claims; religious exemption jurisprudence can be used as a lens through which to analyze the compelling state interest test and the ideas of harm and substantial burden as they apply to exemption law more generally. This is useful because the tide may be shifting to lend weight to moral claims as well. If this trend continues, and the interpretation of the Free Exercise Clause is broadened to include “free exercise of deeply held moral beliefs,” the analysis presented here could be applied also to moral claims in the future.

This chapter begins by discussing the different facets of religious exemptions, particularly the types of factors that must be evaluated when considering whether to grant these exemptions; it then turns to related questions about who should be responsible for granting exemptions, what counts as religious practice, and the relationship between secular and religious claims.

## **THE MANY FACETS OF RELIGIOUS EXEMPTIONS**

### The Free Exercise Clause

Even if it seems trite, it is necessary to begin an analysis of the Free Exercise clause by asking, “What constitutes free exercise?” The concept of religious liberty in the United States can be traced most notably to Roger Williams and the foundation of Rhode Island in the 1600s, and to Quaker establishments in Pennsylvania and Delaware in the 1700s. However, while Williams is known for his promotion of religious liberty, he did not believe breaking civil law was a valid expression of such

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<sup>6</sup> Medical claims, on the other hand, are seen as legitimate enough that they have hardly been legally contentious at all.

liberty. The idea of religious liberty became increasingly, if not consistently, established over the next century, with most states incorporating the idea into their constitutions but many also recognizing its limits, as discussed in Chapter 1. Religious leaders of the time similarly limited the idea of free exercise. A Baptist leader of the 1780s said, “Should a man refuse to pay his tribute for the support of government, or any wise disturb the peace and good order of the civil police, he should be punished according to the crime, let his religion be what it will” (Waltman 2011, 7-8). The original meaning of the Free Exercise Clause of the First Amendment, ratified with the rest of the Bill of Rights in 1791, can be partially found by looking at the state constitutions that preceded it, as religious liberty protections in early state constitutions became enshrined in the First Amendment itself.

By 1789, all the states but Connecticut had adopted a constitution that included a free exercise clause, indicating to some effect that religious belief should be protected, as long as people did not disturb the “peace and safety” of the state in the name of religion (521 U.S. 507, 552). To an extent, this did imply some degree of preference for religious practice over civil law, as argued by Justice O’Connor in her dissent in *Flores*: religious interests could be prioritized over state interests, as long as the state interests were not central to the functioning of society (552-555). However, the extent of this preference for religion was unclear. The 1777 New York State Constitution, for example, while protecting “the free exercise and enjoyment of religious profession and worship,” specified that this provision “shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State” (553) Other states, including Maryland and Georgia, also included reference to the “peace and safety” that should not be disturbed on religious

grounds (553-554). It remains ambiguous which laws fell under the categories of “peace and safety” and “good order.” Another ambiguity is whether the laws were primarily intended to simply protect private religious worship from government interference or also to protect public acts that might conflict with civil law. Some states referred exclusively to “profession and worship,” and the New York Constitution, in saying that religious worship should not be used to “justify practices inconsistent with the peace or safety,” seemed to imply that the protection was primarily targeted to beliefs and practice within the private realm. On the other hand, the Northwest Ordinance of 1787 prevented new state governments from “molesting” persons based on their “mode of worship” (554). By today, free exercise has clearly come to include religious practice, not just religious belief. The text of the Constitution’s Free Exercise Clause, ultimately, was simpler than those of the states, removing explicit qualifications on the protection of free exercise, but it is perhaps possible to read meaning into the language based on the states’ provisions.

The entanglement of church and state has grown over time, as have exemptions for religious practice. It is ironic to note that for a government that should “make no law respecting an establishment of religion” (U.S. Const. amend. I), references to religion appear over 1400 times in statutes and regulations across the United States, on both the state and federal levels (Sullivan 2005, 11). This phenomenon can be seen as a product of the expansion of government’s programs and general reach, and the diversification of religious practice. Religious practice has become less likely to be associated with a church organization, and the United States simply hosts a wider variety of religions than it did at the time of the ratification of the Constitution, with 250 denominations by the 1960s (380 U.S. 163, 174), a figure

which has since surely grown. The collision of government regulation and religious practice has necessarily become more frequent as both spheres have expanded, giving rise to an explosion of religious claims for exemption. Another factor to be considered in the rise of claims for exemptions is the Supreme Court's decision in *Cantwell v. Connecticut* (1940), which held that the Free Exercise Clause of the First Amendment was applicable to the states via incorporation by the Fourteenth Amendment (310 U.S. 296 (1940)), and *Everson v. Board of Education*, which incorporated the establishment clause (330 U.S. 1 (1947)). Prior to incorporation, there was little occasion where the Supreme Court would have jurisdiction to hear a free exercise case, presumably because it was not evident that the Free Exercise Clause applied to state governments. Finally, in modern society, it is impossible to totally separate church from state because churches frequently operate in the public and non-religious sphere (for example, operating a soup kitchen), so the more realistic question becomes "how" religion and government should interact, rather than "whether" they should do so (Eisgruber and Sager 2007, 6-7).

Analysis of free exercise claims for exemptions is complicated because there are so many variables to consider. For example, there are legal distinctions to be drawn between claims by individuals for exemptions (as in for prison diet accommodations), and claims by groups such as churches or entire organizations (as in exemptions from land use regulations). Perhaps the most complicated and unsettled factor involved in analyzing Free Exercise exemption claims involves detailed assessment of the situational factors surrounding the claim. Generally, these factors are the extent to which the religious practice is burdened and the extent to which the law in question is necessary. As will be discussed, even once these factors are assessed,

conclusions still must be drawn about the appropriate standard of review to apply to laws that burden religion, what constitutes burden to religion in the first place, and how conflicting rights should be ranked or prioritized.

This section will first address facially neutral laws, which are the types of laws that are generally at the core of exemption controversies. It will next look at the development and application of strict scrutiny to laws burdening religion. A comprehensive understanding of the application of strict scrutiny requires an understanding of what constitutes “substantial burden” on religious practice. Finally, this section will look at how religious liberty works within an interconnected system of rights, addressing religious practices that may “harm” others, and addressing the ranking of competing rights more broadly.

### Facial Neutrality

When the First Amendment says “Congress shall make no law . . . prohibiting the free exercise [of religion]” (U.S. Const. amend. I), it is often understood to prohibit not only laws that explicitly address religion but also laws that do not mention religion at all. “Facially neutral” laws are ones that restrict a practice that is not explicitly or exclusively religious. One reason facial neutrality is often not considered sufficient to pass free exercise scrutiny is that neutrally written laws can intentionally target certain religious practices (as in the legitimate instance of banning animal sacrifice—ostensibly neutral, but codified into law to target the behavior of particular sects). More generally, facially neutral laws can, both intentionally and unintentionally, directly and indirectly, constitute a substantial burden on religious practice.

Frequently, in fact, ostensibly neutral laws substantially burden religious practice. For example, Hancock Park, a residential neighborhood in Los Angeles, had zoning restrictions that banned houses of worship. This caused a problem for elderly Orthodox Jews, who were required by their religion to walk to their religious services, some of whom had trouble walking long distances. To remedy this, the religious community bought a house in Hancock Park for the purpose of holding their prayer services, and altered it in no way except for requesting that it be designated nonresidential, a request that was denied (Waltman 2011, 69). This type of *de facto* burden, which falls more heavily on members of the religious sect in question compared with all others, can be found in instance after instance across the country. Chief Justice Burger addressed this issue of “facial neutrality” in *Wisconsin v. Yoder*, saying that uniform applicability was not necessarily enough to make a resulting burden on religion acceptable. Though the law in question, mandating school attendance through the age of 16, was neutral and generally applicable, it conflicted with the respondents’ beliefs as members of the Conservative Amish Mennonite Church that high school attendance was “contrary to the Amish religion” and would “endanger their own salvation and that of their children” (406 U.S. 205 (1972)). Burger said, “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion” (406 U.S. 205, 221). The RFRA emphasizes this idea, drawing from *Sherbert* which itself dealt with a “facially neutral” law that favored those who must, for religious reasons, take off work on Sundays over those who must refrain from work on Saturdays. The RFRA states, “laws ‘neutral’ toward religion may

burden religious exercise as surely as laws intended to interfere with religious exercise” (RFRA 1993).

However, the issue is more complicated than implied by *Yoder*. There are problems with simply using the fact that a neutral law heavily burdens a particular religious practice as the basis for granting exemptions from the law. Though generally applicable laws at times have an unequal burden on certain religious groups, most of them also burden everyone in society, weakening claims of discrimination by not exclusively burdening one group of believers (Volokh 1999, 1534). Zoning laws burden all homeowners, for example, and laws banning marijuana use burden all people, not just those who are Rastafarian. There is nothing inherently problematic about laws that have an unequal impact or that weigh some interests more highly than others. Barry provides the hyperbolic example of sexual assault laws banning rape—such laws obviously place a higher burden on those who wish to commit sexual assault than those who don’t, but these laws value more highly the interests of those who do not wish to be assaulted than the value of “equal” burden. The purpose of most laws is, indeed, to constrain behavior at the extremes—speeding laws particularly burden those who wish to drive quickly—but they are enacted for the purpose of the general welfare. Unequal burden may at times be a symptom of injustice but it is not itself an issue and may also be a necessary corollary of a law serving its purpose (Barry 2001, 34).

When facially neutral laws are understood to burden religious practice, a tension between the Establishment Clause and the Free Exercise Clause may emerge. For one, for courts to be able to determine the legitimacy of secular laws as applied to religious practices in light of the Free Exercise Clause, they have to be able to decide

what qualifies as religion—a challenging task and a strange one for a government body that is supposed to be “separate” from religion altogether (Sullivan 2005, 3). Further, while government laws as they apply to religion can be considered a restriction of free exercise, exemptions from content-neutral laws can also implicate can be seen as government favoring religious over non-religious claims (Sullivan 2005, 25). The case of *Walz v. Tax Commission* dealt with the issue of tax exemptions for religious property in New York State, highlighting the tension between the Establishment and Free Exercise Clauses. Chief Justice Burger, in his majority opinion, wrote: “The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other” (397 U. S. 664, 668-669 (1970)). While the case held that the tax exemptions did not represent a significant enough entanglement between the state and religion to qualify as unconstitutional establishment, it did raise the issue to be considered further in the decades to come.

As discussed, while the purpose of many laws is to fairly share burdens, such as with taxes or speed limits, “fair” does not mean there will never be an unequal impact. For example, laws that ban smoking in public parks place a greater burden on smokers than non-smokers. However, there are situations in which the unequal impact is better characterized an unjust, substantial burden on a religious practice—for example, when an Illinois law prohibited headgear for basketball players for safety reasons, which kept Orthodox Jews from participating. The injustice comes not from the fact of the unequal burden, but rather because their religious concerns were not given any regard; the law’s broad language likely reflected the legislators’ lack of

awareness of the law's potential impact. While there is no "right to play basketball," the law was unnecessarily broad; ultimately, there was a compromise that accommodated the religious practice—the solution was reached that the safety concern could be addressed by yarmulkes being more securely attached (Eisgruber and Sager 2007, 91). Eisgruber and Sager also note, however, that the solution that was reached did not encroach upon the rights of anyone else, and suggest that this case is different from (or at least, the conclusion should not be automatically applied to) other situations, where accommodation of the religious practice may unfairly favor religion over other interests in some way (Eisgruber and Sager 2007, 89).

Eisgruber and Sager present another way to evaluate the need for neutrality, saying, "The Constitution requires accommodation when and only when a failure to accommodate bespeaks a failure of equal regard" (Eisgruber and Sager 2007, 93). This lack of equal regard could perhaps be found in the case of *Employment Division v. Smith*, in which the Supreme Court refused to grant an exemption from Oregon drug laws for the religious use of peyote, while at the same time Oregon law provided exemptions from underage alcohol consumption bans for Christian religious ceremonies (Eisgruber and Sager 2007, 92). This serves as an example of lack of equal regard between religions interests.

The decision in *Sherbert v. Verner* decision, which addressed the case of a woman who was religiously obligated to refrain from work on Saturdays but whose workplace provided for workers to take off only on Sundays, seemed to recognize the sentiment behind this idea of neutrality as one of equal regard. Brennan said, "The extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious

differences” (374 U.S. 398, 409 (1963)). As postulated by Eisgruber and Sager, *Sherbert’s* idea of neutrality is not simply that a law must be neutral on its face (as would be an unemployment law that protected all workers’ right to take off on Sundays) but rather one that is neutral—or perhaps better described as “equal”—in its consideration of equivalent religious demands.

### Sincerity vs. Veracity

As will be discussed later in the chapter, when analyzing an infringement on religious liberty both courts and legislatures generally stay away from creating a definition of religion, or from determining the “veracity” of a religious belief. The only issue that is not off-limits, however, is the sincerity of the belief. The relationship between these two traits, veracity and sincerity, was first prominently raised in *United States v. Ballard* in 1944, in which the Supreme Court held that the legitimacy of a religious belief was not an acceptable subject for the courts to consider, but that sincerity was a legitimate question (322 U.S. 78). With regard to veracity, the Court held, “[W]e do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course” (322 U.S. 78, 86). However, the sincerity of the respondents’ beliefs, they held, could be legitimately considered by a jury.

This idea was reaffirmed in *United States v. Seeger*, which addressed a religious claim to exemption from the draft. The Court held, “We hasten to emphasize that, while the ‘truth’ of a belief is not open to question, there remains the significant

question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case” (380 U.S. 163,185).

### Substantial Burden

One challenge facing a legitimate interpretation of the Free Exercise Clause is determining what actually counts as “impeding” (U.S. Const. amend. I) the free exercise of religion. As has been discussed, religious practice regularly seeps into the secular field, whether through applications for building permits or via requests for certain types of education. As a result, it is impossible to assume we operate in a system where there will not be, at least at times, burden placed on religious practice by the government.

The origins of the “substantial burden” test can be found in *Sherbert*, which introduced the idea of “substantial infringement on religious liberties” (374 U.S. 398, 407). This language was picked up in *Smith*, which restates the test in *Sherbert* as: “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest” (494 U.S. 872, 883). That approach was reaffirmed by the RFRA, which says, “governments should not substantially burden religious exercise without compelling justification” (RFRA 1993). The introduction of the idea of “substantial” burden was necessary for mitigating the overwhelming privileging of religion that would come if certain individuals or groups could claim exemptions from any laws that could touch religious practice and arguably impede it even slightly. While the concept of “substantial” did serve that role, it opened new areas of uncertainty—what constitutes substantial burden, and how can the government possibly decide? Justice Scalia alluded to both of these issues as reasons

for overruling *Sherbert* (494 U.S. 883, 887). Perhaps as a product of *City of Boerne v. Flores*, which in returning control to the states effectively determined that the definition of religion would belong to the various locales, various definitions of “substantial burden” have been enunciated by federal courts, and each has given rise to new issues with analysis of the Free Exercise Clause.

In 2004, the Fifth Circuit attempted to provide a definition of “substantial burden”:

The effect of government action or regulation is significant when it (1) influences the adherent to act in a way that violates his religious beliefs or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and on the other hand, following his religious beliefs. (*Adkins v. Kaspar*, 393 F. 3d 559, 570 (5th Cir. 2004))

In contrast, in 2003, the Seventh Circuit defined substantial burden for land use cases, as when the law “is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable” (*Civil Liberties for Urban Believers v. Chicago*, 342 F. 3d 752, 761 (7th Cir. 2003)).

These two definitions are markedly different. The Seventh Circuit analysis is quite narrow, and refers exclusively to laws that affect the religious practice itself. The Fifth Circuit analysis, however, is much more broad. The law need only “influence” the person, not compel them, for it to be considered an unconstitutional burden, and this applies not only to laws that directly affect the religious practice itself, but also to laws that compel or prohibit behavior that is unrelated to religion entirely. It is a relatively simple thought exercise to see the ways that either definition can be manipulated to constrain or liberate religious practice, particularly in the Fifth Circuit opinion; adopting broad or narrow views of “influence” or “non-trivial” can completely change the implications. Nevertheless, perhaps on a situation-by-situation

basis, it can be possible to tell whether a law impedes the practice of a central tenet of a religion, especially if that religion is well established. However, the two federal court definitions provided also clash on whether a burden can be considered substantial if it merely affects a non-religious privilege, rather than restricting religion directly. Justice Brennan in the *Sherbert* decision hinted that a restriction need not affect religious practice directly to be illegitimate, saying, “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege” (374 U.S. 398, 404). Of course, the mere fact that a liberty is being infringed cannot automatically imply that the law in question is unconstitutional, but the analysis provided in the *Sherbert* decision seemed to imply that laws that burdening non-religious liberties of religious people because of their religious tenets are presumptively unconstitutional, along with laws that burden religious practice directly.

To this point, an issue of religious liberty and exemptions bubbled to the surface in the British parliament in the 1970s, which had passed legislation requiring motorcycle helmets, and this provides a good example of the problem described above. In this scenario, an exemption was ultimately provided for the Sikh community because the religion requires wearing turbans and this requirement was incompatible with the wearing of helmets. Lord Widgery, who argued against such an exemption, referenced the fact that the inability to ride a motorcycle did not impede any religious practice, and so the law could not necessarily be seen as an interference with religion at all. It was an interference with the ability to ride a motorcycle, which is not a preordained right (Barry 2001, 44). Barry emphasizes this difference, explaining that the law was not a denial of equal opportunity (as would be a law that

banned Sikhs from riding motorcycles), and noting that there are many choices people make based on personal preferences and moral and religious tenets (Barry 2001, 45). One could hardly make the claim that those who find motorcycle helmets uncomfortable are being wrongly discriminated against by the law requiring helmets, and allowing neutral laws that may burden the exercise of nonreligious privileges is at least a clear and logical (although some might say insufficiently respectful of religious claims) approach to an interpretation of free exercise.

Both the Fifth and Seventh Circuit definitions of substantial burden also raise the question of whether the law must substantially burden a practice “central” to the religious belief in order for it to be considered unconstitutional. This language was worked into an earlier definition of substantial burden in *Mack v. O’Leary*, in which Judge Richard Posner tackled the centrality question, addressing the inconsistency between the various federal courts’ definitions of substantial burden, and concluding:

A substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs. (80 F.3d 1175 (7th Cir.1996))

The concept of “centrality” in religion can be traced to *Wisconsin v. Yoder*, which, though it did not emphasize centrality, mentioned twice in passing that the practice being burdened by the government was central to the Amish people (406 U.S. 205, 210 (1972)). The issue was crystalized in the *Hernandez v. Commissioner* decision, which declared, “The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice” (490 U.S. 680, 699 (1989)). However, *Hernandez* (while repeatedly mentioning centrality in its decision), also said that determining centrality was “not within the

judicial ken” (490 U.S. 680, 699). This paradox plays itself out time and again, and in overturning the compelling state interest test, Justice Scalia concluded in *Smith*, “If the ‘compelling interest’ test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded” without regard to their “centrality” (494 U.S. 872, 888). Nevertheless, it seems likely that notions of centrality play into the definition of substantial burden, for a burden becomes increasingly substantial as the practice in question becomes more central to the religious belief. This resolution to not consider centrality of belief has become established, particularly through the RFRA and the RLUIPA, which both dictate that centrality is not an applicable factor.

