1990

The Case Against a Right to Religion-Based Exemptions

Ellis M. West
University of Richmond, ewest@richmond.edu

THE CASE AGAINST A RIGHT TO RELIGION-BASED EXEMPTIONS

ELLIS WEST*

When, if ever, does the free exercise clause of the first amendment[1] give an individual or organization the right to disobey with impunity a valid law of the state? This question is being discussed with increasing frequency and intensity because of the growing number of persons and groups who are going to the courts and claiming such a right on the grounds that the application of certain laws to them would burden their free exercise of religion.[2] Almost all the individuals and some of the groups who claim such a right do so because the laws to which they object require them to do or not to do something that is contrary to what their religion, as they understand it, requires them to do or not to do. Some organizations, however, ask for exemptions simply on the grounds that they are churches or are engaged in religious activity, neither of which,

* Professor of Political Science, University of Richmond. Support for the writing of this article was provided by the Faculty Research Committee, University of Richmond.

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. Examples: Fundamentalist parents sued to have their children in public schools excused from having to read certain books or attend certain classes. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987). A Jewish rabbi/chaplain asked to be exempted from having to comply with an Air Force dress code that prohibited his wearing a yarmulke. Goldman v. Weinberger, 475 U.S. 503 (1986). Amish employers sought exemption from the federal law requiring them to pay social security taxes on their employees. United States v. Lee, 455 U.S. 252 (1982). Church-related schools and publishing houses challenged the application to them of laws against racial and sexual discrimination. Bob Jones University v. United States, 461 U.S. 574 (1983); Equal Employment Opportunity Comm'n v. Southwestern Baptist Theological Seminary, 651 F.2d 177 (5th Cir. 1981). For religious reasons, an individual wanted to receive a driver's license without having to have her picture taken and placed on the license. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd per curiam by an equally divided Court*, Jenson v. Quaring, 472 U.S. 478 (1985). Native American parents objected to their infant daughter's being given a social security number as a condition of receiving government benefits. Bowen v. Roy, 476 U.S. 693 (1986). For many other examples, see Esbeck, *1986 Survey of Trends and Developments in Religious Liberty in the Courts*, 4 J.L. & RELIGION 431 (1986).

they claim, can be regulated by the government without violating the free exercise clause.[3]

Ironically, the laws involved in free exercise cases are almost never ones whose primary purpose or primary effect is to harm religion (in general or in particular) or to discriminate against persons or groups because of their religion. Instead, their primary purpose or effect is to protect or promote the health, safety, property, morals, or general welfare of the people—generally conceded to be legitimate objectives of government.[4] The issue in such cases, therefore, is not whether the challenged *laws* are constitutional, but only whether they can be *applied* to those persons or groups whose exercise of religion would, according to them, be made more difficult or impossible were the laws to be applied to them.[5] In contrast, when the *primary* purpose or effect of a law is the burdening or limiting of the exercise of religion, the Supreme Court strikes down the law itself as a violation of the free exercise clause.[6] Because such laws have so little chance of being upheld by the Court, they have little chance of being passed by a legislature in the

3. *See, e.g.*, Ohio Civil Rights Comm'n v. Dayton Christian Schools, 475 U.S. 1115 (1986). The alleged right of churches and other religious organizations generally to be free of government regulation is now widely referred to as the right to church autonomy. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

4. Ira C. Lupu writes:

> Behavior that is generally understood as religious alone is almost never subject to direct regulation. . . . The collision between state policy and free exercise [of religion] thus tends to arise 'incidentally,' and frequently quite unforeseeably. . . . At times, the impact on nonmainstream religions will be the product of a distressing insensitivity. In many other situations, however, the government will have acted in innocence.

Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 773 (1986).

5. *See* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217 (1973); McCrossin, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980); and Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

6. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). Laws whose primary purpose or primary effect is discrimination against religion or a particular church can also be struck down as violations of the free speech clause, Widmar v. Vincent, 454 U.S. 263 (1981), or the establishment clause, Larson v. Valente, 456 U.S. 228 (1982).

first place.[7] Most recent free exercise cases decided by the Court, therefore, have dealt with the issue of religion-based exemptions from valid laws.

In deciding these cases the Supreme Court has declared that the free exercise clause, at least under certain circumstances, does give individuals,[8] if not organizations,[9] a right to be exempt from having to obey laws that for reasons of religion they do not wish to obey. Moreover, it has broadly defined "religious belief" to include whatever gives ultimate meaning to life.[10] Not surprisingly, the Court's interpretation and application of the free exercise clause have engendered considerable criticism—some persons complaining because the Court's interpretation is too expansive,[11] and others because its practice is not nearly as liberal as its rhetoric.[12]

This Article attempts to make the case against the Supreme Court's recent, broad interpretation of the free exercise clause, that is, against the idea that persons or groups have a constitutional right via the free exercise clause to religion-based exemptions. The first section summarizes the Court's current interpretation of the free exercise clause. Then follows an explanation of the ethical, logical, and practical problems caused by the Court's current interpretation. The third section reviews and evaluates the leading arguments on behalf of a

---

7. Choper, *The Free Exercise Clause*, in THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1982-83 71-73 (D. Opperman ed. 1984).

8. Sherbert v. Verner, 374 U.S. 398 (1963).

9. Although the Court has never said that the free exercise clause gives churches or church-related organizations a right to be exempt from the application of valid secular laws, it has implied that the establishment clause under certain circumstances may require the granting of such exemptions. *See* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985). This article, however, does not directly discuss the significance of that decision or whether the establishment clause by itself does or should serve as a basis for a right to religion-based exemptions, because the issues raised by establishment clause decisions in this connection are essentially the same as those raised by the Court's free exercise decisions. In other words, for purposes of this article it will be assumed that churches as well as individuals now have a constitutional right to religion-based exemptions, and that most of the arguments for and against such a right are the same regardless of which of the religion clauses or what combination of the two might be used by the Court to generate such a right.

10. United States v. Seeger, 380 U.S. 163 (1965). *See infra* notes 32-37 and accompanying text.

11. *See, e.g.*, R. MORGAN, THE SUPREME COURT AND RELIGION 144-210 (1972) (one of the earliest and most trenchant criticisms of the Court's expansive reading of the free exercise clause).

12. *See, e.g.*, Leedes, *Court-Ordered Exemptions to Secure Religious Liberty*, 21 U. RICH. L. REV. 335, 340 (1987).

right to religion-based exemptions. The fourth section summarizes the evidence from primary sources and recent historical scholarship on the original meaning of the phrase, "free exercise of religion." The Article concludes with a discussion of the implications for church-state law in general of the Supreme Court's adopting of a narrow interpretation of the free exercise clause.

I. THE COURT'S RECENT INTERPRETATION OF THE FREE EXERCISE CLAUSE

The Supreme Court has had a difficult time deciding whether the free exercise clause requires that exemptions from generally applicable laws be granted to religious claimants. For most of its history, it granted no exemptions because it interpreted the free exercise clause as prohibiting only "governmental action *aimed* at burdening religious practice, not governmental action with a non-religious purpose that happened to impose upon an individual's religious practice."[13] Then, in 1963, in the case of *Sherbert v. Verner*,[14] the Court for the first time used the free exercise clause to exempt a person from a valid law solely because it made the exercise of her religion more difficult.[15] In doing so, the Court enunciated the principle that the government may not prohibit or even *burden* the exercise of religion, even unintentionally or secondarily, unless it can show that such action is necessary in order to protect a compelling state interest.[16]

---

13. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 266 n.11 (1982) [hereinafter *Conundrum*] (emphasis added). Cases where the Court refused to grant religious exemptions include: Reynolds v. United States, 98 U.S. 145 (1878); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland v. United States, 329 U.S. 14 (1946); Braunfeld v. Brown, 366 U.S. 599 (1961). For a general discussion of these and other free exercise cases, see Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV., 309, 317-26, 330-45.

14. 374 U.S. 398 (1963).

15. The Court exempted the appellant from a regulation denying unemployment compensation to those who quit work for personal reasons. It did so because the person's personal reason for quitting work was religious: she did not wish to work on Saturday, her Sabbath. *Id.* at 399-404.

16. Justice Brennan, for the Court, stated that "no showing merely of a rational relationship to some colorable state interest" would suffice to justify a law burdening the exercise of religion. Rather, " '[o]nly the gravest abuses, endangering paramount interests' give occasion for permissible limitation." *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Although some scholars at the time said that *Sherbert* significantly expanded the protection afforded by the free exercise clause,[17] the decision did not turn out to be the "revolution" that they believed or hoped it would be. In spite of the *Sherbert* rhetoric and numerous opportunities for the Supreme Court to apply its holding in other cases,[18] since 1963 there have been only four cases[19] in which the Court has arguably used the "compelling state interest" test and the free exercise clause to exempt persons from the application of a secular, neutral, general welfare-type law.[20] Moreover, those decisions have limited significance.[21] According to Mark Tushnet, they have established that a religious interest will be protected only when its social significance is marginal.[22] In addition, in 1988 the Court significantly narrowed its *Sherbert* holding when it stated that

17. For example, Marc Galanter described *Sherbert* as "the dawn of a new day for religious freedom claims." Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 241. *See also* P. KAUPER, RELIGION AND THE CONSTITUTION 20, 41-43 (1964); Weiss, *Privilege, Posture and Protection: Religion in the Law*, 73 YALE L.J. 593, 621 (1964).

18. The cases in which the Court has declined to protect persons whose religious activity was allegedly burdened by a valid law include: Gillette v. United States, 401 U.S. 437 (1971); Johnson v. Robison, 415 U.S. 361 (1974); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); United States v. Lee, 455 U.S. 252 (1982); Bob Jones University v. United States, 461 U.S. 574 (1983); Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986); and Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988).

19. Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); and Frazee v. Illinois Dept. of Employment Security, 109 S. Ct. 1514 (1989). In Jensen v. Quaring, 472 U.S. 478 (1985), the Court, by virtue of a tie vote, upheld a lower court's decision to exempt a person from a state's requirement that a person's photograph be on her driver's license.

20. For a discussion of most of the free exercise decisions since 1963, see West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 413-28 (1986).

21. Chief Justice Burger emphasized that the *Yoder* case was very unusual, if not unique, thus implying that almost any other case that might arise under the free exercise clause could be distinguished from it. Even so, he noted that the decision was a close one. 406 U.S. at 215-19, 234-36. Also, the facts in *Thomas*, *Hobbie*, and *Frazee* were almost identical to those in *Sherbert*, in that they involved a claim for unemployment compensation. The *Frazee* decision, however, did contribute to a broadening of the protection afforded by the free exercise clause because it clearly established that a person does not have to be a member of a religious organization in order to be eligible for a religion-based exemption.

22. Mark Tushnet calls this "the marginality principle": "an exemption will be provided if doing so has no socially significant consequences but not if

"incidental effects of government programs, *which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs*, [do not] require government to bring forward a compelling justification for its otherwise lawful actions."[23] As might be expected, scholars are now questioning the Court's commitment to its *Sherbert* decision and criticizing it for being unclear and unprincipled in its free exercise decisions.[24]

Two reasons account for the Supreme Court's floundering in free exercise cases. The first is that the Court is badly divided on the issue of how much protection, if any, the free exercise clause should afford those whose religious conduct is threatened by a legitimate, constitutional law. Some justices, in fact, are opposed to the entire concept of a right to religion-based exemptions.[25] The second reason is that in free exercise

---

it does." Tushnet, *The Constitution of Religion*, 50 REV. OF POLITICS 628, 639 (1988).

23. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1326 (1988) (emphasis added). In this case, the Court refused to stop the building of a road near sites high in the California mountains that were held sacred by certain groups of American Indians, even though the Court admitted that the building of the road would make it very difficult or impossible for the Indians to practice their traditional religion. *Id.* at 1327. In holding as it did, the Court majority rejected the position, argued for by the dissenters, that the free exercise clause "is directed against *any* form of government action that frustrates or inhibits religious practice." *Id.* at 1329 (emphasis in original).

24. Ruti G. Teitel's comments are typical of the criticism that has been directed at the Court:

> [T]he Burger Court's approach to religion cases . . . [is] in a state of flux . . . [with no] workable theory to secure individual religious liberty. . . . In free exercise cases, the new accommodation doctrine threaten[s] . . . to allow governmental, majoritarian interests to override the interests of religious minorities. . . . [L]ittle appears to be left of the longstanding "compelling interest" requirement protective of free exercise rights.

Teitel, *The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651, 652, 655, 667 (1986). *See also* Freed and Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, in 1983 SUP. CT. REV. 1, 29-30 (1984); Sheffer, *The U.S. Supreme Court and the Free Exercise Clause: Are Standards of Adjudication Possible?*, 23 J. CHURCH & STATE 533 (1981); and Pepper, *Conundrum*, *supra* note 13, at 267-68, 299-301, 303.

