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ARTICLES

LAW & RELIGION

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WILLIAM A. GALSTON
CHRISTOPHER C. LUND
MAIMON SCHWARZSCHILD

COMMENT

BYRNE: CLOSING THE GAP BETWEEN HIPAA AND PATIENT PRIVACY — AUSTIN RUTHERFORD

Do Religious Exemptions Save?

MAIMON SCHWARZSCHILD*

Everyone needs to believe in something.
I believe I'll have another beer.

- Bumper Sticker

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Religious Americans—and many advocates, politicians, and scholars sympathetic to them—have strongly, even fervently, supported "special accommodations" or exemptions from otherwise applicable laws, when compliance with these laws is claimed to be inconsistent with religious obligation or belief.[1] When the United States Supreme Court held—notably in the 1990 case of *Employment Division v. Smith*—that the free exercise clause of the First Amendment does not usually require such exemptions,

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* © 2016 Maimon Schwarzschild. Professor of Law at the University of San Diego School of Law; Affiliated Professor, University of Haifa.

1. Leading scholarly advocates of broad religious exemptions include Douglas Laycock and Michael McConnell. *See, e.g.*, Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J. L. & RELIGION 139 (2009); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

Congress passed the Religious Freedom Restoration Act (RFRA) in 1993[2] by unanimous vote in the House—better than the Declaration of War after Pearl Harbor—and by almost unanimous vote in the Senate,[3] and many state legislatures have done likewise.[4] The thrust of these laws is that "accommodation" or exemption should presumptively be available from the requirements of any law, if compliance with the law would substantially burden someone's free exercise of religion, unless there is a "compelling state interest" in not offering an exemption. These laws aroused little public or academic controversy until after 2012, when claims for exemption were conspicuously invoked in behalf of conservative Christians.[5]

Some of the more fundamental difficulties with religious exemptions are fairly obvious.

- What counts as a religion? A long-recognized faith or denomination with centuries of provenance, or also a newly-created entity?
- Which religious practices will be accommodated, which will not be, and on what principle?
- Why should religious conscience be accommodated, but not nonreligious conscience, and not other human interests?
- Who or what should be accommodated? Religious individuals? Religious institutions? Nonreligious institutions founded or

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2. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)), *as recognized in* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015). The federal RFRA was enacted in 1993. 107 Stat. 1488.

3. Richard T. Foltin, *Reconciling Equal Protection and Religious Liberty*, ABA HUM. RTS., Jan. 2013, at 2, 2; *1941: Jeanette Rankin Casts Sole Vote Against WWII*, HISTORY.COM, http://www.history.com/this-day-in-history/jeanette-rankin-casts-sole-vote-against-wwii [https://perma.cc/Q9ZV-WV8V] (last visited Feb. 5, 2016).

4. Some twenty-one states have enacted cognate statutes. *See State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/PJ9Z-AJHA].

5. Controversy surged over the *Hobby Lobby* case, in which the Supreme Court recognized a closely held corporation's religious claim against the contraceptive or arguably abortive drug insurance requirements of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.). Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014). There was further national controversy over the Indiana Religious Freedom Restoration Act, IND. CODE ANN. § 34-13-9-8 (West, Westlaw through 2016 2d Reg. Legis. Sess.), adopted in March 2015, where it was anticipated that the law might be invoked by objectors to gay marriage or to discriminate based on sexual orientation. *See* Garrett Epps, *What Makes Indiana's Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/ [https://perma.cc/JQ77-RGXA].

managed by religious people? Businesses owned or managed or staffed, wholly or in part, by religious people?

- Should those who lose out because of someone else's religious exemption justly have to bear the burden? People whose claims would be sustained by the law—against religious or sexual or other criteria in appointing clergy, say, or in the interest of abortion or gay marriage or assisted suicide—if it weren't for the religious exemption?

Although support for religious exemptions may now be breaking down along ideological–political lines, as in the *Hobby Lobby* dispute over whether a private company should have to provide for contraceptive and arguably abortive drugs in violation of an employer's religious beliefs,[6] outright opposition to the idea of religious exemption was uncommonly met with until very recently, either in politics or in the legal literature. When academic writers expressed serious reservations, they tended to suggest that rather than offering exemptions only on the basis of religion, government ought not to favor or discriminate unjustly against any viewpoints, identities, or practices whatsoever—religious or otherwise; or alternatively, that religious exemptions threaten to draw religion too close to a comfortable embrace of government.[7]

It seems to me that there are other important drawbacks to "special accommodation," even from the point of view of religious Americans. First, while occasional exemptions for religious citizens could be accommodated fairly easily in an era of comparatively modest—or constitutionally circumscribed—government, the potential demand for exemptions looms as more of a threat and hence is likely to be resisted more vigorously when government—especially the federal government—undertakes to regulate ever more, and ever more intimate, aspects of life.