### Strict Scrutiny

*Sherbert v. Verner* initially established the compelling state interest test as the test to be used when evaluating the legitimacy of laws that substantially burden religious exercise (374 U.S. 398, 403 (1963)), and the scope of this test was expanded in *Wisconsin v. Yoder* to apply beyond employment laws (406 U.S. 205 (1972)). In *Employment Division v. Smith*, the Supreme Court overruled the compelling state interest test, with Justice Scalia stating for the majority:

If “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. (494 U.S. 872, 888)

Scalia’s argument, in effect, is that it is precisely due to the American value of pluralism that strict scrutiny of laws that burden religion is untenable—“diversity” of

religions means that it is likely that laws will frequently bump against religious practice, and if strict scrutiny is the applicable standard of review in such situations, he argues, the only two options would be anarchy, or suppression of religious diversity altogether. In addition to this practical argument, Scalia also made a constitutional one, saying, “[T]o say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required” (494 U.S. 872, 890). With the compelling state interest test overruled in *Smith* and replaced by the relatively relaxed rational basis standard, review would primarily involve weighing the varying interests against each other, generally in the legislature, with less weight given automatically to religious claims. The RFRA, passed three years after the decision in *Smith* came down, moved to reestablish the compelling state interest test. In the “Congressional Findings” section, The Act reads:

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) 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. (RFRA 1993)

The RFRA had a two-pronged test for the occasions, notably labeled “Exceptions” to the general rule, when government could substantially burden religious practice: there had to be a “compelling state interest” for imposing the burden and the law had to be “the least restrictive means” of achieving its end (RFRA 1993). This two-pronged review is essentially the same as the strict scrutiny standard used in equal protection cases (Waltman 2011, 37-38), and so for all intents and purposes the compelling state interest test, and the application of “strict scrutiny” are now one and the same for purposes of analyzing religious exemption claims. While the rational basis standard is

the constitutional default based on *Smith*, the legislatively embraced strict scrutiny standard is still the law of the land as applied to the national government by the RFRA of 1993, as applied to land use and prison issues in states as well as on the federal level as dictated by the RLUIPA, and as applied more generally in all the states that have adopted their own RFRA. The move by legislatures to limit their own power by adopting RFRA seems unusual, but pressure by religious groups seems to have prevailed: these laws politically express the importance of religion and serve to protect it in future administrations and in political subdivisions. Further, as will be discussed at greater length later in this chapter, the legislative adoption of this strict scrutiny standard raises questions about the relationship between legislative and judicial authority, as applied to the provision of exemptions.

One common argument for applying strict scrutiny to burdens on the free exercise of religion is the one put forth in *Smith* by Justice O'Connor her concurrence. She expressed the idea that as free speech claims are evaluated using the compelling state interest test, so too should be free exercise claims. However, this does not take into consideration that while people have freedom to hold whatever beliefs they choose, this freedom does not necessarily extend to taking any actions they may choose. Free speech protections do not extend to actions based on the beliefs reflected in the free speech; similarly, while freedom of religious conscience is protected, not all actions based on religious beliefs are too (Eisgruber and Sager 2007, 109). Moreover, it is possible to see free exercise claims as already being given higher priority than free speech claims. For example, while religious institutions are often granted exemptions from certain taxes and zoning laws, schools and newspapers are afforded no such protection (Eisgruber and Sager 2007, 111).

One complication of the application of the strict scrutiny test is that it is not always clear what constitutes a compelling state interest and how broadly that concept is to be applied. It is illuminating to compare *Yoder* and *United States v. Lee*, both of which involved requests by Amish sects for exemptions from laws. While an exemption from child education laws was granted in *Yoder* (406 U.S. 205 (1972)), no such exemption was granted in *Lee*, where the Court held that the collection of social security taxes constituted a compelling state interest. The Court decided this on the basis of the Social Security system being nationwide, saying it provides benefits to everyone and that “mandatory participation is indispensable to the fiscal vitality of the social security system” (455 U.S. 252, 258 (1982)). While it is possible, therefore, to distinguish these two cases on the grounds of the necessity of mandatory participation, with such necessity being the justification for denying the exemption in *U.S. v Lee*, Congress took a different tack in its conscription laws, providing an exemption for those with religiously grounded conscientious objection despite the evident value of mandatory participation in the military. So, while the need for universal participation in a nationwide system works to distinguish *Yoder* and *Lee*, it fails to explain the difference in treatment between issues of taxes, and issues of conscription.

### Defining Harm

In common understanding, protecting citizens from harm inflicted by others qualifies as a compelling state interest, and compelling state interests preclude religious claims to exemption. Harm is usually thought in terms of national security, for example, or keeping property from being stolen. However, the definition of “harm” is subject to debate. Should it include harm to oneself, as it seems to with

drug laws? Does it have to be physical harm? What about emotional harm? Financial harm? General burden to a community? And how substantial does the harm need to be to give rise to a compelling state interest?

In the 2015 case *Holt v. Hobbes*, the Court held that an exemption should be granted to a Muslim prisoner who wished to grow a beard in a prison that banned facial hair. While the case was decided on the basis of the RLUIPA, Justice Ginsberg addressed the idea of harm in her concurrence, stating, “Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.* . . . accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief” (574 U.S. \_\_\_\_ (2015)). Needless to say, questions about the appropriate classification of harm permeate exemption cases.

The Constitution does at times protect behavior that can harm others. Speech, for example, can certainly cause negative behavior and emotionally harm others. However, claims of religious motivation are generally not enough to exempt behavior that causes harm. When harmful behavior is excused, its protection often is seen as having “broader value” to society (Volokh 1999, at 1538, 1550), or the behavior itself does not affect those outside of the faith. The idea of “broader value” is alluded to in Justice Scalia’s decision in *Smith*, which emphasizes that previous exemptions were granted only when other principles, such as freedom of speech, were invoked in tandem with free exercise of religion (494 U.S. 872, 881).

### Complicity Claims

Complicity claims are a common type of exemption claim usually made by an individual or a corporation acting in the public sphere, generally in business, in which

the claimant requests an exemption from a law that would make them behave in a way “complicit” with a practice that violates their religious beliefs. While discussion of businesses and corporations is, for the most part, outside the scope of this paper, complicity claims represent a good a good illustration of the issues surrounding substantial burden and harm to others. These claims are different than typical Free Exercise claims inspired by the RFRA because they are made by parties whose own affirmative religious practices are not directly implicated by the law in question. Further, complicity-based exemption claims, if upheld, can cause direct significant harm to other parties. Conversely, the concept of harm to third parties is more incidental to, or even non-existent in, the typical RFRA claims, in which the resulting harm, if any, is broadly distributed among society (Nejaime 2015, 2520), as seen with the use of peyote (which, at most, affects others by marginally raising healthcare costs), or with tax-exempt statuses. As in *Burwell v. Hobby Lobby Stores Inc.*, recent high profile complicity claims have also been different from standard RFRA claims in that they address issues currently salient and contested in United States politics, so accommodation takes on extra significance and, perhaps, heightens the impact on the third-party citizens in question (Nejaime 2015, 2520).

The *Hobby Lobby* plaintiffs argued that the organization had the right to be exempt from a law that would make it “complicit” in the behavior of those who violate its purported religious beliefs (Nejaime 2015, 2520). In other words, the Affordable Care Act arguably burdened Hobby Lobby’s religious liberty by mandating a practice that its owners found contrary to their religious ideas. However, Hobby Lobby was in a position of power as an employer, and its refusal to cover access to contraception through its insurance plan deprived its employees of a benefit

that they were legally entitled to receive. While distributing burden and harm does not necessarily need to be a zero-sum game, this case shows that it frequently may be, or at least that it frequently may be treated as such. By ruling in favor of Hobby Lobby, the Court made the statement that complicity counts as substantial burden. It also seems to have implied that being denied coverage for contraception due to your employer's religious beliefs does not qualify as substantial harm. However, it can be argued that the Court kept the idea of avoiding harm in mind, as both Justice Alito's majority decision and Justice Kennedy's concurrence emphasized that there might be other ways to guarantee the contraception without an employer mandate (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_\_ (2014)).

The constitutional legitimacy of complicity claims is far from settled, in spite of the *Hobby Lobby* decision. A recent smattering of decisions have held that denying services "complicit" with same sex marriage, such as taking wedding photographs or baking wedding cakes for same sex couples, constitutes unconstitutional discrimination, in spite of whatever religious liberty claim is being made (Gershman and Audi 2015). Again, however, complicity claims do involve a slightly different type of evaluation than the free exercise claims primarily addressed in this paper. As with Hobby Lobby and the baker, those making complicity claims are generally not acting purely in private: by engaging in business and bringing themselves and their religiously-based action into the sphere of public accommodation, the evaluation of harm and burden is different than that for individuals acting in private.

## Ranking Rights

It follows from the idea of harm—and the question “Is harm ever justified?”—that part of the challenge in developing a comprehensive constitutional analysis of exemption laws for religious practice is the tension between different types of rights. Free exercise of religion repeatedly runs up against other civil rights protections, such as freedom from discrimination (Minow 2007, 286). The idea of ranking rights is far from alien to the United States political system. For example, the famous Footnote 4 in *United States v. Carolene Products Co.* introduced the idea of different levels of scrutiny, suggesting higher levels of scrutiny in situations that invoke the Bill of Rights amendments, or that implicate “discrete and insular minorities.” (304 U.S. 144 (1938)) The idea of “fundamental” and “non-fundamental” rights crops up regularly, often paralleling the *Carolene* interpretation. Fundamental rights are generally found to stem from the Bill of Rights, and the notion of “substantive due process” under the Fifth Amendment is often deemed to include fundamental rights like “privacy” and “the right to marry” (Legal Information Institute). The different treatment of different categories of discrimination by religious groups highlights the ranking of rights. While racial discrimination is clearly outlawed, the legal status of discrimination on the basis of gender and sexual orientation by religious groups is more ambiguous, as discussed in the previous chapter (Minow 2007, 814). Even less clear is the ranking of religious liberty compared with other liberties and protections.

Some argue that religious claims deserve higher levels of protection than do other types of liberties. One potential argument for the relative strength of religious claims over other types relies on the nature of religion. Many see religion as a fundamental part of identity rather than “just” a belief and, accordingly, limitations

on religious practice can be seen as more of a burden (Volokh 1999, 1536). Another sometimes-argued claim to heightened protection for religious liberty is that religion has a central place in society. For example, Law Professor Cole Durham of Brigham Young University said:

The greatness of our tradition in religious liberty will be impoverished if we do not understand that at its core it is about religious differences, religious pluralism, and religious conscience, and that sometimes these values are so strong that they even override otherwise relevant equality claims. (Waltman 2011, 50)

On the other hand Durham's argument may be seen as failing to recognize the strength of the values (such as racial equality) that may conflict with religious liberty. It does, however, reflect that religious liberty is often seen as ranking "higher" than other liberties; the historical understanding of the role of religion in society included the idea that religious liberty itself is a fundamental right the impediment of which is inconsistent with American values. Similarly, at the end of his historical narration of free exercise in the United States, Jerold Waltman, Professor of Constitutional Studies at Baylor University, tipped his hand a bit, lamenting:

[Free exercise] has to compete with a highly secularized version of liberal individualism and identity politics . . . the net result of both is that free exercise suffers. Both its claims to the protection of conscience and its role in allowing religious people to call the polity to a deeper sense of values loses esteem. When the state puts religious expression on par with other values, it inescapably deprives religion of its central place in society. (Waltman 2011, 146)

However, while founding lawmakers may have recognized that religious liberty ought not directly disrupt civil society, the Founders did not see "privileging" religious over moral values as a concern, the way many theorists do today (Waltman 2011, 10).

Distinctions between the importance of religious and secular values are arguably ones that should not be made by the government, and more importantly such distinctions

can undervalue the significance that secular values and beliefs may have to their holders (Volkh 1999, 1536). Further, just like other rights addressed in the Constitution, free exercise is not without its limitations. No other First Amendment liberty—freedom of speech or the press, for example—is interpreted to be boundless. There is no reason to assume that religion would transcend these boundaries. In fact, constitutionally speaking, courts often treat free exercise as secondary to other constitutional claims. A well-known example is the case of *Bob Jones University v. United States*, in which the Court decided that the University’s religiously-motivated discrimination against black students disqualified it from tax-exempt status (461 U.S. 574 (1982)). This is an example of the way, contrary to Durham and Waltman’s arguments, racial equality is seen as appropriately prioritized over religious liberty.

## **LEGISLATURES VS. COURTS: MAKING EXEMPTION DECISIONS**

### How the Exemption System Works

One question repeatedly at the center of exemption arguments is whether exemptions should be granted by the legislature or by the judiciary, and in some ways the jury is still out on this question. For one, states without their own RFRA do not have such a model to guide decision-making, and across the nation an answer about who makes these types of decisions is fluid and hardly regular. However, to the extent that there a legal answer to this question, it has certainly changed over time. Before 1963 and *Sherbet*, the general understanding was that religious exemptions were for the legislature to grant (Volkh 1999, 1473). However, when the Court explicitly laid out the compelling state interest test in *Sherbert*, decisions about exemptions fell to judges, who ultimately had to evaluate whether the laws in question passed strict

scrutiny (Volokh 1999, 1467). This model was upheld in *Wisconsin v. Yoder*, and remained the standard until *Employment Division v. Smith* was decided in 1990. In his majority opinion, Justice Scalia argues that exemptions should be granted by legislatures, and that it is generally not the appropriate role of the courts to make such decisions. He said:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. (494 U.S. 872, 890)

Not only did this clearly move into the realm of the legislature the role of granting exemptions, but it provided a normative rationale for doing so. Scalia recognized the shortcomings of subjecting minorities to a democratic system but nonetheless declared legislative bodies better suited to determining the importance of particular laws. He said that the only alternative options would be anarchy, in which all religious claims would trump all laws, or an untenable situation in which the courts would have to make an unsustainable number of decisions balancing state interests and the importance of practices to certain religions.

The RFRA of 1993, passed three years after the *Smith* decision, quickly reinstated the application of strict scrutiny to laws that burden religion, giving the courts the power to make initial determinations about requests for exemptions and instructing them to make decisions based on a strict scrutiny model. After *Flores*, the state-level RFRA's took a similar approach, and strict scrutiny continued to apply to federal laws. The RFRA defines its first purpose as “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to

guarantee its application in all cases where free exercise of religion is substantially burdened” (RFRA, Section 2). In the wake the RFRA and its state-level counterparts, while the court still has responsibility for initially determining whether exemptions should have been granted by the legislature, the legislature holds the ultimate power to in effect overrule the court. In a scenario where the court says exemptions are not necessary, the legislature can revise its prior legislation to grant exemptions, or, in a scenario where the court deems exemptions to be necessary based on the RFRA, the legislature can continue to refuse exemptions by determining that despite the court ruling, the law as it stands does in fact reflect an interest worthy of protection (Volokh 1999, 1468-1469). This model is dubbed the “common-law model” by Eugene Volokh, a Professor of Law at UCLA who has dealt extensively with First Amendment issues. He said, “The answer to the question ‘When should religious exemptions be granted, and who should decide when they should be granted?’ is ‘When the courts think such an exemption doesn’t unduly jeopardize compelling state interests and the legislature hasn’t specifically overridden this judgment’ ” (Volokh 1999, 1474). Ultimately, this model allows more room for modification than would one that has exemptions dealt with exclusively by courts or by legislatures.

### How the Exemption System Should Work

Of course, an answer to the positive question “who makes decisions about exemptions?” is in no way an answer to the normative question of who should make the decisions. There are valid arguments to be made for each, and perhaps the answer is truly that a common-law model of some sort is preferable, regardless of which standard (rational basis or strict scrutiny) is being applied to evaluate claims. This

model acts as a compromise: it reflects the will of the people as initially expressed by the legislature (i.e., a law without exemptions) but it allows a judicial check (providing for exemptions) which can, in turn, be overridden as long as the legislature has a rational basis for doing so, as per *Smith*. This debate over which body of government ought to grant exemptions is central in many respects to the history of free exercise in the United States.

There are many benefits to relying on legislatures to grant exemptions. Decisions by legislatures reflect a democratic ideal, in that the legislature is a representative body, and this could add to perceived legitimacy of the decision (Waltman 2011, 15). Since there is the potential for fallibility in both the legislatures and the courts, an argument can be made that it is more “democratically legitimate” to leave the power to the legislators and the political process (Volokh 1999, 1548). Further, when compared with courts, legislative decision-making may have more flexibility in the criteria on which it bases its decision, in that it can consider morality and practicality, rather than focus on constitutional tests (Volokh 1999, 1559).

However, legislative decisions can magnify biases against non-Western religions as well as Western religions that are not well represented in the particular state, with smaller minorities either suffering at the hand of legislative discrimination, or simply not being heard at that level (Waltman 2011, 15-17). Courts have a different set of strengths and weaknesses in evaluating these cases. Their decisions may be more theoretically grounded in that they rely on precedent and constitutional principles. For those judges who do not face judicial elections, the fear of public backlash is minimized. Further, free exercise is a right, and a right that would potentially receive fairer consideration in a court than in a legislature, considering that interpreting rights

is more explicitly the role of the judiciary (Waltman 2011, 17-18). (Though *Smith* is an obvious counterexample.) Courts also have more immediate flexibility and can act more quickly, at least in theory, in that relief from a burdensome law can be provided without being subject to the political process (Volokh 1999, 1561). However, judges, perhaps to a greater extent than the legislature, may not be familiar with the religion in question and its particular doctrinal values, or with the relative importance of the statute in question, because judges are more removed from the public and its specific needs. Also, judges do not escape the human fallibilities and biases also present in the legislatures. Further, granting courts sole power over exemptions is potentially infeasible on a practical front, given the potential for a large number of cases to overwhelm the docket, slowing the process down (Waltman 2011, 17-18). The problem with relying on courts to enforce strict scrutiny is also that it requires evaluation of compelling state interest, which includes evaluating what constitutes “harm” to another party. This test, put in place by *Sherbert* and reaffirmed by the RFRA, does very little to actually clarify when an exemption should be denied. For legal purposes, what constitutes inflicting harm arguably goes beyond physical harm to a specific individual—is discrimination harm? Is refusing to pay taxes harm (as in, to society as a whole)? Is refusing to be vaccinated harm? Is compromising one’s own personal safety harm? These are difficult questions to answer (and ones I will address in Chapter 4), but the constitutional model suggests that judges would frequently be in the position of declaring that practices the legislature had deemed harmful to individuals or to society were, in fact, not so (Volokh 1999, 1470). Nonetheless, even though imperfect, the presence of an independent check has some inherent value, and that is what the courts provide.