25. A recent example of the Court's division of opinion on the issue of a right to religion-based exemptions is its five to four decision upholding an Air Force regulation that had the effect of preventing an Orthodox Jew from wearing a yarmulke while in uniform even though he claimed the rule burdened the exercise of his religion. Goldman v. Weinberger, 475 U.S. 503 (1986). It is clear that Justices Stevens and Rehnquist wish to return to the Court's pre-*Sherbert* interpretation of the free exercise clause. *See* United

cases the Court, although still claiming to use a compelling state interest test, actually employs an ad hoc balancing test, which favors the government as much as it does the religious objector and thus leads to unpredictable results.[26] Formally, the test can be described as follows:

> In each case the claimant must first make some demonstration that the regulation which proscribes or prescribes certain activities substantially burdens the practice of the claimant's religion. Second, if such a burden exists, the Court will weigh the governmental interest in the regulation against the burden on free exercise rights. [Third,] [e]ven though the governmental interest appears to be of a sufficient magnitude to justify some burden on religious activity, it will be held invalid unless it burdens religious freedom no more than necessary to promote the overriding secular interest.[27]

What this description obscures is "the multivariate nature of the interests on each side,"[28] that is, the various factors to be taken into account by judges and the weight to be given to each of them. Concerning these factors, there is considerable confusion among judges and legal scholars.[29] Tushnet goes so far as to say that the test allows judges to take into account "whatever . . . they want to put into the balance."[30] Because of the slip-

---

States v. Lee, 455 U.S. 252, 262-63 (1982) (J. Stevens, concurring); Thomas v. Review Bd., 450 U.S. 707, 720-23 (1981) (J. Rehnquist, dissenting). Before he retired, Chief Justice Burger was apparently won over to the Stevens-Rehnquist position. *See* his plurality opinion in Bowen v. Roy, 106 S. Ct. 2147 (1986); *see also* Leedes, *supra* note 12, at 375-76.

26. *See* Tushnet, *supra* note 22, at 631, 638-39; Leedes, *supra* note 12, at 342-50; and West, *supra* note 20, at 417-21.

27. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1079 (3d ed. 1986).

28. Laycock, *supra* note 3, at 1374.

29. For example, although sincerity of belief is required of a claimant if he wishes to win an exemption, there is disagreement over whether centrality of belief is a requirement. Carl Esbeck says that it is not required. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 398 (1984). Lupu, *supra* note 4, at 771, 774, 776, disagrees. The majority of the Court now says that it does not want to become involved in assessing the significance of religious beliefs or practices, but the practical effect of its taking this position is an unwillingness on its part to grant exemptions, for it leaves the Court with the alternative of either accepting at face value the claims of the litigants about the centrality of their beliefs or practices, or of simply not granting an exemption. In *Lyng*, it chose the latter. Lyng v. Northwest Indian Cemetery Ass'n, 108 S. Ct. 1319, 1329-30 (1988).

30. Tushnet, *supra* note 22, at 631. *See also* Lupu, *supra* note 4, at 768.

pery nature of the balancing test, it is impossible to predict with any accuracy how a court, including the Supreme Court, will decide any particular free exercise case.[31]

At about the same time it was expanding the scope of protection afforded religious persons and groups by the free exercise clause, the Court was also expanding the meaning of "religion." Although it has never officially defined the scope and meaning of "religion" for first amendment purposes, in 1961 the Court stated that there can be religions that are not based on belief in God.[32] A few years later it gave a broad, functional definition to the word "religion" contained in the Congressional draft laws. It held that any belief, value, or commitment is religious, at least when it functions in the lives of persons in the same way that conventional religious tenets function in the lives of those who believe them.[33] Some scholars now argue that in free exercise cases the Court either does or should use, at least implicitly, the same broad, functional understanding of religion that it enunciated in its draft law decisions.[34]

Other scholars have questioned the wisdom of the Court's expansive definition of "religion"—mainly on the grounds that it is so broad that it would allow almost any activity to be immune from government regulation.[35] Some, moreover, have

---

31. According to Jesse Choper, "[the] Court has created such confusion . . . in this area that not only do we not know what it is going to do with cases like this but it does not know either." *Panel Discussion*, in THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1981-82 248 (D. Opperman ed. 1983).

32. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

33. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

34. *See, e.g.*, D. OAKS, RELIGIOUS FREEDOM AND THE SUPREME COURT 116-18 (1981); Konvitz, *The Problem of a Constitutional Definition of Religion*, in RELIGION AND THE STATE 147-65 (J.E. Wood, Jr. ed. 1985); Sturm, *Constitutionalism and Conscientiousness: The Dignity of Objection to Military Service*, 1 J.L. & RELIGION 265 (1983); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

35. Thus Bette Evans writes:

> If religion is defined by the function of the belief system rather than by its content, then any ultimate system of values should qualify for First Amendment protection. By this characterization, one whose ultimate set of personal values is music, football, or the Democratic party might well have a legitimate religious claim.

Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & STATE 463, 469 (1988).

argued that the Court's adoption of a broad, functional definition of "religion" for purposes of constitutional adjudication would mean that the government could not promote (teach) any values or ideologies for fear of violating the establishment clause, which has been construed as prohibiting government sponsorship of religion.[36] Finally, it has been suggested that the "presence" of a broad, functional definition has contributed to the courts' reluctance to grant religion-based exemptions as constitutional rights.[37]

In the face of these difficulties and criticisms, the Supreme Court has basically three options for dealing with free exercise cases. First, it can continue its present unpredictable course of "muddling through" by using an ad hoc balancing approach.[38] Second, it can attempt to breathe new life into its *Sherbert* decision and its "compelling state interest test" by making it much more difficult for the government to justify withholding religion-based exemptions to those who have sincerely religious reasons for seeking them.[39] Third, the Court can repudiate the notion of a right to religion-based exemptions and return to its pre-*Sherbert* interpretation of the free exercise clause. It is the third option that I argue for in the remainder of this Article. It must be emphasized, however, that it is only court-ordered exemptions as constitutional rights—not the granting of exemptions as privileges by legislative bodies—that is being challenged. Although the two kinds of exemptions are similar, the argument—if it is compelling—that a right to court-ordered exemptions is not guaranteed by the Constitution does not necessarily imply that legislature-granted exemptions are unconstitutional.

---

36. *See* Smith v. Board of School Commissioners, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987); Evans, *supra* note 35, at 488-89; Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978). To avoid this problem, some scholars advocate two definitions of religion—a broad one for the free exercise clause and a narrow one for the establishment clause. *See, e.g.*, Note, *supra* note 34, at 1083-89.

37.[W]hen "religion" has no more right to free exercise than irreligion or any other secular philosophy, the whole newly expanded category of "religion" is likely to diminish in significance. When that happens, the "free exercise of religion" is not likely to be protected to any greater extent by the no-longer-unique religion clause than by the First Amendment's free speech provision.

D. OAKS, *supra* note 34, at 118-19.

38. This option is apparently favored by Leedes, *supra* note 12, at 349, 371.

39. *See* Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 312.

II. ARGUMENTS AGAINST EXEMPTIONS AS A CONSTITUTIONAL RIGHT

Six arguments can be made against the idea that the first amendment religion clauses give persons or churches a right to be immune from government regulation whenever they have religious reasons for seeking immunity. The first three arguments apply to religion-based exemptions in general, whether granted by legislatures or courts.

The first argument is that granting exemptions as constitutional rights violates the principle of neutrality toward religion, one of the most fundamental principles in the theory and law of religious freedom.[40] Justice Black gave one of the first explanations of the principle when he wrote: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; . . . State power is no more to be used so as to handicap religions, than it is to favor them."[41] Because it prohibits discrimination for and against religion in general, any particular religion, or persons or groups because of their religion or lack thereof, the principle of government neutrality toward religion is very similar to the idea of equal protection of the law guaranteed by the fourteenth amendment.[42]

Inevitably, however, when the government gives exemptions to some religious persons that it does not give to all, that constitutes special or favored treatment for their religion or for them because of their religion. The discrimination can be threefold in nature. First, the exempted persons or groups are

40. Lupu, *supra* note 4, at 766-67. The Supreme Court has said that it is an "established principle that the Government must pursue a course of complete neutrality toward religion." Wallace v. Jaffree, 472 U.S. 38, 60 (1985). *See also* Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 746-47 (1976) (opinion of Blackmun, J.); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (opinion of Burger, C.J.); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Epperson v. Arkansas, 393 U.S. 97, 109 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 215-22 (1963).

41. Everson v. Board of Educ., 330 U.S. 1, 18 (1947). The Court has also said that the principle of neutrality "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." Gillette v. United States, 401 U.S. 437, 450 (1971).

42. *See* Garvey, *Freedom and Equality in the Religion Clauses*, in 1981 SUP. CT. REV. 193 (1982); Lupu, *supra* note 4, at 739-60; Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

not required to do or refrain from doing something that others are required to do or not do. Second, exemptions to certain persons because of their religion or to certain churches may give those religions or churches an unfair advantage over other religions, secular ideologies, churches, nonprofit organizations, or businesses with which they compete for members and money.[43] The discrimination is tripled if the persons and groups not favored with exemptions have a duty or burden, such as taxes, shifted to them because of the exemptions given to the religious individuals or groups.[44] As Michael McConnell has pointed out, however, "religious accommodations often, perhaps always, impose some costs on others. Sometimes these costs are not inconsiderable."[45]

It is not only competitors or outsiders who may be harmed when churches receive exemptions from laws. Members and employees of churches are also harmed when exemptions have the effect of depriving them of legal benefits or rights that are available to other persons in society. For example, if because of a church's right to autonomy its members could not sue church officials who violate church rules, those members would be deprived of "the legal remedies normally available to attack unauthorized 'management' actions."[46] When granting an exemption has such an effect, it means that the government is guilty of favoring one part of a church over another, in violation of the principle of neutrality toward religion.[47]

Because of the importance of the principle of neutrality or equality, the Supreme Court itself has struck down or modified certain government mandated exemptions. For example, in *Larson v. Valente*[48] it struck down a law that imposed registra-

43. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 698-700 (1980); Lupu, *supra* note 4, at 765; Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L. J. 293, 324 (1986); and McConnell, *Accommodation of Religion*, in 1985 SUP. CT. REV. 1, 37 (1986).

44. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1199-1200 (2d ed. 1988).

45. McConnell, *supra* note 43, at 37. Even a defender of a right to religion-based exemptions, Douglas Laycock, recognizes that it would be unfair to give exemptions when the effect of doing so would be to shift a burden or duty, financial or otherwise, to others. He thus questions both the giving of draft exemptions only to religious objectors and the Supreme Court's decision in *Sherbert*, the case that first established a right to exemptions for reasons of religion. Laycock, *supra* note 3, at 1414-15.

46. Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1380, 1403 (1981).

47. *Id.* at 1403-04.

48. 456 U.S. 228 (1982).

tion and reporting requirements on some religions but not others. In another decision, the Court invalidated a Connecticut law that provided sabbath observers with an absolute right not to work on their sabbath, and did so partially on the grounds that such a law might well cause unequal treatment of employees on the basis of religion.[49] A third example consists of two decisions by the Court in which it interpreted Congress's draft exemption law in such a way that the exemptions could be given not only to persons with religious reasons for seeking the exemptions (which is what Congress actually intended), but also to persons whose moral and philosophical beliefs led them conscientiously to object to fighting in a war.[50] The reason the Court performed such radical surgery on the law was because otherwise the law would have violated the principle of neutrality and one or both religion clauses.[51] Finally, and most recently, the Court struck down a Texas law that granted an exemption from a sales tax to religious publishing companies and to them alone, and it did so clearly on the grounds that the law violated the principle of neutrality because it demonstrated a preference for religious ideas.[52]

The second argument against government granting religion-based exemptions is a practical one: that such a policy creates ill will and divisiveness among the American people. America today can no longer be said to be a "religious nation." It is a pluralistic society with many different religions and with many persons of agnostic or atheistic bent. "Secular humanism" is a reality.[53] It is only natural, therefore, that religious persons and groups who receive exemptions from taxes and laws will be resented by those who do not receive them. Such resentment is especially likely to be directed at cults and other diversified and multifunctional organizations engaged in activities not usually thought of as religious in nature.[54] This, in

49. Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1051 n.11 (1987) (explaining *Thornton* decision); Thornton v. Calder, 472 U.S. 703 (1985); *id.* at 711 (O'Connor, J., concurring).

50. Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

51. *See Welsh*, 398 U.S. at 345, 356-58, 360 (Harlan, J., concurring); *Seeger*, 380 U.S. at 188 (Douglas, J., concurring); Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 274 (1968); Rabin, *When Is a Religious Belief Religious:* United States v. Seeger, *and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 240-49 (1966).

52. Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).

53. *See* Pulley, *The Constitution and Religious Pluralism Today*, in LIBERTY AND LAW 143-55 (R.A. Wells & T.A. Askew eds. 1987).

54. Robbins, *New Religious Movements on the Frontier of Church and State*, in

turn, may make cooperative social and political endeavors much more difficult at a time when a sense of community is already very weak in this country.[55] The ill will generated by the granting of exemptions will also do little to help the cause of religion in general or the causes of those persons or groups receiving the exemptions.[56]

Religion-based exemptions are undesirable for a third reason. They encourage false and deceptive claims, many of which are granted. The history of existing exemptions given to churches by our tax laws bears witness to the scope of this problem. Increasingly, persons motivated by nothing more than greed pretend to be religious or to be organized as churches in order to take advantage of religion-based exemptions.[57] Even genuine religious groups may be tempted to disguise some of their secular activities as religious in order that they might not fall under government regulation.[58] The granting of such false claims not only is unfair but exacerbates the problem of ill will caused by religion-based exemptions in general. The courts, of course, in applying exemptions have the right to investigate a claimant's sincerity, but the problems in making correct and fair judgments in this area are very serious

---

CULTS, CULTURE, AND THE LAW 8-10 (T. Robbins, W. Shepard & J. McBride eds. 1985).

55. *See* Wells, *Recovering the Mind of the Constitution*, in LIBERTY AND LAW, *supra* note 53, at 157-74.

56. Although the nature and extent of the harm that might be caused to religion can only be a matter of speculation, the following admonition by Carl Esbeck is worth noting:

> Religious bodies must be sensitive to large elements of the public who are already overly cynical about the role of religion, conditioned by highly publicized frauds and other excesses by mail-order [and now TV] "ministries" and "mind-control cults." Limited government regulation can curb many of these abuses and thereby yield an environment of public goodwill which actually enhances the free play for religious beliefs.

Esbeck, *supra* note 29, at 378 n.18.

57. One prominent federal judge has written: "Each year, with renewed vigor, many citizens seek sanctuary in the free exercise clause of the first amendment. They desire salvation not from sin or from temptation, however, but from the most earthly of mortal duties—income taxes." Mone v. Commissioner, 774 F.2d 570, 571 (2d Cir. 1985) (Kaufman, J., opinion of the court). In a similar vein, Thomas Robbins writes: "It seems unlikely that certain movements such as Synanon or Scientology would have defined themselves as churches or even as 'religious' movements were it not for the legal protections the Constitution affords such groups." Robbins, *supra* note 54, at 8. *See also* Beebe, *Tax Problems Posed by Pseudo-Religious Movements*, 446 ANNALS, AAPSS 91 (1975); Marshall & Blomgren, *supra* note 43, at 314.

58. Lupu, *supra* note 4, at 766.

indeed.[59] This explains why the problem of "cheating," although it exists whenever any kind of exemption is created, is especially widespread and difficult to deal with in the case of religion-based exemptions. Courts hesitate to question the sincerity and truth of claims made by self-proclaimed religious groups for fear that in doing so they will violate those groups' religious freedom.[60]

The next three arguments apply especially, although not exclusively, to exemptions as rights, because these arguments are, in effect, accounts of the problems inherent in the process by which courts grant exemptions as rights. Thus the fourth objection to religion-based exemptions is that there is no clear, workable, or fair way of limiting the number and kinds of exemptions to be granted if persons had a recognized constitutional right to disobey for religious reasons whatever laws they chose to disobey—and if there were no limits imposed on such exemptions, the political consequences could be severe.[61] Perhaps it would be a bit much to say that anarchy would reign; the Supreme Court would never allow matters to go anywhere near that far. The question, however, is whether the Court can draw the line in any sort of fair and principled manner. Although the Court theoretically could come up with some principled way of determining which claims for exemptions it would accept and which it would not, it is precisely "a principled way to delimit the notion of a religious practice [that] is lacking."[62]

---

59. Determinations of sincerity are inherently uncertain; . . . . Governmental determinations of religious sincerity thus threaten to result in the very abuses that the religion clauses were, at least in part, designed to prevent. Being subjected by one's government to a false charge of lying about one's religious beliefs is itself a serious wrong.

Pepper, *supra* note 39, at 326.

60. Fingarette, *Coercion, Coercive Persuasion, and the Law*, in CULTS, CULTURE, AND THE LAW, *supra* note 54, at 90. One of the reasons for this hesitation is the fact that the Supreme Court has held that the first amendment prohibits courts, in trials for fraud, from considering the truth or falsity of "religious" claims made by defendants. *See* United States v. Ballard, 322 U.S. 78 (1944).

61. As the Court wrote in *Reynolds*:

Can a man excuse his [disobedience to law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 166-67 (1878). *See also* McConnell, *supra* note 43, at 30.

62. Evans, *supra* note 35, at 479, 467-79.

Consequently, the courts in deciding who is eligible for exemptions will inevitably make decisions that are arbitrary, unpredictable, and discriminatory.[63]

There are three reasons that make this inevitable. The first pertains to the definition of "religion." On the one hand, the Supreme Court's functional definition of "religion" allows almost any activity to count as religious and thus be immune from government regulation and taxation. Paradoxically, that fact has caused the Court to be skittish about granting exemptions as rights.[64] (The Court, however, is not likely to narrow its definition, because it is so widely held that "there is no principled way to circumscribe the concept of a religious belief without threatening the freedom of conscience.")[65] On the other hand, trial judges operating under this expansive definition must decide whether particular persons, organizations, or activities are presumptively covered by the protection afforded by the religion clauses. Given the absence of a clear and limited definition of "religion" from the Supreme Court, they will inevitably pick and choose arbitrarily from among those claiming to be religious. In particular, it has been argued that judges are more likely to classify as religions those institutions and activities with which they are familiar or which they appreciate. Mainstream religions, in other words, are more likely to gain exemptions than new, marginal ones.[66]

A second but related reason for the inability of courts to determine consistently and fairly who or what is eligible for an exemption is the fact that even if "religion" were narrowly defined the range of activities that genuinely religious persons or groups might consider to be religiously significant is still virtually unlimited. There is almost no activity taxed or regulated by the government for which some person or group somewhere might not want an exemption because that activity is sincerely considered to be religious in nature. Courts, however, cannot exempt all such activities from the hand of government. But if they cannot, on what basis can distinctions be made?[67]

---

63. This is an especially important argument because even the advocates of religion-based exemptions agree that they must not be given unless they can be applied consistently and fairly. *See, e.g.*, Paulsen, *supra* note 42, at 342.

64. *See supra* notes 32-34 and accompanying text.

65. Evans, *supra* note 35, at 472. On this point, see Note, *supra* note 34, at 1072-75. (This belief, however, is not shared by this writer.)

66. *See* R. MORGAN, *supra* note 11, at 149-52, 208; Lupu, *supra* note 4, at 765-66; Note, *supra* note 34, at 1072-75. For an argument against this view, see *infra* note 76.

67. *See* Evans, *supra* note 35, at 474-79; Garvey, *Free Exercise and the*

The third reason for the complex of problems mentioned above is the nature of the balancing test used by courts in free exercise cases.[68] In particular cases, courts will take into account a number of factors relating to the interests of both religion and government, without weighting them in any sort of meaningful or comparable way. As Tushnet notes: "The 'relevant considerations' are defined so generally that the weight a decision maker gives to any particular consideration is left almost entirely open. The effect is that balancing tests are inevitably driven by the results sought to be reached."[69] Even advocates of a right to religion-based exemptions admit that the determination of who is eligible for such exemptions can be "troubling" and may "result in arbitrary decisions."[70] It is no wonder, then, that the Supreme Court's free exercise decisions have been widely condemned for being inconsistent,[71] confusing,[72] unpredictable,[73] and providing insufficient guidance to lower courts.[74]

The arbitrariness inherent in the use of a balancing test means that free exercise decisions by courts will inevitably discriminate against some religions and in favor of others. Part of

---

Values of Religious Liberty, 18 CONN. L. REV. 779, 783 (1986). On this point, Justice O'Connor has written:

> A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion, . . . [But] government simply could not operate if it were required to satisfy every citizen's religious needs and desires.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1327 (1988).

68. See *supra* notes 26-31 and accompanying text for a description of the balancing test.

69. Tushnet, *supra* note 22, at 631.

70. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 157 (1986). Pepper also admits that "a balancing test is inherently imprecise and subject to manipulation and distortion . . . ." Pepper, *supra* note 39, at 310.

71. Goldwin & Kaufman, *Preface*, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? xiv (R.A. Goldwin & A. Kaufman eds. 1987); Marshall, *Introduction*, 18 CONN. L. REV. 697, 698 (1986).

72. *See, e.g.*, Pepper, *Conundrum*, *supra* note 13, at 303; Tushnet, *supra* note 22, at 628-29.

73. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329-30 (1969); Lupu, *supra* note 4, at 767-68; Note, *supra* note 5, at 351-62.

74. Marshall & Blomgren, *supra* note 43, at 303; Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131, 1148 (1984).

the problem stems from the fact that judges must determine whether a certain action or activity is required by church doctrine or is otherwise religiously significant. In making such determinations, judges all too often will be either confused or will rely on their own understanding of what is religiously significant.[75] The problem of discrimination, however, is not due simply to uninformed or biased judges, but to the nature of the decision-making process itself. The courts cannot grant all requests for exemptions; lines must be drawn. However, because the line-drawing is done on a case by case basis and depends on the application of a balancing test that takes account of a number of incommensurable factors, it is inevitable that in some cases a certain religious activity will be exempted, while in other cases another activity that is similar to but not identical with the first activity will not be exempted.[76]

The Supreme Court itself has expressed concern about the problem of religious discrimination or unfairness that arises from the use of a balancing test.[77] For example, it was partly for this reason, *i.e.*, to serve the government's "interest in uniform treatment for the members of all religious faiths," that the Court refused to grant an exemption from the military's dress code in the case of Goldman v. Weinberger.[78] It decided that it would be better "to make no accommodation at all rather than to accommodate the practices of some religions but not

75. As Laycock has noted: "[T]he distinctions required by this approach are difficult, especially for secular courts unversed in theological subtleties, and an error can result in penalizing a church for an act of conscience." Laycock, *supra* note 3, at 1400.

76. Contrary to what might be expected, the discrimination may not occur completely at random, for one study of free exercise adjudication in state and federal courts found that the courts' use of the balancing test had benefited marginal religions more than it had benefited established religions. Way & Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCIENCE REV. 652 (1983). This finding is consistent with Mark Tushnet's reading of the courts' handling of free exercise cases, that only the more trivial activities and the smaller religions have a chance of getting exemptions (marginality principle). Tushnet, *supra* note 22, at 638-39. Philip Kurland has also noticed that the smaller the religion the greater its chances of getting an exemption. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 243 (1973).

77. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 707 (1986) (plurality opinion); Gillette v. United States, 401 U.S. 437, 455-58 (1971).

78. 475 U.S. 503, 512 (1986). The Court's reasoning is explained by McConnell: "Although accommodation might be made for skull-caps without serious detriment to the appearance of uniformity, the demands of other religions, such as turbans for Sikhs or dreadlocks for Rastafarian, would not be so easily accommodated." McConnell, *supra* note 70, at 154.

others."[79] In fact, the Court has recently admitted that it is simply not in a position to determine the centrality of a religious practice or to weigh the adverse effects on religion in one case and compare them with the adverse effects in another.[80]

It can be argued, of course, that this complex of problems could be eliminated if the Supreme Court were actually to use a "compelling state interest" test rather than a balancing test, *i.e.*, if it were to insist that the religious interest should always prevail except when the state interest is truly "compelling."[81] Such an argument, however, is weak, for two reasons. First, it would allow the most trivial religious interests to "trump" very important (but not "compelling") government interests. Second, a "compelling interest" test is still a balancing test, albeit one in which the religious interests theoretically "weigh" more heavily in the "scales" than do the government interests. In other words, the test is still vague enough that courts can manipulate it to justify almost any decision they make regardless of the significance of the competing interests,[82] as is illustrated by the fact that in some of the very cases in which it decided against exemptions, the Court insisted that it was using a "compelling interest" test even though, according to most observers, the state interests involved were clearly less than compelling.[83] Moreover, the same problem would exist were the courts to use the establishment clause's rule against "excessive entanglement" between religion and government as a way of protecting the autonomy of churches.[84]

---

79. McConnell, *supra* note 70, at 154.

80. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1325 (1988).