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6. *See Hobby Lobby*, 134 S. Ct. at 2759.

7. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–77 (2007) (arguing that the First Amendment religion clauses protect all citizens, religious and otherwise, from discrimination born of religious diversity); Mark Tushnet, *In Praise of Martyrdom*, 87 CALIF. L. REV. 1117, 1119 (1999) (arguing that religious exemptions tend to corrupt religion by reconciling it too warmly to government); *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 936–47 (1992) (offering a fascinating survey of the historical evidence from the late 18th century founding era and concluding that Americans at the time believed the First Amendment did not provide a right to religious exemption from civil laws).

Second, and perhaps more subtly, by offering exemptions to any and all religions, government may encourage the balkanization of religious life and a proliferation of sects and cults, with negative implications for both the religious and the public life of the country. Third, the idea of seeking special accommodations or exemptions—which often, and perhaps increasingly, might not be available anyhow—is apt to divert religious people from putting their political energy into modifying or defeating unjust or overreaching regulatory proposals altogether, rather than merely seeking special exemptions from them.

I. BIGGER GOVERNMENT, MORE EXEMPTIONS?

A constitutional right to religious exemptions from generally applicable laws was announced for the first time by the Supreme Court in two famous cases decided in 1963 and 1972, and it has had a limited and uncertain life since then. The first case, *Sherbert v. Verner*, involved a Seventh Day Adventist who wanted an exemption from a requirement to be available for work on Saturdays as a condition of receiving unemployment benefit;[8] the second, *Wisconsin v. Yoder*, involved an Amish community that wanted its children excused from compulsory school attendance past the eighth grade.[9] The Court held that the free exercise clause of the First Amendment requires a religious exemption in both cases.[10]

But the Supreme Court reversed course in 1990 when it decided *Employment Division v. Smith* and held that the free exercise clause does not, after all, require religious exemptions from generally applicable laws that are enacted for secular purposes.[11] Even in the years between 1963 and 1990, religious exemptions were by no means granted as readily as *Sherbert* and *Yoder* might seem to imply. The Supreme Court rejected all religious claims for exemption from tax laws; it rejected all claims arising from prisons and from the military; it rejected a claim for exemption from the Fair Labor Standards Act.[12] Virtually the only claims the Court

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8. 374 U.S. 398, 399–401 (1963).
9. 406 U.S. 205, 210–11 (1972).
10. *Sherbert*, 374 U.S. at 410; *Yoder*, 406 U.S. at 234.
11. 494 U.S. 872 (1990), *superseded by statute*, RFRA, Pub. L. No 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 200bb to -4 (2012)).
12. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (upholding prison's prevention of Muslim inmates' attending weekly services); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (allowing Air Force to prohibit wearing a yarmulke), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 & 1989, Pub. L. No. 100-180, 101 Stat. 1019 (codified at 10 U.S.C. § 774(a)-(b) (2012)); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 308 (1985) (holding religious foundation's associates were "employees" under the FLSA); United States v. Lee, 455 U.S. 252, 261 (1982) (requiring Amish employer to pay social security tax), *superseded by*

accepted were—like *Sherbert*—for religious exemption from requirements to be available for Sabbath work under unemployment benefit laws.[13] Religious exemptions, in fact, are mostly provided for by Congressional or state legislation, rather than enforceable as constitutional rights. It is Congress that enacted RFRA; it is Congress that granted the Amish an exemption from Social Security taxes after the Supreme Court turned it down;[14] it is Congress that granted members of the armed forces the right to wear "religious apparel" after the Supreme Court rejected the claim;[15] it is the state legislatures that have enacted RFRA-like laws and granted exemptions from their drugs laws for the sacramental use of peyote.[16]

What legislation—passed by simple majority—granteth, legislation can likewise taketh away.

But what could prompt such a turnabout, given that the religious exemption statutes were passed by such enthusiastic majorities, in Congress and in many state legislatures as well?

Two broad developments since the 1960s are apt to make religious exemptions an uncertain haven in a secular world.

First, the sheer growth of government, especially federal government, and the greater presence of government regulation in American life. The growth of the "administrative state" is well-attested. The Code of Federal Regulations (CFR) ran to about 19,000 pages in 1949, 71,000 pages in 1975, and 174,000 pages in 2012.[17] The federal government's share of the national economy was approximately 15% in 1950; it is over 31% today.[18] State

statute, Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (codified as amended at 26 U.S.C. § 3127 (2012)).