Given the variety of strengths and weaknesses of the courts and the legislatures, a common-law model that combines the two may be the best that the nation can hope for. An advantage of the common-law model, which gives control to both courts and to lawmakers, is that it removes some of the political burden from small religious groups, which may not have the best political leverage. It is arguably easier in this sense to get an exemption from a court, which grants immediate relief from a problem and at the very least gets the issue on the radar of the legislature (Volokh 1999, 1481-1482). While this may result in more exemptions being granted, “so long as any errors that sufficiently concern the legislature are correctable, the likely errors in the direction of too much liberty from government restriction are generally—though not always—less harmful than the likely errors in the direction of too much government restraint” (Volokh 1999, 1482). The relative value of either body having primary decision-making power is difficult to discern and frankly, in the eyes of most, depends on the actual decision that is made in any given situation. Flexibility to evaluate situational factors on a case-by-case basis is important. In the presence of an ideal test for exemptions, perhaps there would not be a need for such flexibility of this sort at all, but no such ideal test has yet been developed.

## **THE LEGAL UNDERSTANDING OF RELIGION**

The difficulties in interpreting the Free Exercise Clause and, accordingly, in granting exemptions, occur in no small part because there is little in the way of a settled legal definition of what counts as religious practice in the first place. Moreover, certain circumstances, such as conscription, have raised the (unanswered) question about the appropriate treatment of other types of strong convictions that are secular

in nature. As it stands, the bulk of exemption cases and jurisprudence focuses on religious exemptions, so in some ways defining religion is of primary importance. So what is religion, speaking legally and constitutionally?

At its root, the definition of religion for legal purposes remains unsettled. The concept of religion in the United States has evolved far from what it was when the Free Exercise Clause was conceptualized. It has become more diffuse, with a modern conception of “spirituality” and a smaller emphasis on institutionally practiced religion (Sullivan 2005, 149-155). The mention of religion in statutes often requires courts to create a working definition of religious practice, but legislation itself, including the RFRA, generally skirts the issue. Although judges must classify religion in order to analyze situations, it is also unorthodox, and often in violation of the Establishment Clause, for judges to engage in disputes about levels of religious orthodoxy (Sullivan 2005, 29). This issue arose in *Warner v. Boca Raton* (64 F. Supp. 2d 1272 (1999)), which dealt with religious liberty as applied to restrictions on decorations in a Boca Raton cemetery. Florida District Judge Ryskamp expressed the belief that his own role in the *Warner* case may have been unconstitutional, for by “talking theology” he may have been exhibiting a “preference for religion” or for particular religious practice (Sullivan 2005, 137). Winnifred Sullivan, called as an expert witness in this case, said, “When the government gets into the business of defining religion, it gets into the business of establishing religion. The result is necessarily discriminatory. To define is to exclude, and to exclude is to discriminate” (Sullivan 2005, 101).

Sullivan explained in her book *The Impossibility of Religious Freedom* that *Warner* necessitated a legal classification of religion, as the decoration practices in question at

the cemetery were considered “folk religion”—in other words, based in religion but not on the direct instruction of religious officials or institutions (Sullivan 2005, 2). In response to a City Council resolution demanding the decorations be removed, the ACLU filed suit against Boca Raton (Sullivan 2005, 22) citing the Florida RFRA. The petitioners lost in the district court, a decision that was ultimately affirmed by the 11<sup>th</sup> Circuit on appeal. This case is just one of several examples that highlight the difficulties in defining what counts as religious practice, and it will be highlighted as a case study.

### Defining “Religion”

Given the frequency with which courts and legislatures need to evaluate the legitimacy of religious claims, it is a problem that there is no fixed definition of religious practice, because it requires individuals within the government to repeatedly engage in defining religion and the tenets of religion that must be protected from burden.

While the government has generally tried to stay out of defining religion, from time to time judges have been forced to try to provide a definition of religion in order to evaluate whether particular laws that have an impact on religion are valid and whether exemptions are constitutionally required. In the early religion cases, the Supreme Court did this by looking to the content of religious belief. One of the earliest examples came with *Davis v. Beason* (1890), which dealt with a law that banned polygamy. Justice Field addressed the definitional issue saying, “The term ‘religion’ has reference of one’s views of his relations to his Creator, and the manner of

discharging it” (133 U.S. 333). Over forty years later, the legal definition had changed very little, with the Supreme Court in *United States v. Macintosh* declaring, “The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation” (283 U. S. 605, 634 (1931)).

As discussed in Chapter 1, the cases dealing with claims to exemption from the draft served to provide some clarity about, and to evolve the Supreme Court’s understanding of, religion. In *United States v. Seeger*, the majority held that a belief system did not need to include a “Supreme Being” to qualify as religious, instead defining religion as “a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption” (380 U.S. 163 (1965)). Five years later, in *Welsh v. United States*, the Court concluded that the Universal Military Training and Service Act “[exempted] from military service all those whose consciences...would give them no rest or peace if they allowed themselves to become a part of an instrument of war” (398 U.S. 333, 344). This interpretation hinted at the idea that religion ought to be defined less by the doctrine of the belief per se, and more by the quality of the belief and the role it plays in a person’s life.

Conflict over the expansiveness of religion’s legal definition was present in *Warner* as well. Judge Ryskamp cited a strict test presented by Daniel Pals, Professor of Religious Studies and History at the University of Miami, regarding what should qualify as religion. Pals said the practice must answer in the affirmative:

- 1) Is it asserted or implied in relatively unambiguous terms by an authoritative sacred text?
- 2) Is it clearly and consistently affirmed in classic formulations of doctrine and practice?

- 3) Has it been observed continuously, or nearly so, throughout the history of the tradition?
- 4) Is it consistently practiced everywhere, or almost such, in the tradition as we meet it in most recent times? (Sullivan 2005, 147)

This model came under criticism by Sullivan, who said that under that test hardly any religious practice in the United States would qualify as religion (Sullivan 2005, 147).

To this point, there was further dissent surrounding *Warner's* narrow interpretation of religion, and narrow understanding of the RFRA as a result. Then-Governor Jeb Bush filed an amicus brief in the appeal of the *Warner* case to the Florida Supreme Court, defending the applicability of the Florida RFRA to this case saying, "Simply because some individuals may not hold institutional beliefs of ancient origin does not mean these beliefs are not religious" (Sullivan 2005, 139). The Florida RFRA, like many other RFRA's including the federal one of 1993, puts forward a rather circular definition of religion, the exercise of which is to be protected. It defined an "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief" (Florida RFRA). While this does little to clarify the definition of "religion," it at least begins to explain "religious exercise"; the federal RFRA does even less, originally defining "exercise of religion" simply as "the exercise of religion under the First Amendment to the Constitution" (RFRA 1993) and leaving it there.

Partially due to the difficulty of definitively defining religion, the danger remains that people may abuse the concept of "religion" to obtain exemptions. (Some would say that the Church of Cannabis's claims to an exemption from marijuana laws is an example of such abuse.) Religion, as it is currently understood in American society, is valuable to emphasize when pushing for accommodation. Freedom of

religious practice is generally looked upon favorably, and so characterizing a practice as religious can be pragmatically beneficial. An example is the portrayal of the use of the yarmulke as being religiously rather than culturally commanded (it is, in fact, culturally commanded), for example in the case of the Illinois high school that banned headgear while playing basketball. That a practice is cultural rather than religious does not undermine the depth of its importance to a person, but it may undermine legitimacy of the practice's claim in terms of religious free exercise (Barry 2001, 33).

### The Boundaries of "Religion"

Apart from a simple definition of religion, a second question important to evaluating religious liberty claims to exemptions is what counts as religious practice, and how far into secular society it extends. At one end of the spectrum would be a narrow definition, limited to "praying" and other rituals that directly engage with the spiritual element of religion. At the other end of the spectrum, a broad definition of religious practice could include every act or practice associated with a religious organization, such as, for example, selecting the specific height for a church in an area with strict zoning restrictions. It is clear that religious concerns work their way into many issues of public policy, from marriage laws to stem cell research, displays of religious monuments, contraception, teaching of intelligent design, and beyond, so determining what counts as religious practice for legal purposes is critical.

Some limits have been set forward about what the law considers to be "religious exercise." For example, Senator Orrin Hatch in a statement to Congress defending RLUIPA, declared:

Not every activity carried out by a religious entity or individual constitutes ‘religious exercise.’ In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill’s definition or ‘religious exercise.’ (*Congressional Record*, July 27, 2000, S7776)

While this does put limitations of the reach of religion for the purposes of the RLUIPA, it is important to note the context in which it was said. The RLUIPA itself, by applying the strict scrutiny standard to land use laws that burden religious practice (RLUIPA 2000), inherently implies that houses of worship themselves are part of religious practice. While this on its own may not be particularly startling, the Act can be further interpreted to imply that the specific properties or location of a building similarly constitute religious liberty that should not be burdened by facially neutral zoning laws. If “building height” can be contained within the definition of religious practice, then it becomes difficult to imagine what cannot. This applies particularly to states with their own RFRA, where strict scrutiny is applied not only to laws that burden the land use of religious organizations and the free exercise of those incarcerated, as provided for by RLUIPA, but to all laws. It is easy to argue that an action generally considered secular is in fact religious because a religious individual or organization is the one performing it.

### The Centrality of Religious Practice

The issue of “centrality” of a practice to religious beliefs was previously discussed in terms of its applicability to constitutional analysis, and the general legal conclusion is that centrality ought not be considered. However, centrality is, more

generally, a third element of the struggle of determining the scope of religion, after defining religion and addressing to what extent secular behavior counts as “religious” if performed by a religious organization. The key questions of centrality are whether a given practice is central to religious beliefs, and whether practices that are not “central” even qualify as religious at all. This is the corollary to analyzing religion’s boundaries, asking not whether practices extend so far into civil society that they should be considered secular, but instead asking whether a practice is “religious enough” to be considered religious.

*Warner* epitomizes this struggle. The plaintiffs’ decoration of their loved ones’ graves did not stem from a religious belief that was codified in any text, nor did they claim that the practice had been taught to them by a religious leader. When the plaintiffs in *Warner* testified, many acknowledged that the decorations were not specifically demanded by religious doctrine but rather were inspired by religious beliefs (Sullivan 2005, 39). A distinction was drawn between practices that were “independently” religiously significant, coming from established religious practice, and ones that were personally significant. When one plaintiff was asked if a certain practice had such independent religious significance, he responded, “Independently, no. They serve a religious purpose for me” (Sullivan 2005, 43). Rather than having been told they “must” do something in accordance with religious institution, the plaintiffs were acting in response to family tradition, ideas of personal piety, and the religious implications that were inherent to them in dealing with death (Sullivan 2005, 142).

For legal purposes, how should such claims be weighed? In *Warner*, the district court judge held that the plaintiffs did not have a legitimate claim under Florida’s

RFRA. He said that while the practices in question did not need to be central to the religious belief taken as a whole, they needed to reflect “some tenet, practice or custom of a larger system of religious beliefs,” adding, “Conduct that reflects a purely personal preference regarding religious exercise will not implicate the protections of the Florida RFRA” (Sullivan 2005, 94). While this logic may suggest some broader principle about “ranking” the importance of different religious practices, it does little to set workable precedent. It is unclear how a judge could consistently apply a test that says, on the one hand, the practice need not be central, but on the other it cannot go so far as to be “purely personal.”

Sullivan, in her testimony in *Warner*, addressed this issue when asked to address the issue of individuals crafting their own religious practice. She answered,

I think that within the American constitutional scheme, constitutionally it’s impossible for courts to recognize religious authority as defining orthodox practice and that, therefore, constitutionally courts have to look to the individual. But it doesn’t mean the individual is not seen in the context of the community. (Sullivan 2005, 87)

This analysis implies that centrality, while ostensible out of the realm of consideration, actually does play a role in judicial analysis. One way it could be used, perhaps, is to tell whether burden is substantial—even if a noncentral practice is religious, a violation of it might not be as significant as it would be if it were central to the belief system.

## **A LEGAL PROGRESSION FROM RELIGIOUS TO SECULAR**

### Expanding “Religion” to Morality

The case history surrounding moral claims for exemption, as compared with religious claims, is far less robust in United States history. The most prominent

example is the fraught history of conscientious objection to war; these cases not only help define religion, but in the process help define the relationship between treatment of religion and treatment of other claims. The first prominent case to deal with this issue was *United States v. Seeger*, which, as mentioned, found that beliefs did not need to include a “Supreme Being” for the belief system to qualify as a religious one for conscientious objection purposes. However, in the process it also held that only religious beliefs, not moral beliefs, qualified a person for status as a conscientious objector exempt from service. The Court clarified, “The exemption does not cover those who oppose war from a merely personal moral code, nor those who decide that war is wrong on the basis of essentially political, sociological or economic considerations, rather than religious belief” (380 U.S. 163).

Five years later in a case with very similar facts, *Welsh v. United States*, the Supreme Court reevaluated the relevant legislation, the Universal Military Training and Service Act, which exempted from combat military service anyone who “by reason of ‘religious training and belief’ [is] conscientiously opposed to war in any form,” (398 U.S. 333 (1970)). The Court interpreted the section to “[exempt] from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war” (398 U.S. 333, 344). While this interpretation does seem to be a stretch, it shows how the definition of “religious” compulsion came to include something that would normally be considered moral compulsion.

On the other hand, the idea of “personal codes” as grounds for exemption was flatly rejected in *Yoder* two years later. Chief Justice Burger declared the Amish mandate to avoid exposing their children to the outside world by sending them to

secondary school a firmly held religious belief. He compares this religious mandate for separation with Henry David Thoreau's personal rejection of his society's social values and his subsequent isolation at Walden Pond—Thoreau's motivation was used as example of an illegitimate basis for exemption (406 U.S. 205, 216).

A recent example, however, perhaps indicates the further evolution of the idea of deeply held moral beliefs as justifying exemptions from laws. The United States District Court ruled on *March for Life v. Burwell* in August 2015, and declared that a nonreligious group with deeply held beliefs opposing certain types of contraception (the ones it considered tantamount to abortion) could be exempt from the provision of the Affordable Care Act that required these methods to be covered by employer-provided insurance (\_\_\_ F. Supp. 3d \_\_\_ (D.D.C (2015))). The ACA, as it was written, provided an exemption from the employer mandate for religious organizations such as churches. Referring to the rationale for this exemption, Judge Leon said, "What HHS *claims* to be protecting is religious beliefs, when it is *actually* protecting a moral philosophy about the sanctity of human life" (*Burwell*, pg. 15), and he used this conclusion to apply the exemption to a non-religious organization as well. This shows a reinterpretation of religion and the applicable law, saying that the law, though only explicitly mentioning religion, implicitly protects "moral philosophy," and implying that moral philosophy counts as religion for these purposes.

The provision of exemptions for conscientious objection to war and the provision of moral exemptions from contraception mandates both display the unusual trend of judges reinterpreting statutory exemptions explicitly for religious practices to include deeply held moral convictions. Rather than saying that moral beliefs as separate from religious beliefs deserve equal protection under the law, both of these

instances involve the reinterpretation of “religion” to include moral practice, rather than a reinterpretation of the law to include protection for moral beliefs. It is a fine distinction, but it shows the way that the operating scheme remains one in which religious convictions, and religious convictions alone, are worthy of exemptions. However, changing times seem to have allowed the definition of religion to expand, to include beliefs that are not explicitly, or even explicitly not, religious.

### Shifting the Religious/Secular Prioritization

In 1971, the ruling in *Lemon v. Kurtzman* held that to be in compliance with the First Amendment, legislation “must have a secular legislative purpose” and “its principal or primary effect must be one that neither advances nor inhibits religion” (403 U.S. 602, 612 (1971)). The implication is that laws that prioritize religion over nonreligion may be a violation of the Establishment Clause. However, it has not been definitively determined the extent to which religious accommodation qualifies as such a violation. In 1985, the Court held in *Estate of Thornton v. Caldor, Inc.* that a Connecticut statute requiring accommodation of days of religious observance was unconstitutional. The statute read, “No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day” (472 U.S. 703). However, the majority stated that such a law demands that “religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath” (472 U.S. 703). This notion of religious exemption as a violation of the Establishment Clause served as the basis for Justice Stevens’ concurrence in *City of Boerne v. Flores*. Stevens said of the RFRA, “the

statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment” (521 U.S. 507, 537 (1997)).

This understanding of the relationship between the Establishment Clause and the Free Exercise Clause, and the implications of this relationship for the validity of religious exemptions, is confusing to say the least. To varying degrees, don't all forms of religious accommodation advance religious purposes over secular ones? The alternate way to view this issue, and the approach that seems to be dominant, is to declare that rather than religious accommodation advancing religion, it instead keeps those of religious faith from facing a burden not felt by others. Perhaps more than any other exemption issue, the dynamic between religion and morality, and between religious and nonreligious beliefs, has received the least in-depth legal analysis.

## **CONCLUSION**

In spite of a wealth of jurisprudence on the issue of exemptions, the constitutional mechanism for granting exemptions remains unclear. A recognition that “facially neutral” laws can burden religious practice was necessary for the nation to appropriately consider and accommodate religious liberty claims, but it opened the door to complicated questions about what standard of review should be applied to laws burdening religion, about what constitutes substantial burden, and about what religious practices are acceptable or unacceptable in an interconnected society where the government is inextricably enmeshed with religious practice that has spilled into the secular realm.

These are decisions being made regularly on a small scale, by local judges and legislatures. Without a clear rule of thumb to follow, biases favoring mainstream religion can easily creep in, both in decisions about which practices should be deemed acceptable, and in decisions about what constitutes a substantial burden on religious practice (Eisgruber and Sager 2007, 85). Additionally, the trouble with many free exercise claims is that they arise in circumstances where the desired practice has already been deemed harmful enough to be proscribed, and the issue has already been deemed serious enough that the legislature may have thoughtfully decided not to provide exemptions (Eisgruber and Sager 2007, 87). However, this may be taking too positive a view of legislation—especially with the treatment of smaller religions, oversight is possible in a way that is less common with mainstream religions.