81. For examples of this argument, see Pepper, *supra* note 39, at 299-336; Teitel, *supra* note 24, at 651-88.

82. Note, *supra* note 5, at 351-62.

83. West, *supra* note 20, at 417-21; Pepper, *Conundrum*, *supra* note 13, at 267-68; Freed and Polsby, *supra* note 24, at 20-21, 29-30. Thus, in his concurring opinion in United States v. Lee, 455 U.S. 252 (1982), Justice Stevens chided his colleagues for claiming to use a compelling interest test when, in his opinion, there clearly was no compelling reason for not exempting Amish employers from the social security tax. The standard actually being applied, he observed, was one "that places an almost insurmountable burden on any individual who [for religious reasons] objects to a valid and neutral law of general applicability . . ." *Id.* at 263 n.3 (Stevens, J., concurring).

84. Concerning the rule against "excessive entanglement," Douglas Laycock writes:

> "Entanglement" is such a "blurred, indistinct, and variable" term that it is useless as an analytic tool. Sometimes it seems to mean contact, or the opposite of separation; it has also been used

A fifth objection to religion-based exemptions, or at least to exemptions as constitutional rights, is that in making decisions about claimed exemptions, courts are very likely to become entangled with religion in the worst sort of way, namely by making judgments on doctrinal or theological issues. On the impropriety of doctrinal entanglement, the Supreme Court has been clear and consistent: government must not take a position on essentially religious issues.[85] Courts, however, in deciding exemption cases, cannot avoid doing just that. In order to determine whether the religious interests at issue outweigh the governmental interests, they must decide how religiously significant the threatened activity is.[86] This requires judges to make decisions they are not qualified to make and which frequently will be contested as unfair by the religious claimants in the case.[87] One advocate of a right to religion-based exemptions, Michael McConnell, concedes the point: "If the government grants religious exemptions from its laws it inevitably will be forced to draw lines that require judgments about religious beliefs. The long-term effect of repeated judgments by government officials about the nature and weight of religious beliefs might well be to interfere with the autonomy of religious life."[88]

The only way for the courts to avoid making such inquiries would be to accept all claims for exemptions simply on the say of the claimants that the activity in question is genuinely religious—a move that would, of course, encourage the most widespread and questionable use of exemptions, and for that

---

interchangeably with "involvement" and "relationship." Sometimes it seems to mean anything that might violate the religion clauses.

Laycock, *supra* note 3, at 1392 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). *See also* Ripple, *The Entanglement Test of the Religion Clauses-A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1218, 1225 (1980); Esbeck, *supra* note 29, at 383.

85. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979) (in settling church disputes, courts must not take a position on the meaning and importance of religious doctrines and practices); Gillette v. United States, 401 U.S. 437, 457 (1971) (government should avoid entangling itself in difficult classifications of what is and is not religious); United States v. Ballard, 322 U.S. 78 (1944) (courts may not judge the comprehensibility or validity of asserted religious beliefs); L. TRIBE, *supra* note 44, at 1231-42; Esbeck, *supra* note 29, at 389-97.

86. Garvey, *supra* note 67, at 785-86.

87. Ripple, *supra* note 84, at 1218; Laycock, *supra* note 3, at 1400.

88. McConnell, *supra* note 70, at 154. McConnell goes on to say: "There is but a fine line between government determinations on religiously relevant legal issues and government pronouncements on religious questions themselves." *Id.* at 155.

reason, would never be allowed by the Supreme Court.[89] To avoid the dilemma of having to choose between such an outcome and courts' becoming doctrinally entangled in religious issues is one of the reasons why Justices Rehnquist and Stevens, and perhaps Justice White, now oppose the granting of any religion-based exemptions as rights, and favor instead a neutral approach that does not require judges to distinguish between religious believers and unbelievers or among religious beliefs.[90] It is also one of the main reasons why a majority of the Court's justices now say they do not want to become involved in assessing the centrality of religious practices in order to decide if they deserve constitutional protection.[91]

Even Justice Brennan, the author of the Court's *Sherbert* opinion, now argues that if legislatures are going to grant exemptions to churches, they should do so in a neutral, indirect fashion, that is, by granting the exemptions to nonprofit organizations generally, and not just to churches.[92] Although he continues to believe that at times the free exercise clause requires religion-based exemptions to be granted by courts, consistency requires that he take the same position on court-ordered exemptions that he takes on legislature-granted exemptions, *i.e.*, that such determinations should be neutral, not religion-based. Indeed, a strong argument can be made

89. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1327 (1988).

90. *See* Bowen v. Roy, 476 U.S. 693, 716 (1986) (Stevens, J., concurring); *id.* at 733 (White, J., dissenting); United States v. Lee, 455 U.S. 252, 262-63 (1982) (Stevens, J., concurring); Thomas v. Review Bd., 450 U.S. 707, 720-23 (1981) (Rehnquist, J., dissenting).

91. Speaking for the Court in *Lyng*, Justice O'Connor said that a judicial policy of weighing:

> [T]he value of every religious belief and practice that is said to be threatened by any government program . . . offers the prospect of this Court holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, [it] . . . would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play.

108 S. Ct. at 1329-30.

92. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 332 (1987) (Brennan, J., concurring) (emphasis added). Justice Brennan forcefully reaffirmed this position in the plurality opinion that he wrote for the Court in Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 892-905 (1989).

that if religion-based exemptions are going to be granted at all, they should be granted by legislatures, not courts.[93]

The final argument against recognizing a right to be exempt from obedience to valid laws on religious grounds is that the existence of such a right makes it almost impossible for the Supreme Court to develop a coherent, persuasive body of church-state law based on the religion clauses of the first amendment. The evidence to support this assertion consists, first, of the fact that current church-state law is in shambles. The Court's decisions in this area have been so weak in terms of clarity, consistency, and cogency that there is scarcely a constitutional law scholar alive who has not excoriated the Court for creating a legal mess.[94] Second, there is widespread agreement that the root of the problem is that the Court has interpreted the free exercise and establishment clauses in such a way that these clauses necessarily conflict with one another.[95] More specifically, what the Court has done is to interpret both

---

93. Richard Morgan explains:

> The legislature can create exemptions with at least some selectivity; it can fall back on reasons of practicality and expediency which would create scandal coming from a constitutional Court. The legislature, in short, is not as vulnerable to the arguments by analogy and the demands of doctrinal symmetry as the Justices. It is precisely the striving toward doctrinal coherence—the distinctive, legitimatizing characteristic of the American Supreme Court—which renders it unwise to attempt to handle conscientious objection constitutionally. Either the exemptions will be extended into areas where they are politically unacceptable, or they will not be so extended and the Court will not be able to explain why. Legislatures do not labor under the same obligation to explain, and they have a great deal more room for policy maneuvering before running into constitutional restraints.

R. MORGAN, *supra* note 11, at 209-10.

94. A typical comment is the following:

> The Court has rigidly adhered to tests developed under the free exercise and establishment clauses despite well-aimed criticism that both tests are confusing and nonsensical. . . . Indeed, the one salient point upon which academia has reached almost universal agreement is that the policies and principles underlying religion clause jurisprudence have been inadequately explored and inconsistently applied by the judiciary. Too many fundamental tenets of constitutional law have been only summarily announced.

Marshall, *supra* note 71, at 698. *See also* Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 CAL. L. REV. 817, 839 (1984); Laycock, *supra* note 3, at 1373; Marshall & Blomgren, *supra* note 43, at 303; McConnell, *supra* note 43, at 5-6 n.13; Tushnet, *supra* note 22, at 628-29.

95. *See* Choper, *supra* note 43, at 673-701; Teitel, *supra* note 24, at 681-84.

clauses too broadly.[96] The free exercise clause, according to the Court, requires exemptions from laws that burden the practice of religion, while the establishment clause prohibits laws that significantly aid religion or excessively entangle government with religion. Just how these two interpretations can be reconciled, however, the Court has utterly failed to demonstrate.[97] Thus, the only solution to the confusion that now pervades church-state law is for the Court to interpret both clauses more narrowly so that they will complement, not contradict, one another. This, in turn, requires that the Court abandon the doctrine that the free exercise clause gives persons or groups a right to religion-based exemptions.

In summary, the arguments against recognizing a constitutional right to religion-based exemptions are that such a judicial policy violates the principle of neutrality toward religion; divides the American people against one another; encourages false claims; is difficult, if not impossible, for courts to administer without being arbitrary, discriminatory, or becoming entangled in doctrinal or religious issues; and makes impossible the development of a convincing body of church-state law. Moreover, one cannot say, as McConnell does,[98] that these arguments apply much less to exemptions granted to religious organizations than they do to exemptions granted to individuals. One has only to look at the controversy that has surrounded the Internal Revenue Service's administration of tax exemptions for churches to know that court-ordered exemptions for churches would cause as many problems as would exemptions for individuals.[99] The only way that churches or individuals could receive exemptions without such problems would be by having a judicial policy of automatically granting

96. Thomas v. Review Bd., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

97. *See* Evans, *supra* note 35, at 463-91; Garvey, *supra* note 42, at 198; Paulsen, *supra* note 42, at 314.

98. McConnell, *supra* note 70, at 159.

99. *See* Emory & Zelenak, *The Tax Exempt Status of Communitarian Religious Organizations: An Unnecessary Controversy?*, 50 FORDHAM L. REV. 1085 (1982); Petkanics & S. Petkanics, *Mail Order Ministries, The Religious Purpose Exemption, and The Constitution*, 33 TAX LAWYER 959 (1980); Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render Unto Caesar?*, 29 U. FLA. L. REV. 50 (1976); Slye, *Rendering Unto Caesar: Defining 'Religion' for Purpose of Administering Religion-Based Tax Exemptions*, 6 HARV. J. L. & PUB. POL'Y 219 (1983); Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977); Worthing, *The Internal Revenue Service as Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 FORDHAM L. REV. 929 (1977).

exemptions to whoever claimed eligibility for them—a policy so extreme that surely no one would defend it.

Although all these arguments are forceful, by themselves they do not necessarily imply that the Supreme Court should declare that religious individuals and organizations have no constitutional right to be exempt from certain regulations and taxes imposed upon them by the government. There are, after all, arguments to be made on behalf of religious exemptions. What the preceding analysis clearly does, however, is to make the case against such a right so strong that only the most compelling of reasons would justify the continued recognition of such a right.

III. THE ARGUMENTS FOR A RIGHT TO RELIGION-BASED EXEMPTIONS

The previous section raised the question: Should religious persons or organizations have a constitutional right to be excused from having to obey laws that all other citizens are required to obey? This section evaluates the principal arguments that have been or could be given to support such a right. Its aim is to show that none of the arguments are satisfactory. In attempting to show this, however, it does not analyze each of these arguments in detail, because many of them are defective in basic ways that become apparent upon casual examination: the arguments are either too broad (*i.e.* they justify giving exemptions to a category of recipients that includes more than religious persons and groups) or too narrow (*i.e.* the proposed category fails to include all religious persons and groups), and some are both.

First, it might be said that exemptions are needed to protect human autonomy or freedom. But all persons and groups may claim that they have as much a right to freedom as do religious persons and groups.[100] A second, similar argument is that the denial of exemptions to certain religious persons or groups amounts to minority oppression of the sort that the Bill of Rights was intended to prevent.[101] If, however, a minority is "oppressed" whenever a religious person or group is denied an exemption, this is true only in the sense that "oppression" occurs any time a law requires *any* person or group to do or not do something to which he/she/it objects. Surely it cannot be said that the Bill of Rights was intended to do away with all

100. Garvey, *supra* note 67, at 789-91.

101. For such an argument, see Pepper, *Some Thoughts on Perspective*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 649 (1990).

minority oppression in this sense, for it is not a prescription for anarchy.[102] If, however, all "oppressed minorities" do not have a right to be excused from obeying laws to which object, then the question remains why religious objectors, and they alone, should have such a right.[103]

The third and fourth arguments justify exemptions only for churches and other religious organizations. The third claims that because churches are voluntary organizations whose members freely consent to whatever their churches are doing, any government action to protect those members is unwarranted paternalism.[104] Aside from the arguments, first, that it is difficult to distinguish between insiders (members) and outsiders (nonmembers) and, second, that church members do not all agree on church policy, there is the more basic response that many private, voluntary organizations other than churches can also claim that they enjoy the "consent" of their members and thus that government regulation of *their* internal affairs constitutes unwarranted paternalism. A fourth justification for religious exemptions is that churches contribute to the public good[105]—but then, of course, so do many other organizations. On the other hand, many so-called churches or religions do not, in fact, contribute to the public good, at least not as most people understand the public good.[106]

Fifth, it has been argued that religious persons experience a special kind of emotional harm or suffering when they obey laws that their religion commands them not to obey.[107] This argument, however, cuts too narrowly because there are many

102. This is not to deny that the Bill of Rights protects minorities. It does so, however, by guaranteeing certain *specific rights*, not by freeing objectors generally from their obligation of obedience to laws. The crucial issue, therefore, is what those rights guaranteed by the Constitution are and, in particular, whether they include a right to religion-based exemptions. This question is addressed below in section IV.