13. *See* William P. Marshall, Smith, Ballard, *and the Religious Inquiry Exception to the Criminal Law*, 44 TEX. TECH L. REV. 239, 244–45 (2011) (summarizing the Supreme Court decisions, mostly against exemptions).

14. *See* 26 U.S.C. 3127 (2012).

15. *See* 10 U.S.C. 774 (2012).

16. *See Smith*, 494 U.S. at 913 n.5 (Blackmun, J., dissenting) (noting that numerous states have enacted accommodations for sacramental peyote).

17. John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137, 140–41 (2013); *see also* Susan E. Dudley & Richard D. Otis, Jr., *eRulemaking: A Case Example of eGov Transformation*, 1–2 (Mercatus Ctr., George Mason Univ., Working Paper No. 57), http://belfercenter.hks.harvard.edu/files/otis.pdf [https://perma.cc/2TB7-FHGZ] (documenting similar growth in the *Federal Register*).

18. CONG. BUDGET OFFICE, A 125-YEAR PICTURE OF THE FEDERAL GOVERNMENT'S SHARE OF THE ECONOMY, 1950 TO 2075 (2002), https://www.cbo.gov/sites/default/files/107th-congress-2001-2002/reports/125revisedjuly3.pdf [https://perma.cc/59XB-478R]; CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2 (2014), http://cei.org/sites/

and local government have grown as well: there were roughly 6.4 million state and local government employees in 1960; by 2013 there were 22 million.[19]

It is not just the quantity of regulation, but also the character of regulation, that is more likely than in the past to impinge on religious people. Federal statutes, and especially federal regulations, touch upon ever more, and ever-more intimate, aspects of American life: health care, including questions of death and dying;[20] education, once virtually entirely a state or local affair;[21] and family life and sexuality, including marriage, contraception and abortion, and child-rearing.[22] Food and drugs are regulated, including substances that might be sacramental.[23] There is extensive regulation of finance and many other economic questions, as well as environmental matters, with inevitable implications for—and potential clash with—religious social doctrine. Federal social welfare policy has expanded dramatically in scope and importance: means-tested welfare programs alone now absorb 21% of the federal budget, and federal spending on the leading welfare

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default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf [https://perma.cc/YGK9-VZW5].

19. ROBERT JESSE WILLHIDE, U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2013, at 2 (2014), http://www2.census.gov/govs/apes/2013_summary_report.pdf [https://perma.cc/E5Y2-3VVC]; U.S. Dep't of State, *The Growth of Government in the United States*, ABOUT EDUC., http://economics.about.com/od/howtheuseconomyworks/a/gov_growth.htm [https://perma.cc/EA84-WV9Z] (last updated Dec. 4, 2014).

20. *See* the ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.). The ACA spans a total of 906 pages from 124 Stat. 119 to 124 Stat. 1025. *Id.*

21. For an overview of the U.S. Department of Education's budget, and hence of the scope of its activities and powers, see the Budget Homepage of the Department of Education, *About Ed / Overview*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/overview/budget/index.html?src=ct [https://perma.cc/DB6H-K34T] (last updated Feb. 9, 2016). For a critical view of the Department of Education, see Lindsey M. Burke, *Reducing the Federal Footprint on Education and Empowering State and Local Leaders*, HERITAGE FOUND. BACKGROUNDER, June 2, 2011, http://www.heritage.org/research/reports/2011/06/reducing-the-federal-footprint-on-education-and-empowering-state-and-local-leaders [https://perma.cc/GS76-PC72].

22. *See, e.g.*, Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (recognizing same-sex marriages for federal tax purposes). For the Final Rule requiring many health insurers to cover, and hence to charge, all enrollees for elective abortions under the ACA, see 45 C.F.R. § 156.280 (2014). For a critical assessment of this rule, see *Backgrounder: The New Federal Regulation on Coerced Abortion Payments*, U.S. CONF. OF CATHOLIC BISHOPS (Nov. 6, 2013), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/backgrounder-the-new-federal-regulation-on-coerced-abortion-payments.cfm [https://perma.cc/9X8J-2G6X]. For an assessment of the impact of welfare-state policy on childrearing in the United States and Western Europe, see KIMBERLY J. MORGAN, WORKING MOTHERS AND THE WELFARE STATE (2006).

23. *See* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–99(f) (2012)).

programs has nearly quadrupled in real terms over the past three decades.[24] Welfare spending, inevitably, comes with rules, regulations, and conditions: these too may impinge on religious practice. The growth, in particular, of federal regulation is significant in all these areas that touch on religious concerns, because secular elites may have more influence over the substance of what is done at the federal level than in many state or local governments.