Over the course of roughly a century of legal battles dealing with the issue of exemptions, generally religious exemptions, the nation seems to have arrived at a place where burdening of religious practice is disfavored, and the application of strict scrutiny of laws that implicate religion is widespread, even though the rational basis test described in *Smith* is the constitutional default. Perhaps the most important conclusion however, is not that it is widespread but that it is inconsistent. The understanding of what constitutes a “compelling state interest” varies, and the understanding of what constitutes harm to others or to society at large fluctuates along with it. The inconsistency can frequently be traced to the tenuous definition of “religious practice” for legal purposes. The questions of “what counts as a religion?”; “which practices by a religious group or individual are religious, and which are secular?”; and “what burdens religious practice?” are all ones that must be answered when evaluating exemption claims, and yet these are questions that are arguably

unconstitutional for the government to even ask at risk of implicating the Establishment Clause. A further indication of the variable nature of exemption analysis is the way its definition of religion has begun to incorporate deeply held moral beliefs; cases surrounding this relatively new issue may be the next wave of exemption jurisprudence.

## CHAPTER 3

### FROM RELIGION TO “CLAIMS OF CONSCIENCE”

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Since before this country declared its independence, religion has been singled out as an institution that deserves extra legal protection. At the time the Constitution was drafted the idea of religious persecution was fresh in the framers' minds. In 1785 James Madison wrote, “Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in religious opinions” (Madison 1785). Accordingly, the virtues of religious liberty, in opposition to religious repression, became encoded in American constitutional society. However, in the past two centuries, the understanding of religion has evolved, reflecting the way religious systems have become more diversified and the way their role in civil society has decreased. The decrease in the social role of religion is a result and further cause of people, on average, becoming less religious (Pew Research Center 2015). While religious discrimination has in no way been eradicated, the relevant questions have become not whether to protect a variety of religions at all, but to what extent, and also whether “religion” should be expanded to include secular “claims of conscience”—a term which here means claims based on beliefs that deal with issues like religion or similar to religion, such as morality and ethics.

To adequately answer these questions, the first step is to determine a definition of religion that is both functional and flexible enough for legal purposes. Flexibility has advantages and disadvantages. Flexible, broad definitions are more inclusive and

run a lower risk of inherently discriminating against certain belief systems. At the same time, interpretive flexibility can open the door to increased bias that is injected by legislatures and courts when interpreting the law, and a too-broad conception of religion can give heightened protection to practices that perhaps do not deserve it.

This chapter will identify four key elements of religion—three elements comprise religious beliefs, and a fourth makes a system identifiable as “religion.” Religious beliefs are characterized by ultimate concerns (such as life and death, and issues of morality), categorical commands, and an element of faith or insulation from reason, generally regarding the ultimate concerns. The fourth element is that the religious beliefs are also manifested within a community rather than solely within an individual. These elements paint an imperfect picture, arguably with the potential to be both under- and over- inclusive, but they nevertheless characterize religion fairly reliably and serve to form a workable definition.

Having identified these properties, the second step is to determine whether the distinction between religion and other claims of conscience is meaningful; in other words, whether religion deserves protection beyond that received by other claims of conscience or whether the two should be treated equivalently. Eisgruber and Sager wrote:

We need not engage in the dubious enterprise of making sweeping metaphysical or phenomenological comparisons between religious and secular commitments. It suffices to observe that secular commitments can be sufficiently compelling that people will die rather than compromise them (think of parents’ love for their children), and that secular needs may be so unyielding as to render ordinary courses of action unthinkable (Eisgruber and Sager 2007, 104).

True, this chapter fully intends to engage in such a “dubious enterprise,” but it comes to the same conclusion as do Eisgruber and Sager. Secular and religious motivations

of equivalent depth and seriousness ought not be treated differently by civil law. To attempt to do so would require applying at least some element of the “I know it when I see it” approach that Justice Potter Stewart used for identifying pornography, something which is subjective and unreliable. Nearly all of the elements of religion can be found reflected in secular belief or practice, and the ones with weaker parallels (such being faith based and “insulated from reason”) do not deserve heightened protection.

There is a temptation to say it doesn’t matter what religion is, or whether a practice is motivated by religion or morality—a situation is worth evaluating exclusively based on people’s actions. To an extent, I agree with this impulse. However, we as a society always take motivation into account. We provide vaccine exemptions for medical reasons, but not necessarily for other reasons. We provide parental leave because people feel compelled to take care of their children and we place social value on this practice. For better or for worse, motivation always influences evaluation of public behavior and, with the right motivation, behavior is accommodated that otherwise wouldn’t be.

This chapter will begin with the problem of defining religion, looking first at what characterizes religious beliefs, and then at what characterizes religion as a whole. The second part of the chapter will take my definition of religion (as an amalgamation of these elements) and compare it to its secular counterparts, drawing conclusions about whether religion deserves protection that elevates it above other types of motivations.

## WHAT IS RELIGION?

As discussed in the previous chapter, there is no fixed legal definition of religion. Attempts by the court to define religion have at most determined what it is not—it does not require a “Supreme Being”—but courts and legislatures have been mostly deferential to those who claim a practice is religious, and avoided specific definitions altogether, operating on a case-by-case basis. As discussed in the previous chapter, the Court in *Welsh v. U.S.* indicated that the crucial part of the definition of religion was that it involves “deeply held” beliefs—beliefs that could also be of a moral or an ethical nature. Other definitions included a notion of “duty” or a “Creator.” No doubt, religion is difficult to define, but pinpointing defining characteristics is necessary for a rational approach to addressing religious issues.

Part of the definition of religion must address the content of the beliefs themselves, namely what it is that sets religious beliefs apart from other types of beliefs. The early definitions provided by the Supreme Court characterized religion in part as belief in the supernatural, particularly in the form of a “Supreme Being.” This understanding can be found in the United States dating back to the 1776 Virginia Declaration of Rights, in which George Mason and James Madison defined religion as “the duty which we owe to our Creator and the manner of discharging it” (McConnell et al. 2002, 869). However, this approach was rejected outright in *Seeger*, which introduced the idea known to theorists as “ultimate concern,” in which the defining quality of the belief has less to do with the doctrine’s contents and more to do with the role the religion plays in an individual’s life. This idea of “ultimate concern” is derived from the work of Protestant theologian Paul Tillich, referenced in *Seeger*,

who translated the idea of God to: “your ultimate concern, of what you take seriously without any reservation” (380 U.S. 163, 187).

This transition away from a Supreme Being is supported by philosopher Émile Durkheim, who presented a fairly comprehensive analysis of the features that distinguish religious beliefs in *The Elementary Forms of Religious Life*, published in 1912. He said, “Religion is broader than the idea of gods or spirits and so cannot be defined exclusively in those terms” (Durkheim 1912, 33). Constitutional law scholar and former federal judge Michael McConnell concurs, indicating that one problem with requiring a supreme being in the definition of religion is that it incorporates into law a bias toward Western beliefs (McConnell et al. 2002, 877).

This section will outline the distinct components that are characteristic of religion and that are commonly associated with religion. It will conclude that while there are issues of under-inclusion with saying that a belief system must possess all of these elements to qualify as religious, this is the only way to create a meaningful definition of religion, as distinct from any other type of system.

### Ultimate Concerns

There are various approaches to understanding the concept of “ultimate concern,” but they generally include the idea of a greater reality, encapsulating a realm that deals with issues loftier than standard civil matters. It is in this realm that ultimate concerns are developed, such as with a supernatural power dictating moral behavior. Judge Adams, in his concurrence in *Malnak v. Yogi*, provided a definition of ultimate concerns:

One's views, be they orthodox or novel, on the deeper and more imponderable questions—the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong—are those likely to be the most “intensely personal” and important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference. (592 F.2d 179 (3d Cir. 1979))

This idea of ultimate concern is useful to the extent that it distinguishes religious beliefs from “personal preferences.” In part, ultimate concerns deal with subject matters that generally transcend both preference and the realm of civil law, such as morality and the meaning of life. While some nonreligious beliefs also deal with these issues, nearly all, if not all, religions do deal with such ultimate concerns in some way.

The notion of ultimate concern is valuable in that it conveys a certain depth of feeling—a quality that is somehow of deeper significance than strong feelings on other types of less personal subjects. However, relying on this notion to understand the scope of “religious beliefs” is not straightforward. What feels like an ultimate concern to one person may not feel like an ultimate concern to another. For example, drawing from *Smith*, the use of hallucinogenic drugs may be of ultimate concern to one whose religion incorporates it into its notion of spirituality, but to others it may just be a pleasant pastime. While Judge Adams' list of ultimate concerns, including life after death, role in the universe, and morality, is largely comprehensive, it is not immediately clear that all religious beliefs relate to such ultimate concerns, nor will it always be clear what qualifies under this list. Nevertheless, the idea of ultimate concerns suggests a type of depth that is valuable to protect in a heightened manner.

## Categorical Commands

Related to the idea of “ultimate concern” is the notion that religion involves a set of commands. Some of these commands may be directly related to the ultimate concerns, such as “thou shalt not kill,” whereas others may be more secondary, such as dietary restrictions or codes of dress. Contemporary philosopher and legal scholar Brian Leiter identified two elements of religion that distinguish it from other types of beliefs, the first of which is “normativity of (at least some) religious commands” (Leiter 2013, 33). He elaborates on this, saying that all religion has some degree of “categorical demands” that must be satisfied regardless of individual desires or discouraging factors. Similar to ultimate concerns, the idea of categorical commands does help identify beliefs as religious, in that all prominent religious systems possess them and in that most other beliefs systems, even if they make demands, generally do so with a greater degree of flexibility.

When dealing with religion, the commands are usually considered to come from an external source, rather than an internal source. In some ways, this might increase the perceived harm of acting out of line with these beliefs, for people may fear they will incur punishment for all of eternity, rather than simply within this life. The notion of commands is related to the notion of ultimate concerns in this regard, in that both increase the depth of feeling surrounding the belief. The idea of commands also overlaps with the third element of religious beliefs, insulation from evidence.

### Insulation from Evidence

The inflexibility of religious commands speaks to another element that defines religious belief, which is that they are faith-based. Durkheim says, “One notion that is generally taken to be characteristic of religion is the notion of the supernatural. . . . Religion would then be a kind of speculation upon all that escapes science, and clear thinking generally” (Durkheim 1912, 22). In addition to categorical commands, Leiter also categorizes religion based on “the relationship between (at least some) religious belief and evidence” (Leiter 2013, 33). He says religion does not “answer ultimately . . . to evidence and reasons,” and to some degree must be based on faith, insulated from rational justification (Leiter 2013, 34). It is important to note that religion is often purported to be based on reason and evidence. However, unlike other evidence-based beliefs, religious beliefs are static even in light of new or conflicting information. Faith is distinct from reason in that it is stable and unqualified—inherently static—while reason is inherently dynamic (Macklem 2000, 37). In some ways this is one of the most compelling and distinct features of religious beliefs, for very few belief systems other than religion are insulated from reason.

### Religious Beliefs Conclusion

The rejection of a “supreme being” as the distinguishing character of the content of religion opened up a vacuum in the definitional question of religion. While the presence of a “supreme being” may be enough to characterize a set of beliefs as religious, it is not a requirement for beliefs to qualify as such. There are, however, three elements of religious beliefs that can be used to more accurately characterize them as religious. The first of these is the idea of “ultimate concerns,” which indicates

that religious beliefs address, at least in part, lofty issues of morality and life and death. A product of these concerns is “categorical demands,” which dictate action in accordance with the ultimate beliefs. Third, religious beliefs are distinct from other beliefs in that they are insulated from reason and evidence, remain static, and reinforce the categorical nature of the commands, in that the commands do not vary regardless of the situation. At the root of these three elements is the understanding that religion helps people understand life and classifies “good and bad” in a way that other systems do not. Durkheim says, “Whether simple or complex, all known religious beliefs display a common feature: They presuppose a classification of the real or ideal things that men conceive of into two classes . . . profane and sacred” (Durkheim 1912, 34).

Unfortunately, the content of religious beliefs is not necessarily enough to identify religion. While these features are useful in identifying religion, even the presence of all of them is not necessarily enough to classify it definitively. To throw this problem into relief, imagine a person having hallucinations of a three-headed turkey dictating the person’s actions and outlining right and wrong, and let’s say that some of the required behavior conflicts with civil law. Ought this belief qualify as religion, thus necessitating an exemption from the law? After all, the turkey’s dictates are categorical commands about issues of ultimate concern, and not based on reason. However, to many, the answer would be no: individual hallucinations cannot be included in the legal definition of religion, for practical reasons.

It appears that the definition of religion requires something other than the possession of beliefs that look religious. This is supported both philosophically and by the need for practicality.

### From Religious Beliefs, to Religion

This brings us to a potential last element of a definition of religion, that it requires some degree of community. This has nothing to do with the religious content itself, but rather it speaks to what we think religion “looks like.”

Durkheim’s characterization of religion emphasizes that it involves a community, defining it as: “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them” (Durkheim 1912, 44). Here, there is the implication that religion is more than simple belief in a divine power—rather, a defining element also includes that the belief is adopted and legitimized by a number of people. Of course, it remains unclear what qualifies as a “community”—how many people must it include, how established must it be?<sup>2</sup>—and whether there is any reason, other than practical purposes, that religion must include community.

Nevertheless, the idea of community as a necessity for characterizing religion is the cornerstone of Durkheim’s definition, and it does solve the problem of individual hallucinations.<sup>7</sup> Durkheim says,

Religion is an eminently social thing. Religious representations are collective representations that express collective realities; rites are ways of acting that are born only in the midst of assembled groups and whose purpose is to evoke, maintain, or recreate certain mental states of those groups (Durkheim 1912, 9).

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<sup>7</sup> On the other hand, what if the person from our three-headed turkey example were to convince others that the hallucination represented a real deity? This would create the necessary community to have it qualify as a religion. Is this a problem? Or is it simply the same as any other religion, just with less historical legitimacy? From a formulaic point of view, it’s the latter.

To Durkheim, not only is religious community indispensable to religious belief but it serves to distinguish religious beliefs from nonreligious beliefs. He says, “Religious beliefs proper are always shared by a definite group that possesses them and that practices corresponding rites. Not only are they individually accepted by all members of the group, but they also belong to the group and unify it” (Durkheim 1912, 41).

In spite of this, Durkheim does not deny that individual religious belief exists. He says, “But if one includes the notion of Church in the definition of religion, does one not by that same stroke exclude the individual religions that the individual institutes for himself and celebrates for himself alone?” (Durkheim 1912, 43). He clarifies, however, that these individual religions have historically been offshoots of other religions, and sets aside the speculative idea of individual religions that are entirely reliant on the innermost self (Durkheim 1912, 43). So, even in incorporating the idea of genuine individual religions, he also implicitly rejects the validity of hallucinations qualifying under a religious definition.

Nevertheless, there is something inherently problematic with including “community” in the definition of religion. While it is crucial from a pragmatic point of view because it helps identify a system as “religion,” and while it is compelling that in many cases community distinguishes something that is religious from something that is not, this is increasingly difficult to defend in an era marked by increasing numbers of those who define themselves as “spiritual but not religious.” Spirituality is distinctly individual, and someone could potentially sincerely feel he or she has religion of sorts, even if it is not derived from any specific institution.

### Inadequacy of Definition

I indicated previously that for a belief system to qualify as religious, it must possess all of these elements. The two possible approaches—to say “religion” must include all the elements, or to say it must only include some—each have their share of pros and cons. Saying a system must include all of them implies a narrow definition of religion, and will exclude other types of very strong beliefs, often moral ones, that reflect many “religious” elements. Saying that a system must only possess one or several of these elements is also problematic. The issue with the second approach is that it reintroduces a great deal of the subjectivity we have been trying to eliminate by creating a definition of religion, though it would reflect the approach the Court took in *Welsh* when it said that certain types of strongly held moral beliefs qualify as religion. If a belief system needs only some of these elements, it can include many traditionally moral things under the “religion” umbrella, and given the number of beliefs that reflect at least one of the outlined elements of religion, this approach to defining religion would make the term “religion” meaningless.

The first approach, with a narrow definition of religion, is more tenable, but it would also exclude many beliefs and practices with “religious” qualities, such as deeply held moral compulsions, and spiritual beliefs that are not reflected in a community. On its own, such linguistic exclusion is not a problem, but the classification of religion, at present, has very tangible legal implications.

Ultimately, legal definitions of religion are forced to marry the beliefs of a religion with the defining tangible features of religion in order to be workable, because there is no singular element of religion that both classifies it and makes it unique, as will be discussed further in the next section. One approach was proposed by Judge

Adams, and included a three-part definition of religion that became part of the majority holding in *Africa v. Commonwealth of Pennsylvania* (1981). The three parts were: ultimate concern (dealing with fundamental problems such as life and death), comprehensiveness (each belief part of larger world-view), and that it is often recognized by outward signs such as clergy and observation of holidays (662 F.2d 1025 (3rd Cir.)). The biggest problem with the elements of the definitions courts and philosophers propose is that they come to them primarily by looking at the defining features of religions that already exist. When there are legal battles over religious exemptions, however, they are primarily over religions that society is less familiar with—when society is familiar with a religion, either the law is crafted around it, or exemptions are given more readily.

#### Creating a Definition, Anyway

There is no clean answer to the question of whether a “religion” needs to include all four elements characteristic of religion: ultimate concerns, commands, faith, and community. However, for practical purposes, the answer must be yes, in order for the classification of “religion” to actually hold significance. While this classification system is imperfect, identifying religion by these elements will work most of the time. As will be discussed in the next section, religion may be unique in the way it combines these elements, acting as the only salient example of an institution that organizes all of the elements into one system, acting broadly upon many elements of its adherents’ lives. This level of comprehensiveness is certainly unusual.

Unfortunately, a byproduct of this approach is that it excludes many beliefs that mirror subsets of religion, and there is nothing qualitatively different about beliefs

that impel with similar strength, just on a smaller scale. Moreover, it prioritizes faith over reason-based beliefs. Therefore, after having adopted a narrow definition of religion out of necessity for comprehension and practicality, out of necessity for justice society must next mitigate the problems of this exclusionary strategy by giving equivalent legal priority to other types of deeply held beliefs on important topics, as per the mandate in *Welsh*.