103. Moreover, Pepper's admonition to take the perspective of the oppressed, *supra* note 101, at 650, adds nothing to the argument, for it assumes that it is only lack of sensitivity to the plight of religious objectors that accounts for opposition to religion-based exemptions as rights. Although that may indeed be true in some cases, to assume that it is generally true or to argue that it is actually the case for any given opponent of exemptions simply because the person is a Protestant is to engage in the worst sort of *ad hominem* argumentation.

104. *See* Laycock, *supra* note 3, at 1403-06, 1408-09.

105. McConnell, *supra* note 43, at 16-19.

106. *See* Braiterman & Kelley, *When Is Governmental Intervention Legitimate?*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 171-72 (D.M. Kelley ed. 1982).

107. Garvey, *supra* note 67, at 792-93.

truly religious activities whose abandonment, though seen as undesirable, would not cause "pangs of conscience."[108] Also, it would protect only individuals and not churches, because churches (institutions) do not have emotions, and their members do not share the same beliefs or emotions.[109] On the other hand, as Kent Greenawalt has argued, there are secular conscientious objectors who in the same circumstances also experience the same kind and degree of suffering as that experienced by religious objectors.[110] If, in order to counter this objection, one suggests, as Jesse Choper has done, that exemptions be given only to persons whose reason for not wanting to obey a law is to avoid punishment in the afterlife,[111] then the criterion for exemption becomes too narrow because there are many religious persons whose behavior is not influenced by a belief in the afterlife or by concern for punishments of any sort.[112]

A sixth argument is that exemptions should be given to religious persons and groups so that the peace and order of society will not be threatened by widespread disobedience, civil or otherwise, by religious objectors.[113] Although peace and order are very valuable, there is no reason to think that religious persons or groups would be more likely to disobey laws or to engage in acts of violence than would other persons and groups upset with the government and its laws.[114]

Seventh and finally, there is John Garvey's argument that religious persons should be exempt from obeying laws to which they object because they are similar to insane persons in that they lack the powers of cognition and volition, at least with respect to certain decisions.[115] If this argument is meant to be

108. *Id.* at 793-94; Laycock, *supra* note 3, at 1390-91; McConnell, *supra* note 43, at 27.

109. *See* Lupu, *supra* note 4, at 766.

110. K. GREENAWALT, CONFLICTS OF LAW AND MORALITY 321-26 (1987). *See also* Garvey, *supra* note 67, at 793-94.

111. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 598.

112. K. GREENAWALT, *supra* note 110, at 324-25; Garvey, *supra* note 67, at 793-94.

113. Garvey, *supra* note 67, at 794-95, and McConnell, *supra* note 43, at 16.

114. Garvey, *supra* note 67, at 796. Garvey gives another reason for rejecting the civil disobedience argument. This is that it "provides too little protection because it builds on policy (social utility) rather than principle. If conflicting social goals loomed larger than [order]. . ., the right would go up in smoke." *Id.* (citing with approval R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-100, 266-72 (1977)).

115. *Id.* at 798-801. For a similar argument to the effect that persons

taken seriously, the obvious answer to it is, on the one hand, that something like an insanity defense should be broadly available to all persons, not just religious ones, and, on the other hand, that churches and indeed many if not most religious persons simply do not fit the insanity model.[116]

Are there any arguments for a right to religion-based exemptions that are neither too broad nor too narrow? Four have been made, three of which rely on some principle of neutrality. According to the first, the religious enterprise deserves special privileges because "it is specially burdened by disqualification from general state aid."[117] As the law now stands, this disqualification contention is essentially correct. The Supreme Court has indeed interpreted the religion clauses as prohibiting laws the primary effect of which is the financing of religion. The principle of fairness, moreover, dictates that religion get something in return. It does not necessarily dictate, however, that that something be a right to exemptions granted to religious persons or groups. What it does dictate is the absence of laws whose primary purpose or effect is to *harm* religion. The Supreme Court has explained the fair deal required by the principle of neutrality in these terms:

> Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching, or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given *the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function*. The dual prohibition makes that function altogether private.[118]

It should be noted, however, that sometimes the Supreme Court has disallowed financial aid not only to church activities that are primarily religious in nature, but also to those that are not primarily religious in nature, such as education in subjects

---

do not freely choose their religious and sexual orientations, see Replogle, *Sex, God, and Liberalism*, 50 J. POLITICS 937 (1988).

116. Garvey's own reservations about this argument are stated in his article, *supra* note 67, at 800.

117. Esbeck, *supra* note 29, at 379.

118. Abington School Dist. v. Schempp, 374 U.S. 203, 218-19 (1963). For comments on the special protection afforded religion that is not afforded secular ideas or doctrines, see Garvey, *supra* note 42, at 217-18; McConnell, *supra* note 70, at 152.

other than religion.[119] Insofar as the Court continues to bar such indirect and secondary aid to religion, advocates of a right to religion-based exemptions have a right to complain that the principle of neutrality is not being lived up to by the government. True neutrality, in short, calls for the Court to allow secondary, indirect aid to religion while at the same time disallowing religion-based exemptions as a constitutional right.[120]

According to the second argument based on neutrality or fairness, majority religions do not really need a right to religion-based exemptions because by virtue of their size and political influence they are usually able to prevent the government from passing laws that place, even inadvertently, any prohibitions or burdens on the practice of their faith.[121] Minority religions, on the other hand, especially the smaller ones, are not able to protect themselves through the normal democratic political process. A right to exemptions is needed, therefore, to protect minority religions and ensure government neutrality toward all religions.[122]

The main problem with this argument is that its empirical assumptions about the nature of religion and government in America are incorrect, in several respects. There are now no majority religions in America, unless one is willing to ignore all the many different varieties of Christianity that exist in this country.[123] Therefore, even though some religious groups are bigger than others, it does not follow that they will often be able to protect themselves from certain laws.[124] They will certainly find it difficult to do so if the Supreme Court continues to

119. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

120. Hopefully this makes it clear that this article is not intended to be an argument for the strict or absolute separation of church and state or for the principle of no aid to religion.

121. Stephen Pepper rhetorically asks, "If Catholic or Jewish beliefs prohibited photos on drivers' licenses, would they be required?" Pepper, *supra* note 39, at 313.

122. *See* Galanter, *supra* note 17, at 217, 291; McConnell, *supra* note 70, at 152-53; Pepper, *supra* note 39, at 313-14.

123. This is not to say that so-called "Christian" churches or sects have nothing in common, but only that they have many differences, both religious and political, and that some of them may have more in common with some non-Christian groups than with some Christian groups. *See* Pulley, *supra* note 53, at 148.

124. Just as women, a numerical majority, have often been oppressed by a male minority.

hold, as it did recently in *Texas Monthly, Inc. v. Bullock*,[125] that religion-based exemptions granted by legislatures violate the establishment clause. Second, the political power or influence of an interest group is not determined simply or even primarily by size; money, cohesiveness, organization, and leadership may be more important than size. As a consequence, relatively small groups are often very successful in the political arena.[126] Finally, our government is not one of numerical majority rule; rather, it is structured in such a way as to give minority groups a degree of power that is far greater than their numbers alone would suggest. Because of all the "checks" built into our system, it is difficult for any majority to get its way; and to the extent that it does, it does so by taking into account the interests of minorities.[127]

These three facts, of course, do not mean that no religious group ever suffers from valid secular laws or that we do not need a Bill of Rights to prevent the government from passing certain kinds of laws, *e.g.* ones whose primary purpose or effect is to discriminate against certain religions or certain persons because of their religion. Rather, the point is that one cannot say how much, if any, the size of our different religious groups is a factor in determining their success at obtaining legislature-granted exemptions. In other words, it is simply not clear that minority religions get fewer exemptions from legislatures than do majority religions and thus have a special need for a right to court-ordered exemptions.[128]

---

125. 109 S. Ct. 890 (1989). As Jesse Choper has pointed out, the argument that court-ordered exemptions are needed to equalize minority and majority religions assumes that legislature-granted religion-based exemptions are legitimate. If they are not, however, as the Court seems to say in *Texas Monthly*, then two wrongs do not make a right. Choper, *supra* note 43, at 693.

126. *See* E. LADD, THE AMERICAN POLITY 411-18 (1987).

127. For elaboration and documentation of this point, see K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986). It must be admitted, however, that this point applies more to the national government than it does to state governments, and even less to local governments. However, the fact that government in America is divided among different levels itself makes it possible to a significant degree for minorities, religious or otherwise, to find protection at some level of government or in some part of the country—certainly more protection than they could obtain in a unitary, majority-rule system.

128. Thus, the Quakers were able to obtain religious conscientious-objector exemptions in various draft laws; the Christian Scientists have obtained exemptions in state laws governing the practice of medicine; the Amish obtained for themselves alone an exemption from the Social Security tax on self-employed persons; and Congress enacted the American Indian

The third argument for a right to religion-based exemptions that involves the principle of neutrality is essentially an attempt to refute the argument made earlier that the availability of such a right violates that principle. It attempts to do this by defining the government neutrality that is required by the religion clauses in a way that differs from the characterization used earlier.[129] According to this alternative characterization, government neutrality is required only with respect to a person's *choice* of religion. Because this is so, the argument goes, exemptions and other forms of accommodations of religion are permissible provided they do not have the effect of forcing or influencing persons to accept one religion over another, or any religion at all. The argument assumes that the central value of the religion clauses is freedom of choice with respect to religion and that those clauses prohibit only laws threatening that freedom. If courts were to operate with such an understanding of the neutrality toward religion that is required by the Constitution, some exemptions would be acceptable and some would not—the difference depending on their impact on the free exercise (choice) of religion.[130]

This way of understanding the religion clauses (together with the principle of neutrality) is appealing, mainly because its assumption that those clauses were intended to protect freedom of religious choice is correct. There are, however, two serious flaws in the argument. First, its analysis of the purpose of the religion clauses is incomplete, for it overlooks the fact that the early proponents of religious liberty wanted to protect not only free choice regarding religion, but also the quality or integrity of both religion and government.[131] It is possible,

---

Religious Freedom Act of 1978. Way & Burt, *supra* note 76, at 653. Although Way and Burt go on to say that legislative exemptions appear to be less common than court-ordered exemptions, they give no evidence to support this claim.

129. *See supra* notes 40-42 and accompanying text.

130. Perhaps the best statement of this argument has been made by Paulsen, *supra* note 42, but similar arguments have been made by Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment*, 45 U. CHI. L. REV. 805, 829 (1978); Choper, *supra* note 43.

131. *See* Little, *Roger Williams and the Separation of Church and State*, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 13-16 (J. Wood, Jr. ed. 1985). Although Roger Williams was certainly opposed to laws that coerced persons with respect to religion, the most fundamental principle in his theory of church-state relations was that government should not legislate on matters of religion—not only because such laws, he thought, entailed some degree of coercion or at least influence, but because legislation with

therefore, that they would have opposed some laws that had no negative effect on religious choice. This, in turn, leads to the second flaw in the argument, which is that it permits some forms of government accommodation to which the founders clearly objected. For example, under the principle of neutrality being considered here, not all establishments of religion would necessarily violate the religion clauses, because it is possible to have an established religion that is thoroughly liberal and tolerant.[132] We know, however, that the framers of the first amendment opposed the establishment of a national religion of any sort[133]—a fact inconsistent with the argument that they opposed only laws that actually and negatively affect the free choice of religion. The explanation for the apparent inconsistency is that the framers *presumed* that *all* statutes classifying along religious lines had pernicious effects upon the exercise of religious liberty.[134]

It must be admitted, however, that early Americans did not always adhere to a policy of enacting no laws explicitly or essentially religious in purpose or effect, for they passed laws that symbolically linked religion and government and that gave exemptions from tax laws to churches and exemptions from military service to conscientious objectors.[135] Where does this leave us? The only honest conclusion to be drawn is that the founders were divided over how to protect religious freedom. Today, therefore, we have a choice between two ways of pro-

---

respect to religion was the prerogative of God alone. *See* West, *Roger Williams on the Limits of Religious Liberty*, in THE ANNUAL OF THE SOCIETY OF CHRISTIAN ETHICS 137-38, 153 (D.M. Yeager ed. 1988).

132. "Statutes classifying along religious lines often may have virtually no discernible effect on the actual exercise or nonexercise of religion. Surprisingly enough, this might even be said of an officially established, but completely liberal and tolerant, national religion." Paulsen, *supra* note 42, at 341 n.130. The same can probably be said about tax support of churches and other forms of private religious activity. *See id.* at 337; Choper, *supra* note 43, at 678, 695.