The second development since the 1960s is the diversification or fragmentation of religious life in the United States. American religion, to be sure, has always come in a variety of denominations and sects, even in colonial times and in the decades after American independence, although in those eras the overwhelming majority of religious people and groups in America were Christian and Protestant.[25] According to Justice Felix Frankfurter, in 1943 there were "in the United States more than 250 distinctive established religious denominations."[26] Yet the sociology of American religion in the mid-twentieth century was substantially reflected in Will Herberg's 1955 bestseller, *Protestant-Catholic-Jew*—with a pinch of kosher salt, perhaps, for Jews, who even then were only about 3% of the population.[27] The "Mainline churches," a relatively small number of well-established historic Protestant denominations, were strong numerically and institutionally: a majority of all churchgoers—even when counting non-Protestants—attended Mainline Protestant churches until the mid-20th century, and as late as 1970 their members, together with Roman Catholics, made up more than two-thirds of Americans.[28] Adherents of

24. *CRS Report: Welfare Spending the Largest Item in the Federal Budget*, U.S. SENATE COMMITTEE ON THE BUDGET, REPUBLICANS (Oct. 18, 2012), http://www.budget.senate.gov/republican/public/index.cfm/files/serve/?File_id=34919307-6286-47ab-b114-2fd5bcedfeb5 [https://perma.cc/QU8Y-RQXK].

25. *See* JAMES D. DAVIDSON & RALPH E. PYLE, RANKING FAITHS: RELIGIOUS STRATIFICATION IN AMERICA 43–44 (2011).

26. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting).

27. WILL HERBERG, PROTESTANT-CATHOLIC-JEW (rev. ed. 1960). For Jewish population statistics at the time, see Alvin Chenkin, *Jewish Population of the United States, 1955*, *in* 57 AMERICAN JEWISH YEARBOOK 119, 119 (Morris Fine & Jacob Sloan eds., 1956) (estimating the Jewish population in 1955, the original year of publication of Herberg's book, as approximately five million, or 3% of the total approximate U.S. population of 166 million). *See also* Population Estimates Program, Population Div., U.S. Census Bureau, *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, CENSUS.GOV (June 28, 2000), https://www.census.gov/population/estimates/nation/popclockest.txt [https://perma.cc/CM98-ZBTK] (reporting the national population as 165,931,202 on July 1, 1955).

28. Benton Johnson, *The Denominations: The Changing Map of Religious America*, PUB. PERSP., Mar.–Apr. 1993, at 3, 3, 6, http://www.ropercenter.uconn.edu/public-

non-Judeo-Christian religions were numerically few and culturally almost invisible at the time.[29] In the decades since the 1960s—and hence since the time that religious exemptions were introduced by the Supreme Court in the *Sherbert* and *Yoder* decisions—membership in the Mainline churches declined dramatically. The Episcopal Church had nearly 3.5 million members in the mid-1960s: it has fewer than 2 million today, although the population of the country was less than 200 million then and is more than 300 million now.[30] There were more than 4 million Presbyterians in 1960; there are fewer than 2 million today.[31] The United Church of Christ lost over 40% of its membership between the mid-1960s and the year 2008.[32]

A majority of churchgoing American Protestants today attend Evangelical, fundamentalist, or charismatic churches, whose doctrines and practices, it is plausible to think, are more varied than those of the older Mainline churches.[33] The numbers of Muslims in America, although they are still probably only about 1% of the population, have grown along with their visibility in American life and culture; so likewise with Hindus, Buddhists, and followers of other Eastern religions.[34] The popularity of New Age and non-Christian religious or quasi-religious beliefs has grown. In American prisons, for example—not an entirely representative subset of the country, to be sure—there has been a sharp growth in adherence to a variety of sects including the Nation of Islam (Black Muslims), pagan groups such as Wicca, Odinism, Asatru, and Druidism (such pagan groups often associated with White Supremacists among the prisoners), and

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perspective/ppscan/43/43003.pdf [https://perma.cc/8NRX-TVH3]; *see also* DAVIDSON & PYLE, *supra* note 25, at 114–17 (providing statistics on Mainline Protestant and Roman Catholic populations between 1960 and 2010).

29. *See* DAVIDSON & PYLE, *supra* note 25, at 156–61 (discussing an influx of these "nonelite" religions).

30. Jackie Bruchi, *Episcopal Church Membership Makes Precipitous Drop*, STAND FIRM (Oct. 26, 2011), http://standfirminfaith.com/?/sf/page/27978 [https://perma.cc/D5K8-QJ65]; Population Estimates Program, *supra* note 27; *see also Fast Facts About American Religion*, HARTFORD INST. FOR RELIGION RES,, http://hirr.hartsem.edu/research/fastfacts/fast_facts.html#growlose [https://perma.cc/5XB6-MRJW] (last visited Feb. 8, 2016) (discussing decline in evangelical membership).