## **WHY TO (NOT) SINGLE OUT RELIGION**

In some ways, religion as we have conceptualized it is unique. Professors of Law John Witte Jr. and Joel Nichols say:

Religion is a unique source of individual and personal identity, involving ‘duties that we owe to our Creator, and the manner of discharging them’ as Madison put it. Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith.” (Witte and Nichols 2010, 288)

It is difficult to conjure up a system of beliefs that parallels religion when it is thought of in this manner, as a system that combines all of these elements with such expansive implications. However, as will be explained, the elements of religion, viewed individually, are hardly unique and many beliefs or organizations incorporate at least several of these elements. Further, even to the extent that religion as a system stands alone, its features ought not guarantee it distinctive protection that exceeds that for other matters of conscience.

There are plenty of organizations that have rituals and provide community, and plenty of belief systems that provide a model for evaluating right and wrong. These can be about individual practices (for example, vegetarianism) but can also be

more global, such as someone who strictly follows a Kantian model of morality. However, neither vegetarianism nor Kantian philosophy has traditionally been considered religious, probably because neither relies on a notion of faith. In evaluating a civil law that impinges on one of these types of beliefs, should the beliefs automatically be given less weight just because they do not represent a part of a system that contains all of the traditional evaluative features of “religion”? Is there actually something so special about a belief system including all of these defining features? Or do we just, either for practical or discriminatory purposes, look for missing elements in order to try to exclude from legal protection practices that we traditionally do not consider religious?

For the purposes of this section, imagine two prisoners. Jill is a practicing Jainist, forbidding her from eating meat, on religious grounds. Jack, on the other hand, is a lifelong vegetarian, repelled by meat on moral grounds and, most likely, on physical grounds now too. Under the current law, the RLUIPA—which relies on the Free Exercise Clause—the prison would be required to accommodate Jill, while Jack would have no legal recourse, even if his motivation is equally intense.

Sure, arguably, religion and morality are not the same. While they may both possess a categorical nature to some degree, morality answers to reason in a way that religious beliefs do not. Further, Leiter says, religion must address “existential facts” about human life, making “intelligible and tolerable” inevitabilities such as suffering and death (Leiter 2013, 51-52); not all conceptions of morality achieve this goal. Morality also generally does not bind members into a community. Nevertheless, if two people have equally deep motivations for their actions, oughtn’t they be given equal consideration? Particularly so if both deal with issues of ultimate concern?

## Religion's Other Protections

Advocating for religion to not receive special legal treatment is not the same as saying there should be no protection for religious beliefs at all. “Freedom of thought” is highly regarded as a political and social virtue that deserves protection, and religious beliefs are already protected to at least the same extent as other matters of conscience are.<sup>8</sup> This can be seen in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948, which says,

Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” (*Universal Declaration of Human Rights*, article 18)

This statement, however, raises the true problematic element of freedom of religion. The problem lies not with people holding the beliefs, but with the people acting on them, especially acting on them publicly. Religion, more than most belief systems, demands particular courses of action that may, and often do, clash with civil law. Taken in this context, to what extent should religious practice be protected by the Constitution?

One way to evaluate this issue is to look to what was originally intended by the Free Exercise Clause. At the time of ratification, there was debate over whether the text should refer to “equal rights of conscience” or “free exercise of religion.” Arguably, the debate doesn’t matter—they ultimately chose to refer to religion specifically. However, it was a close question at the time, battled out in Congress, with

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<sup>8</sup> “Freedom of thought” was deemed in *Palko v. Connecticut* to be the “indispensable condition, of nearly every other form of freedom” (302 U.S. 319 (1937)).

Madison pushing for a protection of conscience. This is not necessarily to say that the alternative to free exercise of religion was to protect morality as well. The understanding of the word “conscience” has evolved; in the eighteenth century, it did primarily refer to religious belief. However, there must have been a distinction, for if the understanding of “religion” and “conscience” had been identical, it would probably have provoked less debate. Further, one of the proposals was that the Constitution should protect both “religion” and “conscience,” which further implies a distinction (McConnell et al. 2002, 79-83). One interpretation of the distinction is that “liberty of conscience” dealt exclusively with beliefs, while “freedom of religion” extended to actions. Witte said,

“Liberty of conscience was a guarantee to be left alone to choose, to entertain, and to change one’s religious beliefs. Free exercise of religion was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community.” (Witte 1996, 394)

Under this interpretation, there is no doubt that the Free Exercise Clause was intended to extend to religious action, not just religious belief. However, for the most part, other constitutional rights already protect religious action. Note Witte’s understanding of “free exercise”: “The phrase [free exercise of religion] generally connoted various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, religious education, among others” (Witte 1996, 395). Nearly all of these examples of free exercise are covered by the other clauses of the First Amendment, making the Free Exercise Clause redundant. In addition to the freedom of expression, the right to privacy as it is currently understood could also protect religious practice. The freedom from discrimination, built into the Fourteenth Amendment, acts as a final check that protects religious beliefs and

religious practice without invoking the Free Exercise Clause. Macklem corroborates this, saying,

Most and possibly all of the leading features of religious freedom have now found secular expression and a corresponding political guarantee under the rubric of non-religious principles, such as freedom of expression, freedom of association, and freedom to be free from discrimination. (Macklem 2000, 7)

Justice Scalia made a similar argument in *Smith*, when he said that the free exercise claims that had been decided in favor of granting exemptions did so in conjunction with a finding of an infringement of other rights, such as speech or assembly (494 U.S. 872, 881). The problem, of course, is that religion often demands more than other belief systems. Further, to many, religion deserves a higher level of consideration due to the nature of the beliefs themselves, in a way that goes beyond protecting them simply because they represent a matter of conscience. While other parts of the U.S. constitutional system protect many of the fundamental aspects of religion, they do not extend heightened protection to religious conduct to nearly the extent the Free Exercise Clause does. The question becomes, therefore, not whether religion should receive protection, but whether religiously motivated conduct should receive more protection than actions inspired by other types of motivation.

### Distinguishing Religion by the Nature of Beliefs

The relevant area of inspection when determining the deference religion should get must be the beliefs themselves—it is the beliefs rather than religious actions that give religion the exalted place it has, as people would not typically hold identical nonreligious behavior in the same regard (Leiter 2013, 35). Durkheim concurred:

The rites can be distinguished from other human practices—for example, moral practices—only by the special nature of their object. Like a rite, a moral rule prescribes a special way of behaving to us, but those ways of behaving

address issues of a different kind.... Therefore, only after having defined the belief can we define the rite. (Durkheim 1912, 34)

This chapter previously identified the defining features of religious belief. It follows that to determine whether religious practice deserves heightened protection, it is important to figure out whether the features of the beliefs are unique to religion, and if so, whether they present enough cause to provide extra protection only to religion. While the “comprehensiveness” element of religion may be useful for identifying it, the determination of whether religion is worthy of extra protection requires evaluating its individual elements, not just brushing it off as worthy because it is so massive and pervasive.

The notion of community, which is separate from the identification of religious beliefs, is also left out of this analysis, because it is readily apparent that community on its own is not unique to religion, and that this is just a factor important for identifying religion—or perhaps more accurately, for identifying what is not religion—but not for separating it from other belief systems.<sup>9</sup>

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<sup>9</sup> On the other hand, one could also make the argument that a strong enough community on its own is enough for a practice to qualify as religious. This is the argument that Mark Oppenheimer, columnist for *The New York Times*, made in a recent article about CrossFit as a religion—if a community brings significant meaning to a person’s life, creates feelings of spirituality, and has certain lifestyle dictates, is that not enough to make it resemble “religion” as it is commonly understood (Oppenheimer 2015)? It seems that the answer is yes. At the same time, this conclusion does not affect this paper’s analysis, for the relevant aspects of the notion of community can be broken down into the three characteristics of religious belief (ultimate concerns, commands, and perhaps insulation from reason). The idea of a strong community seems to almost necessitate these other traits, and thus community remains an inadequate mechanism for distinguishing religion from nonreligion; either the traits of the community deserve protection or they don’t, but the community itself is not what creates this need.

### Distinguishing Religion: Ultimate Concerns?

The notion of ultimate concerns implies the notions of strength, meaning the degree to which the motivation is compelling, and depth, which indicates the personal and consuming nature of the beliefs. While ultimate concerns often characterized by religious concerns, they not limited to those issues. Judge Adams, in his definition of ultimate concerns, characterized them as those beliefs that are “the most ‘intensely personal’ and important to the believer” (592 F.2d 179 (3d Cir. 1979)). While he says such ultimate concerns are usually related to a religious understanding of issues of morality and mortality, the relevant criterion is that the beliefs are uniquely important to their holder, and therefore should receive extra protection.

This notion of depth can be understood as a psychological approach (McConnell et al. 2002, 878), and a model that could extend to other deeply held motivations. This includes, of course, motivations that are not religious, such as a desire to care for one’s family members. It’s worth looking at the earliest reported case of a free exercise claim, discussed in Chapter 1, which was made in 1793. *Stansbury v. Marks* (2 Dall. 213 (Pa. 1793)) involved a Jewish citizen who was supposed to testify in court on a Saturday, in violation of the Sabbath, and who refused. He was subsequently fined, and contested the penalty on the grounds of the Pennsylvania state constitution’s religious liberty clauses that mirrored those of the federal Constitution (2 Dall. 213 (Pa. 1793)). Although Phillips lost this case, the previous chapters indicate that Phillips’s argument would be looked upon favorably today. However, what if the reason he wanted to miss his court date was to care for a sick family member? This is a motivation that can be seen as moral, or it can be seen as simply deep personal desire, but regardless, it is only in rare circumstances that it

could be deemed religious. Nevertheless, the compulsion is equally deep (or at least, it cannot be falsified that it is not).

An example of strength of motivation can be found in the case of a person addicted to drugs, who will do anything to get them. This is an intensely compelling motivation, but also a nonreligious one. Accordingly, at least arguably, strength of belief is not enough to distinguish religious motivations from other types of motivations. And, in the case of the drug addict, it shows that strength of desire is not necessarily enough for exalted protection.

Even if religion is one of the most common reasons for intense depth and strength of belief, it is not alone in producing these feelings. The desires of both the drug addict and the relative of a sick family member do represent strong beliefs that could inspire choices in conflict with civil law.

One could make the argument that the ultimate concerns deserving of protection have to be based in divinely commanded or derived notions of morality or mortality, and that this is the bases on which religion alone should receive exalted protection. However, this argument presents problems. It seems a little like an arbitrary distinction on which to protect the beliefs, if it is understood that other types of belief can produce equally strong desires even without divine command. In fact, this line of argument could be considered discriminatory in favor of Western religions, to the extent that many believe ultimate concerns to require a conception of the afterlife.

Since other types of beliefs not traditionally considered religious also deal with issues of morality and mortality, making religion not unique in this regard and thus not deserving of extra protection on these grounds. There is nothing wrong with

society deciding to provide extra protection to issues of ultimate concern, at least in theory. However, it is impossible to say that religion is unique in dealing with such issues.

### Distinguishing Religion: Categorical Commands?

Religious commands act as a set of demands on an individual that run parallel to civil law. This can create arguments both in favor of and opposed to civil law prioritizing religion over other sets of beliefs. On the one hand, the personal ramifications of not respecting religious commands is higher than that of not respecting other motivations, in that the people are more likely to feel a greater violation if they feel the law is obstructing their chance of a favorable afterlife. Moreover, this type of violation is likely to provoke anger, so from a pragmatic point of view accommodating choices based on religious beliefs may have a lower cost than not doing so. It is possible that the reason religious practices are given such weight is simply because of the extremes to which those who possess religious beliefs will fight to defend the beliefs' corresponding behavior; this is a direct product of the categorical nature of belief. Those who adhere to a practice for reasons of religious conscience may be willing to continue the practice regardless of the legal cost, and they seem to be more motivated to fight for legal protection than are those of weaker conviction (Leiter 2013, 36).

On the other hand, it is not clear that feeling a compulsion to act in a way that challenges civil law is a good reason for exemption from civil law. Other types of motivations, including morality claims, are hardly given such flexibility—this result is a product of a democratic system that binds all citizens to laws for the common good,

sometimes at the expense of minority beliefs. It is not clear that this result is a bad thing—remember that those looking to discriminate racially often based their claims on religious grounds, and that today a similar argument is being made by those refusing to provide services to same-sex couples. There is no way to say automatically that “claims of morality” based in commands from sources external to civil law should be given extra protection. Entering into civil society means you accept the law of the land as the highest law. Commands from outside this system do not necessitate accommodation, and it would set a dangerous precedent to say that they do.

### Distinguishing Religion: Insulation from Evidence?

One of the most distinguishing features of religion is that it is faith-based and insulated from evidence. Macklem argues that faith alone guarantees the distinct freedom of religion (Macklem 2000, 37), and says:

The justification for religious freedom is not to be found in the articles of religious freedom . . . nor in the institutions and practices that attend religious belief, but in the capacity of religious faith to sustain its adherents in their fundamental commitment to life and to the moral values that make life worth living, a commitment that cannot always be made on the basis of reason alone. (Macklem 2000, 4)

On these grounds, Macklem argues for the “secular value” of faith, and says that despite the secular position of judges and legislatures, governing bodies are “morally bound” to recognize faith as worthy of protection. We protect freedom of religion, he says, because faith itself contributes “to the pursuit of human well-being” (Macklem 2000, 27). However, for this to be unequivocally true, it would have to be verifiable that there is a net positive to faith-based beliefs, and it is impossible to conclude that the benefit some individuals might gain from using faith to solve unanswerable

questions outweighs the harms done to society in the name of religion, or the harms done to the belief-holder for allowing them to escape addressing issues using reason.

Even if, however, we decide to assume that religious faith produces individually positive outcomes in that it provides comfort with regard to life's most daunting issues, this is not an adequate reason to provide it more legal protection than other sources that provide the same positive existential benefits as religious faith. There is something democratically untenable in a society that lets, for example, religious drug users have an exemption from the law, but denies this benefit to those who receive spiritual value from drugs but who do not purport to derive this value from any system of faith. More generally, society should not privilege those who act insulated from reason above those who rely on reason to motivate their actions.

Further, toleration of faith-based and/or false beliefs is already represented in the various freedoms that protect liberty of conscience: Falsity of beliefs is a necessary and inevitable element of life, so it deserves the same toleration that other matters of conscience do (Leiter 2013, 91), to the extent it doesn't extend into the public sphere. But faith alone does not necessitate extra protection. Even if there is a "secular value of faith" as Macklem claims, the appropriate approach to take when the faith-based beliefs provoke actions that directly conflict with civil law remains unclear. Providing exemptions for unlawful, religiously motivated actions, beyond what is typical for secular belief-based actions, implies that the value of faith is greater than the value of the civil law that is presumably in place to protect the interests of society as a whole.

Interestingly, the arguments made by Bobby Henderson, the founder of Pastafarianism, actually may also present a compelling argument for why faith ought not be a factor based on which religion is prioritized. He wrote, "Pastafarianism is

different than most religions in that we explicitly make the point that our scripture need not be believed literally. In other religions this is known but not often said out loud” (Henderson, “Church of the Flying Spaghetti Monster”). He continues by arguing that a lack of strict belief in the scripture does not make one’s feelings of religiosity illegitimate and saying, “A lot of Christians don’t believe the Bible is literally true—but that doesn’t mean they aren’t True Christians. If you say Pastafarians must believe in a literal Flying Spaghetti Monster to be True Believers, then you can make a similar argument for Christians.” This complicates the relationship between faith and religion, showing that while faith in the general religious system may be necessary, faith in any particular tenet may not.

In spite of this complication, faith, compared with the other elements of religion, may be the strongest argument for the uniqueness of religious belief. However, it is not a valid reason to privilege religious beliefs over others because it is not unique in the benefits it provides nor can we systematically privilege irrationality *qua* irrationality.

#### Bonus: The Establishment Problem

In addition to the inadequacies of the elements of religious beliefs to justify extra protection for religious practice, there is a First Amendment Establishment Clause issue with such governmental practice. For example, a brief submitted to the Supreme Court as part of the Selective Draft Law Cases (245 U.S. 366 (1918)) by Harry Weinberger, attorney for the plaintiffs, stated:

You may have two persons of exactly the same religious conviction of opposition to participating in war in any form. They may believe firmly, “Thou shalt not kill.” Both of them may be equally honest; both may be

equally moral; both derive their convictions from the same source, their conscience; but one of them belongs to a certain particular sect and the other does not. The one who belongs to the well-recognized religious sect is exempted from the duty of engaging in the combatant service of the war if those are its principles, and the other, for his honest conviction, because he refused to serve, is made a felon and subjected to severe penalties. If this is not making a law “respecting an establishment of religion” and “prohibiting the free exercise thereof,” “establishing inequality” and “making religious distinctions,” no such law can be devised (No. 702 Pl. in Err. Br. 37, 39 (O.T. 1917)).

Now, this argument was made in objection to the portion of the Selective Service Act of 1917 that stipulated that to receive an exemption a person must be a member of a “well-recognized” religious sect that had pacifism in one of its tenets. Accordingly, this argument is in objection to the government giving preference to one religion over another, as opposed to giving preference to religion over nonreligion. However, it is applicable here for two reasons.

First, U.S. society has evolved to the point where secular beliefs should be given the same weight as religious ones. There is some jurisprudence to support these points, as discussed in Chapter 2. Beginning with *Lemon v. Kurtzman* in 1971, several Court rulings have suggested that not only is it unconstitutional for one religion to get legal priority over another, but also that religion cannot be prioritized over nonreligion. If, as the Lemon test states, to be in compliance with the First Amendment legislation “must have a secular legislative purpose” and “its principal or primary effect must be one that neither advances nor inhibits religion” (403 U.S. 602, 612 (1971)) then this indicates that laws that prioritize religion over nonreligion may be in violation of the Establishment Clause. This is the analysis that was adopted in *Wallace v. Jaffree*, which held that authorized time for silent prayer in public schools was unconstitutional (472 U.S. 38 (1985)), and was the basis for Justice Stevens’

concurrence in *City of Boerne v. Flores*. Stevens said of the RFRA, “the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment” (521 U.S. 507, 537 (1997)). This understanding of the relationship between the Free Exercise Clause and the Establishment Clause becomes more and more relevant as the number of religious citizens drops (Pew Research Center 2015).