133. *See* Reichley, *Religion and the Constitution*, in RELIGION IN AMERICAN POLITICS 4 (C.W. Dunn ed. 1989).

134. Paulsen candidly admits this fact: "Presumptively, at least, classifications along religious lines have effects upon the exercise of religious liberty. This appears to have been the fundamental premise behind the establishment clause insofar as it was designed to protect religious liberty. An official church, for example, is conclusively presumed to impair an individual's freedom to worship as he or she chooses." Paulsen, *supra* note 42, at 341. In agreement is Lupu, *supra* note 4, at 741-42.

135. R. CORD, SEPARATION OF CHURCH AND STATE 188-92 (1982); M. HOWE, THE GARDEN AND THE WILDERNESS 160 (1965); Reichley, *supra* note 133, at 9-10.

tecting religious freedom and thus two ways of understanding the principle of government neutrality toward religion. The moderate approach would not prohibit all laws that are explicitly or essentially religious in nature, but it would require the courts to judge these laws on a case by case basis according to their effects on religious choice. The more extreme approach would strike down all laws that are explicitly or essentially religious in nature, on the assumption that they pose "dangers to social harmony, personal freedom, and religion itself."[136]

Of the two kinds of neutrality, which is preferable? Although the founders did not make an unequivocal choice between these two approaches, the evidence suggests that in general they preferred the second and thus the kind of government neutrality toward religion upon which the case against a right to religion-based exemptions rests.[137] Michael Paulsen comes close to this view, for although he defends religion-based exemptions, he says that they should be treated as "suspect classifications," subjected to "strict scrutiny," and thus allowed only when they can be shown not to abridge religious liberty.[138] Moreover, the moderate understanding of neutrality is vulnerable to the criticism that it raises too many questions about just what is forbidden by the religion clauses. For example, is it influence and inducement that is prohibited, or merely pressure and coercion? And how can courts fairly and accurately determine when and to what extent "coercion" is affecting the religious decisions that persons make?[139] For these reasons, the case for a moderate understanding of government neutrality toward religion is not convincing.

This brings us to the final and most common argument for a Constitutional right to religion-based exemptions. This argument is not, however, either a theoretical or practical argument but an appeal to a written authority, namely, the Constitution itself. The religion clauses themselves are cited as proof of the fact that the courts should give special protection to religion.[140] It is not enough, however, to say that the Constitution gives

136. Reichley, *supra* note 133, at 10.

137. *See infra* Section IV.

138. Paulsen, *supra* note 42, at 341-42, 345.

139. For discussions of the difficulty of determining the nature and presence of coercion in the area of religion, see the several essays on this issue in CULTS, CULTURE, AND THE LAW, *supra* note 54, at 59-160.

140. Religion has "*special* value" because only it "is explicitly mentioned in the first amendment." Garvey, *supra* note 67, at 791. For similar assertions, see McConnell, *supra* note 43, at 9; Pepper, *supra* note 39, at 330.

religion special protection. No one is contesting that point; it is clear that the religion clauses prohibit laws whose primary purpose or effect is the inhibition of religion. What is at issue, rather, is how much protection the Constitution gives religion and, more specifically, whether it guarantees a right on the part of religious individuals and groups to religion-based exemptions. The answer usually given is that of course it does. What else could the free exercise clause mean to provide if not a right to religion-based exemptions? After all, the word "exercise" means to "practice," "apply," or "live out," and the word "free" means without legal restraint. Therefore, the free exercise clause is clearly violated, at least presumptively, by any law that imposes any restraint on any conduct or behavior deemed to be part of one's religion. Both Supreme Court justices[141] and legal scholars[142] assume this to be almost a self-evident truth.

The fact of the matter, however, is that such an interpretation of the free exercise clause is simply false. It is a classic example of how a literal or common sense reading of a constitutional or legal text can be completely misleading, for the contemporary understanding of the phrase "free exercise of religion" is not the understanding that was held by those eighteenth-century Americans who used the phrase and fought for its inclusion in the constitutions of that age. This point is of the utmost significance because the case made by the Supreme Court and legal scholars for a constitutional right to religion-based exemptions is based almost entirely on the unexamined and unsupported assumption that the plain words of the first amendment mandate such a right. If that assumption can be

---

141. For example:

> The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion.

Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

142. For example:

> The free exercise clause confers a substantive freedom, and not merely a right to equal protection. For example, national prohibition without an exception for sacramental uses of wine would prohibit the free exercise of the Christian and Jewish religions, and equal application of the law would not save it.

Laycock, *supra* note 3, at 1379 n.63. For similar comments, see Choper, *supra* note 43, at 683, 686, 688; Garvey, *supra* note 42, at 219; McConnell, *supra* note 70, at 152; Pepper, *supra* note 39, at 300-01, 330.

shown to be unwarranted, which the next section attempts to do, then the case for such a right fails.

IV. THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE

This section is a brief summary of an immense amount of historical data and research relating to the original meaning of the free exercise clause. Although there are many kinds of data that one could look at in order to ascertain the original meaning of the free exercise clause, the two most important, and the ones relied on here, are (a) the understanding of religious freedom held by those persons who are generally recognized as being at the forefront of the movement for religious liberty[143] and (b) the general events of the eighteenth century relating to church-state relations as recounted in the best, most recent historical scholarship on the period.[144] The historical data makes it abundantly clear that the "free exercise of religion" mentioned in the first amendment was not originally understood to include a right to violate legitimate laws with impunity. Rather, "free exercise of religion" meant the absence of laws whose *primary* purpose or effect was either to support or harm religion in general, any particular religion, or any persons or groups because of their religion, and it meant nothing more than that. Simply put, the free exercise of religion meant the freedom to choose and practice one's religion (or no religion) without being subjected to intentional, direct government coercion or influence.[145]

---

143. According to Anson Phelps Stokes, the statesmen and religious leaders most interested in religious freedom from 1775 to 1790 were Benjamin Franklin, John Witherspoon, George Mason, Isaac Backus, George Washington, Patrick Henry, Samuel Livermore, Thomas Paine, John Carroll, Thomas Jefferson, James Madison, Charles Pinckney, and John Leland. A.P. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 292-357 (1950). Because Franklin, Henry, Livermore, Paine, and Pinckney failed to write very much on the meaning of religious liberty or, if they did, what they wrote has not survived to this day, this article relies primarily on the ideas of Witherspoon, Mason, Backus, Washington, Carroll, Jefferson, Madison, and Leland. *See* West, *The Founding Fathers and the Scope of Religious Liberty* (paper presented at annual meeting of the Midwest Political Science Ass'n, Chicago, Illinois, Apr. 10, 1987).

144. I have relied, in particular, on M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); W. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986).

145. It must be emphasized that the argument set forth in this section is not for an "originalist" interpretation of the Constitution, for it does not

That the free exercise clause was understood in this way is indicated, first of all, by the general understanding of the nature of freedom that prevailed in the eighteenth century. Freedom, to most persons who thought and wrote about it, did not mean freedom to do as one pleases or freedom from law; on the contrary, as John Locke argued, it meant freedom through law.[146] After all, the main function of government was understood to be the protection of life, liberty, and property.[147] In the absence of good laws, it was not clear to what extent persons would be free; it depended on their circumstances and personal traits. The main threat to freedom, therefore, was not law *per se*, but arbitrary, unauthorized, unconstitutional law.[148] Because persons were free to do only what was not lawfully prohibited, whenever early Americans

---

assume that the meaning of the Constitution should be determined exclusively or even primarily by the original intent of the framers. Indeed, the entire article is based on the opposite assumption that other kinds of considerations, including significant changes in our government or society from the eighteenth century to the present, may be taken into account by judges responsible for interpreting the religion clauses of the Constitution. This section discusses the original meaning of the free exercise clause only because it has been shown that a right to religion-based exemptions cannot be justified on the basis of nonhistorical kinds of reasons or factors *and* because the defenders of a right to exemptions rely so heavily on what amounts to an originalist position by claiming that the wording of the first amendment creates such a right. Because an "originalist" argument is not being made here, the contention made by Pepper, *supra* note 101, at 656-57, that some of the founders might have favored a right to religion-based exemptions if they had only known what life in contemporary America would be like, is irrelevant. Even if it was relevant, moreover, given all the arguments made earlier against such a right, there is no reason to believe that the founders would have favored such a right if they could have foreseen what contemporary America would be like.

146. [H]owever it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not as we are told a liberty for every man to do what he lists: . . . but a liberty to dispose, and order as he lists, . . . within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.

J. LOCKE, SECOND TREATISE OF GOVERNMENT 32 (C.B. Macpherson ed. 1980) (1st ed. 1690).

147. *See, e.g.*, The Virginia Declaration of Rights § 1 (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 70 (P.B. Kurland & R. Lerner ed. 1987).

148. In Locke's words:

[F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all

discussed whether or not they were free in some respect or another, what they usually had in mind was whether or not a particular law was valid, *i.e.*, was a law that the government had authority to pass.[149] So far as religious freedom is concerned, this means that the issue at that time was not whether a law burdened or even prohibited the practice of a person's religion, but whether the law was legitimate.[150] In short, the free exercise clause found in the first amendment and some state constitutions was essentially a code phrase that meant there were certain kinds of laws that governments could not pass. It did not refer generally to what persons were free to do or to refrain from doing.

A second, related point is that the idea of religious freedom was closely related to the social contract theory of government, which was almost universally accepted by eighteenth century Americans.[151] According to this theory, governments are created by and accountable to the people, and exercise lawfully only those powers that are delegated to them by the people through a political contract or compact. For this reason, written contracts (constitutions) between the people and their government that spelled out what powers the former had and had not granted to the latter were vital. Generally the limitations imposed on government were understood in terms of certain areas of life or kinds of activities over which the

---

> things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . .

J. LOCKE, *supra* note 146, at 17. For a discussion of Locke's concept of freedom and its significance in early America, see M. KAMMEN, SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE 19-27, 45-46, 49-51 (1986).

149. "[L]iberty in the eighteenth century was a concept of constitutional law . . . ." J. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 3 (1988).

150. J.P. Reid writes:

> Indeed, eighteenth-century thought about liberty was so attuned to the existing constitution and so removed from the ideal [*i.e.* theoretical] that *many rights recognized today were thought of then in opposite ways. Religious tolerance is an example.* It was not just a matter that the concept of liberty did not require that Catholics be treated equally with Protestants. Rather, principles were so dependent on the current constitution that a proposal to allow Catholics to be candidates for public office in one of the ceded islands [Grenada] could be condemned as contrary to liberty. . . . "an outrageous violation of the laws of England, of the constitution of this colony, and of the liberty of the subject."

Id. at 64 (quoting a 1772 letter to the electors of St. George, Grenada) (emphasis added).

151. T. CURRY, *supra* note 144, at 97.

government had no jurisdiction. Freedom, also, was understood largely in terms of limitations on the power of government; violations of freedom were thought to occur most fundamentally when a government legislated in an area over which it had no jurisdiction.[152] It was, moreover, widely assumed that religion was one of those areas or activities about which the people had never authorized the government to legislate. Thus, the phrases "religious freedom" or "the free exercise of religion" referred to a political condition or arrangement that prevented the government from legislating in matters of religion.[153] The first amendment, in particular, was a statement that the national government had no authority to legislate in the area of religion.[154]

It would, therefore, have come as a surprise to the founders if they had been told that the first amendment not only prevents the national government from passing laws in the area of religion but requires the government to grant exemptions, for reasons of religion, from laws that the government may licitly enact. The first amendment, after all, says, "Congress shall make no *law* . . ."; it does not say or even imply that persons or churches should be exempted from otherwise valid laws. Moreover, if the first amendment were to be interpreted as requiring religion-based exemptions, the word "no" in the amendment would also make no sense. As all advocates of such exemptions admit, persons should not have a right to be exempt from *all* laws that might prohibit or burden the exercise of their religion, but only those whose application cannot be justified by a balancing test. The first amendment, however, was intended to state an absolute prohibition.[155] The idea of

---

152. M. HOWE, *supra* note 135, at 18, 23.

153. T. CURRY, *supra* note 144, at 190.

154. M. HOWE, *supra* note 135, at 17-22. Curry writes:

> At the Virginia Ratifying Convention, Madison had stated that the federal government had not the "shadow of a right . . . to intermeddle with religion," and all Americans, Federalists and Antifederalists, agreed with him. Apart from the literalist reading of the language used in connection with establishment, not a shred of evidence exists to verify that anyone wanted the new government to have any power in matters of religion. . . . Ironically, what was intended as a declaration of no power has been interpreted as conferring some of the very power it was intended to forbid.