31. *2012 Statistics Show Dramatic Decrease in PCUSA Membership*, THE LAYMAN, http://www.layman.org/2012-statistics-show-dramatic-decrease-in-pcusa-membership-congregations [https://perma.cc/SME6-N2FM] (last visited Feb. 8, 2016).

32. *See* YEARBOOK OF AMERICAN CHURCHES 210 (Constant H. Jacquet, Jr. ed., 1967); YEARBOOK OF AMERICAN AND CANADIAN CHURCHES 2008, at 281 (Eileen W. Lindner ed., 2008).

33. PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 4 (2015), http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf [https://perma.cc/3FH8-FY8F] (reporting that of the 46.5% of Americans identifying as Protestant Christians in 2014, 25.4% affiliated with Evangelical churches, 14.7% with mainline churches, and 6.5% with historically Black churches).

34. *Id.*

"Native American Spirituality."[35] The Pew Forum on Religion and Public Life reports that the religiously unaffiliated—those who say they have no particular religious affiliation—have increased in just seven years from slightly more than 16% of American adults in 2007 to slightly under 23% in 2014.[36] The unaffiliated are by no means all determinedly irreligious however: more than half of them in a recent Pew survey describe themselves either as "religious persons" (18%) or as "spiritual but not religious" (37%). A quarter of them believe in astrology; a quarter of them believe in reincarnation; 30% of them say they believe in spiritual energy in physical things such as crystals, trees, or mountains.[37] It is fair to think that today's array of religious groups, doctrines, notions, and practices is liable to be a source of considerably more varied claims for religious exemptions than was the case when the mainline churches enjoyed more ascendancy and when the religious landscape of the country could plausibly be described in a book entitled *Protestant-Catholic-Jew*.

When government's rules are fewer, in short, and its regulatory ambitions more narrow—and when the range of the country's religious diversity is narrower as well, and the kinds of exemptions likely to be sought are fewer and more predictable—government might afford to be tolerant in offering accommodations and exemptions. But with more regulation, especially federal regulation that seeks to shape or reshape the country's way of life more uniformly throughout the nation, the very purposes of such regulation may be threatened if exemptions are available to an ever-wider array of people and interests. A shift in attitude already seems to be under way since the Supreme Court's *Hobby Lobby* decision in the summer of 2014, which granted religious exemption to a family-owned company from federal mandates to provide contraceptive and arguably abortifacient insurance for employees.[38] The decision has met with furious reactions from "pro-choice" political and opinion leaders who favor the mandatory requirements.[39] Restrictive amendments to the RFRA, and

35. *See* U.S. COMM'N ON CIVIL RIGHTS, ENFORCING RELIGIOUS FREEDOM IN PRISON 13–14, 72 n.166, 124 n.26 (2008), http://www.usccr.gov/pubs/STAT2008ERFIP.pdf [https://perma.cc/Y4BG-E2DV].

36. PEW RESEARCH CTR., *supra* note 33, at 20.

37. PEW RESEARCH CTR., "NONES ON THE RISE": ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 24 (2012), http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf [https://perma.cc/L3VH-B97M].

38. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

39. *See* Brett McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. (forthcoming 2015) ("The case received a huge amount of media attention—more than

even proposed amendments to the Constitution, have been urged on by many in politics, in the media, by pressure groups, and in the academy, who until recently were among the enthusiasts for RFRA and religious exemptions.[40] Support for exemptions may be more fragile than it seemed, if that support breaks down whenever exemption is sought, especially in behalf of a major Christian body of belief, from a law or administrative regulation whose supporters feel strongly about enforcing it.

II. A Boon to Balkanization

Religious accommodations or exemptions, moreover, offer an incentive for the creation of sects or cults, some of them bizarre, some of them sincere, and some of questionable sincerity: few, if any, of them with the intellectual and spiritual resources that develop over centuries among faiths with substantial bodies of adherents.[41] Often—perhaps usually—it will be sects or cults without historic provenance who will need and seek exemptions, because well-established religions, with substantial numbers among the electorate, would presumably more often have the political force to forestall the enactment of laws from which exemption would be needed.

It is sometimes suggested that religious exemptions are a kind of compensation or tradeoff for the exclusion of religion from public institutions under the Establishment Clause of the First Amendment as interpreted—or misinterpreted—in judicial decisions since the Second World War.[42] Beginning in the late 1940s, the courts have disallowed religious symbols

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any case of that term for the court. Reaction to the decision was intense and highly polarized. Conservatives celebrated, while liberals expressed outrage.").