Second, when deciding what qualifies as religion, there is inevitably going to be bias, in a way that might not be present if legal determinations were based on specific traits of belief, as opposed to on broader classifications of the category of religion. As Kent Greenawalt says, “Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations” (Macklem 2000, 11). The product of that is a favoring of more established religious belief, shortchanging other beliefs or belief systems that might otherwise deserve legal protection. Accordingly, a system that prioritizes religion over nonreligion will, at the margins, most likely advance discrimination against non-mainstream beliefs, no matter how carefully the definition of religion is crafted. An example of this favoritism has already been mentioned, with regard to the earliest Free Exercise case, *Stansbury v. Marks* (2 Dall. 213 (Pa. 1793)). Needless to say, if Judaism were the dominant religion in the United States, it is highly unlikely Phillips would have been asked to testify on a Saturday at all. This is the same issue that arose nearly 200 years later, in *Sherbert v. Verner*, in which Sherbert, a Sabbatarian, was denied unemployment benefits after losing and refusing to accept jobs that provided a day off only on Sundays, conflicting with her religion, which mandated rest on Saturdays.

## **CONCLUSION**

It is evident that no singular element of religion clearly entitles religious action to protection beyond other types of belief-based action. Religion receives this extra protection for historical reasons and because of the prominence of religion in civil society, not because there is something unique about it that makes it more deserving of protection than other types of equally compelling claims. This is not to say that religious beliefs do not deserve protection, but this protection is already in place under the umbrella of liberty of conscience. It could be argued that it is not any particular aspect of religious beliefs that make them deserving of extra protection, but rather that religion as a whole—a confluence of the various elements of beliefs and practice—is worthy of heightened protection because of how important it is to its participants, and because of the value it adds to their lives. Nevertheless, this is not enough. As Leiter said,

There is no apparent moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of reasoning we everywhere else expect to constitute constraints on judgment and action, even allowing that those demands may figure in systems of belief that have some utility-maximizing effects. (Leiter 2013, 63-64)

Further, even if religion is unique in the way it combines its various elements to create an end result, there is no element of religious belief that cannot be found in secular beliefs. Nonreligious individuals often have their own frameworks of morality and their own ways of reconciling issues of mortality. They may also feel an overwhelming compulsion, based on their beliefs, to behave a certain way in conflict with civil law. In addition, all people possess motivations that are insulated from reason, such as a preference for one food over another. To the extent that faith is unique to religion, it

is valuable not because it is a belief insulated from reason, but because it adds utility to the holder's life. No matter: beliefs and practices that increase the value of an individual's life are in no way unique to religion. As Macklem says on this issue, "Whatever our forebears may once have thought, we today would be prepared to acknowledge the distinctiveness, but not the uniqueness, of the connection between religious belief and human well-being" (Macklem 2000, 31).

The relevance of this line of argument increases as the number of religious citizens in the United States declines. Freedom of religion may once have been important to single out, at a time when nearly everyone professed a religious belief and when there was a long and recent history of religious persecution. Nevertheless, the right to be free from discrimination based on religious beliefs has become encoded in the Fourteenth Amendment, and as the number of actively religious people declines, the arbitrary inequality created by a Free Exercise Clause that privileges religious beliefs over other types of beliefs becomes pronounced. Between 2007 and 2014, the number of people in the U.S. who reported themselves to be "unaffiliated" with any religion rose by 6.7 percent, to 22.8 percent of the population. Notably, the increase over time in those who report to be unaffiliated is largest among younger demographics, and overall, approximately 35 percent of the population born between 1981 and 1996 report no religious affiliation (Pew Research Center 2015).

Religious doctrine cannot serve as the basis for religious freedom. The foundation for such a fundamental freedom must answer to a view of morality that encompasses the entire citizenry, and religious doctrine does no such thing. Commitment to faith-based beliefs is acceptable within the realm of religion itself, but when such doctrine serves as the foundation of a right, it is operating in the realm of

the government, which is responsible to all of its citizens, not just some. Accordingly, freedom of religion must be based on secular grounds so that it can apply to all citizens (Macklem 2000, 21-22).

Let's return to the issue of our two prisoners, Jill and Jack. Jill's request for dietary accommodation is based on her religious beliefs, while Jack's is based on a lifelong practice grounded in morality. While Jill's dietary practice stems from categorical religious commands, as part of a system of beliefs that is faith-based and deals with ultimate ends, Jack's practice is equally categorical. For him, the motivation is internal rather than external, but it is no less powerful and no less important to him; you might even say it qualifies as one of his ultimate concerns. We have already concluded that the protection of religious practice is due to the beliefs behind it, not because of the practice itself, so just because Jill's practice manifests itself in a community rather than on an individual level, that alone should not give it legitimacy. Having eliminated the legitimacy of distinguishing Jill's practice from Jack's on the basis of categorical commands, ultimate concerns, or community, all that's left to distinguish the two is that Jack's moral beliefs are based in reason, while Jill's religious beliefs are not. That is ground far too shaky for the RLUIPA distinction between religious and moral compulsion to rest upon, especially since reason should be valued, not punished.

The distinction between religious beliefs and others is murky, and the bases on which they can be distinguished are not grounds for legally privileging religion. Society has an interest in protecting liberty of conscience, and perhaps even granting higher protection to beliefs that meet certain criteria, such as being deeply held; this will be discussed further in the next chapter. An approach that has been taken to

provide exemptions for certain qualified nonreligious actions has been to expand the definition of religion to include these actions. This approach, while potentially helpful, is no panacea for the issues that arise when privileging religion over nonreligion, and it would expand the establishment issue created when government respects religious systems. Accordingly, if we are going to provide extra protection to certain belief-based actions, we must move forward so that this is not based on the arbitrary distinction between religious and nonreligious beliefs, but rather on the qualities of the beliefs—qualities that deserve protection on their own.

## CHAPTER 4

### A NEW MODEL FOR EXEMPTIONS

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The previous chapter established that deeply held religious and secular beliefs should receive equivalent treatment under the law. However, this conclusion does leave open the question of whether these beliefs should entitle the holders to exemptions from laws and, if so, what the parameters of those exemptions should be.

There is something inherently strange about the practice of exemptions in a republic like the United States, especially one with democratic tendencies. Our laws are passed for “the common good,” drawing from Rousseauian philosophy, and the Fourteenth Amendment provides safeguards against discriminatory laws. Assuming, then, that laws have a purpose, it seems illogical to allow people to be exempt from them. Social contract theory suggests that we accept a system of society in order to ease the collective action problems that arise when all pursue their own interest. As Justice Scalia said in *Employment Division v. Smith*, a system in which all laws substantially burdening religion must either pass the compelling state interest test or have religious exemptions provided from it is “courting anarchy.”

Nevertheless, exemptions have persisted since the founding of this country. At the extreme, separate from claims of conscience, it is easy to see why. Take someone who is allergic to vaccines—no nation with integrity would insist on applying a universal vaccination law to an individual in whom it could be anticipated to cause a severe medical reaction. Vaccination laws are put in place for the common good, and

it is plain to see how mandatory universal participation benefits everyone.

Nevertheless, there is flexibility at the margins, where the harm to an individual of applying the law in a particular case would outweigh the general gain. This situation provides leverage to certain claims of conscience for exemptions, as it shows that we generally operate on the principle that if individual costs are high enough, then exemptions should be provided.

The questions then become the ones I have been dealing with, both directly and indirectly, throughout this paper. Which individual burdens are so severe that exemptions should be provided regardless of the cost to society, and which societal costs are so great that they should take precedence? Evaluation of exemptions requires a balance between individual burdens and social harms.

Perhaps the greatest challenge in evaluating exemptions is that the more a society strives for fairness by making case-by-case evaluations, the more subjective the process becomes, thereby opening the door to greater injustice. This is the theme that played out in Chapter 2, and if that chapter—dealing with the constitutional elements of exemptions—proves anything it is that the question cannot be framed as “What is the right way to handle strong claims for individual exemptions?” but rather requires the more negative spin: “What is the least problematic way to deal with exemption requests?”

That question is what this chapter will address, beginning with an analysis of the three possible approaches to exemptions—all, none, or some. After discussing the need for exemptions and accommodations, it will examine which type of claims should receive favorable treatment and which should not, and outline a system where two variables—depth of belief and amount of harm to others—are viewed in tandem

to determine whether an exemption is acceptable and necessary, or unacceptable. This model will be applied to the conception of exemptions that exists today, ultimately concluding that the RFRA's compelling state interest test is necessary as a baseline model but needs to be seriously updated and constrained in a way that expands protection of free exercise to all claims of conscience, constrains the understanding of burden, and denies exemptions to a broader range of harmful actions by updating and expanding which government interests it deems compelling.

### **SHOULD THERE BE EXEMPTIONS?**

#### In Theory: "No exemptions" is Fairest

As mentioned, a democratic system should not, in theory, include exemptions from laws. Laws are intended to serve a public purpose, and deviations from these laws would therefore seem to inherently have a negative effect. The effect of such deviation may be only minimal or even only theoretically probable. Nevertheless, noncompliance cannot be universally condoned, and so, it could be argued, it should not be allowed at all. Speaking pragmatically, people enjoy the benefits of society and must therefore be willing to accept that with civil society there will come some loss of liberty. This idea was reflected in the writings of the Founders; in 1802, Jefferson wrote that man "has no natural right in opposition to his social duties" (Jefferson 1802).

Further, by at least one conception of justice, a "no exemptions" approach is significantly more stable. A decision to "sometimes" do anything, which is what would be necessary in a system that builds in exemptions, opens government up to a whole host of new questions—namely, under what circumstances do religious interests

outweigh civil interests, and what definition of “religion” should be used to analyze the question? The potential pitfalls are numerous: interpretations of the boundaries of religion will probably reflect a Western bias, and it is strange to task either courts or legislatures with determining whether a practice is “central” to a religious belief or otherwise worth protecting (Waltman 2011, 13).

This “no exemptions” approach would not mean that claims of conscience would receive no protection. As mentioned in the previous chapter, most of the behavior associated with these claims already receives protection under First and Fourteenth Amendment rights—speech, assembly, and freedom from discrimination (Macklem 2000, 7). An approach of no exemptions simply means the government would not have to give special treatment to claims of conscience not covered by other civil liberties, and it would not privilege those with strong claims of conscience over those without strong claims of conscience, or over society as a whole. It would also mean that the government could avoid the murky decision-making process traditionally found in cases dealing with exemptions for “claims of conscience,” and could instead rely on other, far more established and defined rights that prevent certain types of prohibitive laws from being passed in the first place.

This approach might also serve as a useful tool for reevaluating the merit of our laws. While recognizing the substantial burden placed on some individuals by certain laws, Barry says,

It does not follow, though, that the best approach is to keep the general law unchanged and simply add an exemption for the members of some specific group. The alternative is to work out some less restrictive alternative form of the law that would adequately meet the objectives of the original one while offering members of the religious or cultural minority whatever is most important to them. (Barry 2001, 39)

Through this approach, a society could determine whether the laws in place are actually the ones that are best, while “avoid[ing] the invidiousness of having different rules for different people in the same society” (Barry 2001, 39). Barry gives an example of laws that should not exist, rather than be subject to exemptions: a ban on headscarves in the workplace, for which religious exemptions are typically granted. The argument goes that if there is no particular reason to believe that wearing headscarves would be inconsistent with performing a particular job, employers should not have license to probe into the motivation for headscarf use, to determine if the wearers are not actually religious. He says, “Once the right has been won . . . why should not those for whom it is a matter of personal preference be able to take advantage of it?” (Barry 2001, 59). If a claim that certain interests override a law’s purpose is valid, perhaps the law should be repealed or replaced rather than upheld with exemptions for certain types of objections. This invokes the notion of “tailoring” from the compelling state interest test—if the law burdens a practice unnecessarily as a result of a poorly conceived law with a legitimate purpose, these are the situations in which the law should perhaps be reconsidered.

Unfortunately, the problem with this solution is that cases are rarely so clear-cut. In most examples, exemptions or accommodations in some way “shift the burden” onto other members of society, as with vaccine or conscription exemptions. This returns us to the original problem presented by the idealistic model: while laws are intended to serve the public interest, in specific instances the burden on an individual or a group may outweigh the harm of granting an exemption. Further, the “springboard” theory I presented about medical claims to exemptions shows that justice will at times necessitate the granting of an exemption. As Barry concedes,

“[Religious exemptions] are anomalies to be tolerated because the cure would be worse than the disease” (Barry 2001, 51).

### In Practice: Some Exemptions are Necessary

A system of no exemptions would be ideal—that is, if it were a system in which laws existed only in situations where the burdens on individuals were outweighed by benefits to society and where laws were never more burdensome than necessary. However, this is not the world we live in.

The most straightforward explanation for this problem is that legislators are imperfect—legislation reflects biases and oversights. Laws that constitute a significant burden on a religious minority may have been enacted without any awareness by the legislators, such as a law requiring bright signs on slow-moving vehicles, which unbeknownst to the legislators, placed a substantial burden on the Amish (Volokh 1999, 5). Laws that do not accommodate those who have less-common religious requirements, such as refraining from work on Saturdays (as opposed to Sundays) reflect an inherent and sometimes unconscious bias toward Christianity. True—both the bright-sign law and the Sunday-rest law could theoretically be completely reworked to achieve the underlying goal while accommodating religious practice. However, reworking a large portion of laws in a way that maintains their objectives while also accommodating religion and, necessarily, other claims of conscience would be a massive project and the new legal regime that resulted would still probably have some unforeseen problems that would need to be addressed via exemptions. These two types of approaches, reworking laws versus granting exemptions, will oftentimes achieve the same end result. However, there are fundamental distinctions between the

two approaches, which means they should be used in different circumstances. Reworking laws may often be less immediately practical but it is perhaps a more principled approach, used in situations where there is a fundamental problem with the law based on oversight. This approach means laws can reflect the best interests of society as a whole without governing bodies undertaking the undemocratic process of granting exemptions. Granting exemptions, while introducing problems of biases and harm by allowing certain people to avoid following laws that have been deemed necessary for society, is a much more realistic way of dealing with conflicting interests in specific situations. Sometimes it makes more sense to cork the leaking ship rather than buy a new boat.

Besides legislative ignorance, another reason the alteration of laws or the provision of exemptions for claims of conscience may be necessary at times is that the cost of a law to an individual or group is too high. This argument is less straightforward than the one about legislative ignorance—everyone can agree that oversight is not a boon to legislation; however, not everyone can agree that individual claims of conscience ever trump the social merit of certain laws. The movement to bar religious exemptions for vaccinations certainly presents such a case.

However, there are times where accommodating religion reflects fair and sound judgment. I feel this on a personal level with the case of accommodation in prisons for particular dietary restrictions. As a lifelong vegetarian, an imposition of a meat-based prison diet would, to me, reflect some notion of cruel and unusual punishment. Whenever I doubt the validity of accommodation for claims of conscience I contemplate this scenario.

Needless to say, granting exemptions is a challenging process. While it would be extremely burdensome to me to have my dietary preferences violated, I also recognize that solving this problem could require a marginal increase in the cost of running prison systems. Moreover, accommodating me requires a judge or legislature to say that my claim is valid, while the claim of the person craving foie gras is not. These are the questions asked before—how much of a burden on an individual is too much, and how much collateral burden should society shoulder to relieve individual burden?

It is not unheard of for society to absorb the cost of variations among its individual citizens—universal healthcare policies in many societies are direct manifestations of such logic. While people will receive different payoffs based on their individual need, everyone contributes to the system. This is an example of an issue where certain individuals imposing a greater burden does not invalidate the existence of the system, and it can be applied to the way that society absorbs the minimal harms caused by certain types of exemptions—the system is available to everyone when it is relevant, but certain people will get more use from it. Further, exemptions address issues of legislative ignorance and undue burden. However, as I will discuss, there must be limits to this approach, and a system of exemptions that gives near-automatic preference to sincere claims of conscience, as ours is sometimes understood to do with regard to religious claims, is untenable.

### The Limits on Exemptions

As previously argued, a policy of allowing no exemptions from any laws would be unworkable. However, granting exemptions on demand would make the laws

meaningless. In any exemption system, especially one that recognizes nonreligious claims of conscience as equal to religious ones, as I have argued we should, limits on “Free Exercise” must be imposed. This is true in order to maintain some sense of law and order, and to maintain equality between religious and secular claims. The limits can closely approximate those set forward by Mill’s “Harm Principle,” which will be discussed later in the chapter.

Some interpretations of the Free Exercise Clause go too far down the “universal exemptions” path. The trouble with most balancing approaches, taken to correct the problems with “no exemptions,” is that they go beyond saying that government should try to accommodate variety among its citizens; rather, in the case of religious believers, they give religious interests an advantage over other public interests by saying government “bear[s] the burden of proving that their refusals to make accommodations [to religious practice] are well justified” (Eisgruber and Sager 2007, 85-87). Of course, in the wake of *Smith*’s “rational basis” test for laws burdening religion, the constitutional understanding of the Free Exercise Clause is relatively limited. However, the primary legislative interpretation of this clause for the purpose of exemptions, under the RFRA and the RLUIPA, is expansive, and many would argue that religious practice must remain unimpeded to comply with religious liberty requirements.

However, just as with other rights addressed in the Constitution, free exercise should not be without its limitations. No other First Amendment liberty—speech, press, assembly—is interpreted to be boundless. While acceptable religious practice is not considered boundless either (constrained by compelling state interests, under the RFRA, and even more so by the rational basis test under *Smith*), there is a disparity

between the way freedom of religion is treated compared with other constitutional protections. The common standard for considering whether religious claims to exemption are valid is whether or not they are “sincere,” and if they are, they are generally treated with deference and are spared external definition. However, this is a far different standard than the one that is used with other freedoms, such as speech, which is frequently subject to legal regulation. For example, free speech has been found to protect flag burning but not obscenity, a distinction that is perhaps not arbitrary, but that does reflect the courts putting limits on the bounds of that right. As McConnell et al. said, “‘Religion’ in the Constitution is a legal category. It is natural that the courts should say what its limits are” (McConnell et al. 2002, 870).

Further, Madison stated in his 1800 “Report on the Virginia Resolution” that there is significance to the term “prohibiting” in the Free Exercise Clause, when compared with the term “abridging” applied to the freedom of speech, press, and assembly.<sup>10</sup> This seems to indicate that there is legitimacy to regulating religious practice, so long as free exercise is not prohibited altogether (McConnell et al. 2002, 85). At a minimum, it seems reasonable to conclude that the Constitution does not accord religion more favorable status than it does to other rights.

This conversation keeps coming back to religion in part because religious claims are the most common types of claims for exemptions, but the arguments apply more generally to all claims of conscience. However, a “universal exemptions” approach would certainly favor religious beliefs over nonreligious ones, because

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<sup>10</sup> For reference, the First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

religious beliefs are more easily “provable,” and because they are more likely to be seen as dealing with critical issues that warrant exemption.