T. CURRY, *supra* note 144, at 208, 215. In this light, Pepper's attempt, *supra* note 39, at 303, to derive a right to exemptions from Madison's statement that "[r]eligion is wholly exempt from its [government's] cognizance" is wholly misguided.

155. Pepper, *supra* note 39, at 304. Although Pepper correctly says that the wording of the first amendment indicates that the protection afforded

exemptions, in short, is simply an anomaly that does not fit within the eighteenth century understanding of freedom and constitutional government.

The third reason for saying that the free exercise clause was intended to prevent only the passage of laws whose primary purpose or effect is religious in nature is the fact that in the eighteenth century the phrase "free exercise of religion" was used, both in laws and generally, as a synonym for the disestablishment of religion, although not necessarily its complete disestablishment. After the revolution, for example, many of the new states adopted constitutions that used the phrase "free exercise of religion" to signify the new relationship between church and state that was being created.[156] At first, however, there was little agreement on just exactly what the "free exercise of religion" required or prohibited. Although it was widely understood that it would be violated by a law forcing contributions from all citizens for the support of *one* church, a debate ensued in a few states over whether it prohibited assessments (taxes) for the support of *all* (Protestant) churches. Led by

---

religious freedom in the national Constitution was intended to be absolute, he is wrong in saying that this means that the free exercise clause created a right to religion-based exemptions. He is misled by the fact that although many of the free exercise clauses in state constitutions were qualified or conditional in nature, the free exercise clause in the first amendment was not. In order to understand the significance of this difference, one must realize that complete religious freedom was a gradual accomplishment. During the eighteenth century even the principle that laws should not directly discriminate against certain religions or persons because of their religion was often not considered to be an absolute principle, and guarantees of religious liberty in the state constitutions were often worded to reflect this point of view. As a result, in various states many groups, including Catholics, Jews, and atheists, were specifically singled out for disabilities of one sort or another because they were thought to pose a special threat to the order or justice of society. *See* T. CURRY, *supra* note 144, at 78-104, 157-58, 221. The first amendment is "absolute," therefore, because it made no exceptions to its prohibition against laws pertaining directly and primarily to religion. In no way does this indicate that the amendment was intended to give persons the right to be exempt from nondiscriminatory laws that they do not want to obey for reasons of religion.

156. The first and most influential legal provision that was intended to guarantee religious freedom was Section 16 of the Virginia Declaration of Rights, adopted by the Virginia Assembly in 1776. It reads:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 147, at 70.

Thomas Jefferson, James Madison, Isaac Backus, and John Leland, the opponents of such general assessments eventually carried the day by arguing that they violated the free exercise of religion guaranteed by their respective state constitutions.[157] As Thomas Curry has noted:

> On one Church-State topic, the support of churches, Americans during the revolutionary period engaged in extensive discussion and applied their theory that the state had no power in religious matters. In the majority of states they decided that freedom of religion applied not only to the exercise of religion, but also to its support . . . . Opponents of state support for religion regarded such support as an establishment, but *they opposed it primarily as a violation of the free exercise of religion*.[158]

The significance of this point for our understanding of the religion clauses of the first amendment is difficult to overstate. It indicates clearly that the two religion clauses were not intended to prohibit two different kinds of law, but were two different ways of saying the same thing.[159] Thus, one simply cannot say that the free exercise clause was intended to prevent government interference with religion and the establishment clause to prevent government aid to religion. *A fortiori* one cannot say that the free exercise clause was meant to protect against indirect, unintentional restraints on the exercise of religion—in other words, that it guarantees a right to be free (for reasons of religion) from having to obey valid laws. All one can say for certain is that the phrase "free exercise of religion"

---

157. T. CURRY, *supra* note 144, at 146.

158. *Id.* at 191-92, 210-11 (emphasis added). Curry explains that in Virginia the opponents "linked a general assessment not to establishment, but to a violation of religious liberty: 'Farewell to the last Article of the Bill of Rights! Farewell to the "free exercise of Religion"!' " *Id.* at 137.

159. On this point, Curry writes:

> To examine the two clauses of the amendment as a carefully worded analysis of Church-State relations would be to overburden them. Similarly, to see the two clauses as separate, balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there. . . . The two clauses represented a double declaration of what Americans wanted to assert about Church and State. . . . Contemporaries did not, for example, distinguish between religious oppression as falling under the ban of the "free exercise" clause and a general assessment as being prohibited by the "establishment" clause.

Id. at 216-17. *See also* L. TRIBE, *supra* note 44, at 1156; Paulsen, *supra* note 42, at 312-26.

meant that "the new government had no authority whatsoever in religious matters."[160]

On the other hand, the preceding evidence and analysis do not show conclusively that the free exercise clause was *not* meant to guarantee a right to religion-based exemptions from valid laws. Even if the principle of free exercise of religion was widely used to bar laws whose purpose or effect was primarily religious in nature, that would not mean that the principle was used exclusively for that purpose. There is, however, no evidence, or at least none that this writer has been able to discover, that the principle of religious freedom was ever used in the seventeenth or eighteenth centuries to justify a right, natural or constitutional, to be exempt for reasons of religion from a law whose primary purpose and effect are secular in nature. Indeed, a study of the writings of those persons most identified with the cause of religious freedom reveals that none of them favored the granting of such exemptions as a matter of right and that most of them opposed such exemptions, either explicitly or implicitly.

Already there is a published study of the views of Jefferson, Madison, and Mason on the issue of exemptions: namely, Michael Malbin's *Religion and Politics: The Intentions of the Authors of the First Amendment*.[161] Its conclusion is that "the framers unquestionably denied that anyone had a *right* to claim an exemption from a valid, secularly based law because of a religious objection to it."[162] That the framers would take such a position is only to be expected because their mentor, John Locke, had earlier taken the same position.[163] Malbin's work, however, is not conclusive on the issue, because it is incomplete in two respects. First, it fails to do justice to Madison's insistence on equality of religious liberty, in the sense that religiously motivated or affiliated individuals and organizations

160. T. CURRY, *supra* note 144, at 215. That this was the intent of the first amendment did not mean that the government always adhered to the principle. *Id.* at 217-21. Nevertheless, as Curry says, "[t]hat Americans during the revolutionary period did not always carry their principles into practice either in Church-State or other matters did not negate those principles." *Id.* at 221.

161. M. MALBIN, *supra* note 144.

162. *Id.* at *Preface*, and also at 28, 35-40. Agreeing with Malbin are W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 36 (1976); R. MORGAN, *supra* note 11, at 23; Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U. L. REV. 62-64 (1976).

163. *See* Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom"*, 25 J. CHURCH & STATE 231 (1983).

have the *same* rights, no more and no less, as those held by other similarly situated individuals and organizations.[164] This principle Madison first stated in the provision on religious liberty that he proposed for the Virginia Declaration of Rights. After stating that "all men are *equally* entitled to the full and free exercise of it [religion] according to the dictates of Conscience," he immediately explained what that means: "*therefore* that no man or class of men ought *on account of religion* to be invested with particular emoluments or privileges; nor subjected to any penalties or disabilities . . . ."[165] Consistently with this principle, Madison opposed both laws that prevented clergymen from serving in the legislature and laws that granted tax exemptions specifically to churches.[166]

Malbin's study is also incomplete because it assumes that the meaning of the free exercise clause can be found by looking almost exclusively at what happened in Virginia and at the writings of Jefferson and Madison. Such an approach ignores what most historians today accept, namely, that the meaning and practice of religious freedom in America have been determined not simply by rationalist, Enlightenment ideas, as expressed by persons like Jefferson, Madison, Franklin, and Paine, but also by theological ideas derived from radical or separatist Puritanism and expressed by persons like Roger Williams, Isaac Backus, and John Leland.[167] When one looks at the writings of these latter individuals, however, one discovers that they held exactly the same position on religious-based exemptions as rights that Jefferson held.

In the case of Roger Williams, for example, the evidence is abundantly clear that he did not think the principle of religious liberty gave religious persons or churches the right to be exempt from obeying laws that prevented them from practicing

---

164. For the clearest, most convincing elaboration of this point, see Weber, *James Madison and Religious Equality: The Perfect Separation*, 44 REVIEW OF POLITICS 163 (1982).

165. 1 THE PAPERS OF JAMES MADISON 174 (W.T. Hutchinson & W.M.E. Rachal eds. 1962) (emphasis added).

166. Weber, *supra* note 164, at 171, 182.

167. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 242 (1967); M. HOWE, *supra* note 135, at 1-31; Grenz, *Church and State: The Legacy of Isaac Backus*, 2 CENTER J. 57, 73 (1983); Moore, *Religious Liberty: Roger Williams and the Revolutionary Era*, 34 CHURCH HISTORY 57 (1965). William Lee Miller even argues that dissenting Protestantism "had more to do, over all, over time, pound for pound, head for head, with the shaping of the American tradition of religious Liberty than did the rational Enlightenment." W. MILLER, *supra* note 144, at 153.

their religion as they thought they should. After a careful review of Williams' writings, Edmund Morgan concludes:

> [Williams] thought every government was entitled to impose a rigorous standard of behavior in matters that affected civility, humanity, morality, or the safety of the state and individuals in it. . . . When conscience (even religious conscience) led to practices injurious to the "life, chastity, goods, or good name" of the state's subjects, the state could legitimately interfere to protect them.[168]

Perhaps just as significant as Williams' position on exemptions is his commitment to the principle of fairness or equality. Thus, he wrote, "If it be answered that although God's people may doe thus against the Magistrates consent, yet others may not, I answer . . . who sees not herein partiality to themselves . . . ." Likewise, Williams criticized those who wanted the rulers to "give liberty only unto themselves, and not to the rest of their subjects," because he disapproved of liberty's being given "with a partiall hand, and unequall Ballance . . . ."[169]

Isaac Backus and John Leland, the two spiritual descendants of Williams who had a significant hand in the establishment of religious freedom in the latter part of the eighteenth century,[170] did not depart from Williams' general position on religion and government, including his stand against a right to religion-based exemptions. Concerning the latter, Leland wrote: "Let a man's motive be what it may, let him have what object soever in view; if his practice is opposed to good law, he is to be punished. Magistrates are not to consult his motive or object, but his actions."[171] Leland gave at least three reasons

---

168. E. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 136 (1967). William Lee Miller makes the same point: "Williams did not accept appeals to one's 'conscience' as a basis for exemption from a shared social duty. . . . even though the conscience in question should be . . . religious." W. MILLER, *supra* note 144, at 184-85. *See also* West, *supra* note 131, at 133-60.

169. Williams, *The Bloudy Tenent of Persecution*, in 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 395, 401-02 (1963).

170. *See* T. MASTON, ISAAC BACKUS: PIONEER OF RELIGIOUS LIBERTY (1962); A.P. STOKES, *supra* note 143, at 306-10, 353-57; Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROC. AM. ANTIQUARIAN SOC. 155 (1952); Gaustad, *The Backus-Leland Tradition*, 2 FOUNDATIONS 131-52 (1959); Little, *American Civil Religion and the Rise of Pluralism*, 38 UNION SEMINARY Q. REV. 401, 408-10 (1984); McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HISTORICAL REV. 1392 (1968).

171. Leland, *The Yankee Spy* (1794), in THE WRITINGS OF JOHN LELAND 228 (L.F. Greene ed. 1845 & photo. reprint 1969). More specifically, he said

for not making exceptions to laws in order to accommodate persons who have religious reasons for seeking such exceptions. First, he said that under such a policy "the most atrocious villains would always pass with impunity."[172] Second, he suggested that such a policy would be difficult to administer.[173] Third, he argued that to get exemptions persons might be willing to do or say things that otherwise they would not or should not do or say.[174] The evidence regarding the views of Isaac Backus on exemptions consists primarily of passages in which he defended Roger Williams from charges that on occasion he had violated the religious freedom of certain persons, particularly Quakers, by refusing to exempt them from compliance with certain laws to which they conscientiously objected.[175] Also relevant is Backus' position that immoral conduct was censurable by the church, even if committed in good conscience.[176]

In light of the preceding historical evidence, it is simply not credible to say that the free exercise clause of the first amendment was intended to give persons or churches the right to disobey laws with impunity provided they had religious reasons for wishing to do so. Granted, "the framers assumed that the realm of religious interests and religious convictions occupied a special constitutional status,"[177] but this does not mean that they favored a right to religion-based exemptions. It

---

that neither the motive of obedience to God nor the objective of saving one's soul can justify the government's not punishing a person who has committed a crime. *Id. See also A Blow at the Root* (1801), in *id.* at 237, 250.

172. *A Blow at the Root*, in THE WRITINGS OF JOHN LELAND, *supra* note 171, at 250.