40. *See, e.g.*, Sam Stein, *White House, Democrats Plot Response to Supreme Court Hobby Lobby Ruling*, Huffington Post (Aug. 28, 2014), http://www.huffingtonpost.com/2014/06/30/white-house-hobby-lobby_n_5544287.html [https://perma.cc/ECG3-CM7E]; *see also* Eliza Newlin Carney, *Hobby Lobby Ruling Fuels Amendment Push*, Roll Call (July 2, 2014, 3:41 PM), http://blogs.rollcall.com/beltway-insiders/hobby-lobby-ruling-fuels-amendment-push/?dcz= [https://perma.cc/7S7V-DR5K] (presenting proposed constitutional amendment to reverse the decision); Katha Pollitt, *Why It's Time To Repeal the Religious Freedom Restoration Act*, The Nation (July 30, 2014), https://www.thenation.com/article/why-its-time-repeal-religious-freedom-restoration-act/ [https://perma.cc/QF6N-J35Z] ("The law, passed in 1993 with near-unanimous support, has become an excuse for bigotry, superstition[,] and sectarianism.").

41. *See, e.g.*, Mattias Gardell, Gods of the Blood: The Pagan Revival and White Separatism (2003) (studying the racist pagan white-separatist and neo-Nazi cults in the United States); *see also* Hugh B. Urban, The Church of Scientology: A History of a New Religion (2011) (documenting the controversial Scientology movement).

42. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611, 1613 (1993) (arguing that exemptions under the Free Exercise clause are warranted because of the special disabilities imposed on religion by the Establishment Clause).

and exercises which had been traditional in public schools and often, although not always, disallowed or sharply limited them in other government activities and on public property.[43] Legal secularism expunged many elements of "civil religion" from American public institutions. But it is during this same postwar era that religious Americans, many of whom are troubled or offended by the secularization of public life, have been offered special accommodations and religious exemptions, either as a matter of constitutional law or of statutory grace.

Yet the tradeoff of religious interests lost and gained is not really symmetrical or balanced.[44] Although American "civil religion" in the 19th and 20th centuries was almost always nondenominational in the sense that religious symbols and rituals in public life were not exclusively those of any particular Christian denomination, American public religion nonetheless usually had an implicit bent towards the values and style, and often towards the actual institutions, of Mainline Christianity.[45] The Bible was commonly read and taught in the public schools, especially in the 19th and earlier 20th centuries, and the Bible in question was typically the Authorized (King James) Version.[46] This sometimes provoked bitter

43. *See e.g.*, Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (banning minute of silence at the opening of the public school day in Alabama); Engel v. Vitale, 370 U.S. 421, 424 (1962) (banning nondenominational invocation in the New York public schools); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (banning optional religious instruction during school hours on public school premises). As to religious symbols and activities on public property other than schools, compare Lynch v. Donnelly, 465 U.S. 668, 671–72 (1984) (permitting the placement in a public park of a Christmas crèche which included candy canes and a teddy bear), with McCreary Cty. v. ACLU, 545 U.S. 844, 850, 881 (2005) (prohibiting display copies of the Ten Commandments in state courthouses); Cty. of Allegheny v. ACLU, 492 U.S. 573, 580–81, 620 (1989) (forbidding a nativity scene: no candy canes or teddy bear), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811, 1821 (2014); Marsh v. Chambers, 463 U.S. 783,784–86 (1983) (upholding opening each legislative day in the Nebraska legislature with chaplain's prayer).

44. I owe this point to Professor Andrew Koppelman. *See* Andrew Koppelman, Response, *Religion's Specialized Specialness: A Response to* What If Religion Is Not Special?, 79 U. CHI. L. REV. DIALOGUE 71, 74 n.18 (2013) ("[T]he purported tradeoff doesn't really balance, because the majority religions that are constrained by the Establishment Clause are not the same as the minority religions that are protected by the Free Exercise Clause.").

45. *See* Glenn A. Moots, *The Protestant Roots of American Civil Religion*, 23 HUMANITAS 78, 78 (2010) (evaluating the "virtues and vices [of Calvinism] in the development of Anglo-American political theology and civil religion").