Accordingly, in light of the need for exemptions but also the need to have limits, some sort of middle ground must be found. This is, in many ways, already reflected in the system we currently have. However, as we move from recognizing only religious claims to respecting more general claims of conscience, and with the recognition that some claims are under-prioritized (like very strong moral claims of conscience) while others receive treatment that is far too preferential (like violations of zoning laws because they are exercised by a church), it becomes necessary to reconceptualize our system of exemptions, beginning with clarifying what types of claims deserve enhanced deferential treatment.

## **HOW TO HANDLE EXEMPTIONS**

There are two main variables that must be evaluated when determining whether a generally unlawful action deserves an exemption. The first variable involves the quality of the belief—is it deeply held, on core issues? What does “deeply held” mean, and how is it determined? The second variable involves the effect of the action—does it cause harm? If so, to whom, and what qualifies as harm in the first place? While providing exemptions relies on evaluating variables, there are limits and parameters to this approach. If a belief is not deeply held, or is not substantively burdened, then it is not eligible for an exemption. Once it is determined that depth and burden reach a certain threshold, then it can be weighed against the harm to society that an exemption would cause.

Variable One: Actions, Based on Deeply Held Beliefs, Substantially Burdened

The first test that must be met when determining whether a claim of conscience necessitates an exemption is whether or not the underlying belief is “deeply held,” language used in *Welsh v. U.S.* for determining whether a claim of conscience required an exemption from the draft (398 U.S. 333, 344 (1970)). While the “deeply held” nature of a belief is not easy to measure objectively, it is a key attribute of beliefs that should receive exemptions. My primary reason for saying that exemptions must sometimes be granted is that the harm to an individual of refusing the exemption sometimes truly outweighs the cost to a community as a whole if the exemption is granted. This is a bold statement, as laws intend to promote the general welfare and are supposed to apply to all citizens equally. Therefore beliefs must have significant value to their holder in order to be worthy of an exemption.

Depth, however, as I am referring to it, is not necessarily the same thing as strength—strength of a belief is not the variable that should be considered for granting exemptions. Depth implies strongly held beliefs, but specifically on deeply important, personal topics. Depth implies both strength, and relevance to core, personal issues. This notion is supported by the discussion in *Welsh*, which seemed to tease out something of an emotional character of beliefs that provoke behavior that requires exemption. In establishing a distinction between views that are “essentially political, sociological, or philosophical views or part of a merely personal code,” as the government claimed *Welsh*’s were (398 U.S. 333, 336 (1970)), from views that rest on “moral, ethical, or religious principle,” the Court introduced the idea that the distinction is not based on the strength of the belief but rather on the depth and the quality of the issues the claim addresses. While I could have very strong views that

taxes are bad for the economy, for example, I should not be granted an exemption from tax laws on that basis, not only because tax laws require mandatory participation to achieve their goals but also because beliefs about taxes are not the type of core beliefs that should qualify for exemption. These beliefs are less personal, and an exemption system, providing exemptions for individuals, should be about personal claims—that is, deep ones on certain core issues.

Claims of conscience surrounding “moral, ethical, or religious” topics are, in many ways, inherently the most powerful. As Leiter says, “A claim of conscience is, after all, a claim about what one must do, no matter what—not as a matter of crass self-interest but because it is a kind of moral imperative central to one’s integrity as a person, to the meaning of one’s life” (Leiter 2013, 95).<sup>11</sup> While Leiter is automatically including “depth” into the understanding of “claims of conscience” in a way that I do not, this does show the manner in which claims of conscience have the potential to be deeper than other types of beliefs, such as purely personal or political ones.

However, a “deeply held” belief is not a sufficient basis for granting exemptions for belief-based actions. Some people have an evil—or at least immoral—conscience, plain and simple. Leiter, for example, mentions Nazis, but there are plenty of other cases, such as those who wish to racially discriminate. This taps into the “harm” issue, which will be discussed later in the chapter.

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<sup>11</sup> Note the way this sounds like the characterization of “categorical commands” from Chapter 3, thus demonstrating the relationship between ultimate concerns and categorical commands.

*The Relationship Between Depth and Centrality*

With regard to the idea of beliefs being “deeply held,” there are limits to what may count as “religious exercise” for these purposes. Senator Hatch, in a statement to Congress, declared:

Not every activity carried out by a religious entity or individual constitutes “religious exercise.” In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within [the RLUIPA’s] definition of “religious exercise.” (146 Cong. Rec. S7776, 2000)

In other words, while some actions may be tangentially related to the religious practice of a person with deeply held religious beliefs, those actions are not necessarily based on such beliefs. This understanding helps address the problem of individuals trying to claim exemptions on the simple grounds that their actions are related to religion. This is perhaps most relevant on the religious organization level. For example, if a church wants to build a shopping center in a location where zoning laws prohibit it, ought they, under the RLUIPA, be able to do so on the grounds that it is “religious activity”? Assuming the government did not prohibit such development on discriminatory grounds, the answer is no.

This approach of looking at centrality to help determine whether a belief is deeply held can be applied on the individual level as well—for example, if a person wished to disobey traffic laws on the way to church. If the government could not make decisions about the cut-off for what qualifies as religious practice, a person could insist on an exemption from the speed limit so as not to be delayed by it on the way to church, and could claim that the denial of such an exemption would impede

religiously mandated practice. While Justice Thurgood Marshall wrote in *Hernandez v. Commissioner* that determining centrality to religious exercise was “not within the judicial ken” (490 U.S. 680, 699 (1989)), there is an extent to which centrality must be considered, even if it is done deferentially. One way to deal with this issue from a legislative and judicial standpoint would be to follow a standard that centrality could not be considered for belief-based actions that are exclusively religious, such as prayer ceremonies, but that it could be considered for actions that are generally fundamentally secular in nature, such as building a building or driving.

#### *Sincerity, and Practicality*

Any workable understanding of “deeply held beliefs” must incorporate a consideration of sincerity. As the majority in *U.S. v. Seeger* agreed, “While the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case” (380 U.S. 163, 185).

The declaration of objection to “participation in war of any form” that is required for a conscientious exemption to the draft (Selective Service System 2016) seems to indicate the element of practicality that has historically gone into legal conceptions of religious and other claims of conscience. It is possible to imagine a scenario where a religious or ethical system would accept violence in one situation but reject it in another, but requiring a consistent belief makes it far easier to discern which claims are legitimately deeply held. It is much easier to determine whether an objection is sincere if there is evidence that the religion forbids all war.

However, as shown by the prison diet cases, the courts have determined that sincerity of belief simply means that you think your religion compels you to take or refrain from certain action, even if that belief is not based in scripture; accordingly, a person can presumably feel religiously compelled to avoid fighting in some wars but not others and this can still be legitimate even on legal grounds. Accordingly, while sincerity of the beliefs is an obvious preliminary criterion for determining whether a belief is worthy of being characterized as “deeply held,” there are serious flaws in the practical approaches taken to determine sincerity. As with the draft exemption “practicality” clauses (the ones that require a uniform objection to all war), the strategies taken to determine sincerity, such as looking to texts or specific rituals, privilege some types of religion over others, and especially privilege religion over other types of deeply held beliefs. For matters of conscience such as veganism and vegetarianism, there are indicators of sincerity similar to those of religion, such as a vaguely identifiable community and widespread recognition of legitimacy. However, other more individualized types of claims might not have such indicators. Thus, an emphasis on verifiability “would also have the unwelcome consequence of treating genuine claims of conscience unequally before the law, simply based on how practicable it is for the courts to adjudicate their genuineness” (Leiter 2013, 97). Of course, to an extent, all claims require proof. While it constitutes an injustice for a claim to be wrongly evaluated, it is not unjust to have a system that involves evaluation as long as all people have the right to present such claims (Leiter 2013, 97-98).

A process to determine sincerity has the most value as a falsifier—claims that are demonstrably not sincere should not get exemptions. However, in all other

situations, considerations about sincerity should operate as just one item within a rubric of evaluation; a lack of conclusive evidence that a belief is sincere is not enough to deny an exemption.

### *Substantial Burden*

Finally, when considering a claim for an exemption, it is necessary to examine whether the beliefs in question are actually substantially burdened. In accordance with Madison's argument that religious exercise can be abridged as long as it is not prohibited, this model holds that a law that simply makes action based on a claim of conscience more difficult, rather than outright requiring violation of the relevant beliefs, does not require an exemption. Judges should have discretion to determine how much burden is substantial (and thus, "too much"), but the threshold must be high enough to represent a real restriction. This approach is reminiscent of the one taken by the Seventh Circuit in 2003, discussed in Chapter 2, when the court defined a law that imposes substantial burden as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable" (342 F. 3d 752, 761 (7th Cir. 2003)).

An example of an impediment to free exercise that does not represent an unacceptable amount of burden might arise when drug-use exemptions are granted for religious purposes; these exemptions do not preclude the government from retaining the ability to regulate the form of the drug and where it may be used. This issue is also one that might arise with Title VII claims for accommodation in the workplace. If particular employees cannot work on certain days for religious reasons

but the work shifts available to them on other days are less desirable, this does not constitute a violation of religious freedom.

The issue of punishment for the violation of a law that burdens a claim of conscience represents a grey area in the analysis of substantial burden. In other words, if following a law would represent a significant and unacceptable burden on free exercise, but the punishment for disobeying the law is not prohibitive, does this actually represent a substantial burden for the purpose of this analysis? This paper, along with John Locke, would suggest no. Locke, who greatly influenced the Founders, said in *A Letter Concerning Toleration*, “A private Person is to abstain from the Action that he judges unlawful; and he is to undergo the Punishment, which it is not unlawful for him to bear” (Locke 1689, 48). While Locke here was advocating for people to accept any lawful punishment in the name of their claims of conscience, it is not necessary to take such an extreme stance. For example, one could start by asking whether it qualifies as a substantial in a situation where it is merely a small fine imposed for lack of compliance with the law, as in *Jacobson v. Massachusetts*, in which Jacobson had to pay a \$5 (today, approximately \$100) fine for his refusal to be vaccinated (197 U.S. 11 (1905)). While this is an interesting line of thought, it is not necessarily the most practical approach to advocate for violating the law provided that the punishment is low enough. Moreover, it would necessitate a whole new discussion about what level of fine or punishment is too much to be legitimately considered an feasible alternative to following the law. Nevertheless, the idea of payment as a compensatory measure for receiving exemptions that burden society is perhaps one worth further consideration.

One of the most interesting applications of the logic of this section is to “secondary claims” of religious liberty violations, which was discussed in Chapter 2. A claim is secondary when the burden is not on religious practice specifically. The clearest example arose in the British parliament, where a law requiring motorcycle helmets drew criticism from the Sikh community, whose members’ turbans made helmet-wearing impossible (Barry 2001, 44-45). While the parliament ultimately granted an exemption, the model presented in this paper would not do so. No religious practice was directly impeded, and there is no inherent right to be able to ride a motorcycle.

### *Conclusion*

What is an action worthy of receiving an exemption? Sincere and deeply held claims of conscience must motivate the desired action. The definitions of “claims of conscience” and “deeply held” provided here are loose, and subjective to the extent that “ultimate concerns” may vary by person. The phrase “claims of conscience” generally applies to beliefs regarding moral, ethical, or religious issues. Depth implies that there is something a person “must do, no matter what,” and so from a happiness-maximizing perspective that should at least be given legal consideration, if not accommodation, whether it is a traditional religious ritual or stamp collecting (to the rare, rare person who regards stamp collecting as an ultimate end). The rationale and values of the Eighth Amendment lurk behind this analysis—government should not impose a system that is “cruel and unusual,” perceptions of which vary by person.

Some would take issue with this approach. Nearly everyone possesses deeply held beliefs or has practices that address ultimate concerns. This is potentially

problematic, because it makes determination of what qualifies as beliefs worthy of protection quite subjective, and many would agree with the words of Macklem: “Stamp collecting is not and cannot be a religion, no matter how obsessive its adherents may be” (Macklem 2000, 25). Macklem’s approach, however, is unacceptable under this chapter’s model.

Stamp collecting, if it were a central tenet of an established religion, would be readily considered for exemption, both under our current system that heavily prioritizes religion and under this chapter’s model. The centrality of a practice, while off-limits under the current judicial and legislative models for exemption, does actually need to be considered, at least at the margins. When a practice is fundamentally secular, such as the construction of a taller building, it generally cannot represent a deeply held belief, even if it were a church that desired the engineering of the building; this is the type of generally non-central claim that would receive closer review. However, if a practice is fundamentally central to someone’s belief system, as stamp collecting hypothetically could be, then the government would be required to treat it just as it treats other central religious practices that, to many, “don’t make sense.” The biggest problem with the argument that stamp collecting could never be a “religious practice” worthy of protection even if it qualifies as someone’s ultimate ends is that it flies in the face of a century of jurisprudence that protects religious belief on the basis of sincerity and on the issues the belief addresses (namely, ultimate concerns), not on whether the belief makes sense. Sincere, deeply held beliefs that are religious in character get equal treatment under the current system; this proposed model continues this practice, and just expands it to all claims of conscience.

Judges cannot discriminate based on whether a claim of conscience “makes sense” when deciding whether to provide an exemption; they can determine only whether the beliefs are deeply held and sincere. An understanding of the nature of the belief must then be coupled with viewing the belief-inspired practice within civil society. This means that when evaluating exemptions judges must also consider the effect an exemption would have on other individuals and on society as a whole.

### Variable Two: Harm to Others

#### *Degrees of Harm*

All exemptions produce some degree of harm. They represent a chink in the armor, a hole in a law that was supposed to apply to everyone for the general welfare. However, just as the legitimacy of granting an exemption increases with the depth of the claim of conscience, the legitimacy of granting an exemption decreases as the harm to others caused by the exemption becomes ever more significant. Another way to put this is to ask at what point does the harm become great enough that defending against it becomes a compelling state interest?

The idea of evaluating degrees of harm is already firmly established in our legal system, including in application to First Amendment rights. For example, the “imminent lawless action” test of free speech rights, established in 1969 in *Brandenburg v. Ohio* (395 U.S. 444 (1969)) and discussed further in *Hess v. Indiana* (1973), emphasized the relevance of the time frame in which speech could incite people to break the law. In *Hess*, the speech in question was held to “[amount] to nothing more than advocacy of illegal action at some indefinite future time” (414 U.S. 105, 108), making the state suppression of the speech unconstitutional. The Court might have

ruled in favor of the state if the illegal actions it promoted were “imminent.” In many ways this may seem like an arbitrary distinction, but it shows how lines are drawn to legally distinguish gradations of harm.

As discussed in Chapter 2, the Supreme Court has attempted to do something similar with regard to religious exemptions. Even though the distinctions it has drawn are inconsistent and thus do not serve as a useful model, they are instructive for thinking about the ways that claims of conscience should be evaluated in terms of the harm that they cause. As a reminder, both *Wisconsin v. Yoder* and *U.S. v. Lee* dealt with the Amish requesting exemptions—in the former from certain mandatory education laws and in the latter from the collection of Social Security taxes. The Court granted the exemption in *Yoder*, declaring that the law compelling attendance in school until the age of 16 signified a substantial burden on the Amish that outweighed the general gain of mandatory school attendance. This conclusion was based in part on the conclusion that the different educational needs of those living in isolated Amish communities meant the usual interests of state-compelled education were not relevant, and also in part on the extremity of the religious burden (406 U.S. 205, 222). In *Lee*, however, the Court ruled the other way, holding that enforcing universal participation in the Social Security System was “indispensable” to the system’s “vitality” (455 U.S. 252, 258), and that the system provides benefits to everyone.

The key distinction here is the issue of whether the potential harm was considered to extend beyond those who requested the exemption. If there is harm from lack of education, as in *Yoder*, it remains within the Amish community. However, the harm from allowing some people to opt out of the Social Security System was

determined to extend significantly into the greater society. This introduces the first consideration in evaluating harm.

### *Harm to Whom?*

There are three types of harm to others that can be caused by an exemption for a claim of conscience: direct harm to another individual, direct harm to a group or to society, and indirect harm to society.<sup>12</sup> For the most part, exemption law can be guided by Mill's Harm Principle: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1869, I.9).

Under no circumstances should exemptions be tolerated that would cause direct harm to another individual, no matter how deeply held the beliefs are that motivate the action. The purpose of society, at its most basic, is to protect people from harms caused by others, and this means that it is unacceptable for the state to override its highest purpose and let people harm anyone simply because they justify their actions by deep claims of conscience. In some situations, this is obvious. If I believe my religious beliefs demand I murder another, no court, no matter how respectful of religious liberty, would take this claim seriously. This draws from Mill's principle that the role of government is to prevent citizens from having their rights impinged by others. This notion extends beyond just receiving protection from physical harm, to receiving protection from the infringement of important interests. Harassment in the

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<sup>12</sup> A fourth type of imaginable harm would be harm by the person to him or herself. However, harm to self is an expansive issue that goes beyond the scope of this paper. It also is not necessarily as applicable to this paper's model. This is because exemptions are only granted if there is a deeply held belief, and if you have a deep, compelling reason to do something that by definition does not harm others, you most likely should be able to do so. Theoretically at least, the harm to self would also be cancelled out by the action that presumably would bring value and meaning.

name of religion is certainly unacceptable. Discrimination would also qualify as harm, and accordingly loopholes for religiously-based discrimination against same-sex couples should be abandoned. This conclusion touches on the idea of complicity claims, perhaps the largest and most contentious category of religiously-inspired harm that manifests itself in today's society, and suggests that complicity claims to exemptions—such as those presented in *Hobby Lobby* and in the several cases involving providing services to same-sex couples—should be denied.

Mill's Harm Principle ought also to be extended to prohibit the second type of harm outlined: direct harm to a group or to society. This would generally apply to issues such as zoning regulations, where the inappropriate construction of a building or ignoring parking laws in front of a church could very much cause harm to a community. It would also apply to issues such as vaccination exemptions, which have the potential to cause direct harm to a community and therefore should not be granted. Even if the harm in this situation is not immediate, it is palpable enough and of a high enough likelihood that exemption claims ought to be denied.

Unlike the first type of harm (direct harm to individuals) this second category does open the door a crack for judicial analysis regarding the value of the claim and the value of the law. For example, imagine a situation (originally presented by Eisgruber and Sager) in which two women each want to open a soup kitchen in spite of prohibitive zoning regulations. One woman feels religiously compelled to do this and the other feels a moral compulsion. Perhaps both should be allowed to do so. This is a situation that begs for a reevaluation of the law, rather than for an exemption per se.