173. After all, he asked, how "[c]ould the magistrate perfectly know whether it was God, Satan, or ill-will, that prompted him [the criminal] to do the deed?" *Id.*

174. Leland wrote:

> Ministers should share the same protection of the law that other men do, and no more. . . . To indulge them with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens, not as sacred officers . . . .

Leland, *The Rights of Conscience Inalienable* (1791), in *id.* at 188.

175. Backus was an admirer, disciple, defender, and biographer of Williams. *See* W. MILLER, *supra* note 144, at 215-16; Little, *supra* note 131, at 11-16. For passages where Backus defends Williams' position on religion-based exemptions, see I. BACKUS, 1 A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE BAPTISTS 237-38, 360-62 (1871 & photo. reprint 1969).

176. S. GRENZ, ISAAC BACKUS—PURITAN AND BAPTIST 304 (1983); Grenz, *Isaac Backus and Religious Liberty*, 22 FOUNDATIONS 354 (1979).

177. M. HOWE, *supra* note 135, at 160.

means only that they did not want governments passing laws that were essentially or primarily religious in nature, thus interfering with the "free exercise of religion."

V. Implications and Conclusion

In this Article, I have argued that the religious liberty guaranteed by the Constitution is not necessarily violated (even presumptively) whenever the government interferes with the practice of religion by an individual or a church. If this were not the case, then there is almost no government action that could not at some time or another be considered a violation of religious freedom. The founders of our country, however, certainly did not think that when they adopted the first amendment they had created such a conflict-generating principle. To the contrary, they assumed that if the government did not legislate on religious matters but confined itself to protecting and promoting merely secular concerns, then the people would have all the religious freedom they could ever need or rightly expect.

Because the position advocated here is a minority position, at least among constitutional law scholars, and to avoid misconceptions about what this position is, this concluding section clarifies some of the implications of the Supreme Court's adopting of such a position.

First, the policy that persons do not have a right to religion-based exemptions is not an extreme one, for it was held by the Court until 1963. The Court's return to such a position, moreover, would not unduly unsettle the law because, as noted earlier, there have been only four decisions by the Court itself upholding a right to religion-based exemptions, and not all of those decisions would necessarily need to be overruled.[178]

Second, the position advocated here does not amount to reading the religion clauses out of the Constitution, for they are clearly needed to prevent laws whose primary purpose or effect is to aid or harm religion or any persons or groups

178. *Sherbert*, for example, can be upheld because the state policy challenged in that case actually discriminated against persons who observed Saturdays as their Sabbath because it allowed Sunday worshippers, but no others, to collect unemployment compensation whenever they were fired for not working on their Sabbath. Sherbert v. Verner, 374 U.S. 398, 406 (1963). For this reason some justices now explain the *Sherbert* decision as one against discrimination and not as a precedent for using the free exercise clause to grant exemptions from nondiscriminatory, secular laws. *See* United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring); Bowen v. Roy, 476 U.S. 693, 702-12 (1986) (plurality opinion by Burger, C.J.).

because of their religion. The fact that such laws are seldom passed is no reason for denigrating the importance of the religion clauses or for broadening the protection afforded by them, as though a constitutional provision is of no use unless the government frequently attempts to violate it. Of course, the claim that the religious freedom guaranteed by the first amendment prohibits only laws that are essentially or primarily religious in nature leaves many questions unanswered—including how judges are to distinguish the religious from the secular or determine whether a law is essentially religious or civil in nature. Although it is beyond the scope of this Article to attempt to answer such questions, it is not unreasonable to believe that clear and principled answers to them can be formulated and consistently applied by the Court. In fact, the very principle of religious freedom itself and the entire enterprise of church-state adjudication are based on the assumption that such answers are possible.[179] To be sure, as I argued earlier, courts can not be fair and consistent in deciding cases where the issue is whether a person or organization has a right to be excused from obeying a valid law. The situation, however, is quite different when a court is deciding whether a law is essentially secular or religious in nature, and thus valid or invalid in the first place.[180] For example, and most importantly, an *ad hoc* balancing test is not used in the latter type of case. Moreover, if religious liberty were to be narrowly interpreted, the potential for judicial abuse will be much less than it is at present, simply because there will be fewer church-state cases to adjudicate.

Third, the argument made here is not one for "strict neutrality"; that is to say, it is not an argument against all religion-based exemptions, including those granted by legislatures as privileges. After all, to show that no religion-based exemptions are *required* by the Constitution is not to show that all such exemptions are *prohibited* by the Constitution. It must be admitted, however, that some of the arguments made earlier against religion-based exemptions as rights can also be used to show that religion-based exemptions as privileges are unconstitutional. For example, if the religion clauses together require the government to be neutral between religion and non-religion, then how can exemptions granted by legislatures solely to reli-

179. *See* Little, *Conscience, Theology, and the First Amendment*, 72 SOUNDINGS —— (1989) (forthcoming).

180. This, of course, does not imply that such decisions will always be easy to make, but only that they will usually be understandable, defensible, and thus legitimate.

gious persons or groups not violate those clauses? If the founders were opposed to laws that were essentially or primarily religious in nature, then how can any exemptions designed to aid religious persons and groups be consistent with the original meaning of the religion clauses?

Two answers will be briefly suggested. First, there is simply the evidence from history that indicates that some religion-based exemptions granted by legislatures were never considered to be unconstitutional.[181] Typical is the founders' treatment of those who conscientiously objected to fighting in wars. Although members of the First Congress refused to adopt as part of the proposed Bill of Rights a provision that would have given persons "religiously scrupulous of bearing arms" a *right* to be exempt from such service, they nevertheless stated that it would be permissible for Congress to grant such exemptions.[182] That the founders were willing to condone some religion-based exemptions granted by legislatures while at the same time expressing opposition to laws pertaining essentially or primarily to religion is, of course, puzzling.[183] Nevertheless, it is a fact, and it allows the Supreme Court to uphold some legislature-granted exemptions on the basis of their "unique history," just as it did in upholding prayers in legislatures by paid chaplains.[184]

A second justification for religion-based exemptions granted by legislatures is based on the principles of hardship and neutrality. The fact is that legislatures are always crafting exemptions from laws for categories of persons, groups, or businesses that might be unduly harmed (*e.g.*, put out of business) by having to conform to those laws. If such exemptions can be given to secular entities, the principle of neutrality or fairness would suggest that religious entities that might suffer special but significant hardship should also be allowed to receive such exemptions.[185] Going beyond this, however, and

181. *See supra* notes 133-35 and accompanying text.

182. *See* W. BERNS, *supra* note 162, at 54-55; Malbin, *Conscription, the Constitution, and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805 (1972).

183. *See* T. CURRY, *supra* note 144, at 209-22.

184. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

185. Such exemptions, however, should be given only in cases where the hardship for which an exemption would provide relief was caused by the government in the first place. Otherwise, the principle of neutrality could be used to justify forms of direct aid to religion *per se*. In addition, such exemptions should not be given if they would have the effect of significantly influencing some persons' choice of religion, and they must be made available to all religions that would experience the relevant hardship were the

giving all religious entities a *right* to obtain exemptions without giving the same right to secular entities not only is not required by but actually violates the principle. It also causes the kind of psychic and moral affront associated with discrimination much more than does the occasional, special treatment of a religious group by a legislature.[186]

Even if religion-based exemptions granted by legislatures were declared unconstitutional, however, that would not mean that legislatures could never grant exemptions that had as one of their effects the lifting of restrictions on the practice of religion. The Supreme Court has clearly indicated that religious persons and organizations can benefit from exemptions provided those exemptions are religiously neutral, *i.e.*, provided the exemptions are given to secular categories of persons or groups, albeit ones that are broad enough to include religious persons or groups within them. In most cases, these would be exemptions granted to individuals on the basis of their sincere, conscientious convictions, whether or not they were rooted in religion, or exemptions granted to organizations that were charitable or non-profit in nature. There is no reason to think that such religion-neutral exemptions could not give just as much protection to religious persons and churches as could be given by religion-based exemptions.

A fourth point is that an argument against a right to religion-based exemptions is not an argument against religion. (This point applies both to the motives of the person making such an argument[187] and to the actual effects that adopting the argument would have on the life and well-being of religion.)[188] There are at least two reasons for saying this. First, it is not self-evident that having exemptions is good for churches or religious individuals. From a secular point of view, they would,

---

law to be applied to them. Otherwise, even the moderate principle of neutrality toward religion would be violated. *See* McConnell, *supra* note 43, at 36, 39, 41; Paulsen, *supra* note 42, at 341-45.

186. Garvey, *supra* note 42, at 212-13.

187. Pepper mistakenly assumes that persons who favor a narrow interpretation of the free exercise clause have an anti-religion bias. Pepper, *supra* note 39, at 306-07.

188. Although Walter Berns is correct in saying that the founders were opposed to a right to religion-based exemptions, he is wrong in arguing that the founders' "solution of the religious problem consists in the subordination of religion." W. BERNS, *supra* note 162, at 26. Not only was the solution favored by leading religious spokesmen of the day, it gave religion the freedom to flourish even to the point of being strong enough to provide a creative check on politics. *See* Cochran, *Normative Dimensions of Religion and Politics*, in RELIGION IN AMERICAN POLITICS 51-61 (C.W. Dunn ed. 1989).

of course, often be helped by having exemptions; they would have more "earthly" resources and opportunities to do whatever they might wish to do. From a spiritual point of view, however, the effects of having exemptions may be negative. Roger Williams, for example, felt that laws whose primary effect was to aid religion or persons because of their religion threatened the quality or integrity of "true religion" more than did laws having the opposite effect.[189] Moreover, from the standpoint of certain religious traditions, having to "stand up" for the faith from time to time is beneficial to that faith. The lesson from early Christianity, for example, is not that government should always avoid conflicts with the church, but that the church should always remain true to God regardless of the demands imposed on it by the state. According to this perspective, the church's "freedom comes from faithfulness to God and as a result can never be given or taken away by a state."[190]

Another reason why opposition to religion-based exemptions as rights is not necessarily anti-religious is because from the perspective of certain religions, including most Christian churches, it is one's religious responsibility to promote good government. From this point of view, government is ordained by God for the purpose of carrying out certain functions beneficial to humankind.[191] What the government demands, therefore, may be more consistent with God's will than what some church demands, and Christians, therefore, are not necessarily called always to put what the church demands above what the government demands. William Lee Miller has even argued, most eloquently, that in the United States it is good government, not religion, that is the endangered species, and that churches too often act like other selfishly motivated interest groups. From his point of view, therefore, the churches' concern for getting exemptions from valid laws represents a very debased kind of Christianity.[192]

Finally, it should be said that the case against a right to religion-based exemptions does not imply that government should have unlimited power or that it never passes foolish or unjust laws. The fact, however, that some religious persons or

189. West, *supra* note 131, at 141-42.

190. Hauerwas, *Freedom of Religion: A Subtle Temptation*, 72 SOUNDINGS — (1989) (forthcoming).

191. *See, e.g.*, O. BROWNSON, THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES AND DESTINY 97 (1865 & photo. reprint 1972).

192. Miller, *Responsible Government, Not Religion, Is the Endangered Species*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, *supra* note 106, at 41-56.

churches have in recent years been mistreated by the government is not enough to justify giving religious persons and groups a right to be exempt from obeying whatever laws they may feel are foolish, unjust, or burdensome. After all, it is not only religious persons or groups who suffer from unwarranted or unfair laws. Again, the question is why special protection should be given to them alone. Of course, if and when a government action has a primary effect that is harmful to religion (in general or in particular) or to persons or groups because of their religion, then the courts, using the first amendment, should and do afford relief to the victims of such action. In the case of other government action to which religious persons or groups object, even for religious reasons, the only remedies available should be limited to those available to all citizens, such as participation in the political process and reliance on provisions of the Constitution other than the religion clauses.

In other words, the choice we face is not between unlimited religious freedom and unlimited government power. The crucial issue here, as it is in most cases, is where to draw the line between two extremes. This article has argued that the line should be drawn where the founders drew it—not because we must do what the founders intended, but because their understanding of religious freedom simply makes more sense than do others, including that of the Supreme Court today. It is more consistent with the principle of fairness, better avoids government entanglement with religion, and is easier to apply by the courts in a consistent and predictable manner. On the other hand, if the Court continues to hold that the free exercise (or establishment) clause gives persons and groups a right to religion-based exemptions, it runs the serious risk of discrediting the principle of religious liberty itself because of the misdeeds, judicial and otherwise, that will be committed in its name.[193] It is precisely because religious freedom is so important that it must not be naively, arbitrarily, or unfairly interpreted and applied.

193. *Id.* at 46.