46. NOAH FELDMAN, DIVIDED BY GOD 62 (2005) ("With Bible reading a daily staple, the [nineteenth century] common schools grew, attracting students with the promise of free education.").

controversy when Roman Catholics, whose numbers were increasing in the 19th century, objected to lay Bible reading in general and to the King James version in particular.[47] The public school day often began, well into the mid-20th century, with the "Lord's Prayer," again in the King James Version or something close to it.[48] Invocations at public events—in schools, town halls, and other public institutions—were commonly pronounced by Mainline Protestant and in later times occasionally by Roman Catholic or Jewish clergy: chaplains in legislatures and in the fighting forces also tended to come from these denominations.[49] Presidents of the United States most often announced themselves as affiliated with Mainline churches: Episcopalian and Presbyterian most of all, then Unitarian, Methodist, and Baptist in lesser numbers.[50] The "Presidents' Church" on Lafayette Square opposite the White House, which every President since Madison has attended at least once, is Episcopalian.[51] The National Cathedral in Washington—where solemn national occasions are often marked—is Episcopalian.[52] Some aspects of American "civil religion" persist to this day, but legal secularism tends to challenge it, and since the late 1940s, the courts have restricted or disallowed various expressions of it.[53]

Special accommodations or exemptions, by contrast, are typically sought by other-than-Mainline sects or denominations. The idea that exemption might be a constitutional right was introduced in Supreme Court decisions involving a Seventh Day Adventist in *Sherbert v. Verner* and an Amish community in *Wisconsin v. Yoder*.[54] Both these sects, while far from Mainline, have a certain history and generally accepted legitimacy

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47. *Id.* at 70 ("In 1844, over the course of several days, nativists in Philadelphia claiming that Catholics wanted the Bible out of the schools killed thirteen people and burned a Catholic church to the ground.") (citing A FULL AND COMPLETE ACCOUNT OF THE LATE AWFUL RIOTS IN PHILADELPHIA (1844)).

48. *See, e.g.*, STEPHEN D. SOLOMON, ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION AND STARTED THE BATTLE OVER SCHOOL PRAYER 3 (2007).

49. JACQUELINE E. WHITT, BRINGING GOD TO MEN: AMERICAN MILITARY CHAPLAINS AND THE VIETNAM WAR 78 (2014) ("For most of the twentieth century, the military chaplaincy operated on a loose quota system . . . of one-third Catholic chaplains; one-third Liturgical Protestant (Episcopal, Lutheran, Presbyterian, etc.); and one-third Evangelical Protestant, 'other' Protestant, and Jewish."); *see* BRIAN D. MCLAREN, A GENEROUS ORTHODOXY 135 (2004).

50. *The Religious Affiliations of U.S. Presidents*, PEW RES. CTR. (Jan. 15, 2009), http://www.pewforum.org/2009/01/15/the-religious-affiliations-of-us-presidents/ [https://perma.cc/U3VM-MHMV].

51. *St. John's Church*, NAT'L PARK SERV., http://www.nps.gov/nr/travel/wash/dc28.htm [https://perma.cc/QXE6-J98H] (last visited Feb. 8, 2016).

52. *Service Descriptions*, WASHINGTON NAT'L CATHEDRAL, http://www.cathedral.org/worship/serviceDescriptions.shtml [https://perma.cc/SQK2-HLWC] (last visited Feb. 8, 2016).

53. *See supra* note 43.

54. *See supra* notes 8–10 and accompanying text.

to them. But for every one exemption case involving a plausibly Mainline denomination, such as *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*—the decision holding that religious discrimination statutes do not apply to religious organizations' choice of religious leaders[55]—there are surely two or three, or perhaps five or more, cases such as *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, involving a sect wishing to import ayahuasca tea, a Schedule I substance[56]; or *Employment Division v. Smith*, involving peyote and a "Native American Church."[57] One study of litigation under the RFRA, as of 1996—the year before the RFRA was held unconstitutional as applied to the states—found that 337 reported cases had cited the RFRA in the three-year time range of the study: of these, 18% involved non-Christian Muslim, Jewish, or Native American religions, although these religions made up only about 3% of religious membership in America at the time.[58] It is fair to infer that many if not most of the Christian claimants were from other-than-Mainline denominations. A United States Civil Rights Commission study of religious freedom in prison reports that adherents of non-Christian religions file a majority of grievances about free-exercise limitations in American prisons: from 2001 to 2006 inclusive, of a total of 250 cases filed in the federal courts under the Religious Land Use and Institutionalized Persons Act (RLUIPA), only 27 were by prisoners claiming to belong to a Christian religion.[59] American prisons, to be sure, cannot be claimed to be a representative cross-section of American society: but they are suggestive, at least, of more general trends.

The newfound availability of exemptions is surely not the only reason for the decline of Mainline American denominations in the past half-century and the growth of less sophisticated religiosity. There are many possible causes: widespread cultural and demographic shifts, as well perhaps as the capture of leading positions in the formerly Mainline churches, in the National Council of Churches and otherwise, by extremist political sectarians.

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55. 132 S. Ct. 694, 702 (2012).
56. 546 U.S. 418, 423 (2006).
57. 494 U.S. 872, 874 (1990), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).
58. REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 541–42 (James T. Richardson ed., 2004).
59. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 35, at 87.