While reevaluation in the soup kitchen situation might be positive, the lack of clarity in this second category of harm, which involves direct harm to society, presents a real problem. An example of such a situation is ban on headwear in identification photographs, and claims to exemptions from such a ban. An individual's photo identification generally does not have an impact on any other individual, and only in rare circumstances would an obscured photo cause harm. Moreover, unlike with income taxes, such harm is not cumulative, and unlike with vaccines the threat, in most situations, is more to government efficiency than to specific people. This is further complicated by the understanding of security concerns, which, while not spread over society in the way that a financial burden would be, could have a dramatic direct impact on individuals affected by security breaches. The effect of a headgear ban on individuals, on the other hand, would definitely be substantial to a number of people. Nevertheless, direct harm to others is possible, as government's security interests are real ones. Different courts have reached different decisions about whether exemptions are required in this situation, and it is difficult to find a consistently applied calculus. In one case, the judge relied on expert testimony that stated that Islamic law permits exceptions to its veiling requirements, and thus found that the identification laws did not represent an impermissible burden (Brougher 2012, 6). Other courts have found that denying exemptions qualifies as a violation of the Free Exercise Clause (Brougher 2012, 7).

The third type of harm outlined is indirect harm to society. These are the harms that may increase the general financial burden on society but that hurt no one directly, or at least do not cause harm nearly equivalent to the burden placed on the exemption-claiming individual. In these situations, more often than not, exemptions

should be granted, for in nearly all such situations the harm to society is outweighed by the burden on the individual that the denial of an exemption would place. In prison diet accommodation cases, the burden on the individual of denying an exemption would be greater than the financial cost to the prison of providing a separate meal. In drug use cases based on claims of conscience, any significant harm caused by the action would apply only to the individual engaging in the practice. Most people, in some aspect of their lives, impose a greater than average burden on society, whether through greater medical costs or the need for financial aid to attend college. Accordingly, in a moral society we should accommodate individuals in situations where the harm to society is generalized and spread thin. There are of course limits to this approach—highly harmful behaviors ought not be tolerated even if the harm is not specifically targeted, because such requests for exemptions would fall into category two, causing direct rather than indirect harm. Highly harmful actions that are clearly and noticeably a product of exemptions and that take a significant toll on society, measured through financial or social effects, should not be tolerated even if the harm is diffused through society as a whole. This relies on the idea of some threshold beyond what is an acceptable amount of harm for society to internalize.

### *Harm Conclusion*

In *On Liberty*, Mill says:

“[E]very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person’s bearing his share (to be fixed on some equitable principle) of the

labours and sacrifices incurred for defending the society or its members from injury and molestation.” (Mill 1869, IV.3)

Mill’s statement means in part that a system of exemptions needs to take harm to others into account far more than does the present system. No direct harm to others based on claims of conscience should be tolerated in civil society regardless of any burdens such laws impose. Some other laws, such as vaccination requirements, do not involve direct harm to individuals but rather to society. Claims to exemption from these laws represent the middle ground of this analysis. While such behavior should generally not be tolerated, there is more room for argument; a judge might have to determine whether there truly is direct harm to society involved or whether the law is not accurately tailored to meet its purposes.

In the third category, where any harm to others is indirect and diffused throughout society, government should be more lenient than it currently is. In the face of compelling claims of conscience, exemptions should usually be granted, because the burden on the individual will nearly always outweigh the harm to society.

As Leiter says, “Practices of toleration are, themselves, answerable to the Millian Harm Principle” (Leiter 2013, 83). This means that the understanding of harm goes both directions—it can refer to the harm that a forbidden action might cause to society if an exemption were granted, but it can also refer to the burden placed on an individual who is denied an exemption. This approach to the third category is also supported by Mill’s principles, for each person, he says, must bear a share of the weight that comes with defending others’ liberty. This weight is diffused throughout society, and it safeguards the ability to engage in important practices that do not directly harm others or the proper functioning of society.

## **CONCLUSION**

A practical understanding of justice means that an approach of “no exemptions” doesn’t work. A system that does not allow for exemptions is, on its face, the most just because the law will apply to everyone and because there is less room for subjective evaluation by courts and legislatures. However, looking to reality and to notions of harm and burden as we understand them, it is evident that denying an exemption is sometimes far more harmful than granting one. Nearly everyone can imagine a practice that would be exceptionally burdensome if forced to do or abstain from, and these are the types of situations that government ought to consider ameliorating. However, a law’s burden on an individual is not the only consideration—when evaluating exemption claims, the government must also take into account that one government obligation is to protect citizens in a society from one another, and many exemption claims, if accommodated, could result in harm to others. For this reason, while some exemptions ought to be granted, it would be impossible to exist peacefully within a framework where claims to exemptions are given complete or near-complete deference.

Within the necessary model of “some exemptions” the depth of belief on specific topics would have to be weighed against the harm an exemption would inflict on others in the society. In general, deeply held claims of conscience must underlie claims to exemptions. There is something fundamentally problematic about granting exemptions, and so it should happen only when absolutely necessary; if the beliefs behind the desired unlawful action are not deeply held, then there is no good reason for an exemption to be granted. This notion of depth indicates a certain level of

strength—the belief must be powerful—but it speaks also to the quality of the belief. Issues of morality, ethics, and religion qualify as claims of conscience with depth, and these are the types of beliefs that deserve some degree of consideration. Underlying all of these is a notion of “ultimate concerns”—one of the central identifying characteristics of religion—on which restriction would constitute a serious burden. Strong feelings on other, less personal types of issues are not enough to warrant heightened consideration; for example, an individual’s antipathy toward paying taxes would not entitle him or her to an exemption from taxation.

An understanding of deeply held beliefs will also at times require the government to delve into issues of centrality—which under the present system is off-limits—because in this model the centrality of a practice is important for determining whether the practice reflects a deeply held belief. This is an issue that is pretty exclusive to religious claims. Accordingly, to avoid excessive entanglement between government and religion, centrality should be treated leniently: the denial of claims on the grounds that a practice is not central should only happen when the practice is fundamentally secular in nature, such as constructing a building. This issue is less relevant to nonreligious types of claims of conscience, which are more often directly related to the underlying belief and are generally not part of a broader system of beliefs and required actions.

Finally, depth of belief ideally possesses some form of identifier, so that government can pragmatically distinguish between sincere and insincere beliefs—an insincere belief is obviously not deep, and since there is inherent harm to exemptions, the government should safeguard against false claims of deep belief that are made simply to obtain an exemption from a disliked law. Unfortunately, I cannot conceive

of any system to address this that does not fall prey to biases and excessive favorability to religion, particularly well-known Western religions. One solution to this problem would be to require that all claims before the law have some degree of verifiability, and “too bad” if you are unable to prove it—denying unverifiable claims is an acceptable approach. While this is reasonable to a point, it presents problems for a model that incorporates nonreligious beliefs into its covered claims of conscience, because the sincerity of secular beliefs is far more difficult to prove. Accordingly, and making a value judgment that it is more important to protect all claims of conscience than to be completely positive that the beliefs are sincere, this chapter’s model of exemptions incorporates tests of sincerity only to the extent that sincerity is falsifiable. Simply being unable to prove a belief is genuine is insufficient grounds for an exemption to be denied.

However, given this uncertainty and for other reasons, the second variable in this exemptions calculus is equally important, if not more so. This variable involves the extent of the harm caused by an exemption from a law. No direct harm to another of any variety—physical, social, or even financial—ought to be tolerated. Claims for exemptions that would cause direct harm to society should also be evaluated skeptically; an example is claims to exemptions from vaccination laws, the impact of which could be immediately harmful. However, some claims may mistakenly seem to fall into this category; exemptions from laws that affect society may cause a direct effect but no direct harm, such as a proposed violation of zoning laws to build a soup kitchen. In this realm, judges ought to have discretion to evaluate whether the harm of denying the proposed exemption outweighs the harm of granting it, and legislatures ought to consider whether the law is constructed appropriately in

the first place. These two categories of claims, both of which cause direct harm, should receive highly conservative consideration of claims to exemptions. On the other hand, the third category, in which harm is negligible and diffused, ought to receive more lenient treatment. Society exists to protect citizens from each other, but a more complex society also has systems in place so that individual needs can be met. So, even though accommodating claims of conscience by providing a variety of diets increases the cost of the prison system, the value of such accommodation is enough, and the harm caused is minimal, so accommodations should be provided.

This system, which requires judges to evaluate the claims for exemption by weighing the harms of granting or denying an exemption is not without its flaws. Like any system, it does rely on subjective calculations of harm. However, by limiting the types of beliefs that can be used to justify exemption claims, and by strictly limiting harm to general, diffused increased cost to society, this model has boundaries in place to keep the subjectivity from wreaking havoc. The proposed model's expansion of exemption analysis to apply to all claims of conscience eliminates the arbitrary nature of simply privileging religion, and also serves to reduce the establishment issues that arise in evaluating exemption claims. When claims of conscience are considered on the basis of their actual traits, rather than on their classification of religious versus nonreligious, society is protecting the beliefs based on their secular value and is not advancing religion over nonreligion in the same regard.<sup>13</sup> Further, the emphasis on preventing harm means that all people can live securely even when deeply held beliefs are given consideration by the government.

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<sup>13</sup> Recall Sullivan, referenced in Chapter 2, who said, "To define is to exclude, and to exclude is to discriminate" (Sullivan 2005, 101). Moving away from a system that relies on defining "religion" per se can solve some of these issues.

## CONCLUSION

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### **THINKING PRACTICAL: REFRAMING THE RFRA**

The model presented in the previous section, which weighs the depth and significance of a belief-based action against the potential harm that an exemption could do, is a reframing of the models that today govern the provision of exemptions. As discussed in the first two chapters, there are two models currently in use. The “rational basis” model, upheld in *Smith*, is the baseline constitutional approach and holds that as long as government has a rational basis for a law it need not provide exemptions, no matter the cost. The “strict scrutiny” model mandated by the federal RFRA and RLUIPA, and the various state-level RFRA, implements the standard that the government may substantially burden religious exercise (and thus, not provide an exemption) only in situations where it furthers a compelling state interest and represents the least restrictive means of achieving that interest.

While I am skeptical of many claims to exemptions because of the way they might involve some sort of direct harm to others or to society as a whole, an application of strict scrutiny to laws burdening claims of conscience still should be the standard. However, strict scrutiny as it is applied under the current RFRA model should be seriously reevaluated. The RFRA has three key components, and they will be addressed one by one.

### Element One: Exercise of Religion

As discussed in Chapter 3, the notion of protected exercise of religion must be expanded to include other types of belief-based action. Certain moral and ethical beliefs are just as compelling as religious ones are. The violation of certain secular beliefs can be felt just as deeply as the violation of religious beliefs. As argued in the draft exemption case *Welsh v. United States*, strong moral claims ought to be treated with the same deference as religious ones. Many elements of religious are reflected in other types of beliefs, and the factors that potentially make religious systems unique—that they are faith-based and comprehensive systems that do not answer to reason or to civil law—are not worthy of special protection. In light of this, we as a society must determine what we do consider worthy of protection. Accordingly, the Free Exercise Clause, interpreted today, should be taken to protect liberty of conscience and aid in citizens’ ability to act on the beliefs they hold most dear.

While in some ways this is an expansion of the types of claims that receive heightened protection, it is also a contraction in a significant manner. Under this model, claims of conscience must truly be deeply held and important to their holder, and extra non-essential beliefs do not receive heightened protection simply because they are labeled “religious.” Accordingly, this model more accurately protects what deserves protection by focusing on the significance of the beliefs rather than on ambiguous definitions of the categories of beliefs, definitions that get more ambiguous as the common notion of religion itself becomes more ambiguous. The model also protects against Establishment Clause violations that could be caused by exemption systems that prioritize religion over equally compelling nonreligious beliefs.

## Element Two: Substantial Burden

Currently, there is no definitive understanding of what qualifies as substantial burden (needed to trigger strict scrutiny) under the RFRA. The Fifth Circuit definition, provided in 2004, defined it as existing when religious adherents are influenced to act in violation of their religious beliefs, or when the adherent must choose between receiving a “non-trivial benefit” and their religious practice (*Adkins v. Kaspar*, 393 F. 3d 559, 570 (5th Cir. 2004)). For this paper’s model, the Fifth Circuit’s approach is far too forgiving in its understanding of what constitutes a substantial burden. Considering that the only beliefs that ought to be protected are the ones that are the most deeply held, merely “influencing” people holding such beliefs to behave contrary to them is not enough to identify a violation of their rights. As is true for everyone in society, sometimes acting on beliefs must be sacrificed, especially if acting on these beliefs would violate reasonable civil law. This paper’s model more closely approximates the Seventh Circuit’s approach, which declared that a law “necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable” in order to be considered an unacceptable substantial burden (342 F. 3d 752, 761 (7th Cir. 2003)). With regard to centrality of belief, the Supreme Court has generally concluded that centrality should not be considered when determining whether there is a substantial burden on a claimant. However, it is appropriate to conclude that centrality matters because it is necessary for evaluating depth of belief. In light of this, to avoid entanglement issues in which the government must take on the unorthodox task of evaluating the different tenets of a religion, centrality matters only at the fringes of religious practice, where the practices themselves could be equally considered secular.

### Element Three: Strict Scrutiny

Finally, the RFRA stipulates that the only time a law may substantially burden religious practice is when it reflects a compelling state interest and uses the least restrictive means for achieving that interest, thus adopting “strict scrutiny” as the appropriate level of review. While I agree that this level of review is the appropriate one, the understanding of “compelling state interest” under strict scrutiny must be significantly expanded.<sup>14</sup>

The notion of “compelling state interests” should be expanded to include the prevention of direct harm to others or to society at large. This approach would reject claims that it is legitimate to discriminate against others citing religious beliefs—an ongoing debate—because of the harm inflicted on those discriminated against. On March 30, 2016, Georgia governor Terry McAuliffe vetoed a so-called “religious liberty” bill that would have “prevented the state from penalizing businesses and individuals who cite faith-based grounds for discriminating against same-sex couples, transgender people, and people who have sex outside of marriage” (Villarreal 2016). On the very same day, the Mississippi Senate passed a bill “to provide certain protections regarding a sincerely held religious belief or moral conviction for persons, religious organizations, and private associations” (Miss. H.B. 1523. 2016). These protections include, among many others, the right for businesses to deny services to members of the LGBT community on religious or moral grounds. This paper’s model of understanding harm, and what constitutes a compelling state interest, rejects the

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<sup>14</sup> Alternatively, another approach would be to declare that the “intermediate level of scrutiny” is the appropriate standard to apply to laws that burden claims of conscience. However, as this has never been the typical standard applied to religious liberty claims, it makes more sense at present to stick to considering the two that have been tested—rational basis, which is the lowest level, and strict scrutiny, which is the highest.

legitimacy of these bills on the grounds that the actions, while perhaps based on beliefs that qualify as deeply held claims of conscience, inflict direct harm on others in the community.

The only area of harm the government does not have a compelling interest to prevent is generalized diffused harm, usually financial, that does not cross some threshold beyond what is an acceptable and negligible amount of burden for society to assume in the interest of relieving an acute burden on an individual with deeply held beliefs.

### **THINKING BIG: WHAT DO EXEMPTIONS TELL US?**

Exemptions are, in some respects, outside of the law, in that they deviate from what a legitimate, representative government has deemed the most appropriate and beneficial way to behave in society. In spite of this, an understanding of exemptions in the United States serves to illuminate the most fundamental issues in a democracy. A model for legal exemptions addresses issues from the smallest, such as whether one can sport a colander as religious headwear in a driver's license photo, to the largest, such as what the appropriate role of government is in discerning the relative weight of burden on an individual versus harm to society.

Exemption analysis inherently pits individual rights against the rights of society as a whole, and claims to exemptions force the legal system to weigh and balance various harms and social ills. The notion of exemptions is inherently peculiar, because the provision of exemptions brings into the legal system the idea that there are some values more important than civil law. As Eisgruber and Sager say, "Our laws do not descend arbitrarily from an alien entity called 'government.' They are the

product of legislative and administrative concerns, enacted by our representatives in service of what those representatives deem good and specific reasons” (Eisgruber and Sager 2007, 82). With this in mind, exemptions are inherently individualistic, representing not only deviations from specific laws but also exemptions from a democratic system as a whole. Nevertheless, both the current system and the model presented in this paper have concluded that exemptions are, at times, necessary.

An attempt to understand why such a contradictory system has come to be an inherent part of the United States legal model taps into centuries of discussion about what qualifies as rational behavior. In order for a state to “behave rationally,” must it follow a simple “no exemptions” approach that forces all individuals to act toward the greater good in a formulaic, uniform way? Or does rationality mean allowing exemptions, which present a whole series of legal and ethical challenges and seem contradictory to democracy’s purpose, but also often seem to be the only “reasonable” solution to excessive burden? The classical model of probability, embraced by John Locke among others from the mid-seventeenth to the mid-nineteenth centuries, proposes a type of rationality that was premised on the courses of action that would be taken by “reasonable men” (Daston 1988, xi). This can be differentiated from the current understanding of rationality, which corresponds directly with mathematical calculations of probability and utility maximization (Daston 1988, xiii).

It is possible that a system that allows for exemptions can be explained and shaped by this second, more modern conception of formulaic utility maximization. Perhaps, if an individual’s burden is great enough, the benefit of permitting an exemption outweighs the social cost. However, this is impossible to measure

mathematically, because an attempt to formulate objective calculations must incorporate subjective understandings of pain and happiness. Moreover, someone trying to perform such a calculation would have to decide whether there is a social utility value to all citizens following the law even if unlawful behavior does not have direct measurable effect on others and, if so, what that value is. This is beyond the realm of calculation. More realistically, especially since the Enlightenment thinkers who proposed the classical model based on the “rational man,” rather than on cold calculation, influenced the founders of the United States, exemptions seem to exist not because they are necessarily in line with some model of greater good but because, when evaluated on a case-by-case basis, they “just make sense.” A typical reasonable person, when imagining acting as a lawmaker, would readily give an exemption to a person who is heavily burdened by a law if that exemption imposes no tangible harm on the rest of society.

The modern model of rationality understands that even “rational men” are often not rational by a mathematical calculus. While the classical model counters that if the math does not match the reality, then the math should be altered, the modern model suggests the reverse. For better or for worse our current approach, and this paper’s approach, to exemptions in the United States incorporates the classical notion that moment-to-moment reasonableness is more valuable than abstract calculations.

The narrative of exemption law is far from over. This paper has explored tensions between subjective interpretations and restrictive definitions, between individual burden and societal harm, between what is “reasonable” and what is “logical.” Exemption law is by its nature paradoxical, pitting individual liberties against what we understand to be the very essence of democratic civil law: that it

applies to everyone. Exemptions reflect an inherent absurdity, but as a practical matter and on a visceral level, still seem necessary. In confronting these tensions and making choices to resolve them, we reveal our values and define the kind of society we want to have. So let's choose wisely.

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