But constitutional or legal policy that seems to offer exemptions and accommodation to any sect or cult that seeks it and that claims to be a religion must tend at least to some degree to legitimate such sectarianism in the public eye and to erode the distinction between faiths with substantial history—and with the intellectual, spiritual, and aesthetic resources that grow with historic development—and sects or cults without such resources. This is all the more so in a constitutional order that attributes aggressive separationism or legal secularism to the Establishment Clause, so that the authority of public institutions is ever more cut off from any identification with Mainline or historic faiths. It may go too far to amend the famous epigram attributed, or misattributed, to G. K. Chesterton, to suggest that when people stop believing in Mainline religion, they will believe in anything. But it is at least open to question whether the decline of the Mainline and historic denominations, and the increased balkanization or privatization of American religious life, have been beneficial either to the quality of religious life or to the tone or substance of public life in the United States in recent decades.

III. BEWARE DIVERSION AND RETREAT

Emphasis on accommodations and exemptions, finally, is apt to divert the political energy of religious Americans from persuading their fellow citizens not to enact laws from which religious exemptions are needed or wanted. The question of exemption arises most often, after all, when government grows in its reach and ambition. If most aspects of life, including those that touch on religious life, are left to people's private arrangement, then not much special accommodation will be needed. But when government assumes command and control over more areas of life, regulating who shall do what under what rules and regulations, then clashes with one or other religious way of life are almost inevitable. To take an obvious example, with a relatively open market in health care and private health insurance, religious institutions needed no special exemptions to adopt their own approaches on questions of abortion and end-of-life issues, as on other matters. But greatly increased government regulation or takeover implies more uniform standards and rules and hence more controversy over whether there should be religious exemptions and if so, for whom, to what degree, and on what terms.

Religious Americans, therefore, belonging to many faiths and denominations, have reason to be especially concerned about overreach of government, because the more regulation—particularly federal regulation, with its nationwide command and, perhaps, its secularist cultural bent—the more likely it is to impinge on religious practice and belief. Religious Americans, however, are numerous: depending on one's criteria of "religious,"

probably a majority of Americans, notwithstanding the decline in religious affiliation in recent years and decades.[60] Moreover, many nonreligious Americans, for entirely secular reasons, are also wary of the growth or overgrowth of government. Religious people should seldom be without political allies in seeking to modify or defeat unjust or overreaching regulatory proposals.

But political energy and resources are not unlimited. To the extent that these resources are devoted to seeking special accommodations and exemptions, they are not devoted to mitigating or opposing the enactment of over-intrusive rules and regulations.

The emphasis on religious exemptions thus represents a withdrawal, at least to some extent, from public debate and political action over the merits of things: a withdrawal, to use the slightly tribal phrase, from the "public square." As such, it even implies acceptance, at least as a practical matter, of the idea that religious arguments are illegitimate in the sphere of public debate. After all, when religious people join in public debate on the merits, some of their arguments might be couched in religious terms or might invoke religious principles. The idea that religious arguments, or "comprehensive doctrines," are alien to "public reason" and should not be introduced into public debate has been a favorite of various secularist writers and publicists.[61] But it is an idea that many, if not most, religious people would reject in principle.

Seeking frequent exemptions and accommodations puts religious people in the invidious position of demanding special privileges. This is never an appealing, or perhaps even a viable, demand: least of all in an egalitarian society, where a core idea is rejection of special privilege.

It is not sustainable anyway, beyond a limited number of exemptions, for a limited number of religious bodies, in a modestly regulated polity. In an ever-more-minutely regulated polity, you cannot keep demanding exemptions; and they will not be granted. It is a well-known military axiom

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60. *See* PEW RESEARCH CTR., *supra* note 33, at 3 ("To be sure, the United States remains home to more Christians than any other country in the world, and a large majority of Americans—roughly seven-in-ten—continue to identify with some branch of the Christian faith.").

61. *See e.g.* JOHN RAWLS, POLITICAL LIBERALISM, at xvi (1993); Robert Audi, *Liberal Democracy and the Place of Religion in Politics*, *in* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 1, 25–46 (1997); John Rawls, *The Idea of Public Reason Revisited* 64 U. CHI. L. REV. 765, 765–66 (1997).

that armies in retreat are at their most vulnerable.[62] Religious Americans need not retreat from robust political action, merely to plead for special indulgence. It will not avail them, or not for long, if they do.

62. "It was from the example of Cannae [the defeat of the Romans, and the massacre of retreating Roman soldiers, by Hannibal's Carthaginian army] that the nineteenth-century French tactical analyst Ardant du Picq first proposed the important perception that it is in retreating that an army exposes itself to disabling losses." JOHN KEEGAN, A HISTORY OF WARFARE 271 (1993).